IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20150001176
APPEAL 2015/5

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An appeal against orders of the Māori Land Court made on 21 November 2014 at 328 Aotea MB 225-237 in relation to Mohakatino Parininihi No 1C West 3A2
BETWEEN	HAUMOANA WHITE Appellant
AND	ANGELA HELEN POTROZ, JOHN EDWARD POTROZ AND BARRY STUART KING Respondents

Hearing:	21 May 2015 (Heard at Whanganui)
Court:	Deputy Chief Judge C L Fox (Presiding) Judge D J Ambler Judge M J Doogan
Appearances:	Russell Gibbs, lay advocate for the appellant Susan Hughes QC, for the respondents
Judgment:	23 March 2016

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

Copies to:
Susan Hughes QC, PO Box 8213, New Plymouth 4342
Attention: Susan Hughes QC
Email: susan@bankchambers.co.nz

TABLE OF CONTENTS

Introduction .... **[1]**

Background .... **[6]**

The evidence before the Court .... [6]

The title history of the land .... [11]

The application for rehearing .... [33]

Judge Harvey's decision .... [37]

The parties' submissions on appeal .... **[40]**

The appellant's submissions .... [40]

The respondents' submissions .... [43]

Issues .... **[51]**

Natural justice .... **[52]**

The lower Court's refusal to grant a rehearing .... **[58]**

The law .... [58]

Judge Harvey's exercise of discretion .... [68]

The status of the land and its consequences .... **[85]**

The status of the land .... [89]

Consequences of the status of the land .... [106]

Outcome .... **[115]**

Introduction

[1] On 20 February 2014 Judge Harvey made orders under s 18(1)(a) of Te Ture Whenua Māori Act 1993 ("the 1993 Act") determining the ownership of Mohakatino Parininihi No 1C West 3A2 ("1C West 3A2") in favour of the respondents, and under s 131 of that Act determining the land to be general land.[1] The application had been brought by a Deputy Registrar of the Court, had not been the subject of prior notification in the *Pānui*, had not been served on any interested parties, and was addressed in Chambers without a hearing in open court.

[2] The respondents ("the Potroz Family Trust") claim ownership of the land through a chain of title derived from a memorandum of transfer confirmed by the Waikato-Maniapoto District Māori Land Board ("the Land Board") on 10 February 1933 transferring the land from its then sole Māori owner, Kereni Wetini, to Frederick William Waddell. The trust says that it purchased this land along with other land in 2003 from the successors in title to Mr Waddell. However, it was not until 21 March 2014, when the lower Court's 20 February 2014 orders were registered, that the trust became the registered proprietors of the land.

[3] On 22 July 2014 Neville Fisher and Haumoana White, the appellant, applied to the lower Court for a rehearing of the Deputy Registrar's application. They claimed to be interested parties by reason of the Court's 1945 succession orders in respect of Kereni Wetini whereby 1C West 3A2 was vested in Mihiata Wetini (Dickson), Mei Jimmerson and Mura Rattenbury. Mr Fisher is the son of Mura Rattenbury, who lives in Australia and supports her son's application. Mr White is the whāngai son of James Bertrand, who was the whāngai son of Te Oro Watihi, who was an original owner in the Mohakatino Parininihi block. Kereni Wetini and James Bertrand succeeded to the land interests of Te Oro Watihi. Thus, Mr White claims an interest in the application as a nephew to Kereni Wetini.

[4] In essence, Mr Fisher and Mr White claim that the sale to Mr Waddell was never completed and that the land is still owned by Kereni Wetini's three successors per the 1945 succession orders.

[1] 315 Aotea MB 243 (315 AOT 243).

[5] Judge Harvey heard the application for rehearing on 24 October 2014 and dismissed it in his 21 November 2014 decision.[2] Mr White appeals that decision. Mr Fisher did not participate in the appeal but supports it. The fundamental issue on appeal is whether a miscarriage of justice has arisen from the lower Court's refusal to grant a rehearing.

Background

The evidence before the Court

[6] The evidence concerning title to 1C West 3A2 has been pieced together over the course of the two hearings in the lower Court and the appeal hearing in this Court. During the appeal hearing Ms Hughes QC, acting for the Potroz Family Trust, acknowledged that more "pieces of the puzzle" were becoming available as the proceeding progressed.[3] It is therefore important to have a sense of how those pieces of the puzzle have come together.

[7] The orders of 20 February 2014 were made in Chambers. The Deputy Registrar's application was supported by title research undertaken by Court staff. The research appears to have been based on searches of the Court record and the LINZ register, and material provided by the Potroz Family Trust. Mr Fisher and Mr White had no involvement in that process as they were unaware of the application.

[8] By the time of the rehearing application hearing on 24 October 2014, the lower Court had received affidavit evidence from both parties. Mr Fisher and Mr White swore a joint affidavit dated 14 October 2014 in which they set out their connection to the land, their understanding of the history of the land, and various points challenging the documentary evidence that pointed to the land having been transferred from Kereni Wetini to Mr Waddell in 1933. On behalf of the Potroz Family Trust, Christopher Ussher, the trust's solicitor, swore an affidavit dated 20 October 2014 setting out the outcome of his research which supported the trust being the owner of the land. He had found the "missing transfer" (as the lower Court put it) between Kereni Wetini and Mr Waddell. The lower Court also heard from some of the parties during the hearing.

---

[2] *Fisher v Potroz – Mohakatino Parininihi No 1C West 3A2* (2014) 328 Aotea MB 225 (328 AOT 225).
[3] 2015 Māori Appellate Court MB 310 (2015 APPEAL 310).

[9] Subsequent to the lower Court's decision dismissing the rehearing application, on 20 January 2015 Deputy Registrar Caroline Green produced a nine page memorandum with 15 attachments addressing the history of the land (which was sent to the parties at the Court's direction). It is not clear how the memorandum came to be produced, as the lower Court did not expressly direct it during the hearing on 24 October 2014 or in the decision of 21 November 2014. Clearly the Court did not take the memorandum into account in its decision as it did not materialise until two months later. Given that we are called upon to assess the correctness of the lower Court's 21 November 2014 decision we cannot place any weight upon Ms Green's later findings.

[10] The only other point to note in relation to the piecing together of the evidence is that neither Mr Ussher, nor Mr Fisher and Mr White, nor, for that matter, Deputy Registrar Green located or viewed the Land Board's file 14232 which concerned the critical transaction between Kereni Wetini and Mr Waddell that was entered into in 1926.

The title history of the land

[11] We set out below the title history of the land based on the available evidence. We refrain from making any finding as to the legal effect of that evidence given the nature of the appeal and the prospect that findings may still need to be made.

[12] On 10 May 1909 Mohakatino Parininihi No 1C West block was vested in the Land Board by order in council.[4]

[13] On 24 May 1914 a certificate of title for parts of Mohakatino Parininihi No 1C West was issued (TN78/274) for an area of 6,271 acres 2 roods. The original proprietor was the Land Board. The certificate of title included the area that would later be partitioned in 1924 to form 1C West 3A2. Various transfers, proclamations and partition orders affected this title until it was cancelled in 1968 and the balance area carried over to a new certificate of title (TNB1/1352). By that time the registered proprietor was the Māori Trustee, who had assumed the role of the various Māori Land Boards. 1C West 3A2 remained part of TNB1/1352 until a separate Computer Interest Register ("CIR") was issued for 1C West 3A2 on 23 July 2013 (CIR 626777).

---

4 *"Declaring Land to be subject to Part 1 of "The Native Land Settlement Act, 1907""* (10 May 1909) 39 *New Zealand Gazette* 1285 at 1295.

[14] On 20 June 1924 the Court partitioned Mohakatino Parininihi No 1C West 3A to create (among others) 1C West 3A2 in favour of Kereni Wetini solely. The block had an area of 91 acres 29 perches. The area of the land was subsequently defined as comprising 36.9638 hectares (91 acres 1 rood 14 perches) pursuant to digital title plan ML37979 approved by the lower Court on 17 June 2013. A full survey plan has yet to be completed for the land.

[15] On 9 June 1925 1C West 3A2 was re-vested in Kereni Wetini as beneficial owner pursuant to s 10 of the Native Land Amendment Act and Native Lands Adjustment Act 1922.[5]

[16] The next event in the history of 1C West 3A2 is critical, being the execution of the memorandum of transfer whereby the land was to be transferred from Kereni Wetini to Mr Waddell. A copy of the memorandum of transfer was produced by Mr Ussher, who obtained it from the Land Valuation Tribunal where it was included in an application under the Land Settlement Promotion and Land Acquisition Act 1952 dated 28 July 1989. It is not clear what happened to the original memorandum of transfer. It may still be on the Land Board's file 14232.

[17] There is debate over the date on which Kereni Wetini signed the memorandum of transfer and whether in fact it contains his signature. Nevertheless, on its face the document contains Kereni Wetini's signature confirming his consent to the sale. The date of signing was said to be either 10 February 1926 or 1936 (and even 1956, but that is plainly wrong as Kereni Wetini died on 20 April 1943). We proceed on the assumption that it was signed in 1926.

[18] The memorandum of transfer also has a certificate of confirmation endorsed on it pursuant to s 219 of the Native Land Act 1909 ("the 1909 Act"). It records that the Land Board held a sitting on 9 February 1931 where it confirmed the alienation. The seal of the Board was applied to the certificate on 10 February 1933. The sitting of the Board on 9 February 1931 is recorded in a minute book entry that was referred to by the lower Court in its decision of 21 November 2014. Judge Harvey struggled to decipher aspects of the handwritten minute, for example, he mistranscribed the figure £60 as "£100". We offer the following interpretation of the handwritten minute:[6]

---

5 65 Otorohanga MB 288-289 (65 OT 288-289).

6 See original minute at 20 Waikato Maniapoto Alienation MB 134 (20 ALWM 134).

Mohakatino Paraninihi 1C West 3A2

F W Waddell

Howarth for applicant.

I am now asking for re instatement and re confirmation of a transfer (no 13293). It was rescinded 8/6/1929 for non completion. There is only one native owner Kereni Wetini. He is present. Land is of little value of no value to anyone except adjoining owner.

I M Hare. I appear for Kereni Wetini who consents to confirmation provided interest at [illegible] is paid from date of original confirmation (21 [illegible] 26). Consideration is £60 which is amount of Government Valuation in 1926.

Confirmed accordingly.

[19] The 1926 memorandum of transfer was never registered against a land transfer title. The historical record is incomplete as to why the transaction was not completed. Nevertheless, the Court record discloses that the Land Board sent a memorandum to the Registrar of the Court on 11 February 1933 noting the alienation of the land to Mr Waddell. The unsigned and unsealed partition order for 1C West 3A2 contained within the Court record also includes a handwritten note, "sold to Mr F W Waddell of Waitara 10.2.33.BD file 14232".

[20] On 10 March 1942 Mr Waddell executed a memorandum of transfer whereby he transferred 1C West 3A2 to the Guardian Trust and Executors Company of New Zealand Limited ("NZI"). The memorandum of transfer does not contain any reference to a land transfer title. The transfer apparently arose out of the resolution of a dispute between Mr Waddell and his former partner, James John Patterson. The 1942 memorandum of transfer was never registered against a land transfer title.

[21] On 20 April 1943 Kereni Wetini was killed in action in Tunisia, North Africa. He had executed a will naming his sisters as successors in relation to any land interests. Probate of his will was granted on 18 January 1944.[7] On 17 January 1945 the Court made succession orders vesting Kereni Wetini's land interests in his sister Mihiata Wetini (Dickson) as to a half interest, with the other half interest going to the children of his deceased sister Mihirangi

[7] 73 Otorohanga MB 265 (73 OT 265).

Wetini, being Mei Jimmerson and Mura Rattenbury.[8] The succession orders included 1C West 3A2.

[22] A succession order was subsequently signed and sealed in relation to 1C West 3A2. We understand that from the date of the 1945 succession order until the lower Court's order of 20 February 2014, Mihiata Wetini (Dickson), Mei Jimmerson and Mura Rattenbury were shown in the Court's ownership record to be the owners of 1C West 3A2. The historical record does not explain why the Court granted the succession order in relation to 1C West 3A2 if the land had already been alienated to Mr Waddell in 1933.

[23] As noted above, on 9 February 1968 certificate of title TNB1/1352 was issued for the balance of the lands in the original title TN78/274, which included 1C West 3A2. The registered proprietor was shown as the Māori Trustee.

[24] On 9 August 1989 NZI executed a memorandum of transfer whereby 1C West 3A2 (together with six other blocks of land) was transferred to Thomas Wallace and Lionel Lamb. The memorandum of transfer referred to the earlier memoranda of transfer of 10 February 1926 and 10 March 1942, and to the land being comprised and described in certificate of title TNB1/1352. The relevant clause describing the land also provided:

> The Purchaser shall be deemed to have purchased this property solely in reliance on his own judgment and not upon any representation or warranty made by the Vendor or its agent and shall not make any claim against the Vendor in respect thereto particularly as to any title, boundary or survey requirements which might apply now or hereafter to the said property and the vendor shall not be obliged to ensure that the Purchaser can register any transfer executed by it in favour of the Purchaser in respect of the said property.

[25] The 1989 memorandum of transfer was never registered against a land transfer title.

[26] On 30 May 2003 Mr Wallace and Mr Lamb executed a memorandum of transfer whereby they transferred their interests in 1C West 3A2 to the trustees of the Potroz Family Trust. The memorandum refers to certificate of title TNB1/1352. Like the three previous memoranda of transfer, the 2003 memorandum of transfer was never registered against a land transfer title.

---

[8] 74 Otorohanga MB 12 (74 OT 12).

[27] In early 2013 Angela Potroz, one of the respondents, contacted the Māori Land Court at Hamilton to enquire as to the steps required to obtain title to 1C West 3A2. According to the Court's internal memorandum,[9] the Court registry decided to take steps to have a certificate of title issue for the land on the basis of the digital title plan (ML379739) issued for adjoining titles. That enquiry also led to the Deputy Registrar's application under ss 18(1)(a) and 131 of the 1993 Act.

[28] On 17 June 2013 Judge Harvey approved digital title plan ML379739 for 1C West 3A2. On or about that date he also signed the 20 June 1924 partition order for 1C West 3A2. That order shows Kereni Wetini as owner. It was registered with LINZ on 23 July 2013 and CIR 626777 issued in the name of Kereni Wetini on that date. The registration of the partition order had the effect of cancelling the existing certificate of title TNB1/1352. Thus, from 23 July 2013 Kereni Wetini was recorded as the registered proprietor of 1C West 3A2 in CIR 626777.

[29] On 2 September 2013 the Deputy Registrar applied under s 18(1)(a) of the 1993 Act to determine ownership of 1C West 3A2 in favour of the trustees of the Potroz Family Trust and under s 131 to declare the land to be general land. The application was not notified in the *Pānui* prior to the hearing and no steps were taken to identify whether there were any interested parties other than the Potroz Family Trust. That is notwithstanding the Court record disclosing the 1945 succession order and CIR 626777 listing Kereni Wetini as the registered proprietor.

[30] The application came before Judge Harvey in Chambers on 20 February 2014 when he granted the orders.[10] The Court's minute contains the case manager's one and a half page explanation of the title history and the orders. As might be expected with what was apparently treated as a *pro forma* and uncontested application, the minute simply records the Court making the orders without any separate reasons for doing so.

[31] One aspect of the information provided to the lower Court deserves comment. The minute records that Kereni Wetini was succeeded to on 17 January 1945. It then records that "the land was *then* sold to Mr F W Waddell" (emphasis added) and refers to the Land Board's

---

9 Record of Appeal at pp 306 and 307.
10 315 Aotea MB 243-244 (315 AOT 243-244).

confirmation of 10 February 1933. However, clearly if there was a sale of the land it predated the 1945 succession order.

[32] On 21 March 2014 the Court's ss 18(1)(a) and 131 orders were registered against CIR 626777 whereby the land was registered in the name of the trustees of the Potroz Family Trust and the status of the land was declared to be general land.

The application for rehearing

[33] Mr Fisher and Mr White applied for a rehearing on 22 July 2014 pursuant to s 43 of the 1993 Act.

[34] Section s 43(2) requires any application for rehearing to be made not more than 28 days after the order is made "unless the Judge is satisfied that the application could not reasonably have been made sooner." In its decision of 21 November 2014 the lower Court accepted that the applicants had no knowledge of the hearing on 20 February 2014 and therefore could not appear and be heard on the matter. The Court was therefore satisfied that the application could not reasonably have been made within 28 days. We do not understand the respondents to challenge that ruling, and we fully agree with' the lower Court s approach to s 43(2).

[35] The interlocutory hearing took place on 24 October 2014.[11] Dayle Takitimu had earlier been appointed by the Court as counsel to represent Mr Fisher and Mr White. Ms Takitimu attended the hearing by way of telephone. Ms Hughes attended in person on behalf of the respondents. At the outset of the hearing Ms Takitimu sought an adjournment on the basis that further research needed to be undertaken in relation to the chain of title to the land. Ms Hughes opposed the request. The lower Court did not expressly address the adjournment request but implicitly rejected it as the hearing proceeded and the subsequent decision under appeal was issued on the basis of that hearing.

[36] Ms Takitimu referred to the need to have the opportunity to test the evidence before the Court, primarily that of Mr Ussher. She also raised issues concerning the dates on the memorandum of transfer between Kereni Wetini and Mr Waddell, and the authenticity of Mr

---

[11] 328 Aotea MB 141-160 (328 AOT 141-160).

Wetini's signature. The lower Court gave her an opportunity to ask questions of Mr Ussher. Ms Hughes made full submissions as to why the application for rehearing must fail. Mr White gave evidence about his understanding of the history of the land. Mrs Potroz also gave evidence in relation to a meeting with Mr White when they purchased the land, which concerned an arrangement whereby Mr White was able to use the part of 1C West 3A2 that lies on the coast side of the main road, and the Potroz Family Trust was able to use Mr White's land on the opposite side of the main road. Mr White agreed there was an arrangement along those lines but denied that it reflected any acceptance on his part that the respondents had good title to 1C West 3A2.

Judge Harvey's decision

[37] In his reserved judgment of 21 November 2014 Judge Harvey outlined the background to the rehearing application and the parties' respective submissions.[12] The judge relied on this Court's decision in *Henare v Māori Trustee – Parengarenga 3G* concerning rehearing applications.[13] He then addressed Mr Fisher and Mr White's specific challenges to the Potroz Family Trust's claim to the land.

[38] As far as the challenges to the 1926 memorandum of transfer were concerned, the lower Court concluded that Kereni Wetini had signed it in 1926 and that the document was in order.[14] The Court noted the lack of registration of the memoranda of transfer against the land transfer titles. Notwithstanding that omission, a person who has paid valuable consideration and who has a specifically enforceable contract has an equitable interest in the land.[15] Further, the certificate of confirmation on the memorandum of transfer was conclusive proof that all requirements have been duly fulfilled.[16] As to the status of the land, the lower Court concluded that it was General land by reason of the operation of s 2(2)(f) of the Māori Affairs Act 1953 ("the 1953 Act").[17] Finally, in terms of the 1945 succession order, the Court concluded that the order was made in error.[18]

---

12 *Fisher v Potroz – Mohakatino Parininihi No 1C West 3A2* (2014) 328 Aotea MB 225 (328 AOT 225).
13 *Henare v Māori Trustee – Parengarenga 3G* [2012] Māori Appellate Court MB 1 (2012 APPEAL 1).
14 *Fisher v Potroz – Mohakatino Parininihi No 1C West 3A2* (2014) 328 Aotea MB 225 (328 AOT 225) at [34]-[38].
15 Ibid at [39]-[42].
16 Ibid at [44].
17 Ibid at [43], [45] and [46].
18 Ibid at [47]-[49].

[39] Having addressed the specific challenges to the Trust's claim to the land, the lower Court concluded:[19]

> [50] In conclusion, taking into account the evidence and submissions of the parties and the material available from the Court's own records, I consider that the present application should be dismissed. To grant a rehearing would simply allow the applicants an opportunity to be heard in circumstances where the substantive outcome would not alter. I am satisfied that declining to grant the rehearing would not cause a miscarriage of justice because the records confirm that Kereni Wetini sold the land to F W Waddell in 1931.

The parties' submissions on appeal

The appellant's submissions

[40] Russell Gibbs, a supporter of Mr White, appeared with our leave as Mr White's lay advocate at the appeal hearing.

[41] In Mr White's notice of appeal he set out the various grounds on which he says the lower Court's decision was in error. The Court was said to be wrong in refusing to grant the rehearing, in concluding that a rehearing would not alter the substantive outcome, and in making the various findings in support of the respondents' chain of title to the land. The Court failed to give sufficient weight to the fact that Mr Waddell never completed the purchase and never had title to the land, and failed to apply the principle of indefeasibility of title to Kereni Wetini's ownership of the land. Finally, the finding that the land was General land was wrong.

[42] Mr Gibbs's submissions concentrated on the substantive dispute concerning the competing claims to the land. His underlying premise was that there were evidential and legal challenges to the respondents' claimed title to the land, and that Mr White (and, implicitly, Mr Fisher) were entitled to a rehearing to address those matters. Mr Gibbs disputed that the evidence demonstrated that Mr Waddell ever completed the transaction and claimed that he never paid the purchase price. Mr White also spoke of the use and occupation of the land by his whānau over the 80 or so years the land was supposedly out of Māori ownership.

---

[19] Ibid at [50].

The respondents' submissions

[43] Ms Hughes submitted there was no error in the lower Court's decision dismissing the rehearing application.

[44] In terms of the correct approach to rehearing applications, Ms Hughes pointed out that neither s 43 of the 1993 Act nor r 8.1 of the Māori Land Court Rules 2011 ("the 2011 Rules") expressly set out the test the Court should apply to rehearing applications. Nevertheless, the provisions in the 1993 Act and the 2011 Rules are analogous to r 12.14 of the District Court Rules 2014 concerning applications to set aside judgments, and the general principles that apply to such applications also apply to rehearing applications in the lower Court.

[45] Relying on *Smith v Penney*[20] (which in turn relies on the Court of Appeal's decision in *Russell v Cox*)[21] Ms Hughes submitted that the essential test is whether it is just in all the circumstances to set aside a judgment (and thereby grant a rehearing). The courts have consistently identified that three factors ought to be taken into account:

(a) Whether the parties' failure to appear was excusable;

(b) Whether there is a substantial ground of defence; and

(c) Whether irreparable injury will be done to the party which obtained the judgment if the rehearing is granted.

[46] Ms Hughes took a pragmatic stance in relation to the first issue and, while not necessarily accepting that Mr Fisher and Mr White had standing in the lower Court, she accepted that they had no knowledge of the application and therefore had a reasonable excuse for failing to appear. Similarly, Ms Hughes did not seriously argue that the respondents would suffer "irreparable injury" if the rehearing were to be granted. The focus of her submission was on whether Mr Fisher and Mr White could make out a substantial or arguable ground of defence. She said they could not.

---

[20] *Smith v Penney* [2013] NZHC 2988.
[21] *Russell v Cox* [1983] NZLR 654 (CA).

[47] Ms Hughes submitted that the lower Court's analysis of the factual and legal position whereby the respondents have good title to the land was beyond argument. There was no evidential foundation to conclude that Kereni Wetini did not consent to the sale or did not receive the sale proceeds. Further, the Land Board's certificate of confirmation was conclusive proof that the land had been sold to Mr Waddell in terms of ss 219(2) and 220(3) and (6) of the 1909 Act, which provide as follows:

> **219 Native Land Act 1909**
>
> …
>
> (2) On confirmation being so granted the instrument of alienation shall (if otherwise valid) take effect according to its tenor, subject to the requirements (if any) of registration under the Land Transfer Act, 1908, as from the date at which it would have taken effect if no such confirmation had been required.
>
> **220 Native Land Act 1909**
>
> …
>
> (3) A certificate of confirmation shall, except in criminal proceedings, be conclusive proof that all the requirements of the law as to the matters referred to in this section (other than the matters referred to in paragraphs *(g)* and *(h)* thereof) have been duly fulfilled.
>
> …
>
> (6) No certificate of confirmation shall be questioned or invalidated on the ground of any error or irregularity in the procedure by which it was applied for or granted.

[48] Mr White's evidence concerning occupation of part of the land did not undermine the respondents' title to the land. As for the possible claim of adverse possession raised by Ms Takitimu at the hearing on 24 October 2014, Ms Hughes rejected any suggestion that such a challenge had been properly raised with the Court; it was raised in oral submissions only contrary to r 8.1(2) of the 2011 Rules and was, in any event, contradicted by the evidence of Mrs Potroz and Mr White.

[49] Ms Hughes rejected any suggestion that the interlocutory hearing on 24 October 2014 was insufficient for the lower Court to test the evidence concerning the 1926 memorandum of transfer, the 1933 certificate of confirmation or the events of the following 80 years prior to the respondents' efforts to perfect their claimed title. In short, the lower Court was fully

entitled to reject the rehearing application as a rehearing would not result in a different outcome.

[50] Ms Hughes also addressed the lower Court's determination that the land was General land. While she disagreed with the lower Court's reliance on s 2(2)(f) of the 1953 Act, the land was nevertheless General land by reason of the definitions in s 2 of the 1909 Act which applied at the time of the transaction between Kereni Wetini and Mr Waddell. Ms Hughes argued that notwithstanding that the 1926 memorandum of transfer was never registered against a certificate of title, the Land Board's confirmation of the alienation effected a transfer of the legal fee simple. Relying on *R v Waiariki District Māori Land Court*,[22] Ms Hughes submitted that the 1925 partition order effected a grant of legal title to Kereni Wetini. Further, relying on *Haddon-Pakiri R*[23] and *Re Puhi Mahi to Hutchison*,[24] she argued that the confirmation by the Land Board triggered the transfer of the legal estate to Mr Waddell. The proviso in s 219 of 1909 Act ("subject to the requirements (if any) of registration under the Land Transfer Act, 1908,") did not apply as there was no separate certificate of title for 1C West 3A2 at the time. Therefore the land was General land.

Issues

[51] The appeal raises three principal issues. First, were Mihiata Wetini (Dickson), Mei Jimmerson and Mura Rattenbury (or their successors and/or representatives) entitled to notice of the Deputy Registrar's application and hearing on 20 February 2014 in accordance with the principles of natural justice? Second, did the lower Court exercise correctly its discretion in refusing to grant a rehearing? Third, is the land General land or Māori freehold land, and what are the consequences of the land's status?

Natural justice

[52] The principles of natural justice apply to the Māori Land Court as much as to any other court. We recently reiterated that basic tenet in the context of an application to the Chief

---

[22] *R v Waiariki District Māori Land Court* [1922] NZLR 417 at p 423.
[23] *Haddon – Pakiri R* (1994) 3 Taitokerau Appellate MB 178 (3 APWH 178).
[24] *Re Puhimahi to Hutchison* [1919] NZLR 82 (HC).

Judge in *Tioro v McCallum – Ngapiki Waaka Hakaraia*.[25] We set out below the discussion from that decision which applies to the Māori land jurisdiction in general:[26]

> [20] It is a fundamental tenet of natural justice that an affected party should be given notice of proceedings that might affect his or her rights or interests. This stems from the maxim *audi alteram partem*, which simply means "hear the other side". As the leading text *Constitutional and Administrative Law in New Zealand* explains:
>
>> Where a hearing is proposed, it is elementary that persons who may be affected by the decision must be given notice of the date, time and place of the hearing. The range of interested parties must be determined according to common law requirements as to standing. The courts presume that Parliament does not intend its statutory procedures to prescribe exhaustively those who might have standing to be heard. Reasonable steps must be taken to serve all interested parties, unless the rights or interests affected are speculative or insignificant. An interested party includes those whose public responsibilities are implicated, such as a public official or body administering a statutory scheme. In *Waitemata Health v Attorney-General*, a review tribunal erred by failing to notify the Director of Mental Health of the right of appearance in a hearing to release a mental health patient. The law prescribes no particular procedure for the serving of notice, provided the notice is *reasonable*. Notice may be sent to a party's postal or business address, or it may be more widely disseminated through public notice in the local newspaper. The latter method may be necessary if the number of interested parties is indeterminate or large.
>
> [21] Nevertheless, the requirements of natural justice depend on the circumstances of the case:
>
>> "Natural justice is but fairness writ large and juridically." The duty to act fairly (or simply "fairness") may substitute as a reference for natural justice. They are alternative descriptions for a single but flexible concept whose content may vary according to the nature of the public power in question and the circumstances of its use, including the effect of the decision on personal rights or interests. The requirements of natural justice are "flexible", "adaptable", and "context specific", and cannot be neatly tabulated: "This is an area of broad principle, not precise rules". Prescribing prescriptive rules of universal application would introduce "a new formalism" – a "recipe for judicialisation on an unprecedented scale". The courts will look at the matter "in the round" to determine whether the process was fair. Higher standards of fair treatment are required where a decision has profound or significant consequences, or bears the earmarks of adjudication affecting "rights". Rigorous standards of procedural fairness are expected of courts but only rudimentary standards may apply to employers, trade unions or political parties: "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth." The courts are concerned with not only the "actuality" but also the "perception": decisions must be reached "justly and fairly", and be seen to be so.
>
> [22] These principles of natural justice apply to the Māori Appellate Court, the Māori Land Court and applications to the Chief Judge.
>
> [23] In *Ngati Apa ki Te Waipounamu Trust v Attorney-General* Keith J, delivering the decision of the Court of Appeal, observed in relation to the Māori Appellate Court:

---

[25] *Tioro v McCallum – Ngapiki Waaka Hakaraia* [2015] Māori Appellate Court MB 483 (2015 APPEAL 483).

[26] Ibid at [20]-[27].

> We begin with the proposition the parties, those appearing before the [Māori Appellate Court], and those affected by the proceeding were entitled to a fair hearing. That entitlement includes the right to have adequate notice of the proceeding and a reasonable opportunity to present their own cases through evidence and submissions and to challenge the cases put up against them.
>
> [24] Keith J noted, quoting a leading American judge, that "The history of liberty has largely been the history of procedural safeguards."
>
> [25] It has similarly been held that the Māori Land Court is obliged to give notice of an application to affected parties, and that an order made without proper notice is beyond the jurisdiction of the Court. In *Jennings v Scott* Savage J of the High Court ruled:
>
> > I am satisfied that the orders were made without jurisdiction and am prepared to found this conclusion on the one ground that the Māori Land Court was under a duty to give the owners of the lands involved a reasonable opportunity to be heard on whether or not the amalgamation order should be made and that in breach of that duty, and thus contrary to the rules of natural justice, it failed to provide the plaintiffs, or at least some of them, with that opportunity.
>
> [26] In relation to applications to the Chief Judge under s 45, the High Court has held that natural justice requires parties be given the right to be heard. In *Bennett v Māori Land Court*, Rodney Hansen J stated that the absence of a right to appeal a dismissal of such an application supports the implication of a right to be heard, and fairness required the applicant in that case be given the opportunity to be heard. The High Court held that the decision was made in breach of natural justice. It was quashed and remitted to the Chief Judge.
>
> [27] Accordingly, the principles of natural justice apply to the Chief Judge as much as they do to the Courts of this jurisdiction. All affected parties before the Chief Judge are entitled to the right to be heard and procedural fairness, a touchstone of which is proper notice in accordance with the rules of Court. That has not happened in this case, the consequence of which is that there has been a breach of natural justice. Chief Judge Isaac was unaware that a breach of natural justice had occurred.
>
> (footnotes omitted)

[53] Applying those principles to the Deputy Registrar's application, we conclude that the application and hearing on 20 February 2014 should have been notified to Mihiata Wetini (Dickson), Mei Jimmerson and Mura Rattenbury (or their successors and/or representatives) as affected parties. The Court's own record showed them to be the owners of 1C West 3A2 and CIR 626777 recorded Kereni Wetini as registered proprietor. The application had the obvious aim of negating the 1945 succession orders and the three successors' interests in the land, and they were therefore directly affected by it. Where some of them were deceased, notice of some sort would be expected to be given to their prospective or actual successors. The overall situation is analogous to that encountered in *Tioro v McCallum – Ngapiki Waaka Hakaraia*.

[54] The 2011 Rules reflect those principles of natural justice and provide for notice to be given to a "person materially affected" by a proceeding. Rule 2.5(1) of the 2011 Rules defines the term "person materially affected" to be "any person whose rights or interests in any property may be materially affected by a proceeding". Form 1 of the 2011 Rules provides for the applicant to identify each person that might be affected by an application. We note that the only affected parties identified by the Deputy Registrar on the original application were Mr and Mrs Potroz. Rule 4.13(1) of the 2011 Rules in turn provides that an applicant must notify the application to every person named in the application as a party and "any other person materially affected", though r 4.13(3) provides exceptions:

> **4.13 Application must be notified to other parties and persons materially affected**
>
> (1) The applicant must notify the application to every person named in the application as a party and any other person materially affected by service on that person.
>
> (2) Service must be made in accordance with rules 4.15 and 4.22.
>
> (3) However, service by an applicant is not required—
>
> (a) in relation to any person who consents in writing and without conditions to the granting of the application, unless a Judge directs that the person must be served; or
>
> (b) to the extent that a Judge directs otherwise; or
>
> (c) to the extent that any of the exceptions to notice and service in rules 4.14, 4.19, and 4.20 apply.

[55] None of those exceptions apply in the present instance. In addition, r 5.8 of the 2011 Rules provides that the Registrar must send notice of the hearing to, among others, "at the discretion of the Registrar, but subject to any direction by a Judge, any person appearing on the face of the application to be materially affected by it". Because the lower Court had not directed otherwise, the Registrar should have sent notice of the application to any owners of 1C West 3A2 listed in the Court record or their successors.

[56] Accordingly, the principles of natural justice and the 2011 Rules dictate that Kereni Wetini's successors were entitled to notice of the Deputy Registrar's application and the hearing. The Registrar should have taken steps to identify the persons materially affected and served notice of the application and hearing on them. If in doubt, directions should have been sought from the resident judge. A judicial conference may have even been necessary under

s 67 of the 1993 Act. Whatever the approach taken, had notice been given we have no doubt that Mr Fisher and Mr White would have come forward as representatives of Kereni Wetini's successors. There was a fundamental breach of natural justice.

[57] We also offer the general observation that with applications generated from within the Court registry, Registrars need to ensure that the obligation to notify materially affected persons is not overlooked simply because the application is an internal one and relies on title evidence compiled by registry staff. We offer no criticism of the individual staff members involved here. But the present example demonstrates the risk that such internally-generated applications are treated as *pro forma*. They should not be.

The lower Court's refusal to grant a rehearing

The law

[58] As noted, a rehearing may be sought pursuant to s 43 of the 1993 Act:

> **43 Rehearings**
>
> (1) Subject to subsection (2) of this section, on an application made in accordance with the rules of Court by any person interested in any matter in respect of which the Court has made an order, the Judge by whom the order was made or any other Judge may order a rehearing … upon such terms as the Judge thinks reasonable, and in the meantime may stay the proceedings.
>
> (2) A rehearing under this section shall not be granted on an application made more than 28 days after the order, unless the Judge is satisfied that the application could not reasonably have been made sooner.
>
> (3) An application under this section shall not operate as a stay of proceedings unless the Judge so orders.
>
> (4) The rehearing need not take place before the Judge by whom the proceedings were originally heard.
>
> (5) On any rehearing, the Court may affirm its former determination, or may vary or annul that determination, and may exercise any jurisdiction that it could have exercised on the original hearing.
>
> (6) When a rehearing has been granted, the period allowed for an appeal to the Maori Appellate Court shall not commence to run until the rehearing has been disposed of by a final order of the Court.

[59] Rule 8.1 of the 2011 Rules governs rehearing applications:

> **8.1 Rehearing**

> (1) An application for a rehearing under section 43 of the Act may be made—
>
> (a) during the sitting in which the decision in the matter to be reheard was given, in which case the application may be made in open court or in writing to the clerk of the Court; and
>
> (b) at any other time, in writing to the Registrar.
>
> (2) The application must set out the grounds relied upon.
>
> (3) The application may be considered and determined without notice in the Panui (except to the extent that it must be notified under rule 6.6), without notice to any party, and without any appearance by the applicant if the Court is satisfied that, on the face of the application, there has been a breach of procedure or natural justice so serious that an order of rehearing is clearly warranted.
>
> (4) A matter may be reheard by the same Judge who first heard it or by any other Judge, and may be reheard at the same sitting or at any other sitting of the Court.
>
> (5) Where the rehearing takes place at any other sitting of the Court, the original application must be notified and processed in accordance with these rules.

[60] The lower Court relied on the principles concerning rehearing applications discussed in this Court's decision in *Henare v Māori Trustee – Parengarenga 3G.*[27] The outcome of that decision turned on the question of whether the rehearing applicant had satisfied s 43(2) of the 1993 Act (having filed outside the 28 day time limit), which is not in issue here. The Court laid out several general principles concerning rehearing applications:[28]

> [18] Section 43(1) contemplates that the Court has a discretion to grant a rehearing in circumstances which might otherwise give rise to a miscarriage of justice.
>
> [19] While the circumstances in which a rehearing may be granted are many and varied, Courts have held that a rehearing is justified in cases where:
>
> a) A judgment has been obtained by any unfair or improper practice of the successful party to the prejudice of the opposite party; or
>
> b) Material evidence has been discovered since the hearing which could not reasonably have been foreseen or known before the hearing; or
>
> c) Any witness has been guilty of such misconduct as to affect the result of a hearing; or
>
> d) A rehearing appears necessary in order to avoid possible injustice to the applicant and there is no injury or prejudice to the opposing party.

---

27 *Henare v Māori Trustee – Parengarenga 3G* [2012] Māori Appellate Court MB 1 (2012 APPEAL 1).

28 Ibid at [18]-[25]

> [20] An application for a rehearing will not be allowed merely for the purposes of repairing omissions in the presentation of an earlier case or for reshaping that case.
>
> [21] Even where it is established that there has been a miscarriage of justice such that a rehearing is justified, the jurisdiction is discretionary, and a Court may very occasionally consider it inappropriate to grant a rehearing.
>
> [22] The appellant submitted that circumstances in which it would be appropriate to allow a rehearing should be limited to:
>
> a) Applications by parties who were not afforded the opportunity to appear and to be heard in respect of the orders; and
>
> b) Applications made on the basis of further material or evidence which was not previously available by a party who used reasonable diligence.
>
> [23] That submission aligns with the Māori Appellate Court decision of *Edwards v Whakatohea Māori Trust Board*, where the Court stated:
>
> > Without going into a treatise on the grounds for a rehearing it can be said that there are normally two grounds which will substantiate an application for rehearing. The first is some procedural defect which denies to one party his full right to natural justice. The second is the availability of further evidence which is material to the proceedings and could not reasonably have been adduced by the applicant for rehearing at the original hearing.
>
> [24] While a rehearing will normally be granted where there are procedural defects denying natural justice and in instances where further evidence becomes available, these are not the only grounds for a rehearing.
>
> [25] In terms of section 43(1), the ultimate question in the case of an application for a rehearing is whether the applicant has established circumstances which, in their totality, amount to a miscarriage of justice that justifies a rehearing. The onus is on the applicant to establish circumstances having those attributes.
>
> (footnotes omitted)

[61] Ms Hughes invited us to adopt the approach taken in the general courts to applications to set aside judgments. While we reject her initial submission that the District Court Rules 2014 apply to this Court, we accept that those Rules are analogous to the lower Court's jurisdiction under s 43 of the 1993 Act, and that the general principles developed by the case law are relevant. Ultimately, the issue for the Court is whether the circumstances give rise to a miscarriage of justice that justifies a rehearing.

[62] Ms Hughes submitted that the Court must assess three factors in deciding a rehearing application, being whether the applicant's failure to appear was excusable, whether there was

a substantial ground of defence, and whether there would be irreparable injury to the party which obtained judgment if the rehearing were to be granted.

[63] We agree that those factors are relevant to the Court's exercise of discretion. However, they are not prerequisites to the granting of a rehearing under s 43 of the 1993 Act, and nor should they be allowed to become rigid rules that dictate the Court's exercise of discretion. That is the essential point of the leading decision from the Court of Appeal in *Russell v Cox*.[29] There, the Court of Appeal followed the approach of the House of Lords in *Evans v Bartlam*,[30] quoting extensively from that decision. It is instructive to set out the Court of Appeal's discussion in some detail:[31]

> Lord Russell of Killowen said:
>
> > "It was argued by counsel for the respondent that before the Court or a judge could exercise the power conferred by this rule, the applicant was bound to prove (a) that he had some serious defence to the action and (b) that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that until those two matters had been proved the door was closed to the judicial discretion; in other words, that the proof of those two matters was a condition precedent to the existence or (what amounts to the same thing) to the exercise of the judicial discretion.
> >
> > "For myself I can find no justification for this view in any of the authorities which were cited in argument; nor, if such authority existed, could it be easily justified in face of the wording of the rule. It would be adding a limitation which the rule does not impose.
> >
> > "The contention no doubt contains this element of truth, that from the nature of the case no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action, and (b) how it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence of the discretionary power to set aside a judgment signed in default of appearance" (ibid, 481-482).
>
> Lord Wright cited Bowen LJ in *Gardner v Jay* (1885) 29 Ch D 50, 58 for the following statement:
>
> > "… when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon

[29] *Russell v Cox* [1983] NZLR 654 (CA).

[30] *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646.

[31] *Russell v Cox* [1983] NZLR 654 (CA) at pp 658-659.

> which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the Court do so?"

And he himself put the matter as follows:

> "A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae once the facts are ascertained. In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication" ([1937] AC at p 489).

[64] The Court of Appeal went on to conclude:[32]

> …Mr Woodhouse drew our attention to the observations of McCarthy J in *Paterson v Wellington Free Kindergarten Association Incorporation* [1966] NZLR 975, a case to which R 236 was applicable. McCarthy J, delivering the judgment of this Court, said:
>
> > "In approaching an application to set aside a judgment which complies with the rule, the Court is not limited in the considerations to which it may have regard, but three have long been considered of dominant importance. This was accepted by the Chief Justice in the Court below and by all counsel in this Court. They are, 1. That the defendant has a substantial ground of defence; 2. That the delay is reasonably explained; 3. That the plaintiff will not suffer irreparable injury if the judgment is set aside: *Atwood v Chichester* (1878) 3 QBD 722; *Hovell v Ngakapa* (1895) 13 NZLR 298; *Trengrove v Inangahua Hospital Board* [1956] NZLR 587. But, whilst it appears from these cases that delay, if reasonably explained and if it does not create irreparable injury, is not of itself a good reason for refusing to set aside, we do not doubt that where the delay is substantial, as it is here, the Court can more readily conclude that injury would be caused" (ibid, 983).
>
> **We think that in the light of *Evans v Bartlam* the passage to which reference has just been made should be read as doing no more than emphasising three matters which, as a matter of commonsense and practice, the Court will generally regard as of importance in deciding whether it is just to set aside a judgment. But it should not be regarded as laying down a general rule that an application to set aside a judgment must satisfy these conditions as a necessary prerequisite to the exercise of the discretion; it should be taken as doing no more than highlight factors which on any application to set aside a judgment may generally be regarded as relevant to an inquiry which will determine where the justice of the case will lie.**
>
> **The relative importance of the various factors will vary from case to case. For these reasons we think that what Williams J said in *Union Bank of Australia v***

[32] Ibid at p 659.

> ***Chesney*** **must be read against the facts of that case (which might be decided in the same way today) and not taken as authority for a principle of universal application. The test against which an application to set aside the judgment should be considered is whether it is just in all the circumstances to set aside the judgment, and the several factors mentioned in the judgments discussed should be taken, not as rules of law, but as no more than tests by which the justice of the case is to be measured, in the context of procedural rules whose overall purpose is to secure the just disposal of litigation.** (emphasis added)

[65] Thus, the Court of Appeal ruled that the three factors Ms Hughes points to are not strict criteria that must be satisfied, but are tests that may generally be used to assess the ultimate issue of where the interests of justice lie. Interestingly, the outcome of *Russell v Cox* illustrates the extent to which the "interests of justice" must be applied to the particular circumstances before the Court: notwithstanding the considerable default and misconduct on the part of the appellant who sought to have judgment set aside, the Court of Appeal was persuaded on a narrow ground to grant a rehearing on particular terms.[33]

[66] It is also important to observe that the leading decisions concerning applications to set aside judgments and/or for rehearings invariably involve situations where a defendant has been served with proceedings but has not defended them, or has unsuccessfully defended proceedings and seeks a further hearing. For example, in *Henare v Māori Trustee – Parengarenga 3G* the rehearing applicant had in fact attended the original lower Court hearing. Those scenarios are quite different to the one faced by the lower Court, where the interested parties had no notice whatsoever of the application and no opportunity to participate in a hearing. While the same general principles apply to rehearing applications where a party has had no notice of the proceeding, the fact that a Court has made orders affecting a party's rights without that party having the opportunity to participate is highly relevant to the Court's exercise of discretion.

[67] Finally, before turning to the challenge to the lower Court's refusal to grant a rehearing, we note that in order for Mr White to satisfy this Court that the lower Court's exercise of discretion should be overturned he must first satisfy us that the decision contains an error of law or principle, or irrelevant considerations have been taken into account, or relevant considerations have not been taken into account, or the decision is plainly wrong.[34]

---

[33] Ibid at p 660.

[34] *Muru v Te Aho – Maungatautari 4G Section IV* [2013] Māori Appellate Court MB 5 (2013 APPEAL 5), *Nicholls v Nicholls – Part Papaaroha 6B* [2011] Māori Appellate Court MB 64 (2011 APPEAL 64).

Judge Harvey's exercise of discretion

[68] The present appeal throws up one of the fundamental tensions within the justice system which courts are charged with addressing: the tension between substantive and procedural rights. In addressing the lower Court's refusal to grant a rehearing we are mindful of the guidance contained in the words of the leading American judge quoted by Keith J in *Ngāti Apa ki Te Waipounamu Trust v Attorney-General*: "The history of liberty has largely been a history of procedural safeguards".[35] In the present context we would add that the interests of justice are not only concerned with arriving at the correct outcome but also arriving at the correct outcome by the correct process.

[69] For the reasons that follow, we conclude that the lower Court erred in refusing to grant a rehearing of the Deputy Registrar's application. Our principal reasons are, in summary: first, the lower Court failed to identify and give sufficient weight to the breach of natural justice that had occurred; second, the Court misdirected itself in proceeding to determine the substantive merits of Mr Fisher and Mr White's grounds for a rehearing when, at an interlocutory level, it should instead have been concerned with whether they had established a substantial or arguable interest in the issue of the ownership of the land to justify a rehearing; and, third, notwithstanding the lower Court's detailed analysis of the merits of Mr Fisher and Mr White's grounds, some of those grounds do deserve the Court's full consideration. That is only possible through a substantive hearing. We address each of these three principal reasons in turn.

[70] First, as we have concluded in the previous section of this decision, there was a fundamental breach of natural justice in Kereni Wetini's three successors (and their respective successors and/or representatives) not receiving notice of the Deputy Registrar's application or the hearing of that application. The lower Court's decision of 21 November 2014 does not address that breach and its seriousness, or the extent to which it is a factor in the exercise of discretion under s 43 of the 1993 Act. In that respect, the lower Court failed to take into account a highly relevant consideration.

[71] To put the substantive application in context, it sought to determine ownership of the land in favour of the Potroz Family Trust in contradiction of the Court's 1945 succession

---

[35] *Ngāti Apa ki Te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 at [15].

order, aspects of the Court's ownership records and the registered title. It was attempting to perfect a title that (it is claimed) had lain unperfected for 80 years. Importantly, it concerned ownership of Māori freehold land – a subject that goes to the very heart of the 1993 Act, as reflected in the Preamble and ss 2 and 17.

[72] The fact that parties materially affected by the Deputy Registrar's application had been denied the right to participate in a substantive hearing and defend their apparent title – regardless of whether or not their title will ultimately be upheld – ought to have been a major factor when deciding whether to grant a rehearing.

[73] Furthermore, as we noted earlier (see [66]), there is a significant difference between applications to set aside judgment or for rehearing where parties have been served with the proceedings, and applications such as the present one where the parties have had no notice whatsoever of the substantive application and no opportunity to participate in the proceedings.

[74] In fact, r 8.1(3) of the 2011 Rules recognises that very difference in the types of rehearing applications that come before the lower Court. It permits the Court to deal with such applications without any appearance if satisfied "that, on the face of the application, there has been a breach of procedure or natural justice so serious that an order of rehearing is clearly warranted." This rule only serves to reinforce our underlying premise that where a party with a material interest in an application is not made aware of the application, that party has a strong basis to seek a rehearing.

[75] There is an irony in the present situation. The substantive application, concerning the most weighty of issues – the ownership of land – was dealt with in Chambers on the papers when the parties materially affected should have been given notice and been able to attend a hearing. Conversely, the rehearing application was the subject of a contested interlocutory hearing when r 8.1(3) of the 2011 Rules allows for such applications to be dealt with in Chambers on the papers.

[76] Our second principal reason for concluding that the lower Court was wrong concerns its approach to the substantive grounds raised by Mr Fisher and Mr White. The lower Court undertook a full analysis of the merits of those grounds. However, in undertaking that

exercise the lower Court in effect required the applicants to satisfy it that they had a *valid* claim to the land. We detect three errors in this regard.

[77] First, the lower Court treated the second of the tests outlined by Ms Hughes and the authorities as a *prerequisite* the applicants had to satisfy in order to be entitled to a rehearing. But that is exactly what *Russell v Cox* and the authorities relied on by the Court of Appeal warned against. In our view, concentrating on the substantive merits without balancing the interests of justice in procedural fairness has meant that the ultimate aim of avoiding a miscarriage of justice was not achieved.

[78] Second, the lower Court went further than assessing whether the rehearing applicants' grounds were substantial or arguable by effectively deciding their case once and for all. While it was clearly tempting to dispose of the applicants' arguments and avoid what was perceived to be an unnecessary hearing, that is not the test to be applied. The underlying test is whether the applicants have a sufficient interest at stake to justify a rehearing. We conclude they do.

[79] Third, given the nature of the Deputy Registrar's application and the lower Court's role under the 1993 Act, the lower Court misdirected itself in examining the extent to which the rehearing applicants had a "defence" to the claim. In our view, it is a mistake to equate applications in the lower Court with orthodox *inters partes* proceedings in other Courts.

[80] The lower Court is, at its core, a land titles court. Applications, such as the Deputy Registrar's application, are brought to confirm or clarify or modify title to Māori land. A key part of the Court's function is to provide a forum in which title issues can be addressed (see s 17(2)(b) of the 1993 Act). Mr Fisher and Mr White clearly had an interest in the application on behalf of Kereni Wetini's successors, who can point to Court orders and records that support their ownership of the land. Ultimately, they may not be able to maintain their interests in the land (depending on what a substantive hearing establishes in terms of the evidence and the law). But their "interest" in the *process* whereby title is confirmed one way or the other cannot be disputed.

[81] Thus, the question for the lower Court was not so much whether Mr Fisher and Mr White had a substantial or arguable *defence* to the claim, but whether they (or those through

whom they claim) had a substantial or arguable *interest in the issue of the ownership of the land*. The Court's own records demonstrated that they did. That is a slightly different to that laid down in the authorities discussed in *Russell v Cox*. But that simply reflects the different nature of the lower Court's function and illustrates why such specialist courts must be careful to not simply adopt approaches developed in the general Courts. As the Court of Appeal in *Russell v* Cox noted, the three factors are of general application. But the circumstances of the particular case will always dictate the particular approach that should be taken.

[82] Our third principal reason for overturning the lower Court's decision is that a substantive hearing was required to resolve the factual and legal disputes raised by Mr Fisher and Mr White. Ms Hughes endeavoured to convince us that not only was the interlocutory hearing sufficient to resolve those disputes, but so too was the appellate hearing. In other words, that any procedural defect has been cured by the interlocutory and appellate processes. We disagree.

[83] Interlocutory and appellate hearings are seldom substitutes for substantive hearings, where parties have full notice of an application and the evidence relied upon, and a full opportunity to test evidence and present their own evidence. We acknowledge that Ms Takitimu had an opportunity to cross-examine Mr Usher and Mrs Potroz at the interlocutory hearing. However, at the outset of that hearing she raised her concerns about her ability to address the historical issues in the context of seeking an adjournment.

[84] We are reluctant to comment on the substantive merits of the grounds raised by Mr Fisher and Mr White. They are best left for a rehearing. Nevertheless, lest it be suggested that they have no merit whatsoever, there are clearly matters that require further examination. Questions were raised about whether Kereni Wetini received payment and whether he actually signed the documents. Locating the Land Board's file 14232 (which has yet to happen) may well answer those issues. What then is the explanation (if any) for the failure to register the 1926 memorandum of transfer in over 80 years? Were the 1945 succession orders simply an error? If so, how should the lower Court address them as part of this proceeding? Finally, what issues, if any, arise from the 80 year delay in applying to perfect the title and Mr White's claim to undisturbed use and occupation of the land (in effect, a claim to adverse possession)?

The status of the land and its consequences

[85] Having decided that a rehearing must take place there would ordinarily be little need to comment on Judge Harvey's determination that the land is General land as that issue will be revisited in due course.

[86] However, we offer our *tentative* views on this issue because Ms Hughes argued that the land was General land for different reasons from the lower Court, and because the land's status has other consequences. For example, if it was General land from 1933, an issue arises as to the jurisdiction of the lower Court to make an order under s 18(1)(a) in relation to subsequent transfers; on the other hand, if it remained Māori freehold land, that status affects how the land can be dealt with today.

[87] In addressing this issue we refrain from providing a definitive view on the land's status as that issue will need to be decided afresh by the lower Court. Furthermore, we did not have the benefit of full argument from both parties: Ms Hughes' position was addressed in submissions filed after the appeal hearing and Mr Gibbs did not grapple with the issue in any detail.

[88] We also note in relation to the question of jurisdiction that there is longstanding authority that an appellate Court can and should address orders that may have been made without jurisdiction even though the particular challenge to jurisdiction may not have been raised in the lower Court or, for that matter, by way of appeal. See in particular the discussion in *Taueki – Horowhenua X1B 41 North A3A and 3B1* and the cases set out therein.[36]

The status of the land

[89] The lower Court concluded that the consequence of the Land Board's 1933 confirmation of the 1926 transfer from Kereni Wetini to Mr Waddell was that the land became General land by reason of s 2(2)(f) of the 1953 Act. Ms Hughes agreed the land was General land but disagreed with the lower Court's approach, arguing instead that the land became General land (at the time, European land) by reason of the definitions of land in s 2 of the 1909 Act.

---

[36] *Taueki – Horowhenua X1B 41 North A3A and 3B1* (2008) 16 Whanganui Appellate Court MB 30 (16 WGAP MB 30) at [44]-[46].

[90] Like Ms Hughes, we do not understand that s 2(2)(f) of the 1953 Act applied to the 1926 transfer. That provision was first introduced by s 3 of the Māori Purposes Act 1960 and did not have retrospective effect. Further, there is authority that provisions of that nature are not triggered unless and until *registration* of the transfer of the legal fee simple in the land. That was the point discussed by the Court of Appeal in *Coles v Miller* in relation to s 2(2)(d) of the 1953 Act, where Blanchard J, delivering the decision of the Court, ruled:[37]

> [40] Mr Hassall's argument that the brown and purple blocks ceased to be Māori land in 1960 when the transfers from Māori owners to Mr Stevens were executed depended on the definition of "alienation" in s 2 of the 1953 Act, which, in respect of Māori land, encompassed the making of any transfer or sale affecting the legal or equitable fee simple of freehold land and particularly included a contract to make such an alienation. We agree with Mr Chapman, however, that s 2(2)(d) (see para [9] above) made it plain that Māori freehold land remained of that status until the contract had been completed by a transfer of the *legal* fee simple. In the case of land under the Land Transfer Act, a transfer is not effective to pass the legal estate until registered. It is only upon registration that the legal title transfers (s 41 of the Land Transfer Act). It has been famously remarked that the Torrens system is not a system of registration of title but a system of title by registration (*Breskvar v Wall* (1971) 126 CLR 376, 385 per Barwick CJ). There was therefore no completion by the transfer of the legal fee simple to Mr Stevens until registration, which did not happen until 28 February 1964 when the transfers to him were noted on the certificates of title (s 34(2) of the Land Transfer Act).
>
> [41] On 13 September 1963, when Judge Smith made his order, all of the subject land was therefore Māori freehold land.

[91] Ms Hughes' argument that the land is General land instead depends on a finding that the Land Board's 1933 confirmation of the 1926 transfer had the effect of transferring the legal fee simple from Kereni Wetini to Mr Waddell and thereby triggered proviso (c) of s 2 of the 1909 Act (a predecessor to s 2(2)(d) of the 1953 Act). That proviso provided:

> (c) Native land which has become subject to a contract of sale or to any other contract of alienation of the fee-simple thereof made before or after the commencement of this Act shall be deemed to remain Native land, notwithstanding that contract, **until the contract has been completed by a transfer of the legal fee-simple**.
>
> (emphasis added)

[92] Thus, land remained Native land (known as Māori freehold land today) until the transfer of the legal fee simple was effected. Once the transfer of the legal fee simple took effect, the land assumed the status dictated by the principal definitions in s 2 of the 1909 Act.

---

37 *Coles v Miller* CA25/01, 8 November 2001 at [40]-[41].

In the present case, because Mr Waddell was not Māori, Ms Hughes argues that upon the transfer of the legal estate of the land it would have become European land.

[93] We agree with Ms Hughes that the effect of the 1924 partition order was to grant Kereni Wetini exclusive *legal* ownership of the land notwithstanding that the partition order had not been registered under the relevant Land Transfer Act. He was then able to alienate his legal interests in the land (subject to any restrictions the law imposed at the time). That is the principle discussed in *R v Waiariki District Māori Land Court* where the Court of Appeal framed the primary question as follows:[38]

> The first question for determination is whether an unregistered partition order of Native land under the Land Transfer Act affects the legal estate of the Native owner, or merely constitutes a partition of the property in equity, leaving the legal estate in all of the owners in common until registration.

[94] After addressing the relevant legislation applicable at the time, the Court of Appeal concluded:[39]

> We are of opinion, accordingly, that a partition order affects the legal estate even before registration. That is to say, the owners of any subdivision possess a legal and not merely an equitable estate in that subdivision, and they possess that estate to the exclusion of all the other former co-owners, notwithstanding the fact that the registered title does not yet show any transmission of the estate, but shows all of the Natives as owners in common of the whole block.

[95] Therefore, the 1924 partition order gave rise to a separate legal title for 1C West 3A2. Whether Kereni Wetini immediately became the full legal owner of the land is complicated by the land being vested in the Land Board at the time. It was revested in him as beneficial owner on 9 June 1925. That would seem to have been the point in time when he was entitled to obtain a separate certificate of title for the land. We therefore proceed on the basis that Kereni Wetini was the full legal owner of the land from 9 June 1925.

[96] However, the more difficult issue is whether the combined effect of the 1926 transfer and 1933 confirmation was to transfer the legal estate in the land to Mr Waddell. Ms Hughes was not able to point to any case law directly on point but relied on *obiter* comments in *Haddon - Pakiri* and *Re Puhi Mahi to Hutchison* to support her argument. We cannot agree

---

38 *R v Waiariki District Māori Land Court* [1922] NZLR 417 (CA) at p 423.
39 Ibid pp 424-425.

that either of those decisions are authority that a confirmation of sale alone effected the transfer of the legal estate in Maori freehold land.

[97] The passage in *Haddon – Pakiri R* relied on by Ms Hughes does not say that, and in fact the Court expressly declined to answer the question it posed: [40]

> In his submissions Mr Peters contended that it was only on registration that status changed under Section 2(2)(f). While this Court would probably agree that such was the case where mere noting of a transfer was required, different considerations might well apply where a transfer had been confirmed by the Court. This is not a matter which the Court has to consider under the terms of the Case Stated and it therefore expresses no firm views on it.

[98] Ms Hughes also relied on the following passage from *Re Puhi Mahi to Hutchison* where the Court was commenting on proviso (c) of s 2 of the 1909 Act:[41]

> This proviso has a necessary and beneficial operation. If the purchaser is a European the land remains Native land until the transfer is complete. There was need for such a provision, because prior to the conveyance or transfer a European might be the equitable owner, and such an equity shall not make the land cease to be Native land; the conveyance or transfer must be confirmed by a Māori Land Board or the Native Land Court.

[99] That statement is not authority that the granting of a certificate of confirmation effects a transfer of the legal estate in Māori land. Rather, Stout CJ was merely explaining the rationale for proviso (c) of s 2 of the 1909 Act, which was to ensure that land did not lose its status as Native land simply because a contract had been entered into for its sale; the transfer needed to be completed before the status changed. The decision is in fact authority for a quite different proposition: that proviso (c) did not have the effect that a transfer from one Māori to another Māori automatically resulted in the land losing its status as Native land. Rather, the principal definitions in the section dictated the ultimate status of the land once the transfer of the legal estate was completed.

[100] It would seem that *Coles v Miller* is in fact the decision that is closest on point, as the Court of Appeal was concerned with s 2(2)(d) of the 1953 Act, which is the successor to proviso (c) of s 2 of the 1909 Act. The Court of Appeal clearly considered that registration of the transfer was necessary to pass legal ownership of the land.

---

[40] *Haddon – Pakiri R* (1994) 3 Taitokerau Appellate MB 178 (3 APWH 178) at [31].

[41] *Re Puhi Mahi to Hutchison* [1919] NZLR 82 (HC) at p 84.

[101] Ms Hughes also sought to distance the present facts from the effect of the proviso in s 219(2) of the 1909 Act, which we set out once again:

> **219 Native Land Act 1909**
>
> …
>
> (2) On confirmation being so granted the instrument of alienation shall (if otherwise valid) take effect according to its tenor, **subject to the requirements (if any) of registration under the Land Transfer Act, 1908**, as from the date at which it would have taken effect if no such confirmation had been required.
>
> (emphasis added)

[102] She argued that because there was no separate certificate of title for 1C West 3A2 as at 1933, the registration requirements of the relevant Land Transfer Act did not apply to the transfer. She did not refer us to any authorities in support of her argument.

[103] It seems to us to be contrary to orthodoxy to argue that a land owner can transfer the *legal* ownership of part of a land block that is under a certificate of title prior to any registration of a transfer. That offends s 41(1) of the Land Transfer Act 1952 (and its predecessor, s 38 of the Land Transfer Act 1915). Surely the position is, as Judge Harvey reasoned in his decision, that prior to registration of any of the transfers the most the transferees could argue for was equitable ownership of the land[42] (which could then be converted to legal ownership upon registration of the transfers or by order of the Court).

[104] In light of the authorities we have been referred to it is our view that in order for the legal estate to have been transferred to Mr Waddell the 1924 partition order first needed to be registered (as it eventually was in 2013), a separate title issue, and the memorandum of transfer then be registered against that separate title under the relevant Land Transfer Act. In the absence of those steps taking place, the most Mr Waddell had was an equitable interest in the land pursuant to the unregistered memorandum of transfer.

[105] Accordingly, our *tentative* view is that the unregistered memorandum of transfer (and, for that matter, the subsequent three memoranda of transfer) did not effect a transfer of the legal estate in the land. It is therefore difficult to accept that the land became General land.

---

[42] See *Fisher v Potroz – Mohakatino Parininihi No 1C West 3A2* (2014) 328 Aotea MB 225 (328 AOT 225) at [41]; and Hinde, Campbell and Twist *Principles of Real Property Law* (2007, Lexis Nexus Wellington) at p 264.

Nevertheless, the views we have expressed are tentative and it will be for the lower Court to revisit the issue of the status of the land with, no doubt, the benefit of more extensive submissions from the parties.

Consequences of the status of the land

[106] The real point of discussing the status of the land in this part of our decision is that the land's status does have significant consequences for the parties and for the proceedings, some of which may not have been fully appreciated.

[107] If the land had been transferred out of Māori ownership but remains Māori freehold land, then that status will obviously bring with it certain restrictions on alienation and provide a right of first refusal to the preferred classes of alienees, which we assume will include Mr Fisher and Mr White.

[108] On the other hand, if the land was transferred out of Māori ownership but became General land from 1933 onwards (as Ms Hughes argued), then that brings into question the jurisdiction of the lower Court to make an order under s 18(1)(a) of the 1993 Act to determine ownership of the land in favour of the Potroz Family Trust.

[109] Section 18(1)(a) of the 1993 Act provides:

> **18 General jurisdiction of Court**
>
> (1) In addition to any jurisdiction specifically conferred on the Court otherwise than by this section, the Court shall have the following jurisdiction:
>
> (a) To hear and determine any claim, whether at law or in equity, to the ownership or possession of Māori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:
>
> …

[110] As is plain, the Court's jurisdiction only applies to "Māori freehold land". If the land is or becomes General land, the Court has no jurisdiction. Similarly, the related jurisdiction in s 25 of the 1993 Act (where the Court can restore the effect of lost instruments of alienation) only applies to an "instrument of alienation of Māori freehold land". We refer to s 25 for the

sake of completeness as it appears to have been an alternative means by which the respondents could have applied to the Court to give effect to the 1926 transfer.

[111] Clearly the land was Native freehold land at the time the 1926 memorandum of transfer was executed. Therefore the lower Court has jurisdiction under s 18(1)(a) to determine ownership of the land as a result of the 1926 transfer (and the 1933 confirmation). However, if the Court concludes that the transfer was valid and that its effect was to change the status of the land to General land from 1933 (as Ms Hughes contends and the lower Court concluded), then that determination necessarily ousts the jurisdiction of the Court to make any *further* determinations of ownership of the land post 1933. That is where the jurisdictional impediment arises.

[112] In other words, the lower Court has jurisdiction to give effect to the 1926 memorandum of transfer, but if it does that and that land's status changes to General land as at 1933, then the Court has no further ability to deal with the later 1942, 1989 and 2003 memoranda of transfer. The land is simply beyond the jurisdiction of the Court. Thus, at best the Court can only complete the chain of title as far as 10 February 1933.

[113] It follows that if Ms Hughes' argument that the land was General land from 1933 is correct, the lower Court's s 18(1)(a) order confirming title in favour of the Potroz Family Trust must have been without jurisdiction. That is a further reason why a rehearing is necessary.

[114] The lower Court will therefore need to revisit the issues of the land's status and the Court's jurisdiction when the proceeding returns before it.

Outcome

[115] Pursuant to s 56(1)(b) and (f) of the 1993 Act we allow the appeal, revoke the order of the lower Court of 29 November 2014 dismissing the rehearing application, and under s 43 of the 1993 Act grant a rehearing of the Deputy Registrar's application under ss 18(1)(a) and 131 of the 1993 Act.

[116] The lower Court will need to address the question of notice, representation, further research and pre-trial directions before the matter proceeds to hearing. We need not make any express directions in this regard.

[117] The appellant was not represented by counsel and costs will therefore lie where they fall.

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

C L Fox **DEPUTY CHIEF JUDGE** (Presiding)	D J Ambler **JUDGE**	M J Doogan **JUDGE**