IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT

A20130009145
APPEAL 2013/8

UNDER	Section 49, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Tauwhao Te Ngare Block and a preliminary decision of the Chief Judge made on 9 August 2013 at 2013 Chief Judge's MB 567-594
BETWEEN	THE TRUSTEES OF THE TAUWHAO TE NGARE TRUST Appellants
AND	DONALD SHAW Respondent

Hearing:	13 May 2014 at 2014 Maori Appellate Court MB 88-131 (Heard at Hamilton)
Court:	Deputy Chief Judge Fox (Presiding) Judge L R Harvey, Judge MJ Doogan
Appearances:	J Koning for the Appellants D Shaw in person
Judgment:	23 December 2014

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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REASONS

DEPUTY CHIEF JUDGE FOX AND JUDGE DOOGAN

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DEPUTY CHIEF JUDGE FOX AND JUDGE DOOGAN

Introduction

[1] This appeal concerns an order made by the Māori Land Court in 1976 laying out a roadway. The purpose of the roadway was to provide access to a proposed new wharf.[1] The trustees of land adjacent to the wharf appeal the decision of the Chief Judge to refuse to cancel the 1976 roadway order other than on terms to secure alternate legal access from the wharf.

[2] The trustees appeal on the following grounds:

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1 37 Tauranga MB 248 (37 T 248)

(a) The Chief Judge does not have jurisdiction to make a conditional order under s 44 of Te Ture Whenua Mäori Act 1993 (the 1993 Act);

(b) The Chief Judge erred by taking into account the alleged delay between the issue of the roadway order on 18 March 1976 and the filing of an application by the appellants under s 45 of the Act on 8 July 2005;

(c) The Chief Judge erred by holding that the interests of justice required alternative access for the respondent and Mr Barker and their successors in title;

(d) The Chief Judge erred by holding that a new roadway can be laid out over the Rangiwaea marae reservation and the Tauwhao foreshore reservation which may include the area comprising the wharf and pontoon; and

(e) The Chief Judge does not have the jurisdiction to lay out a new roadway other than in accordance with s 317 of the 1993 Act.

[3] During the hearing, counsel for the trustees, Mr Koning, conceded that the Chief Judge does have jurisdiction to make a conditional order. He submitted that in the particular circumstances of this case he did not have jurisdiction to make the conditional order that was made.

[4] The issue for our determination is whether the Chief Judge was right to conclude that the interests of justice require that an alternate roadway from the wharf must be provided as a condition of cancellation or amendment of the 1976 roadway order. In assessing this issue we consider the following questions relevant:

(a) Is the 1976 roadway order an "alienation"?;

(b) Does the 1953 or the 1993 legislation require consent to create a roadway order?; and

(c) Can the Court make a roadway order over a Māori reservation?

[5] For reasons set out more fully below, Judge Harvey has decided to issue a minority judgment in this case.

Background

[6] Rangiwaea Island lies in Tauranga Harbour. Most of its 370 hectares are Māori land. In the early 1970s the Department of Māori Affairs, with assistance from the Māori Land Court, began exploring ways to encourage the development of Rangiwaea. The focus was on the creation of roadways and title improvement, particularly consolidation of the 72 blocks that then existed. In

May 1973, a meeting of owners was called to discuss laying down a roadway from the old wharf to a proposed crossing to Matakana at the other end of the island. The owners agreed in principle to the plan but pointed to the need for a new wharf and for the proposed road line to be altered to link up to that wharf. The location for the proposed new wharf was agreed not long after (adjacent to Rangiwaea 1A2C).

[7] In August 1975 the Deputy Registrar of the Māori Land Court applied for a roadway to be laid out over Rangiwaea 1A1 and Rangiwaea 1A2C. This new roadway would run from the new wharf to join existing roads up the spine of the island to a proposed new causeway to Matakana. The Court granted the roadway application in March 1976. The wharf was not constructed until late 1982. The roadway was not surveyed or formed in accordance with the 1976 order, but there has been vehicle access from the wharf since it was constructed.

[8] Over the last decade the roadway order has become the subject of extensive litigation. The appellants have fallen out with Donald Shaw a non-Māori owner of adjoining General land. Previously Mr Shaw had enjoyed access over trust lands to the wharf for some 22 years.

[9] Mr Shaw purchased a block of Māori freehold land known as Rangiwaea 1A2B in 1982. That land was adjacent to Rangiwaea 1A1 over which the 1976 roadway order lay. Mr Shaw built a house on this land. In 1984 he successfully applied to change the status of the land from Māori land to General land. Mr Shaw subdivided Rangiwaea 1A2B into lots 1, 2 and 3, selling lots 2 and 3 and retaining lot 1 in the name of the M Shaw Family Trust. Lots 2 and 3 are currently owned by the Seaview Trust. A trustee of that trust, Mr Ross Barker, appeared in support of Mr Shaw.

[10] The appellants are the trustees of the largest individual block of land on the island known as Tauwhao Te Ngare. This comprises 225.387 hectares. It came into being as a result of the amalgamation of a number of titles in May 1982, including the blocks known as Rangiwaea 1A1 and Rangiwaea 1A2C over which the 1976 roadway lay.[2]

[11] At the time the roadway order was made, Rangiwaea 1A1 was a Māori reservation for the purpose of a marae, cemetery, recreation ground and aeroplane landing strip for the "common use and benefit of the Ngai-Tauwhao hapū and Maoris of the locality". The reservation was gazetted on 23 June 1966.[3]

[12] Upon amalgamation in 1982 the Māori reservation over Rangiwaea 1A1 was cancelled and replaced by a Māori reservation over that part of the Tauwhao Te Ngare block covering the marae

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2 37 Tauranga MB 248 (37 T 248).

3 "Setting Apart Maori Freehold Land as a Maori Reservation" (23 June 1966) 38 *New Zealand Gazette* 989 at 990.

and urupā (the Tauwhao Marae Reserve).[4] The Tauwhao Marae Reserve was gazetted on 5 May 1983.[5] Papakāinga housing was subsequently developed nearby on land that was formerly part of Rangiwaea 1A1, including on and around the line of the 1976 roadway.

[13] As foreshadowed, vehicle access from the wharf area has been continuous since 1982 over routes that changed as papakāinga housing was erected.

[14] The land formerly known as Rangiwaea 1A2C is the small area of land seaward of Rangiwaea 1A1 which leads directly to the wharf and barge ramp. On 8 July 1993, that part of the Tauwhao Te Ngare block formerly known as Rangiwaea 1A2C was gazetted as a Māori reservation for the common use and benefit of the owners of Tauwhao Te Ngare and their invitees.[6] The gazette notice was registered against the Tauwhao Te Ngare block title on 12 March 2004.[7] This reserve (Tauwhao Foreshore Reservation) is a landing reserve and comprises the land immediately adjacent to the wharf area and extends to other parts of the Tauwhao Te Ngare block adjacent to the foreshore.

[15] Litigation began late in 2003 when the trustees of the Tauwhao Te Ngare Trust placed a chain across the wharf access. This was one day after Mr Shaw had declined an offer by the Trust to purchase his land. Disagreement over whether or not Mr Shaw's land had the benefit of legal access to the wharf was evidently a factor leading to disagreement over price.[8] Mr Shaw obtained an injunction in December 2003 preventing the trustees from restricting use of the roadway by Mr Shaw, his family and invitees.[9]

[16] The focus of litigation since that time has been on the validity or otherwise of the 1976 roadway order. In 2004 Mr Shaw applied to the Court for an order under s 18(1)(a) of the 1993 Act declaring that he has an interest in the block over which the roadway lies, which would entitle him to access the wharf. Appeals and cross appeals were filed in respect of Judge Milroy's decision on that application.[10] They have been adjourned sine die pending the outcome of the trustees' application pursuant to s 45 to cancel the 1976 roadway order. The s 45 application was filed in

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4 "Cancelling the Reservation of Maori Freehold land" (5 May 1983) 59 *New Zealand Gazette* 1371 at 1387.

5 "Setting Apart Māori Freehold Land as a Maori Reservation" (5 May 1983) 59 *New Zealand* Gazette 1371 at 1388.

6 "Setting Apart Māori Freehold Land as a Maori Reservation" (8 July 1993) 103 *New Zealand Gazette* 1941 at 1966.

7 See Computer Freehold Register 367875.

8 See background context discussed by Judge Milroy in *Shaw – Tauwhao Te Ngare Block* (2005) 81 Tauranga MB 8 (81 T 8).

9 *Shaw – Tauwhao Te Ngare Block* (2003) 76 Tauranga MB 176 (76 T 176)

10 *Shaw – Tauwhao Te Ngare Block* (2005) 81 Tauranga MB 8 (81 T 8)

July 2005 but not finally dealt with until the decision now under appeal was issued in August 2013.[11]

[17] The Chief Judge in his decision now subject to this appeal, concluded that he had jurisdiction pursuant to ss 44 and 45 of the 1993 Act to consider cancelling or amending the 1976 roadway order. He relied upon a report prepared by Judge Clark. He found that there were errors in the making of the 1976 roadway order that triggered jurisdiction under ss 44 and 45. Those errors were:[12]

(a) The application and submissions made by the Deputy Registrar wrongly referred to consents having been obtained at a meeting of owners in 1973;

(b) Regarding Rangiwaea 1A2C, only one of the two owners' consents had been obtained;

(c) The Court wrongly assumed that "trustees" had been appointed to Rangiwaea 1A1. The seven persons who provided "consent" were no more than an informal committee. In total only seven out of 277 owners consented;

(d) An error of law in that there is no evidence that one of the two owners in the Rangiwaea 1A1 block, Takiri Taikato, knew of the 1976 hearing. There was a further error of law in that there is no evidence that other than the seven "trustees" that the remaining owners in Rangiwaea 1A1 were notified of the application and hearing; and

(e) An error of law in that the Court should not have made a roadway order over a Māori reservation as it breached s 439(9) of the Māori Affairs Act 1953 (the 1953 Act).

Appellants' submissions

[18] Counsel for the appellants, Mr Koning, argued that the Chief Judge does not have jurisdiction to lay out a new roadway other than in accordance with s 317 of the 1993 Act. Mr Koning pointed to the fact that the area where the wharf and pontoon are located is now a Māori reservation (gazetted on 8 July 1993). That means that any new roadway order, whether agreed by the parties or created by the Court, must necessarily cut across that Māori reservation (on land that was formerly Rangiwaea 1A2C). In addition, any new roadway would also have to cross the Tauwhao Marae Reserve (on land previously Rangiwaea 1A1). Counsel contended the Court did

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11 *Trustees of Tauwhao-Te Ngare Trust v Shaw – Tauwhao-Te Ngare Block* [2013] Chief Judge's MB 567 (2013 CJ 567)

12 Ibid, at 577

not in 1976 and does not now have jurisdiction to lay out a roadway over a Māori reservation. In the previous and current legislation Māori reservations are declared inalienable.

[19] Mr Koning also pointed to the fact that the gazette notice for the foreshore reserve is registered against the title of Tauwhao Te Ngare so that whatever equitable interest Mr Shaw and Mr Barker may have by virtue of the 1976 roadway order cannot defeat the indefeasible interest registered against the title.

[20] Mr Koning says therefore that the trustees of Tauwhao Te Ngare Trust cannot agree to grant access to the pontoon and wharf other than by way of license limited to a period of under 14 years per s 338(11) and (12) of the 1993 Act. On that basis, Mr Koning submitted that the Chief Judge erred in concluding that the parties could come to some agreement on a new or alternate order.

[21] Under questioning, Mr Koning accepted that the Chief Judge would have jurisdiction under s 45 to amend an order if he considered it in the interest of justice to do so.

[22] Mr Koning also argued that if there was to be a new roadway order then it must be in compliance with the 1993 Act. There would need to be a sufficient degree of support amongst the beneficiaries for that new roadway order. There are now three sets of beneficiaries: beneficiaries of Tauwhao Te Ngare; beneficiaries of Rangiwaea marae; and beneficiaries of the foreshore reserve. Counsel contended that without a sufficient degree of support from all three classes of beneficiaries, the Court would not have the jurisdiction to make a roadway order. Laying out a new roadway would also mean that the reservations should be amended with new gazette notices issued to exclude the area required for the new roadway.

[23] Mr Koning argued that the Chief Judge was wrong to have regard to the fact that no appeal or rehearing was lodged after the making of the 1976 order and that it had taken some 35 years for the trustees to challenge it. Mr Koning submitted that it was not clear that owners were in fact aware of the 1976 order at the time it was made. Furthermore, in 1976 trustees had not actually been appointed with respect to Rangiwaea 1A1 and Rangiwaea 1A2C. There was an informal committee who had been consulted on proposals for economic development on the island, which included establishing a new wharf and improved roading access from the wharf across the island.

[24] Counsel also submitted that the Chief Judge was wrong to conclude that the interests of justice required alternative access for Mr Shaw and Mr Barker. They had in fact had the benefit of access to the wharf for a considerable time and the trustees were prepared to grant a license (up to a period of 14 years). They also had access to their properties by water. The interests of justice essentially came down to assessing the balance of convenience as between the parties. In that

context the Chief Judge should have had regard to the fact that implementing the 1976 order would require the removal of at least one of the papakāinga houses. Alternate access in that area would compromise possible extensions of the urupā. The proximity of the marae, urupā and papakāinga housing on the land that was formerly Rangiwaea 1A1 meant that the beneficiaries were understandably concerned about the possibility of public access over this area, which is what would happen if the 1976 order (or an amended version of it) were upheld.

Respondent's submissions

[25] Mr Shaw represented himself. He did not prepare or file written submissions but addressed us and made the following points: Mr Shaw noted that a question of access to the wharf did not just affect his land or the land held by the Seaview Trust. The access from the wharf connects to road access across the island. It connects all the blocks including other general title blocks. Mr Shaw said that the Trust's offer of a license had not been for 14 years but for his lifetime. He is now 78 years of age and has given the land to his grandchildren. He believed his land had legal access and he wants the uncertainty resolved.

[26] Mr Shaw applied for the injunction when access was denied. He did so in order to verify that the road order had been made. He said that when he was purchasing the land he was offered an easement but was told by Ms Tawhiti, from whom he bought the land, that he did not need an easement because there was a roadway order.

[27] In the 1970s and early 1980s, according to Mr Shaw, the condition of the land and infrastructure on the island was much worse. The whole objective of putting in place the new wharf with road access was to enable development with a view to providing an opportunity for Māori to resettle on the island. This has been successful. What is now happening is the biggest land owner wanting to have exclusive use of the wharf access. There is now extensive horticulture and forestry on the island which in season requires the movement of a number of people and vehicles across the wharf on a daily basis.

[28] Even so, Mr Shaw accepts that there are errors with the original order. He is still hoping that these can be corrected and that he and others can continue to have access. Mr Shaw said that the new road should follow a route acceptable to the trustees and it should be restricted to the beneficiaries of the Tauwhao Te Ngare Trust and all the block owners and invitees who have access off the roads on the island. Mr Shaw thought that any amended or new roadway order should not be in the nature of a public road. Similarly, Mr Shaw said that he would have no objection to restrictions on access at times of tangi or the like. He also accepted that he should share the cost of any initial survey and continued upkeep of the road in proportion to usage. Mr Shaw said that

these were proposals he wanted to take to the trustees in accordance with the Chief Judge's direction for a teleconference. That discussion was circumvented by this appeal.

The Law

[29] Section 77 of the 1993 Act provides that orders made by the Māori Land Court are presumed conclusive after 10 years. They may not be challenged for want of jurisdiction or on any other ground by any Court in proceedings commenced more than 10 years after the date of the order. Where there is repugnancy between two orders, each of which would otherwise be protected by the 10 year presumption, then to the extent of any such repugnancy the order that bears the earlier date shall prevail.[13]

[30] Notwithstanding this presumption the Chief Judge has a special jurisdiction to correct mistakes or omissions if satisfied that an order of the Court was erroneous in fact or law. The Chief Judge, if so convinced, has power to cancel or amend an order and make such other order as, in the opinion of the Chief Judge, is necessary in the interest of justice to remedy the mistake or omission.[14]

[31] It is well settled that the Chief Judge exercises this special jurisdiction by applying the civil standard of proof (balance of probabilities).[15] The relevant principles are:[16]

(a) When considering s 45 applications, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence provided by the Applicants (and any evidence in opposition);

(b) Section 45 applications are not to be treated as a rehearing of the original application;

(c) The principle of Omnia Praesumuntur Rite Esse Acta (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies to s 45 applications. Therefore in the absence of a patent defect in the order, there is a presumption that the order made was correct;

(d) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct;

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13 Te Ture Whenua Māori Act 1993, s 77

14 Te Ture Whenua Māori Act 1993, ss 77(3), 44, and 45

15 *Tau v Ngā Whānau o Morven and Glenavy – Waihao 903 Section IX Block* [2010] Maori Appellate Court MB 167 (2010 APPEAL 167)

16 *Ashwell – Estate of Rawinia or Lavinia Ashwell (nee Russell)* [2009] Chief Judge's MB 209 (2009 CJ 209) at [15]

(e) The burden of proof is on the applicants to rebut the two presumptions above; and

(f) As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decisions. These principles are reflected in s 77 of the 1993 Act, which states that the Court orders cannot be declared invalid, quashed or annulled more than 10 years after the date of the order. Parties affected by orders made under the Act must be able to rely on them. For this reason, the Chief Judge's special powers are used only in exceptional circumstances.

[32] In *Estate of George Amos – Horahora 1A4B, 1A4E & 1A4F Blocks* the then Chief Judge stated:[17]

> The interests of justice being a paramount consideration and whilst errors may exist in a Court order or in the facts presented, the Chief Judge must decide if the cancellation sought will bring justice to the situation or create an injustice.

[33] This formulation was central to the approach taken by the Chief Judge in the present case where he found that while errors exist, both parties would suffer adverse effects if the 1976 roadway order was cancelled or remained unchanged.

Discussion

The Interests of Justice?

[34] The central argument on appeal was that the Chief Judge was wrong to conclude that the interests of justice required alternative legal access for Mr Shaw and the Seaview Trust as a condition precedent to cancellation of the 1976 roadway order.

[35] The trustees say that access itself is not the issue as they are prepared to offer a licence (for 14 years) to Mr Shaw and his family. Mr Shaw would have to negotiate a separate licence with the trustees of the marae reservation. Mr Shaw has declined the offer of a licence on the basis that it is limited in term and uncertain. In the alternative, the trustees say that Mr Shaw can access his house by boat. Mr Shaw accepts that this is so, but points out that this access is tidal and difficult given his and his wife's current age and state of health. It is also impractical for the movement of stock, equipment or produce of any size.

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[17] *Estate of George Amos – Horahora 1A4B, 1A4E & 1A4F Blocks* [2002] Chief Judge's MB 54 (2002 CJ 54) at [4.14]

[36] The Chief Judge had regard to a number of factors, identified by Judge Clark in his report, in weighing what the interests of justice require in this particular case.[18] Having regard to those matters the Chief Judge observed that over the passage of time attitudes and circumstances of the parties had altered. He concluded:[19]

> …These changing attitudes and circumstances however, do not in my view mean that the interests of justice would be best served if the roadway order is simply cancelled. In my view there has to be a workable solution to both parties to necessitate a cancellation or amendment.

[37] We are not persuaded that the Chief Judge was wrong to so find. On the facts of this case, we agree with the Chief Judge that a simple cancellation of the 1976 roadway order would not represent a fair or just outcome. Notwithstanding errors made at the time the 1976 roadway order was promulgated, it is clear that it was made in the context of proposals to improve access and infrastructure on the island. These initiatives had the support of relevant public authorities and were broadly supported by those owners who participated in the 1973 discussions. The clear intention was that a roadway from the new wharf and pontoon would link to existing and future roading on the island to the benefit of all owners.

[38] The wharf has been in use for over 30 years. No beneficial owner or trustee has previously raised in a formal way before the Court any of the issues now said to require cancellation of the 1976 order. To now cancel that order would transfer control of access from the wharf to a trust which is now the single largest owner on the island. That scenario was never in contemplation when the new wharf was constructed or when horticulture and forestry developments were put in place across the island as a result of the improved access. The evidence indicates that once a new wharf was built all owners expected enduring legal access to and from it.

[39] We therefore reject Mr Koning's primary argument that the interests of justice require cancellation of the 1976 order. It was Mr Koning's contention that it was not open to the Chief Judge to make the conditional order that he made. He should either have upheld the 1976 order or cancelled it, there being no other available options in this particular case.

[40] Mr Koning says the balance of convenience clearly favours his clients, the trustees, as to uphold the 1976 roadway order would require the shifting of one of the houses. Cancellation of the 1976 order is the only other option because there is no jurisdiction under the previous or current legislation to alienate land designated a Māori reservation. Mr Koning argues that the Chief Judge could not direct the parties to agree on a new or amended roadway because, even if they wished to,

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[18] Report of Judge Clark at [83]-[97] set out in *Trustees of Tauwhao-Te Ngare Trust v Shaw – Tauwhao-Te Ngare Block* [2013] Chief Judge's MB 567 at 579-581

[19] *Trustees of Tauwhao-Te Ngare Trust v Shaw – Tauwhao-Te Ngare Block* [2013] Chief Judge's MB 567at [34]

his clients do not have power to alienate land designated a Māori reservation. Mr Koning says a new roadway order would need to be consistent with the 1993 Act. This would require demonstration of a sufficient degree of support from three different sets of beneficial owners.

[41] For the reasons that follow we do not agree. To explain why, it is necessary to set out our view of the applicable law at the relevant time. We begin by considering whether a roadway order is an "alienation", first in terms of the 1953 and then the 1993 legislation. We then consider whether or not consent was required under either Act. Finally, we consider whether or not the Court can make a roadway order over a Māori reservation.

Is the 1976 roadway order an "alienation"?

The 1953 legislation

[42] The Māori Affairs Act 1953 contains an exclusive definition of alienation. If the nature of a roadway order is sufficient to effect a disposition of the type referred to in the definition of alienation in the 1953 Act, then on the face of it, it is possible for a roadway order to be an alienation

[43] Part 27 of the 1953 Act related to roads and streets. Section 415 as originally enacted provided that the Court could make orders laying out roadways for the purpose of providing access to any land. Section 415(3) was then substituted by s 22 of the Māori Affairs Amendment Act 1967 to provide that written consent was required from district councils and/or regional authorities. Under the 1953 Act there was a presumption that unless otherwise restricted, roads laid out by the Court conferred on all persons the same rights of user as if it were a public road.[20]

[44] Sections 418-420 of the 1953 Act made provision for providing access to Māori land, General land and Crown land, and the level of consent required depending on the type of land that the road would traverse. The Court's power to grant rights of way was not contained in Part 23 of the Act but was instead contained in s 30(j) of the 1953 Act.

[45] Under the 1953 Act a roadway order could be either public or private. Both types of roadway orders had different effects on Māori land. Where a road was to be declared public, then consent from the owners was specifically required and the road was officially "set apart" as a public road and treated as a separate instrument of title. Whereas with a private roadway, underlying ownership and status of the land comprising the roadway did not change.

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[20] Māori Affairs Act 1953, s 416(1)

[46] In *Deputy Registrar – Oharotu 4*, Judge Ambler identified a number of factors to consider when determining whether a roadway order gives rise to a separate instrument of freehold title:[21]

> [49] First, if the roadway order was made at the time of investigation of title or partition (as per s 91 of the 1886 Act, s 69 of the 1894 Act, s 117 of the 1909 Act, s 48 of the 1913 Act or s 477 of the 1931 Act) then normally the roadway order was intended to be a separate freehold title. At a practical level that was because, if the roadway was first deducted from the parent title as a separate freehold parcel, then all owners in the land being partitioned shared equally in the burden of the loss of land to the roadway. However, if it was created as per a right of way easement over the partitioned titles then the burden of the encumbrance was not necessarily shared equally by the owners.
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> [50] Second, if it was intended that the roadway later be proclaimed a public road then the roadway order would normally give rise to a separate freehold title.
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> [51] Third, the wording of the order is a key factor, though inconsistency in statutory language and the wording used in minutes and orders means that a cautious approach is required. For example, if a roadway order says that an area is "set aside" or "set apart" then that suggests a separate freehold title. Conversely, if the roadway order is expressed to be "laid out" or "over" or "laid over" or "traversing" existing titles or it refers to an existing title as the servient tenement, then it is in the nature of an easement. In this regard, if a roadway order is endorsed against the freehold title order of another block (as was the practice at one time) or registered against a land transfer title, then it is in the nature of an easement.
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> [52] Fourth, where a roadway order is allocated a distinct title name or appellation, such as "Parekura Hei Road" or "Oharotu 4", that suggests a separate freehold title.
> [53] Fifth, if the roadway is shown as a separate title on a sketch plan or survey plan and is excluded from surrounding titles, that indicates a separate freehold title. For example, the survey plan may show the roadway as having primary title boundaries or it may show a disjoined vinculum over titles on either side of the roadway. Conversely, if it is shown as running over existing titles as per a right of way or has a joined vinculum running through it, then it is not a separate freehold title. Care should be taken in relying on sketch plans as they do not always follow the Court's minute and are not necessarily approved by a Judge. Care should also be taken in relying on survey plans that have not been approved by the Court.
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> [54] These suggestions are not definitive or exhaustive.

[47] Using the factors set out in Judge Ambler's decision as a guide, and considering the 1976 roadway order, we conclude that the 1976 roadway order did not create a public road for the following reasons:

(a) The 1976 roadway was not created upon partition of the titles;

(b) It has not been proclaimed a public road;

(c) The wording used in the 1976 roadway order is "laid out" rather than "set apart" meaning it is more in the nature of an easement;

(d) It does not have its own distinct title; and

(e) It is not shown as a separate title on a sketch or survey plan.

[48] The 1976 roadway order is therefore a private roadway order.

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[21] *Deputy Registrar – Oharotu 4 Block* (2010) 7 Taitokerau MB 234 (7 TTK 234)

The 1976 roadway order

[49] For the 1976 roadway to be an alienation it must come within the definition set out in s 2 of the 1953 Act. It must make or grant a disposition of the kind referred to that affects the fee simple of the land.

[50] Judge Clark relied on the decision of this Court in *Māori Trustee – Rowallan Block VIII Section 1* where the Court found that a roadway order *is* an alienation.[22] He reluctantly accepted that case as stating the correct legal position. We have come to a different view to *Rowallan* and, to the extent that it may have application to the facts of this case, we prefer the dissenting opinion of Judge Cull.

[51] In *Rowallan,* this Court dealt with two appeals concerning a decision of the Court below to grant a road order per s 442 of the 1953 Act over certain Rowallan Blocks ("the Incorporation lands").[23] Those lands were subject to Part 24 of the 1953 Act by New Zealand Gazette (relating to Māori land development) and were held by the Board of Māori Affairs. The Board objected to the s 442 order on the basis that it was an "alienation" as defined in s 2 of the 1953 Act and the Board's consent was a condition precedent to the Court having jurisdiction to entertain the application.[24] The Respondents argued that the order was not an alienation because s 442 is one of the special powers of the Court and as such is not subject to the general powers in Part 24 of the 1953 Act. Separate judgments were then delivered in that appeal.

[52] Judge Cull dissenting argued that under no circumstances would he consider an order of the Court to be an alienation. After examining general definitions of alienation, as well as the definition contained in the 1953 Act, he was satisfied that the only person capable of alienating land is the owner of the land and that the only way to deprive an owner of their land was by operation of law. Moreover, Judge Cull considered an order of the Court to be an operation of law and therefore and order could not be held to be a grant or transfer within the meaning of alienation. He further pointed out that the Court does not hold an estate or interest in the land which is capable of being granted or transferred.

[53] Judge Cull distinguished the decision in *The Proprietors of Hauhungaroa 2C Block v Attorney General* on the basis that the Court has the power to make orders affecting General land and General land is not included in the definition of alienation.[25] If the *Hauhungaroa* decision was

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22 *Māori Trustee – Rowallan Block VIII Section 1* (1985) 3 Te Waipounamu Appellate Court MB 88 (3 APTW 88)

23 Ibid

24 Per Mäori Affairs Act 1953, s 330

25 *The Proprietors of Hauhungaroa 2C Block v Attorney General* [1973] 1 NZLR 389

followed, only roadway orders affecting Māori land would be alienations and those orders affecting General land would not. Judge Cull reasoned:[26]

> When the Court makes an order whether a roadway order under Section 415 a tramway order under Section 442, or an order creating an easement under Section 30, it is ordering or commanding that something be done or permission is given to someone to do something in respect of someone else's land even without that person's consent. An alienation contemplates an alienor and an alienee with the alienor making or granting the transfer sale, gift, lease of his estate or interest in the property to the alienee pursuant to some arrangement between them...When the Court makes an order it is not by way of agreement but by way of command.

[54] On the issue of whether there is a derogation of the proprietary rights of the owners, Judge Hingston in *Rowallan* relied on *Hauhungaroa* as authority for the proposition that the effect of a roadway order per s 416 of the 1953 Act was sufficient derogation.[27] He was supported by Judge Russell who considered that an order per s 442 of the 1953 Act created a licence affecting the fee simple of the land. He further considered that whatever the owners' views, their estate in the land is diminished and the estate of the licensee is enhanced. Judge Russell did not consider that a distinction should be made between easements created by instruments executed by owners and easements created by orders of the Court on behalf of the owners.

[55] When considering whether or not the 1976 order should be characterised as an alienation, we are not persuaded on the facts of this case that the reasoning of the majority in *Rowallan* applies. The context in which the 1976 order was made clearly points to establishment of what was meant to be a private roadway for the benefit of land owners on Rangiwaea Island. The objective was to provide road access from the new wharf which when constructed would benefit of all owners on the island. There was no derogation from the rights of the owners over whose land the 1976 roadway order was made. Underlying ownership remained with those owners. We therefore conclude that the 1976 roadway order, properly construed, is not an alienation in accordance with the definition of that term in the 1953 legislation.

Is a roadway order created by the 1993 legislation an alienation?

[56] Strictly speaking, we do not need to address this issue because we agree with the Chief Judge that the interests of justice require more than a simple cancellation of the 1976 order. We acknowledge that there is some ambiguity in the language used by the Chief Judge. It is not entirely clear whether he envisaged cancellation of the 1976 order conditional on agreement

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[26] *Māori Trustee – Rowallan Block VIII Section 1* (1985) 3 Te Waipounamu Appellate Court MB 88 (3 APTW 88) at 91

[27] Ibid, at 98

between the parties as to the terms of a new roadway order, or whether he envisaged amendment to the 1976 order on agreed terms.[28]

[57] Because we see no reason to promulgate a new roadway order, issues concerning compliance with the 1993 legislation do not arise. Nonetheless given the length of time the parties have been in dispute over the issue of legal access from the wharf, we think it helpful to set out our views on the 1993 provisions and also to address the related question as to whether the Court has power under both the 1953 and 1993 legislation to lay out a roadway over a Māori reservation.

[58] The 1993 Act provides for an inclusive definition of alienation. Section 4(c)(ii) provides that an alienation does not include "[a] disposition of a kind described in paragraph (a) of this definition that is effected by order of the Court".

[59] Part 14 of that Act relates to title reconstruction and improvement. Sections 315 to 326 concern easements and roadways and s 316 of the 1993 Act gives the Court the jurisdiction to lay out roadways. Section 317 specifically provides the consent requirements for laying out a roadway. Where the Court wishes to lay out a roadway over Māori freehold land it must be satisfied that the owners have had sufficient notice of the application and sufficient opportunity to discuss and consider it, and that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.

[60] Roadway orders can either be public or private. In *Ngunguru Coastal Investments Limited - Horahora 1B4A2D1 Block* this Court agreed that s 320 (which provides for roads to be proclaimed as public roads) alienates the land from its owners and vests it in a territorial authority and contrasted that situation with roadways created by s 316 where the ownership is retained by the owners.[29]

[61] A roadway order made under the 1993 legislation is not an alienation. A private road is in the nature of an easement, which would normally fall within the definition of alienation in s 4(a)(ii) of the 1993 Act. However, given the fact that it is made by way of an order of the Court it is excluded from the definition of alienation by s 4(c)(ii) of the 1993 Act.

Does the 1953 or the 1993 legislation require consent to create a roadway order?

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[28] See Chief Judge's reasoning in *Trustees of Tauwhao-Te Ngare Trust v Shaw – Tauwhao-Te Ngare Block* [2013] Chief Judge's MB 567 at [33]-[37]

[29] *Ngunguru Coastal Investments Limited – Horahora 1B4A2D1 Block* [2012] Māori Appellate Court MB 80 (2012 APPEAL 80).

[62] The issue of consent was touched upon briefly above; however separate consideration of this issue is required. Mr Koning argues that the trustees of the Tauwhao Marae Reserve have no legal authority to consent to a new or amended roadway order.

1953 Legislation

[63] The 1976 roadway order was made pursuant to ss 415 and 418 of the 1953 Act. Section 416(4) provided that the laying out of a roadway over any land shall not affect the ownership of the land comprised therein, or its description as Māori land, or Crown land, or General land (as the case may be).

[64] Section 418 sets out the requirements for consent as follows:

> **418 Roadways providing access to Maori land**
>
> (1) For the purpose of providing access to any Maori freehold land as aforesaid, roadways may, without the consent of any person being required, be laid out—
> (a) Over any other Maori land; or
> (b) Over any General land that ceased to be Maori land on or after the fifteenth day of December, nineteen hundred and thirteen (being the date of the commencement of the Maori Land Amendment Act 1913).
>
> (2) For the purpose of providing access to any Maori freehold land as aforesaid, roadways may, subject to consents being given as hereinafter specified, be laid out—
> (a) Over any General land that ceased to be Maori land prior to the fifteenth day of December, nineteen hundred and thirteen, with the consent in writing of the owner and of every other person having any estate or interest therein; or
> **[**(b) Over any Crown land, with the consent in writing of the **[**Director-General of Lands**]** and of every person having any estate or interest in the said land.**]**

[65] In *Von Dadelszen v Goldsbury – Pukeiti 4A Block* this Court noted the effect of roadway orders:[30]

> The principle of the Māori Affairs Act is that Māori land should not be left land-locked following the division of land titles by the Māori Land Court. The Act has preserved to Māori owners a statutory right to obtain access even although, following a division, adjoining titles may cease to be Māori land. Accordingly the purchasers of such lands acquire not a special advantage but a special disability in that the land could be made the subject of a roadway order even without the purchaser's consent, if it in fact provides the most suitable access.

[66] In *Coles v Miller* the owners of a farming property at Ngatira sought judicial review of an order of the Māori Land Court laying out a roadway several kilometres in length over their land under Part 27 of the 1953 Act.[31] In that case it was argued that the Court had acted in breach of

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30 *Von Dadelszen v Goldsbury – Puketiti 4A Block* (1982) 16 Waikato Maniapoto Appellate Court MB 328 (16 APWM 328), as cited in *Lakeview Farms Limited v Muaupoko and Horowhenua Trustees – Horowhenua X1B41 North C1 Block* (1986) 13 Whanganui Appellate Court MB 116 (13 APWG 116) at 126.

31 *Coles v Miller* CA25/01, 8 November 2001

natural justice in failing to ensure that they had the opportunity of putting forward their views on the proposed roadway.

[67] The Court of Appeal accepted that it would have been a breach of natural justice if the Court had made a roadway order without either obtaining the consent of someone whom it knew from its records had an interest in the affected land or giving that person notice of the hearing at which the application for the order was to be heard. In that case however there was no evidence showing that the Court would have been aware of the appellants' interest in the land.

[68] At the time the 1976 order was made there was no legislative requirement in the 1953 Act for the Court to obtain the consent of the owners before laying out the roadway. Making such an order was at the discretion of the Court. While consent was not specifically required, as set out in *Coles v Miller*, the principles of natural justice require that parties likely to be effected by an order of the Court should have an opportunity to be heard.

1993 Legislation

[69] In contrast, the 1993 Act makes it clear that consent is required before a roadway order can be made. Section 317(1) states:

> **317 Required consents**
>
> (1) The Court shall not lay out roadways over any Maori freehold land unless it is satisfied that the owners have had sufficient notice of the application to the Court for an order laying out roadways and sufficient opportunity to discuss and consider it, and that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.

[70] In *Ngunguru Coastal Investments Ltd – Horahora 1B4A2D1* the Court stated:[32]

> [60] We contrast s 320 with the provisions of s 317 of TTWMA. That section discusses the level of consent required when laying out roadways over Māori freehold land, customary land, general land and Crown land. In each scenario, although the levels of support differ, the consent of the owners is required … In those scenarios there is a mandatory obligation on the part of the Court to seek the views of the owners. There is no such mandatory obligation under s 320 of TTWMA.

[71] The level of support in terms of s 317(1) where access is over Māori land is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter. This is a discretionary matter for the Court to weigh up in determining whether to create the roadway order.

Can the Court make a roadway order over a Māori reservation?

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[32] *Ngunguru Coastal Investments Limited* [2012] Māori Appellate Court MB 80 (2012 APPEAL 80).

[72] The roadway order was laid out over a Māori reservation constituted under the 1953 Act. Section 439(9) provided that the land comprised within a Māori reservation shall, while the reservation subsists, be inalienable, whether to the Crown or to any other person. This provision is continued in the 1993 Act by s 338(11).

[73] In *Muraahi v Phillips* this Court distinguished between restrictions on "alienation" and "inalienable":[33]

> [84] ... the "inalienability" provision in s 338(11) is different from provisions restricting **alienation** unless there is compliance with TTWMA. We tend to agree. "Inalienable" strictly prohibits **alienation.** In contrast, where **alienation** is restricted by compliance with certain conditions, it is nonetheless permitted subject to meeting those conditions. Maori Reservations generally contain wāhi tapu or land of special significance to Māori. It makes sound sense that reservation land should be inalienable. (Emphasis added)

[74] In the recent decision of *Grace – Ngarara West A25B2A* an application to set aside land as a Māori reservation was opposed by the Transport Agency who were proposing to take part of the land for the expressway per the Public Works Act 1981.[34] Chief Judge Isaac considered that:

> [79] …I cannot stretch the meaning of "inalienable" to mean "alienable". "Alienation" under TTWMA is "every form of disposition of Māori land", apart from the listed exceptions...

[75] In that case the Public Works Act 1981 was not one of the listed exceptions in the definition of alienation. In this case a disposition of the kind effected by creation of a private roadway order is excluded from the definition of alienation as it is effected by order of the Court.[35]

[76] The term "inalienable" is used in the 1993 Act in reference to Māori reservations and Māori customary land (s 145). Both are deemed inalienable. The Court has the ability to lay out roadways over any land per s 316. Section 317(2) provides that the Court shall not lay out roadways over any customary land without the consent of an agent appointed by the Court pursuant to Part 10 of the Act. The fact that the Court can lay out roadways over customary land suggests the legislature intended that the Court have the ability to lay out roadways over all types of land including Māori reservations.

[77] We can see no reason why a private roadway order could not be laid out over a Māori reservation. We consider that was the clear intention of the 1976 order and find no error of law accordingly. While there were certain factual errors made by the Court at the time the 1976 order was made, we can find no error of law or jurisdiction, which might in all the circumstances tell towards cancellation of the order in the interests of justice. Upon cancellation of the 1976 order we

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33 *Muraahi v Phillips* [2013] Māori Appellate Court MB 528 (2013 APPEAL 528)
34 *Grace – Ngarara West A25B2A Block* (2014) 317 Aotea MB 268 (317 AOT 268)
35 Te Ture Whenua Māori Act 1993, ss 4(a), 4(c)(ii).

accept that a number of consequential issues then arise in terms of the options available for constituting a new roadway order in accordance with the 1993 legislation. These include issues of the kind raised by Mr Koning such as consent of the owners and the effect of registration against the title of the foreshore reserve status.

[78] We would add by way of observation that because of their special status it would only be in the rarest of cases that the Court would be likely to lay out a roadway over a Māori reservation in the absence of the consent of the beneficiaries.

[79] In conclusion, we do not consider it in the interests of justice that the 1976 order be cancelled. That order remains, and per s 77(2) of the 1993 Act, prevails over subsequent orders to the extent of any repugnancy.

Decision

[80] The appeal is allowed in part. Pursuant to section 56(1)(b) of Te Ture Whenua Māori Act 1993 the orders and directions made by the Chief Judge on 9 August 2013 at [2013] Chief Judge's MB 567-594 at paragraphs [36] and [37] are revoked and substituted with the following:

i. The order laying out a roadway at 37 Tauranga MB 248 dated 18 March 1976 is amended to provide that use of the roadway is restricted to owners and beneficial owners of land on Rangiwaea Island and their families, invitees and agents only;

ii. As soon as practicable and in any event no later than three months from the date of this judgment, the trustees of the Tauwhao Te Ngare Trust and the trustees of the Tauwhao Foreshore Reservation are to prepare and lodge with the Māori Land Court a plan of the roadway approved as to survey by Land Information New Zealand; and

iii. Leave is reserved to the trustees of the Tauwhao Te Ngare Trust and the Tauwhao Foreshore Reservation to file a survey plan that differs from the route shown on the sketch plan annexed to the 1976 roadway order providing such amended survey plan ensures comparable access from the wharf across the blocks formerly known as Rangiwaea 1A1 and Rangiwaea 1A2C to join with roads shown as existing roads in the schedule attached to the 1976 roadway order.

[81] As Mr Shaw represented himself there will be no order as to costs.

[82] These orders are to issue forthwith pursuant to rule 7.5(2)(b) of the Māori Land Court Rules 2011.

Pronounced at 3.20 pm in Wellington on Tuesday the 23rd day of December 2014

CL Fox
DEPUTY CHIEF JUDGE
(Presiding)

MJ Doogan
JUDGE

JUDGE HARVEY

Introduction

[83] I have read the opinion of the majority in this appeal. With respect, I do not agree that the appeal should be dismissed, wholly or in part. Either the 1976 roadway order is lawful or it is not. Making its cancellation conditional on a future agreement between the parties over access will not remedy its legal defects. The correct remedy would have been for the Chief Judge to adopt the recommendations of Judge Clark who concluded that the only appropriate outcome was for the 1976 roadway order to be cancelled and for the process to commence from the beginning. The appeal should therefore be allowed.

[84] It will be remembered that the 1976 order was made on an application by court staff and, it would appear, according to the evidence, without the knowledge let alone consent of all of the affected owners and beneficiaries. The report of Judge Clark discloses that those persons who did approve did not have their written confirmation correctly attested. Others who purported to support the roadway were not in fact trustees appointed by the Court but merely an advisory committee of sorts without any relevant legal standing. It is difficult to see therefore how, notwithstanding s418 of the 1953 Act, such an order could stand. In short, I consider that the 1976 order should be cancelled without condition because the pathway that was traversed by the Court that led to that decision was tainted with such serious defects so as to render it unsafe.

[85] In addition, I do not agree that the Māori Land Court can legitimately exercise the discretion to issue a roadway order over a Māori reservation *without* the consent of the beneficiaries and trustees of that land. While it is correct that the 1993 legislation empowers the Court to create roadways over Māori customary land, it would be surprising to find any examples of it doing so since the coming into force of the Act. Further, I cannot accept that it is consistent with the principles of the 1993 legislation to force on beneficiaries and owners a roadway against their wishes for the benefit of a neighbouring land owner especially where a practical alternative exists.[36] That would be contrary to the fundamental principles of the Act, the principles of retention, development and utilisation of Māori land for the benefit of the owners, their whānau and hapū. In the present case that alternative is for Mr Shaw to be granted a licence of up to 14 years, which is permissible

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[36] For a recent example (relating to a project of national significance) see *Grace – Ngarara West A25B2A* (2014) 317 Aotea MB 268 (317 AOT 268)

under s 338(12) of the Act, a proposal he declined on the basis that it was for a finite term and uncertain.

[86] In contrast to the 1953 legislation the 1993 Act makes provision for the sufficiency of notice, opportunity for discussion and the sufficiency of support tests when the Court is exercising its discretion to grant a roadway. Where an amended order is sought, which effectively lays out a new roadway, although made under earlier legislation, there is a strong argument in terms of natural justice that the Court should similarly consider the level of support of the owners, and the beneficiaries where there is a trust in place.

[87] For the reasons that follow, I consider that it would be an anathema for any court to force a roadway order over any Mäori land let alone a Māori reservation in opposition to the views of a majority of the beneficiaries, even where there is a statutory discretion for doing so. The only exception would be where it could be demonstrated with compelling arguments and evidence that the trustees and beneficiaries were either acting unreasonably or irrationally, taking into account the nature and importance of the Mäori reservation to its community. It is also necessary to recognise, in the context of this appeal, the distinction between Mäori freehold land on the one hand and where such land has the added overlay of a Mäori reservation, on the other. This point will also be discussed further.

Are the principles of natural justice relevant to notice and consent?

[88] In *Carroll v Auckland Coroners' Court* the High Court stated:[37]

> [35] The common law requirements of natural justice are context specific – a "flexible concept which aims to achieve across an infinite spectrum of situations both the actuality and the perception that things have been done justly and fairly". They will vary depending upon the nature of the proceeding, the gravity of the matters at issue, and can be shaped by express statutory provision as to the procedure to be followed. In determining whether natural justice has been complied with, the courts look at the matter in the round to determine whether the process was fair.
>
> [36] Generally natural justice is thought to require at least advance notice of the subject matter of the hearing, advance notice of the risk of findings adverse to the person's interests and the right to be legally represented if the circumstances require it. People are entitled to a fair opportunity to be heard which necessarily includes a reasonable amount of time in which to prepare a case. What constitutes a reasonable amount of time will depend upon the complexities of the issues involved.

[89] In *Coles v Miller* it was argued that the Court had acted in breach of the principles of natural justice by failing to ensure that the owners of the block had the opportunity of putting

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37 [2013] NZHC 906, [2013] NZAR 650

forward their views on a proposed roadway over their land.[38] As the majority have concluded, the Court of Appeal accepted that a breach of natural justice would occur where a court made a roadway order without the consent of someone whom it knew had an interest in the affected land, or by failing to give notice of the hearing. There was, however, no evidence confirming that the Court was aware of the appellants' interest in the land.

[90] On the issue of notice, this Court has long emphasised the critical need for notice to owners of Māori land whenever proceedings affecting their interests are commenced. In the decision in *re Uruamo v Akarana Ongarahu B (Rewiti Marae)* this Court held that notice of a meeting without an agenda was deficient with the result that the existing trustees were not given notice that they were likely to be removed.[39] Then in *Cameron – Part Maretai 3B* following a hui of beneficiaries the Māori Land Court made orders removing trustees and appointing replacements.[40] Concerning the replacement trustees, this Court acknowledged that the advertisements for the hui did not state that new trustees were sought. The orders removing trustees were affirmed while the orders appointing new trustees were revoked because of this defect in notice.

[91] In the present case, the Court is aware that any proposed amendment of the roadway order or the grant of a new roadway order over the Māori reservation would be of significant concern to the beneficiaries of the land, as set out in the submissions of the Trust in this appeal. Accordingly, although a statutory basis may exist for imposing an amended roadway over the block, the interests of natural justice require the Court to consider the matter in its entirety, including a balancing of interests as between the parties. Those interests include the right to notice and the ability to consent or refuse. Judge Clark's report confirms that the rights of the affected owners were not afforded adequate consideration when the 1976 order was made. Moreover, the views of the beneficiaries to the Māori reservation must remain a pivotal consideration, given the nature of such reservations and their importance.

How is the Māori reservation overlay of the affected land a relevant consideration?

[92] In *Gibbs–Te Rūnanga o Ngāti Tama*, on an application for the creation of a Mäori reservation over General land, the core principles of the 1993 Act were emphasised:[41]

> [51] ... The Preamble, s2 and the principal purpose of the Act are all relevant in this context in providing important considerations for the Court as the Māori Appellate Court has recently held. The principles of utilisation, retention and development are also applicable. The retention of Māori freehold land in the hands of the owners, their whānau and hapū is a

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38 8 November 2001, CA25/01
39 (1994) 3 Taitokerau Appellate Court MB 263 (3 APWH 263)
40 (1996) 19 Wāikato-Maniapoto Appellate Court MB 34 (19 APWM 34)
41 (2011) 274 Aotea MB 47 (274 AOT 47)

> cornerstone, fundamental principle of the Act that underpins the approach that the Court must take with every application.

[93] It is trite law that the Court must have regard to those underlying principles and general objectives of the Act when determining applications. Ascertaining and giving effect to the wishes of the owners is a paramount consideration, along with the principles of utilisation, the retention and development of the land. Where Māori land owners have decided, following proper process, to create management structures then their reasons for doing so should be respected. Where owners have taken the added step of consenting to the creation of a Māori reservation over their land then the importance of respecting their decision making is even more relevant. This is because the overlay of a Mäori reservation imbues the title with the legal recognition of the special significance of the land and provides in law the added protection of inalienability against any person *including* the Crown.

[94] As the Chief Judge himself recently held, the protection of a Māori reservation overlay renders such land incapable of alienation while that status subsists against all persons including the Crown:[42]

> [79] The words "inalienable against the Crown" mean simply that. No other meaning can be attributed to those words and notwithstanding the submission by counsel for the Transport Agency, I cannot stretch the meaning of "inalienable" to mean "alienable". "Alienation" under TTWMA is "every form of disposition of Māori land", apart from the listed exceptions. Compulsory acquisition by the Crown under the PWA is not a listed exception. In short, s 338(11) means that once a Māori reservation status has been recommended and gazetted, the Crown cannot acquire this land.

[95] As this Court found in *Mato – Nukutaurua 3C3B* the area of land set aside for Mäori reservations is but a fraction of the entire Mäori land estate. Their importance therefore cannot be underestimated given the reality that they are covered with the Crown's protection:[43]

> Given the historical survey, albeit brief and general, it is apparent that any limitation on the creation of Maori reservations or the extraction of public reserves from them based on a perceived public interest of new import, or to delegate responsibilities thereon to local authorities must be seriously viewed, not only in the Maori interests, but in the national interest having regard to the Crown's original commitments on the settlement of this country. It is also apparent why the matter assumes such importance for Maori people. Although there are now many Maori reservations, they occupy but a small proportion of the total acreage of remaining Maori lands. Today, the reservations alone have the benefit of the Crown's protective cloak.
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> …
>
> The Appellate Court finds that the Crown pursuant to the provisions of Section 5(k) of the Acts Interpretation Act 1924 can only have its right to continue creating Section 439 reservations fettered if there is express statutory provision to that effect.

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42 *Grace – Ngarara West A25B2A* (2014) 317 Aotea MB 268 (317 AOT 268)
43 (1987) 32 Tairāwhiti Appellate MB 217 (32 APGS 217) at MB 241 and 244

[96] Under the current and previous legislation the importance of Māori reservations has been highlighted in numerous decisions of this and the Māori Land Court. For example, in *Otene - Pt Tauhara Middle 4A2A (Tauhara Māori Reservation)* it was held that the Court must have regard to Māori customary concepts relating to turangawaewae and ancestry in determining beneficiaries of a Māori reservation.[44] Moreover, the distinction in customary terms between owners and invitees or hosts and guests must be maintained, in accordance, effectively, with tikanga Māori.[45] The authorities also confirm that Māori communities are entitled to have recognition of the fact that the land is a Māori reservation, that it has some special tribal significance, that Māori usually control it, and that others use it only for as long as they accepted and respected those facts.[46] These are all relevant considerations to the present case. And as long as the reservation status exists, the reservation trustees possess a licence as to occupation, use and enjoyment of the land until the reservation is cancelled.[47]

[97] The Māori reservations register of the Court confirms that the vast majority are set aside for beneficiaries that are usually hapū based. Where the land has been awarded to individuals according to a title determination made in favour of hapū then the result is the same. So the majority of Māori reservations are set aside for hapū and kin based groups usually for the purpose of burial grounds, marae or meeting places, sites for traditional food gathering and accessing natural resources including rōngoa, places of historic and cultural interest including waka landing sites, battle grounds, sites of worship and customary observance. Equally importantly, at the risk of belabouring the point, the setting aside of areas for such purposes is not common. To provide context, Court records confirm that less than 10% of the total number of titles have the overlay of a Māori reservation. In summary, it is a special status reserved for specific communal purposes to benefit particular Māori communities of interest.

[98] It should also be remembered that when the 1976 roadway order was issued, one of the affected blocks was subject to a Māori reservation, Rangiwaea 1A1. It was therefore subject to s439(9) of the 1953 Act, which includes a comparable prohibition against alienation:

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

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44 (1977) 58 Taupō MB 168 (58 TPO 168)

45 See *Trustees of Waipahihi Reserve - Waipahihi Māori Reservation* (1978) 59 Taupö MB 184 (59 TPO 184) and *Pihema v Ngāti Whatua of Orakei Māori Trust Board – Section 722,790,792,793 and 794 Town of Orakei Blocks IX Rangitoto Survey District* (1990) 3 Taitokerau Appellate Court MB 44 (3 APWH 44)

46 *Trustees of Waipahihi Reserve - Waipahihi Māori Reservation* (1978) 59 Taupö MB 184 (59 TPO 184)

47 See *Campbell v Mahuika – Rahui A13* (1992) 32 Tairawhiti Appellate MB 370 (32 APGS 370) and *Perenara v Te Runanga o Ngati Rangitihi – Ruawahia 2B* (1992) 8 Waiariki Appellate MB 52 (8 AP 52)

> thinks fit. The revenue derived from any such lease or occupation licence shall be expended by the trustees as the Court directs.
>
> (9A) Notwithstanding anything in subsection (9) of this section, any lease or licence which is granted pursuant to the proviso to that subsection and which is granted for the purposes of education or health may be for a term exceeding 7 years and may confer on the lessee or licensee a right of renewal for one or more terms.

[99] As highlighted by counsel for the Trust, implementing the 1976 roadway order would necessitate the removal of at least one of the papakāinga houses and could compromise possible extensions of the hapū urupā. The Court should proceed carefully in such circumstances to ensure that any order does not restrict the ability of the owners to utilise and develop their land, without their consent. This is especially relevant given that both Mr Shaw and Mr Barker have access to their land by water and, in the case of Mr Shaw, there is an alternative option available in the form of the grant of a licence.

Is there a practical alternative?

[100] By way of analogy, in the well known decision *McGuire v Hastings District Council* , Lord Cooke observed:[48]

> …. The Treaty of Waitangi guaranteed Maori the full exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, that and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads. **Thus, for instance, their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route**. So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available.
>
> (Emphasis added)

[101] The evidence for the appellant underscores the reality that access by way of renewable licence, at the election of the trustees, remains a practical alternative. The Trust's witnesses, as set out in the submissions of counsel, confirm that they are able to grant a licence of up to 14 years to Mr Shaw for access. Despite the disputes that have arisen over the last few years, they say that they are still willing to grant that licence. For example, William Gardiner says in para 82 of his affidavit:

> The Trust has never had a problem with granting Don Shaw and his family access over the Tauwhao block on an informal basis. As he himself has acknowledged, he and his family used the wharf and roadways on Rangiwaea without obstruction from the time he moved to the island.

[102] Brendon Taingahue says the same in para 18 of his affidavit:

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48 *McGuire v Hastings District Council* (2002) 8 ELRNZ 14, [2002] 2 NZLR 577 (PC) at [21]

> The trust does not oppose granting Mr Shaw and his family access across the Tauwhao Te Ngare block. The trustees have long been prepared to grant him a licence so that he can freely travel between his property and the wharf, and this offer remains open to Mr Shaw and Mr Baker.

[103] However, as Mr Koning posits, it is likely that this alternative finds no favour with Mr Shaw because he may have other plans in mind. Counsel suggests that a reason for Mr Shaw's refusal of this alternative is that he may wish to sell the land to a third party. Mr Shaw himself confirmed that he is 78 years of age and that his wife has been unwell and has ongoing health challenges. Access to their land by boat is therefore problematic. Doubtless, the importance of guaranteed legal access to any third party prospective purchaser cannot be underestimated. In fairness, I note that there is little if any concrete evidence on the point but it must remain nonetheless a matter of potential concern for the appellants should the land eventually be sold to persons outside of Ngai Tauwhao hapū.

[104] For the appellants, the hapū and the land owners as mentioned, the consequences might include removal of at least one house. An additional consideration, as counsel has outlined, is that there are now three sets of beneficiaries' interests to consider should further proceedings commence over the roadway, in the absence of agreement. Further disruptions could also include compromising the protection of the urupā and other sites of importance to the hapū. Understandably, if as counsel contends, the 1976 order were to remain or if some variation on it were imposed, then the hapū would rightly be concerned about access by members of the public to these areas, the urupā, marae and foreshore reserve. They are as entitled as anyone to have their rights to privacy and for the quiet enjoyment of their land respected without the prospect of trespassers interfering with those rights.

[105] If Mr Shaw were to agree with the trustees a licence for up to 14 years, the appellants would then have some assurance that, members of their wider community who have been on the island for over three decades, will continue to enjoy rights of access to their land. That does not seem an unreasonable outcome. If the ownership should change at some point in the future then the issue of ongoing access can be discussed with any new owners and the trustees in due course.

[106] In any case, the Court should always hesitate and make a careful assessment of the relevant interests where it is contemplating a scenario where the rights of the group are to be altered for the benefit of individuals, as this Court has emphasised:[49]

> …If this type of development [the use of trusts and incorporations] is to be a viable option available to Maori people of today, then the Court must tread warily with applications for partition, and, in its consideration of the interests of the owners as a whole, is bound to give

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[49] *Cottrell – Tarawera C6* (1982) 9 Täkitimu Appellate Court MB 286 (9 ACTK 286)

> full rate to any policy decisions of the owners at general meetings favouring development on a collective basis as a preferred alternative to the fragmentation of titles to individual owners and to individual unit settlements.

[107] That principle was also underscored by this Court in *re Rangiwaea No 4 F16 No 4B1*:[50]

> … the propensity of Maoris to act communally for the good of the people as a whole, as an incidence of custom on the one part, and as an incident of necessity where ownership has become fragmented on the other, must prevail over the propensity of the law to facilitate individual ownership and entitlement, and the furtherance of individual rights.

[108] In summary, Mr Shaw seeks reasonable access if the 1976 roadway order is cancelled. The appellants have agreed to provide him with a licence for that purpose of up to 14 years. He claims this proposal is uncertain. I disagree. He simply elects not to accept this alternative. He also says that it is for a finite term. That is likely to be correct but there is no guarantee that any such licence that is issued will or will not be renewed. In any event, Mr Shaw may have other considerations is mind, as he is entitled to ponder. But his refusal to accept the alternative access arrangement cannot mean that the balancing of interests, including the interests of justice, should necessarily fall in his favour. By making the cancellation order conditional on an alternative route being agreed it might appear that this is what has in fact occurred. Perhaps of more concern, if there is no agreement between the parties, then presumably the flawed 1976 roadway order will remain extant. It is difficult to see how on any basis, including the interests of justice, that it will be lawful for this defective order to remain in force.

Why did Judge Clark recommend that the 1976 roadway order be cancelled?

[109] As foreshadowed, Judge Clark prepared a report and recommendation for the Chief Judge where he concluded that the following errors had been made in relation to the 1976 roadway order:[51]

(a) the application and submissions made by the Deputy Registrar wrongly referred to consents having been obtained at a meeting of owners in 1973;

(b) in relation to Rangiwaea 1A2C only one of two owners' consent had been obtained;

(c) the Court wrongly assumed that "trustees" had been appointed to Rangiwaea 1A1. The seven persons who provided "consent" were no more than an informal committee. In total only 7 out of 277 owners consented;

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50 (1977) *re Rangiwaea No 4 F16 No 4B1* 12 Whanganui Appellate Court MB 342 (12 APWG 342) at 6

51 *Trustees of Tauwhao-Te Ngare Trust v Shaw – Tauwhao-Te Ngare Block* [2013] Chief Judges MB 567 (2013 CJ 567) at 577

(d) there is no evidence that one of the two owners in the Rangiwaea 1A1 block, Takiri Taikato knew of the 1976 hearing. There was a further error of law in that there is no evidence that other than the seven "trustees" that the remaining owners in Rangiwaea 1A1 were notified of the application and hearing; and

(e) the Court should not have made a roadway order over a Māori reservation as it breached section 439(9) of the 1953 Act.

[110] Judge Clark then proposed three options for the Chief Judge to consider, cancellation of the 1976 roadway; or leave the roadway intact; or amend the roadway order or make a new roadway order. By a narrow margin he preferred the first option, to cancel the roadway because:[52]

(a) There were numerous errors of fact and law in the presentation of the 1976 application to the Court and on the part of the Court in making its decision;

(b) Whilst cancellation of the 1976 roadway will no doubt cause considerable inconvenience to the D & M Shaw Family Trust and the Seaview Trust, they will not be left landlocked. They will be able to continue to access their properties by boat and sea;

(c) The D & M Shaw Family Trust and the Seaview Trust titles are marked with the memorial "That the within lands have no legal road frontage." They have relied upon the fact that a paper roadway order exists traversing Rangiwaea 1A1 and 1A2C. Strictly speaking as is clearly marked on the titles, their properties do not have legal road frontage;

(d) If the option at paragraph 100(c) is adopted any roadway formed and surveyed would dissect the marae and urupā and run across the foreshore reservation and part of the marae reservation. It would also hamper the aspirations of the trustees of Tauwhao Te Ngare to further develop the papakāinga block.

[111] These errors, along with those referred to in para [108], are fatal. They must render the 1976 order flawed beyond redemption. And it will be remembered that the orders were never sealed or signed, being in draft form, like the accompanying diagram. According to counsel neither was the roadway ever surveyed or formed. But if the Chief Judge's decision is upheld, as foreshadowed, it will mean that unless the appellants agree with Mr Shaw, the 1976 roadway order will remain in force.

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52 Ibid at 582

[112] These proceedings in one form or another have been before the courts for over a decade. Doubtless they have consumed the time and resources of both parties. Cut to their core they are a dispute over access between two residents on the one hand, and Ngai Tauwhao hapū on the other. While there may be inconvenience to Mr Shaw and his family, a practical remedy is available; one that will serve all of the interests of justice without recourse to further costly and time consuming litigation.

[113] In conclusion, I agree with the report of Judge Clark in the original s 45 proceedings where, reluctantly, he recommended that the correct course of action was to cancel the 1976 roadway order and for the process of determining suitable means of access for the affected individuals to commence from the beginning.

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L R Harvey
JUDGE