I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O WAIKATO MANIAPOTO
In the Māori Appellate Court of New Zealand
Waikato Maniapoto District

A20200015962

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Kawhia U2B
I WAENGA I A *Between*	NIKI TUWHANGAI Kaitono pīra *Appellant*
ME *And*	CHRISTINE BOON Kaiurupare pīra *Respondent*

Nohoanga: *Hearing*	10 August 2021, 2021 Māori Appellate Court MB 327-378 (Heard at Hamilton)
Kooti: *Court*	Judge M P Armstrong (Presiding) Judge T M Wara Judge D H Stone
Kanohi kitea: *Appearances*	L Fraser for Appellant M Grayson for Respondent
Whakataunga: *Judgment date*	22 September 2022

TE WHAKATAUNGA Ā TE KOOTI PĪRA MĀORI
Judgment of the Māori Appellate Court

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Hei tīmatanga kōrero
Introduction

[1] June Ormsby passed away on 21 November 2016. There has since been considerable conflict within the Tuwhangai whānau regarding the ownership of shares in Kawhia U2B. The conflict exists between Niki Tuwhangai and Christine Boon, who is Mrs Ormsby's daughter and executor of her estate.

[2] Mr Tuwhangai and Mrs Ormsby are whānau who were raised together on the land where Mokai Kainga Marae now stands. Kawhia U2B is next to Mokai Kainga Marae, and is 5.7111 hectares of Māori freehold land overlooking Kawhia harbour. Around 1990, Mr Tuwhangai and Mrs Ormsby decided to purchase shares in Kawhia U2B from Moekau Myra Moke. On 23 March 1992 an order was made by the Māori Land Court to give effect to the transfer. The order recorded that the shares were transferred to Mr Tuwhangai and Mrs Ormsby as joint tenants.

[3] Ms Boon says that the 1992 Court order was wrong because it recorded Mr Tuwhangai and Mrs Ormsby as joint tenants. She says the order should have recorded Mr Tuwhangai and Mrs Ormsby as tenants in common. She applied to the Chief Judge pursuant to s 45 of Te Ture Whenua Māori Act 1993 ("the Act") to correct the error. The Chief Judge agreed that the Court erred in 1992 and he amended the 1992 order to provide for tenancy in common, rather than joint tenancy. Mr Tuwhangai appeals that decision.

Kōrero whānui
Background

[4] Around 1989, Mr Tuwhangai approached Mrs Moke about purchasing the shares she owned in Kawhia U2B. Mrs Moke was a widow who acquired 335.184 shares in the land from her late husband, Rori Moke. While she did not own all of the shares in Kawhia U2B, she was the majority shareholder owning 335.184 out of 415 shares. The transfer was initially framed as being between Mrs Moke and Mr Tuwhangai, however Mrs Ormsby was subsequently included in the transaction.

[5] On 19 February 1990 an agreement for sale and purchase was executed ("the 1990 agreement"), whereby Mrs Moke agreed to sell the shares to both Mr Tuwhangai and Mrs

Ormsby for $11,500.00. The 1990 agreement was conditional on Mr Tuwhangai and Mrs Ormsby obtaining approval from the Māori Land Court, and described the share parcel in the transaction as follows:

> 335.184 shares as tenant in common (out of a total of 415 shares) being Part Kawhia U2B Block and being part of the land comprised in C.T. 8A/1099 South Auckland Land Registry.

[6] On 18 April 1990, an application for confirmation of the alienation was filed by Russell Thomson, counsel for Mr Tuwhangai and Mrs Ormsby, seeking the Court's approval of the transaction. However, a jurisdictional issue arose because section 225 of the Māori Affairs Act 1953 ("the 1953 Act") restricted alienation of land owned by more than 10 owners. On 12 June 1990, Mr Thomson sought an adjournment stating that the application may have to proceed via an alternative route.[1]

[7] On 22 November 1990, Mr Thomson then filed an application to summon a meeting of owners. The application set out two proposed resolutions:

> That approval be given to the sale by MOEKAU MYRA MOKE (now Couch) of Christchurch formerly a widow now a married woman to the sale of the 315.184 shares out of the total shares in this block of 415.00 shares, which she holds as executrix on the late ROY MOKE alias RORI MOKE, to NIKI TUWHANGAI of Te Kuiti, Warden and JANE MAANGA ORMSBY of Tokoroa, controller as joint tenants, for the sum of $11,500.00.
>
> That approval be given to the sale to the said NIKI TUWHANGAI of Te Kuiti, Warden and JANE MAANGA ORMSBY of the shares held by such other owners of the land as may wish to dispose of their shares to them.

[8] The initial application for confirmation of alienation was ultimately dismissed by Judge Carter on 9 July 1991, and the Judge confirmed that the calling of a meeting of assembled owners was a better approach.[2]

[9] On 8 November 1991, the owners were notified of the meeting to be held on Friday 6 December 1991 at the Māori land Court in Hamilton. The notice included the first resolution only. The meeting proceeded as scheduled and a report was filed by the reporting officer, dated 9 December 1991. There were four owners present at the meeting, and five owners represented by proxy. The formal statement of proceedings of this meeting recorded

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1 104 Otorohanga MB 174 (104 OT 174).
2 105 Otorohanga MB 181 (105 OT 181).

both Mr Tuwhangai and Mrs Ormsby as present, however Mrs Ormsby did not sign the written resolution as being present at the meeting.

[10] The resolution that was passed at the meeting was similar to the notified resolution, with one amendment as to Mrs Ormsby's name:

> That approval be given to the sale by MOEKAU MYRA MOKE (now Couch) of Christchurch formerly a widow now a married woman to the sale of the 315.184 shares out of the total shares in this block of 415.00 shares, which she holds as executrix on the late ROY MOKE alias RORI MOKE, to NIKI TUWHANGAI of Te Kuiti, Warden and JUNE MAANGA ORMSBY of Tokoroa, controller **as joint tenants**, for the sum of $11,500.00.

[11] An application for confirmation of resolution of assembled owners was filed on 6 December 1991, and an order was granted by Judge Carter on 23 March 1992 confirming the resolution of owners.[3]

[12] Mr Tuwhangai has lived on the land since 1992. While Mrs Ormsby intended to build a house on the land, this did not occur.

[13] Mrs Ormsby passed away in 2016, and on 22 August 2017 Mr Tuwhangai applied to the Māori Land Court for transmission by survivorship of Mrs Ormsby's joint interest in the 335.184 shares to himself. Mrs Boon opposed, and the matter was referred to mediation, however no resolution was reached. Mrs Boon subsequently filed separate proceedings seeking orders that the joint tenancy was severed and the imposition of resulting and/or constructive trusts. These applications were heard by Judge Clark on 14 December 2018 (which we refer to as "the 2018 decision").[4] He dismissed Mrs Boon's application and granted an order pursuant to s 18(1)(a) of the Act, determining the joint tenancy over the shares in favour of Mr Tuwhangai solely by way of survivorship.

[14] On 19 February 2019, Mrs Boon applied to the Chief Judge pursuant to s 45 of the Act. She claimed that the order made in 1992 was incorrect because of a mistake, error or omission and asked the Court to amend the order to recognise the ownership arrangement between Mr Tuwhangai and Mrs Ormsby as tenants in common, rather than joint tenants. The application was granted by the Chief Judge on 30 October 2020, who amended the 1992

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3 106 Otorohanga MB 84 (106 OT 84).
4 173 Waikato Maniapoto MB 99-122 (173 WMN 99-122).

order to the effect that the 315.184 shares of Moekau Myra Moke were purchased by Mr Tuwhangai and Mrs Ormsby as tenants in common in equal shares.[5] Accordingly, the order made by Judge Clark in the 2018 decision, ending the joint tenancy held by Mrs Ormsby and Mr Tuwhangai in favour of Mr Tuwhangai as the sole survivor, was cancelled.

[15] This decision of the Chief Judge was appealed by Mr Tuwhangai, and the issue for this Court is whether the 1992 order ought to have been amended.

Ko te hātepe ture o te tono nei
Procedural History

[16] On 18 December 2020 an appeal was filed on behalf of Mr Tuwhangai. The appeal was initially set down for hearing on 12 May 2021, however on 12 April 2021 counsel for the appellant requested that the appeal be adjourned. This was not opposed by Mrs Boon.[6] The application was adjourned to be heard during the August appeals week, and on 8 June 2021 the appeal was set down for hearing on 10 August 2021.[7]

[17] On 27 July 2021, counsel for the appellant filed a supplementary bundle of documents which included the following evidence:

(a) An affidavit from Maxine Moana-Tuwhangai dated 13 September 2018;

(b) A brief of evidence from Niki Tuwhangai dated 13 September 2018; and

(c) A brief of evidence from Christine Boon dated 8 October 2018.

[18] These documents were not on the record of appeal, nor were they on the record in the proceedings before Chief Judge Isaac. Rather, they were filed in the proceedings before Judge Clark in 2018. In addition, counsel for the appellant had not sought leave to file these documents pursuant to s 55(2) of the Act. Therefore, we issued directions on 5 August 2021 directing counsel to address this matter by way of written submissions to be filed no later than 9 August 2021.[8]

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5 *Boon v Tuwhangai - Kawhia U2B Block* [2020] 2020 Chief Judge's MB 1084 (2020 CJ 1084).
6 2021 Chief Judge's MB 212 (2021 CJ 212).
7 2021 Māori Appellate Court MB 96 (2021 APPEAL 96).
8 2021 Māori Appellate Court MB 288 (2021 APPEAL 288).

[19] The hearing was then held on 10 August 2021, following which we reserved our decision. During the hearing we determined that we would not grant leave for the filing of the evidence, and we would set out our reasons in our decision.

Ngā take hukihuki
Preliminary Matters

[20] Before turning to the issues of appeal, there are two preliminary matters to be addressed.

Leave for the filing of the evidence

[21] Counsel for the appellant sought leave to file additional evidence, being the affidavits referred to at [17]. Ms Fraser submitted that these documents were both expressly relied on by the appellant in the first instance hearing and were expressly referred to in the judgment of the Chief Judge. She claimed that the evidence is not new, as it was prepared for, discussed, and relied on in the 2018 decision, and was referred to and relied on by the appellant in submissions filed in response to Mrs Boon's application to the Chief Judge. Ms Fraser said that the absence of those documents from the case file appears to be an inadvertent error, rather than indicating these documents comprise new or fresh evidence, and that no prejudice arises to the respondent from the material being accepted into the record.

[22] Counsel for the respondent submitted that the documents were not adduced at the earlier hearing before the Chief Judge, the respondent does not consent to the evidence being heard by this Court, and that the documents are not necessary for this Court to reach a just decision.

[23] Turning to the law, the Court may grant leave to a party to adduce further evidence pursuant to r 8.18 of the Māori Land Court Rules 2011. In determining whether to grant leave, the Court must be satisfied that the further evidence may be necessary for it to reach a just decision.[9] In addition, the Court may excuse compliance with a rule if satisfied that compliance would be oppressive or otherwise inappropriate.[10]

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9 Māori Land Court Rules 2011, r 8.18(2).
10 Māori Land Court Rules 2011, r 2.4.

[24] This Court has confirmed the orthodox approach to adducing further evidence on appeal set out in *Dragicevich v Martinovich*.[11] Three tests must be met:

(a) It must be shown the evidence could not have been obtained with reasonable diligence for use at trial;

(b) The evidence must be such that if given it would probably have an important influence on the result of the case although it need not be decisive; and

(c) The evidence be such as is presumably to be believed although it need not be incontrovertible.

[25] In *Faulkner v Hoete* the Court referred to the Court of Appeal decision of *Erceg v Balenia Ltd*, which confirmed:[12]

> … [T]he requirements are that the evidence be fresh, credible and cogent. It will not be regarded as fresh if it could, with reasonable diligence, have been produced at the trial: *Rae v International Insurance Brokers (Nelson Marlborough) Ltd [1998] 3 NZLR 190 at 192 (CA)*. Particular weight will be accorded in summary judgment proceedings to the need for finality: it is only in exceptional circumstances that the Court will permit further evidence to be filed on appeal: *Lawrence v Bank of New Zealand (2001) 16 PRNZ 207 (CA)*.

[26] We are not satisfied that the further evidence is necessary to reach a just decision for three reasons. First, the appellant had ample opportunity to seek leave for the evidence to be heard. The appeal was initially set down for hearing on 12 May 2021, and at the request of the appellant the hearing was adjourned to 10 August 2021. Counsel for the appellant had almost three additional months to ensure that the case was properly advanced.

[27] Second, we are not convinced that the evidence would have any significant outcome on the result of this case. As accepted by counsel, the matters raised in the brief of evidence of Niki Tuwhangai were addressed in the presentation of his oral evidence before the Chief Judge. With regard to the evidence of Maxine Moana-Tuwhangai, the main component of

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11 *Dragicevich v Martinovich* [1969] NZLR 306 (CA); *Hoko – Papamoa 2A1* (2003) 20 Waikato Maniapoto Appellate MB 167 (20 APWM 167); *Faulkner v Hoete – Motiti North C No 1* [2017] Māori Appellate Court MB 188 (2017 APPEAL 188); *Tairua v Aati – Estate of Mere Hare Kerepeti* [2020] Māori Appellate Court MB 224 (2020 APPEAL 224).

12 [2008] NZCA 535.

her evidence was also addressed by Mr Tuwhangai. Finally, the evidence of Mrs Boon was of little relevance to the inquiry of the lower Court.

[28] Third, and for reasons we will come to next, we can rely on this material in any event as extrinsic evidence.

[29] For these reasons, leave to file the evidence listed at [17] was declined.

Reliance on Extrinsic Evidence

[30] While this was not an issue raised by the parties, in assessing the factual findings of the lower court it is apparent that the Chief Judge relied on some of the factual findings of Judge Clark in the 2018 decision. We consider that it is appropriate to comment on this approach.

[31] Section 128 of the Evidence Act 2006 permits the Court to take judicial notice of "uncontroverted facts", being facts so known and accepted either generally or in the locality in which the proceeding is held that they cannot reasonably be questioned. In addition, *National Standards Committee (No 1) v Deliu* is authority for the proposition that judgments of the Court are matters of public record and the Court is entitled to take judicial notice of them without them having to be produced as evidence.[13]

[32] With regard to the present case, both Mr Tuwhangai and Mrs Boon were parties to the 2018 decision. This decision was attached to the s 45 application to the Chief Judge. As parties, both Mr Tuwhangai and Mrs Boon were aware of the findings in that decision. Therefore, it was open for the Chief Judge to take judicial notice of the factual findings from the 2018 decision.

Te kaupapa o te pīra
The approach on appeal

[33] An issue arises as to the correct approach on appeal of the exercise of the power under s 44 of the Act. Until recently, an appeal against a decision of the Chief Judge has proceeded as an appeal against the exercise of discretion. Counsel for the appellant submitted

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13 *National Standards Committee (No 1) v Deliu* [2012] NZHC 3378, at [28].

that, in light of the relatively recent Court of Appeal decision of *Inia v Julian*, the approach ought to differ. The Court of Appeal has confirmed that applications to the Chief Judge involve both an evaluative decision and a discretionary decision:[14]

> We accept the argument made … that the powers vested in the Chief Judge under s 44(1) of the Act fall in two parts. The first is an evaluative decision as to whether the order made was "erroneous in fact or in law because of any mistake or omission on the part of the court or the Registrar or in the presentation of the facts of the case to the court or the Registrar". The second is a power, which is likely in most cases to involve discretion, to "cancel or amend the order … or make such other order … as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission".

[34] Ms Fraser submitted that, as s 44 contains both an evaluative and a discretionary power, the approach on appeal ought to differ depending on which power is being challenged. She says that the decision as to whether there was an error, mistake or omission in the 1992 order per s 44(1) of the Act is evaluative, therefore, the appeal grounds on this finding should proceed on a de novo basis. We agree.

[35] If the appeal concerns the evaluative decision of the Chief Judge as to whether an order was erroneous in fact or in law because of any mistake or omission in the presentation of facts, the stricter appeal criteria do not apply. An appeal of the evaluative decision is to proceed by way of rehearing.

[36] If the appeal concerns the Chief Judge's decision to grant a remedial order under s 44(1), that decision is an exercise of discretion, and the *Kacem v Bashir* approach applies. In that context, the appellant must satisfy the Court that the Chief Judge:[15]

(a) erred in law or principle;

(b) took into account of irrelevant considerations;

(c) failed to take account of a relevant consideration; or

(d) is plainly wrong.

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14 *Inia v Julian* [2020] NZCA 423, at [10].
15 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

[37] Once one of these criteria are established, the role of the Māori Appellate Court is to rehear the proceeding.

Te pīra
The Appeal

[38] The appeal can be summarised on the following grounds:

(a) That the Chief Judge failed to consider the range of information that suggested that the 1992 order was properly made.

(b) That the Chief Judge preferred the evidence of Mrs Boon, when Mrs Boon offered no new evidence relevant or probative to the question of whether the 1992 order was made as a result of an error or a mistake.

(c) That the Chief Judge incorrectly characterised the contemporary evidence of Mr Tuwhangai, and wrongly concluded that the evidence supported a finding that the 1992 order was made in error.

(d) That the Chief Judge misconstrued the 1990 agreement, and wrongly concluded it provides evidence of a mistake affecting the 1992 order.

Ngā tāpaetanga
Submissions

[39] For the appellant, Ms Fraser argued that the Chief Judge failed to properly apply the relevant legal test. The well-established principles that apply to an application under s 45 are summarised *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)*, and confirm that there is a presumption that the order made was correct, there must be evidence that the order was flawed, and the onus is on Mrs Boon to prove this on the balance of probabilities.[16] Ms Fraser argued that Mrs Boon did not adduce any new evidence that had not already been considered and rejected by Judge Clark in the 2018 decision. Ms Fraser submits that the Chief Judge incorrectly placed significant reliance on the 1990 agreement to define the ownership

16 *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)* [2009] Chief Judge's MB 209 (2009 CJ 209).

relationship between the parties as a tenancy in common, which was problematic for a number of reasons:

(a) The 1990 agreement was not the basis for the 1992 order.

(b) With knowledge of the agreement, Judge Carter proceeded to make the 1992 order on a joint tenancy basis.

(c) Third, the Chief Judge wrongly disregarded the fact that Mrs Ormsby joined the agreement after the words "tenancy in common" had already been inserted, rendering its meaning unreliable.

[40] Ms Fraser also submitted that the Chief Judge incorrectly placed weight on Mr Tuwhangai's evidence given in hindsight that he would have wanted a tenancy in common arrangement to protect his family. In addition, she submits that the Chief Judge incorrectly placed weight on Mr Tuwhangai's acceptance that he did not use the terms 'tenancy in common' or 'joint tenancy' in discussion with Mrs Ormsby Ms Fraser argues that the Chief Judge adopted the starting point that the parties intended a tenancy in common, which is at odds with the presumption that the 1992 order was correct.

[41] Finally, Ms Fraser submits that the Chief Judge's reasoning suggests that he failed to properly apply the relevant tests under ss 44 and 45 of the Act, in that there was an absence of new evidence, and the Chief Judge effectively reversed the burden of proof, requiring Mr Tuwhangai to explain why a joint tenancy was entered into.

[42] For the respondent, Mr Grayson submitted that the approach by the Chief Judge to the s 45 application and his resulting decision are correct.

[43] First, he argued that the appellant incorrectly draws upon the 2018 decision that granted Mr Tuwhangai succession by survivorship over Mrs Ormsby's interest in the shares. The application before the Chief Judge under s 45 of the Act was a separate application, and the jurisdiction of the Chief Judge extends further than that of the Māori Land Court in the 2018 decision.

[44] Second, he submitted that the appellant incorrectly argues that Mrs Boon did not offer any relevant or probative new evidence in support of her application beyond that which was derived from the 2018 decision. He argues that the appellant misconstrues the point that the s 45 application was a new application with broader jurisdiction, and that Chief Judge's enquiry into Mr Tuwhangai's understanding of events at the time is consistent with the *Ashwell* approach.

[45] Thirdly, Mr Grayson submitted that the enquiry by the Chief Judge as to Mr Tuwhangai's understanding at the time of his dealings with Mrs Ormsby was proper and should not be construed as incorrect weighting.

[46] Finally, Mr Grayson submitted that there is no evidence of a deliberate move by Judge Carter to deviate from the conventional ownership model of tenants in common, other than the 1992 order which was based upon Mr Thomson's mistaken reference to a joint tenancy in his draft resolution for assembled owners.

Kōrerorero
Discussion

Did the lower court err in identifying a mistake or omission?

[47] The first ground of appeal is that the Chief Judge failed to consider a range of information that suggested the 1992 order was correctly made. As part of this point of appeal, Ms Fraser argued that the Chief Judge failed to properly apply the relevant legal test as set out in *Ashwell*. This ground of appeal challenges the Chief Judge's evaluative decision. Accordingly, we must consider this ground by way of rehearing.

[48] The correct starting point for the Court's exercise of special powers under ss 44 and 45 is the presumption that the order was lawfully made, and that the burden of proof to rebut the presumption, on the balance of probabilities, is on the applicant. Section 45 applications must be accompanied by proof of the flaw identified, through the production of evidence not available or not known of at the time the order was made.[17]

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[17] The Chief Judge acknowledged this starting point: see *Boon v Tuwhangai - Kawhia U2B Block* [2020] 2020 Chief Judge's MB 1084 (2020 CJ 1084) at [29].

[49] The flaw identified in Mrs Boon's case before the Chief Judge was the ownership arrangement of joint tenancy. Mrs Boon says that the ownership arrangement should have been tenancy in common.

[50] The key question here is whether there was a mistake or omission in the presentation of the facts of the case to the Court in 1992. The Chief Judge effectively determined that the solicitor acting for Mr Tuwhangai and Mrs Ormsby made an error or mistake by changing the proposed ownership arrangement from tenancy in common to joint tenancy.[18] This finding rests on two pillars. The first is that Mr Tuwhangai and Mrs Ormsby initially intended to hold the shares they purchased as tenants in common. The second is that this intention was changed by their solicitor in error. We now inspect those pillars.

Did Mr Tuwhangai and Mrs Ormsby intend to hold the purchased shares as tenants in common?

[51] The Chief Judge relied on two reasons to find that Mr Tuwhangai and Mrs Ormsby intended to hold the shares they purchased as tenants in common: the wording of the 1990 agreement and the evidence given before him by Mr Tuwhangai.

[52] The 1990 Agreement sets out the legal description of the interest as a freehold estate, further described as:

> 335.184 shares as tenant in common (out of a total of 415 shares) being part Kawhia U2B Block and being part of the land comprised in C.T. 8A/1099 South Auckland Land Registry.

[53] In these proceedings, importance was placed on the words "tenant in common" as defining the arrangement between Mr Tuwhangai and Mrs Ormsby. Having considered the plain meaning of the agreement, we are not convinced that the term "tenant in common" refers to the arrangement between Mr Tuwhangai and Mrs Ormsby. Rather, it describes the nature of the interest Mrs Moke had in the land that was subject to the sale.

[54] It is clear from the Certificate of Title that the persons listed on the title held their interests as tenants in common. The Certificate of Title includes the following reference:

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[18] Above at [39] and [41].

> the persons set out in the schedule hereunder are seised of an estate in fee simple as tenants in common in the shares set out after their respective names out of a total of 415 shares.

[55] Mrs Moke was selling the interest that she owned, being the 335.184 shares as a tenant in common with the other four owners. Therefore, it follows that the property described in the 1990 agreement is the property which is subject to the transfer, and the reference to "tenant in common" refers to the arrangement between Mrs Moke and the other owners, as opposed to the arrangement between Mr Tuwhangai and Mrs Ormsby.

[56] Accordingly, we are not convinced that the 1990 agreement evidences an intention of Mr Tuwhangai and Mrs Ormsby to hold the shares they purchased from Mrs Moke as tenants in common. Instead, the 1990 agreement simply describes the estate that is being sold, not how it is to be held subsequently. Therefore, if Mr Tuwhangai and Mrs Ormsby originally intended to hold the purchased shares as tenants in common, the 1990 agreement cannot be relied on to prove that intention.

[57] Turning to the evidence given by Mr Tuwhangai before the Chief Judge, as the only living party to the original transaction and the original proceedings, his evidence regarding the parties' intentions was critical to the Chief Judge's inquiry. As the Chief Judge noted at the hearing, "the ownership in Māori Land Court records recording joint tenancy is actually very rare… that in most cases joint tenants are husband and wife."[19] Under these circumstances it was appropriate for the Chief Judge to require Mr Tuwhangai to give evidence to address the ownership arrangements. Ms Fraser submitted that by requiring Mr Tuwhangai to provide an explanation for why a joint tenancy was entered into, the Chief Judge wrongly reversed the burden of proof. We do not accept this submission. The Chief Judge correctly queried as to whether the order was erroneous in fact or law, and it was open to him to pursue a line of inquiry regarding the ownership arrangements.

[58] However, Mr Tuwhangai's contemporary evidence must be assessed carefully. The evidence given by Mr Tuwhangai before the Chief Judge can be summarised as follows:[20]

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19 2020 Chief Judge's MB 481-498 (2020 CJ 481-498), at 498.
20 2020 Chief Judge's MB 650-671 (2020 CJ 650-671), at 653.

(a) Mr Tuwhangai and Mrs Ormsby were purchasing the shares together and agreed to equally split the cost of the purchase price.

(b) The purchase price was paid equally by both Mr Tuwhangai and Mrs Ormsby.

(c) Around the time of purchase, both Mr Tuwhangai and Mrs Ormsby visited the land and discussed where they would build their houses on the land.

(d) Mr Tuwhangai and Mrs Ormsby did not discuss legal terms such as tenancy in common and joint tenancy.

(e) Mr Tuwhangai and Mrs Ormsby did not discuss what would happen to the shares if one of the parties died.

(f) Mr Tuwhangai's involvement with Māori land was always as a tenancy in common and therefore he understood this type of ownership.

(g) Mr Tuwhangai did not instruct Mr Thompson to change the nature of the ownership to a joint tenancy.

(h) In 2009 Ms Ormsby offered to sell her interest in the land to Mr Tuwhangai which he declined.

(i) Mr Tuwhangai confirmed that in hindsight he would have ensured the purchase was as tenants in common to protect his family.

[59] Ms Fraser submitted that the Chief Judge appears to have placed weight on Mr Tuwhangai's evidence that in hindsight, he would protect his family's interest and ensured the purchase proceeded as tenants in common. She argued that his contemporary views are not a valid consideration when determining whether a mistake occurred before the Court in 1992, and that an order cannot be determined as made in error simply because a party regrets it.

[60] As to Mr Tuwhangai's evidence regarding his understanding of joint tenancy, both the 2018 decision and the Chief Judge found that Mr Tuwhangai was inconsistent with his

understanding this legal concept.[21] As identified by the Chief Judge, initially the appellant's case was that the change of the terms from tenants in common to joint tenancy was intentional, however this changed when he gave evidence that the parties did not use such legal terms in their discussions.

[61] Ultimately, it was open for the Chief Judge to take into account Mr Tuwhangai's hindsight statements. They were relevant to the Chief Judge's inquiry. They were certainly not irrelevant considerations. However, those views must be balanced against the other evidence as to whether a mistake occurred before the Court in 1992. That is the second pillar of the Chief Judge's finding that we must now inspect.

Did the solicitor for Mr Tuwhangai and Mrs Ormsby make an error?

[62] In considering the Chief Judge's finding that the solicitor for Mr Tuwhangai and Mrs Ormsby made an error, it is useful to recount some of the steps leading to the Court granting the 1992 orders. Of particular relevance are the following uncontroverted facts:

(a) The 1990 agreement is the only historical document on the record that refers to the phrase "tenants in common". As we have found, it is used to describe the estate being purchased, not necessarily the manner in which that estate (once purchased) would be held.

(b) The 1990 agreement was filed in support of the initial application to seek confirmation of the share sale per s 225 of the 1953 Act. This application was dismissed.

(c) The share sale was subsequently approved by way of a meeting of owners per s 317 of the 1953 Act. An application to summons a meeting of owners was duly filed with the Court. Importantly, this application sought approval for the share sale to Mr Tuwhangai and Mrs Ormsby as joint tenants.

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[21] 106 Otorohanga MB 84 (106 OT 84), at [58]; and *Boon v Tuwhangai - Kawhia U2B Block* [2020] 2020 Chief Judge's MB 1084 (2020 CJ 1084), at [40].

(d) A notice of meeting of owners was published on 8 November 1991. Again, that notice referred to Mr Tuwhangai and Mrs Ormsby as joint tenants.

(e) The meeting of owners was held on 6 December 1991. The resolution put to the owners referred to Mr Tuwhangai and Mrs Ormsby as joint tenants.

(f) Mr Tuwhangai and Mrs Ormsby are recorded in the official minutes of the 6 December 1991 owners meeting as being present. Mr Tuwhangai signed the written resolution as being present at the 6 December 1991 meeting. Mrs Ormsby did not sign this resolution.

(g) The outcome of the meeting of owners was considered by the Court on 25 February 1992. Mr Tuwhangai attended that hearing. The application was adjourned to chambers to enable the adequacy of consideration to be assessed. Evidence on this point was filed on 13 March 1992. On 23 March 1992, the Court granted the 1992 order, which again referred to Mr Tuwhangai and Mrs Ormsby as joint tenants

[63] The notion that Mr Tuwhangai and Mrs Ormsby would hold the shares as joint tenants was first raised in the application to summons a meeting of owners on 26 November 1990. This notion was repeated in the notice calling the meeting of owners, the resolution put to the meeting of owners, the statement of proceedings arising out of the meeting of owners and the 1992 Court order. If the reference to joint tenancy was an error, there were multiple opportunities to correct it. None of those opportunities were taken at the time.

[64] As the solicitor's file is no longer available, the extent to which he liaised directly with Mr Tuwhangai and Mrs Ormsby at the time is unknown. However, based purely on the public record, it is almost inescapable that both Mr Tuwhangai and Mrs Ormsby were aware that they were to be joint tenants of the shares they purchased. No steps were taken during the Court process to change this arrangement. Moreover, no steps were taken over the next 25 years to change it. It was not until the 2017 application to terminate the joint tenancy arrangement by survivorship that the joint tenancy arrangement become an issue.

[65] As the starting point is that the 1992 order is presumed correct, Mrs Boon must prove on the balance of probabilities that the order is flawed. She relied on four factors to prove this flaw: the 1990 agreement as evidence of the parties' intentions; the legal presumption of ownership as tenancy in common (joint tenancy being usually reserved for a husband and wife relationship); the absence of justification to depart from tenancy in common in the resolution; and the absence of inquiry of the Court when making orders.

[66] Turning to each of these factors:

(a) As noted, we do not consider that the 1990 agreement evidences how Mr Tuwhangai and Mrs Ormsby intended to hold the shares they purchased. The 1990 agreement is a red herring.[22]

(b) We accept that shares in Māori land blocks would ordinarily be held as tenants in common. However, the clear and multiple references to joint tenancy in the present case, for a period of over 18 months while the application progressed through Court, rebut this presumption.

(c) There is no need to justify a departure from tenancy in common. The public record clearly shows that joint tenancy was proposed.

(d) We do not agree that there was an absence of inquiry by the Court. The Court file is relatively extensive and shows that the Court was actively engaged on the application.

[67] It is against this background that the contemporary evidence of Mr Tuwhangai must be assessed. Mr Tuwhangai's hindsight view, expressed in 2020, that he would not have agreed to a joint tenancy arrangement in 1992 must be assessed against the facts of the case as then presented to the Court. In making that assessment, we consider that his hindsight view does not displace the clear facts presented to the Court that the shares he purchased with Mrs Ormsby were to be held as joint tenants.

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22 See 173 WMN 99-122, above n 4at [55].

[68] The Chief Judge was satisfied that Mrs Boon had proved, on the balance of probabilities, that the 1992 order was erroneous in fact or law because of any mistake or omission in the presentation of the facts of the case to the Court. He made this finding because he considered that Mr Tuwhangai and Mrs Ormsby intended to purchase shares in Kawhia U2B as tenants in common and their lawyer made in error by asking the Court to vest those shares in them as joint tenants. We find that the evidence does not prove, on the balance of probabilities, that Mr Tuwhangai and Mrs Ormsby intended to hold those shares as tenants in common. On that basis, together with the clear and multiple references in the Court record to Mr Tuwhangai and Mrs Ormsby holding the shares as joint tenants, we are not satisfied that there was an error in the presentation of the facts to the Court in 1992.

Kupu Whakatau
Decision

[69] The appeal is upheld. Under s 56(1) of Te Ture Whenua Maori Act 1993:

(a) The order granted by Chief Judge Isaac per ss 44 and 45 of the Act on 30 October 2020 at 2020 Chief Judge's MB 1084-1101 is revoked;

(b) The orders granted on 23 March 1992 at 106 Otorohanga MB 84, and on 14 December 2018 at 173 Waikato Maniapoto MB 99-129, relating to Kawhia U2B are affirmed.

[70] If costs are at issue, counsel for the appellant should file and serve submissions on costs within 1 month. Counsel for the respondent should file and serve submissions within a further month. We will then decide costs on the papers.

I whakapuaki i te 3.00 pm i Te Whanganui-a-Tara, rua tekau mā rua o ngā rā o Mahuru i te tau 2022.

M P Armstrong (Presiding)	T M Wara	D H Stone
JUDGE	**JUDGE**	**JUDGE**