

**IN THE HIGH COURT OF NEW ZEALAND  
WHANGAREI REGISTRY**

**CIV 2008-488-548**

BETWEEN	TE WHANAU O RANGIWHAKAAHU HAPU TRUST First Plaintiff
AND	FRIENDS OF MATAPOURI INC Second Plaintiff
AND	DEPARTMENT OF CONSERVATION First Defendant
AND	THE CHIEF EXECUTIVE LAND INFORMATION NEW ZEALAND Second Defendant
AND	ATTORNEY-GENERAL OF NEW ZEALAND Third Defendant

Hearing: 5, 6, 7, 8 and 9 July 2010

Counsel: S M Henderson for Plaintiffs  
H S Hancock, D Ward and G Gardner for Defendants

Judgment: 22 December 2010

---

**JUDGMENT OF HEATH J**

---

*This judgment was delivered by me on 22 December 2010 at 3.00pm pursuant to Rule 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*

Solicitors:

Henderson Reeves Connell Rishworth, PO Box 11, Whangarei  
Crown Law, PO Box 2858, Wellington

## CONTENTS

<b>The proceeding</b>	[1]
<b>The causes of action</b>	[8]
<b>The Trust's standing to sue</b>	[10]
<b>Allegations made against the Morrison interests</b>	[14]
<b>The Otito Block – how the disputes arose</b>	
(a) <i>Introductory comments</i>	[19]
(b) <i>The early days</i>	[21]
(c) <i>The Morrison purchase and its consequences</i>	[42]
(d) <i>The 1965 attempt at boundary redefinition</i>	[46]
(e) <i>The 1996 application for subdivisional consent</i>	[67]
(f) <i>The “correction” application to the Surveyor-General</i>	[82]
<b>Analysis</b>	
(a) <i>The claims based on breach of contract and breach of trust</i>	[84]
(b) <i>The claim based on breach of principles of the Treaty of Waitangi</i>	[92]
(c) <i>The judicial review application</i>	
(i) <i>The nature of the claims</i>	[97]
(ii) <i>The decision to approve DP 199214 and to issue new titles</i>	[99]
(iii) <i>The standard of proof</i>	[112]
(iv) <i>Did the Chief Surveyor err, in a judicial review sense?</i>	[121]
(v) <i>Relief</i>	[141]
<b>Result</b>	[146]

### The proceeding

[1] The Otito Scenic Reserve (the Reserve) is situated at Matapouri Bay, on the east coast of the North Island, about 40 minutes drive from Whangarei. The Reserve forms part of land previously known as the Otito Block. That land was originally held for the benefit of descendants of Rangiwakaahu Te Awa Te Rahui.

[2] Te Whanau o Rangiwakaahu Hapu Charitable Trust (the Trust) was incorporated to represent those descendants. The Trust and Friends of Matapouri Inc<sup>1</sup> (the Society) have brought this proceeding in an endeavour to restore boundaries of the land that they claim were wrongfully changed through approval of a new survey plan in 1999, the effect of which is said to have removed about 1.1 hectares from the title. The Trust alleges that the Crown has wrongfully taken land from the Reserve and dealt with it for the benefit of interests associated with the late Mr and

---

<sup>1</sup> A society incorporated to represent and advance the interests of people concerned with the protection of historical cultural and environmental aspects of Matapouri and its associated coastal areas.

Mrs Morrison (the Morrison interests), who originally purchased land adjacent to the Otito Block, in 1912.

[3] The nature of the relief sought means that the Trust must be treated as the sole plaintiff.

[4] Three Crown interests<sup>2</sup> have been joined as defendants to the proceeding. Each has a distinct public function. The Department of Conservation has responsibility for administering the Reserve.<sup>3</sup> The Chief Executive of Land Information New Zealand is sued in respect of functions performed, at various times, by the Chief Surveyor, the District Land Registrar and the Surveyor-General. The Attorney-General is joined to represent the Crown, in its capacity as a Treaty of Waitangi partner. Unless the context otherwise requires, I refer to the three defendants collectively, as the “Crown interests”.

[5] The present disputes have been simmering for some time. Tangata whenua are passionate about restoring what they believe to be the correct southern boundary of the Reserve.

[6] The present proceeding was issued on 2 May 2008, in part to obtain Court rulings on an application to the Surveyor-General to correct the cadastral record.<sup>4</sup> In 2009, the proceeding was set down for hearing over five days, beginning on 5 July 2010.

[7] While the hearing was pending, the Crown engaged further with the Morrison interests. In January 2010, the Crown reached an agreement, whereby the bulk of the land in issue was transferred to those interests. As a result of that sale, only 2000m<sup>2</sup> of the original 1.1 hectares remain in issue, for the purpose of this proceeding.

---

<sup>2</sup> Department of Conservation, Chief Execution of Land Information New Zealand and the Attorney-General.

<sup>3</sup> Under the Reserves Act 1977.

<sup>4</sup> Under s 52 of the Cadastral Survey Act 2002.

## **The causes of action**

[8] There are four causes of action. The Trust:

- a) Alleges that it is entitled to sue for breach, by the Crown, of contractual obligations to the trustees of the Otito Block when the Block was sold to the Crown, under the authority of a Maori Land Court order made on 5 September 1969.
- b) Claims that the Crown breached the terms of the Maori Land Court order of 5 September 1969 and thereby committed breaches of trust obligations owed by it to the beneficial owners of the Otito Block.
- c) Seeks judicial review of decisions made by public officials within Land Information New Zealand. Three particular decisions are in issue:
  - i) The Chief Surveyor's decision in December 1999 to approve DP 199214.
  - ii) The District Land Registrar's decision to cancel an existing title and to issue a new one, in consequence of approval of DP 199214.
  - iii) The Surveyor-General's refusal to exercise his powers to correct DP 199214.
- d) Seeks damages against the Crown for "breach of the principles of the Treaty of Waitangi". This cause of action relies on the "partnership" between Maori and the Crown and the imposition of "fiduciary" obligations which the Trust contends have been recognised by appellate decisions.

[9] The relief sought under each cause of action includes declarations that:

- a) DP 199214 is not an accurate representation of the common boundary between the Reserve and Section 1 of Block X; and
- b) The southern boundary of the Reserve was correctly defined by reference to the angled survey peg shown in both SO 5117 and LT 56234 and Tewahitapu Creek, as shown on ML 3903.

Orders are also sought requiring correction of the survey of DP 199214, reinstatement of the correct southern boundary and correction of the computer register of land holdings.

### **The Trust's standing to sue**

[10] Mr Hancock put in issue the Trust's authority to bring these proceedings on behalf of the descendants of Rangiwahakahu Te Awa Rahui; or those who, before the 1970 sale to the Crown, were beneficial owners of the land.

[11] After the hearing, I issued a Letter of Request to the Maori Land Court to seek advice on whether the Trust was an appropriate representative of the descendants.<sup>5</sup> Both my request and a separate application by the Trust were considered by that Court, at Whangarei, on 3 September 2010. The Trust and the Crown were each represented at that hearing.

[12] After considering evidence adduced on the issue and hearing submissions from counsel, Judge Spencer made a determination, on the Trust's application, that:<sup>6</sup>

Te Whanau o Rangiwahakaahu Hapu Charitable Trust is the appropriate body having the representative capacity and authority to deal with all matters that may concern the previous Maori ownership and the tangata whenua of the Otito Scenic Reserve in proceedings currently before the High Court.

The Maori Land Court reserved the costs of the hearing before it, for determination in this proceeding.<sup>7</sup>

---

<sup>5</sup> Te Ture Whenua Maori Act 1993, s 30(1)(b).

<sup>6</sup> *Re Te Whanau o Rangiwahakaahu Hapu Charitable Trust* (2010) 9 Tai Tokerau MB 248 at 264.

<sup>7</sup> *Ibid.*

[13] On the basis of the Maori Land Court's determination, I am satisfied that the Trust has standing to bring this proceeding.

### **Allegations made against the Morrison interests**

[14] In opening for the Trust and the Society, Mr Henderson made allegations of misconduct against some of the Morrison interests. His opening statement had been made available in written form to counsel for those persons, the week before the hearing began. I gave leave to the Morrison interests to enter an appearance for ancillary purposes and to support that with any affidavits designed to rebut the allegations.

[15] The sole purpose of allowing those additional affidavits to be filed was to permit those associated with the Trust and the Morrison interests respectively to put their positions on the record. While some of the Morrison interests were formerly defendants in this proceeding (having been joined at their own request) no relief was sought against them. They were struck out as defendants before the hearing began. The Trust has never challenged the indefeasible titles they acquired from the Crown.

[16] At the conclusion of the hearing, Mr Henderson sought to file and serve affidavits in reply. That application was resisted by the Crown. I said I would rule on that issue when giving a substantive judgment.

[17] In the absence of the Morrison interests being represented before the Court and the need to make factual findings on the cross-allegations, I decline to enter into a debate about them. Rather, I confine myself to the causes of action pleaded. On that basis, the additional evidence must all be characterised as irrelevant and inadmissible.<sup>8</sup>

[18] I refuse to admit the additional evidence. Costs are reserved. I will determine all questions of costs arising as between the Trust and the Morrison interests on the papers, in terms of directions given at the conclusion of this judgment.

## The Otito Block – how the disputes arose

### (a) *Introductory comments*

[19] Originally, three preliminary questions were posed for this Court's consideration:<sup>9</sup>

- a) Is the boundary between the Reserve and the adjoining land defined correctly in DP 199214?
- b) If the boundary defined in DP 199214 is incorrect, what is the location of the true boundary between those two parcels of land?
- c) What is the true southern boundary?

[20] Because sufficient time became available to deal with all pleaded causes of action, I vacated the order that the preliminary questions be tried. As it transpires, that proved to be fortuitous. It became clear to me that the existing survey evidence would render it nigh impossible to determine an objectively “correct” boundary of the land. But, it was feasible to consider, in the context of the judicial review claim, whether there had been sufficient evidence available to the Chief Surveyor (in 1999) to approve DP 199214 or to the Surveyor-General (in 2008) to refuse to correct the cadastre. Both of those issues turn on standard of proof, in relation to the decisions then being made, in precisely the same way that a Court determination of the “correct” boundary, if undertaken now, would depend on whether the civil standard of proof had been met. Whatever approach may be taken is dependent on which plan is used as the *status quo* at the time of the relevant decision.<sup>10</sup>

---

<sup>8</sup> Evidence Act 2006, s 7(2).

<sup>9</sup> *Te Whanau o Rangiwakaahu Hapu Charitable Trust v Department of Conservation* HC Whangarei CIV 2008-488-548, 23 December 2008 Associate Judge Robinson at [6].

<sup>10</sup> See further at paras [112]-[120] below, and the discussion that follows them.

(b) *The early days*

[21] Known as the Otito Block and defined by reference to plan ML 3903, Maori freehold land (comprising 62 acres) was vested in trustees, in September 1877, by (what was then known as) the Native Land Court.<sup>11</sup> Subsequently, the southern boundary of the land was confirmed by a survey (recorded in plan SO 5117, completed in 1893) of the contiguous Section 1 Block X Opuawhanga Survey District. The boundaries remained in that state until 1999, when DP 199214 was approved by the Chief Surveyor and a new title issued as a consequence of that decision.

[22] On 20 April 1839, a trader, Gilbert Mair Snr, purchased land in the vicinity of Matapouri from Maori. The purchase deed suggests it included an area from Ringaringa (located on the east coast, north of Otito), south to Tutukaka Harbour. At some point that interest was on-sold to other Pakeha, who lodged a claim with the Land Claims Commission<sup>12</sup> for 15,000 acres. When their application came before the Commissioners, conflicting claims to the land came to light; some by Maori.

[23] Following a payment to the applicants for Government scrip to enable them to acquire land in the vicinity of Auckland, the Crown took over combined claims in the Matapouri/Tutukaka area. Nevertheless, unresolved claims by Maori stood in the way of the Crown acquiring full title to the land.

[24] In October 1861, a surveyor, William Searancke, in conjunction with a Government Land Purchase Commissioner, engaged in negotiations with Maori to settle outstanding claims. By 1863, Mr Searancke had reported that negotiations for the acquisition of remaining Maori interests in the Matapouri Block had been completed.

---

<sup>11</sup> *Re Otito Block* (1877) 2 Whangarei MB 216.

<sup>12</sup> See the Land Claims Ordinance of 1841. In a proclamation issued on 14 January 1840 by Governor Gipps of New South Wales (from where the colony of New Zealand was then administered) warning was given that purchasers of land from Maori from that date would be void and earlier purchasers could only be validated following an investigation by Land Claims' Commissioners. Strangely, this proclamation was published in Tasmania, in the Hobart Town Courier and Van Diemen's Land Gazette, on 14 February 1840; 8 days after the Treaty of Waitangi was signed.

[25] At that time, the Matapouri Block was described as running from a point about one mile south of Matapouri to the northern head of Tutukaka Harbour, then running inland along the boundary of the land purchased by Mr Mair and others.<sup>13</sup> As part of the negotiations, Mr Searancke promised Maori that a reserve of not more than 1000 acres would be created on the south side of Matapouri Harbour.

[26] In or about September 1863, Mr Searancke received instructions requesting him to stop his purchase negotiations. When responding to the relevant Government agency, he indicated that he would continue to survey the Matapouri Block. On 19 October 1863, he advised that he had “so far as in my power at present completed” that survey. He added that he had been unable to survey the adjoining Tutukaka Block because of the absence of some owners.

[27] After Mr Searancke was given permission to complete negotiations in respect of the Matapouri Block, a purchase deed was signed (on 22 November 1864) by a number of Maori. The original deed does not have a plan attached to it but does describe boundaries, in handwriting:

... on the Coast at “Mimitu” and then along the Coast to “Otara” and on to “Otito” whence it runs inland along the surveyed lines and down again to the Coast and on “Te Karo” whence it again runs inland to the large dry Kauri Tree, thence southerly to “Te Wairua” and on to “Parangarau” hence in an Easterly direction to “Te Ihu a Manaia” and on to “Owaitara” on the Coast ... and on to Mimitu where the boundaries commenced.

[28] A note at the foot of the purchase deed refers to a burial ground at Taritirahi that was reserved for Maori, who were also given an option to purchase a cultivation at Tokoroa.

[29] The boundaries of what is now known as the Otito Block are not incorporated within the description set out in the purchase deed. A common boundary between the Matapouri and Otito Blocks appears to have been surveyed, probably by Mr Searancke, sometime between September 1863 and September 1864.

---

<sup>13</sup> Letter from Mr Searancke to Minister for Native Affairs, 17 July 1863; OLC 4 6\*31, Archives New Zealand.

[30] SO 718 is the first plan of the area in dispute that is part of the cadastre,<sup>14</sup> as a Survey Office plan. It is undated and unsigned. No notation appears on it to indicate approval by either the Surveyor-General of the day, or anyone with delegated authority.

[31] SO 718 shows the Otito Block as a native reserve, containing 62 acres, with a common boundary between the Otito and Matapouri Blocks starting at a location on the north side, known as “Otito”. The area of 62 acres is consistent with that shown in ML 3903 and subsequent Orders in Council of 1957, 1970 and 1972.<sup>15</sup> The boundary runs in a straight line inland from Otito, before branching towards the coast on a different angle, touching what appears to be a watercourse and then running down to the coast north of a location called “Te Karo”. The straight line indicates some bearings (and perhaps) distances, but is not clear in either of those respects. There are no measurements of the coastal boundaries of the Otito Block.

[32] Around this time, other plans had been prepared to define land in close proximity to the Otito Block. Two of those plans were ML 531 and ML 2323. The latter provides both a definition of the Matapouri Reserve and depicts part of the Otito Block boundary.

[33] ML 2323 appears to have been completed in 1871 and is likely to have been based on ML 531, a plan prepared in respect of the Te Wairoa Block.<sup>16</sup> ML 2323 shows the Block renamed as “Matapouri”. It appears that the Provincial Surveyor and the Deputy Inspector of Surveys approved the plan. The plan was produced at a hearing before the Native Land Court on 19 January 1872.

[34] ML 2323 shows the junction of the north western boundary of the Matapouri Block and the coast, at a point called “Te Karo”, and proceeds in a line to the coast.

---

<sup>14</sup> The Cadastral Survey Act 2002 defines the term “cadastre” as “all the cadastral survey data held by or for the Crown and Crown agencies”: s 4. In addition, s 4 defines the term “cadastral survey data” as meaning “information in or derived from cadastral surveys, and related information”. It also includes survey system information and tenure system information”. “Cadastral survey” is defined by s 4 to mean “the determination and description of the spatial extent (including boundaries) of interests under a “tenure system”.

<sup>15</sup> See paras [45], [64] and [66] below.

<sup>16</sup> See para [40] below.

The words “Te Wahitapu” have been handwritten near the mouth of what appears to be a waterway.

[35] In January 1872, the land contained in the Reserve came before the Native Land Court at Kawakawa, for investigation of title. Unfortunately, the Court’s Minute Books for that hearing have been lost. However, it is clear that an order was made, on 29 January 1872, issuing a certificate of title under the Native Land Act to Maori and the owners of the Reserve.

[36] Against the backdrop of those contemporary events, on 20 September 1877, the Native Land Court began an investigation into the title to the Otito Block and the neighbouring Parangarau Reserves. The evidence taken at that hearing is no longer available. The decision of the Court is brief.<sup>17</sup>

[37] The investigation proceeded on the basis of a new plan, ML 3903,<sup>18</sup> which was produced at the hearing. It seems clear enough that ML 3903 built on SO 718. Although Mr Searancke’s plan of the Otito boundary (SO 718) did not contain any measurements around the coastal boundaries of the Otito Block, some measurements were included in ML 3903. By this time, ML 2323 was also available and had defined the northern boundary to the Matapouri Block; which is also the southern boundary of Otito. ML 3903 shows, for the first time, “Te Wahitapu Creek”, as a means of fixing the boundary.

[38] ML 3903 contains a notation, indicating that it was approved by the Deputy Inspector of Surveys, on 22 July 1880.

[39] A memorial recording ownership of the Otito Block was entered, in accordance with the Native Land Court’s decision. The description of the boundaries, on the memorial is:

Bounded towards the North West and North by the Sea 6300 links – towards the South East by the Sea and Te Wahitapu Creek 6100 links and towards the South West and West by the Matapouri Block 2580 links.

---

<sup>17</sup> *Re Otito Block* (1877) 2 Whangarei MB 216.

<sup>18</sup> *Ibid.*

[40] Among the evidence produced by the Trust is an undated report (probably prepared in or about 1972) by Mr P J Phillips:<sup>19</sup> “*Report on Definition of Wahitapu Stream at Otito Block*”. Mr Phillips compared the survey data in ML 2323 and ML 3903:

7. ML 2323 is a magnetic survey covering the Te Wairoa Block area but renames the area Matapouri. It is the first plan showing survey data and locates the points “Otito”, “Te Karo” and “Kaurimaroke” and was surveyed in 1871 by S Taiwhanga. This plan was accepted by the Maori Land Court and this office for the definition of the Matapouri Block title boundaries. The additional survey work shown on ML 2323 was subsequently approved as the definition of the Parangarau and Otito Block exclusions as it was adopted onto ML plans 3902 and 3903.
8. The only data differences between ML plans 2323 and 3902 are on the boundary line from the point “Otito” to angle peg where ML2323 has transposed the bearing figures and a difference in distance probably because this line continued out to some coastal traverse. *Regardless of the cause of this difference, the distance on ML3903 must be accepted as this is the first plan defining that boundary and used for title purposes and is a survey carried out by R Reay in 1877 of the position. ML3902 is a compilation from ML2323. Both plans were accepted by the Maori Land Court and this office for title purpose.* (my emphasis)

[41] In 1893, another surveyor, Mr Haszard, sought to redefine the Parangarau and Otito Block exclusions, for the purpose of a subdivision for a Crown land purchase. Mr Haszard’s plan ultimately became SO 5117. The relevance of SO 5117 lies in its reliance on ML 3903 to define the common boundary between the Otito and Parangarau Blocks; the latter being land from which Section 1 of Block X Opuawhanga Survey District was partitioned.

(c) *The Morrison purchase and its consequences*

[42] In SO 5117, the southern boundary of the Otito Block was defined by reference to “Tewahitapu Creek”. In 1912, Mr Morrison (a Pakeha), acquired sections 1 and 2 of Block X. Mr Morrison was told that the northern boundary of his

---

<sup>19</sup> Between February 1954 and November 1987, Mr Phillips was employed by the Department of Lands and Survey. During that time he held positions as Maori Investigation Officer, Manager of the Statutory Computing and Maori Division and Manager of the Land Transfer Division. He was based in Auckland and was directly responsible to the Chief Surveyor and the Commissioner of Crown Lands. Mr Phillips gave evidence on behalf of the Commissioner of Crown Lands to the 1969 sitting

land was Te Wahitapu Stream.<sup>20</sup> The northern boundary of Section 1 was also the southern boundary of the Otito Block.

[43] In 1946, Mr Morrison and his wife built their house to the south of that stream.

*(d) The 1954 Maori Land Court order*

[44] On 25 August 1954, the Maori Land Court recommended that an Order in Council issue to set aside the land known as the Otito Block “as a recreation reserve for the common use of the Ngatiwai Tribe”.<sup>21</sup> Judge Clarke, in making that order, recorded that the land was “in continual and common use by the people living at Matapouri Bay as a recreation area” and that it was “the wish of the owners that the . . . land be set aside as a Maori Reservation”.<sup>22</sup>

[45] On 17 January 1957, the Governor-General made an Order in Council to give effect to the recommendation.<sup>23</sup> The land was described, in the Order in Council, as containing 62 acres, “more particularly delineated on the plan numbered MA 21/3/315 lodged in the Head Office of the Department of Maori Affairs, Wellington, and thereon edged red”.

*(e) The 1965 attempt at boundary redefinition*

[46] In 1965, after the Otito Block had been declared a Maori Reservation (in 1954) but before trustees were appointed to transfer it to the Crown (in 1969),<sup>24</sup> Mr Morrison began a process that challenged the correctness of the southern boundary of the Otito Block.

---

of the Maori Land Court at which the sale of the Otito Block to the Crown was authorised: see para [62] below.

<sup>20</sup> See para [54] below.

<sup>21</sup> *Re Otito Block* (1954) 27 Whangarei MB 316.

<sup>22</sup> *Ibid.* The recommendation for the issue of an Order in Council was made under s 439 of the Maori Affairs Act 1953.

<sup>23</sup> “Setting Apart Maroi Freehold Land as a Maori Reservation” MA 21/3/315 (17 January 1957) *New Zealand Gazette* 1957 at 46.

<sup>24</sup> See paras [44], [61] and [62].

[47] In a letter dated 21 June 1965, to the District Land Registrar, a surveyor, Mr Hosking wrote:

**Pt Sec 1 Blk X Opuawhanga S D**  
**Pt C T 346/217 – J Morrison**

On the enclosed print from DP 43764 I have edged in green the title boundary of Pt Sec 1, in particular where it adjoins the Otito Block at the eastern end.

Mr Morrison has occupied up to the stream north of his house since 1912 when he bought the property and there is no evidence whatever that the stream ever flowed on the alignment shown as a pecked line on my plan. However, this pecked line, which runs through my client's house, is shown thus on SO 5117. This plan shows the distance of 400 links from the stream to the angle in the Otito Block boundary to the north-west and the title is based on this plan.

From the bend north of the house at the rocky spur, the stream appears always to have flowed from the north-west, draining as it does watersheds to the north and west. All land south-west of the house is fairly level consolidated sand in grass up to the main road. East of the rocky spur the stream bed varies from time to time through pure sand and for weeks at a time there will be no flow whatever.

I consider that the alignment of the stream shown on SO 5117 must have been guessed west of the rocky spur – the original field notes may throw some light on this point.

Please be good enough to let me know whether or not I may accept the present stream as the southern boundary of the Otito Block.

[48] On 9 July 1965, the District Land Registrar responded to Mr Hosking. Having considered the plans to which Mr Hosking had referred, he advised that there was “no other evidence available as to the position of this stream and it is the opinion of this office that your client's title boundary is to the position of the stream as shown on SO plan 5117”.<sup>25</sup>

[49] On 23 December 1965, solicitors instructed on behalf of Mr Morrison forwarded a plan of survey of Part Sections 1 and 2 Block X Opuawhanga Survey District, a declaration of value by a registered proprietor and surveyors' reports to the District Land Registrar. This plan is known as LT 56234. The solicitors sought

---

<sup>25</sup> As a result of discovery in this proceeding, the Trust has produced in evidence an internal memorandum (dated 25 June 1965) which preceded the District Land Registrar's letter, in which it was said: “It is most unlikely that any acceptable evidence would now be available to refute these early surveys”.

to re-open the effort made by Mr Hosking to have the southern boundary of the Otito Block redefined.

[50] By this time, another firm of registered surveyors, Williams and Partners, had been instructed by the Morrison interests to assist in this process. The solicitors attached to a letter to the surveyors a declaration made by a Mr Woolley, a resident of the Matapouri District, who had lived there for the whole of his life; some 78 years.

[51] In his statutory declaration, made on 15 December 1965, Mr Woolley said:

2. THAT I have always understood that the stream boundary of the Otito Block was the boundary of the Morrison's property. The first man to farm the Morrisons land was a Mr Galbraith who fenced the property along the southern boundary of the stream more or less on the line of the present fence.
3. THAT to my knowledge the stream has always run along the present course round the base of the rocky outcrop from the Otito Block. The stream has never changed its course except at the point where it enters the sea. After a flood the mouth would be shifted a few feet but with the action of tides etcetera it always returned to its present course. I have never known the stream to leave its bed in the close vicinity of the Morrisons house.
4. THAT to my knowledge the Morrisons and their predecessors in title have always farmed their land up to this stream although a fence was erected close along the southern boundary of the stream to prevent the stock straying into it.

[52] The District Land Registrar began to investigate these issues. In mid 1966 he issued a requisition, to which Williams and Partners responded, on 15 June 1966. The surveyors asked that Te Wahitapu Stream, as surveyed on LT 56234, be recognised as the boundary of Lot 1. Twelve points were advanced in support of that submission:

1. Although CT 1C/1356 does not describe the boundary in this vicinity as being the stream, the original grant does so describe it.
2. The boundary of the adjoining land, the Otito Block, is described on ML 3903 as the Wahitapu Stream.
3. We have already submitted a Statutory Declaration by Mr H W S Woolley that the stream has not changed its course and has been the recognised boundary for over sixty years.

4. We herewith submit a Statutory Declaration by Mr John Morrison to similar effect.
5. We have proved by our topographical survey and plan that it is impossible for the stream ever to have followed the course indicated by the dotted lines shown on SO 5117 because, by doing so, it would have to pass through a high rock knoll and outcrop.
6. We consider that the position of the stream has never before been surveyed for the reasons given in our original boundary report.
7. The Solicitor for the Trustees of the Otito Block advises that the Trustees are prepared to accept the official ruling as to the definition of the common boundary. There is no dispute.
8. In our view no firm survey of Title has ever been issued for the Otito Block and the boundaries of it have never been properly delineated.
9. Also we consider that the Survey illustrated by SO 5117 is incomplete.
10. In these circumstances we consider that the only recorded properly conducted survey setting out the position of the land as it has been farmed and occupied for at least sixty years should be accepted and approved.
11. We cannot agree with your statement on the requisition sheet that, by accepting the Te Wahitapu Stream as the boundary, we have included in our Lot 1 a portion of the Otito Block. How can this be so when the same stream is described as being the boundary?
12. Before the survey was completed, the matter of this stream boundary was discussed with Senior Professional Officials of the Lands and Survey Department and never was there any doubt expressed as to the acceptance of our definition.

[53] LT 56234, while departing from those aspects of SO 5117 based on the position of the waterway, did confirm the existence of the angled peg defining the western and southern boundaries of the Otito Block.<sup>26</sup> That meant that the angled peg was (in surveyors' terms) "renewed" in 1966.<sup>27</sup>

[54] The statutory declaration by Mr Morrison (of 19 May 1966) was generally confirmatory of evidence provided earlier by Mr Woolley. Mr Morrison said that the vendor (Mr Aspden), had assured him "that the creek where it is now situated and shown on the plan lodged for deposit was definitely the boundary between the Otito

---

<sup>26</sup> See also paras [31] and [47] above.

Block and his farm”. Mr Morrison averred there were no survey pegs or fences evident to suggest that the situation was anything other than what Mr Aspden had explained to him.

[55] Mr Morrison also explained why he considered that Te Wahitapu Stream could not have been in a different location at the time the 1877 plan was approved:

4. WHEN Otito was declared a reserve in 1957 the Lands and Survey Plan of 1877 was, I understand, used to indicate the boundary as being all the land north of the creek. At no stage was it ever considered by the Trustees in my discussions with them throughout the years that the position was otherwise. I have seen the 1877 plan and in my view it is nothing like a true representation of the Otito Block. However, it does clearly show the creek as the boundary.
5. IN my opinion the creek has always been where it is now because it is the natural drainage for all water from the hills to the sea. I have myself taken levels and found that the creek bed at present is seven feet or so lower than the lowest part of the flat land to the south of it. The land to the south is black soil which in my view indicates that the soil has been uncovered by drifting sand.
6. WHEN I built a house near the boundary of my land about 1945 I asked Mr Finch (a Whangarei Surveyor who is now deceased) where the boundary was. I was advised that I could safely consider the creek to be the boundary.
7. ABOUT twelve years ago I transferred my interest in the land to my wife Mollie Felton Morrison who is the present owner and at that stage it was never considered the position was other than as previously outlined.
8. IN my view the question which has risen here is not one of alteration of boundary but is the establishment of the correct boundary. In my view the correct boundary is as shown on the Lands and Survey Plan of 1877 and that the stream has been accepted at all times by all owners of the adjoining pieces of land as the correct boundary.

[56] The Land Transfer Surveyor responded to Williams and Partner’s letter of 16 June, on 24 August 1966. He was not satisfied that the contemporary location of Te Wahitapu Stream, did, in fact, represent the boundary between the Otito Block and the Morrison property. His reasoning was:

---

<sup>27</sup> The expression “renewed”, in this context, means the location of an old peg (from SO 5117) by the surveyor (Mr Williams) and its renewed use for the new plan: designated as OP(R) – old peg renewed.

- a) Title to the Morrison land had been derived from Warrant 2340 which, in turn, was based on SO 5117.
- b) The southern boundary of the Otito Block is Te Wahitapu Creek.
- c) The survey of Te Wahitapu Creek was made in 1877 and was recorded in ML 3903. The location of the creek was to be assessed as at 1877. A plot of Te Wahitapu Creek from ML 3093 placed the creek well to the east of the rock knoll on the topographical plan submitted by Williams and Partners.
- d) The evidence of approved survey plans was to be accepted until proved incorrect. The Land Transfer Surveyor emphasised this point by saying: “It appears that in the original state of the sand country, it is quite possible that the Creek at that time followed the course as shown on ML 3903”.

[57] The Land Transfer Surveyor, in his letter of 24 August 1966, indicated that proceedings should be initiated in the Maori Land Court to determine whether the boundary shown on ML 3903 was incorrect and, if so, to establish the correct boundary on the title. The District Land Registrar was not prepared to accept a plan that departed from those on which the Morrison title was based.

[58] Following discussions involving Mr Williams, the Morrises’ solicitor and the Chief Surveyor (Mr Reid) in September 1966, Mr Reid asked the District Surveyor in Whangarei to conduct an investigation into some questions:

- a) Was it reasonably possible for a stream to have flowed in the general position shown on the early plans? The District Surveyor was asked to provide information to the Chief Surveyor, irrespective of whether his answer was “yes” or “no” to that question.
- b) If the District Surveyor considered that ML 3093 and SO 5117 were accurate, as at the date of the respective surveys, was there any

evidence that could account for the change of the stream to its present position?

[59] Mr Cartwright, the District Surveyor, reported to Mr Reid on 17 January 1966:

Following my recent field inspection of the stream boundary between the above Blocks I have to report that in answer to your questions it is possible that the Wahitapu Stream did flow at some time along the reproduced plot from plan ML 3903 and ML 13317 but not by SO 5117. My reasons for this assumption are: that the semi consolidated foredune would have been liable to change.

At present the dune rises steeply from [mean high water mark] to an average height of some 20 feet. Present indications are that the dune is still building up, therefore it could be assumed that at some time before 1912 the bed of the Wahitapu Stream was closed by sand and generally over the years the sand has continued to build up to its present position today.

There is a distinct hollow immediately below and S.E. of the rock knob, which to me indicates the possibility of an early stream bed or at least that ground elevation was considerably lower than at present.

The flat area to the rear could well have been swampy prior to development although today with this area now in grass there is no evidence to support this contention. Similarly there is no evidence today of any depressions which might be taken as early stream beds.

If one assumes plan ML 13317 as preceding ML 3903, then from the approximate plots it would seem that the stream gradually changed course towards its present location. The rockknob would have formed a barrier to its outlet, with the result that a fairly sudden change of direction must have occurred, whereby the outlet changed to more or less its present position.

On the assumption that the OP SO 5117 found by LT 56234 is in fact the original position, then by reproduction, the stream as defined by SO 5117 must be taken as inaccurate, at least in the vicinity of the rock knob.

In my opinion the shift from the early definitions to the present location is too great to rule out the value of plans ML 3903 and ML 13317 both of which generally agree for shape of stream.

[60] Solicitors instructed for the trustees of the Otito Block became involved in discussions in 1968. In a letter to the District Land Registrar that they sent on 15 March 1968, those solicitors advised that one of the trustees had pointed out that the “rock knob” had “traditions attached to it and he is sure that it would never have left the ownership of” Maori. That correspondence evidences that a dispute was

inevitable if the Morrison interests succeeded in their attempts to obtain approval to their revised plan.

[61] On 5 September 1969, the Maori Land Court heard evidence from owners and then made orders vesting the land in trustees for the purpose of facilitating a sale of the Block to the Crown.<sup>28</sup> As one of the purposes of this hearing involved a grant of a life tenancy to Mrs Morrison, it is clear that the Morrison interests would have known that the hearing was taking place. No evidence appears to have been adduced to suggest that the southern boundary was located incorrectly on SO 5117.

[62] The recorded evidence from Mr Phillips, for the Commissioner of Crown Lands, confirmed that a price of \$13,000 could be paid and that the Crown would respect the wahi tapu on the land, requiring them to be pointed out. The Crown also agreed to grant a life tenancy for Mrs Morrison in respect of part of the land. Mr Phillips confirmed the Crown's intention to use the land as a scenic or recreation reserve, or for some other consistent purpose. Based on that evidence and evidence from owners emphasising the need to care for the two wahi tapu on the land, Judge Nicholson appointed five trustees<sup>29</sup> and ordered:

. . . that the following trusts and conditions be created in respect of the said Otito Block:

- (1) To sell to Her Majesty the Queen (The Crown)
- (2) Consideration for such sale to be not less than Thirteen Thousand Dollars (\$13,000).
- (3) The nett proceeds of such sale to be lodged with the Maori Trustee and to be held by him pending further order of this Court.
- (4) The two "Wahitapus" on the land to be pointed out to the purchaser and purchaser to respect such sacred grounds.
- (5) The trustees to arrange with the purchaser a life tenancy grant for Mrs Morrison as that part of Otito Block occupied by her dwelling house and outbuildings and gardens therearound in adverse possession.

---

<sup>28</sup> *Re Otito Block* (1969) 45 Whangarei MB 176-177.

<sup>29</sup> Under s 438 of the Maori Affairs Act 1953.

[63] Notwithstanding the Maori Land Court's order,<sup>30</sup> nothing has been found that documents the precise terms of the life tenancy. For present purposes, I assume that the life tenancy was intended to ensure that the dwelling, outbuildings and garden situated within the area of land containing 62 acres that was shown in ML 3903 could be used by Mrs Morrison, in adverse possession, for the remainder of her life.<sup>31</sup>

[64] The Crown purchase of the Otito Block was completed in January 1970. No document has been found that records the precise terms on which the Crown ultimately agreed to purchase the Otito Block.<sup>32</sup> The land was declared Crown land in May of that year. The proclamation issued by the Administrator of the Government vested land described in a schedule in the Crown. The Schedule recorded that the land was "situated in Block X Opuawhanga Survey District" and contained an area of 62 acres as shown, edged red, on ML 3903.<sup>33</sup> The area shown in the proclamation confirms that there was no issue about the correctness at the 1969 hearing of the area of land in issue.

[65] In May 1971, the Land Transfer Surveyor, while approving LT 56234, as to "survey data" decided not to approve it for "deposit". In this context, the term "approved as to survey data" means a decision to accept the measurements shown on the plan, but not the boundaries of the land in question. As the (present) Surveyor-General, Mr Grant, said in evidence before me, an approval of that type would put a District Land Registrar on notice that it might be "risky" to issue a guaranteed title, based on the plan.

[66] On 18 August 1972, the Otito Block was declared a scenic reserve under the Reserves and Domains Act 1953.<sup>34</sup> When this declaration was promulgated the

---

<sup>30</sup> See para [62] above.

<sup>31</sup> ML 3903 being the plan on which the Orders in Council of 1970 and 1972 were based.

<sup>32</sup> There is a letter from the Registrar of the Maori Land Court to the Chief Surveyor dated 12 December 1969 making it clear that "negotiations for the sale are between you and the trustees" and identifying the need to arrange a life tenancy grant in favour of Mrs Morrison in accordance with the Court order.

<sup>33</sup> "Declaring Land to be Crown Land" IA 5/5259 (25 May 1970) *New Zealand Gazette* 1970 at 919.

<sup>34</sup> "Definition of the Purpose of a Reserve" DO 13/127 (18 August 1972) *New Zealand Gazette* 1972 at 1820.

Otito Block was again described as containing an area of 62 acres, more or less, and being shown in ML 3903.

*(f) The 1996 application for subdivisional consent*

[67] The Land Transfer Surveyor's decision not to accept plan LT 56234 for survey purposes remained the subject of some debate between the Morrison interests and the Crown.

[68] On 11 November 1996, application was made on behalf of the Morrison interests to subdivide the land into four lots. As part of the application an "apparent anomaly" was raised in relation to the southern boundary of the Otito Block. This led to relitigation of issues involving LT 56234.

[69] On 11 September 1997, the Chief Surveyor wrote to the Conservation Officer in Whangarei suggesting that the boundary might have been intended to be the left bank of the stream. He acknowledged that there was no "field book" reference for ML 3903 and no reference to the physical nature of the boundary on the face of the plan. In those circumstances, the Chief Surveyor suggested that the points raised by the solicitors about the inaccuracy of ML 3903 "may have some validity however until a new survey defining Otito Block is undertaken the boundary is as defined by ML 3903". That view was restated on 16 September 1997, in a further letter to the Conservation Officer from the Chief Surveyor.

[70] On 19 October 1999, a survey report was prepared by Mr Henry, for whom field work was done by Mr Carr, designed to establish "a definitive fix of Sections 1 and 2 Block X Opuawhanga Survey District where these sections abut the Otito Reserve". This report was obtained in the context of the Morrison interests' application for subdivisional approval.

[71] On 8 July 1998, the Whangarei District Council granted the four lot subdivision application. In doing so, it left unresolved the location of the southern boundary of the Otito Block. Its decision required the boundary to be resolved by the Chief Surveyor, after final survey.

[72] Surveyors acting for the Morrison interests prepared a plan (which, after deposit was) known as DP 199214 to address the boundary issue.<sup>35</sup> In late 1999, that plan was lodged with Land Information New Zealand. DP 199214 represented a survey of Lot 1, being Part Sections 1 and 2 Block X Opuawhanga Survey District, with a total area of 25.9450 hectares, within Certificate of Title 127D/669. The plan indicated that the land was formerly comprised in Certificate of Title 85A/244, a certificate of title containing 24.8314 hectares. ML 3903 and the Orders in Council promulgated on the basis of it,<sup>36</sup> refer to an area of 62 acres within the Otito Block. That equates to an area of 25.0906126 hectares. That is how the discrepancy of about 1.1 hectares came to exist.<sup>37</sup>

[73] In his report, Mr Henry stated that the purpose of the survey was “to establish a definitive fix of Sections 1 and 2 Block X Opuawhanga Survey District where these sections abut the Otito Reserve”. The report touches on historical investigations of the land.

[74] Mr Henry concluded that the data and methods of research used initially to define the boundary adjoining Te Wahitapu Stream “were inconclusive and at times based on suspect assumptions and generalisations”. He considered that his own research had “conclusively [proved] the appropriateness of the definition of the boundaries as shown on” DP 199214. Mr Henry believed that four issues required resolution:

1. That the south eastern boundary of the Otito Reserve was intended to be the Te Wahitapu Stream to the extent shown on ML 3903.
2. That the contents of the warrant creating the land in Section 1 Blk X Opuawhanga SD are not in conflict with the definition on ML 3903.
3. Having established that part of the south eastern boundary of the Otito Reserve is the Te Wahitapu Stream prove that the streams position today has not changed significantly from that in 1877 (the survey date of ML 3903)
4. Establish that there has never been more than one Te Wahitapu Stream in the area.

---

<sup>35</sup> I use DP 199214 to refer to the plan, both before and after its deposit.

<sup>36</sup> See paras [64] and [66] above.

<sup>37</sup> See para [7] above.

[75] The evidence said to support the surveyor's thesis, in respect of each of the issues raised, was then summarised:

- a) ML 3903 "clearly shows . . . Te Wahitapu (Creek) Stream as the boundary. This was established from a coloured print of ML 3903 obtained from Land Information New Zealand. The juxtaposition of the words "Creek" and "Stream" in the report makes it clear that the authors considered only one waterway had existed at material times. Reliance was also placed on the statutory declaration of 19 May 1966 from Mr Morrison.
- b) While CT 346/217 had been created on 23 December 1921, by reference to Warrant 2340 and the plan to which it referred (DP 282), the plan reference was "incorrect and DP 282 [was] of no value in this assessment". The authors did draw on "a wavy line" showing a boundary adjoining the south-east boundary of the Otito Reserve on CT 346/217 and opined that was shown "in a similar manner to ML 3903" and could be "deduced to be . . . Te Wahitapu Stream".
- c) Having "conclusively established" that Te Wahitapu Stream was considered "part of the boundary between the Otito Reserve and CT 346/217", the evidence of Mr Woolley suggested that more than one stream had not existed in the location.

[76] Mr Henry did not accept that the differences could be explained by stream movement or by the existence of more than one waterway in the location at various times. Mr Henry stated that these suggestions "were not supported by any geological or other appropriate investigations". He referred to a report by Mr Brook, a geologist, who confirmed that Te Wahitapu Stream was the only stream that, in recent geological times, had existed in that area. He opined that the stream had been in its present position since ML 3903 was prepared, in 1877.

[77] To emphasise the stream's alignment remaining in the same place, the surveyors observed that an overlay of the plot of the stream in the vicinity of a

“significant bluff showed that the shape of the stream was almost identical with ML 3903 and LT 56234”.

[78] Reference was then made to the “old peg” to which LT 56234 had referred. This is the angle peg said to have marked the intersection of the western and southern boundaries of the Otito Reserve.<sup>38</sup> Mr Henry opined that “there [was] no proof of its reliability” and “with the absence of any other evidence and the lack of any dispute over this boundary we have accepted the alignment as shown on LT 56234 for the eastern boundary of Part Section 1 on CT 346/217”.<sup>39</sup>

[79] A memorandum written by the Chief Surveyor to the District Land Registrar on 23 November 1999, in respect of DP 199214, appears to be the last word on the survey. Notwithstanding some concerns expressed in his memorandum, the Chief Surveyor took the view that Mr Henry’s report, basing the position of the stream on the bearing of LT 56234 and the deduced angle from ML 3903, was an acceptable method by which to derive the boundary position. In his memorandum, the Chief Surveyor said:

...

I can accept [Mr Henry’s] argument, however the shift in the stream boundary is substantial, almost 40m.

This degree of shift may cause concern to the whanau with relationships with the Otito Reserve. In particular I draw your attention to the minutes of the Board of Maori Affairs meeting of 21 April 1970.<sup>40</sup>

This survey places the buildings ... outside the reserve if the position of the stream is accepted where it is today. It is not known why some of the whanau believe the boundary to be further south.

In terms of the Survey Regulations the plan has been approved.

My only concern in the determination of the boundary near the stream is that it could have come further south. The surveyor’s report [bearing?] the position on the bearing of LT 56234 and the deduced angle from ML 3903 is an acceptable method to derive the boundary position.

---

<sup>38</sup> See para [53] above.

<sup>39</sup> See para [52] above. Notwithstanding those observations the report also states that “OP REN from SO 5117 south of O15 IX LT 56234” was a mark “not looked for”.

<sup>40</sup> The Chief Surveyor referred to those parts of the Minutes requiring the trustees to arrange with the purchaser a life tenancy grant for Mrs Morrison over that part of the Otito Block occupied by her dwelling house and outbuildings and gardens.

While it appears that the Department of Conservation will accept, and maybe hide behind, a decision from this office, there are people with strong cultural beliefs that the boundary is in a different position.

[80] The Trust contends that the effect of DP 199214 was to relocate and change the shape of the southern boundary of the reserve as it had been defined since 1877 and confirmed in 1976. Mr Henderson submits that, as a result, the area of the land was reduced.<sup>41</sup> The buildings in respect of which the life tenancy was granted by the 1969 Maori Land Court order<sup>42</sup> fall outside of the boundaries established by DP 199214.

[81] To give effect to the Chief Surveyor's decision, the District Land Registrar cancelled CT 85A/244 and replaced it with CT 127D/669 which contained more land (1.1136 hectares) than the previous title.

(g) *The "correction" application to the Surveyor-General*

[82] Having attempted other means of resolving difficulties in relation to the boundary, application was made to the Surveyor-General, under s 52 of the Cadastral Survey Act 2002, to correct the boundary. Section 52 provides:

**52 Correction of errors in survey**

(1) If an error is found in a cadastral survey dataset affecting any title under the Land Transfer Act 1952 or any title or tenure under any other Act, the Surveyor-General may, in writing, require the cadastral surveyor responsible for the error to undertake, or arrange to be undertaken, the work necessary to correct the error within a time that the Surveyor-General considers reasonable.

(2) Subsection (1) does not limit—

- (a) the powers granted in sections 7 and 46 of the Crown Grants Act 1908:
- (b) the powers of the Registrar under sections 80 and 81 of the Land Transfer Act 1952, or the provisions of section 170 of that Act:
- (c) the powers of any court under any enactment.

---

<sup>41</sup> See paras [7] and [72] above.

<sup>42</sup> See para [62] above.

(3) In subsection (1), cadastral surveyor includes a former licensed cadastral surveyor and a person who was a registered surveyor under the Survey Act 1986.

[83] The threshold for exercise of the s 52 jurisdiction is the existence of “an error” in a cadastral survey.<sup>43</sup> In this case, the Surveyor-General declined to exercise his jurisdiction. Mr Grant, the Surveyor-General, deposed that to exercise the s 52 power he had to be satisfied that:

- a) The effect of the error was sufficiently serious to warrant correction; and
- b) A correcting survey was the best mechanism of correcting the cadastral record, having regard to any impact on the tenure systems that depended on the cadastre.

## **Analysis**

### *(a) The claims based on breach of contract and breach of trust*

[84] The Trust alleges that the Crown (through its agent the Department of Conservation) had contractual obligations evidenced by the Maori Land Court order of 5 September 1969 which were breached. Breach of contract is alleged on the basis that the Crown failed:

- a) To confirm the correct southern boundary of the Otito Block by survey, in order to secure ownership of and to hold in perpetuity as a reserve.
- b) To formalise a grant of a life tenancy to Mrs Morrison, in a manner that would have dealt with the encroachment of her buildings and gardens on to the Otito Block.

---

<sup>43</sup> Cadastral Survey Act 2002, s 52(1).

- c) To take occupation of the Otito Block and to hold and preserve it in perpetuity as a reserve, after Mrs Morrison's death.
- d) To identify the two wahi tapu, in order to protect them and any other part of the Reserve of special cultural significance from desecration.

[85] As a result of the alleged breaches the Trust, on behalf of those who previously had interests in the Otito Block, seeks declarations that DP 199214 is not an accurate representation of the southern boundary of the Reserve and the adjoining land and that the southern boundary of the Reserve is correctly defined by reference to OP(R)SO 5117, as shown on LT 56234, and Tewahitapu Creek, as shown on ML 3903. Special and general damages are also sought.

[86] A similar claim is issued on the basis of breach of trust. It is alleged the Crown, after the order of 5 September 1969, had a duty to hold the Reserve, including the disputed land with its two identified wahi tapu, in a manner that protected the wahi tapu and preserved the land for public enjoyment in perpetuity as a reserve. The same particulars are used to identify the alleged breach of trust as are pleaded in respect of the breach of contract.

[87] These two causes of action are fraught with legal difficulties and, on any view of the facts, cannot succeed.

[88] First, the allegations of breach of contract and trust proceed on the basis that the Crown, in purchasing the land, assumed some contractual, fiduciary or trust obligation in favour of the beneficial owners of the land along the lines pleaded. In fact, the trustees appointed by the Maori Land Court, under s 438 of the Maori Affairs Act 1953, were expressly authorised to sell the land to the Crown on the terms set out in the Court order, to give effect to the desire to make the land a reserve. The Court order is the best evidence of the terms of an arm's-length transaction.

[89] Second, the land was transferred absolutely to the Crown, once the trustees of the s 438 Trust executed a Memorandum of Transfer to give effect to the order of the

Maori Land Court of 5 September 1969. That memorandum was signed and lodged for registration on or about 22 January 1970. At the time the transfer was effected, no decision had been made by a Chief Surveyor to change the boundaries of the land from those recorded in ML 3903 and SO 5117. The area of the land, as published in the relevant Order in Council, remained as 62 acres.

[90] Third, even assuming (without deciding the point) that the Trust could bring a claim for breach of contract or breach of trust on behalf of those owners previously represented by the trustees appointed by the Maori Land Court under s 438 of the 1953 Act, there is nothing to suggest that the Crown did anything other than to carry into execution the intentions of the 1969 order authorising sale.

[91] Fourth, the time that has passed since the land was transferred to the Crown in 1970 means that the claim in contract is statute barred<sup>44</sup> and any claim for breach of trust, by analogy, cannot succeed, on the application of the doctrine of laches.

*(b) The claim based on breach of principles of the Treaty of Waitangi*

[92] The Trust alleges that the Crown has breached the principles of the Treaty of Waitangi and should therefore be liable for losses suffered by those whom the Trust represents. Reliance is placed on the “partnership” nature of the Treaty, between Maori and the Crown, and the “fiduciary” obligations that arise from it.<sup>45</sup> Specific emphasis is placed on s 4 of the Conservation Act 1987:

**4. Act to give effect to Treaty of Waitangi**

This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

[93] The Crown retort that the Treaty does not create directly enforceable private law rights.<sup>46</sup> Mr Ward, who argued this part of the case for the Crown interests, submitted that while compliance or otherwise with the Treaty principles were issues

---

<sup>44</sup> Limitation Act 1950, s 4(1).

<sup>45</sup> Generally, see *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

<sup>46</sup> *Hoani Te Heuheu Tukino v Aotea District Land Board* [1941] NZLR 590 (PC).

for the Waitangi Tribunal to consider and to make recommendations on, they were not justiciable in the Courts.

[94] On the current state of the law, Mr Ward's submissions are plainly right. While the Department of Conservation has authority to administer the Reserve<sup>47</sup> that *administration* cannot be called into question by reference to the principles of the Treaty.<sup>48</sup>

[95] Further, there is binding authority to the effect that fiduciary obligations created by the Treaty are not enforceable as a matter of private law. In *New Zealand Maori Council v Attorney-General*,<sup>49</sup> the Court of Appeal said:

[81] We do not intend to traverse the arguments made to us on the basis of the recent Canadian authorities as to the nature of the duty owed by the Crown to aboriginal peoples in that country. Those decisions reflect the different statutory and constitutional context in Canada. The decisions of this Court contain clear statements to the effect that the Crown's duty to Maori is analogous with a fiduciary duty and we see no proper basis for us to revisit them. The law of fiduciaries informs the analysis of the key characteristics of the duty arising from the relationship between Maori and the Crown under the Treaty: good faith, reasonableness, trust, openness and consultation. But it does so by analogy, not by direct application. In particular, we see difficulties in applying the duty of a fiduciary not to place itself in a position of conflict of interest to the Crown, which, in addition to its duty to Maori under the Treaty, has a duty to the population as a whole. The present case illustrates another aspect of this problem: the Crown may find itself in a position where its duty to one Maori claimant group conflicts with its duty to another. *If Gendall J was saying that the Crown has a fiduciary duty in a private law sense that is enforceable against the Crown in equity, we respectfully disagree.* (my emphasis)

[96] For those reasons, there is no basis on which a private law action could be brought against Crown interests for breach of Treaty principles, even in a case where the underlying facts on which breach was alleged could be proved. Without embarking on any consideration of that factual issue, I conclude that the claim for breach of Treaty principles is not sustainable and must be dismissed.

---

<sup>47</sup> Conservation Act 1987, s 6 and Schedule 1.

<sup>48</sup> Generally, see *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553 (CA).

<sup>49</sup> *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA).

(c) *The judicial review application*

(i) *The nature of the claims*

[97] The more difficult questions arise in relation to the three decisions under challenge on the judicial review cause of action. While different decision-makers are involved, none of whom have been joined specifically as parties, the Crown interests take no pleading point. Nevertheless, it is important to separate out the decisions in issue so that the statutory obligations of the particular decision-maker can be properly analysed.

[98] The three decisions which the Trust seeks to impugn are:

- a) The decision of the Chief Surveyor to approve DP 199214.<sup>50</sup>
- b) The decision of the District Land Registrar to issue a new Certificate of Title based on the survey contained in DP 199214,<sup>51</sup> in substitution for an earlier Title that he cancelled at the same time.
- c) The Surveyor-General's decision not to "correct" DP 199214.<sup>52</sup>

While I have summarised the nature of the decisions in issue, the submissions made in support of the respective challenges were more nuanced.

(ii) *The decision to approve DP 199214 and to issue new titles*

[99] In 1971, the Land Transfer Surveyor had declined to approve plan LT 56234 for deposit. Instead, it was approved as to "survey data only".<sup>53</sup> The Trust complains that the attempt to have DP 199214 approved for deposit was not dealt with by the Chief Surveyor in the same manner as it had been in 1971. Mr

---

<sup>50</sup> Survey Regulations 1998, reg 42.

<sup>51</sup> Land Transfer Act 1952, s 81.

<sup>52</sup> Cadastral Survey Act 2002, s 52.

<sup>53</sup> See para [65] above.

Henderson submitted that on the information available to the Chief Surveyor the new plan ought not to have been approved for deposit.

[100] In my view, whatever approach was taken, the Trust was entitled to consistency of treatment. For example, the same standard ought to have been applied in determining whether or not to approve a new plan.

[101] In 1971, the Land Transfer Surveyor was not satisfied that the then location of Te Wahitapu Stream, at that time, represented the southern boundary of the Otito Block, as surveyed in 1877. That conclusion was reached on the basis of the land being derived from the plan known as SO 5117, for which the old boundary peg had been renewed following Mr Williams' survey in 1966.<sup>54</sup>

[102] The Land Transfer Surveyor took the view that it was possible the creek shown in ML 3903 could have been in a different location in 1877. Therefore, evidence contained in the previously approved plan (SO 5117) that had been used for the purpose of obtaining a Land Transfer Act title should be afforded primacy until such time as it had been proved to be incorrect.

[103] The evidence gathered by the Morrison interests to support the 1996 subdivision application attempted to meet the concerns expressed by the Land Transfer Surveyor in 1971. Mr Henry's report was put forward to support the proposition that Te Wahitapu Stream could have been the only waterway across the property in 1877 and that the renewed angled peg confirmed in 1966 by Mr Williams was unreliable. Mr Henry's report was reinforced by Mr Brook's geological opinion that the only stream in the area of the Otito Block "in recent geological times" was Te Wahitapu Stream.<sup>55</sup>

[104] The decision to accept DP 199241 for deposit appears to have been reached with some reservations. When the Chief Surveyor wrote to the Registrar-General of Land on 23 November 1999, he acknowledged that the boundary was likely to be contestable by those "with strong cultural beliefs that the boundary is in a different

---

<sup>54</sup> See para [53] and 31 above.

<sup>55</sup> See para [76] above.

position”.<sup>56</sup> Further, he indicated expressly that he did not know “why some of the Whanau believe the boundary to be further south”; an implicit acceptance of lack of inquiry on that important topic.<sup>57</sup> Notwithstanding his reservations, the Chief Surveyor was prepared to revisit the pre-existing plans, even though they had been used to establish title to the relevant land.

[105] This raises a question of standard of proof. On the basis of what evidence should the Chief Surveyor have been prepared to approve a plan that differed from that used to obtain title? This is an issue which has been expressed in various ways in the evidence; not at all times in a consistent manner.

[106] The Land Transfer Surveyor, in 1971, appears to have taken a view that he needed to be satisfied that the earlier plan was incorrect. The available evidence at that time did not convince him.<sup>58</sup> The Chief Surveyor in November 1999, in his memorandum to the District Land Registrar that appears to have followed his formal decision to approve DP 199214, was well aware of competing views about the location of the stream in 1877 and the fact that some of the buildings previously occupied by the Morrisons would lie outside the Reserve in the event that title was changed.<sup>59</sup> Nevertheless, on what seems to have been a lesser standard, (the survey methodology and evidence was “acceptable”), the new plan was approved.

[107] The Surveyor-General, Mr Grant, expressed the view that a very high standard of proof was required to move away from an accepted plan.<sup>60</sup> Examples of the way in which Mr Grant expressed himself in cross-examination (albeit on the linked question of standard of proof on a s 52 application to correct the cadastral record) were: “The question I was essentially being asked is, am I in a position to say that the Surveyor’s definition of that boundary is in error”; “Am I sufficiently convinced that this survey is in error in order to exercise my statutory power”; “My decision was a question of whether I was sufficiently convinced that there is an error”; “the question that I was faced with was whether or not the – one of those sets

---

<sup>56</sup> See para [79] above.

<sup>57</sup> Ibid.

<sup>58</sup> See paras [56] and [56]d) above.

<sup>59</sup> See para [79] above.

<sup>60</sup> This view is consistent with that expressed by the Land Transfer Surveyor in August 1966: see para [56] above, point (d).

of arguments was clearly superior to the others to the extent to say that the peg needed to be relied on”; “I need to be satisfied that there is little doubt that there is an error”. After that evidence had been given, I asked Mr Grant a direct question:

Q: In other words, is it fair to say that the standard you applied on the application to correct the plan was a very high standard, requiring you to be convinced it was appropriate for you to interfere with the approved plan?

A. Yes, that’s correct, yes.

[108] The way in which Mr Grant expressed himself in cross-examination is consistent with the way in which his decision letter was framed. In his letter to the solicitors for the Trust, the Surveyor-General said:

... I have completed an investigation into the surveys [sic] issues concerning the boundary of Otito Scenic Reserve.

The consequence of applying s 52 Cadastral Survey Act 2002 to DP 199214 is significant as it would have an impact on the rights of a number of individuals. Before exercising this discretion, *I need to be convinced beyond reasonable doubt that the survey actually was in error – ie that a challenge to my direction by the surveyor or those other affected parties would be unlikely to be upheld by the Courts.*

... In the case of DP 199214, the survey report and other supporting information indicates that the surveyor was aware of the conflicting evidence [about the location of Te Wahitapu Stream in 1877] and sought expert advice from a geologist to help resolve this conflict. Using this expert advice ..., *the surveyor has made a determination of where the boundary is located. It is not my role to challenge this unless it is clearly in error.*

*I am not able to say with confidence that the surveyor was not entitled to rely on this evidence and consequently I cannot determine the survey is in error.* It follows that I am unable to exercise my discretion to require the survey to be corrected.

.... (my emphasis)

[109] Mr Grant’s letter makes it clear that he regarded DP 199214 as the *status quo* to which he was directing his inquiry. Plainly, that was right. The question for Mr Grant was whether the Trust had demonstrated to the appropriate standard that DP 199214 was in “error”, for the purposes of s 52(1) of the Cadastral Survey Act.

[110] In cross-examination of Mr Grant, it emerged that Mr Henderson’s questions were based on a different premise. Mr Henderson was endeavouring to have Mr

Grant confirm that DP 199214 was incorrect because it ought not to have been approved in favour of the existing SO 5117. That latter question is relevant only to the 1999 decision of the Chief Surveyor to approve DP 199214 and the consequential decision of the District Land Registrar to act on that plan in cancelling and issuing titles.

[111] The point becomes clear when the issue is analysed in respect of standard of proof. Depending upon the state of the evidence and the appropriate test to be applied, the question posed to the Chief Surveyor in 1999 (has SO 5117 been shown to be wrong?) could have been answered “no”. But, the question posed of the Surveyor-General in 2008 (has DP 199214 been shown to be wrong?) could equally have been answered “no”.

*(iii) The standard of proof*

[112] The Land Transfer Act 1952 is the latest of a series of statutes designed to implement the Torrens system of land registration in preference to the deeds system inherited from British law after 1840. The Torrens system is designed to provide a guarantee from the State as to the accuracy of the register and the boundaries of land, with provision being made for compensation to be paid to persons who are precluded from asserting an adverse claim due to the way in which the title registration system operates.<sup>61</sup>

[113] Those objectives are given life through what is known as the principle of indefeasibility, a concept discussed fully by the Privy Council in *Frazer v Walker*.<sup>62</sup> In advice delivered by Lord Wilberforce, their Lordships held that a registered proprietor who, under ss 62 and 63 of the Land Transfer Act, was immune from adverse claims (other than those specifically excepted) because the concept of indefeasibility was central to the land registration system.<sup>63</sup> None of the relevant exceptions apply in this case.

---

<sup>61</sup> Hinde McMorland and Sim *Land Law in New Zealand* (online ed) at para [8.005].

<sup>62</sup> *Frazer v Walker* [1967] 1 AC 569 (PC).

<sup>63</sup> *Ibid*, at 580 and 585, applying *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC) and *Boyd v Mayor, etc of Wellington* [1924] NZLR 1174 (CA).

[114] A cornerstone of the Torrens system is the registration of title based on accurate and robust surveys of land. If boundaries were unclear, the guarantee system could be put in jeopardy. Therefore, it is particularly important that boundaries, when relied upon to issue titles, should not be the subject of alteration without a compelling reason. Importantly, every instrument in which land is described by reference to a deposited plan takes effect “according to the intent and meaning thereof, as if the plan was fully set out” in the instrument.<sup>64</sup>

[115] Those considerations point to the need for the type of high standard, identified by Mr Grant, to be applied whenever an attempt is made to “correct” an existing deposited plan, on the basis that a plan on which title has been issued was in error. Otherwise, the interests of registered proprietors who had acquired title on the basis of such a plan could be compromised too readily.

[116] There is no reason in principle why the high standard required should not apply equally when a surveyor seeks to deposit a plan that is inconsistent with one on which title has already been issued. The effect of such a decision (exemplified by the Chief Surveyor’s approval of DP 199214 in 1999) is to alter the basis on which title had previously issued. Similarly, when the Surveyor-General is asked to exercise powers under s 52 of the Cadastral Survey Act, he or she must be satisfied an error exists to avoid the type of prejudice to existing registered proprietors, to which I have already referred.

[117] In this case, there were no private interests that might have been affected by the 1999 decision to approve DP 199214, in preference to the existing SO 5117. It is difficult to resist an inference that a decision to that effect might not have been so readily made had the affected land been in private ownership, as opposed to a scenic reserve administered by a statutory officer on behalf of the Crown.

[118] So far, I too have been guilty of using loose language in determining the appropriate test. I have done so deliberately, in an endeavour to identify those concerns of relevance to the decision-maker. Only by determining likely effects can an appropriate decision be made as to the test to be applied.

---

<sup>64</sup> Land Transfer Act 1952, s 168(2).

[119] I agree with Mr Grant that a very high standard of proof is required. A decision-maker in the position either of the Chief Surveyor (in 1999) or the Surveyor-General (in 2008) ought to have asked himself whether the evidence presented was so compelling that he had to conclude that the earlier plan was in error and that it should be replaced, notwithstanding the consequential prejudice that might otherwise be caused to those with interests in the land. I am satisfied that standard was applied by Mr Grant; it also appears to have been used by the Land Transfer Surveyor when rejecting, for survey purposes, the 1965 survey.

[120] I hold that Mr Grant did not err in the approach he took to the s 52 application. Nor did he err in the conclusion he reached. The remaining questions, are whether the Chief Surveyor erred in 1999 in approving DP 199214 and whether the District Land Registrar erred by issuing titles in reliance on that approved plan.

*(iv) Did the Chief Surveyor err, in a judicial review sense?*

[121] I start by considering the competing evidence available to me, following more detailed reports than those which were made available to the Chief Surveyor in 1999. It is appropriate to take account of those additional reports because they critique the survey report provided by Mr Henry on the basis of which the Chief Surveyor made his 1999 decision. It is fair for the parties to have expected the type of robust analysis by the Chief Surveyor that is contained in the various reports I have had the benefit of considering.

[122] There are two issues of significance:

- a) Was the peg located by Mr Williams in 1966 reliable?<sup>65</sup>
- b) Was the 1999 location of Te Wahitapu Stream the boundary shown on ML 3903 and SO 5117?

---

<sup>65</sup> This is the peg that provided evidence of the angled line to which SO 5117 referred in its depiction of the relevant land. See para [53] above.

[123] The competing arguments advanced out of the 1965 survey have already been recounted fully.<sup>66</sup> I now consider the additional evidence in relation to each of those main points.

[124] Mr Goodwin is a surveyor, property developer and property investor who became interested in the Matapouri Bay survey issues following an article published in the *New Zealand Herald* on 25 October 2008. Of his own volition, he began to make inquiries. Mr Goodwin is the co-author of a draft chapter for a surveying text which deals specifically with survey methodology and the principles to be applied in determining whether surveys have been conducted in a sufficiently robust manner.

[125] Mr Goodwin gave evidence before me. For someone called as an expert witness, I found him rather dogmatic in his opinions and disinclined to consider alternative viewpoints during cross-examination by counsel. Nevertheless, his reports provide useful information on the issues I need to consider.

[126] Mr Goodwin, after carrying out mathematical calculations from the undisputed position of Trig 32C, concluded that the old peg from SO 5117, as renewed by Mr Williams in 1966, was reliable. Relying on calculations made by another surveyor, Mr Shaw, Mr Goodwin also considered that, had the angle peg not been located during the Williams survey, its position could still have been ascertained today, within one or two metres, by minor triangulation; something that Mr Goodwin considers is “vastly more accurate than the discrepancies of 60 to 70 metres with the 1999 survey definition”.

[127] As part of the s 52 inquiry, Mr Newland, Senior Advisor to the Surveyor-General, completed a report dated 8 February 2008. That report reviewed information provided by the solicitors for the Trust to the Surveyor-General in support of the s 52 application. Taking account of the age of the earlier surveys, the survey methods, accuracies and conventions of the time, Mr Newland concluded that there was “little reason to doubt the integrity of each of [the] earlier surveys”. He considered that they were in reasonable agreement. That conclusion suggests that a

---

<sup>66</sup> See paras [52] and [56] above.

robust analysis of the plan approved by the Chief Surveyor in 1999 ought not to have concluded that the renewed peg located by Mr Williams was unreliable.

[128] Mr Shaw, a surveyor from Whangarei, completed a further report in 2009. He made reference to a number of names used in the early plans and put forward explanations for their subsequent disappearance. For example, in SO 718 in 1867, the term Te Karo was used to define a position. He said that the word “Karo” means a coastal shrub which grows to 10 metres and which may not have been present when later plans were drawn, primarily due to the possibility of severe weather in the region between 1867 and 1877.<sup>67</sup>

[129] Mr Shaw opined the position given to the angle peg on SO 718 uses an (assumed) “Otito” and other measured topographical features and was plotted near the confluence of two drains which combined to form Te Wahitapu Stream, in its lower reaches.

[130] Mr Bevin, Mr Grant’s immediate predecessor as Surveyor-General, also reviewed the survey evidence, in a report dated August 2008. He concluded that the “relevance and reliability of OP SO 5117 and SO 5117 cannot be dismissed without specific evidence, which” was not provided in other reports. At the hearing, Mr Bevin changed his stance in saying that there was “strong evidence” that the old peg from SO 5117 was not “in the original position as shown on SO 718”. That change in view appeared to have occurred as a result of further inspection of original plans in the week preceding the hearing. Somewhat concerningly, that does not appear to have been relayed to the solicitors for the Trust prior to the time at which this evidence was given. Certainly, no amended brief was provided before the hearing commenced.

[131] The sum of that evidence suggests to me that there are reasonable differences of opinion among distinguished surveyors as to whether the peg on SO 5117 was identified correctly by Mr Williams in 1966. On that issue it would be difficult to see that the Chief Surveyor could have reached a conclusion, based on Mr Henry’s

---

<sup>67</sup> See para [134] below.

report, that the peg was unreliable if he had applied the correct test.<sup>68</sup> The tenor of his report to the District Land Registrar<sup>69</sup> suggests that the Chief Surveyor knew there were *bona fide* disputes about this issue; indeed, Mr Grant hinted, in evidence that the Chief Surveyor's view may well have been reached on a balance of probabilities.

[132] The situation with regard to Te Wahitapu Stream is not so straight forward. The reliability of the "creek" shown in ML 9303 seems to be dependent on whether there were two water courses running over the land at the relevant time. The surveyors appear to agree (and what geological evidence that exists seems to confirm) that the present Te Wahitapu Stream has remained largely in its present location since 1877.

[133] Mr Goodwin has suggested an explanation for the existence of a second waterway and a reason to explain why it subsequently disappeared.

[134] Mr Goodwin's researches indicate that three large tsunami reached the eastern coastline of New Zealand in that period. His evidence (based on perusal of contemporary newspapers) is that tsunami resulted from earthquakes in Chile in August 1868 and May 1877 and another in August 1883, following the Krakatoa Volcano eruption in that year. A summary of articles from May 1887 were produced demonstrating high tidal waves between the Bay of Islands, in the north, and Bluff, in the south. The May 1877 tsunami reached New Zealand after SO 718 had been prepared and before the Native Land Court's investigation into title of the Otito Block in September 1877. It is not inconceivable that ML 3903 (considered at the 1877 hearing) was prepared before the tsunami struck. The 1883 tsunami pre-dated Mr Haszard's survey of 1893 which became SO 5117.

[135] Mr Newland comments, in his report to the Surveyor-General, while all the old surveys were consistent in their depiction of Te Wahitapu Stream's position, ML 3903 showed the sea boundary diagrammatically and in the wrong shape. Despite those misgivings Mr Newland concluded that in the absence of conflicting

---

<sup>68</sup> See para [119] above.

<sup>69</sup> See para [79] above.

evidence to the contrary, the stream position shown on ML 3903 could have been considered as “acceptable”, given the absence of reason to doubt the integrity of the early surveys.

[136] Mr Newland puts forward the possibility of the stream moving northwards over a period of 120 years due to something in the nature of erosion or avulsion or the existence of two contributories at the relevant time. Accepting that those possibilities appear to have been negated by the geologist’s report, Mr Newland found himself in a position where he could not determine which, if any, of the surveyors had made an error. For that reason he was not convinced that DP 199214 was in error. It can readily be inferred that, for the same reason, he would not have been convinced that ML 3903 and SO 5117 were wrong, if they had been his *status quo*.

[137] Mr Shaw’s report also acknowledged that Te Wahitapu Stream did not appear to have substantially moved from the position shown on SO 718. However, he took the view that placing the stream to the northwest of the rocky outcrop that forms a wahi tapu, did not preclude the possibility of a stream to the southwest of that object at the time SO 5117 was prepared.

[138] Mr Bevin’s view was that it was quite possible that the definition of the boundary shown on the early survey plans related to a more southern tributary that has since disappeared, possibly “because of agricultural development of this area”. Those observations were made notwithstanding the content of the geologist’s report.

[139] Given the geologist’s report, the question of location of Te Wahitapu Stream is more problematic than the old peg renewed. Nevertheless, it is clear that, in accordance with appropriate surveying practice, those reviewing the conduct of their predecessors were not prepared to assume incompetence or some other irregularity in the preparation of the early plans that necessarily required alteration of the southern boundary of the Otito Block. The fact that, in 1972, a conclusion to similar effect was reached by the Land Transfer Surveyor (“it is quite possible that the Creek at that time followed the course as shown on ML 3903”<sup>70</sup>) tends to suggest that the

---

<sup>70</sup> See para [56](d) above.

high standard of proof to justify deposit of DP 199214 was not, in 1999, met. That is the conclusion which I draw also from the information.

[140] In my view, the Chief Surveyor made a reviewable error in 1999, by failing to apply the proper standard of proof. By applying too low a standard, he approved a plan which was inconsistent with one on which title had previously issued. The decision of the District Land Registrar to cancel an existing title and to issue one based on the new plan was understandable, given the view of the Chief Surveyor. It cannot be said that he acted unlawfully or irrationally in those circumstances.

(v) *Relief*

[141] What relief, if any, can be granted after this period of time? Mr Hancock has submitted that no relief should be granted because of the delay in seeking judicial review. I do not, with respect, accept that submission. The primary rule is that relief ought rarely to be refused where an error of law has been established.<sup>71</sup>

[142] The legal difficulties that have arisen have come to light primarily as a result of analysing both the Chief Surveyor's and Surveyor-General's decisions in tandem. The Trust ought not to be precluded from receiving relief in those circumstances. There has been no disentitling conduct on its behalf justifying that approach.

[143] Having said that, it is not possible, as sought, to provide relief in the form of rectification of the Register. Those who have acquired title have done so in good faith based upon the plan approved by the Chief Surveyor in 1999 and implemented by the District Land Registrar's decision to issue title. To provide relief in the form of rectification of the Register would undermine the principle of indefeasibility on which the Land Transfer Act is based.

[144] It is clear, that at all times, the Reserve was intended to contain 62 acres. That area was consistently shown in all of the plans from SO 718 through to SO 5117 and confirmed by Orders in Council issued in 1957, 1970 and 1972.<sup>72</sup> The

---

<sup>71</sup> *GXL Royalties Ltd v Minister of Energy* [2010] NZCA 185 at para [67].

<sup>72</sup> See paras [31], [45], [64] and [66] above.

area of 62 acres equates to 25.0906126 hectares. By the issue of a new Certificate of Title, approximately 1.1 hectares was lost from the Reserve.

[145] A declaration will provide a basis on which the Trust can, in extant Waitangi Tribunal proceedings, seek redress for what has gone before.

## **Result**

[146] For the reasons given:

- a) The claims based on breach of contract and breach of trust are dismissed.
- b) The claim based on breach of the principles of the Treaty of Waitangi is dismissed.
- c) The Trust's application to review the 1999 decision of the Chief Surveyor (to approve DP 199214) is granted. A declaration is made that the Chief Surveyor erred in law in applying the wrong test in making those decisions and that DP 199214 ought not to have been approved for survey purposes.
- d) The Trust's application to review the 1999 decision of the District Land Registrar to cancel the existing title and to issue a new one based on DP 199214 is dismissed.
- e) The application to review the decision of the Surveyor-General not to correct DP 199214 is dismissed.

[147] All questions of costs are reserved. They include costs as between the Trust and the Morrison interests<sup>73</sup> and those incurred in the Maori Land Court proceeding, in which a representation order was made in favour of the Trust.<sup>74</sup>

---

<sup>73</sup> See para [18] above.

<sup>74</sup> See para [12] above.

[148] The Registrar is directed to forward a copy of this judgment to the solicitors for the former fourth defendants, the Morrison interests.

[149] The Registrar is directed to allocate a telephone conference before me on the first available date after 21 February 2011, for the purpose of making such timetabling directions as may be required to resolve all questions of costs.

[150] Counsel should also be in a position to advise me, at that time, whether issues of costs can be resolved on the papers or need a further oral hearing.

[151] I thank all counsel for their assistance.

---

P R Heath J

Delivered at 3.00pm on 22 December 2010.