In the Māori Land Court
of New Zealand
Waikato Maniapoto District

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IN THE MATTER an application by **Donald Shaw** under Section 18(1)(a) of Te Ture Whenua Māori Act 1993 with regard to the **Tauwhao Te Ngare Block**

DECISION

Introduction

Donald Shaw is a trustee of the D and M Shaw Family Trust, which owns Lot 1 Deposited Plan South Auckland 82146 comprising 6.5125 hectares and described in Certificate of Title SA64D/511 ("the Shaw property"). The Shaw property is situated on Rangiwaea Island in Tauranga Harbour. An order of the Māori Land Court was made on 18 March 1976 pursuant to ss 415 and 418 of the Māori Affairs Act 1953 ("the 1976 Order") laying out a roadway ("the wharf roadway") over Rangiwaea 1A1 and Rangiwaea 1A2C (now part of the Tauwhao Te Ngare Block): see Court minute and order at T 37/248. The Court minute notes that the wharf roadway would not be properly defined until it had been formed and surveyed. The 1976 order was never signed and sealed, and it does not appear that the roadway was surveyed in order to perfect the order. Mr Shaw therefore made application under section 18(1)(a) of Te Ture Whenua Māori Act 1993 seeking an order that he has an interest in the Tauwhao Te Ngare Block ("the Tauwhao Block") so that he may use the wharf roadway.

The trustees of the Tauwhao Block oppose the application. The Tauwhao Block is Māori freehold land comprising 252.3873 hectares and described in Certificate of Title SA52C/593. The Tauwhao Te Ngare Trust ("the Tauwhao Trust") is an ahu whenua trust constituted under section 215 of Te Ture Whenua Māori Act 1993.

The application was heard on 16 September 2004, and I reserved my decision. On 12 October 2004 the Court received a Memorandum from Counsel for the Applicant advising that supplementary submissions would be filed in respect of matters not adequately addressed by the Respondent in respect of his notices of opposition. An exchange of Memoranda then took place with the result that the Court granted leave to the Applicant to file further submissions by 26 November 2004, with submissions in reply filed by the Respondent on 9 December 2004. The issues raised by this application focus on the validity and efficacy of the Roadway Order.

Wharf Roadway

Diagram "A" attached to this judgment shows the Shaw property. It also shows part of a roadway created in 1973 ("the 1973 roadway") which also runs through the Tauwhao Block. The line of the 1976 Order, as marked on the diagram attached to the application for that order, would run diagonally from the corner of Lot 3 through the Tauwhao Block, passing over land currently occupied by one of the buildings shown on Diagram "B", and then joining the sand track leading down to the new wharf. The access actually used is marked as "current roadway" on Diagram "B". That access runs from the corner of Lot 3 next to the Tauwhao Block, traversing the Tauwhao Block parallel to the 1973 roadway for a little distance, then turning to skirt the Marae on one side and the Urupā on the other before again joining the sand track down to the new wharf. There was no dispute that the "current roadway" does not follow the line of the roadway referred to in the order at T 37/248 until it reaches the point where the Tauwhao Block narrows down to form the area outlined on which the new wharf is situated.

1976 Order

A number of arguments made by both the Applicant and the Respondent rely on the factual basis of the 1976 Order. I will briefly set out those facts here but will discuss them in greater detail when I deal with the submissions by the parties. The facts were set out in an affidavit of

Bruce Stirling, an historian who researched the background to the creation of the Roadway Order and the development of Rangiwaea.

On 21 August 1975 the Deputy Registrar of the Māori Land Court applied for a roadway to be laid out over Rangiwaea 1A1 and Rangiwaea 1A2C. Rangiwaea 1A2C was owned by Ihipera Tawhiti and Takiri Taikato. Rangiwaea 1A1 was a Māori Reservation for the purpose of a marae, cemetery, recreation ground and aeroplane landing strip for the "common use and benefit of the Ngai Tauwhao hapu and Māori of the locality". The reservation was gazetted on 23 June 1966.

The application was made upon the grounds that a roadway over Rangiwaea 1A1 and 1A2C to the new wharf on Rangiwaea 1A2C had been agreed at a meeting of owners of 25 May 1973. Ihipera Tawhiti gave written consent to the roadway application by letter dated 22 August 1975. On 11 March 1976 the Court received the written consent of a group referred to as the "advisory trustees" of Rangiwaea 1A1 Reservation. The consent also stated that no form of compensation was sought as the roadway would benefit all owners of Rangiwaea Island. The Court received the County's written consent to the roadway application on 17 March 1976. On 18 March 1976 the Court granted the roadway application, but, as noted above, the order was never perfected. It appears that as late as 28 May 1982 the roadway had not been built or formed so that the survey defining the roadway could not be completed. No doubt this was due to the fact that the wharf was not built until late 1982.

Mr Stirling's evidence goes on to say that no steps appear to have been taken to form or survey the 1976 roadway until about 1989. While the wharf roadway runs over the triangular area marked green on Diagram "B", the actual path taken over the Tauwhao Block to the wharf has changed from time to time, so that even now parts of the access are not clearly marked and formed.

History

Both parties made reference to the historical context within which the 1976 Order was made. While not strictly necessary to the determination of this matter, the history of development of the island

goes some way to explain the different perspectives the parties have to the 1976 Order.

Rangiwaea was confiscated under the New Zealand Settlements Act of 1863 and the Tauranga Lands Acts of 1867 and 1868. In 1880 the land was returned to Te Whānau a Tauwhao me Te Ngare by the Tauranga Lands Commission. By the early 1970s Rangiwaea had been partitioned into 72 blocks comprising approximately 370 hectares. At that time there were five families and two marae on the island. The Department of Māori Affairs, assisted by the Māori Land Court, sought to encourage development of Rangiwaea by the creation of roadways for access, and by title improvement. The development of Rangiwaea by these methods proceeded in fits and starts. The creation of the 1973 roadway and the 1976 Order were part of one phase of development. Further development occurred after these orders were made. To quote from the Affidavit of Bruce Stirling:

"44. In the meantime there were further title improvement projects and new land development proposals which resulted in different roading requirements for Tauwhao and Te Ngare on Rangiwaea.

45. On 25 July 1980 Maori Affairs convened a meeting of owners in Hamilton to once again discuss the development of Rangiwaea. This meeting resulted in an application to the Court to aggregate various blocks and create a trust under section 438 of the Act. The application was heard at Tauranga on 30 August 1980.

46. The Court issued a reserved decision on 28 January 1981. Judge Cull observed that the title improvement projects begun in 1973 had been "a dismal failure due largely to a lack of follow-up by the Maori Affairs Department after the boundaries of individual sections had been sliced and cut about." Judge Cull also noted that "the island is virtually uninhabited."

47. The Court adjourned the aggregation application sine die but ordered that the blocks be vested in nine trustees pursuant to section 438 of the Act. The trust was to be known as the Tauwhao Te Ngare Trust. Rangiwaea 1A2B and Rangiwaea 1A2C had not been part of the proposed aggregation and were not vested in the trustees. Rangiwaea 1A1 was also excluded having been gazetted as a Maori Reserve in 1966. Attached and marked "S" are Court minute and order T 41/57-65 and T 41/212-218.

Development appraisal

48. In August 1980 the owners approached the County and the Harbour Board for assistance with land development, particularly water access from Tauranga and roading on Rangiwaea. In September 1980 the Country prepared a development appraisal that recommended that the Harbour Board be requested to provide wharf facilities. The appraisal also noted that the County had previously been involved in survey and preliminary engineering work for internal roads on Rangiwaea and recommended that the County be asked to provide a progress report. Attached and marked "T" is County appraisal.

49. On 3 September 1980 the County wrote to Maori Affairs about the development of Rangiwaea recording that County officers, together with two trustees and some Harbour Board representatives, had inspected the proposed site of the new wharf. It was also noted that a roading programme had to be developed for Rangiwaea as part of land development. Attached and marked "U" is a letter from County dated 3 September 1980. "

The Tauwhao Te Ngare Trust approached the County for financial assistance for the building of the new wharf, and also commissioned a preliminary study on the development of Rangiwaea Island. To quote again from Mr Stirling's affidavit:

" **Amalgamation proposal**

53. On 13 February 1982 Maori Affairs called a meeting of owners at Otumoetai to discuss a proposal to amalgamate the blocks vested in the Trust. The Trust reported that the Harbour Board was to build the wharf in February and March 1982. Ihipera Tawhiti and the children of Takiri Taikato asked that Rangiwaea 1A2C be included in the proposed amalgamation. The other owners and trustees agreed to the inclusion of Rangiwaea 1A2C in the Trust. The meeting also agreed to the cancellation of the Maori reservation over part of Rangiwaea 1A1 to enable this land to be included in the Trust. Attached and marked "Y" are the undated Maori Affairs minutes of the meeting.

Amalgamation order

54. On 12 May 1982 the Court heard the application to amalgamate the blocks vested in the Trust. Rangiwaea 1A2A and 1A2C

and part of 1A1 were included in the application. The Court was also asked to cancel the reservation over Rangiwaea 1A1 and reserve part of the block as a Maori Reservation for the purpose of a marae, cemetery, recreation ground, and village site for the common use and benefit of the Tauwhao and local Maori. Rangiwaea 1A2B was not included in the amalgamation. Attached and marked "Z" is Court minute T 42/288-300.

55. The Court issued a reserved decision on 14 May 1982. The previous titles were cancelled and substituted by a new amalgamated title comprising 252 hectares ("the 1982 amalgamation order"). The new block was called the Tauwhao Te Ngare block ("the Tauwhao block") and vested in the Trust. The Maori reservation over Rangiwaea 1A1 was cancelled and replaced by a Maori reservation over part of the Tauwhao block covering the marae and urupa ("the Tauwhao marae reserve"). The Tauwhao marae reserve was formally gazetted on 1 May 1983. Attached and marked "AA" are Court minute and order T 42/338-339 and New Zealand Gazette notice 1983 p.1388. "

The Tauwhao Landing Reserve

Another complicating factor is that a landing reserve was created that included that part of the Tauwhao Block formerly known as Rangiwaea 1A2C. The reserve was formally gazetted as a Māori Reservation on 2 July 1993 for the common use and benefit of Tauwhao and Te Ngare: see New Zealand Gazette Notice 1993 p1966. The gazette notice was registered against the Tauwhao Block title on 12th March 2004.

Sale of Rangiwaea 1A2B to Mr Shaw

Mr Shaw purchased Rangiwaea 1A2B from Ihipera Tawhiti on 12 March 1982. The transfer was confirmed by the Court on 13 May 1982. In 1984 Mr Shaw applied for a change of status of Rangiwaea 1A2B to General land. The change of status was granted

on 17 May 1985. In paragraph 5 of Mr Shaw's Affidavit dated 5 March 2004 he states as follows:

> " In 1984(sic) when I purchased the land, Mrs Tawhiti told me that there was a roadway from the corner of Rangiwaea 1A2B to a new wharf which was being built at that time. "

In paragraph 6 of the same Affidavit he states the following:

> " The order from the Maori Land Court in 1976 had appended to it a sketch plan of the proposed roadway. That sketch plan showed the roadway was to link straight through to the new wharf and barge ramp, and linked up with a public road which serviced the old wharf. As a matter of practicality however, the roadway delineation took a different route. "

However, in cross-examination Mr Shaw accepted that his Affidavit was incorrect, because he had purchased the land in 1982. He said that when he bought the land nobody told him about the roadway. He went on to say that it was not until sometime later, when he was preparing to build his house that Mrs Tawhiti told him that the roadway was there. Mr Shaw thought that Mrs Tawhiti would have given him this information in about May 1984.

Later in cross-examination Mr Shaw agreed that he began using the current physical access when the Trust changed the route and began to put papakainga houses on the block. Mr Shaw also said that he sometimes gained access to the wharf by going along parallel to the beach, but that he did not use that way for commercial vehicles. Mr Shaw agreed that he would still have access by boat to his property if he was unable to use the roadway across the Tauwhao Block, but that he would not be able to move any goods, materials or his home kills.

Finally it should be noted that Mr Shaw's Certificate of Title SA64D/511 states that the land has no frontage to a legal road.

S. Milroy

Submissions for the Applicant

The Applicant's whole case rested on the minute of the Order of the Court at T37/248. The Applicant referred to the records of the Court, which, in the Applicant's view, showed that consent to the roadway was first obtained from the owners' meeting held on 25 May 1973. At that meeting a roadway scheme was proposed to the landowners, and the minutes record that all owners present were in favour of the roadway scheme. A Roadway Order was made in 1973, following on from the meeting of owners. The Applicant submitted that the 1976 Order was in the contemplation of the owners at the 1973 meeting because the roading was meant to ensure access by the owners to the new wharf, once it was determined where the wharf would be sited. The Māori Land Court also received further written consent from the owners or their representatives of the two blocks concerned in the 1976 Order, except from Takiri Taikato.

By virtue of section 416 of the Māori Affairs Act 1953, the effect of laying out of a roadway is that it confers on all persons the same rights of user as if the roadway were a public road. The only exception to this is under subsection (2) of section 416, which allows the Court to define or limit the persons or classes of persons entitled to use the roadway. The Applicant submitted that he therefore had a right to use the wharf roadway.

The Applicant also relied on section 68(1) of the Māori Affairs Act 1953 and section 77(1) of Te Ture Whenua Māori Act 1993. The sections are, in the Applicant's words, "practically identical". The sections provide that no order of the Court with respect to Māori land shall be annulled or quashed or held to be invalid on any ground whatever in proceedings instituted more than ten years after the date of the order.

The Applicant also provided a reply to the grounds of opposition advanced by the Respondent but I will state these when setting out the Respondent's submissions.

Submissions for the Respondent

Counsel for the Respondent noted that the remedy sought by the Applicant is not clear. The Applicant asked the Court to recognise that the Applicant is entitled to the benefit of the use of the roadway to give him access to the wharf and barge ramp. However, as the Applicant acknowledged, the roadway cannot now follow the route as delineated on the plan attached to the original roadway application because of the development of the papakainga housing in that area. On this point I note that it was clear from the hearing that Mr Shaw wants access over the Tauwhao Block, but in light of the papakainga development he is prepared to compromise by not insisting on access as delineated on the plan attached to the original 1976 roadway application.

The Respondent opposed the application on the following grounds, as quoted from the submissions of Counsel for the Respondent at paragraph 30:

" a) The Court did not have the jurisdiction to make the order in March 1976 and the order should be annulled.

b) The consent of the Tauranga County Council to the roadway application has lapsed by operation of law.

c) The order was not approved by the Court or sealed in accordance with the 1953 Act and does not constitute an equitable interest.

d) Shaw and the Tauwhao trust by conduct abandoned the roadway.

e) The Tauwhao block, the Tauwhao foreshore reserve and the Rangiwaea marae reserve are not subject to the roadway.

f) The Tauwhao foreshore reserve and the Rangiwaea marae reserve are inalienable.

g) Shaw failed to register the order against the title to the Tauwhao block and the order is now incapable of registration.

h) Shaw is not entitled to a prescriptive easement or easement of necessity and has reasonable access to the Shaw property.

i) The Court does not have a discretion under s.18(1) of the 1993 Act to take into account the various matters raised by Shaw.

J. Milroy

j) The application is defective because Shaw does not claim an interest in the Tauwhao foreshore reserve and the Rangiwaea marae reserve. "

Lack of Jurisdiction to Make 1976 Order

In relation to ground a) the Respondent argued that the meeting of owners in May 1973 was called to discuss the laying down of a roadway from the old wharf to the crossing at Matakana. The plan produced at the meeting delineated that roadway and the Deputy Registrar informed the owners that no compensation would be payable as the roadway would benefit everyone. The owners then discussed the development plan. That discussion included reference to the fact that a new wharf would need to be built and that the proposed road line could be altered to link up with the new wharf. The District Officer told the owners that the Department wanted the owners to look at the scheme *in principle*, and at the end of the meeting the owners agreed, in principle, to the development plan. The Respondent argued that the owners did not agree to any roadway over Rangiwaea 1A1 and Rangiwaea 1A2C at the meeting, as set out in the Registrar's application for the 1976 roadway. The owners only gave agreement "in principle", and without knowing where the roadway might run.

The Respondent also argued that the trustees of Rangiwaea 1A1 had no authority to consent to the roadway application because under Section 429(7) of the Māori Affairs Act 1953 a Māori Reservation could only be vested in trustees by order of the Court. The Rangiwaea 1A1 Reserve was set aside for the benefit of Tauwhao and the local Māori, but the Court did not vest the reserve in the advisory trustees. The beneficial owners of Rangiwaea 1A1 would therefore need to consent to the roadway application. Their consent was not obtained.

In short, the Respondent said that only one owner, Ihipera Tawhiti, consented to the roadway application. However, the Respondent referred to Rule 108(6) of the Māori Land Court Rules 1958. The Rule requires that a consent be filed with the application and the consent must be attested. Ihipera Tawhiti's consent is not witnessed and, so the Respondent argued, is defective. The Respondent relied on *Waimamaku B2G4A* [1972] 2 Tokerau 80 MB 56 as authority that the written consent of the owners of Rangiwaea 1A1 and 1A2C must be filed

in Court, and the lack of the consents meant that the Court was not empowered to make the roadway order.

The Respondent also referred to section 439(9) of the 1953 Act, which provides:

> " (9) The land comprised within a Maori reservation shall, while the reservation subsists, be inalienable whether to the Crown or to any other person:
>
> Provided that the trustees in whom any Maori reservation is vested may, with the consent of the Court, grant a lease or occupation licence of the reservation or of any part thereof for any term not exceeding 7 years, upon and subject to such terms and conditions as the Court thinks fit. The revenue derived from any such lease or occupation licence shall be expended by the trustees as the Court directs. "

The Respondent relied on the case *Part Tauhara Middle 4A2A (Tauhara Māori Reservation)* (1977) Waiariki MB 168, a decision of Judge Durie (as he then was), where the learned judge confirms that land in a reservation is inalienable, except that the trustees may with the consent of the Court grant a lease or occupation licence of the Reservation for up to seven years, or, where the lease is granted for the purposes of health or education, for a term exceeding seven years. Judge Durie goes on to say (at 13 to 14):

> " In all other respects a reservation is inalienable, and "alienation" as defined in section 2 of the Maori Affairs Act 1953 "means, with respect to Maori land, the making or grant of any transfer, sale, gift, lease, licence, easement, profit, mortgage, charge, encumbrance, trust, or other disposition, whether absolute or limited, and whether legal or equitable (other than a disposition by will), of or affecting customary land or the legal or equitable fee simple of freehold land or any share therein; and includes a contract to make any such alienation and also includes the surrender or variation of a lease or licence and the variation of the terms of any other alienation as hereinbefore defined" . "

Respondent Counsel then referred to the case *Re Rowallan VIII* (1985) 3 South Island ACMB 88 in which the Māori Appellate Court by a majority held that a roadway order made by the Māori Land Court was an alienation for the purposes of section 2 of the 1953 Act. The conclusion reached by the Respondent was that the order of the Court

laying out a roadway over Rangiwaea 1A1 Reserve was an alienation and prohibited under section 439(9) of the 1953 Act and also by section 338(11) of the 1993 Act. In summary the Respondent's submissions under this head are:

i The consent of the owners of Rangiwaea 1A1 and 1A2C was not obtained to the making of the roadway order; and

ii A roadway order is an alienation prohibited by both the 1953 and the 1993 Act.

Therefore the Court did not have jurisdiction to make the roadway order.

The Applicant's response to these submissions was that under section 418(1)(a) the consent of the owners is not required. Only the Tauranga County Council's consent was legally required. The Applicant also referred to section 68 of the 1953 Act and section 77 of the 1993 Act, which provide that Court orders are conclusive after ten years. The Applicant submitted that any defects in the making of the 1976 Order are therefore not relevant, and the 1976 Order must be given effect.

Local Authority Consent

The County gave its consent to the roadway application in March 1976. Sections 347 and 348(1) and (3) of the Local Government Act 1974 provide:

" Private roads and private ways

347 [Grades, and formation,] of private roads

Subject to the Resource Management Act 1991], the provisions of this Part of this Act relating to the [ ] grades, and formation of roads and to building lines shall apply to private roads as they apply to other roads under the control of the council.]

[348Powers of council with respect to private roads and private ways

(1) Except with the prior permission of the council, no person shall lay out or [form] any private road or private way, or grant or reserve a right of way over any private way, in the district . . .

> (3) Any permission of the council under subsection (1) of this section to lay out or [form] any private road or private way as aforesaid shall be deemed to lapse on the expiration of 3 years after the grant thereof, unless the work has then been completed to the satisfaction of the council; but may from time to time be extended by the council for a period or periods not exceeding one year at any one time. "

The Chief Surveyor reported in 1982 that the roadway had still not been formed. The Respondent therefore concluded that the County consent had lapsed under section 348(3) of the Local Government Act 1974.

Applicant Counsel argued that sections 347 and 348 of the Local Government Act 1974 "were not introduced or brought into the purview of the Maori Affairs Act 1953 by virtue of section 416(6) until 1978". The 1953 Act does not refer to the Municipal Corporations Act 1933 and the Municipal Corporations Act 1954 did not apply because section 416(6) did not apply to roadways connecting with a County road *outside a borough*. The consent from the County specifies that it is in relation to a County road outside a borough, so that section 416(6) does not apply. Applicant Counsel went on to say that the County consent was specifically provided pursuant to the Maori Affairs Act 1953 which does not have provision for lapse of consent.

Draft Order not Approved or Sealed by Court

The Respondent argued that the order was not approved in draft form by the Court and could not be sealed in the absence of a proper survey. Nor did the order provide, as it should have, for the roadway to be properly surveyed before the draft order was approved. The Respondent referred to Rule 108(3) of the 1958 Rules which provides as follows:

> " The applicant shall file with any such application in duplicate a description of the proposed roadway with sufficient particularity to enable the boundaries thereof to be accurately determined, together with a plan thereof, showing all existing subdivisions affected by the roadway. If any such subdivisions have not been surveyed, the plan shall show the approximate boundaries of the same as determined upon the making of the relevant partition orders. "

J. Milroy

The Respondent then referred to Rule 108(11) of the 1958 Rules, which provides as follows:

> " (11) Upon the pronouncement of the order or before any such pronouncement, if the Court shall require it, the applicant shall submit a draft order for the approval of the Court, together with a plan of the roadway (in duplicate) to be attached to the order; and any such plan shall be of such a nature as, together with the description of the roadway contained in the order, shall be sufficient to enable the order to be registered under the Land Transfer Act 1952. "

The Respondent also referred to the Māori Appellate Court case *Re Puketiti 4A* (1982) 16 Waikato Maniapoto ACMB 328 for authority that roadway orders ought to specify essential provisions as to formation, fencing, maintenance and the purposes for which the roadway may be used. It is also authority that roadway orders ought to be made conditional on survey.

Similar comments were made in *Part Mahoenui 2 Section 6 Block* (1980) 16 Waikato Maniapoto ACMB 190 by the Māori Appellate Court. In the present case the minute at T37/248 records Mr Taite for the Registrar in support of the application. At the end of his submission he says:

> " I now ask the Court for an order laying out a roadway in terms of sections 415 and 418. Such roadway to commence at the eastern boundary of Rangiwaea 1A2C, the siting of the new wharf, and thence to run in westerly direction until it reaches the road junction at the north-western boundary of Rangiwaea 1A1. "

The Court made the order in the following words:

> " When this application was first heard the Court reserved its decision to enable the necessary consents to be filed: see T37/54.
>
> Order section 418/53 in terms of application and submission herein. "

The draft order was not made conditional upon survey, and the draft was never approved by the Court. The Respondent referred to Rule 34(3) of the 1958 Rules which provides that:

> " (3) Every order which requires a plan of the land comprised therein to be endorsed thereon or annexed thereto shall have so endorsed or annexed a plan of the land sufficient for the purpose of registration

> under the Land Transfer Act 1952. No such order shall be signed and sealed until the plan has been endorsed or annexed as aforesaid. "

Respondent Counsel submitted that the combined effect of section 34 of the 1953 Act and Rule 34(3) of the 1958 Rules was that a final order for a roadway must be an order signed and sealed by the Court, and therefore the 1976 Order is not a final order. If it is not a final order then section 77 of the 1993 Act does not operate to cure the defects in the order.

Applicant Counsel argued that although the order was not signed or sealed, the failure to follow the prescribed process does not render the order invalid. Applicant Counsel relied on the authority of the Court of Appeal in *Coles and Ors v Miller and Ors* (CA 25-01, 8 November 2001, Gault, Blanchard and Goddard JJ).

The Applicant noted that the order is shown as current on the Memorial Schedule, and further argued that section 77 of the 1993 Act renders the order conclusive after ten years. The Applicant also advised the Court that if the Court declares the order valid the Applicant will then apply for sealing of the order. In this regard, I note that the signing and sealing of a roadway order is often delayed for some years until completion of the survey. The 1973 roadway order, made by Judge Cull, was in fact signed by Judge Carter some years later.

Abandonment

The substance of the Respondent's submissions under this head were that neither the previous owners nor Mr Shaw asserted any rights under the 1976 roadway order until Mr Shaw proposed to sell the Shaw property in 2003. The facts used by the Respondent to support this view are as follows:

(a) In 1981 Ihipera Tawhiti and Takiri Taikato entered into an agreement with the Tauwhao Trust for a right of way over Rangiwaea 1A2C, as shown in Mr Stirling's affidavit at Exhibit "V".

(b) Mr Shaw became aware of the existence of the order in 1984, and between 1984 and 1989 various tracks were used over the Tauwhao Block to gain access to the wharf.

(c) In 1989 Mr Shaw and the Tauwhao Trust discussed a mutual exchange of rights of way. *(See Gardiner Affidavit, Exhibit "S").*

(d) In May 1990 Mr Shaw and the Tauwhao Trust discussed the proposed sale of Rangiwaea 1A2B. Mr Shaw mentioned the 1976 order, but in 1998 when Mr Shaw subdivided Rangiwaea 1A2B he proposed a new arrangement of exchange of rights of way with the Tauwhao Trust. *(See Gardiner Affidavit, Exhibit "U").*

During the discussions which carried on until May 1999, Mr Shaw did not rely on his legal rights under the 1976 order.

(e) In March 2000 Mr Shaw was informed by the Tauwhao Trust that he did not have any legal right to cross the Tauwhao Reserve. He did not assert his rights under the 1976 order at that time.

(f) In Mr Shaw's Affidavit dated 31 August 2004 he states:

> " Initially the road was constructed along the lines of the delineation of the 1976 order. The respondent trust then started to build papakainga housing. When that started the roadway delineation was unilaterally altered by the respondent trust away from the papakainga housing. I believe that construction of the papakainga housing started in 1985 or 1986. During the construction it was common knowledge that the road was moved (from its delineated route in the 1976 order) to avoid the papakainga housing. I was not concerned about this, nor to the best of my knowledge was anyone else. "

(g) The Tauwhao Trust also proceeded with development of the block without any consideration of the 1976 roadway. The site for the papakainga is over the 1976 roadway. The roadway as delineated in the diagram attached to the application for the 1976 Roadway Order cannot now be used unless one or more of the houses in the papakainga development is moved.

On the basis of these facts the Respondent considers that the roadway has been abandoned. Respondent Counsel notes that abandonment is stated in *Halsbury's Laws of England* (4th Edition, Volume 14) at

paragraph 121 as follows:

> " To establish abandonment the conduct of the dominant owner must have been such as to make it clear that he had, at the relevant time, a fixed intention never at any time thereafter to assert the right himself or to transmit it to anyone else. It is a question of fact whether an act amounts to an abandonment or was intended as such. "

And again at paragraph 123:

> " In no case, whether title to an easement has been perfected or not, or whether the easement is negative or positive, will mere non-user of a right alone cause extinguishment; the suspension of the exercise of a right is not sufficient to prove an intention to abandon it. There must be other circumstances in the case to raise a presumption of the intention to abandon, and abandonment will not be lightly inferred. "

Respondent Counsel also quoted *Part Mahoenui 2 Section 6 Block* as authority that the Māori Land Court can consider whether a roadway has been abandoned, but that in that case the Court considered that the roadway had not been abandoned because it could still be used.

The Applicant pointed out that registration of the roadway order is not required under section 36(1) of the 1953 Act. Section 123(1) of the 1993 Act does require registration of Māori Land Court orders under the Land Transfer Act 1952. This provision was not in force at the time the 1976 Order was made. The Applicant again noted that the 1976 Order was entered on the Memorial Schedules for the relevant blocks.

The Applicant further argued that, although the roadway has not been surveyed or formed, the formation of the roadway is unnecessary, as it is the right of access which was the purpose of the 1976 Order and which is contemplated by section 415. The Applicant asserted that the roadway has been and continues to be used by various residents of Rangiwaea Island, and places reliance on the Māori Appellate Court case *In the Matter of Marcus John Manning* (Appeal 1989/5, Taitokerau

Registry, 24 May 1991). At page 6 of that judgment the Māori Appellate Court recognises that a roadway can be "legal but unformed".

I note that the *Manning* case deals with the cancellation of a roadway set aside or laid out in 1919 with the substitution of a new route in 1970. The Māori and European land owners affected by the roadway all agreed to the change, as did the Council. The Māori owners were in agreement with the new route, which was more practical than the 1919 roadway. In the circumstances the Court decided that it would be unjust for the Māori owners to receive compensation when their part of the road was completed and they had received the advantages from the road. The matter came before the Appellate Court in 1989 because the Māori Land Court had refused to make a roadway order. The Appellate Court was of the view that the owner of the 2B Block was entitled to access taking into account the whole history of the past negotiations and decisions over the road access from 1919 to 1979.

Tauwhao Foreshore Reserve and Rangiwaea Marae Reserve

The Respondent further objected to the application on the basis that the actual physical access to the wharf and barge ramp runs across both the Rangiwaea Marae Reserve and the Tauwhao Foreshore Reserve. The Gazette Notices for both Reserves make no mention that the Reserves are subject to the 1976 Order. The Respondent asserts that the only unregistered interests which are deemed to survive the setting apart of a Māori Reservation by Gazette Notice are leases and licences, pursuant to section 439(6) of the 1953 Act and section 338(6) of the 1993 Act, which are identical. The Gazette Notice setting apart the Foreshore Reserve is registered against the Land Transfer Title of the Tauwhao Block. The Respondent argued that the case *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 applies. In that case Hammond J (at 198

and 199) was of the opinion that the Land Transfer Act trumps the Māori Affairs legislation so as to protect the indefeasibility of title which is guaranteed under the Land Transfer Act. The Respondent submitted that the Gazette Notice represents a proclamation by the Crown creating a legal interest and that clearly defeats an unregistered draft order of the Court. In support of this the Respondent referred to section 123(5) of the 1993 Act, which provides:

> " (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. "

In respect of the Rangiwaea Marae Reservation the Respondent acknowledged that it had not yet been surveyed, but asserted that upon survey and registration the Reservation would not be encumbered by the 1976 Order.

In reply the Applicant noted that the order recommending the creation of a new Māori Reservation, in substitution for the cancelled Rangiwaea 1A1 Reservation, was made on 14 May 1982, after the 1976 Order. The Marae Reserve comprises 1.9100 hectares and the physical access currently used passes across that Reservation. The Tauwhao Foreshore Reserve was recommended by the Māori Land Court on 25 January 1993 and the Reservation was Gazetted on 8 July 1993, Gazette Notice 1993 p1966. The Applicant's submission is that the 1976 Order pre-dates both orders recommending the creation of a reservation, and that therefore the Reservations are subject to the 1976 Order. In supplementary submissions the Applicant referred to section 77 of the Land Transfer Act 1952 which states:

> " No right to any public road or reserve shall be acquired, or be deemed to have been acquired, by the unauthorised inclusion thereof in any certificate of title or by the registration of any instrument purporting to deal therewith otherwise than as authorised by law. "

The Applicant referred to Hinde, McMorland and Sim, *Land Law in New Zealand* at [9.035]; *Martin v Cameron* (1893) 12 NZLR 769; *Assets Realisation Board v Auckland District Land Registrar* (1906) 26 NZLR 473; and *Sutherland v Cameron* (1908) 28 NZLR 25 for the proposition that the effect of section 77 of the Land Transfer Act 1952 is

that a road or highway may be proved to exist across land comprised in a certificate of title. A more recent case referred to by the Applicant was *Man O'War Station v Auckland City Council* [2000] NZLR 267 (CA), and the Privy Council decision at [2002] NZLR 584. The Applicant says that the case of *Registrar-General of Land v Marshall* refers to the primacy of title and can be distinguished on the issue of indefeasibility with respect to the registration of the Gazette Notice setting aside part of the land as a reservation.

As a second ground for rejecting the Respondent's submissions, the Applicant says that the circumstances in which the Tauwhao Foreshore Reserve was gazetted fall within the exceptions to indefeasibility. This application was lodged with the Court on 26 November 2003. The Gazette Notice for the Reservation was registered on the title on 12 March 2004, with the Respondent filing their Notice of Opposition on 26 March 2004. The Applicant says that the Court should therefore not take into account the registration of the Gazette Notice. The Applicant alleged that the circumstances of the registration clearly raised question marks, although I think the Applicant stopped short of alleging actual fraud for the purposes of the Land Transfer Act, given the lack of evidence on that point.

The Applicant's third ground for attacking the Respondent's position on the registration of the Reservation is that the registration was wrongful because:

(i) the recommendation was made without jurisdiction;

(ii) securing the registration of the Gazette Notice after the proceedings had been commenced was an intentional and wrongful act of the Respondent; and

(iii) it was unreasonable for the Respondent to effect registration of the Gazette Notice at that time. The Applicant said that they would have grounds under section 81(1) of the Land Transfer Act 1952 to ask the Registrar to exercise his discretion to remove the entry of the Gazette Notice from the title if the Court determined that the registration of the Notice has the effect of indefeasibility. The Applicant also invited the Court to express a view as to whether the Registrar should exercise his discretion in that manner.

On the statement that the recommendation for the Reservation was made without jurisdiction the Applicant referred to section 439(6) of the 1953 Act, which provides that:

> " (6) No [notice] under this section shall affect any lease or licence, but no land shall be set apart as a Maori reservation while it is subject to any mortgage or charge. "

The documents show that on 13 September 1991 the Tauwhao trustees signed a mortgage over the whole of the land to the Trustbank Bay of Plenty Limited. The mortgage was subsequently varied on 16 June 1994, and was not discharged until 17 May 2004. Since the land was subject to a mortgage at the time the order was made the Applicant argued that the Court had no power to make the recommendation. The Applicant also produced the minutes of the hearing of the reservation application before Judge Carter on 25 January 1993 (*see 51 T 278*). The Applicant argued that those minutes show that Judge Carter might have assumed from the evidence given by the witnesses that the block was not subject to a mortgage. The Applicant went on to say that the recommendation was therefore *ultra vires* and the subsequent gazetting and registration could not perfect the defect. The Applicant referred to *Church of Samoa Trust Board v Broadlands* [1984] 2 NZLR 704, at 713 where the Judge, in discussing another case *Green and McCahill Contractors v Minister of Works* [1974] 1 NZLR 251 said:

> " It was submitted for the plaintiff that the registration of the proclamation had given the void document legal substance and validity. Wilson J rejected the claim on the basis that registration did not have the effect of validating a void transaction; it conferred no rights other than those pertaining to the registered proprietor as such. "

The Applicant further submitted that the 1993 recommendation cannot receive the protection of section 77(1) of Te Ture Whenua Maori Act 1993, because that section provides that orders of the Court are conclusive after ten years, whereas a recommendation for a reservation is not an order. The Applicant submitted that even if the Court accepts that the recommendation does constitute an order, section 77(2) of the 1993 Act means that the earlier 1976 Order would prevail over the later reservation order.

The Applicant goes on to suggest that the case is one for remittal to the Chief Judge, but that this Court "should recognise the flawed basis on which the Recommendation was obtained, permit the recognition of the roadway, and, if considered appropriate, make a fresh Recommendation that the land be designated as a reservation".

In the Respondent's supplementary submissions in reply, Counsel rejects the Applicant's submissions on the basis that the draft roadway order does not come within section 77 of the Land Transfer Act 1952 and that the Māori Land Court does not have jurisdiction to make a finding that an instrument has been fraudulently or wrongfully registered under the Land Transfer Act 1952. Moreover the Respondent argued that the Applicant does not have an interest in land that is recognised and protected by law. As the 1976 Order was laid out over Rangiwaea 1A1 Reservation the draft roadway order could not defeat the prior interest of the beneficiaries of the Reservation.

The Respondent also submitted that section 77 of the Land Transfer Act 1952 only applies to public roads. There is no definition of a public road in the Land Transfer Act and the Respondent referred to the definition in the Local Government Act 1974, and the Local Government Act 2002. According to the Respondent Māori roadways do not come within those definitions of public roads, with that view being supported by section 320 of Te Ture Whenua Māori Act 1993, which expressly provides for a Māori roadway to be declared a public road. The Respondent went on to say that cases referred to by the Applicant, being *Assets Realisation Board v The Auckland District Land Registrar* (1906) 26 NZLR 473, *Sutherland v Cameron* (1908) 28 NZLR 25, *Martin v Cameron* (1893) 12 NZLR 769 and *Man O'War Station v Auckland City Council* [2000] 2 NZLR 267, concern the common law doctrine of the implied dedication of a public highway.

In respect of the registration of the Gazette Notice, the Respondent said that the Tauwhao Foreshore Reserve was set apart by Order in Council, and the reserve was therefore created by an act of the Executive. The Order in Council was duly registered in accordance with section 347 of the 1993 Act. The allegations of fraudulent and wrongful registration made by the Applicant were not supported by any specific evidence, and Respondent Counsel referred to Lord Denning's observation in

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Associated Leisure Ltd v Associated Newspapers [1970] All ER 754, at 757, that Counsel must not allege fraud "unless he has clear and sufficient evidence to support it".

Respondent Counsel objected to the reference by the Applicant to the minute of the hearing where the Foreshore Reserve application was heard at 51 T 278-279. The objection was on the basis that this was new evidence, not adduced by either of the parties at the hearing. Respondent Counsel submitted that the recommendation to set apart the Tauwhao Foreshore Reserve must be deemed *intra vires* unless and until the contrary is established before the Māori Land Court. The Respondent also argued that *Boyd v Mayor of Wellington* [1924] NZLR 1174 and *Chan v Lower Hutt City Corporation* [1976] 2 NZLR 75 held that registration of an invalid instrument confers an indefeasible interest in the absence of fraud. The indefeasibility continues until cancellation or correction by the Registrar: *Church of Samoa Trust Board v Broadlands* [1984] 2 NZLR 704.

Cancellation or Variation of Reserve

The Respondent noted that there was no application under section 338(5) before the Court for a cancellation or variation of the Rangiwaea Marae Reserve or the Tauwhao Foreshore Reserve, and suggested that the Applicant would require cancellation or variation of the reserves to accommodate the 1976 Order. The Respondent submitted that the Court could not vary the Reserves because the laying out of a roadway "would not be a minor adjustment to meet the changing needs of the beneficiaries". The Respondent also said that the Court could not cancel the reserves to provide access to the Shaw property as that would be an incompatible use that would defeat the purpose of the reservations. To quote from the Respondent's submissions (at paragraph 196):

> " 196. It would allow outsiders to drive around and across the Rangiwaea marae and urupa without restriction. The whole purpose of the Rangiwaea marae reserve is to ensure that Tauwhao have exclusive use of this area which is at the core of their identity.
>
> 197. The creation of a roadway across the Tauhao (sic) foreshore reserve would irreparably alter this Maori reservation. The

roadway proposed by Shaw would take up most of the Tauwhao foreshore reserve which is in most part a narrow sand spit. A roadway would allow people who are not Tauwhao to drive along the Tauwhao foreshore reserve at will and park their cars at the wharf. It would also allow outsiders to arrive by boat and walk around Rangiwaea at will.

198. The roadway would also interfere with the whole purpose of the Tauwhao foreshore reserve. This is as a place where Tauwhao are able to meet, gather kai moana, land their boats and bath in without interference from outsiders. The Tauwhao foreshore reserve would be severely compromised if outsiders were given general access by roadway.

199. These Maori reservations were created by Tauwhao because these areas and activities are of the highest significance to Tauwhao. As Judge Durie noted (at 16) in *Part Tauhara Middle 4A2A*, "an analysis of existing Maori reservations highlights their role in the perpetuation of the tribe's spiritual origins, the preservation in common of facilities of importance to the whole tribe or the maintenance of the tribe's communal existence."

200. Tawhao (sic) also set apart the Tauwhao foreshore reserve and the Rangiwaea marae reserve in the expectation that these areas would be permanently protected from any future interference by outsiders whether the Crown or private individuals. "

The Respondent relied for authority on the case *Part Tauhara Middle 4A2A* supra, and in particular Judge Durie's observations (at 15) as follows:

" The provision in paragraph (a) for the exclusion of any part of the land, must be read in conjunction with subsection (2) enabling the inclusion of additional land. These provisions are primarily directed to a redefinition of reservation boundaries to meet changed circumstances, or where the legal boundaries do not accord the de facto boundaries. The most usual circumstance for the inclusion of additional land is when an urupa is full, or when a Marae requires additional land for extension. The exclusion of reservation land may be appropriate when it is apparent that the area is too large for the purpose having regard to the needs of the owners for personal occupation or development of parts, or when, for example, the intention is to erect flats on the part excluded for the housing of the elderly in close proximity to the Marae. The Court's main concern

> is to ensure that the area is not changed as to defeat the purpose for which the reservation was created, or to allow some incompatible user. The exclusion of a peripheral part to enable commercial development may be acceptable, (especially, as often happens, when the income there from is to support and maintain the reservation) but where a modern generation of "beneficiaries" proposes the exclusion of some central or major part for some commercial reason inconsistent with the legislation and the reservation itself, then if the Court is minded to permit such development, it must ask itself whether or not the reservation status should remain in respect of the whole of the land. "

Judge Durie noted (at 16) that: "an analysis of existing Maori reservations highlights their role in the perpetuation of the tribe's spiritual origins, the preservation in common of facilities of importance to the whole tribe or the maintenance of the tribe's communal existence".

The Respondent also relied on the *Re Rowallan VIII* supra and section 338(11) to the effect that the grant of a cancellation or variation of the reserve to accommodate the 1976 Roadway Order would be a prohibited alienation. Nor is a roadway order an alienation by way of lease or occupation which might be allowed under section 338(12) or under section 338(7).

The Applicant in response again relied on the creation of the 1976 Order prior to the gazetting of the Reservations, so that the Reservations are subject to the 1976 Order.

In addition the Applicant referred to the resource consent application dated 19 March 2003 to the Bay of Plenty Regional Council regarding the barge and coastal permit. Condition 5.2 states that: " There shall be free public access to all permanent structures under this permit at all times except on the following occasions . . . ", (attached to the Affidavit of W Gardiner as Exhibit "EE").

The Applicant argued that since the papakainga was built subsequent to the 1976 Order it would be inequitable and unjust to allow the Respondent to rely upon this ground to defeat the application. Applicant Counsel asserted that Mr Shaw could register the 1976 Order against the title of Tauwhao Block upon completion of a proper survey. The Respondent says that the order has not and is not capable of registration, and cannot now be perfected. Mr Shaw could have arranged for a proper

survey and registration of the 1976 Order when he became aware of it in 1984. The Respondent says that as Mr Shaw did not take any steps to survey and register the roadway he cannot do so now because to survey the actual access used and to register it would conflict with the Reservations. The Respondent relied on the Māori Appellate Court case *Waimamaku B2G4A* (1972) 2 Tokerau ACMB 56 for the proposition that the Court should not make roadway orders varying from the plan contained in the application without first hearing evidence and submissions from all parties, including submissions on the matter of compensation.

The Applicant's response to that argument is that the Applicant was entitled to the access delineated on the diagram attached to the application for the 1976 Order. That access is no longer available because of the actions of the Respondent, but the Applicant is still entitled to insist on his rights under the order. That would require removal of the buildings situated on the route of the roadway. Rather than require such drastic action, the Applicant has proposed what amounts to a compromise so that the 1976 Order will follow the actual access route.

Prescriptive Right and Necessity

The Respondent also made submissions as to whether the Applicant could have a prescriptive right or easement of necessity. The Applicant did not rely on such a prescriptive right or easement of necessity, so I need not consider the Respondent's submissions on this point.

Flawed Application

The final submission for the Respondent is that the application was flawed on the basis that the Applicant did not claim any interest in the Tauwhao Foreshore Reserve or the Rangiwaea Marae Reserve. The Māori Appellate Court case *Nukutaurua 3C3B* (1986) 32 Gisborne ACMB 217 is authority for the Respondent's submission that the setting apart of a Māori Reservation created a separate title for the severed area.

As the application only claims an interest in the Tauwhao Block and not the Foreshore Reserve or the Marae Reserve the application is flawed.

Discussion

In many ways this is an unfortunate case, because neighbours who have lived amicably for most of the 22 years that they have had an association have felt it necessary to litigate this matter rather than reach some compromise. In this regard I note that the Trust made an offer to Mr Shaw for purchase of the Shaw property for $640,000.00, in line with a valuation they obtained which valued the property as if it had no legal access to the barge ramp and wharf on the island. The Applicant, on the other hand, considered that the property was worth in the region of $780,000 to $800,000, based on a valuation premised on the property having legal roadway access. For whatever reason a compromise has not been reached and the Court must now determine the matter.

The Applicant's case is quite straightforward. The Applicant asserts that the 1976 Roadway Order is a valid and final order of the Court. All that is required to perfect the order is a survey, upon completion of which the order can be signed and sealed. The 1976 Order pre-dates the orders creating the Reserves, and therefore the Reserves must be subject to the 1976 Order. Although the 1976 Order was based on an application where the line of the roadway was depicted as crossing what is now the papakainga area on the Tauwhao Block, the essence of the order, the Applicant says, is that access was given from the road junction at the north-western boundary of what was then Rangiwaea 1A1 to the site of the new wharf. Whatever the developments that have occurred since 1976, the Applicant's case is that Mr Shaw is entitled to legal access between those two points. If that were all there was to it I would have no hesitation in finding that the 1976 Order, despite the lack of a survey and despite being unsigned and unsealed, was a valid order and Mr Shaw would be entitled to the benefit of that order. However, this is not a straightforward case, and I propose to go through each of the arguments made by the Respondent.

J. Milroy

Was the 1976 Order Validly Made?

The Respondent questioned the validity of the creation of the 1976 Roadway Order on the following grounds:

(a) The Court lacked the necessary consents of owners to make the order.

(b) The order was made in breach of section 439(9) of the 1953 Act.

(c) The consent of the local authority lapsed due to the provisions of sections 179 and 180 of the Municipal Corporations Act 1954.

I deal with these grounds in order below.

(a) I agree with Respondent Counsel that the 1976 Roadway Order appears to have been made without appropriate consent from the relevant owners. Section 418 of the 1953 Act provides as follows:

" (1) For the purpose of providing access to any Māori freehold land as aforesaid, roadways may, without the consent of any person being required, be laid out –

(a) Over any other Māori land . . . "

On the face of it this provision appears to say exactly what it means, that consent of the owners is not required. However, in the Court of Appeal judgment in *Coles and Ors v Miller and Ors* at paragraph 43 the Court says:

" We can accept that it would have been a breach of natural justice if the Court had made a roadway order without either obtaining the consent of someone whom it knew from its records had an interest in the affected land or giving that person notice of the hearing at which the application for the order was to be heard. "

Obviously best practice is that those whose interests would be affected by a roadway ought to be consulted by the Court, although there are circumstances where the Court may deem that consent unnecessary. That was not the case here. Judge Cull reserved his

decision on the application to enable the consents to be filed. In this regard I note that under the 1993 Act section 317 now requires the consent of the Māori owners to the laying out of roadways over any Māori freehold land.

A search of the records of the Court by Mr Stirling and the Case Manager failed to discover a written consent from Pakiri Taikato. I assume that his consent was not obtained. As no trustees were ever appointed in respect of the Rangiwaea 1A1 Reserve the written consent of the "advisory trustees" cannot be taken as consent of the owners. If it is argued that the 1973 meeting provided consent from the owners my view is that it did not do so. Judge Cull certainly thought it necessary to obtain further consents from the owners. Nor do I know how the owners could consent to a roadway at the meeting in 1973 without knowing where the roadway was to run. There was consent "in principle", but I think that is very far from the specific consent to a specific application that would be required to be valid consent.

(b) In my view the 1976 Order was made in breach of section 439(9) of the 1953 Act. The Māori Land Court is bound by the decision of the Māori Appellate Court *Re Rowallan VIII* supra that an order of the Court is an alienation for the purposes of section 2 of the 1953 Act. There is much to be said for Judge Cull's dissenting view in that case that an order of the Court works by operation of law and not as a voluntary disposal of property referred to in the ordinary definitions of "alienation" in the law dictionaries. However, even if Judge Cull is correct, and orders of the Court are not alienations, the wording of section 439(9) is as follows:

> " The land comprised within a Māori Reservation shall, while the reservation subsists, be inalienable either to the Crown or to any other person . . . "

"Inalienable" is defined in *Butterworths New Zealand Law Dictionary* (4th Edition) as being not transferable. The element of a voluntary transfer is not present. Moreover the special nature of a Māori Reservation supports the interpretation that the land cannot be transferred by any means, whether voluntary or by operation of law, except in the special circumstances set out in the statute.

In the absence of further evidence I would have to conclude that the 1976 Order was in breach of the statute.

(c) On the matter of whether the County Council consent has lapsed, I must agree with the Applicant. The relevant period is the date at which the 1976 Order was made. At that time section 415(3)(c) provided that the Court shall not lay out a roadway without the consent in writing of the County Council "in the case of a roadway connecting with a County road outside a borough".

Section 416(6) of the 1953 Act only imports the lapse of consent provisions of section 179 and 180 of the Municipal Corporations Act 1954 in respect of private streets or private ways "laid out within a borough". As the Tauranga County Council consent was given specifically in respect of section 415(3)(c) it was a valid consent and has not lapsed.

Does Section 77 of the 1993 Act Save the 1976 Order?

Section 77 provides as follows:

" (1) No order made by the Court with respect to Maori land shall, whether on the ground of want of jurisdiction or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any court in any proceedings instituted more than 10 years after the date of the order.

(2) Where there is any repugnancy between 2 orders each of which would otherwise, by reason of the lapse of time, be within the protection of this section, then, to the extent of any such repugnancy, the order that bears the earlier date shall prevail, whether those orders were made by the same or different courts.

(3) Nothing in this section shall limit or affect the authority of the Chief Judge to cancel or amend any order under section 44 of this Act. "

The 1976 Order was clearly made more than ten years ago and, on the face of it is saved by the provisions of section 77(1), despite the lack of consent of the owners and the breach of s 439(9) of the 1953 Act. Nor is there any repugnancy between the 1976 Order and the 1962 order setting apart Rangiwaea 1A1 as a reserve, as the 1962 order has been cancelled.

In my view the Marae Reservation was clearly meant to replace the old Reservation over Rangiwaea 1A1. This *could* have been done by excluding a part of the old Reservation under section 439(5) of the 1953 Act, and retaining the Marae and urupā area within the old Reservation. The protection of the Reservation status would therefore have continued to pre-date the 1976 Order. For whatever reason, the Reservation was cancelled instead, and the recommendation for the Marae Reserve was made, creating a separate and new severance as from the date of gazettal in 1983. Thus the Marae Reservation post-dates the 1976 Order. So far as the route delineated in the roadway application for the 1976 Order passes over the Marae Reservation, the Marae Reservation is subject to that order.

Although the 1976 Order was never signed nor sealed and no survey of the roadway has been completed, I agree with the Applicant that these are technical and administrative matters that can be completed by the Applicant at a later time than the making of the order. In support of this view I refer to paragraph 39 of the Court of Appeal judgment in *Coles v Miller* supra states as follows:

> " It appears that after the plan was prepared and approved in 1964, the sealing of the order was overlooked until 1968 when Judge Gillanders Scott attended to that formality. Section 34(3) of the 1953 Act permitted signature by another Judge of the court. But the order he signed, like the plan, referred back to the minute of 17 September 1963. It was expressed as being made on that date by Judge Smith. Rule 34(3) of the 1958 Rules provided for the situation in which an order required a plan of the land comprised there. It was not to be signed and sealed until the plan had been approved by a judge and minuted and the plan was endorsed on or annexed to the order. No evidence of the minuting of Judge Smith's approval has been adduced, but it would appear from Mr Kinder's statement recorded by the court in its Minute in 1992 (para [19]) that Judge Smith did sign an approval of the plan. However that may be, failure to follow that prescribed process could not have the result that the sealing of the order in 1968 became in itself the making of a fresh order at that time (which would itself have been protected by s68 and now by s77). "

In addition, section 41 of Te Ture Whenua Māori Act 1993 provides that the substance of every final order of the Court shall be pronounced orally in open Court. Section 42(2) provides that the order shall be dated as at

the date of the minute of the order and relates back to that date. In other words the order is made at the date of the minute. Conditional orders take effect once the condition is satisfied, and until then they are open to challenge and would not have the protection of section 77. However, the 1976 Order is not worded so as to be an order conditional upon survey. The 1976 Order simply assumes that formation and survey of the roadway will occur, without making the order conditional upon them occurring.

The Respondent referred to the Māori Appellate Court case *Re Puketiti 4A* (1982) 16 Waikato Maniapoto ACMB 328 where the lower Court had approved a draft order without making a survey of the roadway a condition precedent to the final order. The Māori Appellate Court criticised that practice and said at page 12 of the judgment:

> " We consider it incumbent upon the Maori Land Court, even without specific statutory or regulatory direction, to ensure that its orders will not be made final unless they are in registerable form. In this case we consider that the lower court should have made survey (along with formation and fencing) a condition precedent to the making of a final order. "

Similar comments were made in *Part Mahoenui 2 Section 6 Block* supra, where Judge Durie in the Māori Appellate Court again emphasised the importance of the requirement for survey to the standard contemplated by the Land Transfer Act.

What all this means is that since the 1976 order is not conditional as to survey the Māori Appellate Court would no doubt frown upon it, but nevertheless it would be a final order of the Māori Land Court and so have the protection of section 77 of the 1993 Act.

In the case *In re Te Kumi A31, Te Kanawa v Martin* (1985) 17 Waikato Maniapoto ACMB 38-54 the Māori Appellate Court also said that an order is not final unless and until it finally disposes of the rights of the parties. In that case the lower Court indicated that costs would be awarded to the Applicant but that they would be fixed by agreement between Counsel and following agreement the Court would give further directions. The Appellate Court was unanimous that the minute of the Court was not a final order against which an appeal could lie. However,

the 1976 Order is unequivocal, and does not specify the completion of further actions before it is to take effect.

The difficulty is that the access as currently used does not follow the line delineated in the roadway application. In this respect I should add that whether the route as delineated in the 1976 roadway application is followed, or the actual access as currently used, both would cross the Marae Reservation at some point. To obtain an order creating a roadway over the access as currently used would be a variation from the original 1976 Order, and would seem to create a fresh order that would bear a date later than the Gazette Notice of the Marae Reservation. The Variation Order would therefore be in breach of section 338(11) of the 1993 Act, which provides that land in a Māori Reservation is inalienable.

The Applicant argued that the essence of the 1976 Order is access so that the actual line of the roadway does not matter. The Applicant called in aid the *Coles v Miller* case to support the view that the important thing about a roadway order is that it gives access between two points so that slight variations from the line of the roadway depicted in the diagram attached to the application can be taken as authorised by the roadway order. In the *Coles* case the question on appeal related to the dismissal of an application to cancel a roadway order over the Coles' land. As part of the appeal the Appellant sought to question the jurisdiction of the Māori Land Court in making the roadway order in 1968. The 1968 order was made to vary a roadway order made in 1935. The Court records and plans relied upon by the 1935 Court and evidencing the line of roadway could not be produced at the Appellate Court hearing, so that there was insufficient evidence before the Court to permit a finding that the 1968 order was made without jurisdiction. The basis of the claim for lack of jurisdiction was that it was suggested that the Court provided access to General land over General land, which it did not have the power to do.

I note that in the *Coles* case the 1968 roadway order was both surveyed and sealed. The case is therefore able to be distinguished from the present situation where the Roadway Order is not signed, sealed or surveyed and where the diagram of the line of the roadway is available to the Court. The parties know where the roadway was meant to run so that the Applicant has not the same leeway as in *Coles* to argue that the

line of the road was unknown but access should still be given along the line of roadway actually being used.

The Applicant also referred to the Māori Appellate Court case *In the Matter of Marcus John Manning, Matauri 2F2B Block* (Appeal 1989/5, Taitokerau Registry, 24 May 1991). That was the second judgment issued by the Māori Appellate Court on that matter. The Appellate Court heard the appeal on 21 November 1989 and issued a Preliminary Determination on 18 December 1989 at 280 Appellate Court MB 232-340 (2 APWH 323-340). The second judgment dealt with issues of notice of the hearing of the appeal on 21 November 1989 and substantive opposition to the proposed roadway. The Appellate Court was not persuaded by the further submissions made and said (at pages 5 and 6 of the judgment):

> " In its earlier determination the Appellate Court made it clear that the most important aspect of the historical background to the road development had largely been ignored by the lower Court. The past negotiations and decisions over this road access were fairly exhaustively traversed in the 21 November 1989 decision. . . . the Appellate Court has carefully perused the history of this public road which was wanted by the property owners both Maori and European. Nor did those owners want any compensation for their land. They were seeking a road and pressing for its completion. The minutes of the Court (see 14 Kaipara MB 247, 10 March 1919 and 68 Matauri MB 268 of 19 March 1937) spell out in no uncertain terms what the Maori and European land owners wanted and agreed to. This history shows from ML Plan 11533 that the earliest road surveyed gave access to Matauri 2B Block and actually passed through that land. In 1970 the road line was changed to a more direct route but as a result no longer provided road frontage for 2B. It was agreed between the owners and the Council that a new access would be provided to 2B from the newly surveyed road. The whole question was very fully dealt with before the Maori Land Court in a decision given on 21 December 1978 by Judge Nicholson. In that decision the question of compensation for the roadway was also discussed when the position in respect of Matauri 2F was examined. The Court recorded that the Maori owners were in agreement with the new route which was more practical than the 1919 roadway. The Court decided that it would be unjust for the owners of Matauri 2F to receive compensation when their part of the road was completed and they had received the advantages from the road. There was indeed no objection from the Maori owners and the Court ordered that no

> compensation was payable to 2F. One of the owners, Kira Williams, asked that the road line to 2B as remaining under the old 1919 order and which is the present unformed legal access should be cancelled in favour of the more direct access. The present application flows from that history. The owner of 2B Block is entitled to the access which was always intended. The former owners of 2F2B agreed to this arrangement in statements made to this Appellate Court by Mr Toka Williams confirm that the owners were agreeable to the substitution of a new access way and for the cancellation and return to 2F2B owners of the existing legal but unformed roadway. "

Turning then to the original Preliminary Determination of the Māori Appellate Court in the *Manning* case at 2 APWH 323-340 the Appellate Court noted a number of factors. The present legal access to Matauri 2B, across Matauri 2F2B was a legal but unformed paper road. The Appellant never used the route, but instead used an informal track, which was in existence when he bought the 2B Block in 1972. The Appellant applied for a roadway order in January 1988, but the Appellate Court noted that the time lapse was not due to a casual or indifferent attitude by the Appellant, as he had tried to get satisfaction over many years. The historical evidence showed that a previous owner of Matauri 2B had attended Court sittings relating to proposed roadways in the area. The Appellant showed involvement in those earlier proceedings. In particular on 17 September 1970 the Court noted that Council had agreed with the owners of Matauri 2B to provide access from the new proposed road (the Te Ngaere Bay Road) to the boundary of 2B. In 1978 the County applied for orders varying the 1919 and 1970 orders, with the plan attached to the application showing the legal but unformed route as access to 2B. The Appellant by letter dated 24 September 1978 expressed his objection to the access. When the matter was heard for some reason the Appellant was not able to attend, but one of the owners, Kira Williams, raised the question of better line of access from the road to 2B. At that stage the Deputy Registrar suggested that Mr Manning should make an application and Mr Fountain, Counsel for the County Council, agreed. The Court goes on to say (at page 9 of the judgment):

> " The Court made its amending orders on 22nd of January 1979 (folio 72) and approved the new roadway on the basis of Plans ML 14872 and 15092. In effect the [legal but unformed]

route was retained as the access way. In the view of this Appellate Court the learned Judge probably anticipated that a further application would be forthcoming to tidy up the practical access.

This 1979 decision more particularly set out at folio 68 to 71 of the record clearly emphasises that the orders were putting into effect what the Maori and European owners had agreed was a practical road line and that compensation was not payable. "

Later on the Appellate Court goes on to say (at pages 9 to 10):

" Counsel has also argued that the history of the access to Matauri 2B is compelling reason why the present application should have been granted as it would be consistent with the intention of all the owners involved in the earlier Courts that have considered the road line since 1919.

The Appellate Court accepts that argument and considers that it is an important factor which should have been given more weight by the lower Court. It is obvious that through the evidence and attendance of former 2B owner Mr Leslie and the present Appellant's representation that the owners of 2B have since 1937 always assumed they would be given a practical access to 2B when the roadway was formed. They have consistently sought that right and in the Appellate Court's view they have a strong right in justice to have the access in the most practical route. "

By comparison Mr Shaw has taken no action in Court until the present to assert his rights in regard to the 1976 roadway, or to protect his rights when it became apparent that the papakainga housing development would occlude at least part of the roadway. He sought rights of way agreements with the Trust, but these were never finalised. Nor does the prior history of the 1976 Order carry with it the same weight as in the *Manning* case. Again by comparison the order was made on the basis of a 1973 meeting where only consent "in principle" was obtained due to the lack of certainty as to where the new wharf would be sited. The application itself was made by the Deputy Registrar of the Court, rather than by the owners, and the matter was never heard in Court. Instead consents were sought by letter sent directly to the owners of Rangiwaea 1A2C and the "advisory trustees" of Rangiwaea 1A1. There is no guarantee here that the beneficial owners of Rangiwaea 1A1 were even aware of the application. They would therefore have had no opportunity to oppose the application. Nevertheless, the order was made

but, as it stands, it must be in terms of the line of the roadway depicted in the diagram attached to the application. This brings me to a consideration of whether the roadway has been abandoned.

Abandonment

As the learned authors of *Halsbury's Laws of England* (4th Edition, Volume 14) at paragraph 121 state, to establish abandonment the dominant owner must make it clear that he had a fixed intention never at any time to assert his rights in the roadway. It is a question of fact whether an act amounts to abandonment but abandonment is not to be lightly inferred. The difficulty of proving abandonment is shown by the case *Part Mahoenui 2 Section 6 Block* supra. In that case the Māori Land Court considered whether an order made in 1920 and varied in 1936 for a right of way to cross the land and to link with a state highway had been abandoned. The 1936 order was not completed by survey or registration, and a diagrammatic plan depicting the route of the 1936 order had been lost in the Māori Land Court. The Appellant argued that the right of way had been abandoned, and, not having been surveyed or registered, was unenforceable. All the Judges of the Māori Appellate Court concurred that there was nothing to prevent the Respondent from having the 1936 order surveyed and registered. In terms of the abandonment the Māori Appellate Court found that there was no abandonment because both parties accepted that the original right of way could still be used.

The Respondent says that neither the original owner nor Mr Shaw surveyed the roadway, and did not have the order signed, sealed and registered. Both the previous owner and Mr Shaw approached the Tauwhao Te Ngare Trust to propose exchanges of rights of way without any reference to the order. Various tracks were used by Mr Shaw over the Tauwhao Block, and when the papakainga housing development began in 1985 or 1986 in Mr Shaw's words "it was common knowledge that the road was moved (from its delineated route in the 1976 order) to avoid the papakainga housing. I was not concerned about this, nor to the best of my knowledge was anyone else". (From paragraph 6 of Mr Shaw's Affidavit dated 31st August 2004). On this basis the

Respondent argues that Mr Shaw did show a fixed intention not to assert his rights in the roadway.

Certainly the establishment of the papakainga housing shows that the Respondent Trust considered the 1976 roadway to be defunct. At the hearing of the Amalgamation Order in May 1982 Mr Gardiner, the Chairman of the Tauwhao trustees stated as follows:

> " As to house sites we are trying to do this in a reserve we have. We hope our tribe – Tauwhao tribe will go back. This land belongs to Tauwhao. At the meeting of owners to discuss the proposed amalgamation on 13 February 1982 the meeting discussed the cancellation of Part Rangiwaea 1A1 Block as a Māori Reservation so that a village and service buildings could be established on the site. Mr Hansen, a registered engineer and former planning officer for Tauranga County Council was there and, as the minutes state, he explained the planning concepts for the village area. He says "the main aim would be to provide a cluster of houses around the marae. All power and telephone lines would terminate in that area". In the Registrar's submission to the Court on the amalgamation application he says:
>
> > " It is not intended at the moment to do anything about the existing roadways. If it is necessary to do anything about them in future then it is hoped that any new roading pattern would be established in relation to utilisation patterns. " "

This suggests to me that roading, and the necessary roadway orders, would be tidied up and sorted out once the development of the Island was more settled. As the wharf had not yet been built there was no guarantee that the 1976 Order would still be required, especially if it was envisaged that a village would be established right where the roadway runs. In all, this presents a very confused picture because of the changing intentions and delays in the development of the Island, the building of the wharf and the later uses of the land in Rangiwaea 1A1.

In my view the evidence shows that Mr Shaw was uncertain as to his legal rights in respect of the 1976 Order because of all the intervening activity between 1976 and the present time. But uncertainty about one's legal rights does not amount to an intention not to assert those rights. Mr Shaw continued to cross over Rangiwaea 1A1, and although the route changed because of the building of papakainga housing I do not think it

can be said that Mr Shaw agreed that the line of 1976 Order could not be used – he was given no choice about the matter. That cannot be the basis on which he loses rights given pursuant to the 1976 Order.

His failure to take some action at the time to protect his rights and the fact that he later sought agreement with the Trust as to a right of way are rather more problematic. Mr Shaw's evidence at hearing was that he didn't object to the change in the route so long as he had access to the wharf. From this I infer that had he known that by failing to object to the change of route he might be giving up his legal right of access for access at the sufferance of the trustees he might well have objected to the change. Combined with Mr Shaw's confusion as to what his legal rights were, I do not think the Court can infer from these actions a clear intention on Mr Shaw's part not to assert his rights under the 1976 Order. I find that abandonment is not proven.

Tauwhao Foreshore Reserve

The 1976 Order crosses what is now the Tauwhao Foreshore Reserve. As previously stated the 1976 Order pre-dates the setting aside of the foreshore reserve and, without any more than that, the Reservation would be subject to the 1976 Order. However, the Gazette Notice of the Reservation was registered against the title and the Respondent claimed the protection of the indefeasibility provisions of the Land Transfer Act 1952 against the unregistered interest represented by the 1976 Order. Respondent Counsel relied on the judgment of Hammond J in *Registrar General of Land v Marshall* supra as authority that the registration of the Gazette Notice of the reserve "trumps" the unregistered equitable interest that Mr Shaw has by virtue of the 1976 Order. The result of that would be that the Reservation is free of the 1976 Roadway Order so that Mr Shaw could not rely on it for access to the wharf and barge ramp. The Applicant opposed that argument on four grounds:-

1. The Roadway Order pre-dates the creation of the Reservation and is unaffected by registration;

2. The circumstances in which the Gazette Notice was registered fall within the exceptions to indefeasibility;

3. The registration of the Gazette Notice was wrongful;

4. The land is not a Reserve because the recommendation was *ultra vires* and the Gazette Notice was therefore of no effect;

5. In any event the roadway prevails by application of section 77(2) of the 1993 Act.

I agree with the grounds outlined by the Applicant in 1. above. Judge Durie in his decision on the *Part Mahoenui 2 Section 6* case states (at page 3 of his judgment) as follows:

> " There is a certain supremacy of the Court entrusted with a jurisdiction to create and amend titles and to vest lands, that distinguishes its orders from documents recording agreements between individuals and registrable in the land transfer registry. This is illustrated in the following extract from the decision of 12 October 1978 by Chief Judge Scott given in his capacity as Chief Judge on a proceeding pursuant to Section 452 of the Maori Affairs Act 1953 affecting Whareongaonga 5 block and recorded as CJ 1977/19:
>
> > " In an article in (1957) NZLJ 336 E.C. Adams quotes Professor Garrow in his Real Property in New Zealand as saying:
> >
> > > ' It probably never occurs to a New Zealander to have any doubts about his title to the land he holds under a Land Transfer Certificate of Title. He knows no reason why any one should oust him, nor can he conceive the possibility of anyone coming along and saying that he has no title to his land.'
> >
> > In fact a registered proprietor is in danger. Section 36 of the (Maori Affairs) Act provides that an order of the Court may be sent to the District Land Registrar who "shall thereupon . . . register the same accordingly. "
> >
> > Section 99 of the Land Transfer Act 1952 provides:
> >
> > > ' Whenever any order is made by any Court of competent jurisdiction vesting any estate or interest under this Act in any person, the Registrar, upon being served with a duplicate of the order, shall enter a memorandum thereof in the register and on the outstanding instrument of title and until such an entry is made the said order shall have no effect in vesting or transferring the said estate or interest. '

Hosking J in In re Hinewhaki No 3 Block (1923) NZLR 353, 361 said:-

> ' If such an order vests in B land which on the register is in the name of A there is no duty on the District Land Registrar to see that an entry is made on the register showing how B came to be entitled to have the land vested in him . . . The order of this Court would be sufficient warrant in registering B as the proprietor without regard to the intermediate processes by which he became entitled to have the land vested in him. I think that the District Land Registrar is in the same position with regard to owners newly introduced into a partition order made by the Native Land Court. '

Lord Lindley said in Assets Co. Ltd. v Mere Ruihi (1905) A.C. 176 at p. 203:

> ' . . . their lordships are of opinion that it is not the duty of a district land registrar to examine into the validity of a Crown grant, nor to inquire how a Governor's warrant had been obtained, nor to inquire into the proceedings in the Native Land Court culminating in an order of freehold title. The Acts show that these documents may be assumed to have been properly obtained, and may be safely acted upon by the district land registrars and by other persons acting in good faith. ' "

Despite changes to the status and even ownership of certain affected lands in this case there would appear to be nothing at law that could now prevent registration of the 1936 order against each relevant title once the Court has settled the question of its route to enable a signed and sealed order supported by an appropriate survey plan to issue. The proof of the pudding is in its eating however, and unless the parties hereto can come to an agreement on the ultimate objectives, I would incline to the view that the Court should take no further steps unless and until the 1936 order has been completed and registered. "

This is clearly authority that Court orders can be registered unless there are exceptional circumstances involved. In addition section 123 of the 1993 Act provides:

> "(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.

(3) Notwithstanding anything in section 99 of the Land Transfer Act 1952, the production of the outstanding instrument of title shall not be necessary for the purposes of any such registration under that Act.

(4) No fee shall be payable under this Act or the Land Transfer Act 1952 in respect of any order to which this Part of this Act applies.

(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. "

In my view the District Land Registrar is required under section 123(2) to register an order when it is transmitted to him or her. The *Registrar General of Land v Marshall* is a special case dealing with the transfer of freehold title to a property. I consider that the protection of freehold title is an order of magnitude greater in terms of its significance than the registration of easements or roadways, which are after all partial interests, against the title. I therefore consider that this is not a situation in which the indefeasibility provisions of the Land Transfer Act 1952 should operate to defeat Mr Shaw's equitable interest in the 1976 Order.

However, in case I am wrong I will consider the other grounds that the Applicant raised. The Applicant suggests that the circumstances under which the Respondent registered the Gazette Notice possibly fall within the fraud exception to indefeasibility. I do not consider that there is sufficient evidence before the Court to reach such a finding, and I must therefore reject that ground. I also note that section 62 of the Land Transfer Act 1952 provides as follows:

" **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 I 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
>
> . . . "

It is possible to construe the 1976 Order as a "right of way or other easement" and it is therefore one of the exceptions to section 62. In addition section 99 of the Land Transfer Act 1952, as Judge Durie points out in *Part Mahoenui 2 Section 6 Block,* operates to direct the Registrar to register a roadway order.

Grounds 3 and 4 above are intertwined in that ground 3 is partly dependent on ground 4 being made out. The Applicant asks this Court to find that the recommendation by Judge Carter on 25 January 1993 was made without jurisdiction as the land was subject to a mortgage at the time the recommendation was made. The Applicant says that this recommendation does not receive the protection of section 77(1) of the 1993 Act because it is not an order of the Court, but only a recommendation.

Whether the making of the recommendation is an order such as to receive the protection of section 77 is one that I do not have to decide. In my view, the action of the Chief Executive on behalf of the Crown in gazetting the reservation is an executive action that cannot be reversed by the Court. The applicant may apply under section 338(5) for a recommendation from the Court that the reservation be cancelled, but until the Chief Executive acts upon such a recommendation the gazettal is effective and the Court cannot make orders as if the gazettal had not taken place.

The other aspect of ground 3 that the Applicant referred to was that it was wrongful for the registration of the Gazette Notice to occur after the proceedings had commenced. I would be reluctant to go so far as to say the registration was wrongful in the absence of full evidence. And after all the Gazette Notice has to be registered at some time. Nevertheless, I do not think that the Court ought to take into account the registration in making its decision in this case. The registration occurred after the proceedings had commenced and in my view the Court need only consider the situation as at the date of the filing of the application.

For that reason and for those referred to above I consider that the 1976 Order is unaffected by the registration of the Gazette Notice of the Tauwhao Foreshore Reserve.

Summary

My findings therefore are as follows:

1. Although there are grounds for an application under section 45 to the Chief Judge to overturn the 1976 Roadway Order, this Court is unable to do so and must treat the 1976 Roadway Order as valid and effective.

2. Section 77 protects the interests of Mr Shaw in the Roadway Order.

3. However, insofar as Mr Shaw's application is for the recognition by the Court of his interest in the access actually used, as opposed to the route in the 1976 Roadway Order, the Court cannot grant the application. Nor do I consider a variation of the 1976 Roadway Order possible, as this would create a new order which would be subject to the Reservation Orders made in respect of the Marae Reservation and the Tauwhao Foreshore Reservation.

4. The 1976 roadway has not been abandoned by Mr Shaw, and therefore he still has an interest in the line of the road line as delineated in the diagram attached to the application for that order.

5. The consequence of such a finding is that Mr Shaw is entitled to assert his user of the 1976 roadway and to require the trustees of the Tauwhao Te Ngare Block to allow access to the wharf and barge

ramp for him and his successors in title, even if that requires the removal of a building.

The effect of my findings is that the application under s 18(1)(a) is successful, but that does not get the Applicant very far. Logically the next step is for the Applicant to survey the roadway and proceed to ask for signing and sealing of the 1976 Order. However, the removal of a building to give the access provided by the 1976 Order is obviously a drastic step, and it is likely that other access could be provided that does not require such removal, and also does not require the crossing of the marae reservation. I would urge the parties to see if some compromise could be reached on that point.

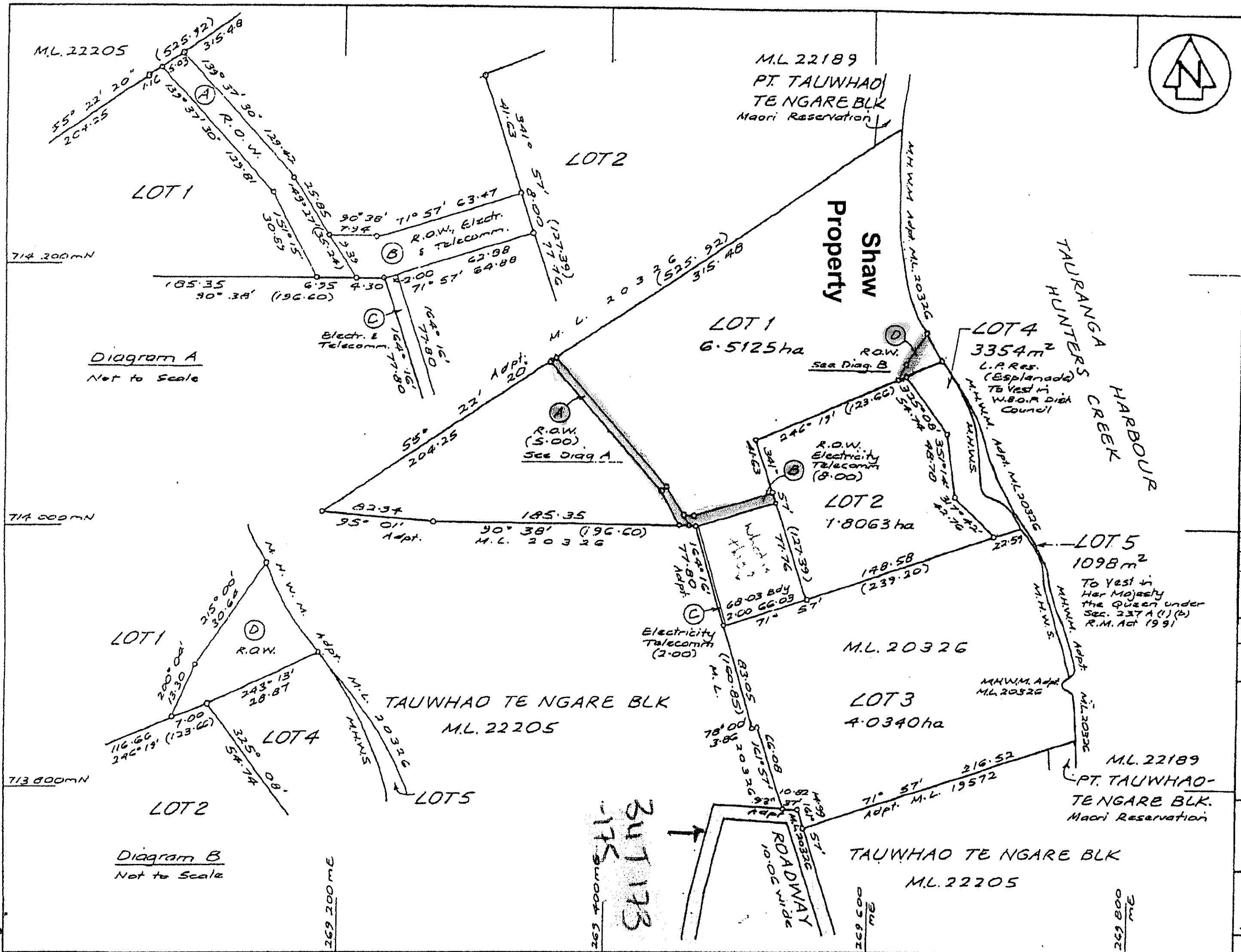
Dated at Hamilton this 23rd day of May 2005

JUDGE S TE A MILROY

A03-6815+A04-2194

DIAGRAM "A" – Shaw property

Minute Book: 81 T 53



Approvals

[signature] Registered Owner

Approved pursuant to Section 223 of the Resource Management Act 1991 on the 13th day of March 1998. Subject to the granting or reserving of the easements set out in the Memorandum hereon.

The Common Seal of the Western Bay of Plenty District Council is affixed hereto in the presence of

[signature] Authorised Officer S/B. 7062

MEMORANDUM OF EASEMENTS

Purpose	Serv Ten.	Shown	Dom Ten.
R.O.W.	Lot 1	A	Lot 2 & Tauwhao-Te Ngare Blk
	Lot 1	B, D	Lot 2
Electricity & Telecomm	Lot 1	B	Lot 2
	Lot 1	C	Lot 3

Note: Lot 5 is subject to Sec. 9A of the Foreshore and Seabed Endowment Revesting Act 1991.

NEW C.T. ALLOCATED

Lot	C.T. Ref	Lot	C.T. Ref
1	64D/511	2	64D/512
3	64D/513	4	L.P. Res (Espl.) 64D/514
5	To Vest in H.M. the Queen		

Total Area 12·7980 ha

Comprised in C.T. 31C/509

I, Douglass Grant Meiklejohn Registered Surveyor and holder of an annual practising certificate (or who may act as a registered surveyor pursuant to section 26 of the Survey Act 1986) hereby certify that this plan has been made from surveys executed by me or under my directions, that both plan and survey are correct and have been made in accordance with the Survey Regulations 1972 or any regulations made in substitution thereof.

Dated at Tauranga this 28th day of April 1998 Signature [signature]

Field Book ... p. ... Traverse Book ... p. ...

Reference Plans M.L. 20326 M.L. 22205 M.L. 19572

Examined [signature] Correct

Approved as to Survey [signature]

25/8/98 ... Chief Surveyor

Deposited this 21st day of September 1998. [signature] District Land Registrar

File Received Instructions

DPS 82146

LAND DISTRICT South Auckland SURVEY BLK. & DIST. V Tauranga NZMS 261 SHT U14 RECORD MAP No 4.2	LOTS 1-5 BEING A SUBDIVISION OF RANGIWAEA 1A2B BLOCK	TERRITORIAL AUTHORITY Western B.O.P Dist (9721/1) Surveyed by Meiklejohn Consultants Scale 1:2000 Date Feb. 1998

W.A. ROBERTSON, SURVEYOR GENERAL, DEPARTMENT OF SURVEY AND LAND INFORMATION, NEW ZEALAND

29 SEP 1998

DIAGRAM "B" – "Current Roadway"