IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2009-463-888
[2017] NZHC 416

BETWEEN	PETER DANIEL STAITE, JEAN TAIRAU-CARSTON, DEBORAH PAKAU, LEONIE REI NICOLLS AND BRUCE ANDERSON BAMBER AS TRUSTEES OF THE WHAOA NO 1 LANDS TRUST Plaintiffs and Ors
AND	ANDREW MARUTUEHU KUSABS, DONALD MAIRANGI BENNETT, JULIAN KUMEROA KEEPA AND WIREMU WAKA AS TRUSTEES OF THE TUMUNUI LANDS TRUST Defendants and Ors

Hearing:	25, 26, 27, 28, 29 July, 1, 2, 3, 4, 8 and 9 August 2016
Counsel:	D G Chesterman and J P Koning for Plaintiffs M S McKechnie and D Prasad for Defendants
Judgment:	13 March 2017

JUDGMENT OF HEATH J

This judgment was delivered by me on 13 March 2017 at 2.30pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

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The nature of the claims

[1] Mr Edward Moke died in 2003. At material times, he was a trustee of the Whaoa No 1 Lands Trust (the Whaoa Trust),[1] the Tumunui Lands Trust (the Tumunui Trust)[2] and the Ngāti Whaoa Māori Reservation (the Reservation Trust).[3] The

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1 The Whaoa Trust was constituted by an order of the Māori Land Court made on 5 March 1982 under s 438 of the Māori Affairs Act 1953. It continues as an ahu whenua trust by operation of s 354 of Te Ture Whenua Māori Act 1993.

2 The Tumunui Trust was constituted by an order of the Māori Land Court, made on 8 December 1986, under s 438 of the Māori Affairs Act 1953. It continues as an ahu whenua trust by operation of s 354 of Te Ture Whenua Māori Act 1993.

Whaoa Trust and the Tumunui Trust are presently constituted as ahu whenua trusts, under Te Ture Whenua Māori Act 1993 (the 1993 Act). The Reservation Trust was created when the Māori Land Court made a recommendation that part of the Whaoa Trust's land be set aside as a Māori reservation (the Reserve).[4]

[2] The Whaoa Trust and the Reservation Trust allege that, during the period of his trusteeships, Mr Moke breached duties that he owed as a trustee of each, by involving himself in a transaction that benefitted the Tumunui Trust, to the detriment of both the Whaoa Trust and the Reservation Trust. Mr Moke's conduct arises out of negotiations that resulted in a lease into which Whaoa Trust (as lessor) entered with the Tumunui Trust (as lessee) in 1994 (the Tumunui lease).

[3] The Tumunui lease was over land known as Rotomahana Parekarangi No 8 Block (the No 8 Block). That land is located on State Highway 5, near Reporoa, in the Central North Island. The Tumunui Trust has been in possession of the No 8 Block since 1 June 1989.[5] While executed in 1994, the Tumunui lease recognised that it had been operative from 1 July 1992.

[4] The Reserve is part of the larger No 8 Block. On the face of the documents that led to its creation, the Reserve consists of 174.0183 hectares, out a total land mass of 529.2973 hectares.

[5] The Reserve was formally established through a *Gazette Notice* published on 27 February 1986.[6] No partition order was ever made by the Māori Land Court to define the boundary between the Reserve and the remainder of the No 8 Block. The absence of such an order has led to a number of difficulties in the description of the area contained within the Reserve and a lack of definition about the way in which beneficial owners of the No 8 Block can access the Reserve.

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3 The Reservation Trust is also known as the Rotomahana Parekarangi 8 Reservation Trust. The Reservation Trust was created by *Gazette Notice* following a reconsideration by the Māori Land Court, under s 439(1) of the Māori Affairs Act 1953: see *Re Rotomahana Parekarangi 8* (1985) 215 Rotorua MB 62.

4 *Re Part Rotomahana Parekarangi 8* Block (1985) Rotorua MB 62. See the Māori Land Court's order of 31 October 1985, set out at para [27] below. The recommendation was made pursuant to s 439(1) of the Māori Affairs Act 1953.

5 See para [58] below.

6 The relevant terms of the *Gazette Notice* are set out at para [28] below. See also para [28] below.

The issues

[6] The Whaoa Trust's primary allegation is that Mr Moke's involvement in the negotiations that led to the Tumunui lease constituted a breach of his fiduciary duty of loyalty.[7] The Whaoa Trust asserts that the Tumunui lease, in the form finally executed, provided a material benefit to Tumunui Trust, and corresponding material detriment to the Whaoa Trust. The Whaoa Trust seeks, as against the Tumunui Trust, rescission of the Tumunui lease or damages and, as against the personal representatives of Mr Moke, declarations as to the effect of his conduct. No monetary relief is sought against Mr Moke, whose personal representatives abide the decision of the Court.

[7] Two separate issues involve the Reservation Trust:

(a) The first concerns the location of the boundary between the Reserve and the No 8 Block. When the No 8 Block was surveyed for the purpose of the proposed Tumunui lease, the Reserve was found to contain 15.8 hectares less land than was set apart as a result of the Māori Land Court's recommendation. The Reservation Trust seeks orders to rectify that position, by aligning the area of the Reserve to that contemplated by the order recommending its creation.

(b) The second concerns an easement, by which those entitled to enter the Reserve may pass over the farm land leased by the Tumunui Trust. The Reservation Trust asserts that the Tumunui Trust is deliberately impeding rights of use of those lawfully entitled to access the Reserve.[8]

[8] For convenience, I characterise the discrete claims under two discrete headings:

(a) The Tumunui lease claims; and

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7 Reliance is placed on *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354. That decision is discussed fully at paras [132]–[145] below.

8 This includes an allegation that the access way is not capable of being used because (in its present state of repair) it is not possible to pass other than by use of a four wheel drive vehicle.

(b) The Reserve claims.

[9] The Tumunui Trust and Mr Moke's personal representatives each deny any liability to the Whaoa Trust, or to the Reservation Trust. Although the proceeding was not issued until 17 December 2009,[9] most of the material events occurred in the period between 1988 and 1994. As a result, by way of affirmative defences, questions of limitation arise, both under the Limitation Act 1950 and the equitable doctrine of laches.[10]

[10] The Māori Affairs Act 1953 (the 1953 Act) applied when most of the events in issue occurred. It was repealed and replaced by Te Ture Whenua Māori Act 1993 (the 1993 Act) with effect from 1 July 1993. The 1993 Act will apply in respect of any applications to the Māori Land Court that may be required to resolve outstanding issues that this Court has no jurisdiction to determine.

The No 8 Block: an historical perspective

(a) Questions of mana whenua

[11] Mr Peter Staite was appointed as a trustee of Whaoa Trust on 2 August 2005, and of the Reservation Trust on 3 November 2009. He is currently chairman of the Whaoa Trust. Although he is the prime mover behind the litigation, he has no first-hand knowledge of any of the material events in issue. To a large extent, the Whaoa Trust's claims must be determined on the basis of contemporary documents.

[12] Mr Staite is of Ngāti Whaoa descent. Since about 1990, he has been researching the history of Ngāti Whaoa and its land interests. He read extensively in order to prepare evidence for various Waitangi Tribunal inquiries into Central North Island claims. For example, Mr Staite was a claimant and gave historical evidence of Ngāti Whaoa grievances during the period of the Tribunal's "Ngāti Whaoa Rohe Claim" inquiry, from 2001 to 2005.

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[9] The claims as originally framed were struck out in their entirety by Associate Judge Christiansen, on 25 July 2013: *Staite v Kusabs* [2013] NZHC 1851. Subsequently, on 30 May 2014, Ellis J reinstated some of the causes of action: *Staite v Kusabs* [2014] NZHC 1183 at paras [89] and [90]. The time taken to complete those interlocutory steps provides some explanation for the delay in bringing the proceeding to hearing in July 2016.

[10] As to laches, see *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335.

[13] Mr Staite also gave evidence on two other Waitangi Tribunal inquiries, on behalf of Ngāti Hurunga te Rangi, Ngāti Te Kahu, Ngāti Taeotu and Ngāti Whakaue. Those claims were known as the "Whakarewarewa Lands Claim" and the "Whakarewarewa Geothermal Lands Claim".

[14] Mr Staite deposed that all members of Ngāti Whaoa descend from their eponymous ancestor, Whaoa, who arrived in New Zealand, with his grandfather, Maaka, and approximately 40 others, on board the waka Te Arawa, around 1300. Mr Staite recited his whakapapa in evidence, and distinguished his Ngāti Whaoa lineage from that of hapū who make up the beneficial owners of the Tumunui Trust. There was no serious contest to Mr Staite's evidence of whakapapa and tribal rohe. For the purpose of this proceeding, I accept his evidence on that topic.

[15] The rohe of Ngāti Whaoa extends from Huka Falls in the south, to Pareheru, near Lake Rotomahana, in the north; and from Te Niho o Te Kiore on the Waikato River in the west, to the Rangataiki River in the east. The rohe includes the Paeroa Ranges. Mr Staite referred to a decision of the Native Land Court in the "late 19th Century" that originally determined that individuals from Ngāti Whaoa were the customary owners of the Rotomahana Parekarangi 3 Block, comprising approximately 18,000 acres. As a result of successive partitions this became (what I am calling) the No 8 Block.[11]

[16] Mr Staite referred to the degree of connection, in genealogical terms, between Ngāti Whaoa and Ngāti Tumatawera, the hapū he says is most closely linked to Mr Moke. Mr Staite's evidence was that Mr Moke was regarded as a rangatira of both Ngāti Whaoa and Ngāti Tumatawera.

[17] Mr Staite and the late Mr Moke were first cousins. Mr Staite deposed that Mr Moke's tangihanga was held at Ngāpuna, on Tumatawera Marae. That is where Mr Moke is buried. Mr Moke's headstone carries the name "Eria Paurini Moke," and the date of his death, 28 October 2003. His tribal affiliations are identified on his headstone. It refers to "Tumunui" as his mountain. There are no references to any Ngāti Whaoa connections.

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[11] See paras [22]–[25] below.

[18] Mr Staite expanded on that evidence. While he accepted that both Ngāti Whaoa and Ngāti Tumatawera could whakapapa to a common ancestor, Atua Matua, Mr Staite said that Ngāti Whaoa is four generations removed from Atua Matua, while Ngāti Tumatawera is eleven generations removed. Mr Staite told me that Ngāti Whaoa and Ngāti Tumatawera descend through different lines, through two half brothers of Atua Matua. Mr Staite said that the

> … mana [of each] is quite separate, their identity's quite separate, even their origins, they're quite separate.

[19] Mr Staite explained that was why Ngāti Whaoa held mana whenua in the Paeroa Ranges, the Kaiangaroa forest area, the Kaiangaroa plains and "other" places. There is no doubt, on the evidence that I heard, that Ngāti Whaoa has mana whenua over the land comprised in the No 8 Block and the Reserve. On the other hand, it is common ground that about 80 per cent of the beneficial owners of the Whaoa Trust are also beneficiaries of the Tumunui Trust.[12]

[20] I asked Mr Staite how, given the different origins of each tribal group, about 80 per cent of the beneficial owners of the Whaoa Trust could also be beneficiaries of the Tumunui Trust. He answered that there were "a lot" of people by the name "Moke" in the list of beneficial owners of Whaoa Trust. It is through their ancestry that the number of common beneficial owners developed. Mr Staite said that he was aware that one of his ancestors, with a common name "Edie" had played a significant part in creating the title of the Tumunui Block, and he knew that Mr Moke was proud of that.

[21] I asked Mr Staite about whether Ngāti Whaoa or Ngāti Tumawera had areas of land in respect of which each held mana whenua. He answered that to reach land over which Ngāti Tumatawera exercised mana whenua, it was necessary to travel some three or four kilometres from the summit of the Paeroa Ranges, towards Rotorua. Ngāti Tumatawera's rohe is in the area to the north of Reporoa.

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[12] Specific information about the extent of Mr Moke's interests in the Whaoa Trust, the Reservation Trust and the Tumunui Trust is set out at para [152] below.

(b) Creation of the Whaoa Trust

[22] As a result of a series of partition orders made by the Māori Land Court in respect of the original Rotomahana Parekarangi Block, the No 8 Block was formed.

[23] On 16 April 1956, the Māori Land Court partitioned the land, so as to establish (what were called) the Rotomahana Parekarangi 3A3A3B2B2B No 1 (No 1 Block) and Rotomahana Parekarangi 3A3A3B2B2B No 2 (No 2 Block). The No 1 Block consisted of about 430 acres (174 hectares) of native bush. The No 2 Block was mostly in pasture, and comprised 879 acres (355 hectares).

[24] On 12 February 1982, the Registrar of the Māori Land Court filed an application under s 438 of the 1953 Act, by which the Court was asked to vest the No 1 Block in responsible trustees. An order to that effect was made on 5 March 1982.[13] That Trust became known as the Rotomahana Parekarangi 3A3A3B2B2B1 Lands Trust.

[25] On 19 May 1982, the Whaoa Trust was established under s 438 of the 1953 Act, and trustees were appointed.[14] On that date, the Māori Land Court also made orders cancelling the titles to the No 1 and No 2 Blocks, and amalgamating them.[15] The amalgamation order created the No 8 Block. On the same day, the Māori Land Court vested the amalgamated No 8 Block in the trustees of the Whaoa Trust.

(c) Creation of the Reservation Trust

[26] The term "Māori reservation" is one of art. A "Māori Reservation" is one established for specific purposes, following a recommendation by the Māori Land Court.[16] In 1985, a recommendation could be made under s 439 of the 1953 Act. Materially, in the form in which it stood as at 31 October 1985, s 439 provided:[17]

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13 *Re Rotomahana Parekarangi 3A3A3B2B2B1* (1982) 202 Rotorua MB 192.

14 *Re Rotomahana Parekarangi 8* (1982) 203 Rotorua MB 48.

15 Pursuant to s 435(1) of the Māori Affairs Act 1953.

16 The nature and purposes of a Māori reservation are explained more fully at paras [223]–[229] below.

17 As at 31 October 1985, the term "Secretary" was used in s 439(1)(2) and (5). As from 1 October 1989, the term was changed to "General Manager" (by s 10 of the Māori Affairs Restructuring Act 1989). A further change was made from 1 January 1992 by s 9(1) of the Ministry of Māori Development Act 1991, where the term was changed to "Chief Executive".

439 Māori Reservations For Communal Purposes

(1) The Secretary of Māori Affairs may, by notice in the Gazette issued on the recommendation of the Court, set apart any Māori freehold land or any General land as a Māori reservation for the purposes of a village site, marae, meeting place, recreation ground, spots ground, bathing place, church site, building site, burial ground, landing place, fishing ground, spring, well, catchment area or other source of water supply, timber reserve, or place of historical or scenic interest, or for any other specified purpose whatsoever.

(2) The Secretary may, by notice in the *Gazette* issued on the recommendation of the Court, declare any other Māori freehold land or General land to be included in any Māori reservation, and thereupon the land shall form part of that reservation accordingly.

(3) Except as provided by subsection (12) of this section, every Māori reservation under this section shall be held for the common use or benefit of the owners or of Māoris of the class or classes specified in the notice. For the purposes of this subsection the term "Māoris" includes persons who are descendants of Māoris.

(4) Land may be so set apart as or included in a Māori reservation although it is vested in an incorporated body of owners or in the Māori Trustee or in any other trustees and notwithstanding any provisions of this Act as to the disposition or administration of that land.

(5) On the recommendation of the Court the Secretary by notice in the Gazette, may, in respect of any Māori reservation made under this section, do any one or more of the following things:

(a) He may exclude from the reservation any part of the land therein comprised:

(b) He may cancel the reservation:

(c) He may redefine the purposes for which the reservation:

(d) He may redefine the persons or class of persons for whose use or benefit the reservation is made.

…

(7) The Court may, by order, vest any Māori reservation in any body corporate or in any 2 or more persons in trust to hold and administer it for the benefit of the persons or class of persons for whose benefit the reservation is constituted, and may from time to time, as and when it thinks fit, appoint a new trustee or new trustees or additional trustees.

…

[27] On 31 October 1985, the Māori Land Court made a recommendation to set aside land out of the No 8 Block, for a Māori reservation.[18] In granting the application, Judge Hingston said:[19]

> **Court**: It appears that this exercise is to the benefit as well the owners the people of New Zealand perhaps Her Majesty in her wisdom will make provision for compensation to these owners who have retired this area of land. The Orders sought appear meet – there is no objection – the owners, the District Council and the Waikato Valley Authority are all apparently in accord therefore –
>
> (i) orders S 27/53 and S 438(c)/53 on own motion terminating Trust in respect of the bush area comprising some 174.01483 ha (430 acres) shown on plan filed in Court and besting in beneficial owners.
>
> (ii) *S 439(1)/53 recommending that this area of 174.01483 ha (430 ac.) be set apart as a Māori Reservation for the purpose of a Timber Reserve catchment area and place of Historical interest for the common use and benefit of the beneficial owners, their descendants and the Ngati Whaoa*.
>
> (iii) S 439(7)/53 subject to Reservation being gazetted Court will vest in present S 438/53 Trustees.
>
> (iv) S 149 Rating Act 1967 Recommendation to Governor General that land be exempt from Rates.
>
> (Emphasis added)

[28] On 31 October 1985, pending the issue of a *Gazette* Notice, the Māori Land Court made an order vesting the Reserve in the trustees of the Whaoa Trust. One of those trustees was Mr Moke.[20] The order recorded that the Reserve had been set aside "for the purpose of a timber reserve, catchment area and place of historical interest for the common use and benefit of the beneficial owners, their descendants and the Ngati Whaoa".[21] That reflected the terms of the Court's earlier recommendation.

[29] Following the Court's recommendation, the Whaoa Trust applied to the Secretary of Māori Affairs under s 439 of the 1953 Act,[22] to have the native bush

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18 The recommendation was made under s 439 of the Māori Affairs Act 1953. The material part of s 439 is set out at para [26] below.

19 *Re Rotomahana Parekarangi 8* (1985) 215 Rotorua MB 62 at 93 (emphasis added). Orders of the Māori Land Court commonly use the abbreviation of the section and the year of the relevant Act. So, "S27/53" means s 27 of the Māori Affairs Act 1953.

20 See the terms of the order set out at para [27] above.

21 The order was made under s 439(7) of the Māori Affairs Act 1953.

22 Set out at para [26] below.

area set aside as a Reserve. On 17 February 1986, the Secretary acted on that recommendation. His decision was published as a *Gazette* Notice on 27 February 1986, as required by s 439(1) of the 1953 Act. The *Gazette* Notice stated:

> *Setting Apart Māori Freehold Land as a Māori Reservation*
>
> Pursuant to section 439 of the Māori Affairs Act 1953, the Māori freehold land described in the Schedule hereto is hereby set apart as a Māori reservation for the purpose of a timber reserve, catchment area and place of historical interest for the common use and benefit of the beneficial owners, their descendants and the Ngati Whaoa.
>
> **SCHEDULE**
>
> SOUTH AUCKLAND LAND DISTRICT
>
> All that piece of land situated in Block X, Paeroa Survey District and described as follows:
>
> Area ha 174.0183 being Part Rotomahana Parekarangi 8 and being part of the land on Order Cancelling Several Titles and Substituting One Title of the Māori Land Court dated 19 May 1982.
>
> Dated at Wellington this 17th day of February 1986.
>
> B S Robinson
>
> Deputy Secretary for Māori Affairs
>
> …

[30] The critical components of the Secretary's decision are:

(a) Land comprising 174.0183 hectares was set aside for the purpose of "a timber reserve, catchment area and place of historical interest".

(b) The Reserve was created "for the common use and benefit of the beneficial owners of the No 8 Block and Ngāti Whaoa.

(d) Creation of the Tumunui Trust

[31] The present chairman of the Tumunui Trust is Mr Andrew Kusabs.[23] He is a chartered accountant, based in Rotorua. He has had extensive experience in the

[23] Mr Andrew Kusabs' son, Mr Craig Kusabs, also gave evidence. However, as I do not need to refer to the son's evidence, I describe Mr Andrew Kusabs as "Mr Kusabs" in the balance of this judgment.

administration of Maori trusts and authorities, over the past 30 years or so. Mr Kusabs gave evidence of the establishment of the Tumunui Trust, and Mr Moke's appointment as a trustee.

[32] The Tumunui Trust was responsible for the administration of Māori freehold land known as Tumunui, situated in Blocks IX, X, XIII and XIV of the Tarawera Survey District. On 8 December 1986, Judge Hingston heard an application to the Māori Land Court to vest the land in alternative trustees.[24] The Tumunui Trust was in financial difficulties. The purpose of appointing new trustees was to bring order to its affairs.

[33] The Trust Order for the Tumunui Trust was made by the Māori Land Court on 8 December 1986. It records that the new trustees were to "take over and/or assume liability for any asset/s or liabilities of the Trust formerly known as Tumunui Block and terminated by the Māori Land Court on the 8th day of December 1986".[25]

[34] There was a dispute between Mr Kusabs and Mr Staite about whether Mr Moke was appointed as a trustee of the Tumunui Trust on 8 December 1986. Mr Staite believes that some evidence that, at the time the Tumunui Trust was established, Mr Moke's father, Eria Tupuritia Moke, was one of the trustees appointed by the Court. Mr Staite gave evidence that Mr Moke became a trustee after his father died on 22 October 1987. Mr Staite cannot give any first-hand knowledge of the appointment of trustees of the Tumunui Trust. He was not present at the Court hearing. On the other hand, Mr Kusabs was present.

[35] The rationale for the establishment of the Tumunui Trust can be gleaned from the reasons given by Judge Hingston on 8 December 1986. The Judge said:[26]

> As to the future of the Trust – the Court indicated that if it was not satisfied with the persons elected by the meeting of owners it would consider appointing persons other than those nominated. It also indicated that it might be appropriate if there was a Responsible Trustee – Advisory Trustee Trust.

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24 *Re Tumunui Blocks IX, X, XIII and XIV* (1986) 218 Rotorua MB 12–17.
25 Ibid.
26 Ibid, at 16–17.

> Having heard each of the Trustees that are here today I am of the view that there should be a Responsible Trustee – Advisory Trustee Trust created here. This is in no way a reflection on the persons I am going to appoint as Advisory Trustees but rather a recognition that they have something to contribute and they can learn from the Trustees who are more experienced in this area and in particular from Mr Kusabs on financial matters. With this in mind the Court makes firstly an order –
>
> S 438(3)(c)/53 determining the present Trust and vesting the land again in the persons entitled.
>
> The Court recognising that the owners have been given an opportunity of considering who should be Trustee of this block makes an order pursuant to s 438(2) of the Māori Affairs Act vesting Tumunui in [five Responsible Trustees and four Advisory Trustees].
>
> …

[36] The trustees whose names were put to the Māori Land Court for approval had been identified following a resolution of assembled owners. Mr Kusabs deposed that all nominated trustees were present, and were questioned by Judge Hingston before they were appointed. That is confirmed by Judge Hingston's decision. Although one of the people appointed as a trustee was described as "Mr Eria Moke", Mr Kusabs identified that person as Mr Moke, not his father.

[37] The person whose name was recorded as being "Eria Tupuritia Moke" was questioned by Judge Hingston. The discussion between the Judge and the nominated trustees was recorded and transcribed. After having been sworn, "Eria Moke" said:[27]

> I am a member of Te Arawa Māori Trust Board – also on other Trusts and Hurunga Marae. If I disagreed with financial advisers I would seek second opinion. I am on Ngati Whaoa Farm Trust.

[38] Mr Kusabs referred to the record of the hearing on 8 December 1986, and to the decision given by Judge Hingston at its conclusion. Having done so, he deposed:

> 24. I am positive that the person known to be Eddie Moke who was in the Court was the same man who was appointed by Judge Hingston. This was the same man who was in attendance at meetings from the date of his appointment until he died. The person who attended the Tumunui trustees meetings was the man who I knew to be a trustee of the Whaoa … Trust. He had said this at the hearing before Judge Hingston on the 8th December 1986 and made reference to his Whaoa trusteeship from time to time when meeting with the Tumunui trustees.

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[27] Ibid, at 15.

[39] As Mr Moke was appointed as a trustee of the Whaoa Trust on 19 May 1982 and his father was not a trustee of that Trust, I am satisfied that Mr Kusabs is correct when he says that Mr Moke was appointed as a trustee of the Tumunui Trust on 8 December 1986. Mr Moke was appointed as one of five "Responsible Trustees" under s 438(2) of the 1953 Act with four additional people being appointed as Advisory Trustees" under s 438(2A).

[40] I find that, from 8 December 1986, Mr Moke was a trustee of both the Whaoa Trust and the Tumunui Trust until his death in 2003. I am satisfied, from the record of the 8 December 1986 hearing, that Mr Moke declared his interest as a trustee of the Whaoa Trust to the Māori Land Court when he was appointed as a responsible trustee of the Tumunui Trust.

The Mills lease – 1964–1989

[41] At the time of the 1956 partition, the Māori Trustee was responsible for the administration of both the No 1 and No 2 Blocks. On 21 November 1962, with effect from 13 December 1961, the Māori Trustee leased each block to Mr John Blackler. By December 1963, Mr Blackler had fallen into arrears of rent and rates. He was also alleged to have breached other covenants of the lease. The assembled owners resolved to transfer the Blackler leases to H Allen Mills Ltd (the Mills lease), and to vary its rental and term.

[42] That resolution was confirmed by the Māori Land Court, on 25 March 1964. H Allen Mills Ltd then acquired the lease from Mr Blackler. The Mills lease was to run until 12 December 2004. Rent was to be calculated by reference to a formula: five per cent of the capital value of the land, less any improvements made by the lessee. The lease was transferred, subject to execution of a deed that granted the owners access to the area of native bush in the No 1 Block. That enabled access across the sheep and beef farm operated on the land, to what is now the Reserve.

[43] H Allen Mills Ltd farmed the land comprised in the Mills lease until 1989. On 2 February 1989, representatives of the Whaoa Trust had met with Mr Mills, who had indicated a desire to wind up his farming operation due to age. Around that

time, Mr Mills had begun to engage in discussions about the possible sale of the lease to another party.

Negotiations to acquire the Mills lease

[44] During 1988, the Tumunui Trust was investigating, through its farm adviser, Mr Hyland, the possibility of acquiring farm land near Reporoa. The No 8 Block was one of those under consideration. On 25 October 1988, Mr Hyland attended a meeting of the Tumunui Trust. He provided a detailed report on Mr Mills' sheep and beef farm operation.

[45] Mr Hyland addressed the possibility of the Tumunui Trust acquiring the Mills lease and converting the land into a dairy unit. In a report dated 18 November 1988 he had advised the Tumunui Trust that an extension of at least 20 years from 1992, making a total term of 43 years, was "essential and reasonable" given the "useful life of a cow shed and fencing".

[46] By February 1989, Mr Mills had identified another person from the area, Mr Ian Bell, whom he was considering as a possible transferee. There is evidence that Mr Bell attended the meeting on 2 February 1989. A memorandum prepared by Mr Price, then-secretary of the Whaoa Trust,[28] suggests that those present on the Whaoa Trust side did not find him "particularly impressive". Mr Price recorded that "no basic work had been done [by Mr Bell] on formulating his management proposals". He added that the Whaoa Trust had been treated "to very enthusiastic ideas with no real substance to back them up".

[47] After addressing Mr Bell's presentation, Mr Price recorded that the Whaoa Trust was aware that the Tumunui Trust was interested in acquiring the Mills lease. He recorded that the Tumunui Trust "had experienced delays in responding to [Mr Mills]" who had then "found" Mr Bell. After having observed that Mr Mills appeared to be "shutting Tumunui out of the lease", Mr Price referred to a separate meeting, with Tumunui Trust representatives, at which "very impressive proposals for managing the property" were presented.

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[28] Mr Price was Mr Staite's step-father.

[48] I am satisfied that the proposals made at that meeting were based on Mr Hyland's report of 1 February 1989, and were advanced by him at that time. On 23 February 1989, Mr Hyland prepared a monthly report on the Tumunui Trust's farming activities, for its trustees. Towards the end of his report he said:

> **DAIRY FARM PROPOSALS**
>
> As I am sure you are all aware, we were unsuccessful with our bid for the Allen Mills Māori Lease Block. This was extremely disappointing as we had done an awful lot of work in this regard and to miss out on the eleventh hour was disappointing. However, any proposals considered in the future will be a relatively easy exercise with the knowledge and costings now at our finger tips.

[49] The trustees of the Tumunui Trust met on 24 February 1988. One of the items on the agenda was the dairy farm proposal. Mr Moke is recorded as having reported to the meeting "that everything was not finalised with Ian Bell yet. There was a chance that the agreement might fall through".

[50] From a memorandum prepared by Mr Price, dated 16 April 1989, it appears that Mr Hyland's study was presented to the Whaoa Trust at a meeting on (or possibly shortly after) the date of that meeting. That meeting was held (most probably) between 20 March and 2 April 1989.[29] Trustees of both Whaoa Trust and Tumunui Trust were in attendance. An undated minute of the meeting recorded that, in addition to two trustees of the Tumunui Trust and Mr Hyland, "E Moke and three members of the Whaoa No 1 Trust" were also present. In 1989, while not recorded as such in the minutes of that meeting, Mr Moke was also a trustee of Tumunui Trust.[30]

[51] Two of the trustees of the Whaoa Trust in 1989 gave evidence before me, Mr Edwards and Mr Bamber. Mr Edwards did not recall attending this meeting. Given the passage of time, I found Mr Bamber's memory (understandably) to be poor. Although I think it is possible that Mr Bamber did attend the meeting, his evidence was (through no fault of his own) unreliable. For that reason, I put his oral evidence on this topic to one side, and rely on the documentary record.

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[29] See para [52] below.
[30] See para [39] above.

[52] The meeting was held at Mr Kusabs' office in Rotorua. Having been shown the complete minute book of the Tumunui Trust for the relevant period, Mr Kusabs considered that the undated minute, which he acknowledged he had prepared, referred to a meeting held sometime between 20 March 1989 and 24 April 1989. With one qualification, I accept that evidence. I consider that the meeting must have taken place before the discussions at Mr Mills' home on 3 April 1989, as the minutes refer to the "asking price" for the lease.[31] That puts the meeting date as somewhere between 20 March and 2 April 1989.

[53] The purpose of this meeting was to consider the possibility that the Tumunui Trust might acquire the Mills lease, on the basis that its term was extended. The minutes record:

> …
>
> Mr Hyland then explained the Tumunui lands Trust's position so far as it related to land leased by Mr Allen Mills from the Whaoa No.1 Trust which was available for purchase. The asking price was $200,000 and the Tumunui Lands Trust had considered the purchase as a way of entering into the dairy farming arena. Costings had been done which showed that the leasehold payable to Mr Mills could be recovered over the 23 year term remaining but the goodwill that he would be prepared to offer was $150,000 with a maximum of $180,000.
>
> The purpose of this meeting was discuss with the Whaoa No.1 Trust our intentions and to see if we could get an extension to the lease in the event of our offer being successful. The Trustees of the Whaoa No.1 Trust were comfortable with Tumunui's participation and would do everything in their power to assist. It was felt that Mr Mills was using all his business cunning to get a higher price than he was entitled to. However, Tumunui Lands Trust felt that it did have a value and our first reaction was $150,000.

[54] At a meeting of the Tumunui Trust held on 4 April 1989, Mr Hyland reported that the proposed sale of the Mills lease to Mr Bell "had fallen through". He added that "the lease was now on the market and [Mr Mills] was offering this" to Tumunui Trust, at $200,000. Mr Kusabs and Mr Hyland both referred to a meeting that had taken place the night before at which they had spoken to Mr Mills and made a "handshake" agreement to buy the lease at $180,000, subject to trustees' approval. Mr Mills had accepted the offer on that basis. The meeting of 4 April 1989 was to determine whether the trustees were prepared to authorise that transaction.

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[31] The relevant extract from the minute is set out at para [53] below.

[55] I am satisfied that Mr Moke participated in these discussions. The minute of the Tumunui Trust's meeting of 4 April 1989 records:

> *Mr Moke felt that Mr Ian Bell had been a ring-in to push the price of the lease up. He felt that his tactics in demanding that the covenants be made could result in a much cheaper price to Tumunui*. However, the Secretary was of the opinion that the lease did have a value and it may be that we have to pay $180,000 in order to become dairy farmers. The costings that had been completed by Ashworths showed that we could recover our money within the period still remaining on the lease and, in addition, we would make a reasonable profit out of the venture. This was made on the assumption that the butterfat price would be $4.50.
>
> All the Trustees took part in the discussion and it was –
>
> Resolved: D. BENNETT/H. HATU CARRIED
>
> That the Tumunui Lands Trust purchase from H. Allen Mills the lease of Whaoa No.1 Trust property for $180,000 subject to the covenants that have not been met being rectified by 1 June 1989.
>
> It was then agreed that the Sale and Purchase Agreement be handed to Mr J. Chadwick for perusal and clarification, if necessary.
>
> (Emphasis added)

[56] On 24 April 1989, the trustees of the Tumunui Trust met again. On this occasion, one of the items of business was the possible acquisition of another parcel of land (known as the Maitland Block) from Mr Mills. That property was contiguous to the No 8 Block. If both blocks were acquired, a dairy conversion project became more viable. Eventually, the Maitland Block was acquired by the Tumunui Trust.

[57] No assignment of the Mills lease was ever executed. Instead, the discussions about assignment morphed into negotiations about the terms on which Tumunui Trust would take a new lease over the land. It is necessary to explain why that happened.

[58] It is common ground that the Tumunui Trust went into possession of the farm land on 1 June 1989, and commenced work to convert the dry stock farm to a dairy unit. In a letter to the Tumunui Trust, dated 22 June 1989, Mr Hyland reported that the time was ripe "to re-approach the Trustees of the Whaoa No 1 Trust to initiate the negotiations for the extension of the lease for a further 20 or 21 years as discussed at

our earlier talks". At a meeting on 26 June 1989, the trustees of the Tumunui Trust resolved to forward a letter to Whaoa Trust "seeking discussions with them on an extension of the [lease] past the year 2011".

[59] Mr Hyland prepared a discussion paper (dated 15 July 1989) for a meeting of trustees of both the Whaoa Trust and the Tumunui Trust. While it is not clear whether that meeting was held on or proximate to that date, I am satisfied a meeting dealing with those issues was held. The discussion paper referred to the fact that the lease had some 22 years to run, expiring on 13 December 2011.

[60] Mr Hyland proposed a term of 42 years from 1 June 1990, with rent reviews every 7 years. On that basis, the lease would end on 31 May 2032. One of the options that Mr Hyland put forward for calculation of rent was "5% of capital GV less improvements (or the previous period's rental, whichever was the greater), plus" an additional allowance based on likely milk fat returns.

[61] In his monthly report of 20 July 1989 to the trustees of the Tumunui Trust, Mr Hyland referred to work being undertaken by a farm manager, including fencing on the hill country. He referred to discussions to be held on 27 July 1989 with Mr Mills, at which the possibility of acquisition of the Maitland Block would be raised. Mr Hyland referred to the need to resolve any question of lease extensions with the Whaoa Trust as that would "influence the overall development" contemplated by the Tumunui Trust.

[62] The possibility of seeking an extension of the term of the Mills lease was considered by the Tumunui Trust at its meeting on 24 July 1989. Those minutes record:

> GENERAL BUSINESS: Whaoa No.1 Trust
>
> The Trustees felt that it was time that we met with the Whaoa No.1 Trust and discussed with the members a possible extension to the current lease. It was felt that the development of the block could be different if an extension to the lease was granted. It was arranged with Mr Moke, Chairman of the Whaoa No.1 Trust, that a meeting of the two Trusts be held on Tuesday 15 August at 2.30 p.m. – this being the same day that we meet with the Lincoln College students who will be touring the farm.

[63] The trustees of the Whaoa Trust and the Tumunui Trust met on 15 August 1989 to discuss a proposed extension. In a letter sent by Mr Price, on 16 August 1989, to the Whaoa Trust's solicitor, Mr Ross Burton of Davys Burton & Henderson, solicitors, Rotorua, (to whom I shall refer to as Mr Burton), Mr Price stated that the Whaoa trustees were "agreeable to an extension of the lease for a period of 20 years". The agreement was premised on a rental to be based on land values. The letter was vague as to the precise basis on which rent would be calculated and whether there would be any option to extend. Although the timing of rental reviews was not spelt out clearly, it appears that three-yearly rent reviews were contemplated.

[64] Although documents were not prepared at that time to give effect to the extension of the Mills lease, Tumunui Trust continued to occupy the farm land and began to expend considerable money to progress the dairy conversion. In a report of 23 February 1990 to the Tumunui Trust, Mr Hyland stated that the dairy conversion was "now in full swing".

The Tumunui lease – 1989–1994

(a) The "proposed assignment" phase

[65] Initially, the Tumunui Trust intended to take an assignment of the Mills lease, on terms reflecting an extension of the lease.[32] Later, the basis for negotiations changed and led to a new lease of the farm land being entered into. I explain, at this stage, what occurred in the "proposed assignment" phase.

[66] One of the difficulties with which the Tumunui Trust was faced was the need to obtain finance from its bankers, Bank of New Zealand (BNZ). This problem became evident following a meeting between the Tumunui Trust and BNZ to which reference was made at Tumunui Trust's meeting on 26 March 1990. Without alterations being made to the title arrangements, BNZ could not take a mortgage over the lease.

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[32] See para [63] above.

[67] The problem arose out of the creation of the Reserve. No separate title had ever been issued for that land. Mr Mills' company had continued to farm the property without encroaching into the area believed to comprise the Reserve. However, anyone acquiring the Mills lease (or entering into a new lease) who was raising finance to do so would need a Torrens title over which its leasehold interest in the property could be registered, and against which a mortgage could be registered.

[68] This difficulty was discussed further at a meeting of the trustees of Tumunui Trust on 25 June 1990. The minutes record consideration being given to a letter from Tumunui Trust's solicitor Mr Chadwick, of Messrs Chadwick Bidois, solicitors, Rotorua (to whom I shall refer simply as Mr Chadwick) dated 12 June 1990. The minutes state:

> Chadwick Bidois – 12/6/90 – Whaoa No.1 Trust
>
> *It had been raised with the Secretary by the Bank of New Zealand that the lease with Whaoa was not one that could be registered because of difficulties in the title, namely the [Reserve] having been cut [out of the No 8 Block]. This would need to be corrected so that that the bank could take a registered mortgage over the lessee's interest in the lease.* In the meantime, however, the bank had advanced the $200,000.00 and would hope to make a further advance of $300,000.00 in line with the budget presented to it. The Secretary had told Mr Chadwick to go ahead and negotiate with Davys Burton Henderson as regarding obtaining a registered title and to see if we could share any costs involved with Whaoa. *In reply, Mr Chadwick had contacted Davys Burton Henderson who could see advantages for Whaoa trustees and they had asked that we obtain our surveyor to arrange the necessary surveys.*
>
> Resolved:
>
> *That the Secretary obtain the services of a competent surveyor who was able to carry out the work promptly and the following names had been supplied:*
>
> *G Couldrey*
>
> R Phipps
>
> L Martin
>
> Resolved: R. KEEPA/H.HATU CARRIED
>
> *That the Secretary arrange a suitable surveyor to handle the Whaoa job and that John Chadwick be advised accordingly.*
>
> (Emphasis in italics added)

[69] The resolution passed by the trustees of the Tumunui Trust on 25 June 1990 makes it clear that one of the named registered surveyors was to be instructed to act *for the Tumunui Trust* in undertaking the necessary work to regularise the titles, so that BNZ could register a mortgage against the lease as security for its loan to the Tumunui Trust. In accordance with the resolutions, Mr Chadwick retained Mr Graham Couldrey, to undertake an investigation of title. In a letter of 6 July 1990 to Mr Chadwick, Mr Couldrey stated:

> Thank you for your instructions to investigate the title position on Rotomahana Parekarangi 8 so far as it affects the proposed lease …

[70] In that letter, Mr Couldrey set out an estimate of costs for the work required to provide a title against which the lease could be registered over the farm land, and to protect access to the Reserve. Mr Chadwick wrote to Mr Burton on 9 July 1990, enclosing Mr Couldrey's letter. Mr Chadwick pointed to the fact that the quotation seemed high but added that "it expresses the problem of creating and surveying the right of way to the bush block". He added:

> 2. That the costs could be minimised if:
>
> (a) There was an alternative right of access to the bush block or
>
> (b) The gazetting and surrender of the bush block could be "unwound" in such a way that the lease could then express by way of covenant a right of ingress and egress to the bush block. I do not know why the bush block reserve was created whether it be for preservation of the bush or to take future advantage of cutting rights or to allow the owners use and enjoyment thereof.

[71] In a letter to the Whaoa Trust of 13 July 1990, Mr Burton explained the reasons for the separate titles and why it was necessary for the lease to be registered. He said:

> The original lease in 1985 was for the whole of the original area of land and subsequently there was some sort of surrender releasing the bush reserve from the farming lease. The writer has suspected for some time that that surrender was not blessed with a sub-divisional plan dividing the original area into two and approved by the Rotorua District Council. Accordingly the surrender and variation of lease at the time is probably not valid and can only be validated by a valid sub-division. In any event a properly completed title survey and sub-division would give the trustees proper Certificates of Title.

> *The Tumunui Lands Trust however have indicated to us through their solicitor that they are keen to be able to have the lease registered but this can only be carried out by having a completed sub-divisional plan done and consent to by the Council. Accordingly it has been indicated to us that the Tumunui Lands Trust would very likely be prepared to contribute towards survey costs. Because of the mutual benefit to the two trusts of having properly surveyed titles, we would suggest, with your approval, that we write to the Tumunui trust's solicitors by suggesting a fifty per cent contribution from that particular trust*, in the event that you are agreeable at all to the survey. Please let us know your trusts instructions in due course.
>
> (Emphasis added)

[72] The possibility of sharing costs on an equal basis was considered at a meeting of the Whaoa Trust on 22 July 1990. The trustees resolved, after reading the solicitors' correspondence, that costs should be shared with the Tumunui Trust on an equal basis.

[73] The trustees of the Tumunui Trust considered their position at a meeting on 30 July 1990. The trustees were referred to Mr Chadwick's letter of 9 July 1990. While the Tumunui Trust was concerned about the cost, I am satisfied that its trustees recognised the likelihood that the Bank would need to register a mortgage. The minutes of that meeting record:

> Chadwick Bidois – 9/7/90 – Whaoa No.1
>
> Mr G Couldrey had reported on the titles and scheme plans required to provide proper titles to the bush area and to Whaoa No. 1. The main concern was that of access to the bush block and to actually surveying the new boundaries. The total cost of this work amounted to $11,970 which Whaoa were prepared to subsidise to the amount of 50%. When the matter was discussed, it was felt that an approach should be made to the bank of see if they did require a proper registered title or whether they were able to take other securities for their advances. Mr Hyland was going to be in conversation with Mr Cooke and would mention it to him.

[74] The minutes of a subsequent meeting of the Tumunui Trust, held on 27 August 1990, record that it was necessary to "undertake the sub-division properly".

(b) The "new lease" negotiations

[75] On 30 November 1990, Mr Burton wrote to the Whaoa Trust explaining that he and Mr Chadwick had had concerns for some time that the Mills lease may not be binding and valid. This appears to be the first suggestion that a legal impediment

might exist to the orthodox assignment of the Mills lease to the Tumunui Trust. The solicitors' concerns rested on the absence of any notation by the Māori Land Court under s 233 of the 1953 Act, or validation on application to the Land Valuation Tribunal. As a result, the lawyers proposed that, after the creation of new titles, a new lease should be prepared. Mr Burton wrote:

> Mr Chadwick and the writer are in agreement that from all points it would be desirable to scrap the present lease and the variation once the new title boundary survey plan has been completed, then complete a new lease which can be registered (the present one cannot be registered as it is not in a registerable form) and at the same time then have the lease noted under Section 233 and an application made to the Land Valuation Tribunal for consent.
>
> In other words it would be a waste of our respective clients' time and money to validate the present lease (which is out of time for validation anyway) and one might as well do the job properly when the new title plan has been completed.

[76] I shall deal shortly with the subdivision process on which the parties embarked. For reasons I shall develop, the process was flawed and is the primary reason why difficulties have arisen in relation to the boundary between the Reserve and the balance of the No 8 Block, over which the Tumunui Trust was negotiating its lease. For present purposes, I outline some of the relevant correspondence that throws light on the terms actually agreed between the Tumunui Trust and the Whaoa Trust for the new lease.

[77] In a letter dated 16 November 1992, Mr Burton recorded that the "respective trustees" of the Whaoa Trust and the Tumunui Trust had agreed the following terms:

> 1. The initial term will be for 10 years from 13 December 1992 expiring on 12/12/2002.
>
> 2. The initial rental which is yet to be set will be on the formula terms set out on the current lease namely at 5% of the capital value of the land according to a special Government valuation to be obtained (at Tumunui expense) *but excluding any capital improvements effected by the lessee*.
>
> 3. In addition to the new term of 10 years commencing on 13 December next, there will be 3 rights of renewal of 10 years each.
>
> 4. The renewal terms of 10 years each from 13 December 2012 and 2022 respectively will each contain provision enabling the lessors to review the rental on the above terms every 3 years. This also means

> that the two 10 year terms from 13 December 1992 and from 13 December 2002 will not contain any interim rent review provisions except on the renewal dates themselves.
>
> 5. Two months prior to each renewal or review date Tumunui is to supply you with Management Plans for the land. This means at the present moment that Tumunui should be providing you with a Management Plan at this particular time.
>
> 6. Two weeks prior to Tumunui's each annual general meeting, Tumunui is to supply Whaoa No 1 with specified agreed sections of its Annual Report.
>
> (Emphasis added)

[78] Having set out those conditions, Mr Burton asked Mr Moke to "advise us if your trustees confirm the above terms". Relevantly, Mr Burton concluded his letter by reference to terms of the existing lease. He wrote:

> The current lease is for a term of 21 years from 13 December 1992 with rental for the first 10 years at $22,000.00 per annum and with a rent review due now and effective from 13 December 1992.
>
> That reviewed rental is to be calculated at 5% of a special Government valuation obtained by your trustees at Tumunui's expense but excluding any improvements effected by the lessee. When the current lease ends on 12 December 2003 there is a right of renewal for 8 years.

[79] A meeting of the trustees of the Whaoa Trust was held at Mr Moke's home at Ngapuna on 3 December 1992. The minutes of that meeting record that Mr Moke distributed copies of Mr Burton's letter to fellow trustees. The minutes record that confirmation of the terms:

> … was implemented without dissent, by way of each and every trustee endorsing a spare copy of the letter, to be returned by him to E Moke, as requested.

[80] The terms on which rent was to be calculated are set out in the following extract from the Tumunui lease:

> … at a yearly rental calculated on the basis of five dollars per centum of the capital value of the said land according to a special valuation carried out by Valuation New Zealand for the purpose at the expense of the lessee but such rental shall not in any case be less than that payable by the lessee during the expiring term *provided always that for the purposes of such valuation there shall be deducted from the said capital value the value of all improvements made on or to the said land by the lessee or its predecessor since the 13th day*

of December 1961 and during the terms hereof by the lessee and subsisting at the date of valuation …

(Emphasis added)

[81] There is an important difference between the way in which Mr Burton's letter of 16 November 1992 was expressed and the wording used in the lease to specify a formula for the calculation of rent. While Mr Burton's letter refers to the need for capital improvements by the lessee to be taken into account, it does so in the context of what he described as a "new lease".[33] On the other hand, the lease document itself refers to improvements to the land since 13 December 1961, when Mr Blackler first entered into a leasing arrangement with the Māori Trustees.[34] In the context of a "new" lease, the Tumunui Trust plainly obtained a significant advantage in the calculation of its rent through the deduction of improvements for which previous lessees had paid, and which had been undertaken from the time that the land was in its virgin state.

[82] The Tumunui lease was executed by all trustees of each Trust on 16 February 1994.[35] It was subsequently approved by the Land Valuation Tribunal, and has been registered against the title to the Tumunui farm land. After the Tumunui lease was executed, the Tumunui Trust continued to operate a dairy farm on the No 8 Block.[36]

(c) The subdivision process

[83] A series of steps were taken between 19 July 1991 and 3 December 1993 to subdivide the No 8 Block into two titles, one in respect of the farm land to be leased by the Tumunui Trust and the other for the Reserve. The need to undertake those steps provides a partial explanation to the delay between the two letters from Mr Burton to Mr Chadwick, dated 30 November 1990 and 16 November 1992 respectively.[37]

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33 See paras[76]–[78] above.
34 See para [41] above.
35 See para [76] below.
36 An easement has been registered over the No 8 Block to permit access to the Reserve: see para [110]
37 See paras [75] and [77] above.

[84] On 19 July 1991, Mr Couldrey made an application to the Māori Land Court, under s 406 of the 1953 Act, to have the Chief Surveyor appoint him to make a survey of the No 8 Block. The application was made in the name of the Tumunui Trust.[38] Mr Couldrey stated that the survey was "necessary or expedient for the completion of order(s) of the [Māori Land] Court dated 31 October 1985". He was referring to the orders by which the recommendation to set aside the Reserve was made.[39]

[85] Initially, it was a little unclear precisely how Mr Couldrey's approach to the Māori Land Court developed. As a result of a request that I made during the hearing,[40] the Māori Land Court made available its files to this Court. A further search of their content was undertaken. On examination, it became clear that, after Mr Couldrey filed the application, he requested an "appointment" to discuss matters with a Judge before completing his survey. A memorandum prepared by a Deputy Registrar indicates that, at the time the application was filed, Judge Hingston was in Court.

[86] The Deputy Registrar obtained verbal directions from the Judge which she then recorded in a letter sent to Mr Couldrey in response to his application. That letter, dated 13 August 1991, stated:[41]

> Rotomhana Parekarangi No 8
>
> The Judge having seen your request for an appointment re the above survey asked for the material. He has directed:
>
> (a) That he will accept an application for a Roadway Order (for the proposed R.O.W.) signed by both groups of Trustees.
>
> (b) That there is very little difference in the area for the reservation and he is happy with the variance (an application for a corrigendum to the Gazette Notice can be made upon completion of survey).

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38 See also, para [101] below.

39 See para [27] above.

40 This was done with the consent of the parties.

41 The letter refers to a "Roadway Order". The Māori Land Court has exclusive jurisdiction to make a roadway order. Such orders are made by the Māori Land Court to enable access to land within its jurisdiction. In 1991, the power to make such an order was conferred by ss 415–420 of the Māori Affairs Act 1953. The Court's power to make such an order now springs from ss 315–326 of Te Ture Whenua Māori Act 1993. Further, see paras [237]–[239] below.

(c) That the reservation does constitute a partition and the plan should show reservation and balance area or similar designation.

Enclosed for your assistance are application forms.

[87] On 15 August 1991, the Deputy Registrar annotated the cover of the Māori Land Court file "RP Survey Vol 2" to say "Roto-Pare 8 Requisition to be held until Court application filed". On 5 December 1991, the Deputy Registrar again wrote to Mr Couldrey. She referred Mr Couldrey to her earlier correspondence, and added:

> The survey requisition is still on hold. Please advise whether it is to proceed.

[88] Mr Couldrey does not appear to have replied to that letter. While the reason is unclear, it is distinctly possible that a deliberate decision was made not to proceed with a roadway application because "there would be no guarantee what sort of order would issue"[42] from the Māori Land Court. The trustees of the Whaoa Trust appear to have regarded the issue of an easement certificate as preferable. Mr Moke, as chairman of the Whaoa Trust, indicated that the Tumunui Trust shared the concern that "the right-of-way must not be one for general public use, but access should be restricted to beneficial owners and their descendants".[43]

[89] Instead, the process on which Mr Couldrey embarked involved an application for subdivision under the Local Government Act 1974. The decision to go down that path led to a number of unforeseen consequences involving boundaries and rights of access with which I need to grapple later. The problems emerged from many difficult issues that arise when there is conflict between laws dealing with the Torrens system of land registration and Māori land law respectively.

[90] The decision to embark upon the subdivision process was made following a letter from Mr Burton to Mr Couldrey dated 6 September 1991. After referring to discussions with Mr Moke and the then secretary of Whaoa Trust, Mr Nichols, Mr Burton said:

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42 This reason was noted by Mr Burton in a letter to Mr Couldrey on 6 September 1991. See para [90] below.

43 Both sets of quoted words appear in the highlighted portion of minutes of a meeting of the trustees of the Whaoa Trust held on 1 December 1991, set out at para [92] below.

WHAOA NO. 1 TRUST – ROTOMAHANA

PAREKARANGI NO. 8 BLOCK & TUMUNUI

> Thank you for your letter of 27 August, we refer to our earlier discussions. We have since spoken to Mr Eddie Moke and Mr Nichols and it is agreed that the proper course of the Trustees is for them to proceed with a subdivisional plan in the normal way providing for two lots and the right of way. We can then prepare and register an Easement Certificate in the normal way setting out the Trustees terms and conditions whereas if we were to apply to the Court for a roadway order, there is no guarantee what sort of order would issue. Furthermore, if there are any breaches of the terms of the right of way then it is in the hands of the Trustees themselves to enforce the terms of the right of way. This procedure is on the assumption that the Council will not require any land for a reserve or cash in lieu of. This method also has the advantage in that we can action the matter more quickly and get the right of way registered before any lease is registered. …

[91] Mr Couldrey signed the Land Transfer plan on 4 October 1991. On 26 November 1991, Mr Burton advised the Whaoa Trust that he had received the Land Transfer plan from Mr Couldrey "for execution by all of the trustees". Eight copies were enclosed for circulation among the trustees. The letter continued:

> … As you will see Lot 1 is intended to be a separate lot for the Reservation. The area on the plan is 158.16 hectares [later established to be 15.8 hectares] which is short by some four to five hectares of the area shown on the sketched plan relating to the original reserve order in the Māori Land Court. This is brought about by the following:
>
> 1. More accurate surveys.
>
> 2. Land contour factors.
>
> 3. Survey requirements.
>
> It would be appropriate to have the Māori Land Court order eventually registered against the new title to Lot 1 but to do this we will need to go back to the Court, for the Court to amend the original order or to rescind the original order and to issue a new one relating to the defined area Lot 1 on the plan.

[92] Mr Burton's advice was considered by the Whaoa Trust at a meeting of trustees held on 1 December 1991. While it appears that the trustees were not particularly concerned about the area of the Reserve, they certainly believed that proper arrangements should be made to enable the beneficial owners of the No 8 Block and their descendants to access it. The relevant part of the minutes of that meeting state:

2. Title Survey of Rotomahana-Parekarangi 8

The secretary referred to correspondence on this subject. The chairman and he discussed the matter with Mr R Burton, lawyer, during August. Following this, the lawyer instructed Couldrey Surveys to proceed with a subdivisional plan providing for two lots, one being the reserve, and the right of way. Mr Burton also stated that on completion of the plan he could then prepare and register an Easement Certificate in the normal way setting out the trustees' terms and conditions, whereas if he were to apply to the Court for a roadway order there would be no guarantee what sort of order would issue.

The chairman stated that Tumunui Lands Trust shared this trust's concern that the right of way must not be one for general public use, but access should be restricted to beneficial owners and their descendants.

J Price moved, G Edwards seconded:

> "That the easement be registered through the Māori land Court with the clear requirement that it permit right of way solely to the beneficial owners of Rotomahana-Parekarangi 8 and their descendants".

The motion was carried.

The secretary then distributed copies of the completed subdivisional plan, recently received from Mr R Burton, who in a covering letter pointed out that more accurate methods since former surveying had slightly reduced the ascertained area of the reserve and that it would be advisable to seek a new Land Court order relating to the newly defined area.

Mr Burton also informed that each and every trustee is required to call at his office to sign the master copy of the plan, which will then be submitted to the Rotorua District Council.

(Emphasis in italics added)

[93] Although the Deputy Registrar of the Māori Land Court wrote to Mr Couldrey on 5 December 1991 seeking advice about whether the survey requisition was to proceed, Mr Couldrey continued to deal with the issue solely on the basis of the subdivision application to the Council. In a letter dated 20 December 1991, Mr Couldrey wrote directly to Mr Moke, as chairman of the Whaoa Trust, to explain "any possible confusion over the areas of the two blocks shown on the subdivision plan" which he had previously sent to the trustees for their approval.

[94] Mr Couldrey advised:

(a) On the new survey plan, the total area comprised in the two lots was 529.06 hectares, made up as follows:

(i) The area of the Reserve was 158.16 hectares and

(ii) The area of the farm block was 370.90 hectares.

(b) On a previous survey plan held in the Māori Land Court (ML 21738), the total area was shown as 529.2973 hectares, made up as follows:

(i) The area of the Reserve was 174.02 hectares and

(ii) The area of the farm block was 355.2733 hectares.

(c) The areas shown on ML 21738 were taken from aerial photographs. While they had been "sufficiently accurate" for the Council's "scheme plan purposes", the survey conducted by Mr Couldrey identified a difference of almost 16 hectares in the size of the Reserve because:

(i) The scale of the photograph used for ML 21738 was "very small", which made "accurate determination of [the] area difficult";

(ii) A large difference in height between the front and rear ends of the No 8 Block "distorted the [photograph], giving rise to area inaccuracies";

(iii) Due to the length of the No 8 Block, two photographs were joined together to produce the final scheme plan, resulting in some error in calculating the area; and

(iv) The selection of the boundary line on the photograph was along the apparent "bush edge". However, it was now known that the "fence [was] some distance into the bush in most places".

(d) The area of the Reservation as shown in the *Gazette Notice*, was 174.0183 hectares, or 15.8583 hectares larger than the area surveyed by Mr Couldrey.

[95] Mr Couldrey completed his advice by stating:

> 5. The new boundary as surveyed follows a good, and in some places new, stock-proof fence, which is the accepted limits of the farm block, and any other dividing line, for example as shown on the sketch plan or as gazetted, would be quite impractical. We have previously discussed the situation with Mr Burton, who feels that the gazetted area can be readily changed in line with the new survey.

[96] Mr Couldrey may well have been right in his assessment that the most appropriate boundary between the farm land and the Reserve was one which followed the stock-proof fence. But, significantly, he overlooked the importance of the decision to set aside part of the No 8 Block as a Māori reservation. The executive decision made by the Secretary for Māori Affairs (and notified by *Gazette Notice*) set apart 174.0183 hectares for the Reserve. In my view, it was not lawful to change the area within the Reserve without first obtaining a recommendation from the Māori Land Court to do so.[44] Nevertheless, this was not the view taken at the time, and correspondence continued on the basis that new titles would be obtained through the subdivision process.

[97] On 25 February 1992, Mr Burton wrote to Mr Couldrey about the area to be included within the Reserve. He said:

> WHAOA NO. 1 TRUST AND PROPOSED ROTOMAHANA PAREKARANGI NO. 8 SUBDIVISION
>
> With reference to this matter we advise that some of the trustees called on us shortly after we wrote to the trust on 26 November 1991 to state that in their view the area intended to be included in the reservation was too large by virtue of the boundary being too far to the east. We understand that the trustees would be seeing you in connection with that and to discuss with you and we would be grateful if you would accordingly bring us up to date with the current position.

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[44] Any application made before 1 July 1993 would have been made under s 439(5) of the Māori Affairs Act 1953. That provision is set out at para [26] above. An application for such a recommendation is now made under s 338(5) of Te Ture Whenua Māori Act 1993. See also, paras [232] and [233] below.

[98] A meeting of the Whaoa Trust was held on 12 March 1992. One of the items on the agenda was the "apparent reduced area" of the Reserve. The minutes of the meeting record Mr Moke explaining the effect of Mr Couldrey's letter of 20 December 1991. Mr Moke appears to have made it clear that the "actual boundary now recognised is a sound stock-proof fence which actually runs some way inside the bush in places". A resolution was passed:

> That the explanation by Mr Couldrey be accepted and the document now be signed.

[99] Also on 12 March 1992, Mr Burton wrote to Mr Moke seeking confirmation of the proposed boundary. It is unclear whether this letter was given to Mr Moke before or after their meeting on the same day. The letter does set out some more detailed thoughts about the boundary issue. After identifying the need for agreement on how the division was to be made, Mr Burton wrote:

> …
>
> With regard to [an area basis] the reservation block according to the Gazette Notice made in 1986 is an area of 174.0183 hectares but based on a sketch rather than a survey plan. What we are a bit uncertain about is whether the unsurveyed area follows the fence line which runs through bush land or whether it follows a higher line between the cleared area and the bush line. If the size of the land is important that is that the area to go into the reservation must be an area of 174.0183 hectares then a new survey plan will be involved which will mean bringing the boundary between the two blocks eastward towards the highway. That will therefore take in quite a bit of the cleared area.
>
> As to [a physical division basis] if the boundary line is the important aspect rather than the actual areas involved then the question is whether or not the boundary line is to follow the old fence line which is mostly well in to the bush or the new fence line where there is a new fencing mostly along the cleared areas.
>
> We think that in the circumstances it is very desirable that the trustee should meet with Mr Graham Couldrey and discuss the plan of sub-division with him and so that if the plan is acceptable in its present form the trustees could then call at our office to sign the Land Transfer plan held by us or if it is not acceptable the trustees could then discuss with Mr Couldrey exactly where the boundary line should be and so that areas can be redrawn and recalculated in area.

[100] On 9 September 1992, the Council passed a resolution under s 305 of the Local Government Act 1974 to approve the subdivision plan "conditional upon the granting or reserving of the easements shown in the memorandum endorsed hereon"

and a certificate that the plan met requirements of the operative district scheme. On 14 September 1992, a Council officer certified, under s 306(1)(f)(i) of the 1974 Act compliance with "all the conditions shown on or referred to on the scheme plan of subdivision".

[101] The Tumunui Trust is shown as the applicant in the Council's scheme plan record.[45] On 1 October 1992, Mr Couldrey applied, on its behalf, for a consent to enable a separate title to issue for "the developed grass area" for a lease in excess of 14 years, and to provide an easement in the form of a right of way to link the Reserve to State Highway 5. In his application, Mr Couldrey referred to the farm land as Rotomahana Parekarangi 8B (comprising 355.2773 hectares) and the Reserve as Rotomahana Parekarangi 8A (comprising 174.02 hectares).

[102] The Council approved the application and recommended that a number of conditions apply:[46]

(a) The right of way be laid out over Rotomahana Parekarangi 8B, in favour of Rotomahana Parekarangi 8A, as shown on the plan submitted by Mr Couldrey;

(b) The existing water supply easement adjacent to State Highway 5 in favour of the Council be retained;

(c) The entrance to the proposed right of way was to be designed, formed, metalled and sealed between the State Highway carriageway and the right of way boundary to the satisfaction of the District Engineer and Transit New Zealand.

[103] Final approval for the subdivision application was given on 22 November 1992, and ratified on 3 December 1992. Prior to its approval, Mr Couldrey had commenced a field survey, without formal reference to the Māori Land Court or the Chief Surveyor. That partial survey brought the difference in area into sharp relief.

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45 This is consistent with the way in which the Tumunui Trust was described in Mr Couldrey's application to the Māori Land Court of 19 July 1991: see para [83] above.

46 Under s 432 of the Māori Affairs Act 1953.

[104] On 3 November 1992, the trustees of the Whaoa Trust signed a foil copy of the plan before lodgement of Land Transfer plan 64109, for examination by Land Information New Zealand (LINZ).

[105] On 15 January 1993, Land Transfer plan 64109 was approved as to survey by LINZ. On 26 January 1993, LINZ wrote to Mr Burton about approval of the survey plan as to survey. The letter stated:

> RE: PLAN S.64109 – E MOKE & OTHERS – YOUR REFERENCE: CS/76
>
> The above plan has been approved as to survey and will be deposited when:
>
> (1) The Partition Order and any subsequent Orders of the Māori Land Court (if any) for [the No 8 Block] is/are registered.
>
> (2) New Certificates of Title are ordered for Lots 1 and 2.
>
> (3) A new Certificate of Title is ordered for the balance of [the No 8 Block].
>
> (4) An Easement Certificate is registered in respect of the easement set out in the Memorandum of Easements.
>
> (5) A transfer creating the easement in gross set out in the Memorandum of Easements in Gross is registered.

[106] On 3 March 1993, the Registrar of the Maori Land Court sent to the District Land Registrar copies of four orders of the Court relating to the No 8 Block. However, neither the order made by Judge Hingston on 31 October 1985 that recommended creation of the Reserve nor the *Gazette Notice* published on 27 February 1986 was forwarded.

[107] On 26 March 1993, agents in Hamilton representing Mr Burton ordered a new Certificate of Title for the No 8 Block, comprising 529.2973 hectares. This was for provisional registration only. On 28 June 1993, Mr Burton ordered new Certificates of Title for Lots 1 and 2, the Reservation and the farm block respectively.

[108] The plan was deposited on 28 June 1993, as DPS 64109. The following titles were issued on 3 December 1993:

(a) PR 52C/294. This provisional title referred to the whole of the No 8 Block and contained memorials for three orders of the Māori Land Court vesting the land in trustees.

(b) CT 52C/295. This was the title issued for the farm land. The area shown is 529.2973 hectares.

(c) CT 52C/296. This comprised the land on which the Reserve is situated. The Certificate of Title notes that there is "no frontage to a Public Road". The area shown is 158.1600 hectares. On issue, the title recorded that a right of way was to be created by easement to provide road access. A copy of the Computer Freehold Register obtained on 9 November 2006 records a right of way specified in Easement Certificate B 147285.7 as having been registered over this title on 3 December 1993, subject to s 309(1)(a) of the Local Government Act 1974.

(d) CT 52C/297. This was the final Certificate of Title for the No 1 Block. A copy of the Computer Freehold Register obtained on 16 April 2007 records a right of way specified in Easement Certificate B 147285.7 as having been registered over this title on 3 December 1993, subject to s 309(1)(a) of the Local Government Act 1974. The Tumunui lease is shown as having been registered on 23 June 1994. A mortgage of that lease in favour of the Bank was registered on 27 July 1994.

[109] At the time the Certificates of Title were issued, there was no reference on any of them to the Reserve. On 3 April 2007, the *Gazette* Notice of 1986 was registered. The memorial reads: "Gazette Notice 1986 page 869 setting apart part of the within land as a Māori reservation for the purpose of a timber reserve, catchment area and place of historical interest for the common use and benefit of the beneficial owners, their descendants and the Ngāti Whaoa".

The easement[47]

[110] Ordinarily, where access to a Māori Reservation is in issue, an order will be made by the Māori Land Court laying out a roadway over which those entitled to enter a reserve may exercise their right to pass and re-pass over other land to do so.[48] Instead, an easement certificate was registered over the title to the land leased by the Tumunui Trust.[49] This was done as part of the subdivision that resulted in the creation of the two Certificates of Title.[50] The easement that has been registered over the No 8 Block to permit access to the Reserve is not marked on the ground. In previous arbitral proceedings between the parties, it has been acknowledged that the right of way created by the easement is not on the surveyed line of the intended access route.

[111] The rights of user conferred by the easement are specified as:

> The rights and powers in respect of the right of way are as set out in the Seventh Schedule to the Land Transfer Act 1952 save that the carriage vehicles, motor vehicles and other conveyances therein referred to may be loaded or unloaded.

[112] The obligations of construction, repair and maintenance are conferred by cl 2 of the easement certificate. That states:

> 2. Terms, conditions, covenants, or restrictions in respect of any of the above easements:
>
> (i) The cost of constructing, repairing and maintaining the Right of Way shall be borne by the registered proprietors of the dominant tenement in the proportions of one equal part to each such [tenement].
>
> (ii) But where the need for repairs or maintenance is directly attributable to the actions or inactions of one or more of those registered proprietors, the cost shall, in that case be borne wholly by that proprietor or, if more than one by those proprietors equally between or among them.

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47 Unless the context otherwise requires, I use the term easement to denote easement certificate B 147285.7.

48 See above n 41.

49 See [70]–[73] above.

50 The Māori Land Court could also have made an order granting an easement: ss 286 and 287 of Te Ture Whenua Māori Act.

[113] Schedule 7 of the Land Transfer Act 1952 sets out the rights and powers of grantees implied in certain easements.

[114] Clause 1 of sch 7 dealt[51] specifically with rights of way. It stated:

> **1 Right of Way**
>
> The full, free, uninterrupted, and unrestricted right, liberty, and privilege for the grantee, his servants, tenants, agents, workmen, licensees, and invitees (in common with the grantor, his tenants, and any other person lawfully entitled so to do) from time to time and at all times by day and by night to go pass and repass, with or without horses and domestic animals of any kind and with or without carriages, vehicles, motor vehicles, machinery, and implements of any kind, over and along the land over which the right of way is granted or created.

[115] The easement certificate was endorsed with a memorial under s 233 of the 1953 Act, on 21 April 1993, before certificates of title were issued as a result of the subdivision. At that time, s 233 provided:

> **233 Instruments To Be Produced To Registrar**
>
> (1) No alienation of Māori freehold land which is not by this Part of this Act required to be confirmed by the Court shall have any force or effect unless and until the instrument by which the alienation is effected has endorsed thereon a memorial that it has been produced to the Registrar and has been noted in the records of the Court.
>
> (2) An additional copy of the instrument of alienation shall at the time of its production to the Registrar for the purposes of subsection (1) of this section be lodged with the Registrar for transmission to the Māori Trustee for the purposes of the recovery, pursuant to section 231 of this Act, of the proceeds derived from the alienation.

[116] That has brought about an unusual state of affairs. While a s 233 memorial exists in respect of the easement, one was not entered in respect of the Tumunui lease that was executed on 16 February 1994. By that time, the need for a memorial was governed by s 161 of the 1993 Act, in the form in which that provision stood prior to its repeal in 2002. The relevant definition of "alienation" and s 161 at that time were:

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[51] Schedule 7 of the Land Transfer Act 1952 was repealed on 26 August 2002, by s 64(1) of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002.

> **4 Interpretation of English terms**
>
> In this Act, unless the context otherwise requires, –
>
> "Alienation", in relation to Māori land,–
>
> (a) Includes, subject to paragraph (c) of this definition,–
>
> …
>
> (ii) The making or grant of any lease, licence, easement, profit, mortgage, charge, encumbrance, or trust over or in respect of Māori land; and
>
> ….
>
> **161 Certain instruments require only noting by Registrar**
>
> Where the trustees of a trust appointed under section 222 of this Act execute an instrument of alienation in respect of any Māori freehold land or any interest in Māori freehold land (being an instrument of alienation that is not required to be confirmed under this Part of this Act), those trustees shall forward a copy of that instrument to the Registrar for noting and the Registrar shall note the contents of that instrument according.

[117] The most significant problem is that the part of the area comprised in the easement is used as a cattle race. During winter, this poses particular problems because of the need for cattle to make their way to the milking shed along muddy ground.

[118] Mr Staite's concern is that the purpose of the Reserve is being undermined by the inability of those entitled to pass over it, both because of its state of repair and the natural disinclination of those responsible for managing the farm to allow third parties to disrupt farming operations. Over time, a number of complaints have been made from beneficial owners of the No 8 Block about their inability to access the Reserve over the land leased to the Tumunui Trust.

The competing contentions

[119] Mr Chesterman, for the Whaoa Trust, seeks relief against Tumunui Trust to remedy what he contends were breaches of Mr Moke's duties as a trustee to the Whaoa Trust. He submits that Mr Moke breached his duty of loyalty to the Whaoa Trust by acting in a way that enabled another trust of which he was a trustee, the Tumunui Trust, to gain an inappropriate advantage. It is alleged that the Tumunui

lease was granted on terms that were materially favourable to the Tumunui Trust and disadvantageous to the Whaoa Trust. A declaration is sought to recognise Mr Moke's breaches. The primary relief sought is rescission of the Tumunui lease. Alternatively, the Whaoa trust seeks an award of damages in an amount to be assessed, as against the Tumunui Trust.

[120] To support its claim for rescission of the Tumunui lease, the Whaoa Trust alleges that the Tumunui Trust has received property with knowledge that it was acquired through Mr Moke's breaches of duties as a trustee. Alternatively, it seeks a restitutionary remedy for the alleged unjust enrichment to the Tumunui Trust, or any other remedy that this Court might think fit to order.

[121] Both the Whaoa Trust and the Reservation Trust seek relief[52] to correct the boundaries of the No 8 Block, as between the farm land and the Reserve, by restoring 15.8 hectares allegedly taken from the Reserve and attributed to the Whaoa farm land. A declaration is also sought to confirm the correct area that ought to be comprised within the Tumunui Trust's farm land and the Reserve respectively.

[122] The final cause of action is based on alleged breaches by the Tumunui Trust of the terms of the easement certificate registered against the land. Reliance is placed on sch 7 to the Land Transfer Act 1952. The Reservation Trust alleges that the Tumunui Trust has allowed the right-of-way to fall into a state of disrepair which means that it cannot be used as originally contemplated by the recommendation of the Māori Land Court, and the subsequent *Gazette* Notice.[53]

[123] Declarations are sought to confirm that the Tumunui Trust is responsible for maintaining and repairing the right-of-way and that they may not block or prevent any member of the Whaoa Trust from using it. A mandatory injunction is also sought to ensure repair of the right-of-way and provision of free access at all times to those entitled to use it.

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52 Under ss 80 or 81 of the Land Transfer Act 1952, to cancel or correct the titles.

53 Set out at para [29] above.

[124] Mr McKechnie, for the Tumunui Trust, rejects the arguments put by Mr Chesterman and submits that none of the relief sought should be granted. In addition to denying the breaches of duty allegedly owed by Mr Moke to the Whaoa Trust and the Reservation Trust, Mr McKechnie submits that the consequences of any breach are not as Mr Chesterman contends, and do not affect the Tumunui Trust's entitlement to enjoy the leased land, to the exclusion of others.

[125] So far as the right-of-way is concerned, Mr McKechnie submits that the Tumunui Trust has no responsibility for the maintenance of the right-of-way, and has not breached any terms of the easement.

[126] Finally, because the events in issue cover a lengthy period, from the time the Tumunui Trust first began to investigate acquisition of what was then the Mills lease in 1988, Mr McKechnie submits that the claim is stale. He contends that it cannot now be brought or determined. He places reliance on both on the Limitation Act 1950 (in force when the proceeding was issued), and the equitable doctrine of laches.

Analysis: The Tumunui lease claims

(a) The "self dealing rule": introduction

[127] A trustee holds property on behalf of others. A fiduciary duty is owed to those for whose benefit he or she is acting. The claim that Mr Moke breached his duties as a trustee of the Whaoa Trust is based on (what is called) the "self-dealing rule". As Professor Matthew Conaglen has pointed out, the self-dealing rule dates from at least 1725.[54] Its original purpose was to enable a beneficiary of a trust to avoid any transaction involving a trustee's purchase of trust property. The rule is intended to apply "whenever a fiduciary enters a transaction and is on both sides of the transaction".[55] The rule is rooted in a fiduciary's duty of loyalty to his or her principal.

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[54] Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, Oxford & Portland, Oregon, 2010) at 126, citing *Whitackre v Whitackre* (1725) Sel Cas t King 13, (1725) 25 ER 195 (Ch).

[55] Matthew Conaglen, ibid, at 126 (footnotes omitted).

[128] In expressing the underlying principle, Salmond J, in *Robertson v Robertson,* said:[56]

> It is well established that a trustee for sale cannot purchase the trust property for himself, and that such a purchase is voidable *ex debito justitiae* at the suit of the beneficiary, even though full value was given by the trustee. It is also well established that the same rule applies to a sale of trust property by a body of trustees to one of their own number. *The rule is not based on any technical considerations relative to any difficulty, real or supposed, in the way of a person transferring property to himself. It is based on considerations of public policy, with intent to protect the beneficiaries of a trust by precluding the trustee from placing himself in a position where his interests conflict with his duty. ...*
>
> (Emphasis added)

[129] In *Fenwick v Naera*,[57] the Supreme Court considered the self-dealing rule in the context of ahu whenua trusts and s 227A of the 1993 Act. Section 227A was introduced by s 33 of Te Ture Whenua Māori Amendment Act 2002, and came into effect on 1 July 2002. It was not in force when the events in issue in this case occurred. It provides:

> **227A Interested trustees**
>
> (1) A person is not disqualified from being elected or from holding office as a trustee because of that person's employment as a servant or officer of the trust, or interest or concern in any contract made by the trust.
>
> (2) A trustee must not vote or participate in the discussion on any matter before the trust that directly or indirectly affects that person's remuneration or the terms of that person's employment as a servant or officer of the trust, or that directly or indirectly affects any contract in which that person may be interested or concerned other than as a trustee of another trust.

[130] To the extent that s 227A might be seen as relaxing the obligations of a trustee under the self-dealing rule, Mr Chesterman submitted its unavailability at the time of the events in issue necessitates a stricter approach to liability in respect of Mr Moke's involvement in the Tumunui lease transaction.

[131] Mr Chesterman's point is that while, in *Fenwick*, the Supreme Court recognised that s 227A enables trustees with competing interests to participate in discussion and voting in relation to transactions of concern, Mr Moke's conduct was

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56 *Robertson v Robertson* [1924] NZLR 552 (SC) at 553.
57 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354.

captured by the pre-existing law, which prevented a trustee from participating and voting on such a transaction, as well as receiving any benefit from it.[58] Even if he were wrong on that point, Mr Chesterman contended that Mr Moke had a sufficient interest in the transaction to justify a finding of breach.

(b) Fenwick v Naera

[132] The Supreme Court's decision in *Fenwick* was made on a third appeal. The case started life in the Māori Land Court.[59] From there it went on successive appeals to the Māori Appellate Court[60] and the Court of Appeal.[61] The differing approaches taken by the four Courts demonstrates the complexity of the issue, in the context of trustees of an ahu whenua trust.

[133] The dispute in *Fenwick* concerned a decision of the trustees of the Tikitere Trust to enter into a joint venture arrangement designed to enable investigation, and possible exploitation, of geothermal resources beneath the land constituted within that ahu whenua trust, and two neighbouring trusts, the Paehinahina Mourea Trust and the Manupirua Trust. The joint venture agreement also involved a company called Tikitere Geothermal Power Co Ltd, which was owned by the Tikitere Trust.

[134] A number of the beneficial owners of the Tikitere Trust objected to the actions of its trustees in entering into the joint venture arrangements. They alleged that three of the trustees had allowed personal interests to conflict with their fiduciary duties to the Tikitere Trust. Initially, they sought removal of the trustees and an order that a meeting of beneficial owners be called to elect replacements. In addition, a review of the Trust Order was sought, on the basis that an interim injunction granted by the Māori Land Court on 31 August 2009[62] (to restrain the existing trustees from making decisions or taking steps in relation to the geothermal power project) should remain in force until new trustees were given the opportunity to consider the position further.

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58 For example, see *Robertson v Robertson* [1924] NZLR 552 (SC) at 553.
59 *Naera v Fenwick – Whakapoungakau 24* (2010) 15 Waiariki MB 279 (15 WAR 279).
60 *Naera v Fenwick – Whakapoungakau 24* (2011) Māori Appellate Court MB 316 (2011 APPEAL 316).
61 *Naera v Fenwick* [2013] NZCA 353.
62 *Naera v Fenwick – Whakapoungakau 24* (2009) 344 Rotorua MB 115.

[135] At the substantive hearing in the Māori Land Court, Judge Harvey held that the trustees did have power to enter into the agreement and, while there might have been an appearance of conflict of interest, that was not sufficient to render the decision to enter into the agreement "nugatory".[63] The Māori Appellate Court dismissed an appeal against the Māori Land Court's decision. It agreed with the Māori Land Court, that "even without the involvement of the 'conflicted' trustees, the same decision would have been reached".[64]

[136] An appeal against the Māori Appellate Court was brought to the Court of Appeal. In the Court of Appeal, the issues argued were, as one would expect, more refined. For present purposes, I focus only on the issues involving conflict of interest.

[137] The Court of Appeal held that, while s 227A of 1993 Act[65] relaxed general legal principles about trustees' conflicts of interests, the 1993 Act was silent on the consequences of a breach by someone who participated in decision-making. It considered that the common law position continued to apply.[66] The Court of Appeal remitted the proceeding to the Māori Land Court for further consideration, based on the need to determine whether any innocent third parties were, or had become, involved in the joint venture arrangements.

[138] Some of the beneficiaries sought leave to appeal to the Supreme Court. That application was refused. The three trustees whose conduct was in issue applied for leave to cross appeal on the conflict of interest point. Leave to cross appeal was granted, so that the Supreme Court could consider whether the Court of Appeal was right in its approach to that issue and, if so, the circumstances in which the remedy of rescission might be granted.[67]

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63 *Naera v Fenwick – Whakapoungakau 24* (2010) 15 Waiariki MB 279 (15 WAR 279) at paras [145]–[154].

64 *Naera v Fenwick – Whakapoungakau 24* (2011) Māori Appellate Court MB 316 (2011 APPEAL 316) at para [71] per Chief Judge Isaac, Judge Coxhead and Judge Reeves.

65 Set out at para [129] above.

66 *Naera v Fenwick* [2013] NZCA 353 at para [97] per Arnold, Stevens and White JJ.

67 *Naera v Fenwick* [2014] NZSC 58.

[139] Glazebrook J, giving the judgment of a majority of the Supreme Court,[68] described the "duty of loyalty" and the "prohibition on trustees (and other fiduciaries) from having conflicts of interest" as "a central tenet of the fiduciary relationship".[69] Generally speaking, duties owed by trustees of an ahu whenua trust reflect those owed by trustees in respect of any form of trust. Glazebrook J continued:[70]

> [70] … Some commentators have even referred to this as part of the "irreducible core" of the relationship. Under the "self-dealing" rule, developed under the duty of loyalty, if a trustee sells the trust property to him or herself, the sale is voidable by any beneficiary *ex debito justitiae* (as of right), however fair the transaction.
>
> (footnotes omitted)

[140] The Supreme Court explained the justification for the "no-conflict rule" by reference to observations made by Lord Herschell in *Bray v Ford*.[71] In the passage from His Lordship's opinion that was quoted with approval by the Supreme Court,[72] Lord Herschell said:[73]

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position, … is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. *It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.*
>
> (Emphasis added)

[141] If a trustee were to put himself or herself in a position of conflict, thereby causing a breach of the duty, liability for breach is "generally strict, at least with regard to the self-dealing and unauthorised profits rules".[74] As Glazebrook J explained:

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68 McGrath, Glazebrook, O'Regan and Blanchard JJ.
69 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at para [70] (footnotes omitted).
70 Ibid (footnotes omitted).
71 *Bray v Ford* [1896] AC 44 (HL).
72 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at para [72]
73 *Bray v Ford* [1896] AC 44 (HL) at 51.
74 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354, at para [73] and fns 98 and 101. See also Matthew Conaglen *The Nature and Function of Fiduciary Duty* (2005) 121 LQR 452 at

> [73] … It is usually no defence to show that any unauthorised profit was made "'honestly' or in good faith" or that the transaction was fair. *The use of strict liability in the context of a fiduciary relationship stems from fiduciary law's traditional prophylactic approach: it is thought that prevention is better than cure in that this provides good protection to beneficiaries and removes temptation from fiduciaries*. As Professor Matthew Conaglen has put it, "removing the fruits of temptation is designed to neutralise the temptation by rendering it pointless".
>
> (Emphasis added; footnotes omitted)

[142] Nevertheless, when assessing whether a relevant conflict exists, Courts must be astute to avoid application of too strict an obligation. The Supreme Court adopted the approach favoured by Lord Upjohn in *Boardman v Phipps*:[75]

> The reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you would imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.

[143] In *Fenwick*, the Supreme Court rejected a submission that the self-dealing rule applied only to purchases.[76] In doing so, it distinguished two earlier decisions, *Jones v AMP Perpetual Trustee Co NZ Ltd*[77] and *Public Trustee v Cooper*.[78] Glazebrook J pointed out that the rule had been applied in commercial transactions other than sales and leases of trust property to trustees. As she said, "At its most basic level, the self-dealing rule is based on the no-conflict rule: having an interest or duty on both sides of a transaction".[79]

[144] The Supreme Court discussed, but did not decide, whether there was an exception to the self-dealing rule where "the trustee has only a limited beneficial interest".[80] The Court left the point open as it considered that, even if there were such an exception, it could not apply in the case before it.[81] Mr McKechnie raised this point, submitting that Mr Moke's interest in the Tumunui Trust was *de*

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75 *Boardman v Phipps* [1967] 2 AC 46 (HL) at 124.

76 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at para [76].

77 *Jones v AMP Perpetual Trustee Co NZ Ltd* [1994] 1 NZLR 690 (HC).

78 *Public Trustee v Cooper* [2001] WTLR 901 (Ch).

79 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at para [78], citing in support J Mowbray and others *Lewin on Trusts* (18th ed, Sweet & Maxwell, London, 2008) at para [20–63] and *Re Thompson's Settlement* [1986] Ch 99 at 115 (Vinelott J).

80 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at para [82]–[94].

81 Ibid, at para [92].

minimis.[82] Strictly speaking, whether or not a limited beneficial interest exception to the self dealing rule exists is a separate question to whether or not an interest is *de minimis*. However, it is not necessary for me to address the conceptual differences as the outcome would not change, whichever approach was applied.

[145] The Supreme Court also considered whether breach of the self-dealing rule should carry an automatic remedy of rescission of the transaction in issue, at the instance of an affected beneficiary.[83] In this context, the Court accepted that the statutory provisions under which ahu whenua trusts are created assumed some importance. It took the view that an automatic remedy of rescission was not consistent with the statutory overlay, when considered in the context of the overlapping beneficial interests.[84] The Supreme Court took the view that it was for the Māori Land Court to determine whether rescission was an appropriate remedy in that case.[85]

[146] I distil the following principles from the Supreme Court's decision in *Fenwich v Naera*:

(a) The rationale for the self-dealing rule is to remove "the fruits of temptation" that a trustee might otherwise have, as an incident of human nature, to seek personal advantage, to the disadvantage of those for whom he or she acts as a trustee.[86] This is based on "fiduciary law's traditional prophylactic approach".[87]

(b) To give effect to that principle, it is unnecessary to consider whether the same outcome would have resulted if the breach of the fiduciary

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82 The basis for this submission is described in para [150] below.

83 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at paras [113]–[127].

84 Ibid, see [122]–[123].

85 But Glazebrook J offered guidance to the Māori Land Court in determining whether rescission was an appropriate remedy in any particular case: see *Fenwick v Naera*, ibid, at para [125].

86 Generally, see *Robertson v Robertson* [1924] NZLR 552 (SC) at 553 (set out at para [128] above) and *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at para [73] (set out at para [141] above).

87 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at para [73], set out at para [141] above.

duty of loyalty had not occurred.[88] The rationale that lays behind the prohibition on self-dealing justifies such "an inflexible rule".[89]

(c) In the context of an ahu whenua trust, because of the statutory overlay in respect of a trust established by a Court order, the remedy of rescission of the transaction in issue is not automatic. Rather, it will be for the Court hearing the breach of fiduciary claim to determine what (if any) remedy is appropriate in the circumstances.[90]

(c) Limited beneficial interest exception

[147] In considering whether there is a "limited beneficial interest exception" to the self-dealing rule, my starting point for analysis is the nature of an ahu whenua trust. That provides the framework against which the duties of one of its trustees are to be assessed.

[148] In the context of a discussion about whether rescission of an agreement should be ordered, the Supreme Court identified distinct aspects of an ahu whenua trust that should be considered when assessing remedy. In my view, these factors are also relevant to the question of whether a breach has been committed; particularly, as to whether a limited interest exception to the self-dealing rule is justified.

[149] After explaining the purposes of ahu whenua trusts by reference to the preamble, interpretation and general objectives provisions of the 1993 Act,[91] Glazebrook J highlighted the following features:

(a) Ahu whenua trusts are created by the Māori Land Court, which is responsible both for the terms of its order and the appointment of trustees.[92]

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88 Ibid.

89 *Bray v Ford* [1896] AC 44 (HL) at 51, per Lord Herschell. None of the remaining members of the House of Lords (Lord Halsbury LC, Lord Watson, Lord Macnaghten and Lord Shand) disagreed with that proposition.

90 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at para [125]. See also para [149] below.

91 Ibid, at paras [106]–[108]. See Te Ture Whenua Māori Act 1993, preamble and ss 2 and 17.

92 Ibid, at para [109]. See Te Ture Whenua Māori Act 1993, ss 219 and 222.

(b) The Māori Land Court has power to approve an extension of activities of an ahu whenua trust provided it is satisfied there is a sufficient degree of support from beneficial owners.[93]

(c) It is open to a trustee or a beneficial owner to apply to the Māori Land Court to review the terms of the Trust Order, or to terminate the Trust if there were sufficient support among beneficiaries.[94]

(d) The Māori Land Court is given the same powers as the High Court in relation to the latter's supervisory jurisdiction over trusts.[95] However, the High Court's jurisdiction is not limited or affected by the extended jurisdiction conferred on the Māori Land Court.[96] In other words, this Court and the Māori Land Court exercise concurrent jurisdiction.[97]

(e) Because beneficial interests in land held by Māori pass from generation to generation, their interests are likely to extend to other land holdings of their ancestors. Adopting observations made by Judge Harvey in his decision in *Fenwick* in the Māori Land Court, Glazebrook J said that "these overlapping interests are 'simply a reality of kinship and obligation to the wider collective inherent in traditional communal ownership'".[98]

[150] Evidence about the extent of Mr Moke's interests in the Whaoa Trust, the Reservation Trust and the Tumunui Trust was given by Mr Kusabs. He searched the records of the Māori Land Court to obtain information about Mr Moke's interests in

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93 Ibid, at para [110]. See also Te Ture Whenua Māori Act 1993, ss 229 and 244.
94 Ibid, at para [111]. See Te Ture Whenua Māori Act 1993, ss 231 and 238.
95 Ibid, at para [112]. See Te Ture Whenua Māori Act 1993, s 237(1).
96 Ibid. See Te Ture Whenua Māori Act 1993, s 237(2).
97 Nevertheless, the role of the Māori Land Court in establishing ahu whenua trusts and in providing oversight of its activities for the benefits of multiple owners is conceptually different from the jurisdiction that the High Court exercises in relation to all trust: *Fenwick v Naera*, ibid, at para [121].
98 Ibid, at para [117] citing *Naera v Fenwick – Whakapoungakau 24* (2010) 15 Waiariki MB 279 (15 WAR 279) at para [155]. More generally, see *Leef v Bidois* [2017] NZHC 36 at paras [50]–[52].

the Whaoa Trust, the Reservation Trust and the Tumunui Trust as at the date of his death, 22 October 2003. Mr Kusabs deposed that:[99]

(a) There are 355.8441 hectares vested in the Whaoa Trust.

(b) There are 174.0183 hectares vested in the Reservation Trust.

(c) Of the 157.050 shares in the Whaoa Trust and the Reservation Trust, the widow of the late Mr Moke holds 3,055.52 shares. That amounts to 1.94 per cent of the total shareholding.

(d) The interests that the late Mr Moke held in the Tumunui Trust represented 54.49436 shares out of 48,161.41754. That represents a percentage shareholding of about 0.113 per cent.

[151] The "limited benefit" exception is founded on a line of authority to which the learned authors of *Lewin on Trusts* refer.[100] Although Glazebrook J referred, in *Fenwick*, to the 18th edition of that text, there is no material difference in the way in which the point is expressed in the most recent edition, the 19th. The definition cited from the 18th edition by the Supreme Court stated:[101]

> … [W]here the purchaser is a company in which the trustee is a small minority shareholder the transaction, though considered suspect, may be justified by showing that the consideration was adequate at the time, even though a better price might have been obtained by postponing the sale.

[152] Glazebrook J reviewed the three authorities on which *Lewin* relies: *Hickley v Hickley*,[102] *Farrar v Farrars Ltd*[103] and *Hillsdown Holdings Plc v Pensions Ombudsman*.[104] She said:[105]

> [84] The authors also cite the case of *Hickley v Hickley* for the proposition that, if two trusts do not share a common trustee, a sale between the trusts

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99 In his written reply evidence, Mr Staite acknowledged the accuracy of those figures.

100 Lynton Tucker and others (eds) *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2015) at [20-120].

101 John Mowbray and others (eds) *Lewin on Trusts* (18th ed, Sweet & Maxwell, London, 2008) at para [20-78].

102 *Hickley v Hickley* (1876) 2 ChD 190 (CA).

103 *Farrar v Farrars Ltd* (1888) 40 ChD 395 (ChD and CA).

104 *Hillsdown Holdings Plc v Pensions Ombudsman* [1997] 1 All ER 862 (QB).

105 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at paras [84]–[89].

will not be set aside under the strict self-dealing rule merely because a trustee of the selling trust has a limited beneficial interest in the purchasing trust.

[85] We doubt that any of these cases provide strong authority for a general exception of the breadth submitted by the Trustees. It is significant that *Farrar* was in the mortgagee context and was in any event founded on the genuine transaction rule and not on self-dealing rule. Lindley LJ, when delivering the judgment of the Court of Appeal in *Farrar*, recognised that the position of a mortgagee is very different from that of a trustee:

> A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgagor confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts bona fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress …

[86] As to *Hillsdown*, this involved the transfer of assets between two pension schemes that were associated with the same parent company. Two of the directors were directors of the parent company as well as of the two pension schemes and thus had "a foot in three camps". Knox J held that the self-dealing rule is not as "hard and fast as to require a negotiation between pension fund trustees and the employer to be set aside automatically without investigation if one or more of the trustees are directors of the employer".

[87] The *Hillsdown* case arose in particular circumstances and may be explicable because of the special position of pension funds (discussed in the next section).

[88] In *Hickley v Hickley*, Mr Hickley was an executor under a will and, as such, was charged with selling a number of dwelling houses. The proceeds from these sales were for the benefit of the testator's three daughters and their children and issue. One third of the proceeds were to go to a nuptial trust (under a marriage settlement) that the testator had earlier set up for one of his daughters and in which his son-in-law, Mr Hickley, had a reversionary interest. Mr Hickley and his wife were anxious to retain some of the property and reside in a house on one of the lots. The trustees of the nuptial trust authorised Mr Hickley to purchase a house and the adjoining lots for the nuptial trust.

[89] In the record of the oral argument it was recorded that "the plaintiffs do not desire to set aside the sale, unless it turns out to have been at an undervalue". Bacon VC held that Mr Hickley's conduct had been perfectly proper, that full value had been received and declined to set aside the sale. Given the position taken by the plaintiffs, as well as the unusual facts, we do not consider this case provides strong authority for a general limited interest exception with regard to trusts.

(footnotes omitted)

[153] In drawing those observations together, Glazebrook J expressed the rationale for any limited beneficial interest exception as "presumably that, where there is only a very small conflicting interest in the transaction, it may not have influenced it, as long as the person is not also negotiating 'on both sides of the transaction' by being a trustee or director of both contracting parties".[106]

[154] In expressing doubts about the existence of a general limited beneficial interest exception, Glazebrook J referred to the analysis undertaken in *Movitex Ltd v Bulfield*, where Vinelott J said:[107]

> In *Re Thompson's Settlement* … I suggested that the explanation of the decision in *Farrar's* case is that the self-dealing rule may not apply in its full rigor if a fiduciary exercises a power of sale in favour of a company in which he has a comparatively small shareholding and if he takes no active part in the negotiations. On further consideration I doubt whether that is the correct explanation. *While the interest of the fiduciary may be so small that it can as a practical matter be disregarded, if the interest is sufficiently large to be capable of influencing the fiduciary's mind, the strict rule applies. For instance, in* Transvaal Land Co v New Belgium (Transvaal) Land and Development Co *[1914] 2 Ch 488 ... a director of the plaintiff company who voted in favour of a resolution for the purchase of shares from the defendant company held as trustee 0.5% of the ordinary shares of the defendant company. He was not a director of the defendant company. But his conflicting interest as trustee shareholder was held sufficient to found a claim to avoid the transaction*.
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> …
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> I think that the true explanation of *Farrar v Farrars Ltd* may be that a mortgagee is not within the strict self-dealing rule and that while he cannot sell to himself or to a trustee for himself (since there are then not in truth two parties to a genuine negotiation) he may sell to a body in which he has an indirect interest, though the court will look jealously on such a sale and set it aside unless the mortgagee can satisfy the court that the terms of sale were honestly and independently settled and that the price was one 'at which the mortgagee could properly sell' …
>
> …
>
> In so far as [*Hickley v Hickley*] is founded on the proposition that the court has a discretion to refuse to set aside a transaction entered into in breach of the self-dealing rule if satisfied that the transaction was fair and honest, it is in my judgment inconsistent with cases of the highest authority which show

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106 Ibid, at para [90].

107 *Movitex Ltd v Bulfield* (1986) 2 BCC 99 (Ch) at 122–123, cited in *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at para [91]. Vinelott J's previous decision, to which he refers, was *Re Thompson's* Settlement [1986] Ch 99 (ChD). The Supreme Court referred also to observations made by Nugee J in *Barnsley v Noble* [2014] EWHC 2657 (Ch).

> that such a sale is voidable, even if a trustee claims to show that he gave more than full value for the property[.]

[155] While the Supreme Court left open the question whether there was "a limited interest exception to the strict self-dealing rule"[108] two reasons were given why the exception could not apply to the trustee against whom the action had been taken, Mrs Fenwick. For present purposes, I consider the first of those reasons applies in this case. Glazebrook J said that, on any view, the "limited interest exception (if it exists) does not apply if the person has a limited interest in the other party but is, at the same time, also a director or trustee of the other party and so effectively 'on both sides' of the negotiations for the transaction".[109]

[156] I have found that Mr Moke was involved on both sides of the transaction. In his dual roles as trustee of the Whaoa Trust and the Tumunui Trust respectively, he was regarded by both sets of trustees as being involved, on their behalf, in the negotiation process.

[157] Even if that were not so, I would not have regarded Mr Moke's limited financial interest in the Trust property as sufficient to exclude liability under the self-dealing rule. In the context of ahu whenua trusts, Māori custom is also important. On the evidence that I heard, it is likely that, at least subconsciously, Mr Moke allowed his greater tribal affiliation with beneficial owners of the Tumunui Trust to override his affiliation to Ngāti Whaoa. Evidence that Mr Moke identified more closely with Ngāti Tumatawera is found on his headstone which refers to "Tumunui" as his mountain.[110]

(d) Did Mr Moke breach his duty of loyalty?

[158] Although there was no equivalent to s 227A of the 1993 Act[111] in the 1953 Act, at the time when the Whaoa Trust and the Tumunui Trust were established in 1982 and 1986 respectively, the Trust order approved by the Māori Land Court in

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108 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at para [92].
109 Ibid, at para [93].
110 See para [17] above.
111 Section 227A is set out at para [129] above.

respect of each contained provisions dealing with the personal interests of trustees. Clauses 4 and 5 of the relevant Trust orders provided:[112]

> 4 Personal Interest of Trustees
>
> Notwithstanding any general rule of law to the contrary no personal shall be disqualified from being appointed or from holding office as a Trustee or as a representative of the trust by reason of his employment as a servant or officer of the trust or by his being interested or concerned in any contract made by the Trustees PROVIDED THAT he shall not vote or take part in the discussion on any matter that directly or indirectly affects his remuneration or the terms of his employment as a servant or officer of the trust or that directly or indirectly affects any contract in which he may be interested or concerned PROVIDED FURTHER THAT if a Trustee is employed by the Trust in any capacity whatsoever he shall not be paid any fees, costs, remunerations or other emolument whatsoever until same has been approved by the Court.
>
> 5 Protection of Trustees
>
> In any case where any Trustee is of the opinion that any direction determination or resolution of a meeting of the Trustees or general meeting of beneficial owners conflicts or is likely to cause conflict with the terms of this trust or with any rule of law or otherwise to expose it to any personal liability or is otherwise objectionable then, and in reliance upon section 30(1)(e) of the Māori Affairs Act 1953 and of the Trustee Act 1956 he may apply to the Court for directions in the matter PROVIDED HOWEVER that nothing herein shall make it necessary for him to apply to the Court for any such directions.

[159] The effect of those two provisions is as follows:

(a) Under cl 4 of the Trust Order, a trustee is permitted to participate in Trust business where he or she is *employed* by the Trust, even where a decision may affect that *employment status*. The protection for the beneficial owners is that he or she cannot receive any payment for services rendered, unless approved by the Māori Land Court.

(b) Under cl 5, where any question of conflict arises a trustee can apply to the Māori Land Court for directions to protect himself or herself from potential liability. The proviso to cl 5 has the effect of putting the

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[112] *Re Tumunui Blocks IX, X, XIII and XIV* (1986) 218 Rotorua MB 12–17.

trustee at risk of action if he or she had a conflict of interest, yet did not seek directions from the Court.

[160] As cls 4 and 5 appear in each of the orders that constitute the Whaoa Trust and the Tumunui Trust,[113] Mr Moke's duties as a trustee of each of the Whaoa Trust and the Tumunui Trust were the same.

[161] Oral evidence about Mr Moke's actions that give rise to the claim of breach of duty is sparse. Primarily, reliance is placed on contemporary documents to establish what Mr Moke did or failed to do. Given that about 23 years have passed since the events in issue and taking account of the fact that memories of those who gave first hand evidence of what occurred at the relevant time have necessarily dimmed, I propose to make factual findings on the basis of the contemporary documents.

[162] The initial focus of Mr Chesterman's inquiry was the background to the arrangement into which the Tumunui Trust entered with Mr Mills to acquire the Mills lease. That arrangement resulted from the "handshake" agreement reached between Mr Mills and Messrs Kusabs and Hyland, following a meeting at Mr Mills' home on the evening of 3 April 1989.[114] The uncontroverted evidence is that this involved an offer for the Tumunui Trust to buy the Mills' lease for $180,000. That arrangement was ratified by the trustees of the Tumunui Trust, including Mr Moke, on 4 April 1989.[115] Money changed hands on 1 June 1989, without any formal documents being prepared or executed.

[163] Mr Chesterman submitted that Mr Moke was a party to the Tumunui Trust's decision to acquire the Mills lease. Further, he contended that Mr Moke knew both that the Tumunui Trust was gaining a material benefit and causing a corresponding material detriment to the Whaoa Trust.

[164] Mr Chesterman relied on the following evidence to support those propositions:

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113 *Re Rotomahana Parekarangi 8* (1982) 203 Rotorua MB 48 at 48.
114 See paras [52] and [53] above.
115 See paras [54] and [55] above.

(a) Mr Moke had participated in meetings of the trustees of the Tumunui Trust in the period leading up to the "handshake" agreement. During that time, the trustees had received (and considered) regular reports from Mr Hyland about the possibility of acquiring a farm on which it could operate a dairy farm. For example, in his report of 18 November 1988,[116] Mr Hyland discussed the possibility that the Tumunui Trust could acquire the Mills lease, on the basis of an extension of 23 years.

(b) Following discussions among the trustees of the Tumunui Trust, Mr Hyland met with trustees of the Whaoa Trust to present a proposal. Initially, that was unsuccessful. Thereafter, Mr Moke took steps to persuade the Whaoa Trust to transfer the lease to the Tumunui Trust, rather than to the person whom Mr Mills seemed to regard as the preferred purchaser at that time, Mr Bell.[117]

(c) Minutes of various meetings of the trustees of the Tumunui Trust:

(i) At the first of these, held on 24 February 1989, Mr Hyland's report of 23 February 1989 was discussed. Paraphrasing the content of the minutes of the 24 February 1989 meeting, Mr Moke is recorded as having observed that no arrangement between Mr Mills and Mr Bell had been finalised. He told the trustees that there remained a prospect that the Mills lease may be available to the Tumunui Trust to acquire.[118]

(ii) Mr Moke was present at the meeting of trustees of the Tumunui Trust on 4 April 1989 when Mr Kusabs and Mr Hyland reported on the "handshake" agreement that they had reached the previous night, to acquire the Mills' lease for $180,000, subject to trustees' approval.[119]

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116 See para [45] above.
117 See paras [46]-[55] above.
118 See para [49] above.
119 See para [55] above.

(iii) The minutes of the 4 April 1989 meeting demonstrate that Mr Moke was an active participant in discussions to determine whether the trustees should approve the informal arrangement into which Mr Kusabs and Mr Hyland had entered with Mr Mills. For example, Mr Moke is recorded as making comments to the effect that Mr Bell had been used by Mr Mills to secure a better price for the lease, and that the Tumunui Trust might acquire it more cheaply. Notwithstanding those observations, the trustees approved the arrangement with Mr Mills.[120]

(iv) The acquisition of the Mills' lease was to be completed on 1 June 1989. In the Tumunui Trust's annual report for the year ended 30 June 1989 the following comment appears: "We take this opportunity of thanking Whaoa No 1 Trustees in smoothing the purchase from Mr Mills". In context, that must be a reference to Mr Moke's role.

(v) In minutes of a general meeting of beneficial owners of the Whaoa Trust held on 4 April 1992, Mr Moke is recorded as having told the assembled owners that: "A very strong effort had been required of the [Whaoa] Trust to persuade [Mr Mills] to sell his lease to [the Tumunui Trust] instead of his individual protegee [sic] whom the [Whaoa] Trust regarded as a very insecure risk".

[165] Mr Chesterman also relied on oral evidence from two of Mr Moke's co-trustees on the Whaoa Trust, Mr Edwards and Mr Bamber. The thrust of their evidence was that they did not know that Mr Mills was seriously considering transferring his lease to anyone other than the Tumunui Trust. They assert that Mr Moke and Mr Price had led them to believe that the Whaoa Trust was desperate to get a new tenant and that the Tumunui Trust was the only option. That oral evidence goes further than the contemporary documents suggest. As I have already

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120 See para [55] above.

indicated,[121] I am not prepared to rely on it. While I regard both Mr Edwards and Mr Bamber as honest people who were doing their best to recollect what happened well over 20 years ago, their memories must be regarded as too unreliable, in the absence of documentary evidence to support what they have said.

[166] Mr Chesterman then addressed the evidence about the extension of the lease that the Tumunui Trust had sought in order to ensure there was time to develop and to secure benefits from a dairy conversion operation. I summarise the relevant evidence to which he referred:

(a) On 18 November 1988, Mr Hyland had reported to the Tumunui Trust that an extension of at least 20 years from 1992, making a total term of 43 years, was "essential and reasonable" given the "useful life of a cow shed and fencing".[122]

(b) On 26 June 1989, Mr Moke attended a meeting of the trustees of the Tumunui Trust at which time it was resolved to write to the Whaoa Trust about an extension of the Mills lease.[123] Minutes of a later meeting, on 24 July 1989, record that Mr Moke was asked to arrange a meeting with the Whaoa Trust to discuss the extension.[124]

(c) A joint meeting of the trustees of the Tumunui Trust and the Whaoa Trust was held on 15 August 1989, at which time Mr Hyland's discussion paper of 15 July 1989 was considered. During the course of that meeting, the trustees of the Whaoa Trust indicated they were "agreeable" to an extension of the lease for a period of 20 years. No reference was made in either the discussion paper or in the minutes of the 15 August 1989 meeting of a period of 43 years being "the useful life of the cow shed and fencing".

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121 At para [51] above.
122 See para [45] above.
123 See para [58] above.
124 See para [62] above.

(d) Mr Price, as secretary of the Whaoa Trust, wrote to Mr Burton on 16 August 1989 to confirm arrangements for the Tumunui lease. For present purposes, the following extract sets out the nature of the agreement reached:[125]

> On 15 August 1989 the Whaoa No 1 Land Trust met the Tumunui Trust to discuss the terms of the lease they are taking over from H Allen Mills & Son. The basic issue requiring agreement between the two Trusts related to an extension of the lease.
>
> *Whoa No 1 Trustees are agreeable to an extension of the lease for a period of 20 years*.
>
> Conditions attached to the extension of the lease are as follows;
>
> 1. *Rental will be based on land values* and not in a share of milk fat prices.
>
> 2. *That there will be three (3) yearly reviews of the lease*.
>
> The purpose of the three yearly reviews has a philosophical base. It is the desire of the Whaoa No 1 Trustee's to keep both future Trustee's and owner's involved in the management of their land on a responsible and continuing level. …
>
> …
>
> *I have been authorised by the Trustee's of Whaoa No 1 to request that you conclude an agreement with the Tumunui Trust containing the provisions described above*.
>
> …
>
> (emphasis added)

A copy of the discussion paper of 15 July 1989 was attached to this letter, so that Mr Burton was apprised of the proposals put by the Tumunui Trust.

[167] On the basis of the evidence adduced, I find:

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125 See para [63] above.

(a) Mr Moke participated in discussions as a trustee of both the Whaoa Trust and the Tumunui Trust when the Tumunui lease was negotiated. He did so during the course of meetings of each trust and, to an extent that I cannot determine with any specificity, in dealings with others outside the two trusts. Mr Moke's involvement in these discussions provided material assistance to the Tumunui Trust in its negotiations with the Whaoa Trust.

(b) Mr Moke was privy to the reports prepared by Mr Hyland for the trustees of the Tumunui Trust, on the basis of which those trustees made their decision to acquire the Mills lease. There is no evidence to suggest that Mr Moke shared that type of information with the trustees of the Whaoa Trust.

(c) Mr Moke was involved in discussions with both Mr Burton (acting for Whaoa Trust) and Mr Chadwick (acting for Tumunui Trust) when the lease document of 1994 was signed on behalf of both Whaoa Trust and Tumunui Trust. Although Mr McKechnie suggested that the approaches made by Mr Couldrey to the Māori Land Court and his involvement in the subdivision application to the Council were undertaken for the sole benefit of the Whaoa Trust, the Tumunui Trust intended to engage a registered surveyor to undertake the subdivision application,[126] and was shown as the applicant in respect of the applications made to both the Council and the Māori Land Court.[127]

[168] Although a new lease was entered into between the Whaoa Trust and the Tumunui Trust, the reason why that was done appears to be linked to a view expressed by the solicitors for each party about possible invalidity of the Mills lease. The need to take account of the value of improvements since the first lease of the No 8 Block was entered into in 1961, seems to have been an error. The contemporary correspondence does not support the notion that the Whaoa Trust and the Tumunui Trust intended to enter into a new lease on the basis that the Tumunui Trust was

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126 See para [69] above. The Whaoa Trust does appear to have agreed to contribute one half of the cost of undertaking the work: see para [71] above.

127 See paras [83] (Māori Land Court application) and [76] (the subdivision application) above.

entitled to have the benefit of all improvements undertaken by both Mr Blackler and Mr Mills' company when rental was assessed for the balance of the new term, which was not to expire until 2032.

[169] I make a positive finding that Mr Moke was not responsible for the error that occurred. That said, there remains a question whether the Tumunui Trust should be entitled to retain the benefit of the wrongly expressed rental formula, having regard to Mr Moke's involvement in negotiations for the new lease on both sides of the transaction.

[170] On the basis of those findings, the prophylactic approach to fiduciary obligations requires me to find that Mr Moke was in breach of his duty of loyalty to the Whaoa Trust. It is plain that he was involved on both sides of the transaction, and arguably favoured the Tumunui Trust, with which he appears to have had stronger tribal affiliations.[128]

(e) Relief against Mr Moke

[171] Mr Moke's personal representatives have taken no steps in these proceedings. They abide the decision of the Court. For that reason, although the conduct of Mr Moke is at the heart of the dispute, no financial remedy is sought against him. Instead, I am asked to make a declaration that Mr Moke did breach his duty of loyalty to the Whaoa Trust. That declaration is needed to provide a foundation for the primary claim for relief against the Tumunui Trust, the party in whose interests Mr Moke is said to have acted in conflict with his obligations as a trustee of the Whaoa Trust.

[172] The absence of any financial claim against the personal representatives of the late Mr Moke means there is no plea for relief from liability in the event that Mr Moke was found liable. The ability to seek relief, as a trustee, stems from s 73 of the Trustee Act 1956, which states:

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[128] See paras [14]–[21] above.

> **73 Power to relieve trustee from personal liability**
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> If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed the breach, then the court may relieve him either wholly or partly from personal liability for the same.

[173] I mention s 73 to identify an issue that needs to be considered in the context of any remedy that should be granted in respect of the Tumunui lease. Obviously, a third party should not be made liable for breach of the self-dealing rule, if the trustee found to have been in breach were subsequently relieved from personal liability by a s 73 order.

[174] I have already found that the evidence establishes a breach of Mr Moke's fiduciary duty of loyalty owed to the Whaoa Trust. He was obliged to act, in carrying out his duties as a trustee, in the best interests of the Whaoa Trust. Instead, he also involved himself in negotiations on behalf of the Tumunui Trust in circumstances where a significant benefit was gained by the latter through the execution of a new lease.[129] Although a trustee may be involved in negotiations on behalf of another party, that can only be done with the informed consent of the fiduciary's principle. There is nothing to suggest that informed consent was given in this case.

[175] Nor did Mr Moke seek permission from the Māori Land Court to act in this way. Clause 5 of the Trust Order (applicable to both the Whaoa Trust and the Tumunui Trust), entitled a trustee to apply to the Māori Land Court for directions to protect himself or herself from potential liability arising out of a conflict of interest. The proviso to cl 5 is that provision of the Trust Order has the effect of putting the trustee at risk if directions have not been sought from the Court.[130] I am satisfied that a trustee who fails to make such an application, in circumstances where it is clear that he or she is acting on both sides of a transaction, cannot be said to have acted "reasonably", for the purposes of s 73 of the Trustee Act.

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[129] See my summary of the expert evidence on this topic, set out at paras [162]–[167] above.

[130] See cl 5 of the Trust Order of the Tumunui Trust, set out at para [158] above. As to its application to the Whaoa Trust, see para [159] above.

[176] In those circumstances, I am prepared to make a declaration that Mr Moke was in breach of his fiduciary obligation of loyalty.

(f) Relief against Tumunui Trust

(i) Knowledge

[177] Mr Chesterman submitted that Mr Moke's breaches of fiduciary duties owed to the Whaoa Trust were known by his co-trustees of the Tumunui Trust. I accept Mr Chesterman's submission that the requisite degree of knowledge on the part of the Tumunui Trust is present.

[178] In my view, the trustees of the Tumunui Trust had actual knowledge that Mr Moke was acting as an agent for both the Whaoa Trust and the Tumunui Trust in the negotiations about the proposed Tumunui lease. In summary:

(a) Mr Moke's role in relation to the lease consisted of involvement in the Tumunui Trust's decision-making processes and liaising with trustees of the Whaoa Trust. As such, he was intimately involved in the process of acquiring the lease and the other trustees of Tumunui Trust knew that.

(b) Mr Kusabs and Mr Moke each displayed knowledge of their obligations when a conflict of interest arose, when voting, at a meeting (held on 27 October 1994) of the Tumunui Trust in relation to a separate transaction involving a lease of a property owned by what is called the Whaoa No 2 Trust. Mr Moke abstained because he was a trustee of the Whaoa No 2 Trust, while Mr Kusabs had an association with another person who was interested in leasing that property.

(c) Mr Kusabs gave unchallenged evidence that he knew that Mr Moke was strongly in favour of the Tumunui Trust leasing the Whaoa Trust's property, and that Mr Moke, as a rangatira of Ngāti Whaoa would have "a degree of influence" within his iwi. That influence

would carry over to his role as chairman of the Whaoa Trust. I am satisfied that influence extended to the Reservation Trust.

(d) Mr Kusabs accepted that he was aware, in the period between 1988–1994 when chairman of the Tumunui Trust, that Mr Moke ought to have stood down from negotiations. Neither Mr Kusabs nor Mr Hyland (who also attended meetings of the trustees of the Tumunui Trust) could recall Mr Moke absenting himself while discussions about the Tumunui lease were held.

[179] I am satisfied that other trustees of the Tumunui Trust were aware that Mr Moke was acting in two different capacities. Importantly, Mr Kusabs, the chairman of the Tumunui Trust appreciated the potential for conflict of interest. No meaningful steps were taken to avoid an actual conflict arising. Despite the fact that neither Mr Kusabs or Mr Moke participated in discussions about, and abstained from voting on, a proposed transaction involving the Whaoa No 2 Trust, no similar steps were taken in respect of the negotiations of the Tumunui lease.[131]

[180] On the basis of the principles laid down in *Fenwick v Naera*,[132] subject to questions of limitation or laches, any transaction entered into between parties involving a trustee with a conflict of loyalty between the two may, as a matter of discretion, be set aside by the Court, or some alternative (and more appropriate) remedy may be granted.

(ii) Limitation and laches

[181] Mr McKechnie relies both on the provisions of the Limitation Act 1950 and the equitable doctrine of laches to defeat any claim against the Tumunui Trust arising out of Mr Moke's breach of the fiduciary duties that he owed to Whaoa Trust. The first question is whether the Limitation Act or the equitable doctrine governs this case.

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131 See para [178](b) and [178](d) above.

132 *Fenwick v Naera* [2016] 1 NZLR 354 (SC), at paras [113]–[127]. Factors to be considered by the Māori Land Court, in that case, were identified in para [125], set out at para [145] above.

[182] The application of the Limitation Act turns principally on how it applies to equitable claims. As a general starting point, the limitation periods found primarily in s 4 of the Act do not apply to claims for equitable relief. That is by virtue of s 4(9), which states:

> This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the corresponding enactment repealed or amended by this Act, or ceasing to have effect by virtue of this Act, has heretofore been applied.

[183] As s 4(9) itself makes clear, there are caveats to that general proposition. The first is where analogy may be made between the equitable action and a common law action. That exception comes from a long-standing rule of the courts of equity:[133]

> [W]here the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation.

[184] Some qualifications to the general rule are also found in s 21 of the Act:

> **21 Limitation of actions in respect of trust property**
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

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[133] *Knox v Gye* (1872) LR 5 HL 656 at 674, per Lord Westbury. See also Andrew S Butler and James Every-Palmer "Equitable Defences" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [38.1.3]: "Limitation by Analogy".

> (3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

[185] Section 21(1) of the Limitation Act governs the limitation period applying to breaches of the fiduciary duties of a trustee. For that section to apply, either of the two limbs must be met:

> (a) The trustee must have committed or been party to fraud or fraudulent breach of trust, or
>
> (b) The trustee must have obtained trust property in breach of trust.

[186] The issue, in this case, is whether Mr Moke can be said to have committed a fraudulent breach of trust, having been found to have breached his duty of loyalty to the Whaoa Trust.

[187] On the scope of the meaning of the term "fraud" in s 21(1)(a), Dr Andrew Butler writes:[134]

> There is New Zealand authority to support the proposition that "fraud" includes equitable fraud and therefore includes simple breach of fiduciary duty (though not a simple breach of a fiduciary's duty to exercise reasonable skill, care, and diligence). Thus, a trustee … will not receive the benefit of the statutory limitation period in respect of any type of action based on his or her alleged double engagement, personal profit, and so on.

[188] As authority for the proposition that fraud includes equitable fraud, Dr Butler cites *Official Assignee of Collier v Creighton*.[135] In that case, Gault J for the Court of Appeal held that "fraud", as used in s 28 of the Limitation Act 1950, included "equitable fraud".[136] Dr Butler also refers to the decision of the Privy Council in *O'Connor v Hart*, to support the proposition that equitable fraud includes a breach of fiduciary duty.[137] Lord Brightman observed in that case:[138]

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134 Ibid, at 1046 (footnotes omitted).
135 *Official Assignee of Collier v Creighton* [1993] 2 NZLR 534 (CA).
136 Ibid, at 538, citing *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC).
137 *O'Connor v Hart* [1985] 1 NZLR 159 (PC)
138 Ibid, at 171.

> "Fraud" in its equitable context does not mean, or is not confined to, deceit; "it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties"; *Earl of Aylesford v Morris* (1873) 8 Ch App 484, 490. It is victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

[189] The effect of interpreting "fraud" in s 21(1) of the Act to include equitable fraud results in no limitation period applying to claims of equitable fraud. That is consistent with the general proposition in s 4(9) of the Act that equitable claims are not subject to limitation. It has been established that Mr Moke acted in breach of his duty of loyalty. That action was unconscionable and in these circumstances can be defined as equitable fraud, adopting Lord Brightman's analysis. As such, the attempt to time-bar the plaintiffs' claims for breach of fiduciary duty must fail by virtue of the application of s 21(1) of the Limitation Act.

[190] Nor am I persuaded that a different result would follow by regarding the breach of duty as one that is analogous to a common law claim. While s 4(9) states that the general proposition is subject to such an analogy, that caveat appears only in s 4. It does not appear in s 21. Although the analogy principle originated at common law, I am satisfied, from the statutory scheme, that it was not intended to apply in respect of s 21. If Parliament had intended that result, I would have expected it to have said so explicitly.

[191] As to the equitable doctrine of laches, while prejudice arising from delay may be sufficient to bring the doctrine into play, its automatic application does not follow. Delivering the judgment of the Supreme Court in *Eastern Services Ltd v No 68 Ltd,*[139] Anderson J referred to advice of the Privy Council in *Nwakobi v Nzekwu*.[140] Delivering that advice, Viscount Radcliffe had said:[141]

> Laches is an equitable defence, and to maintain it and obtain relief a defendant must have an equity which on balance outweighs the plaintiff's right.

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139 *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335.
140 *Nwakobi v Nzekwu* [1964] 1 WLR 1019 (PC). See *Eastern Services*, ibid, at [11].
141 *Nwakobi v Nzekwu,* ibid, at 1026.

[192] The Supreme Court considered whether delay without any prejudice was sufficient to trigger the use of laches as a limitation defence.[142] After traversing relevant authority, Anderson J endorsed an observation made by Cooke P, for the Court of Appeal, in *Neylon v Dickens*.[143] The President had said:[144]

> Whether hard-and-fast requirements for a successful defence of laches in any context can be identified is very doubtful. There is a useful discussion in Meagher, Gummow and Lehane, Equity: Doctrines and Remedies (2nd ed, 1984) chapter 36, where the authors say 'in view of the confused state of the later authorities, certainty on the point is not possible' but give the opinion that mere delay does not constitute laches. The only opinion that we would venture is that it may be unwise to depart from the classic exposition of the doctrine by [Lord Selborne LC], delivering the judgment of the Privy Council in *Lindsay Petroleum Company v Hurd* (1874) LR 5 PC 221, 239 – 241,16 which treats the length of the delay and the nature of the acts done during the interval as always important in arriving at a balance of justice or injustice between the parties, but stopped short of laying down that detriment is always essential. It is understandable that textbook writers often find the ostensible certainty of abstract propositions more attractive than those whose task it is to try to decide actual cases in accordance with law.

[193] While I find that the delay in bringing the proceeding has not impacted on my ability to determine whether a breach of fiduciary duty occurred, I consider that delay is relevant to the nature of any remedy that might be granted for such a breach. The question whether a remedy (and, if so, what type) should be granted will be informed by any prejudice to the Tumunui Trust arising out of the delay.

(iii) Nature of remedy

[194] I now consider whether a remedy is justified.

[195] Mr Chesterman submitted that the nature of the breach of duty by Mr Moke and the extent of knowledge of his co-trustees of the Tumunui Trust justified an order rescinding the Tumunui lease, notwithstanding the passage of time since it was entered into. Unsurprisingly, Mr McKechnie's response was that it was impossible to unwind the lease, particularly given the improvements to the land that have resulted from the dairy conversion undertaken by the Tumunui Trust.

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142 *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at paras [29]–[39].
143 *Neylon v Dickens* [1987] 1 NZLR 402 (CA).
144 Ibid, at 407. See *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at para [37].

[196] As to rescission, Mr Chesterman submitted that I should give considerable weight to the fact that the Tumunui Trust received the benefit of an asset worth approximately $2 million that belonged to the Whaoa Trust, in the form of the value of the capital improvements made to the land while the Mills lease was in force to the time at which the Tumunui lease is deemed to have commenced, 1 July 1992. The Tumunui Trust has had the benefit of that advantage for almost 27 years, and a further 25 years remains to run.

[197] In short, Mr Chesterman submits that if I were to find that the Tumunui Trust's actions were wrongful, it would be wrong in principle to deny rescission of the lease "simply because [the Tumunui Trust has] been on the land a long time and [has] spent money on it and it would be 'difficult' to unwind". Mr Chesterman submits that the Tumunui Trust has made significant profits from the use of the land as a result of the "very low" rental it is required to pay.

[198] As to damages, Mr Chesterman submits that, if rescission were refused, the loss suffered by the Whaoa Trust should be measured as the difference between the actual rent paid under the Tumunui lease and the true market rent that would otherwise have been payable. Some provision would need to be made, in addition, to adjust the rent payable on future rent reviews.

[199] There are two aspects to the Whaoa Trust's claim with regard to detriment suffered as a result of the execution of the Tumunui lease. Both were the subject of evidence from Mr John Larmer, a registered valuer with more than 50 years' experience in rural valuation and consultancy. Mr Avon McLaughlin, a valuer of over 25 years' experience, responded to Mr Larmer. Mr McLaughlin has the advantage of having had significantly greater experience with rural properties in the Reporoa area. I am satisfied that both Mr Larmer and Mr McLaughlin were qualified to give opinions and that each gave evidence, in an exemplary manner, independently of the party by whom they were called.

[200] Following cross-examination, Mr Larmer's evidence was that a term of 20 years for the Tumunui lease would have reflected an expected commercial outcome at the time of negotiation in the 1990s. However, he opined that an extension of 20

years from 13 December 2012 which resulted in an effective term of 40 years was not an expected commercial outcome. Mr Larmer's view was that the lease was onerous, by preventing a market return for the lessor until December 2032.

[201] Mr McLaughlin's position was that the lease term, while longer than industry standard when the rental formula applies for the whole term of 40 years, was not uncommercial of itself. But both Mr McLaughlin and Mr Larmer recognised that the inclusion of a term enabling the Tumunui Trust to claim the benefit of lessee improvements from 1961 provided a considerable advantage to the lessee, to the detriment of the lessor.[145]

[202] Although disagreeing with evidence from Mr Larmer as to any financial loss caused to the Whaoa Trust by those terms, Mr McLaughlin accepted that there was no commercial basis or logic for adopting the rental formula from the Mills lease. He accepted that had two significant consequences:

(a) The first was that the Tumunui lease was "extraordinarily favourable to [Tumunui Trust] and extraordinarily onerous to [Whaoa Trust]"; and

(b) The rental formula, having regard to the term of 40 years conferred by the Tumunui lease was "well below market [rent] for a long period".

[203] In considering the nature of a remedy, I take account of the fact that the Tumunui Trust was entitled to rely on a reasonable expectation that either an assignment of the Mills lease or a new lease would be granted in its favour from the time that it went into possession of the No 8 Block in 1989. It is clear that the Tumunui Trust expended considerable money to undertake its dairy farm conversion and its subsequent operation on the leased land.

[204] While difficulties arising from the need to unwind events that have occurred over the last 23 years would not provide an insuperable hurdle to relief, an inappropriate benefit could be obtained by the Whaoa Trust, were such an order to be

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[145] The rental formula is set out at para [80] above. See also para [202] below.

made without some compensation being awarded in favour of the Tumunui Trust. Compensation could be ordered on the basis that the Whaoa Trust is deemed to have held its interest as a constructive trustee for the Tumunui Trust during the period that the rescinded lease was operative.[146]

[205] Mr Chesterman pleaded in the alternative that the Whaoa Trust and the Reservation Trust were entitled to any other relief this Court saw fit. That leaves open the option of assessing whether or not there is a more appropriate remedy than rescission, damages or constructive trust. In that context, I shall consider whether the equitable remedy of rectification is available. I raised this issue with counsel at the hearing, and each has had an opportunity to make submissions on it.

[206] There are a number of advantages to rectification. First, it is equitable in nature and therefore is not subject, on the basis of my earlier findings, to the Limitation Act or laches. Second, in a contractual context, rectification forms one of the few exceptions to the general rule that oral evidence of the parties' prior negotiations of a contract is not admissible when determining a remedy. As such, I may take into account the entire factual record when determining if rectification ought to be available.

[207] Though typically associated with purely contractual remedies, leases are subject to rectification.[147] The requirements to prove the doctrine were stated in clear terms by Peter Gibson LJ in *Swainland Buildings Ltd v Freehold Properties Ltd*:[148]

> The party seeking rectification must show that:
>
> (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;

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146 A similar approach was taken by the Court of Appeal of Vanuatu in *Colmar v Rose Vanuatu Ltd* [2011] VUCA 20 at paras [66]–[88]. In that case, the Court fashioned equitable relief in order to avoid conferring an unjust benefit to a party on whose behalf another held a leasehold interest in land on a constructive trust. That decision was made in the context of a land registration system in Vanuatu that is limited to leases; "ownership" of the land is by way of customary title.

147 *Wellington City Council v New Zealand Law Society* [1988] 2 NZLR 614 (HC), upheld on appeal in *Wellington City Council v New Zealand Law Society* [1990] 2 NZLR 22 (CA).

148 *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71 at [35]. More generally, as to rectification, see *Dundee Farm Ltd v Bambury Holdings Ltd* [1978] 1 NZLR 647 (CA).

(2) there was an outward expression of accord;

(3) the intention continued at the time of the execution of the instrument sought to be rectified;

(4) by mistake, the instrument did not reflect that common intention.

[208] These requirements form an exception to the rule that the parties, by their final agreement, are taken to intend the terms they record in the writing. I am satisfied that they have been met in this case.

[209] The possibility that the Tumunui Trust would enter into a new lease arose because the solicitors had expressed concerns about whether the Mills lease was binding and valid. Mr Burton and Mr Chadwick formed a view that they should "scrap" the Mills lease and negotiate a new one.[149] On 16 November 1992, Mr Burton wrote a letter that recorded that the Whaoa Trust and Tumunui Trust had agreed to the new terms. The relevant part of his letter reads:

> 2. The initial rental which is yet to be set will be on the formula terms set out on the current lease namely at 5% of the capital value of the land according to a special Government valuation to be obtained (at Tumunui expense) *but excluding any capital improvements effected by the lessee*.

[210] I am satisfied that the reference to an exclusion of capital improvements effected by the lessee, was intended to refer only to the Tumunui Trust. That follows from the fact that the solicitors were discussing a new lease, rather than an assignment of the Mills lease. The terms of Mr Burton's letter evidences a common intention of the parties to that effect, and is also an outward expression of that accord.

[211] The letter invited Mr Moke to advise Mr Burton "if your trustees confirm the above terms". The letter was circulated by Mr Moke at a meeting of the Whaoa Trust held at Mr Moke's home on 3 December 1992. The minutes record that the terms were "implemented without dissent, by way of each and every trustee endorsing a spare copy of the letter".[150]

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149 See para [75] above.
150 See para [79] above.

[212] I find that the trustees of the Whaoa Trust intended to enter into the new lease on the basis of the terms set out in Mr Burton's letter. That is what had been agreed between the two trusts, as contracting parties. There is no evidence to suggest that this intention changed prior to the final execution of the Tumunui lease. Nevertheless, contrary to that common intention, the Tumunui lease continued to refer to capital improvements since December 1961. The relevant part of the Tumunui lease recorded:

> … at a yearly rental calculated on the basis of five dollars per centum of the capital value of the said land according to a special valuation carried out by Valuation New Zealand for the purpose at the expense of the lessee but such rental shall not in any case be less than that payable by the lessee during the expiring term *provided always that for the purposes of such valuation there shall be deducted from the said capital value the value of all improvements made on or to the said land by the lessee or its predecessor since the 13th day of December 1961 and during the terms hereof by the lessee and subsisting at the date of valuation* …
>
> (Emphasis added)

[213] Between the time that the Whaoa Trust endorsed the terms set out in Mr Burton's letter and the final form of the Tumunui lease being executed, the words "or its predecessor since the 13th day of December 1961 and" had completely changed the meaning of the intended terms. That resulted in a significant advantage to the Tumunui Trust, and a significant detriment to the Whaoa Trust.[151] On my reading of the evidence, that was never intended. At the very least, it was due to a common mistake of the parties that the final executed version of the Tumunui lease did not reflect the intended meaning of Mr Burton's letter. It would be unconscionable for the Tumunui Trust to rely on that error to defeat the Whaoa Trust's claims. On that basis, I am willing to make an order for rectification of the Tumunui lease.

[214] Although Mr Moke was not responsible for this aspect of the transaction, the Tumunui Trust plainly gained an inappropriate benefit from the terms of the lease that enabled improvements to the land undertaken by tenants between 1961 and 1992 to be taken into account in fixing the rent. Necessarily, the amount of the rent payable on review to the Whaoa Trust was likely to be significantly less with that

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[151] See para [201] above.

provision in place. I can see no impediment to the grant of equitable relief by way of rectification, so as to cure the economic imbalance that has arisen out of the error. In doing so, I adopt the maxim: "Equity considers as done that which ought to have been done".

[215] No prejudice arises as against the Tumunui Trust. The relief I shall grant does no more than to remove a benefit that the Tumunui Trust was never intended to receive.

Analysis: the Reserve claims

(a) The boundary and easement claims

[216] The Whaoa Trust and the Reservation Trust each invoke ss 80 and 81 of the Land Transfer Act 1952, in an endeavour to correct the Certificates of Title issued for the Reserve and the farm land. The effect of what is proposed would be to alter the boundary fixed by Mr Couldrey's survey, by increasing the area of the Reserve, and reducing the area of the farm land. In this way, the area described in the Certificate of Title for the Reserve can be made to correspond with that published in the *Gazette Notice.*

[217] The Whaoa Trust and the Reservation Trust seek declarations to clarify their respective obligations in relation to the easement. The right created by the easement is the only way in which beneficial owners of the Reservation Trust can access the Reserve, other than by air.

[218] The Whaoa Trust and the Reservation Trust each alleges that the Tumunui Trust has breached the terms of the easement in two respects:

(a) The first is by taking active steps to impede the beneficial owners from exercising their rights of access to the Reserve;

(b) The second is by failing to keep the right of way in a good state of repair. The fundamental complaint is that the right of way is no

longer fit for purpose, because vehicular access at all times of the year is not possible.

[219] Mandatory injunctions are sought to compel the Tumunui Trust to put the right of way into good repair, in order to facilitate access to the Reserve. An inquiry into any damages suffered is also sought, together with exemplary damages of $40,000.[152]

[220] On the boundary claim, I hold that this Court has no jurisdiction to provide a remedy under either s 80 or s 81 of the Land Transfer Act.[153] The District Land Registrar[154] is the only person who may exercise those powers, though he or she would undoubtedly be assisted by the views of this Court on the issues in dispute.[155]

[221] For pragmatic reasons, I have decided not to deal finally in this judgment with questions of relief, arising out of the boundary and easement claims. I consider that the preferable course is for applications to be made to the Māori Land Court, to regularise the boundary between the Reserve and the farm land and to provide an appropriate degree of access for those entitled to enter the Reserve land to do so. If the Māori Land Court were to make such orders, I think it is likely that the parties could make a joint approach to the District Land Registrar to exercise his or her power under s 81 of the Land Transfer Act to correct the existing titles. I draw that optimistic conclusion from Mr McKechnie's acknowledgement, on behalf of the Tumunui Trust, that it is in the interests of all parties to co-operate to find a way to regularise boundary and access rights.

[222] In order to explain why I shall continue to reserve my decision on questions of relief, I need to consider some legal issues that, strictly speaking, go beyond those required to address those claims. I am conscious of the risks posed by a discursive

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152 As to the circumstances in which exemplary damages might be ordered, see *Couch v Attorney-General (No 2) (on appeal from Hobson v Attorney-General)* [2010] NZSC 27, [2010] 3 NZLR 149 at paras [60], [67] and [68] per Blanchard J; [102], [111], [112], [115] and [117] per Tipping J; [150], [179], [238], [239], [253], [254] and [255] per McGrath J; and [259] per Wilson J; cf paras [1]–[4] per Elias CJ.

153 See paras [240]–[250] below.

154 Sections 80 and 81 of the Land Transfer Act 1952 refer to the "Registrar" not the "District Land Registrar". I use the latter expression so as not to cause confusion between the various Registrars referred to in this judgment.

155 See paras [241]–[250] below.

approach. To the extent that I trespass into areas within the exclusive jurisdiction of the Māori Land Court or the District Land Registrar, each should regard my comments as *obiter* in nature. My comments on questions of process are intended to guide the parties through a difficult jurisdictional thicket, in order to resolve the real issues in dispute. I am conscious that I may overlook material points. That is why I do not wish to be taken as providing the last word on the process to be followed.

(b) The nature and purpose of a Māori reservation

[223] I start by considering the nature and purpose of a Māori reservation established under s 439 of the 1953 Act.[156] I do so to explain why I have reached the conclusion that it was not open, in the absence of some other order or direction from the Māori Land Court, for Mr Couldrey to submit a survey plan to the District Land Registrar for the Reserve that specified an area of land inconsistent with that publicly notified in the *Gazette Notice*.[157] My analysis applies equally to s 338 of the 1993 Act. That will be the controlling provision if any application were made for a recommendation that the area in the Reserve be reduced to reflect Mr Couldrey's survey.

[224] In *Re Tauhara Māori Reservation*,[158] Judge Durie undertook a detailed analysis of the nature and purpose of a Māori reservation. I shall set out his views at some length given the relative inaccessibility of the Māori Land Court's judgment in that case and Sir Edward Durie's acknowledged command of this area of the law.

[225] To put Judge Durie's views into context, Tauhara Maori reservation contained some 1,165 hectares of land, including Mount Tauhara which dominates the township of Taupo. The mountain has an important place in Māori history and legend and is regarded as an object of scenic beauty. Surviving trustees of Mount Tauhara Māori Reservation Trust applied to the Māori Land Court to approve a lease to the Broadcasting Council of New Zealand, so that it could erect a television transmitting station at the pinnacle of the mountain. An order designed to provide an access route was also sought.

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156 Set out at para [26] above.
157 See para [103] above.
158 *Re Tauhara Māori Reservation* (1977) 58 Taupo MB 168.

[226] The trustees applied to cancel the reservation in order to conclude a lease and to provide easements in respect of that part of the land which would retain its status as a Māori reservation. Views of the owners had been obtained, so that any objections could be made to the Māori Land Court. Judge Durie observed that the issues raised were "important and require careful consideration be given to the principles to be applied, not only to resolve the matter in hand, but to assist in the future administration of this and other reservations".[159]

[227] Judge Durie considered the underlying purpose of the jurisdiction to set aside land as a Māori reservation. His Honour said:[160]

> Today, there is probably no form of freehold land, more conceptually akin to papatupu or Māori customary land or land held by the Māori on a tribal or communal basis as in pre-european times, than freehold land that has been set apart as a Māori Reservation for the common use or benefit of a hapu or tribe. For the most part the legislature has, from early days in history, been intent on providing a system of ownership of Māori land that was unknown to the Māori of pre-european times.
>
> The "Europeanisation" of Māori land, or the transmutation of Māori tribal and communal ownership to ownership by defined individuals for defined shares, began with the Native Lands Act of 1865. The process that began then became the dominant feature of Māori land enquiry and Māori Land Court order sfor the remainder of the 19th century and the beginning of this, and it has become the basic concept for the Māori land laws of today. While the holding of land for the benefit of a general class was once Māori customary practice, it is now an exceptional circumstances and it is this that makes section 439 Reservation unique for modern Māori people.
>
> This is not to say that once a Māori reservation is made, the land passes for all purposes to the class or classes of persons for whose use or benefit it is created. On my reading of section 439 *the land remains vested in the owners thereof for a legal estate in freehold until such time as trustees are appointed. It has not been unknown for the trustees to be appointed many years after the reservation was constituted, but once appointed*, *the legal estate then vests in them*. In my view *the beneficial estate remains in the original owners or their successors under the Māori land laws which permit successions to beneficial interests. All that the owners have passed over, given or reserved is a licence as to occupation user and enjoyment, of the land and the benefits accruing therefrom, for as long as the reservation status persists;* and *conversely the rights of the beneficial owners to the legal estate or exclusive use and enjoyment as beneficial owners, are suspended.* The use of the words "or benefit" in the statue are not to be construed in the technical sense of thereby creating a beneficial estate in a trust property. The substitution of the words "or enjoyment" in the Māori Reservation Regulations is at least consistent with the intention of the Act.

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159 Ibid at 174.

160 Ibid, at 184-188 (emphasis added).

…

… *When the court is concerned with an application to amend the reservation purposes, to redefine the class, to redefine boundaries, or to cancel the reservation, it will have regard not only to the views of the trustees and the class, but especially to the views of the original owners and their proven successors*. It is for this reason that successions should still be made with regard to reservations.

…

Mount Tauhara Maori reservation provides an example of willingness of owners to have reserved without compensation and for the general benefit of a class, considerable areas of land of considerable value. … In this way, in order to ensure the preservation of the Mountain in its natural state, the owners forsook the prospect of attractive timber royalties, of any other long term commercial development, of compensation by way of exchange, or the possibility of the sale of the Mountain for reserve purposes for valuable consideration. Throughout these proceedings no former owner has suggested that the land should cease to be a Māori Reservation or that any income accruing from any use of the land for broadcasting purposes, should be applied other than to the maintenance of local tribal marae. It has on occasion been suggested that Māori principles, like any principles, have all their price. That has not been suggested by the protagonists in this case, but the record here, and the record of this Court in dealing with Māori Reservations in the past, makes a lie of any such cynicism. *The principle here, the preservation of the past for the betterment and edification of the future is well understood by the Maori people, is basic to Maori attitudes, and has not been questioned by either side in this case*.

… In my view, with one statutory exception, reservations are to be set apart for the hapu or tribe for whom the area has most significance and it is in this way that the class beneficiaries are usually defined b the Court. Thus the turangawaewae of the tribe is maintained. …

… Nor are Maori Reservations to be confused with Maori Reserves. The notion that some land might be held for the general benefit of a hapu or tribe was only briefly contained, and then rarely applied, in the formative legislation that first introduced British legal concepts to Maori tribal land. Our present section 439 did not have its beginnings until the enactment of section 232 of the Native land Act 1909 and it was not until 1938 and the enactment of section 5 of the Native Purposes Act 1937 that it was possible to set apart Maori Reservations for the communal purpose of a general class of Maori. The provisions for Native or Maori Reserves came much earlier but Maori Reserves do not have that same general purpose concern. ….

…

The importance of Māori Reservations to Māori people is indicated by the many applications still being received to set aside lands for that purpose, and the value of the assets thereby passing from individual benefit to the use or benefit of a hapu or tribe as a whole. It must be remembered that with the individualisation of titles in the past, areas of special significance, even marae, have been awarded to named individuals as part of their share of the

> tribal estate. Today, owners have reserved not only small marae but large tracts of land, along sea fronts and rivers and in bushes and forests.
>
> ...
>
> (Emphasis added)

[228] Judge Durie described the basis on which an application under s 439 of the 1953 Act should be considered by the Māori Land Court. He took the view that the Court should:[161]

> (a) place considerable weight upon the wishes of the owners as given in open Court, and then provided that the Court is satisfied that those owners have been fully and fairly informed, and provided that those wishes do not conflict with whatever might be proved beyond doubt as their best interest.
>
> (b) accept evidence of the wishes and views of owners as given at private meetings, in reliance upon section 54 where multiplicity of ownership is such that an alternative procedure is impracticable, but nonetheless treat that evidence with caution as it is at best hearsay evidence, and neither Court nor counsel have had control over what was there submitted and are unable to cross-examine thereon, and
>
> (c) give more weight to the wishes and views of owners in a meeting conducting according to Court direction and under the control of a Court officer.

[229] The nature of a Māori reservation was considered further in *Re Mato*.[162] The Māori Appellate Court explained the historical context in which the Māori Land Court could recommend creation of a Māori reservation, observing that the jurisdiction conferred by s 439 of the 1953 Act[163] reflected "an important matter of national policy", that "might more aptly be called 'Crown Policy'" because "it has existed as a policy since New Zealand was opened for European settlement in about 1840". The Court drew attention to the continued involvement of the Crown in the establishment of a Māori reservation, saying:[164]

> The provisions for the constitution of Māori Reservations in Section 439 of the Māori Affairs Act 1953 also reflect an important matter of national policy, one not so famous today, but any lack of notoriety is more than compensated for by longevity. The reservation of Māori land might more

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161 Ibid, at 180-182.

162 *Re Mato* (1987) 32 Gisborne ACMB 217 (Chief Judge Durie, Judge Cull, Judge McHugh, Judge Hingston and Judge Marumaru). Although Chief Judge Durie was a member of the Court, the Appellate Court's judgment does not refer to *Tauhara Māori Reservation*.

163 Set out at para [26] above.

164 *Re Mato* (1987) 32 Gisborne ACMB 217 at page 13 of the judgment.

> aptly be called 'Crown Policy' for it has existed as policy since New Zealand was opened for European settlement in about 1840. It began as a matter of Imperial Policy. …
>
> …
>
> Māori reservations [are] a reflection of an historical policy that began well before 1909 [when the Native Land Act 1909 was passed and ended what the Māori Appellate Court called a "brief experiment with tribal administration"]. *Māori reservations are created today by the Secretary for Māori Affairs on the recommendation (only) of the [Māori Land] Court. Prior to 1968 the necessary action was taken by the Governor-General by Order in Council. That change, we understand, was to accommodate administrative convenience. We consider the old practice more appropriate, in the light of history*…
>
> (Emphasis added)

[230] *Mato* also makes it clear that the issue of a *Gazette Notice* that notifies the public that land has been set apart "as a Māori reservation is a '<u>division</u>' of that land using the word "division" in its usual sense."[165]

[231] The area of land to be set aside as a Māori reservation is determined by reference to a plan considered by the Māori Land Court at the time it hears a recommendation application. The importance of delineation of the boundaries of a Māori reservation is highlighted by s 439(9) of the 1953 Act.[166] Once land is set aside as a Māori reservation it is "inalienable", whether to the Crown or to any other person. In *Muraahi v Phillips – Rangitoto Tuhua 55B1B*,[167] Deputy Chief Judge Fox and Judge Carter (in a joint judgment) emphasised the distinction between a strict prohibition on alienation of land ("inalienable") and those provisions of the 1993 Act where alienation is permitted provided there is compliance with statutory prerequisites. They added: "Māori reservations generally contain wāhi tapu or land of special significance to Māori. It makes sound sense that reservation land should be inalienable".[168]

[232] There is only one means by which an area set aside as a Māori reservation can be reduced. That is through an application to the Māori Land Court to make a

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165 Ibid, at page 15 of the judgment (emphasis in original).

166 Set out at para [26] above. Section 439(9) of the 1953 Act is replicated in s 338(11) of Te Ture Whenua Māori Act 1993.

167 *Muraahi v Phillips - Rangitoto Tuhua 55B1B* (2013) Māori Appellate Court MB 528 (2013 APPEAL 528) (Deputy Chief Judge Fox, Judge Carter and Judge Ambler).

168 Ibid, at para [84].

recommendation to that effect. Before the reduction becomes operative, it must be confirmed by (now) the Chief Executive of Te Puni Kokiri and published in a *Gazette Notice*. Until 1 July 1993, this process was contained in s 439(5) of the 1953 Act.[169] It is now found in s 338(5) of the 1993 Act, which is to the same effect.

[233] I am satisfied, having regard to the statutory scheme and the judicial interpretations of the controlling provisions, that it was impermissible for Mr Couldrey to purport to reduce the area of the Reservation when preparing a survey plan for subdivisional purposes.[170] While I acknowledge the practical considerations that led him to approach the survey issue in that way, it did not accord with the law. In reaching that view, I have been influenced by the following factors:

(a) The process by which the Reserve was created involved a decision being taken by the Secretary for Māori Affairs, on behalf of the Crown. It seems clear that the statutory delegation of that decision was for no more than "administrative convenience".[171] For practical purposes, the publication of the Secretary's decision in the *Gazette* may be treated in a manner analogous to an Order in Council, the procedure used before 1968. Prior implementation of the decision by legislative instrument emphasises that the Court, or any other public official, ought not to go behind the area of land specified in the notice.

(b) The decision of the Māori Land Court to recommend establishment of a Māori reservation should be made only after mature consideration by owners of the land out of which the reservation is to be carved. As Judge Durie pointed out in *Re Tauhara Māori Reservation*, "considerable weight" should be placed on views expressed by those owners who have been "fully and fairly informed" of the proposal.[172] When the Māori Land Court is concerned with an application which

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169 Te Ture Whenua Māori Act 1993 came into force on 1 July 1993. As at that date, Certificates of Title for the Reserve and farm land had not been issued: see para [108] above. Section 439(5) of the 1953 Act is set out at para [26] above.

170 I make it clear that this is a finding that is binding on the parties; cf para [222] above.

171 Generally, see *Re Mato* (1987) 32 Gisborne ACMB 217, the relevant extract from which is set out at para [229] above.

172 *Re Tauhara Māori Reservation* (1977) 58 Taupo MB 168, the relevant extract from which is set out at para [227] above.

seeks to redefine the boundaries of a Māori reservation, it "will have regard not only to the views of the trustees and the class [of beneficial owners for whom the Māori reservation is created], but especially to the views of the original owners and their proven successors".[173]

(c) Once an area of the Māori reservation is set aside, it becomes inalienable. The mandatory prohibition on alienation supports the view that the area ought not to be changed without compliance with statutory provisions relating to the reduction in area of a Māori reservation.[174]

[234] I compare those legal findings with the directions of Judge Hingston which were conveyed by the Deputy Registrar of the Māori Land Court to Mr Couldrey on 13 August 1991.[175] Assuming the Judge's directions were accurately conveyed by the Deputy Registrar, he:

(a) Took the view that publication of the Secretary's decision in the *Gazette Notice* constituted a partition of the land. The plan submitted by Mr Couldrey was to "show reservation and balance area or similar designation". That approach is consistent with the view expressed in *Mato* that the decision to set aside part of land for a Māori reservation is a "division" of the land.[176]

(b) Was prepared to accept an application for a roadway order, for the proposed right of way "signed by both groups of Trustees". A roadway order is a common means by which access can be provided across Māori freehold land to landlocked land, including a Māori reservation.[177] In context, the Judge appears to have been suggesting that the application be signed by trustees for both the Reservation Trust and the Tumunui Trust.

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173 Ibid at 186. See also para [232] above.
174 See para [231] above.
175 See para [86] above.
176 *Re Mato* (1987) 32 Gisborne ACMB 217, the relevant extract from which is set out at para [230] above.
177 See para [239] below.

(c) Expressed the view that there was "very little difference in the area for the reservation". This is a reference to the reduction of the area from 174.0138 hectares (set out in the *Gazette Notice*) and the area comprised within the boundaries drawn by Mr Couldrey (158.1600 hectares).[178] The Judge indicated that he was "happy with the variance", advising that "an application for a corrigendum to the *Gazette Notice* can be made upon completion of survey".

[235] With respect to the last of those points, notwithstanding the Judge's view about the area in issue, and indications that the trustees of the Tumunui Trust and the Whaoa Trust agreed there was little practical significance in reducing the area, it would have been necessary for the Māori Land Court to hear an application under s 439(5) of the 1953 Act (or, if made after 1 July 1993, under s 338(5) of the 1993 Act) before the area set aside for the Māori reservation could be changed. Such an application would require beneficial owners of the Reserve to be notified and to be given the opportunity to be heard on the application.[179]

[236] In my view, it was wrong in law for Mr Couldrey to prepare a survey plan which contained less land in the Reserve than had been set aside by the decision of the Secretary, as published in the *Gazette Notice*. In my view, the reason why the Certificates of Title were issued in error was because the Registrar of the Māori Land Court failed to send to the District Land Registrar a copy of the recommendation order made by Judge Hingston on 31 October 1985, or the *Gazette Notice* published on 27 February 1986. Had that information been forwarded to the District Land Registrar, I have serious doubts whether the two Certificates of Title would have been issued on the basis of Mr Couldrey's survey, which was approved as Land Transfer Plan 64109 on 15 January 1993.[180]

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178 Compare para [30] and [108] above.
179 See para [228] above.
180 See para [108] above.

(c) Roadway orders

[237] Under Part 14, roadway orders may also be made to provide access to landlocked land.[181] The purpose of Part 14 is "to facilitate the use and occupation by the owners of land owned by Māori by rationalising particular land holdings and providing access or additional or improved access to the land".[182] To achieve those goals, s 287(1) of the 1993 Act confers exclusive jurisdiction on the Māori Land Court:

> **287 Jurisdiction of courts**
>
> (1) … to make *partition orders*, amalgamation orders, aggregation orders, and exchange orders in respect of Maori land, *and to grant easements and lay out roadways over Maori land.*
>
> ....
>
> (Emphasis added)

[238] The Māori Land Court's specific jurisdiction to create easements and to lay out roadways is conferred by ss 315–326 of the 1993 Act. Sections 315, 316 and 317 provide:

> **315 Court may create easements**
>
> (1) The court may—
>
> (a) create easements over any land to which this Part applies for the purpose of being annexed to or used or enjoyed with any other land; or
>
> (b) create easements over any General land for the purpose of being annexed to or used or enjoyed with any land to which this Part applies; or
>
> (c) create easements in gross over any land to which this Part applies.
>
> (2) The grant of an easement under this section may be made subject to a condition for the payment of compensation in respect of the grant, or to any other conditions that the court may impose.
>
> (3) Where an easement is granted under this section for the purpose of providing access to any other land, the grant of the easement shall be made in accordance with the succeeding provisions of this Part.

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181 See para [239] below.

182 Te Ture Whenua Māori Act 1993, s 286(1).

316 Court may lay out roadways

(1) For the purpose of providing access, or additional or improved access, the court may, by order, lay out roadways in accordance with the succeeding provisions of this section and of this Part.

(2) For the purpose of providing access, or additional or improved access, to any land to which this Part applies, the court may lay out roadways over any other land.

(3) For the purpose of providing access, or additional or improved access, to any land other than land to which this Part applies, the court may lay out roadways over any land to which this Part applies.

(4) Any order laying out roadways may be a separate order, or may be incorporated in a partition order or other appropriate order of the court.

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.

(2) 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 to represent the interests of those persons who may be entitled to apply for a freehold order in respect of the application for an order laying out roadways.

(3) The court shall not lay out roadways over any General land without the consent of each owner.

(4) The court shall not lay out roadways over any Crown land without the consent of the Commissioner of Crown Lands.

(5) The court shall not lay out roadways connecting with any State highway without the consent of the New Zealand Transport Agency and the territorial authority for the district in which the connection would be effected.

(6) The court shall not lay out roadways connecting with any public road without the consent of the territorial authority for the district in which the connection would be effected.

(7) Notwithstanding anything in subsections (5) and (6), where a roadway is laid off as part of a partition to which section 301 applies, a separate consent to the laying out of the roadway shall not be required from the territorial authority for the district in which the land to be partitioned is situated.

[239] The power to grant easements and to lay out roadways over Māori land is not dependent upon a prior partition order. A roadway may be laid out to enable access

to land set aside as a Māori Reservation.[183] The purpose of such an order is to provide access to landlocked land. While there are separate provisions of Te Ture Whenua Māori Act 1993 dealing with "landlocked land,"[184] it appears that access to a Māori reservation is usually effected through the means of a roadway order. The protection for the owners lies in the need for consultation and consent before roadway orders can be made.[185] In *Trustees of the Tauwhao Te Ngare Trust v Shaw – Tauwhao Te Ngare*, Deputy Judge Fox and Judge Doogan adopted a passage taken from previous decision of the Appellate Court which accurately summarise the relevant principle. In that decision, the Court said:[186]

> 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 the 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.

(d) The boundary issue

[240] Sections 80 and 81 of the Land Transfer Act provide:

> **80 Errors in register may be corrected**
>
> (1) The Registrar may, upon such evidence as appears to him sufficient, subject to any regulations under this Act, correct errors and supply omissions in certificates of title or in the register, or in any entry therein, and may call in any outstanding instrument of title for that purpose.

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183 This reflects the "division" of land that results from the decision to accept the Māori Land Court's recommendation and to notify that by way of *Gazette Notice*: see para [230] above. Indeed, in *Trustees of Tauwhao Te Ngare Trust v Shaw – Tauwhao Te Ngare* (2014) Māori Appellate Court MB 394 (2014 APPEAL 394), a majority of the Māori Appellate Court (Deputy Chief Judge Fox and Judge Doogan) went further, and held that there was jurisdiction to lay out a roadway *over* a Māori reservation: at paras [76] and [77]. The third member of the Court, Judge Harvey, held that the Māori Land Court could not "legitimately exercise the discretion to issue a roadway order over a Māori reservation *without* the consent of the beneficiaries and trustees of that land" (at para [85]). As the Reserve was set aside out of Māori freehold land owned by the Whaoa Trust, it continues to hold that status, there being no special status afforded to a Māori reservation: see s 129 of the 1993 Act.

184 Te Ture Whenua Māori Act 1993, ss 326A–326D.

185 Ibid, s 317, set out at para [238] above.

186 *Trustees of the Tauwhao Te Ngare Trust v Shaw – Tauwhao Te Ngare* (2014) Māori Appellate Court MB 394 (2014 APPEAL 394) at para [65]. The origin of this quote is said to be from *Von Dadelszen v Goldsbury – Pukeiti 4A Block* (1982) 16 Waikato Maniapoto Appellate Court MB 328. It appears that it has been wrongly attributed to that case. Its origin is unknown.

(2) The Registrar may cancel or correct any computer register and, if appropriate, create a new computer register in order to correct any error or supply any omission in any computer register.

81 Surrender of instrument obtained through fraud, etc

(1) Where it appears to the satisfaction of the Registrar that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error, or that any grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained, he may require the person to whom that grant, certificate, or instrument has been so issued, or by whom it is retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require.

(2) If the Registrar is satisfied as to any matter referred to in this section and there is a computer register involved, the Registrar may cancel or correct any computer register and, if appropriate, create a new computer register.

(3) The Registrar must not take action under subsection (2) without first giving notice to any person appearing to be affected and giving a reasonable period for any response.

[241] Section 80 confers a power on the District Land Registrar to correct errors in a Certificate of Title. It does not empower this Court to direct the District Land Registrar to do so. In *Frazer v Walker*, the Privy Council described s 80 as "little more than a 'slip' section and not of substantive importance".[187] On any view, the claim for correction of the boundary of the Reserve could not be characterised as due to "a slip". A claim under s 80 must fail.

[242] The position is different with regard to s 81. Its heading ("Surrender of instrument obtained through fraud, etc") does not capture its essence. The District Land Registrar is empowered to correct any "entry or endorsement" that has been made "in error", or "fraudulently or wrongfully obtained".[188] Section 81(1) enables the District Land Registrar to require a person to whom a relevant instrument has been issued to deliver up that document to him or her for cancellation or correction.[189]

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187 *Frazer v Walker* [1967] NZLR 1069 (PC) at 1076.

188 Land Transfer Act 1952, s 81(1), set out at para [240] above.

189 Generally, see David Grinlinton "The Registrar's Powers of Correction" in David Grinlinton, (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) at 217.

[243] The breadth of s 81 was articulated in *Frazer v Walker*.[190] Delivering the advice of the Privy Council, Lord Wilberforce said:[191]

> … The powers of the Registrar under s. 81 are significant and extensive (see *Assets Co*. case (supra)). They are not coincident with the cases excepted in ss. 62 and 63. As well as in the case of fraud, where any grant, certificate, instrument, entry or endorsement has been wrongfully obtained or is wrongfully retained, the Registrar has power of cancellation and correction. From the argument before their Lordships it appears that there is room for some difference of opinion as to what precisely may be comprehended in the word "wrongfully". It is clear, in any event, that s. 81 must be read with and subject to s. 183 with the consequence that the exercise of the Registrar's powers must be limited to the period before a bona fide purchaser, or mortgagee, acquires a title under the latter section.
>
> As the appellant did not in this case seek relief under s. 81 and, as, if he had, his claim would have been barred by s. 183 (as explained in the next paragraph), any pronouncement on the meaning to be given to the word "wrongfully" would be obiter and their Lordships must leave the interpretation to be placed on that word in this section to be decided in a case in which the question directly arises.

[244] In *Housing Corp of New Zealand v Māori Trustee*[192] McGechan J considered the scope of s 81, in the context of a mortgage over Māori freehold land that had been registered under the Land Transfer system, but not endorsed by the Registrar of the Māori Land Court under s 233 of the 1953 Act. One of the questions for decision was whether the District Land Registrar was empowered to cancel registration of the mortgage.

[245] McGechan J undertook a learned and exhaustive survey of the historical origins of s 81 and the authorities that had considered the way in which it and its predecessors ought to be interpreted.[193] With some obvious misgivings about the Privy Council's approach to s 81 in *Frazer v Walker*, McGechan J concluded:[194]

> … *Frazer v Walker* was a decision of the Privy Council on appeal from the New Zealand Courts. However much the Courts may disagree with it openly or quietly, it must be followed. Reform of the law has become a matter for the legislature. It was an important factor in the Privy Council's decision that s 81 Registrar's corrective powers were "significant and extensive". Section 81 therefore is to be interpreted so as to be available in a "significant and extensive" way. The Privy Council did not give the benefit of a definition of

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190 *Frazer v Walker* [1967] NZLR 1069 (PC) at 1076 and 1079.
191 Ibid, at 1079. See also *Assets Company Ltd v Mere Roihi* [1905] AC 176 (PC).
192 *Housing Corp of New Zealand v Māori Trustee* [1988] 2 NZLR 662 (HC).
193 Ibid, at 678–700.
194 Ibid, at 699 (emphasis added).

> the "wrongful" element very much upon local practice and knowledge. However, their Lordships may well have had in mind cases such as *District Land Registrar v Thompson* on the one hand and *Re Mangatainoka 1 BC No 2* on the other, both cited but not the subject of express comment. Certainly, the key finding that the Registrar's powers under s 81 exceeded those of ordinary citizens and the Courts has the ring of *District Land Registrar v Thompson* about it. *Whether I like it or not (and I do not) I see no escape from giving the Privy Council decision full force and effect*. To my mind, it prevents a narrow approach restricting Registrar's powers to those of ordinary citizens or the Court, ie, to indefeasibility exceptions under ss 62 and 63, and dictates against any narrow construction of the word "wrongful" back to some notion of intentional wrongdoing not very far from fraud, or at least (like *Hinde*) some requirement of negligence; I do not think the Privy Council's approach allows that process. Rather, *if anything, a liberal approach is dictated. On that basis, it could well be said that "wrongful" is to have its natural meaning of "not rightful" or "contrary to rights". As such it would extend to cover such commonplace matters as breach of contract, breach of trust, breach of property rights and breach of statutory duties so far as the same confer corresponding rights, and indeed negligence*. "Wrongful" as presaged by Edwards J, on that basis means "not innocent": although I do not think it necessary to go so far as simply equating it with "wrong" in the sense of incorrect, or "amoral" as opposed to in breach of legal rights.
>
> I see no escape from the conclusion that s 81 is alive and well, however unwelcome, and applies where the person obtaining registration does so in a manner which is "wrongful" in the sense that it infringes the legal rights of another. While immediate indefeasibility may bar the citizen, and indeed even this Court, it will not in such situations bar the Registrar.
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> (Emphasis added; citations omitted)

[246] McGechan J went on to express a view on how the District Land Registrar might exercise his or her s 81 power:[195]

> … *It is well established in New Zealand that*, whatever his powers may be, the Registrar does not act of his own volition under s 81. *If a person has been wronged by registration, the invariable practice has been to require that person to take Court proceedings, following which the Registrar will then as a matter of discretion and practice implement the result*. The Registrar has not, despite *Frazer v Walker* and the passage of a generation, himself as a matter of general practice invalidated registrations under his own powers, whether arising under indefeasibility exceptions in ss 62 and 63, or going beyond those exceptions. ….
>
> (Emphasis added)

[247] Some decisions of both the Māori Land Court and this Court have suggested that *Housing Corporation of New Zealand v Māori Trustee* is authority for the

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[195] Ibid, at 699.

proposition that a more narrow approach, akin to the correction of slips or minor errors on the record, might be taken in respect of s 81.[196] Such an approach would be inconsistent with the advice of the Privy Council in *Frazer v Walker*.[197]

[248] It is important to see those decisions in context. They are directed to arguments that seek to impugn the immediate indefeasibility of a Land Transfer Act title "without regard to third-party registered rights".[198] In the present case, third party rights are not in issue. There is no doubt that the Tumunui Trust (as the applicant in the subdivision process) was well aware of the existence of the Māori reservation, and of the area ascribed to it by the *Gazette Notice.* If the District Land Registrar were to exercise powers under s 81 to correct the error as to boundaries, no third party interests would be affected. The breadth of the District Land Registrar's powers, as described in *Frazer v Walker*,[199] supports the proposition that the District Land Registrar, if minded to exercise his or her discretion to "correct", has jurisdiction to do so.

[249] I make it clear that, in the circumstances of this case, I consider that the Registrar could exercise power to cancel or correct under s 81 if he or she were satisfied that there had been a "mis-description of land or of boundaries" that had "been made in error". The "error" arose out of a mistaken approach by Mr Couldrey in the way in which he undertook his survey. The boundary between the Reserve and the farm land was fixed by a survey that had proceeded on an incorrect legal premise. I am sure that the error was honestly made.

[250] I add one further comment, in order to confront a point that Mr Koning might take to respond to my analysis. In one sense, it would be open to the District Land Registrar to exercise his or her s 81(1) power without any further order from the Māori Land Court. But, given that the plan on which the Māori Land Court relied, to recommend that an area of 174.01438 hectares be set aside as a Māori reservation, is

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196 For example, see *Re Pakiri R Block* (1994) 3 Tai Tokerau Appellate MB 178 (3 APWH 178) at paras [56] and [57] per Deputy Chief Judge McHugh, Judge N F Smith and Judge Carter and *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC) at paras [99]–[116] per Allan J.

197 *Frazer v Walker* [1967] NZLR 1069 (PC) at 1076.

198 The point was expressed in that way by Ronald Young J in *Edwards v Māori Land Court* HC Wellington CP78/01, 11 December 2001; an appeal was allowed against this judgment (*Bruce v Edwards* [2003] 1 NZLR 515 (CA)) but not on grounds affecting this particular issue.

199 *Frazer v Walker* [1967] NZLR 1069 (PC) at 1076, set out at para [243] above.

insufficient for Land Transfer Act purposes, boundaries for titles that would incorporate that area into the Reserve could not be fixed without a further survey. I think it is most unlikely that the District Land Registrar would be prepared to take any steps to "correct" the Register until such time as further orders had been made by the Māori Land Court.

(e) The easement certificate

[251] A review of the terms of the easement certificate and the relevant provisions of sch 7 of the Land Transfer Act 1952 reveals:[200]

(a) The easement certificate records the Reserve (Lot 1) as the dominant tenement and the farm land (Lot 2) as the servient tenement, in relation to the right of way.

(b) Clause 1 of the easement certificate adopts the rights and powers conferred in respect of a right of way that are set out in sch 7 to the Land Transfer Act 1952, with the qualification that the vehicles and other conveyances may be either loaded or unloaded.[201]

(c) Clause 2(1) put the cost of constructing, repairing and maintaining the right of way on the registered proprietors of the Reservation, as dominant tenement, in the proportion of one equal part to each such tenement.

(d) Clause 2(2) deals expressly with the situation in which "the need for repairs or maintenance is directly attributable to the actions or inactions of one or more of those registered proprietors". In that situation, the cost must be borne wholly by that proprietor or, if more than one, equally between or among them.

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200 The relevant terms of the easement certificate and sch 7 of the Land Transfer Act 1952 are set out at paras [111]–[114] above.

201 Clause 1 of the easement certificate is set out at para [111] above.

(e) Clause 1 of sch 7 provides "full, free, uninterrupted, and unrestricted" rights of access over the land to those entitled to enter the Reserve, for the purpose of doing so.[202]

[252] An essential characteristic of an easement in New Zealand is the ownership by one person of a right of passage over the land of another. The land to which the easement grants access is known as the dominant tenement. The land over which access is granted is known as the servient tenement. That explains why the cost of repairing and maintaining a right of way is thrown on the owners of the dominant tenement, who gain the benefit of access over the other person's land.[203]

[253] In those circumstances, I think it is plain that the easement certificate requires the cost of repair and maintenance to be met by the Reservation Trust.[204] The qualification is that if any particular registered proprietor were responsible for damage that required repair, he or she would bear the cost of undertaking that.[205]

[254] When I viewed the property in the course of the hearing, (admittedly, in the throes of winter) it was apparent that access could not be obtained over the right of way in other than a four wheel drive; indeed, it was not possible to get close to the summit of the Reserve on that day, even in a four wheel drive motor vehicle.

[255] The problems that have arisen in this case demonstrate that the obligations cast upon the Tumunui Trust and the Reservation Trust by the easement certificate and sch 7 of the Land Transfer Act will not resolve questions of access. There are acknowledged problems in relation to the location of the access way, from the plan prepared by Mr Couldrey and the Certificates of Title issued.[206]

[256] There are also allegations that rights of access are being impeded. If they were, the Tumunui Trust would be in breach of its obligation to provide "full, free, uninterrupted, and unrestricted" rights of access to those entitled to use the

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202 Clause 1 of sch 7 is set out at para [114] above.

203 Generally, see Hinde, McMorland & Sim, *Land Law in New Zealand*, (LexisNexis, looseleaf ed) at para 16.003.

204 Clause 2(i), of the easement certificate is set out at para [112] above.

205 Clause 2(ii) of the easement certificate is set out at para [112] above.

206 See para [110] above.

Reserve.[207] If not, the cost of repairing and maintaining the right of way may well rest with the Reservation. Whatever may be the rights and wrongs of the situation, the spectre of persons engaged by the Reservation Trust to repair the right of way, attempting to do so while the Tumunui Trust continues its farming operations is not one to savour.

(f) Should a remedy be granted?

[257] As I indicated earlier, I am not persuaded that it is appropriate at this stage to grant any relief in respect of the boundary and easement issues. As I have tried to demonstrate, this Court cannot provide the solution that the parties desire. I do not consider any form of relief would be useful at this time. The boundary and access issues are best resolved finally by a combination of decisions from the Māori Land Court and the District Land Registrar.

[258] The question of access is inextricably linked to those relating to the boundary of the farm block and the Reserve. There is no doubt that the Tumunui Trust must grant the free, unrestricted and unimpeded access that it promised to the beneficial owners of the Reservation Trust when it entered into the Tumunui lease. It is not doing so at present. Equally, as a matter of law, it is for the Reservation Trust to meet the cost of keeping the right of way in a state of good repair. The practicalities of the Reservation Trust and the Tumunui Trust trying to work in harmony to repair the right of way will likely cause added, and significant, difficulties.

[259] I urge the parties to co-operate in making and progressing promptly applications in the Māori Land Court. I offer some thoughts about the steps that the parties might wish to consider in doing so:

(a) An experienced Māori land surveyor, Mr Rankilor, suggested that an application remains before the Māori Land Court that can be reactivated. While Mr Koning contested that, the use of the application under s 406 of the 1953 Act[208] could provide a foundation to request a conference under s 67 of the 1993 Act. At such a

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[207] See para [251](e) above.
[208] See para [84] above.

conference a Judge of the Māori Land Court may be able to provide assistance on the procedural steps involved, even if that application were regarded as spent.

(b) The parties may wish to consider whether to apply to the Māori Land Court for an order recommending a reduction of the area comprised in the Reserve, based on Mr Couldrey's survey. Before a final decision on that issue could be made, it would be necessary for the beneficial owners of both the Whaoa Trust and the Reservation Trust to be given an opportunity to consider the proposal. If an application were made, the Māori Land Court would consider what weight to be given to those views, in light of whatever application may be made.

(c) Once the boundaries of the Reserve and the farm land were fixed, by whatever means, application could be made for a roadway order to enable access to the Reserve for those whose benefit it was created. The advantage of such an application is the need to engage beneficial owners of the Reservation Trust in that process.[209] As Mr McKechnie raised some questions about whether Mr Staite was bringing the present proceeding with the informed consent and support of beneficial owners, that type of consultation is likely to reveal the degree to which they approve the steps taken to maintain the area set aside for the Reserve. Further, any roadway does not need to be in the current location of the right of way created by the easement. It may be possible for an alternative route to be found which would be sufficient to balance the need for beneficial owners and members of Ngāti Whaoa to cross the farm land to reach the Reserve, and the farming requirements of the Tumunui Trust.

(d) If the Māori Land Court were to make orders to regularise the boundaries of the Reserve, then there would be jurisdiction for the District Land Registrar to consider whether to exercise his or her

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[209] Te Ture Whenua Māori Act 1993, s 317, set out at para [238] above.

discretion to "correct" the Land Transfer Register to conform to the orders made.

[260] I continue to reserve judgment on the boundary and easement issues. I shall make directions to enable this aspect of the case to be brought back before me at a conference in three months' time. At that time, counsel can advise me whether steps have been taken in the Māori Land Court and, if so, the time estimated to complete the hearings in that jurisdiction.

[261] If either party wishes me to proceed to final judgment on the remaining causes of action I will do so after hearing from them at that conference. Each party can make decisions as to how to pursue their respective positions based on the findings I have made about the boundary dispute and the interpretation to be given to the easement certificate.

Result

[262] On the Tumunui lease claims:

(a) I make a declaration that Mr Moke breached his fiduciary duty of loyalty to the Whaoa Trust and the Reservation Trust by acting on both sides of the Tumunui lease transaction.

(b) I make an order for rectification of the Tumunui lease to remove the words "or its predecessor since the 13th day of December 1961 and" from the Tumunui lease.[210] The effect of that order is to require rental to be fixed in accordance with the formula in the lease but taking into account only improvements to the land made by the Tumunui Trust since the lease commenced, on 1 July 1992. A consequence of this order is that adjustments will need to be made to the rent fixed for earlier periods.

(c) I reserve leave to any party to apply for further directions.

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[210] The relevant extract from the Tumunui lease is set out at para [76] above.

[263] On the Reserve claims:

(a) Judgment remains reserved on the fourth and fifth causes of action, seeking relief in respect of the boundary and easement issues.

(b) The Registrar shall allocate a telephone conference before me at 9am on the first available date after 23 June 2017, for further directions to be made. I will hear from counsel as to whether they wish me to proceed to judgment on those remaining issues.

(c) Counsel shall confer and file and serve memoranda for the conference no less than five working days before the allocated date setting out the directions that each seek. Ideally, that information could be provided in a joint memorandum.

[264] Questions of costs are reserved. Counsel shall address, in the memoranda filed for the next telephone conference, any timetabling directions they require to have questions of costs resolved. In making decisions about their respective approaches to costs, I ask counsel to consider the extent to which each has been successful or unsuccessful in the claims or defences advanced.

[265] I advise counsel that I will be on leave from 13 March until 15 May 2017. Accordingly, I will not be able to deal with any applications under leave reserved during that time, unless they are urgent. In the event that any urgent issues require my attention, counsel should contact the Registrar of the High Court at Rotorua to see if arrangements can be made for an urgent telephone conference with me.

[266] I thank counsel for their assistance.

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P R Heath J

Delivered at 2.30pm on 13 March 2017