IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-3096
[2013] NZHC 3525

UNDER	the Land Transfer Act 1952 and the Declaratory Judgments Act 1908
BETWEEN	MALCOLM IAN JENSEN, KATHARINA AGNES LOUISA ELIZABETH JENSEN, MURRAY DARROCH WARIN AND ROBYN WARIN Plaintiffs
AND	REGISTRAR GENERAL OF LAND Defendant

Hearing: 5 December 2013

Counsel: W W Peters for the Plaintiffs
S McKechnie and R Wanigasekera for the Defendant

Judgment: 20 December 2013

JUDGMENT OF BROWN J

This judgment was delivered by me on 20 December 2013
at 11 am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Crown Law, Wellington 6140
Wayne Peters Law, Whangarei

Introduction

[1] The events which this litigation concerns occurred as long ago as 1995 when the plaintiffs purchased from the Maori Trustee a section at Bland Bay in Northland ("the land"). The section was Lot 32 on Deposited Plan 126453 being part of Whangaruru-Whakaturia No 4 Block, part of a subdivision of a large block of Maori freehold land carried out by the Maori Trustee.

[2] Mr and Mrs Jensen, one of the plaintiff couples, had earlier purchased Lot 30 from the Maori Trustee in 1991 when the Maori Affairs Act 1953 ("the 1953 Act") applied. Upon transfer of ownership of Lot 30 to the Jensens the status of that land was deemed to be General land pursuant to s 2(2)(f) of the 1953 Act.

[3] At the time when the plaintiffs purchased Lot 32 the Te Ture Whenua Maori Act 1993 ("TTWMA") had come into force. It did not contain a provision equivalent to s 2(2)(f) and the plaintiffs were unaware that Lot 32 was Maori freehold land.

[4] The Maori Trustee failed to follow the procedures required under the TTWMA. In particular the beneficial owners had not consented to the sale; the first right of refusal was not offered to the preferred class of alienees; no valuation was obtained and the alienation was not confirmed by the Maori Land Court. Consequently the transfer to the plaintiffs ought not to have been registered.

[5] Nevertheless the transfer to the plaintiffs was registered on the Certificate of Title 73D/366 (North Auckland Registry) as at 8 August 1995. No issue arose until 2002 when the plaintiffs proposed to resell the land and became aware that the land was Maori freehold land and that there was an apparent conflict between the records of the Maori Land Registry and the District Land Registry as to the ownership of the land. How significant a problem that posed may be debatable given Judge Ambler's analysis in his 2011 judgment:[1]

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[1] *Warin - Whangaruru Whakaturia 4 Lot 32 DP 126453 (Part)* (2011) 30 Taitokerau MB 37 (30 TKK 37).

> [107] ... But they have good title to Lot 32 and they or any purchaser are able to use it for its intended purpose as a section for a holiday or permanent home. The fact that they are non-Maori makes no difference. Ultimately, the applicants have not satisfied me that the status of the land is a hindrance to any particular plan they have for the land. In all the circumstances I do not consider that a change of status is appropriate.

[6] In any event in the intervening period of several years there have been various applications to and determinations by the Maori Land Court, the Maori Appeal Court and the High Court. The implications of that sequence of decisions are considered below.

[7] The present statement of claim was filed on 7 June 2013. It is fair to say that the objective of the proceeding is to secure a determination that Lot 32 now has (and indeed since 1995 has had) the status of General land.

[8] The defendant filed an application to strike out the statement of claim and an objection to the Court's jurisdiction to hear the claim. That course is naturally opposed by the plaintiffs. It was that opposed application that was argued on 5 December 2013 and which is the subject of this judgment.

[9] In order to understand both the nature of the declarations which the plaintiffs presently seek and the grounds upon which the defendant relies in its strike out application and opposition to jurisdiction, it is necessary first to comprehend the prior litigation history.

Previous litigation

[10] In 2002 the plaintiffs applied to the Maori Land Court pursuant to s 18(1)(a) of the TTWMA for an order changing the status of the land from Maori freehold land to General land. The Maori Land Court dismissed the application on 16 June 2002.

[11] Later that year the plaintiffs applied for a rehearing of the earlier application. At the same time they sought a determination from the Maori Land Court that the plaintiffs (rather than the Maori Trustee) were the owners of the land. In a decision dated 11 November 2002 the Maori Land Court dismissed the latter application but adjourned the rehearing application.

[12] The plaintiffs' appeal to the Maori Appellate Court was heard on 14 May 2003. Although the appeal was dismissed, of its own motion acting under s 56(1)(f) and s 131(1) of the TTWMA the Court determined that a status order declaring the land to be Maori freehold land should be registered against the title to the land in the Land Transfer Office. The status order was subsequently registered on Certificate of Title 73D/366.

[13] In 2006 the plaintiffs issued a proceeding in the Whangarei Registry of the High Court seeking pursuant to the Declaratory Judgments Act 1908:

> A declaration that the transfer registered under the [Land Transfer Act] was legitimately registered and has the benefit of indefeasible title.

During the course of the hearing in the High Court the prayer for relief was amended by the addition of a claim for a second declaration to the effect that the status order registered against the title to the land under the Land Transfer Act 1952 ("LTA") ought to be discharged.

[14] In a decision dated 31 October 2008[2] Allan J granted a declaration that the plaintiffs as transferees named in a transfer registered under the LTA in respect of Certificate of Title 73D/366 have the benefit of indefeasible title. However His Honour declined to make the declaration that the status order registered against the title should be discharged. Concerning the content of that second declaration he commented:

> [139] ... [T]he question of status is quintessentially a matter for the Maori Land Court and the Maori Appellate Court. It appears that the plaintiffs' application for a re-hearing before the Maori Land Court remains on foot. Even if the re-hearing application is taken by the Maori Land Court to have lapsed, it seems to me that, given the outcome of the present proceeding, there are grounds upon which it would be appropriate for the plaintiffs to make a fresh application to the Maori Land Court for a change of status.

[15] In 2009 the plaintiffs made a further application to the Maori Land Court seeking a change in status from Maori freehold land to General land. In a judgment

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2 *Warin v Registrar General of Land* (2008) 10 NZCPR 73 (HC).

dated 14 November 2011[3] Judge D J Ambler declined the application. His conclusion[4] is noted above at [5].

The current proceeding

[16] The plaintiffs' current proceeding is brought under the LTA and the Declaratory Judgments Act 1908. The statement of claim recites the history of the purchase of Lot 32, the discovery that the Maori Land Court title records the land as Maori freehold land belonging to the Maori Trustee and the sequence of legal proceedings relating to the ownership and classification of the land to which reference has already been made. It then states:

> 28. At the time of filing this Statement of Claim and despite the High Court's ruling of 31 October 2008 that the Plaintiffs have the benefit of indefeasible title:
>
> a) The Status Order remains on the LINZ title, and
>
> b) The Maori Land Court title records that the Maori Trustee is the owner of the land which holds the status of Maori freehold land.
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> 29. At the time of registration of the transfer, registration was effected by the Defendant on the basis of the land being general land.

[17] The declarations sought are:

> (a) A declaration that the Status Order should not have been registered on the LINZ title and should now be removed;
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> (b) A declaration that the Plaintiffs' indefeasible title is to land holding the status of General land.

Mr Peters confirmed in response to my inquiry that the declarations are independent, neither being contingent on the other.

[18] Two primary grounds are advanced in the defendant's amended application to strike out the statement of claim:

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3 *Warin-Whangaruru Whakaturia 4 Lot 32 DP 126453 (Part)*, above n 1.
4 At [107].

(a) The declarations sought are a manifestly inappropriate use of the Court's declaratory jurisdiction and constitute an abuse of the process of the Court;

(b) The Court has no jurisdiction to grant the declarations sought because the plaintiffs are seeking declarations which seek to displace the finality of a decision of the Maori Land Court where appeal rights existed from that decision and were not exercised to the Maori Appellate Court.

[19] Written submissions with reference to the strike out application were directed to be exchanged but in the event the exchange did not occur until very shortly before the hearing. In the plaintiffs' synopsis in opposition a line of argument was developed in reliance on case law concerning public registers[5] to the effect that, as there was no notation on the certificate of title at the date of transfer disclosing that the land was Maori freehold land, then the effect of s 62 of the LTA is that the status of the land was then converted to General land.

[20] This was not an argument which the defendant had anticipated having regard either to the terms of the statement of claim or to the notice of opposition to the strike out. Consequently an oral application was made by the defendant to amend the grounds in the strike out application to include (in relation to this recently identified argument) the contention that the statement of claim contained no tenable cause of action. After hearing from Mr Peters with reference to that oral application I granted leave to the defendant to advance argument on that additional ground.

[21] Although as previously noted Mr Peters' position was that the two declarations sought were independent, as the argument progressed the second declaration assumed the greater focus. That state of affairs was reflected in Mr Peters' written submissions which stated that "the status order itself for which removal is sought is merely a manifestation of the deeper legal issues". However, although in the course of argument the first order tended to be viewed as an order

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5 *Slough Estates Ltd v Slough Borough Council (No. 2)* [1971] AC 958 (HL).

consequential on the making of the second order, I begin by addressing the first order on the basis that it has independent status.

First declaration: the status order should not have been registered on the LINZ title and should now be removed

[22] The defendant contends that the High Court lacks jurisdiction to entertain a proceeding seeking such relief, invoking the r 5.49 procedure. It argues that the relief sought results in the proceeding purporting to impeach the decision of the Maori Appellate Court in relation to the status of the land. It further contends that the plaintiffs are seeking declarations which would displace the finality of the subsequent Maori Land Court decision regarding the status of the land, where appeal rights existed from that decision and were not exercised to the Maori Appellate Court. It argues that the declaration sought squarely goes to the relief previously granted by the Maori Appellate Court and the Maori Land Court.

[23] While recognising that *Commissioner of Inland Revenue v Redcliffe Forestry*[6] concerned another decision of a superior appellate court, that is, one at a higher level in the hierarchy of courts, it argues that the principle nevertheless applies in the present case where the Maori Appellate Court is a court of equivalent rank (albeit of a statutory nature) to the High Court. It points out that rights of appeal lay to the Court of Appeal and, with leave, to the Supreme Court which rights could have been, but were not, exercised. In those circumstances it contends that the High Court has no jurisdiction to engage with the issue of the propriety of the status order previously made.

[24] With reference to the second ground it acknowledges that the declaratory judgment procedure is available in principle in relation to the TTWMA.[7] However it submits that the declaratory judgment procedure is limited to questions of law whereas the decisions of the Maori Land Court and the Maori Appellate Court involved a substantial factual dimension which rendered the declaratory judgment procedure inappropriate.[8]

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6 *Commissioner of Inland Revenue v Redcliffe Forestry* [2012] NZSC 94, [2013] 1 NZLR 804.
7 Section 349.
8 *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85.

[25] Reference was made to *Proprietors of Hiruharama Ponui Block*[9] where Hansen J discussed when a declaratory judgment should be considered in the context of the TTWMA. He considered that the High Court should take care not to unnecessarily obtrude on the province of another Court although in that particular instance he decided that the declarations could be entertained since they concerned only the interpretation of the statute and did not involve any usurpation of the Maori Land Court's role.

[26] By contrast the defendant here submits that the first declaration sought directly usurps the Maori Appellate Court's role by expressly seeking to overturn the determination that a status order should be registered. As such, the proceeding is not confined to a matter of general interpretation of the TTWMA but challenges a factual inquiry made by the Maori Appellate Court which resulted in a judgment that could have been appealed but was not.

[27] Finally it was submitted that the proceeding is an attempt to relitigate matters determined by the Maori Appellate Court and reconfirmed in a subsequent hearing by the Maori Land Court and as such amounted to an established ground of abuse of process.[10]

[28] So far as the issue of jurisdiction is concerned Mr Peters drew attention to s 131(1) and (3):

> **131 Court may determine status of land**
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> (1) The Maori Land Court shall have jurisdiction to determine and declare, by a status order, the particular status of any parcel of land, whether or not that matter may involve a question of law.
>
> ...
>
> (3) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court to determine any question relating to the particular status of any land.

[29] He submitted that if, as is apparent, the Maori Land Court does not have exclusive jurisdiction as to the status of land then other courts must be entitled to

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9 *Proprietors of Hiruharama Ponui Block v Attorney General* [2003] 2 NZLR 478 (HC) at [16].

10 *Barber v Green Cabs Ltd* HC Wellington CIV-2010-485-2221, 16 February 2011.

exercise jurisdiction without usurping the function of the Maori Land Court. His point was that the jurisdiction of the High Court recognised in s 131(3) cannot be narrowed.

[30] Plainly the High Court has the jurisdiction to make a determination relating to the particular status of land when in the course of proceedings before it such an issue arises. A case in point is *Hobson v Hobson*.[11] However I do not consider that s 131(3) provides the High Court with a parallel jurisdiction insofar as the making of status orders is concerned. I note that in response to a parallel jurisdiction submission made in *Warin* Allan J commented that he was by no means certain that the High Court's jurisdiction in respect of status orders was as wide as that.[12]

[31] For my part I doubt that the High Court has the power to declare a "status order" at all. However, even assuming that the High Court has that power, I do not consider that it has the power to act in effect in appellate mode by discharging a status order which has been the subject of a determination and declaration by the Maori Appellate Court. Assuming that the High Court does not have the power to discharge such a status order then it must follow in my view that it does not have the jurisdiction to make a "declaratory" order essentially to the same effect but which, by definition, incorporates no machinery to effect the discharge of the status order.

[32] The conclusion that the High Court may not issue declaratory judgments as to the status of Maori land gains support in my view from the provisions of the TTWMA itself. I have earlier noted the defendant's acknowledgement that by dint of s 349 the declaratory judgment procedure is available in principle to the TTWMA. However the defendant contends that s 130 is a privative clause so far as the status of Maori Land is concerned. It reads:

> **130 Certain status not to change except in limited circumstances**
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> No land shall acquire or lose the status of Maori customary land or of Maori freehold land otherwise than in accordance with this Act, or as expressly provided in any other Act.

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11 *Hobson v Hobson* [1999] NZFLR 22 (HC).
12 At [139].

[33] The jurisdiction of the High Court recognised in s 131(3) to determine any question relating to the particular status of any land is contemplated by the reference in s 130 to acquisition or loss of status "in accordance with this Act". However the defendant's contention, which I accept, is that the Declaratory Judgments Act 1908 does not expressly provide for a process for acquisition or loss of status of Maori land. Hence if the power to make (or rescind) a status order does not reside in the High Court under s 131(3), in my view it is not to be found in the Declaratory Judgments Act despite the terms of s 349.

[34] That analysis also applies with reference to Mr Peters' further argument founded on the LTA.

[35] He contends that the High Court has exclusive jurisdiction in all matters concerning the LTA and any registration pursuant to that Act. The TTWMA makes provision in s 123 for orders affecting title to Maori freehold land to be registered against the title to land under the LTA. Furthermore s 142 provides that every status order made under Part 6 shall upon registration have the effect of giving to the land the particular status specified in the order.

[36] Consequently the plaintiffs contend that by virtue of its jurisdiction in relation to the LTA the High Court has jurisdiction to make orders declaring that status orders should be revoked or, at least, that they should not have been registered. For the reasons explained above in relation to s 130, I do not consider that such jurisdiction as the High Court may exercise in relation to the LTA extends to discharging or in some other way dealing with status orders directed to be registered by the Maori Appellate Court. There is no express provision[13] in the LTA concerning the procedure whereby land acquires or loses the status of Maori freehold land.

[37] For these reasons I accept the defendant's submission that the High Court has no jurisdiction to make the first declaration sought. However, even if the High Court had jurisdiction, I do not consider that the Court should contemplate making a declaratory judgment in relation to an issue which inevitably involves a substantial factual dimension.

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[13] Te Ture Whenua Maori Act 1993, s 130 [TTWMA].

Second declaration: the Plaintiffs' indefeasible title is to land holding the status of General land.

[38] Given the fact that the particular thrust of the indefeasibility argument only really emerged in the plaintiffs' written submissions, the issue was not traversed in the defendant's written synopsis of argument in support of the strike out and it is convenient therefore to take the plaintiffs' synopsis as the point of departure.

[39] That synopsis suggested that the strike out application could be characterised as a misunderstanding of the nature of the plaintiffs' case. The crux of that claim is said to "seek recognition of the character" of the indefeasible title which passed to the plaintiffs at the moment in time when the defendant registered the Memorandum of Transfer in respect of Lot 32. The synopsis then stated:

> 6. ... Counsel respectfully presumes it is agreed that a third party would have interpreted from the register the moment after the Memorandum of Transfer was registered, that the Respondents had indefeasible title to general freehold land. A register must mean the same thing to anyone looking at it regardless of personal circumstances – a register is expected to speak for itself. The Plaintiffs' argument will be that on the day a Memorandum of Transfer is registered there is a fossilisation of the indefeasible title which is then incapable of being altered during the period of registered proprietorship except for any process provided for under the Land Transfer Act.

[40] The theme was developed, and the relationship with the earlier judgment of Allan J explained, in paragraph 9:

> At the time that the purchase was settled, all parties involved treated it as if the property had the status of general freehold land and was capable of being transferred to the Respondents. It is now known that the purchase and alienation of the land was not completed in accordance with TTWMA. Nevertheless, it was completed in accordance with the LTA. Through the act of registering the Memorandum of Transfer, the Applicant perfected and fossilised the Respondents' title. This Court has previously held that the Respondents have indefeasible title to the property and, contrary to the MLC's and the MAC's earlier rulings, and the MLC title, are properly recorded as the registered owners of the land. The question now becomes "indefeasible title to what?".

[41] Mr Peters explained that the question which was before Allan J was: did the plaintiffs have indefeasible title? Allan J having ruled in the affirmative, then the next question (which Mr Peters explained was not before Allan J) is as recited above:

indefeasible title as to what? The answer which the plaintiffs seek (and the form of declaration sought records) is: indefeasible title to General land.

[42] Mr Peters developed the argument by reference to the terms of s 62 of the LTA which states in material part:

> ... the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, ...

[43] He drew attention to the fact that the form of the certificate of title prior to the registration of the transfer to the plaintiffs carried no notation recording that the land was Maori freehold land. Indeed nor for that matter did the certificate of title that first recorded the transfer to the plaintiffs. However the computer freehold register search copy (a copy of which was handed up in the course of argument) showed under the heading 'Interests' the registration as at 6 November 2003 of the status order made by the Maori Appellate Court in the following terms:

> Status order determining the status of the within land to be Maori Freehold Land.

[44] Mr Peters argued that a status order is "an interest in land" within the terms of s 62. It was said that s 62 has the consequence that, where there is no notation on the title recording that the land is Maori land, then the effect of registration of a transfer is that Maori freehold land becomes General land. Thus the status order subsequently registered could have no effect because it was not recorded on the certificate of title at the point in time of the transfer of Lot 32 to the plaintiffs in 1995.

[45] Mr Peters explained that this proposition had not been addressed by Allan J in his conclusion at [129] that in enacting the TTWMA Parliament did not intend to override the security of title which s 62 confers. His Honour had not there resolved the point advanced (and recorded at [124]) that Maori land does not change its status simply by virtue of a transfer to a non-Maori purchaser. However that proposition

was said to be the very issue raised by the form of the second declaration sought in the current proceeding.

[46] This avenue of contention having being revealed as the basis for the second declaration sought, in advancing its strike out application the defendant relied primarily on the amended ground that there was no tenable basis of claim. Ms McKechnie analysed the plaintiffs' contention as based on two propositions:

(a) That indefeasible title is antithetical to the status of Maori freehold land;

(b) That the register should speak for itself – as no status order was registered at the date of transfer, then the land did not have the status of Maori freehold land at that time.

[47] Ms McKechnie argued that indefeasibility of title and the existence of status orders are not antithetical. The defendant's position was that prior to the transfer by the Maori Trustee to the plaintiffs the Maori Trustee held indefeasible title in the land comprised in Lot 32 (the status of which was Maori freehold land) and similarly after the transfer to the plaintiffs they then held indefeasible title – but nevertheless indefeasible title to land the status of which continued to be Maori freehold land. In her submission s 62 was not effective to transform the status of land from Maori freehold land to General land irrespective of the absence of any notation on the certificate of title drawing attention to the status of the land.

[48] The argument was developed by reference to s 2(2)(f) of the Maori Affairs Act 1953 which stated:

> (2) Unless expressly provided in this or any other Act with respect to any specified or defined area, and notwithstanding anything in the foregoing definition of the term "land" or in any of the subsidiary definitions included therein, -
>
> ...
>
> (f) Maori freehold land the legal fee simple in which has been transferred otherwise than by an order of the Court or of a Registrar shall, except where it appears on the face of the

> instrument of transfer that the land has remained Maori freehold land, be deemed to be General Land until either –
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> (i) An order is made by the Court under paragraph (i) of subsection (1) of section 30 of this Act determining that the land is Maori freehold land; or
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> (ii) Any other order is made by the Court as a consequence of which the land becomes Maori freehold land.

[49] As noted earlier, it was s 2(2)(f) that had availed the Jensens in relation to their purchase of Lot 30 during the currency of the Maori Affairs Act. However no equivalent provision is contained in the TTWMA.[14]

[50] It might further be noted that that provision was no more than a deeming provision which was effective only until the making of either of the orders referred to in the latter part of that provision. The objective of the provision was discussed by Elias J in *Hobson v Hobson:*[15]

> **Section 2(2)(f) Maori Affairs Act 1953**
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> Because of my finding as to the status of the land, it is not necessary for me to consider the alternative submission of the respondent that the land, having been transferred to the appellant and his brother by transfer which did not note it to be Maori freehold land, is deemed conclusively to be general land until order of the Court, in application of s 2(2)(f) of the Maori Affairs Act 1953. I would however, be reluctant to conclude that s 2(2)(f) has the effect contended for by Ms Tetitaha. As I indicated in my earlier judgment, s 2(2)(f) operates as a deeming provision only until order of the Maori Land Court and may be thought to be a provision inserted in protection of the integrity of the notice provisions of the Land Transfer Act. Its aim is arguably protection of subsequent purchasers without notice.
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> ...
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> Section 2(2)(f) does not create an irrebuttable presumption despite the decision of the Maori Appeal Court in *Pakiri R Block* (Maori Appellate Court, Tai Tokerau District, Case stated 1/93 23 March 1994), I consider it well arguable that the consequence of an order by the Court is that land declared to be Maori land under s 133 is treated as having been Maori freehold land. Such interpretation would seem to best achieve the purpose of the legislation throughout in protection of Maori land. The point however, does not directly arise and I express no concluded view upon it.

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[14] Though s 130 of the Te Ture Whenua Maori Act 1993 notes s 2(2) of the Maori Affairs Act 1953 as a comparative section.

[15] *Hobson v Hobson*, above n 11, at 33.

[51] However Ms McKechnie's most pertinent point with reference to the present contest is that, if s 62 had the meaning contended for by the plaintiffs, there would have been no need at all for s 2(2)(f) of the Maori Affairs Act.

[52] In response to the argument based on the content of the register she submitted that a status order was not an estate or interest in land within the meaning of s 62 but rather (in this case) was declaratory of the fact that the land in question had always been and continued to be Maori freehold land. She developed the argument by drawing attention to the certification provision in s 164A of the LTA and noting the requirements of the form of certification required by Reg 12 of the Land Transfer Regulations 2002. The certification includes the following:

> I certify that any statutory provisions specified by the Registrar for this class of instrument have been complied with or do not apply, and [*whichever of the following apply*] –
>
> > I certify that any statutory provisions specified by the Registrar relating to Maori freehold land have been complied with or do not apply [*use this form if an electronic workspace facility generates a notification that the land is or could be Maori land*]; ...

[53] In her submission it was simply not sufficient just to look at the register if one was endeavouring to ascertain the status of land.

Discussion

[54] The authority upon which Mr Peters relied is a decision of the House of Lords which concerns the correct approach to the construction of a public document. In *Slough Estates Ltd v Slough Borough Council (No 2)*[16] Lord Reid observed:

> It is well settled that the court in construing a will or a contract must put itself in the shoes of the testator or the parties by admitting in evidence all relevant facts known at the time by the testator or by both the parties. But in my view it does not at all follow that the same applies to a public document. It could not possibly apply to a Minister making a statutory instrument. How far can it apply to a written grant of planning permission? This is available to purchasers from the person who originally obtained the permission. They may have no means of discovering what facts were known to the planning authority. It is true that the person who originally obtained the permission would be likely to know. But the question may arise after many years. And it could hardly be that the permission could mean one

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16 *Slough Estates Ltd v Slough Borough Council (No 2)*, above n 5, at 962.

> thing in the hands of the original owner and something different in the hands of a purchaser from him.
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> ...
>
> Of course, extrinsic evidence may be required to identify a thing or place referred to, but that is a very different thing from using evidence of facts which were known to the maker of the document but which are not common knowledge to alter or qualify the apparent meaning of words or phrases used in such a document. Members of the public, entitled to rely on a public document, surely ought not to be subject to the risk of its apparent meaning being altered by the introduction of such evidence.

[55] That authority was considered in a New Zealand context by the Privy Council in *Opua Ferries Ltd v Fullers Bay of Islands Ltd*[17] which concerned a registered ferry service timetable. Contrasting the approach to the construction of a contract, Lord Hope of Craighead said:

> [20] But it does not follow that the same approach is to be taken when one is construing a public document. The documents included in the register maintained by a regional council under s 52(1) of the Act have that character. This is, and is intended to be, a public register of passenger transport services. Members of the public who consult the register may come from far and near. They may have some background knowledge, but they may have none at all. In *Slough Estates Ltd v Slough Borough Council* [1971] AC 958 at p 962 Lord Reid said that extrinsic evidence may be used to identify a thing or place referred to in a public document. But he went on to say that this was a very different thing from using evidence of facts known to the maker of the document but which are not common knowledge to alter or qualify the apparent meaning of words or phrases used in it. As he put it, members of the public, entitled to rely on a public document, ought not to be subject to the risk of its apparent meaning being altered by the introduction of extrinsic evidence. Moreover, the only information which a regional council is obliged by s 53 to ensure is reasonably readily available to the public is that which gives details of the service which the council has registered. The statute makes the position clear. The register is expected to speak for itself.

[56] That last sentence was adopted and relied upon in the plaintiffs' written submissions.[18]

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17 *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] UKPC 19, [2003] 3 NZLR 740.

18 See [39] of this judgment.

[57] Certainly the register which the defendant is required to keep pursuant to s 33(1) of the LTA is a public register. It has been described as the keystone of the Torrens System.[19] Indeed in *Fels v Knowles* Edwards J observed that "the cardinal principle of the statute is that the register is everything".[20] Contents of entries on the register are notice to the world of their contents.[21]

[58] An authority which Mr Peters did not cite but which I apprehend captures the key feature of his argument is *Regal Castings Ltd v Lightbody.*[22] Tipping J there said:

> [147] ... The cardinal feature of the indefeasibility principle is that, absent fraud, it entitles the registered proprietor and those dealing with the registered proprietor to rely on the register. Sections 62 and 63 allow the registered proprietor to deny unregistered interests and resist claims for possession. Sections 182 and 183 allow purchasers and others dealing with the registered proprietor to rely on the register for the purpose of gaining assurance as to what the registered proprietor can convey. On this basis those dealing with the registered proprietor do not have to go behind the register to ascertain the state of the registered proprietor's title.
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> ...
>
> [149] The in personam jurisdiction must not, however, be allowed to impinge on the fundamental purpose of the Torrens system. In terms of s 62, that purpose is to make the registered proprietor's estate (or title, as it is usually put) paramount against interests which are not notified on the register. It is, in my view, immaterial whether such an interest could have been registered. Hence, if Regal had an unregistrable interest in the land which was not susceptible to in personam relief, that interest would not prevail against the paramountcy provisions of s 62.
>
> [150] That section is simply expressed and deliberately so. Except in the case of fraud, the registered proprietor takes free of all interests that are not notified. The certainty and simplicity of that proposition should not be watered down by reference to whether the interest qualifies for registration. It is the fact of non-notification which is crucial. The absence of the interest from the register, for whatever reason, is what matters in a system which has, from earliest times, proceeded on the basis that, as Edwards J put it in *Fels v Knowles*, "the register is everything". If you have an interest, whether registrable or not, of which you wish to give notice, you should, if possible, protect it by caveat. I can find nothing in either the text of the Act or in its underlying purpose to support the view that the paramountcy afforded by s 62 does not apply against unregistrable interests.

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19 Struan Scott and ors *Adams' Land Transfer* (online looseleaf ed, LexisNexis) at [s33.3 comment].

20 *Fels v Knowles* (1906) 26 NZLR 604 (CA) at 620.

21 *Melville-Smith v Attorney-General* [1996] 1 NZLR 596 (HC).

22 *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

[59] However the prescribed contents of a register depend on its function as stipulated in its statutory or other source: e.g. refer *Opua Ferries* above. In the case of the LTA register s 33 provides that it shall include a duplicate of every grant of land and of every certificate of title within the relevant district. It goes on to state:

> ... and the Registrar shall record thereon the particulars of all instruments, dealings, and other matters *by the Act required to be registered affecting the land* included under each such grant or certificate of title.
>
> (emphasis added)

The word "dealing" is defined in s 2 to mean:

> "every transfer, transmission, mortgage, loan or encumbrance of any estate or interest under this Act.

The phrase "estate or interest" is defined in s 2 to mean:

> every estate in land, also any mortgage or charge on land under this Act.

[60] Section 62 which has been described as the key indefeasibility section[23] and which is relied upon by the plaintiffs[24] provides that the registered proprietor of land shall hold the land:

> ... subject to such encumbrances, liens, estates or interests as maybe notified on the folium of this register ... but absolutely free of all other encumbrances, liens, estates or interests whatsoever ...

[61] In my view Mr Peters' argument as to the significance of the register is sound insofar as it relates to estates or interests that are required to be registered by virtue of the LTA. However I consider that the argument founders at the point where it is contended that the absence of a status order or any other notation on the title indicating that the land has the status of Maori freehold land has the consequence that upon a transfer of the land the effect of s 62 is that the status of the land is changed.

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23 At [131].

24 See [42] of this judgment.

[62] The LTA does not address the issue of the status of land. The status of land is addressed in Part 6 of the TTWMA. Six different categories of status are identified in s 129(1) including Maori freehold land and General land.

[63] As earlier noted s 130 limits the circumstances in which land can acquire or lose the status of Maori freehold land. Section 131(1) confers the jurisdiction on the Maori Land Court to make status orders declaring the particular status of any land. Every status order shall be registered under the LTA in accordance with Part 5: s 140. Section 142 provides:

> **142 Effect of status orders upon registration**
>
> Every status order made under this Part shall, upon registration, or upon noting under section 124, have the effect of giving to the land the particular status specified in the order.

[64] Furthermore s 123(5) states:

> Until registration has been effected, an order of the Court in respect of land subject to the Land Transfer Act 1952 shall affect only the equitable title to the land.

[65] Those provisions led Ronald Young J to express the view in *Edwards v Maori Land Court*[25] that the status of land amounts to an estate or interest in land. In addressing an argument that the status of land is not something contemplated by the LTA and to which the indefeasibility provisions apply, His Honour said:

> [112] The statutory regime for status orders is straightforward. Once an order is made (s 136) it must (shall) be registered under the Land Transfer Act in accordance with Part V TTWMA. Section 123(1) requires orders to be registered "against the title". Until registration the order affects the equitable title to the land only (subsection (5)). Finally s142 provides that registration shall "have the effect of giving to the land the particular status specified in the order".
>
> [113] This statutory regime therefore makes it clear that registration of status orders is required and that it is only when registration occurs that land has the status of the new order. Given all land in New Zealand is required to have a "status" (s129) given compulsory registration and given that a change of status does not occur until registration the intention of the legislature was clearly to emphasise that registration is all important.

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[25] *Edwards v Maori Land Court* HC Wellington CP 78/01, 11 December 2001. This decision was not discussed in the course of argument.

> [114] Status runs with the land and will exist independently of the individual registered proprietor. It clearly affects the estate or interest of the individual proprietor. The land's status, if for example it is Maori freehold land, will affect the capacity of the registered proprietor to deal with the land by e.g. sale or lease.

[66] After reciting s 62 of the LTA, he continued:

> [116] Thus the registered proprietor holds the land (if registered under the Act) against all other claims to the land except in the case of fraud (and other particular exceptions) and subject to interests notified on the register.
>
> [117] One of those interests "notified in the folium of the register" will be a status order. The order affects the registered proprietors' estate in the land. This order is effectively protected in the same or a similar way to, for example, the registered proprietors' interest as "owner" of the land. The status order cannot be removed or changed other than by statutory authority e.g. s 81 Land Transfer Act; s125 TTWMA. It is notice to the world of the actual status the land holds. And where for example the land has the status of Maori freehold land it will be subject to statutory restraints in TTWMA. And the land only holds the status once registration is effected.
>
> [118] Indefeasibility was described in *Fraser* v *Walker* [1967] NZLR 1069 at 1075-1076 in the following- terms:
>
> > ...a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys."
>
> [119] And indefeasibility also protects the registered proprietor from encumbrances, liens, estates or interests not registered (s 62 Land Transfer Act). Thus given the status of land is part of the estate or interest in the land registration of the status order will protect it against claims that the land enjoys another status or that the status of the land was wrongfully obtained outside of the statutory exceptions allowing disputation. Once registered the order is entitled to the same indefeasibility protection of other encumbrances liens, estate or interest in the land which will collectively be susceptible to attack only by statutory authority, here the Land Transfer Act (e.g. fraud, wrongfulness) and TTWMA (e.g. annulment).

[67] Those views were noted but not remarked upon further by the Court of Appeal on appeal in *Bruce v Edwards*.[26]

[68] The proceeding in *Edwards* was an application for judicial review where an order had been made by the Maori Land Court changing the status of some farmland in South Taranaki from Maori freehold land to General land. That order, which had been made without requiring notice of the application to be served on the members

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[26] *Bruce v Edwards* [2003] 1 NZLR 515 (CA) at [37].

of the preferred class of alienees, was registered against the title to the land under the LTA. As a result the land ceased to be Maori freehold land and the preferred class of alienees lost their right of first refusal.

[69] The present case is very different from *Edwards*. Here at all material times the land has been Maori freehold land and no order has been made under s 135 changing its status to General land.

[70] The status of the land under the 1953 Act was as provided in s 2(2)(b):

> (2) Unless expressly provided in this or any other Act with respect to any specified or defined area, and notwithstanding anything in the foregoing definition of the term "land" or in any of the subsidiary definitions included therein, -
>
> ...
>
> (b) Maori freehold land acquired by the Maori Trustee shall be deemed to be and to remain Maori freehold land:
>
> ...

[71] The continued status of the land under the TTWMA is spelled out in s 129(3):

> (3) Notwithstanding anything in subsection (2), where any land had, immediately before the commencement of this Act, any particular status (being a status referred to in subsection (1)) by virtue of any provision of any enactment or of any order made or any thing done in accordance with any such provision, that land shall continue to have that particular status unless and until it is changed in accordance with this Act.

[72] The status of the land has not been changed from Maori freehold land in accordance with the TTWMA as provided in s 129(3). On the contrary the Maori Land Court has refused to change its status to General land. The subsequent status order has done no more than reassert what s 129(3) provides. In my view s 129(3) is a complete answer to the proposition advanced by the plaintiffs in this case.

[73] It is fair to assume however that the plaintiffs would wish to invoke the dicta in *Edwards* in support of their contention. Accordingly, despite my view that s 129(3) is determinative of the present issue and in the event that this matter

proceeds further on appeal, I proceed to record my views on the *Edwards* analysis and its implications for the plaintiffs' contentions.

[74] I agree with the analysis of the statutory regime for status orders in [112]-[113] of *Edwards*. However I respectfully disagree that a status order is an estate or interest in land. Status orders are concerned with the various land statuses listed in s 129(1). While the status of land is plainly a characteristic of the land I do not consider that the status of land (e.g. Maori freehold land) is an estate or interest in land.

[75] To my mind that characteristic of land which is its status category is not something that should be able to be defeated or avoided (in the sense of the land being "absolutely free from" to use the phrase in s 62) as a consequence of the fact of an absence of a notation on the certificate of title as to the land's status.

[76] In a case where no status order has ever been made there will be no notation on the title stating the status of the land. If s 62 were to apply, then on a transfer of such land (at least in the absence of any other notice of the land's status) the new registered proprietor would take title "absolutely free from" that status. But what then would be the status of the land? In the present case the plaintiffs would presumably contend that the status should then be General land. But why should that be so? The land has never had that status previously. A default to a General land status would not seem to be consistent with the objective of the TTWMA as reflected in s 130.

[77] If my view is correct that the status of land does not constitute an estate or interest in land, I have difficulty with the proposition that a status order should amount to such an estate or interest. The present case serves to highlight the dichotomy were it otherwise: the status of the land would not be an estate or interest in land but at the point in time when a status order (reiterating that status) was made the status order would amount to such an interest.

[78] Reverting to the reasoning in *Edwards*, in my view the fact that the status of land may affect the capacity of the registered proprietor to deal with the land (e.g. by

sale or lease) does not have the consequence that the status of the land amounts to an estate or interest in the land. It is not a requirement of the LTA that such status orders be registered: they are not "instruments, dealings, and other matters by this Act required to be registered" in the words of s 33(1) of the LTA.

[79] It is the TTWMA itself that provides for their registration: s 140. And it is the TTWMA that records in s 123(5) that until registration is effected an order shall affect only the equitable title to the land. That may have significance in the case of status orders which are intended to change the status of land: e.g. s 133 (changing General land or General Land owned by Maori to Maori freehold land); s 135 (changing Maori land to General land). It would only be after registration of the orders made that the legal title would be affected by the status of what Ronald Young J described as "the new order". However my point is that this would be as a consequence of the provisions of the TTWMA, not as a consequence of the application of s 62 to unregistered estates or interests in land.

[80] The present case does not concern a "new order". The status order which the Maori Appellate Court made did not change the status of the land. It was not an order under s 135. Nor did the status order cause the land to become Maori freehold land. Rather the nature of the status order was simply to declare what had always previously been the position, namely that the land was Maori freehold land.

[81] In my view the fact that at a point in time subsequent to the registration of the transfer to the plaintiffs the Maori Appellate Court elected to make such a status order (in effect declaring that the land continued to have its Maori freehold land status) does not mean that at the date of transfer there was any omission from the title of an "interest" in respect of which the plaintiffs took title "absolutely free" pursuant to s 62.

[82] I apprehend that my conclusion appears to align with the view of Professor Boast:[27]

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[27] Richard Boast "The Implications of Indefeasibility for Maori Land" in David Grinlinton (ed) *Torrens in the Twenty-First Century* (LexisNexis, Wellington, 2003) at 104. See also Richard Boast *Maori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at [15.2.4].

> Section 123 of Te Ture Whenua Maori Act 1993 (TTWM) requires that all orders made in the Maori Land Court affecting title to land are registered under the LTA.[28] This is a new requirement, as under the Maori Affairs Act 1953 such registration was optional. Registration has no effect on the status of land – in the sense, that is, of changing it from Maori freehold land to general land. It is Maori freehold land whether registered or not, although if it is not registered, as noted, the interests are equitable and not legal.

[83] In summary my conclusions are:

(a) The land in question having been acquired by the Maori Trustee, it was deemed to be (and to remain) Maori freehold land by s 2(2)(b) of the 1953 Act;

(b) Upon the TTWMA coming into force the land continued to have the status of Maori freehold land by s 129(3) of the TTWMA;

(c) The status of the land as Maori freehold land has not been changed in accordance with the TTWMA. Indeed attempts to secure a change by the TTWMA processes have been unsuccessful;

(d) In the face of ss 129(3) and 130 of the TTWMA nothing in the LTA can be invoked to advance the proposition that, because there was no notation on the certificate of title to the effect that the land was Maori freehold land, the act of the registration of the transfer of title of the land to the plaintiffs caused the status of the land to change from Maori freehold land to General land.

(e) The absence of a notation on the certificate of title recording the fact that the status of the land was Maori freehold land could not be viewed as an omission or failure to register an "interest" in the land such that such "interest" was defeated by the application of s 62 upon transfer of the title to the plaintiffs.

(f) Even if, contrary to my view, a status order is an "interest in land" for the purposes of the LTA the fact that subsequent to the transfer to the

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[28] TTWMA, s 123(1).

> plaintiffs the Maori Appellate Court made a status order declaring the land to be (as it already was) Maori freehold land did not have the consequence under s 123(5) that only the equitable title to the land was affected by the Maori freehold status of the land. The land had always had such status which was unaffected by the fact that the Maori Appellate Court made a status order declaring that same status to subsist.

[84] In light of these conclusions I consider that the plaintiffs have no tenable case in support of the second declaration which they seek.

[85] Mr Peters submitted that if I considered that there were areas of the pleadings which require amendment then the plaintiffs would seek leave to amend the claim citing Tipping J's well-know motor vehicle repair metaphor in *Marshall Futures Ltd v Marshall*.[29]

[86] In my view the pleadings are not capable of reconstruction so as to sustain the argument which the plaintiffs wish to advance that as a consequence of registration of the transfer to the land to them the status of their section is now General land.

[87] Having regard to the fact that litigation concerning this land has been running, off and on, for over a decade, I consider that the most appropriate and just order is an order striking out the claim. By that means, in the event that my views are erroneous, an appeal can be pursued to the Court of Appeal at an early opportunity. In that way the plaintiffs may more speedily ascertain definitively whether there is a route to the outcome they seek other than via the statutory process before the Maori Land Court.

Disposition

[88] The statement of claim is struck out.

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[29] *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC) at 324.

[89] Memoranda as to costs may be filed by the defendant by 31 January 2014 and by the plaintiffs in response by 14 February 2014.

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Brown J