UTILISATION OF MAORI LAND

AN EXAMINATION OF INCORPORATIONS

AND SECTION 438 TRUSTS

Anne Phillips

Bodies Corporate and Unincorporate
Laws 523

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Ma te wahine ka tupu ai te hanga nei, te tangata
Ma te whenua ka whai oranga ai
Whai hoki, ki te tangohia to wahine e te tangata ke
Ka ngau te pouri ki roto i a koe
Nau, ki te tangaohia te whenua e te tangata ke
Ka tapu to pouri ano
Ko nga putake enei o te whawhai
Koia i kiia ai
He wahine, he oneone, i ngaro ai te tangata

Woman alone gives birth to mankind
Land alone gives man his sustenance
No man will lightly accept the loss of
His beloved wife, nor that of his sacred land
It is said truly that man's destroying passions
Are the love of his wife and love of his land

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CHAPTER 1

INTRODUCTION

Maori land issues can arouse attitudes of impatience and frustration by those who confront a system which is so totally different to the Torren's Land Transfer System. On top of the general inability to comprehend a new way of dealing with land there is transposed a curious blend of Maori spiritual values and attitudes to land and the more Western response aimed at maximising economic return from land assets.

The majority of legal practitioners have limited knowledge of the Maori Affairs Act 1953 and an even more limited understanding of the role of the Maori Land Court. This paper attempts to cure these defects by providing a closer examination of the two major legal forms of corporate ownership of Maori land, incorporations and trusts as established by the Maori Affairs Act 1953 and the Maori Affairs Amendment Act 1967.

Section 25 of the Maori Affairs Amendment Act 1967 defines incorporations as follows:

> Maori incorporation" and "unincorporation" means a body corporate which is established under this Part, or which is continued in existence and made subject to the provisions of his Part by Section 68 of this Act.

The 1967 Amendment then goes on to provide, in Section 26, that:

> An order may be made, in accordance with the provisions of this part of this Act, constituting as a Maori incorporation the owners of any one part or more areas of Maori freehold land, of which at least one area is owned for a legal estate in fee simple by more than 4 owners (whenever any such owner is entitled beneficially or as a Trustee)

Section 438 Trusts are known by the Section in the Maori Affairs Act 1953, which created them. Section 438(1) reads:

> For the purpose of facilitating the use, management or alienation of any Maori freehold land, or any customary land, or any general land owned by Maoris, the court upon being satisfied that owners of the land, have as far as practicable been given reasonable opportunity to express their opinion as to the person or persons to be appointed a trustees or trustees, may in respect of that land, constitute a trust in accordance with the provisions of this section.

Careful reading of the statutory definitions can clarify some problems, but also create further questions.

Maori incorporation and trusts are Maori land based. The absence of Maori land means that no trust or incorporation can exist, it would be ultra vires the empowering legislation.[1]

The nature of the Maori land interest required to establish an incorporation or trust can vary. In the case of and incorporation, multiple-owned Maori freehold land is required before the incorporation can be established. Section 438 Trusts require either Maori freehold land, or customary or general land owned by Maoris.

Determining whether or not land is Maori land is not the simple exercise one might assume it to be. The Maori Land Court has jurisdiction to determine whether any specified land is Maori freehold land or general land,[2] but there are limitations on the Maori Land Courts jurisdiction to determine status particularly if there is a conflicting Land Transfer Office title.[3] The majority of Maori land would be customary land or Maori freehold land, which has never been alienated from Maori ownership, since pre-European times.

The Maori Land Court is "the Court" referred to in both the Maori Affairs Act 1953 and the 1967 Amendment.[4] The Maori Land Court is largely autonomous from the main judicial systems. It has jurisdiction over most matters concerning Maori land but not exclusive jurisdiction. It has been successfully argued that the High Court exercises a supervisory role under the power of judicial review contained in the Judicature Amendment Act 1972.[5]

The Maori Land Court has jurisdiction to make an order constituting an incorporation or a trust, notwithstanding objections from owners in the case of Section 438 Trusts.[4] This jurisdiction has profound implications for the utilisation of Maori land and it can be argued that the paternalistic and benevolent approach of the Maori Land Court together with restrictive legislation encourages conservative attitudes to land management.

Maori land is multiple owned land. Individual title to Maori freehold land does exist but it is unusual. Fragmentation or the division of land into progressively smaller parcels with each generation is the inevitable outcome of multiple ownership. Multiple

ownership of Maori land arose from the customary system of land tenure which meant that Maori title was communal and traditional ownership of land was kept alive by the fires of occupation.

The imposition of a different approach to land ownership and the concept of individual title to land by colonisation meant that the old order broke down with successively smaller parcels of land being owned by individuals who often no longer held an economic interest in the land.

Incorporations and trusts are an attempt to deal with multiple ownership land so that a viable economic entity is created out of what was previously a disparate group of owners, connected by "whanau", "hapu" or "iwi" links, rather than by a desire to run a Maori land-based enterprise at a profit.

Any description of Maori incorporations and trusts would be inadequate without examination of the historical developments which surround Maori land and the Maori Land Court. The first part of this paper describes why the past has not served to enhance the status of Maori land in Pakeha eyes. The past has ensured that Maori attitudes to land have become entrenched. Maori land concerns, as a result, have gradually become more isolated from the mainstream of legal thought and discussion. Maori land is seen as the preserve of the initiated few. These attitudes have been achieved by the combination of two interwoven factors:

(1) The desire of many Maori owners today to return to their land. This wish is expressed in a desire to retain the status quo and a course of passive or even, active resistance can be adopted in response to any suggestion for better land utilisation. Non-attendance at the Maori Land Court, protracted argument before the Maori Land Court, ignoring any correspondence, bitter personality clashes, the non-payment of rates, are some of the ways that opposition to change is expressed.

(2) Difficult legislation which is in urgent need of reform. The legislation calls out for simplification but every attempt to introduce changes arouses controversy from Maori land owners who fear alienation of their land. Alienation of Maori land is a highly emotional issue because loss of land means the loss of cultural roots.

Future challenges lie in the effort to reconcile the use of Maori land as an economic resource and the traditional spiritual relationship with this land. The Maori attitude to land is intensely poetic and personal. To dismiss the Maori spiritual identification with the land is a failure to comprehend the crucial philosophical differences which

determine utilisation. Maori land owners can resent any changed use to their land, and fear its exploitation and loss. Risk-taking commercial ventures can be anathema to many Maori owners who declare that:

> "He kura kainga e hokia;
> he kura tangata e kore e hokia" or
>
> "The treasure of land will persist;
> The treasures of man will not"

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CHAPTER 2

MAORI LAND AND THE MAORI LAND COURT

Maori land legislation in the nineteenth Century reflects a confusion of events and conflicting government policies. Settlers were anxious to acquire land, the Maori owners were often reluctant to sell. The long-term goals of the Maori and the settlers were in opposition. A contest for scarce land resources was inevitable.

The Maori Land Court was set up in 1862 by the Native Land Act to determine the ownership of Maori lands. The preamble to that Act stated:

> It would greatly promote the peaceful settlement of the colony and the advancement and civilisation of the Natives if their rights to land were ascertained, defined and declared and if the ownership of such lands when so ascertained, defined and declared were assimilated as nearly as possible to the ownership of land according to British law.

The stated intention is admirable, peace and civilisation were to be achieved by the definition of Maori rights of ownership.

The Maori Land Court of today and the position of Maori land, cannot be understood without reference to its historical evolution. Two preliminary points should be made with regard to Maori land title. Customary Maori title to land in New Zealand could be extinguished so that it no longer existed in two ways:

(1) Land voluntarily purchased from Maori owners by the Crown which meant that Maori title was extinguished and the land was vested absolutely in the Crown as ordinary Crown Lands to be disposed of by Crown lease or Crown grant in accordance with the Land Acts.

(2) The Maori Land Court would ascertain title to the Maori land. A Crown grant or certificate of title under the Land Transfer Act would be issued to the Maori owners so that it them became freehold land under the English tenurial system as a fee simple title.[1]

The first method of Crown purchase from Maori owners was the more usual way in which land was acquired prior to the establishment of the Maori Land Court in 1862.

The establishment of the Maori Land Court was not greeted by Maori land owners with enthusiasm. In the Maori mind there was no doubt whose interests the Court was designed to support. Numbed resignation to the process of colonisation which

the Maori was powerless to defeat, is a more accurate description of the early stages of colonisation and land dealing.[2]

The ambivalent feelings to the Maori Land Court persist to this day. The events of the past are fondly remembered and past injustices recounted at Maori gatherings. The land in many instances has been lost but the feelings of bitterness remain. The effect is that attitudes have become entrenched so that any attempt by government or the private sector to promote more efficient utilisation of Maori land can be greeted with suspicion and mistrust. Change of any sort, unless it promotes Maori self-determination and autonomy is resisted. The reasons for this extreme conservatism lie in the past.

At this stage it is proposed that we briefly explore the early history of land purchase and settlement in New Zealand so that a better understanding of the Maori attitude to land utilisation is reached. The duality of approaches persists to this day. What is seen by Pakeha exponents of change is an admirably reasonable and appropriate scheme. The Maori often regards the proposal as yet another means by which the Pakeha profits at the Maori expense.

The Treaty of Waitangi

With the Treaty of Waitangi in 1840 came the concept of pre-emption by the Crown. Article two, section two, states that:

> ... the chiefs of the united tribes and the individual chiefs yield to Her Majesty the exclusive right to pre-emption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.[3]

The legal meaning of pre-emption in this context was never discussed, but the clear intention of Lord Normanby, the Secretary of State for Colonies, Governor George Gripps, the Governor of New South Wales, and Lieutenant Governor Hobson, the counsel appointed by the Colonial Office, was that the Crown would secure exclusive control, over all transactions in Maori land.[4] In the Supreme Court in 1847, The Queen v Symonds discussed the concept of pre-emptive rights and declared that the Treaty of Waitangi:

> ... In solemnly guaranteeing the Native title and in securing what is called "the Queens pre-emptive right" did not assert either in doctrine or in practice anything new and unsettled.[5]

The Court held that a bonafide purchaser of Maori land from Maori owners could not succeed against a subsequent grantee of the same land from the Crown.

Pre-emption by the Crown of Maori land was a policy founded in the false belief that there would be many willing Maori sellers of land. The Crown would have no need to actively seek sales by the Maori owners, but would just wait for tribal groups to offer land for sale. The use of Crown grants to conclude sales was equally optimistic. The Crown agent would use reason, negotiation and compromise to settle issues of ownership, boundaries, price and reserve areas. Cooperation rather than competition would be encouraged by the Crown and its agent. Nothing was further from the truth.[6]

In practice, competition for the land far outstripped the supply. Willing sellers were often a minority voice in Maori society with no real right to sell land. The policies of pre-emption, put in place to protect all parties, soon fell short of their objectives.

Settlers were critical of the monopolistic purchase methods of the Crown. Maori owners believed that they were obtaining the lowest price possible for their land and settlers would have paid more in an open market.[7] The resale of land by the Crown to settlers was, in fact, a major source of revenue for the government. Maori people became increasingly alarmed at the pace of land alienation. Unscrupulous tactics were deplored by Maori and Pakeha alike. Bishop Selwyn write to Captain Robert Fitzroy, the Governor from 1843 to 1845, in 1845 expressing his dismay at the land purchase policy of the government:

> The government wished to buy land as cheap, and to sell it as dear as it could; a system which I submit can never be explained, or justified, in the eyes of a people ignorant of the principles of political economy and of systematic colonisation.[8]

The impact on the Maori population was considerable. The old tribal legal system was breaking down, Maori people were dispossessed, the Maori economy was unrecognisably altered, and above all, the beginnings of an enduring Maori suspicion of government land policies, could be detected. The Maori Wars were the final blow to any hopes of a cooperative land policy.

The Maori Wars 1860 - 1863

Maori opposition to government land purchase methods intensified. Maori chiefs expressed opposition to land sales in general or to the alienation of particular areas. Maori people identified land policies with the interests of settlers. Settlers, on the other hand, were agitating to obtain larger areas for development.

The tension erupted into war in 1860 in Taranaki and in the Waikato in 1863. Many long years were lost in the prolonged conflict that followed. Some historians have dismissed land hunger as the only cause for the wars. Just as strong a motive was the desire to impose British sovereignty which would coincidentally allow the easier purchase of Maori land.[9] J. Belich comments:

> The expansion of British control was unextricably interwoven with the purchase of Maori land. Conversely, to oppose land sales was to oppose the extension of British sovereignty and to defend Maori autonomy.[10]

The intensity of the struggle in Taranaki is recalled by the description of the Sim Commission who found that the Taranaki Maori people were not in rebellion against the Crown but reached the conclusion that:

> When marital law was proclaimed in Taranaki and the Natives informed that military operations were to be taken against them, Wiremu Kingi and his people were not in rebellion against the Kings sovereignty; and when they were driven from the land, their pas detroyed, their houses set fire to, and their cultivations laid waste they were not rebels and they had not committed any crime. The Natives were treated as rebels and war declared against them before they had engaged in rebellion of any kind, and in the circumstances they had no alternative but to fight in self-defence. In their eyes, the fight was not against the Queen's sovereignty, but a struggle for house and home.[11]

Waikato, too, suffered the loss of large areas of land. Confiscation of the land was a major blow. The Maori population was reduced to poverty. The sense of a great injustice being committed endured. The desecration and loss meant that many Maori believed that to participate in Pakeha life was in some way to consent to the horror that it represented. Any programme of Maori land reform against the background of bitterness and anger could not expect remarkable success.

Contemporary accounts remind us of the conflicting objectives of the Maori and the Pakeha settlers. The legacy of the horror of war in the Waikato is described by Sir John Gorst in his book, The Maori King:

> They all thanked the Pakeha for his last act of kindness in giving them Waikato timely warning of the evil that was to come upon Waikato and

> an opportunity of themselves escaping; but they could not forget that they were part of Waikato and they must go and die with their fathers and friends. The same answer was returned at Pukaki and Ihumatao ... The fugitives were, of course, unable to carry all their goods with them. What remained behind was looted by the colonial forces and the neighbouring settlers. Canoes were broken to pieces and burnt, cattle seized, houses ransacked, and horses brought to Auckland and sold by spoilers in the public market. Such robbery was, of course, unsanctioned by the government but the authorities were unable to check the greediness of the settlers.[12]

The calamity of war left a bitter legacy . The aftermath was a lasting sense of grievance against Pakeha ways, laws and attitudes. The struggle to return land was seen by many Maori as their cause celebre. Maori attitudes toward land became more entrenched. To take risks with land was foolhardy as it could mean that the land would be lost forever. No short-term benefits could outweigh the fear of loss. Land became the symbol of the endurance and strength of the culture.

The Maori Land Court 1865

As we have seen, the Native Land Court was constituted in 1865, to investigate, determine, and record the titles of customary Maori land.

The first chief Judge, F.D. Fenton, in 1866 laid down a principle which became the precedent for all Land Court judgments:

> Having found it absolutely necessary to fix some point of time, at which the titles, as far as this Court is concerned, must be regarded as settled, we have decided that the point in time must be the establishment of British Government in 1840, and all persons who are proved to be the actual owners or possessors of land at that time must (with their successors) be regarded as the owners or possessors of these lands now, except in cases where changes of ownership or possession have subsequently taken place ... Of course the rule cannot be so strictly applied in the Native Land Courts where the questions to be tried are rights between Maoris inter se but even in that Court the rule is adhered to, except in rare instances.[13]

Titles were vested in Maori owners, often as individuals. The issue of individual titles to Maori land by the Maori Land Court, did speed up the breakdown of Maori society. European land dealers were able to exploit Maori land owners. Maori land became security for debts and tribal lands were sold by one or two individuals who had no right to make a sale.[14] The operation of the Court was defective with poor notification of hearings, adjournment of cases without notice, or no hearings at all.

The New Zealand Herald of 27 May 1885 described Maori Land Court sittings at Cambridge which was responsible for large tracts of land being sold:

> The workings of the Native Land Court has been a scandal ... for many years past, but as the chief sufferers were Maori, nobody troubled themselves very much ... The cases went on month after month ... All this time Maoris were living near a European town; to keep them advances were made by land buyers [and] ... enormous interest was charged. The money usually went for rum ... and the whole time of the sitting ... was spent in drunkeness and debauchery. The consequence was that at the conclusion of the Court, they had entirely divested themselves of their land and had spent the whole of [their] money.[15]

An imperfect system of Maori Land Court administration managed to make all Pakeha systems inappropriate for Maori causes. One old Maori was reported as saying:

> The law has been our ruin. In the time of our ancestors ... we received no hurt similar to this. Give us back what land is left.[16]

The Maori Land Court had to work very hard in order to win the trust of Maori claimants after such a disastrous beginning. That the Court succeeded in doing that is in no small measure a reflection of the calibre of the early judges as well as the quality of the legislation which was passed by Parliament. The uneasiness of the relationship between the Court and the Maori people has never died completely as the unsettled course of the 1978 Maori Affairs Bill illustrates.

Two Acts in 1894 and 1909 assisted in achieving the cooperative goal between Maori and Pakeha. The 1894 Native Land Act made provision to establish the Native Appellate Court. The Native Land Act 1909 was the first codification of matters relating to Maori land. The Maori Affairs Act 1953 was the final complete consolidation. In 1978 the Maori Affairs Act 1953 and its amendments were consolidated into the Maori Affairs Bill, which reached select committee stage but was never enacted. The Maori Affairs Bill was reintroduced in December 1983 with the Explanatory Note as follows:

> Whatever use may be said of the Bill, it cannot be characterised as hasty and ill-considered. Indeed, it has a quite remarkable genesis. It started in 1977 with a desire to bring order our of chaos. The Maori Affairs Act 1953 was well-constructed and well-drafted. But over the years it suffered from the ebb and flow of legislative attention and policy changes. It underwent massive surgery in 1967 and a further serious operation in 1974. In each case, the effects were so widespread that the tidier textual amendment method proved inadequate to the task so that many substantial changed remained locked forever in the amending legislation, where they irritate to this day.

Today he Bill remains before the Select Committee for consideration and submission. The level of controversy generated by some of its provisions reflects the major interest shown by Maori people toward all matters relating to Maori land. The 1978 Bill was widely debated:

> For the first time for many years, the law was set out for all to see, with the (perhaps inevitable) result that nobody liked what they saw.[17]

The 1980 Report of the Royal Commission of Inquiry into the Maori Land Courts commented on the considerable amendments as a hindrance rather than a help:

> This has produced a body of legislation which is a morass for the legal profession and leads to very great difficulties for the Maori people in dealing with their land. The Maori Affairs Bill 1978 has done little to remedy the extraordinary complexity of Maori land law.[18]

Coming to grips with difficult legislation poses a challenge even to the most determined. Before beginning, an even more fundamental question must be answered:

> Is the land Maori land?

If the land in question is Maori land then the jurisdiction of the Maori Land Court would apply in the first instance.

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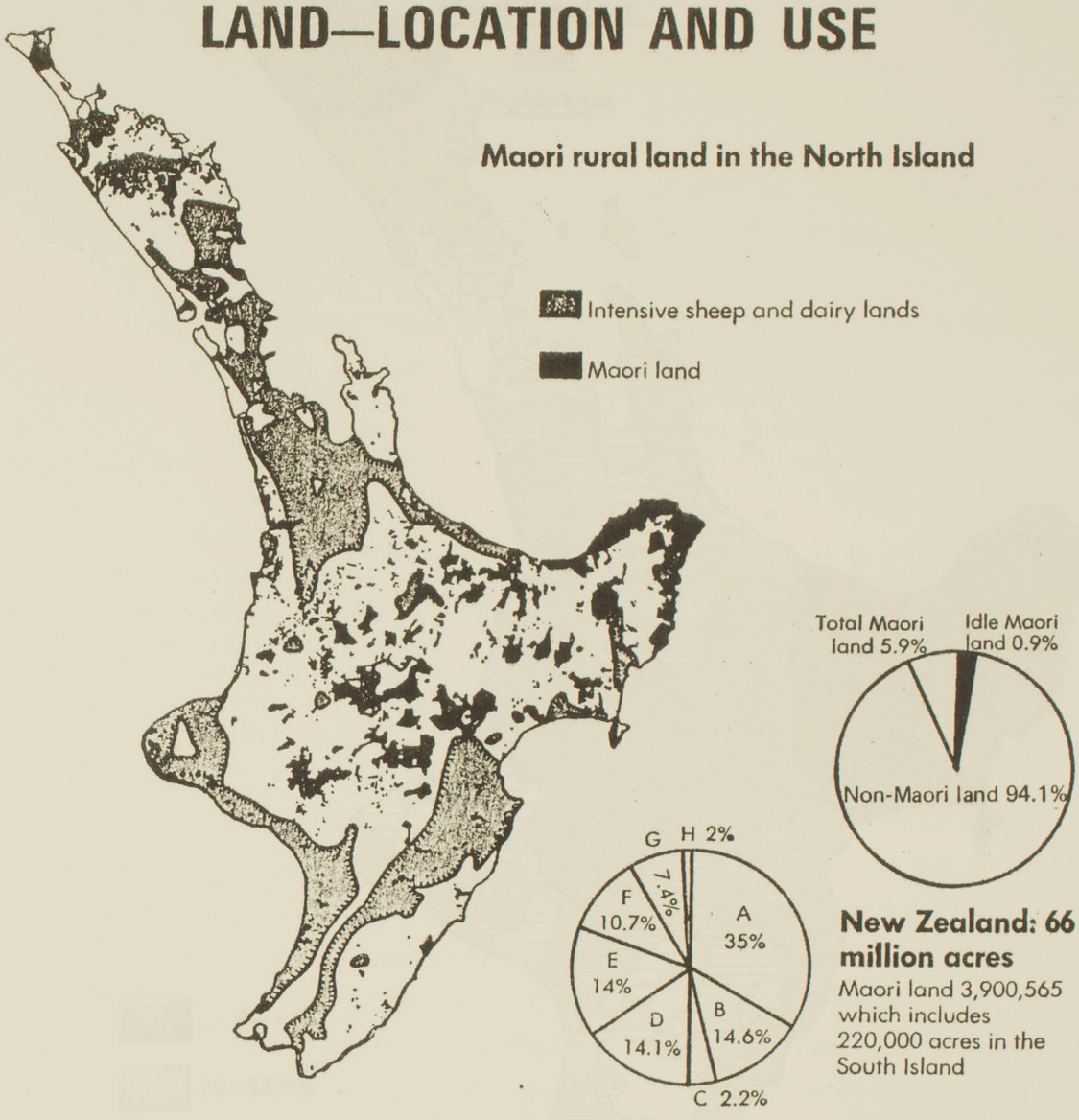
MAP 1

LAND—LOCATION AND USE



New Zealand: 66 million acres

Maori land 3,900,565 which includes 220,000 acres in the South Island

Use of Maori land in the North Island (approx.)

A Leased or under development by Board of Maori Affairs
B Under active incorporation
C Under inactive incorporation
D Farmed but not leased
E Unoccupied but probably suitable for development
F Unoccupied, probably suitable for forestry
G Unoccupied, probably of no use
H Reserves

From: I.H. Kawharu, Maori Land Tenure. Studies of A Changing Institution, p. 35.

Adapted from *The Maori Today* (cover)

MAP 4. North Island: proportion of Maori people in total population (by counties) 1961.

CHAPTER 3

MAORI LAND

Maori freehold land is required to form an incorporation. Section 438 Trusts require Maori freehold land, customary land or any general land owned by Maoris.

A legitimate question is, "what is Maori Land?" The simple, easy definition of Maori land remains elusive. The term is used in two senses:

> First, it can mean 'Maori land' as defined in the Maori Affairs Act and thereby made subject to the jurisdiction of the Maori Land Court. Mainly, but not exclusively, this is land which has never been alienated by its Maori owners and has been held since pre-European times.
>
> Second, it may mean land owned by Maoris, whether within that statutory definition or not, in which sense it will include what the Act calls General (formerly European land). Maori land may be owned by a large number of Maoris, or by a few, or be solely owned. Given when there is multiple Maori ownership the ownership list may include Europeans. The result of the investigations is likely to leave him completely confused.[1]

The confusion is added to by complex legislation with innumerable amendments. The 1953 Maori Affairs Act has been amended substantially until the last major amendment in 1974, by either a Maori Purposes Act or Maori Affairs Amendment Act. The amendments have altered the definition of Maori freehold land resulting in conflicting decisions on the status of Maori land. By and large there has been no substantial reworking of the central themes underlying earlier legislation; rather there has been an "adding on" process, so that new provisions are added on to the old provisions when these are found to be inadequate. It is submitted that a re-examination of the legislative definition of Maori land is called for.

Section 2 of the Maori Affairs Act 1953 defines "land" as follows:

> "Land" includes Crown land, general land and Maori land ... that is to say:
>
> "Crown land" means any land other than Maori land which has not been alienated from the Crown for a subsisting estate in fee simple.
>
> "Customary land" means land which, being vested in the Crown is held by Maoris or the descendants of Maoris under the customs and usages of the Maori people.

> "General land" means any land other than Maori land which has been alienated from the Crown for a subsisting estate in fee simple and includes any land which pursuant to the provisions of Part I or Part IV of the Maori Affairs Amendment Act 1967, ceases to be Maori land.
>
> "Maori land" means customary land or Maori freehold land.
>
> "Maori freehold land" means land other than general land which, or any undivided share in which is owned by a Maori for an equitable estate in fee simple, whether legal or equitable.

Maori Customary Title - To Land

Only a small amount of land is held by Maori customary title. Land which is held by customary title is held in common by all members of the tribe. Personal ownership of the land does not exist. The Maori Land Court has exclusive jurisdiction to investigate the title to customary land,[2] and most investigations of customary titles has been completed by the Court. The ancient customs and usages of the Maori people must be ascertained in order to declare title and interest.

In Re The Bed of the Wanganui River,[3] it was claimed that the bed of the Wanganui River was customary land, and was vested in the tribe as a whole. The Court of Appeal upheld the decision of the Maori Appellate Court which decided that there was no Maori custom or practice which declared that the ownership of the river was separate or different from the ownership of the banks of the river.

In Re Hutt District Section 3 and Gear Meat Processing Ltd,[4] the company made an application to the Maori Land Court to determine the status and ownership of the land contained in a right of way. The Court after investigation of the title concluded that the area in question was excluded from the original sale of Petone and was Maori customary land. It was vested in the village people as a whole.

Maori customary land is vested in the Crown, by reason of the legal fiction that the fee of all land is vested in the Crown by reason of the acquisition of sovereignty under the Treaty of Waitangi. In Tamihana Korokai v Solicitor General,[5] Mr Justice Cooper said:

> It is true that technically, the legal estate is in His Majesty, but this legal estate is held subject to the right of the Natives recognised by the Crown, to the possession and ownership of customary lands which they have not ceded to the King and which His Majesty has not acquired from them.

Maori Freehold Land

After investigation of title of customary land, the Court makes a freehold order, specifying the names of the persons found by it to be the owners. Investigation by the Maori Land Court was not by itself enough, the Crown had to grant an estate in fee simple to the Maori owners or the Maori title was not extinguished.[6]

The Maori Land Court discussed the definition of Maori Freehold Land, as further defined by Section 2(2)(f) of the Act in the case: Re Haumingi 9B2A and the Deputy Registrar.[7]

The applications were brought by the Deputy Registrars of the Maori Land Court as part of a current policy to have the status of land (as Maori or general land) determined and noted on Land Transfer Titles. The reference to Section 2(2)(f) complicated the position further by declaring:

> Maori freehold land the legal fee simple in which has been transferred otherwise than by an order of the Court 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 ...

The only way that the land ceased to be general land was by an order of the Maori Land Court that the land was Maori freehold land.

The question before the Court was whether Maori land ceased to be Maori land if it was transferred. It was held that the land would only remain Maori freehold land and not become general land if there is an express provision in the transfer of this effect, or until the Court makes an order which determines that the land is Maori land.[8]

The concept of Maori freehold land is not an easy one. Current legislation defining Maori freehold land, differs from definitions in earlier legislation. In disputes which have a historical context earlier legislation can be crucial.

The only accurate method of determining the status of the land is to seek a declaration under Section 30(1)(i) of the Maori Affairs Act 1953.

The existence of unregistered Maori Land Court orders does present great difficulties when title to the land is disputed. The confusion surrounding Maori land is complicated by reason of some blocks of Maori land having a Land Transfer Title and other blocks of Maori land not having a title. It is not always possible to tell from a Land Transfer Certificate of Title whether a block of land is Maori land or not. Adams comments that:

> I think that we would all be pleased, if we could find out the legal owner of Maori land with the same facility as we can ascertain the title of a vendor of European land, by merely searching in the Land Transfer Office.[9]

Not all areas of land in New Zealand have had a certificate of title issued under the Land Transfer Act, although the Act does apply very often to the land in question, that is land derived from a Crown grant. The effect of the Land Transfer Act 1952 and its central concept of indefeasibility of title upon the question of aboriginal rights remains the subject of lively academic debate.[10]

McHugh in his examination of aboriginal rights concludes that there are two systems of land tenure in New Zealand, each independent from each other and governed by their own rules. The Maori system of tenure derives from the common law doctrine of aboriginal titles which is extinguished by voluntary ceding by traditional Maori owners or by legislation. The Land Transfer Act provides for another independent system of tenure with the feudal basis of English land law or a Crown-derived system of tenure. McHugh's argument is valid, because the separateness of the Maori land system is conclusive. In addition, the existence of customary titles, which remain in Maori tribal ownership, support his conclusion. More speculative is his submission that the registered proprietors title is concurrent with Maori tenure so that certain aboriginal servitudes may be enforceable and registerable against the title of a registered proprietor as ommitted easements under Section 62(b) of the Land Transfer Act 1952.

The preceding discussion illustrates the traps that Maori land can hold for the unwary. Rowe v Cleary,[11] an unreported decision of what was then the Supreme Court, in Palmerston North determined that solicitors who acted for the plaintiff were negligent when they did not notice that the land in question was Maori land. Registration in the Land Transfer Office could not be completed because confirmation by the Maori Land Court meant delay. The case emphasises the importance of establishing the status of the land. If there is any possibility of the land being Maori land then particular legislative provisions apply.

General Land

General land is land which is all land which is not Maori land. It follows that the important distinction is between general land and Maori land, whether the Maori land is customary or freehold. When the land is transferred to a European it becomes general land.

In Re Himatangi 2A1 and Kerehoma,[12] the sole owner of Maori land was declared to be European under the statutory provisions then in force. His son succeeded to the land on his death and his son was Maori. The question arose whether the land was Maori land. It was held that it was not Maori land, the status of the land changed when the father became a European. The unusual fact situation of this case is supported by the decisions in Re Whangawehi 1B and Ormand deceased,[13] when Maori co-owners in a block of Maori land formed a company and transferred their shares in the land to the company. It was held by the Court that the land had ceased to be Maori land when it was owned by a company. Although the shareholders may be Maori, a company is not Maori. With respect, it is submitted that the decision is unsatisfactory, a company being neither Maori nor European.[14]

The McCarthy Report,[15] points out the anomolous position of Maori land if the full implications of the definition of "Maori" of land tenure are recognised. Many owners of Maori land have only a small amount of Maori ancestry; on succession orders do these lands, for all intents and purposes owned by Europeans, become general lands. The Maori Affairs Act adopts an all-encompassing definition of Maori to mean:

> a person of the Maori race of New Zealand an includes any descendent of such a person.

Legal complexities abound when considering the definition of general land which does not include Maori land alienated from the Crown for a "subsisting estate in fee simple" and Maori freehold land which is owned by a Maori "for a beneficial estate in fee simple, whether legal or equitable." The problems multiply because:

> A subsisting estate may be beneficial while a beneficial estate must be subsisting.[16]

In the face of such difficulties the call for a new classification of Maori land gains impetus. Clause 2 of the Maori Affairs Bill does attempt to clarify the definition by reference to Clause 141 of the Bill be declaring that all land in New Zealand has one of the following statuses:

(a) Maori customary land
(b) Maori freehold land
(c) General land owned by Maori
(d) General land
(e) Crown land
(f) Crown land reserved for Maori

To be workable, these descriptions should be cross-referenced with the Land Transfer Act 1952. The Bill requires orders relating to the legal ownership of Maori freehold land to be registered under the Land Transfer Act 1952 (or if required, the Deeds Registration Act 1908). If ordinary registration is impracticable because of large numbers of owners or the absence of an adequate survey plan, then special provision is made.

Crossing legal barriers to find a precise definition of Maori land is not easy. Any discussion of Maori land would be incomplete without recognition of its diminishing area. Remaining Maori freehold land and customery land are the remnants of what were once extensive tribal lands. Accurate assessment of the areas which are Maori land is not possible but a general picture can be ascertained from Diagram 1 which shows the use of Maori land in the North Island. Not suprisingly, areas with a high proportion of Maori people in the total population retain the largest amount of Maori land (Diagram 2).

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(5) (1912) NZLR 321.

(6) Hira Tamati v District Land Reigstrar [1957] NZLR 231 discussed in:
Difficulties and Complexities As To Title in New Zealand
E.C. Adams (1957) NZLJ 336-338.

(7) (1984) 210 Rotorua MB 106.

(8) The case referred to an earlier decision of:
In Re Puhi Mahi to Hutchinson [1919] NZLR 82
In Re Haumingi illustrates the importance of making Section 30(1)(i) status declaration orders following the transfer of land so that titles may be noted.

(9) E.C. Adams, Maori Land: Unregistered Maori Land Court Orders
(1959) NZLJ @ 171-174

(10) P.G.McHugh, Aboriginal Servitude and the Land Transfer Act 1952
(1986), 16 V.U.W. LR 313-335.
Aboriginal Title in New Zealand Courts
(1984) 2 Canterbury Law Review, 235-265.

See also an interesting discussion and unusual fact situation contained in:
In Re Papara A10 and Ritete
(1984) CJMB 20
Where an application under Section 452 Maori Affairs Act 1953 was construed. The validity of a Maori Land Court order more than 10 years old was questioned, and the title of a subsequent purchaser was impeached with an application to see an injunction against registration under the Land Transfer Act 1952.

(11) (1979) Supreme Court, Palmerston North A41/78.

(12) (1962) Otaki MB.

(13) (1960) Gisborne MB.

(14) The decision relied on:
W. Te Ruke v New Zealand Land Settlement Co
(1884) NZLR 387.

(15) Ibid, page 23.

CHAPTER 4

THE STRUCTURE OF MAORI LAND INCORPORATIONS

Introduction

A Maori land incorporation is a body corporate with perpetual succession and a common seal.

> Under the name specified in the order with power to do and suffer that all bodies corporate may lawfully do and suffer and with all the powers expressly conferred upon it by or under this Act.[1a]

It is tempting to draw parallels with the company structure under the Companies Act 1955 but the resemblance is only a superficial one. The company and the incorporation are distinct methods of holding property. The objectives of the two forms are different, the objective of the company being to enhance the wealth of its shareholders.

A Maori incorporation occupies a central role in the Maori culture. There is an unseen and unspoken range of cultural requirements surrounding the Maori incorporation. The demand from the owners that the Maori incorporations fulfill cultural obligations was evident from the beginning. The relationship between shareholders of an incorporation and its committee of management is such, that objections from owners are likely when cultural obligations are not met generously enough.

On a whole, matching the commercial success of public companies is not the ambition of Maori land incorporations. In a 1985 Conference of Maori Authorities a paper was presented which argued that a strong profit motive or maximising financial return to shareholders should be a target of managers of Maori authorities. The Report conceded that:

> Even if it does, the desire to achieve the profit objective is unable to be supported by the appropriate performance of the managers.[1b]

Ratio of return on shareholders funds as shown in August 1984 by the Reserve Bank was 11.7% for 1983, and 13.1% for 1982. The majority of Maori authorities, including Maori incorporations, would not return 11.7% on the shareholding funds.

Historical Outline

The ambiguous position that Maori incorporations occupy, first as a profit making commercial entity and secondly, as a cultural protector is evident from the Par-

liamentary debate on the 1967 Bill. The Honourable J.R. Hanon, the then Minister of Maori Affairs committed the Maori Affairs Amendment Bill in Parliament on the 7 November 1967. He described Part IV of the Bill as bringing:

> The position of Maori incorporations more up to date, making it possible for those Maori owners of land who wish to do so, and use this means of doing so, to preserve their tribal or sub-tribal lands as long as they wish - as far into the future as they and their descendants wish.[1]

The Minister went on with enthusiasm, to say that the legislation was progressive and far reaching and could be seen as a prototype for what should be done with communal lands in the others parts of the Pacific.

A spirited debate followed in the House, concentrating on the more controversial aspects of the Bill and ignoring the extensions to the concept of Maori incorporations made by the Bill.

Reactions to incorporations by Maori people have been varied. The Native Land Court Act 1894, Section 122 first introduced a system of land ownership whereby the many owners of Maori land could be incorporated by an order of the Native Land Court. Incorporations were introduced as the legislative solution to what was then seen as the twin evils of fragmentation of title and multiplicity of owners.

The then Member for Northern Maori, M.R. Rata, addressed the issues of complexity and multiplicity of titles by quoting the words of Judge K.G. Scott of the Maori Land Court:

> The multiplicity of titles is held up as a bogy to dealing with Maori land, but this is absolute rot. There is no complexity to which the law has not provided an answer.

Mr Rata went on to say that:

> Complexity of title and allegations of undue delay are to my mind the defence of the ill-informed and a convenient excuse for those who lack the ability to tackle tasks which require patient negotiation and understanding of the law.[2]

Incorporations were not introduced to assist Maori land utilisation. The objective of the early legislation was to assist the government and private purchasers to buy Maori land. Early settlers were confronted by an alien system of tribal and family land ownership. Individual title to land was unknown in Maori society. Agreement to sell land was almost impossible to obtain as it required the consensus of a large

number of owners. The result was a willingness by the Legislature to experiment with various legal structures, so that blocks of land could be disposed of to acquisitive settlers.[3] A single legal entity which controlled shares of land in proportion to the amount of land owned by the shareholder, could achieve what previously took as many owners who were involved in that area of land. An incorporation of owners could present a clear legal title to land for alienation by sale or lease.

The device of incorporation was later developed as a means of facilitating the best and most economic use by Maori owners of their land. The Native Land Act of 1909 gave power to an elected committee of management to organise the development of land on behalf of owners who would be shareholders in the undertaking.

Sir Apirana Ngata recognised the potential for Maori land incorporations on the East Coast of the North Island and under his patronage the system of incorporation had its greatest success. A contemporary account describes Ngata's work:

> One of the hardest things that Ngata did was to set up land incorporations, because there was a lot of opposition within the government and they said to him:
> **'Oh, the Maori people can't run all that land! Who's going to supervise the farming, and who can we trust to look after the money? Oh no, we won't agree to that'**
> But Ngata kept on going, and he got his people to put their shares in a certain block into an incorporated company, with an incorporation committee to run the land, and then they raised money from the banks with the land as their security.[4]

Sir Apirana Ngata can be credited as the main influence in the spread of incorporations and their major position of importance in Maori culture today.

The Position of Incorporation's Today

The diligence and persistence of Ngata's work has been well-rewarded and today, the largest farming enterprise in the country, the Mangatu Incorporation, is a Maori incorporation formed by the Mangatu No. 1 Empowering Act 1893. To give some idea of the size and nature of incorporations, a survey compiled in 1975 is reproduced. Of the 170 incorporations then in existence, 128 provided statistics.[5]

Areas of Land Held

Over 40,000 hectares	2	incorporations
Between 10,000 and 12,000 hectares	4	incorporations
Between 5,000 and 10,000 hectares	8	incorporations
Between 2,500 and 5,000 hectares	13	incorporations
Between 1,000 and 2,500 hectares	32	incorporations
Between 500 and 1,000 hectares	19	incorporations
Between 100 and 500 hectares	28	incorporations
Under 100 hectares	18	incorporations
Area not given	4	incorporations
	128	

Number of Shareholders

Between 4,000 and 5,000	2	incorporations
Between 3,000 and 4,000	1	incorporation
Between 2,000 and 3,000	2	incorporations
Between 1,000 and 2,000	15	incorporations
Between 500 and 1,000	21	incorporations
Between 100 and 500	47	incorporations
Between 50 and 100	10	incorporations
Under 50 shareholders	29	incorporations
Undetermined	1	incorporation
	128	

Notwithstanding the large areas of land held by Maori incorporations as a business enterprise they are peripheral to the national economy rather than vital to it. The absence of incorporations as a major power and a cohesive group is as much a reflection on owner apathy as it is a desire to retain the status quo so that there is identification with cultural rather than economic values as the priority of Maori land ownership. There is no representation by management committees of incorporations on any of the major marketing or producer boards or boards of major public companies whose primary enterprise is agricultural and horticultural products.[6]

Maori land incorporations are too diverse and legally complex to attempt to cover every aspect of the land-holding structure in this paper. I will continue to draw

analogies with the company structure in the hope of illumination on the part of the reader as to the similarities as well as the differences from the company organisation but I will concentrate on three main aspects. First, the formation of an incorporation, secondly the effects and the objects of incorporation and thirdly, the management of an incorporation. Obviously, incorporations are not the source of wealth and profits for shareholders as are companies, but it can be argued that such different structures should be examined with regard to the different criterior applicable to each structure.

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Na Tuini Ngawai
i TITO

APIRANA NGATA (1874 - 1950; Ngati Porou)

E RERE RA TE KIRIMI

Tera te mahi pai rawa
E kiia ana mai,
He mahi ra e puta ai
Nga moni nuinui noa!
E whanga ra, e tama ma,
Ki nga pei marama -
Kua riro ke i nga nama,
Aue nga wawata!

E rere ra te kirimi
Ki roto ki nga kena nei!
Kia tika hawerewere,
Kei rere parorirori,
Kia rite ai nga nama!

Tera nga tino momo kau
E kiia ana mai,
Kei Taranaki ra ano,
Na Maui Pomare!
Ko nga kau ra i rere ai
Te Nati ki te hao!
He rau mahau, he rau maku
Ka ea nga wawata!

E rere ra te kirimi
Ki roto ki nga kena nei!
Kia tika hawerewere,
kei rere parorirori,
Kia rite ai nga nama!

Tera te pata rongo nui,
He Nati te ingoa,
Te wahi ra i mahia ai,
Ko Ruatoria!
Hara-mai ra Te Pirimia,
Mahau te kawanga
E pono ai te mahi nei,
He mahi kai ano!

E rere ra te kirimi
Ki roto ki nga kena nei!
Kia tika hawerewere,
kei rere parorirori,
Kia rite ai nga nama!

THE CREAM SONG

There's some really good work
We've been told about,
Work that will make us
Lots and lots of money!
Just wait, you fellows,
For your monthly pay -
But our debts have taken it,
So much for our dreams!

Flow on, cream,
Into these cans!
Go straight in,
Don't go crooked.
So our debts can be paid!

There are some pedigree cows
We've been told about,
Over in Taranaki.
They belong to Maui Pomare!
They're the cows the Nati
Rushed to get hold of!
A hundred for you, a hundred for me,
And our dreams will be realised!

Flow on, cream,
Into these cans!
Go straight in,
Don't go crooked,
So our debts can be paid!

There's some famous butter,
Nati is its name,
The place where they make it
Is Ruatoria!
Welcome, Prime Minister,
You have come to perform
The Opening ceremony
For this food-producing work!

Flow on, cream,
Into these cans!
Go straight in,
Don't go crooked,
So our debts can be paid!

(Translation by Margaret Orbell)

CHAPTER 5

THE FORMATION AND EFFECT OF A MAORI INCORPORATION

Section 29 of the Maori Affairs Amendment Act describes the procedure for incorporation. The Court has a discretion to make an order, part of the extensive discretionary authority of the Court and its parens patriae or paternalistic role.[1]

In Aotea District Maori Land Board v State Advances Superintendent,[8] it was accepted that:

> The policy of our Native Land legislation is pre-eminently for the protection of Native owners of the land.

And in Pateriki Hura v Aotea District Maori Land Board,[2]

> It must not be forgotten; however, that the Native Land Court is in effect, parens patriae of Native Lands, ... the legislature may have found it desirable not only to give the court wider powers in relation to such matters than the ordinary court enjoys in relation to European questions concerning European land, but in addition more general powers based on a supposed Native immaturity of judgment, to conserve Native lands and the profits thereof from uneconomic use and exploitation.

The paternalistic note does not encourage autonomy on the part of applicants or the ability to take risks which may bring failure, but can also encourage success. By contrast, the Registrar of Companies has no such discretion.

> The Registrar shall return and register the memorandum and articles, if any, and shall register or otherwise deal with such other documents in the manner required by or under this Act.[3]

Section 8A of the Companies Act does give the Reistrar a general discretion to refuse registration or require amendment of a document which:

(a) Contains any matter contrary to law; or

(b) Does not comply with this Act; or

(c) Has not been duly completed; or

(d) Contains any misdirection or error, or any matter that is not clearly legible.

It is submitted that the discretion of the Registrar of Companies is more suitably limited than the wide discretion of the Maori Land Court. Maori people must learn to

manage their own land, without the parental supervision of the Maori Land Court and its unfeltered discretion.

The Maori Land Courts administrative role does not combine easily with the need for judicial independence. The McCarthy Report concluded:

> The Maori Land Court should be a court of justice with traditional judicial standing and independence. But if it is to be that, it must strive to be predominantly a judicial and less an administrative body.[4]

It is submitted that the role of the Maori Land Court must change considerably in the future to encourage autonomy and self-determination for Maori people. A more judicial role would be more appropriate.

The discretionary role of the Maori Land Court is continued in Clause 262 of the Maori Affairs Bill which provides a subjective test for the making of an incorporation order. The court

> may if it considers it is in the interests of the owners to do so, make an order incorporating as a Maori incorporation ...

Before the Maori Land Court makes an order of incorporation the owners of the land must have passed a resolution in terms of Section 315 of the Act:

> That the owners of the land or of any part thereof shall, either by themselves or together with the owners of any other land, become incorporated under Part XXII of this Act for such object or objects as may be specified in the resolution; or that any defined land of the owners be included in an existing order of incorporation pursuant to Section 280 or Section 282 hereof.

The resolution of the assembled owners must be confirmed by the Court.[5] Owners and assembled owners are also defined by the Maori Affairs Act.[6]

If the assembled owners do not or cannot meet to pass a resolution then it is enough if:

> the Court is satisfied that the owners of not less than half of the aggregate shares in the land, or their trustees in the case of owners under disability, consent to the making of an order.[14]

Procedure at meetings is set by statute,[15] and at least 3 individuals entitled to vote must be present during the whole time of the meeting.

Meetings of owners are difficult to organise and expensive. If the land area sought to be incorporated is large, the number of assembled owners may not be enough to

pass a resolution. The failure to keep Maori land records up to date and to note on the Register succession orders to Maori land, means that often the owners cannot be found. For these reasons, incorporations are not likely to increase in number, but remain at the present number.

DIAGRAM 1

STEPS FOR FORMATION OF MAORI LAND INCORPORATION

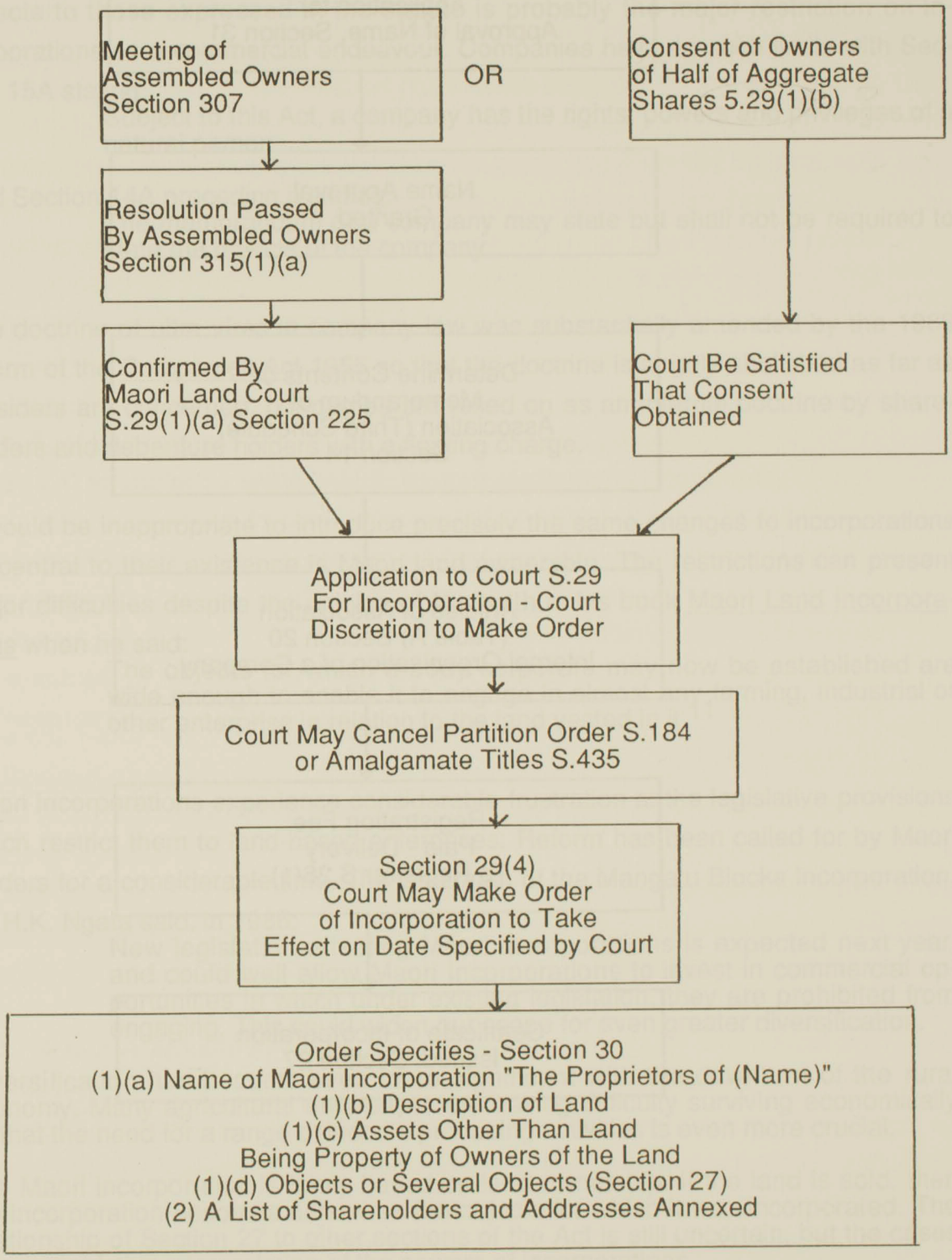
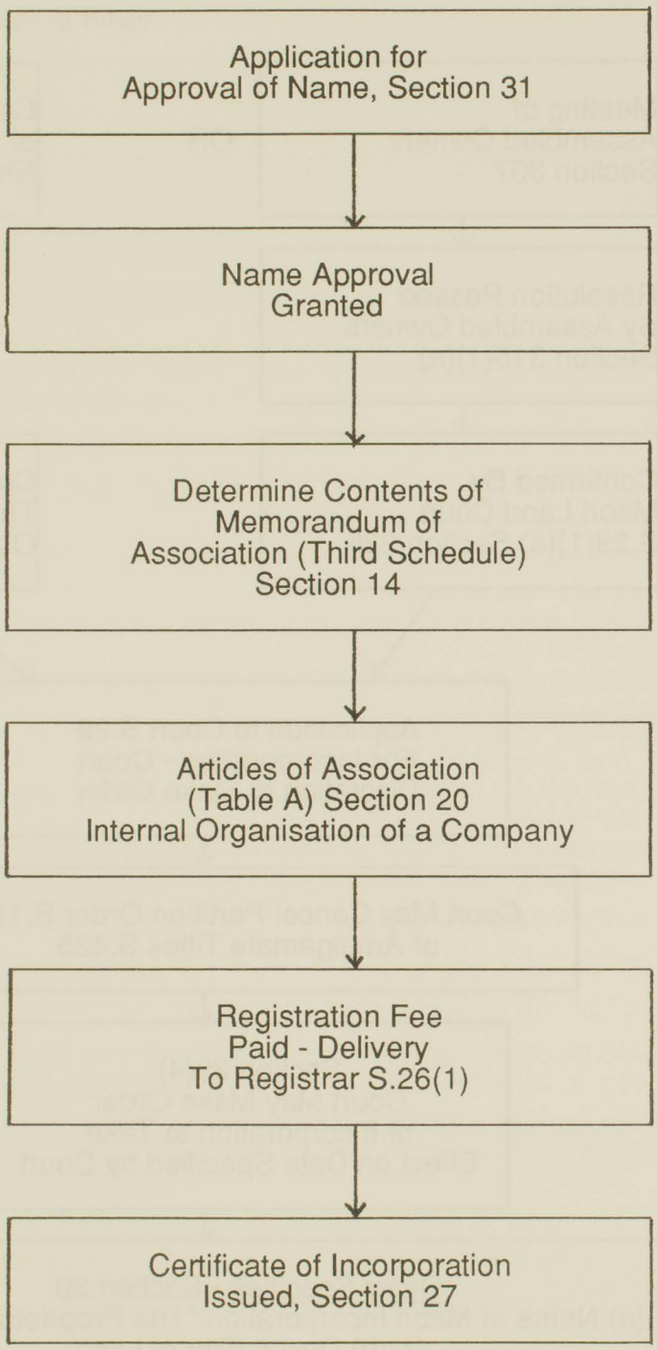


DIAGRAM 2

STEPS FOR REGISTRATION OF A COMPANY



The Objects of a Maori Land Incorporation

The Maori Affairs Act 1953 expressly provides for the objects for which Maori incorporations are established.[10] The objects are purely land based. The limitation of objects to those expressed in the statute is probably the major restriction on incorporations as a commercial endeavour. Companies have no such limits with Section 15A stating:

> Subject to this Act, a company has the rights, powers and privileges of a natural person ...

And Section 14A preceding it stating:

> The memorandum of a company may state but shall not be required to state the objects of the company.

The doctrine of ultra vires in company law was substantially amended by the 1983 reform of the Companies Act 1955 so that the doctrine is largely abolished as far as outsiders are concerned, but can be still relied on as an internal doctrine by shareholders and debenture holders with a floating charge.

It would be inappropriate to introduce precisely the same changes to incorporations as central to their existence is Maori land ownership. The restrictions can present major difficulties despite the opinion of N. Smith in his book Maori Land Incorporations when he said:

> The objects for which a body corporate may now be established are wide enough to enable it to engage in almost any farming, industrial or other enterprise in relation to the land vested in it.[11]

Maori incorporations experience considerable frustration at the legislative provisions which restrict them to land-based enterprises. Reform has been called for by Maori leaders for a considerable time. The Chairman of the Mangatu Blocks Incorporation, Sir H.K. Ngata said, in 1985:

> New legislation affecting Maori incorporations is expected next year, and could well allow Maori incorporations to invest in commercial opportunities in which under existing legislation, they are prohibited from engaging. This could widen our scope for even greater diversification.

Diversification has become even more significant with the downturn of the rural economy. Many agricultural enterprises are having difficulty surviving economically so that the need for a range of income producing activities is even more crucial.

The Maori incorporation is firmly based on land ownership. If the land is sold, then the incorporation becomes ultra vires the objects for which it was incorporated. The relationship of Section 27 to other sections of the Act is still uncertain, but the cases take a restrictive interpretation of the powers of incorporations.

In Re The Proprietors of Waipiro A13 Incorporated,[12] the body corporate sold the land which was the subject of their application for incorporation, Waipiro A13. It was held in the Maori Land Court that on the transfer of the incorporations original land the "substratum" of the body corporate was destroyed and the object of the body corporate was spent. Interested parties would have grounds to apply to the court for winding up.

Section 27(e) does give the incorporation the power:

> To carry on any other enterprise or do any other thing in relation to the land that may be specified in an order of incorporation.

The problem with this seemingly wide object is that it requires a relationship to the land, as well as a prediction by the Maori Land Court as to future industries. The fishing industry could never be regarded as having a relationship with the land. The fishing industry could generate profits which could, in turn, be used for land based development. What sorts of enterprises that can be specified in the order of the Court remains speculative, as there are no conclusive cases to guide us.

In Re An Application by Ngati Whakaue Tribal Lands Incorporated to Redefine Objects,[13] all of these issues were argued. It was argued that on its face Section 27 limited Maori incorporations to the development of their lands with authority to engage in only those businesses that are reasonably consistent with the use of that land. Subsequent sections in the Maori Affairs Act do give further powers. Section 50 provides that an incorporation "may acquire any land" and the provisions of the Act then apply to the land acquired "in the same manner and to the same extent as they apply to land vested in the incorporation by its order of incorporation". Section 28 enables the court to:

> redefine the objects for which the incorporation was established, or add any other objects specified in or authorised by Section 27 of this Act.

The power to redefine objects is not the power to alter objects. The relationship that Section 28 has with Section 27 is not clear, but it is likely that any addition to or redefinition of the objects will be within the terms of Section 27.

The facts in the Ngati Whakaue case are that the incorporation had the objects of farming its lands, to subdivide and sell land, and to build houses (as some of the incorporations land was close to the Rotorua city). The incorporation received capital return from the subdivision and sale of lands and with these profits the incorporation invested in commercial buildings in Rotorua city, having first obtained the consent of the Maori Land Court to acquire land as was required by earlier legislation. The in-

corporation wanted to develop enterprises on the land and buildings it had acquired, including the development of a tavern. On application to the Licensing Control Commission for a license to construct, own and operate a tavern, the Maori incorporation was opposed by the Rotorua District Council who claimed that the application was ultra vires the incorporations objects.[14]

The Licensing Control Commission put forward a case stated to the High Court which held that the incorporation did not have the power to apply for a licence at the time it made the application. The Ngati Whakaue Tribal Lands Incorporation could not rely on Section 48(1) of the Maori Affairs Amendment Act 1967, to save the application. Section 48(1) provides:

> An incorporation shall ... have power to ... dispose of or deal with assets from time to time vested in it in the same manner as if it were a private person of full capacity.

This section could bring the application within its powers. Although a Maori incorporation could deal with its assets as if it were "a private person of full capacity". Section 48 must be read as ancillary to the objects of the incorporation.

The Supreme Courts interpretation of Section 50 in the Ngati Whakaue case is interesting. Section 50 provides:

> A Maori incorporation may acquire any land or interest in land, whether by way of purchase, lease, or otherwise.

The court took the view that an incorporation may acquire other land and may be authorised to conduct any other business appropriate to that land. An alternative view would be that the incorporation may only acquire other land when it is reasonably consistent with its existing objects. In the Ngati Whakaue case, by legislation which has since been repeated, authorisation was required. A question arises as to whether this decision would apply in future. An incorporation could be acting ultra vires if it acquired further land not required for the performance of its principle objects.

The Maori Land Court in the Ngati Whakaue case did redefine the objects of the incorporation to include the holding of a tavern licence. The redefinition of objects occurred after the application had been made. Consequently, the original application was void but the incorporation was not stopped from making a fresh application pursuant to its extended powers.

The Maori Land Court can take a restrictive view of the objects of a Maori incorporation. In Re Taharoa C Incorporation (1976),[15] the Court held that an incorporation formed for mining purposes could not acquire commercial premises for investment purposes.

It is submitted that the Maori Land Court is correct when it takes a conservative view of the objects of an incorporation, and an action by an incorporation becomes ultra vires the objects if it develops enterprises which have no relationship with the land.

The difficulties presented by a limited range of objects should not be underestimated. Major concessions have recently been won from the Crown for the fishing industry as a result of the Muriwhenua Fishing Report, released by the Waitangi Tribunal in June 1988. Incorporations would be a suitable corporate entity with capital who could exploit these resources. Proposals have been put forward that a company could be incorporated by a Maori incorporation, with the objective of developing the fishing industry. A step of this sort could invoke an action in the Maori Land Court, that an incorporation was acting ultra vires its objects.

The end result is that it remains highly likely that the Maori will not be able to use the resource offered in the agreement announced on 21 September 1988. The government has estimated that over the full 20 years of the settlement, Maori fishermen will only use about 30% of the quotas. The reason for the inability to exploit these quotas is the sophisticated and expensive organisation required to successfully meet the fishing quotas made available to the Maori people. The Evening Post on 22 Sepotember reported the Chief Executive Officer of Sealord Products, Dr. B. Rhoades, as saying:

> That to take advantage of the 16,000 tonne quota available in the first year of the new regime would require the establishment of a well-balanced industry including fishing capacity, processing capacity and marketing.

Some Maori incorporations would be well-equipped financially and have the required management expertise to develop an enterprise based on the fishing industry. To be prevented from being involved because of conservative legislation is certain to arouse a call for reform.

The harsh consequences of the ultra vires doctrine for both the company and third parties in company law, needs no reminders.[16] It is alarming to see outdated con-

cepts still present in similar legislation. The Maori Affairs Bill is more satisfactory as Clause 268 does give wider powers. Clause 268, para 1, saying:

> Every Maori incorporation shall have all such powers as are reasonably necessary to enable it to discharge the obligations of the trust in the best interests of shareholders.

Para 2(d) gives an incorporation the power to:

> Acquire, hold and dispose of shares in any company carrying on business relating to or affecting any business carried on or proposed to be carried on by the incorporation.

It is submitted that the extension of powers contained in the Bill is more appropriate for the new entrepreneurial approach of Maori people.

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(2) [1927] GLR 557, 560.

(3) [1940] GLR 173, 175.

(4) Section 26(2) Companies Act 1955.

(5) Op.cit.
Report of the Royal Commission of Inquiry into the Maori Land Courts, 1980 @ p. 81.

(6) Section 224 Maori Affairs Act 1953
The first application is made to the Maori Land Court to confirm the resolution, then the application is made for incorporation.

(7) Section 305.

(8) Section 29(1)(b) Maori Affairs Amendment Act 1967.

(9) Section 309 Maori Affairs Act 1953.

(10) Section 27 Maori Affairs Amendment Act 1967.

(11) Ibid, page 71.

(12) (1966) 8 Ruatoria MB.

(13) (1979) 191 Rotorua MB 350.

(14) (1982) Ngati Whakaue Tribal Lands v Rotorua District Council, High Court, Wellington 436/80 (Unrep.)

(15) (1976) 53 Waikato-Maniapoto MB 350.

(16) Re Jon Beauforte (London) Ltd [1953] Ch. 131
Cabaret Holdings Ltd v Meanee Sports and Rodeo Club Inc. [1982] 1 NZLR 673.

CHAPTER 6

SHARE CAPITAL AND MANAGEMENT

In company law, a share is a definite portion of the share capital of a company. Ford Wrenbury in Bradbury v English Sewing Cotton Co Ltd[1] has given the classic description of a share;

> A share is, therefore, a fractional part of capital. It confers upon the holder a certain right to a proportionate part of the assets of the corporation, whether by way of dividend or of distribution of assets in winding up. It forms, however, a separate right of property. The capital is the property of the corporation. The share, although it is a fraction of the capital, is the property of the corporator. The aggregate of all the fractions if collected in two or more hands does not constitute the corporators the owners of the capital - that remains the property of the corporation.....

Briefly, a share is the residual claim of the member on the profit and net assets of the company.[2]

The effect of an order of incorporation is that the land is vested in the incorporation and the former owners thereof shall cease to have any interest therein whether legal or equitable.[3] The initial shareholders of an incorporation are

> The persons who immediately before the making of an order of incorporation were the owners of any freehold interest in the land specified in the order.[4]

The capital of the incorporation is the value of the landed assets exchanged for shares. The total number of shares in the incorporation is fixed by the court. The number of shares is related to the value of the land and other assets.[5] The allocation of shares is on a proportional basis, related to the value of his or her former share in the value of any assets of the incorporation.[6] The incorporation establishes a share register which is the official record of shareholders showing the number of shares held by each shareholder and an address if this is known.[7] If the incorporation has more than 50 owners an index must be kept for cross referencing.[8] Certificates may be issed by the incorporation, at the request of shareholders, the certificate showing the extent of the shareholding at the date of issue of the certificate. Such a certificate cannot be construed as evidence of title except for the time which it was issued.[9] Shareholders have the privilege of limited liability,[10] and it is pos-

sible for incorporations to adjust the shareholding by passing a resolution specifying the number of shares as a minimum share unit for the incorporation.[11] The number of shares in a minimum share unit should not exceed $50 in value "if the value thereof were computed as the proper proportion of the equity value of the incorpoation.[12] The provision attempts to deal with further fragmentation of land by succession and the immune administrative difficulties that very small shareholdings can pose to the incorporation. Shares cannot be taken in execution of any judgement, nor can shares pass to the official assignee or trustee in bankruptcy.[13] Share are only transferable by the terms of Act and no shares can be sold unless authorised by the terms of section 41 of the Amendment Act,[14] which determines whom shareholders may transfer their shares. Nor can a majority shareholding be achieved easily as Section 40 (1) (b) provides that the acquisition of shares by a person in excess of a number specified by a resolution of a general meeting of shareholders or to a proportion of the total shareholding specified in the resolution, is not lawful unless the shares are acquired as a result of a Will or intestacy of a deceased shareholder.

Shares in a Maori incorporation and shares in a company have several fundamental differences. It is proposed to examine these differences in greater detail.

(1) The Concept of Shares in Maori Land

The corporate concept of a shareholding representing a fractional part of capital has been one which has aroused a good deal of antipathy when it has been applied to Maori land. With fragmentation of land owners to receive "shares" in the land, but the shares can be over an identifiable piece of land which is the property of the shareholder. In the Maori incorporation, the capital is the land and the property of the incorporation. The land is vested in the incorporation and the owners cease too have a legal or beneficial interest in the incorporation. The failure to identify particular interests has caused considerable distress to some Maori owners who value their "turangawaewae" or place to stand.

The Maori Affairs Bill removes this problem, which arises from the application of the principles of company law to Maori land. The provisions in the proposed legislation retain the concept of a share but makes it clear that the share is a beneficial interest in Maori freehold land. The legal title to the land rests in the incorporation but the owners retain the beneficial ownership.[15]

(2) Restrictions on Freedom of Transfer

The Articles of Association of a company may impose restrictions on share ownership in three ways:

(1) compulsory purchase
(2) pre-emption which mean there is a right of first refusal on transfer of shares.
(3) power for the directors to refuse registration.

Compulsory purchase and refusal of registration of transfers must be exercised bona fide for the benefit of the company as a whole and with fairness. Pre-emption provision must be contained in the articles which are usually construed strictly.[16]

By contrast Maori incorporations have restrictions on transfer of shares which are legislative. Shares may be transferred to the incorporation to another shareholder, to the Maori Trustee or Crown and to the shareholders spouse, children, siblings or parents. A share valuer nominates the price of the shares to be sold to the incorporation.[17] If the incorporation does not take up the offer a shareholder can transfer his or her shares to any person as long as a resolution has not been passed by shareholders in terms of Section 40 (1) of the Amendment Act which limits the number of shares able to be held by an individual.

It could be argued that restrictions on transfer of this nature, prevent commercial reality confronting management with the need for hard financial decisions as the potential for takeover, which in economic theory, disciplines ineffective management, is removed. The cushioning effect of these legislative provisions do not encourage a hard-line approach to investment, as whatever happens, the land will be safe and remain in Maori ownership, albeit with encumbrances.

(3) Majority Shareholdings

The majority shareholding in a company carries with it the premium of control. Control in a major public company is power in the sense that there is a high probability that one will carry out one's will despite any resistance. Birk and Means,[18] in their exceptional economic analysis of large corporations described five different types of control,

(1) control through almost complete ownership
(2) majority control
(3) control through legal devices without majority ownership
(4) minority control
(5) management control.

The control of a corporation rests on the ability to attract sufficient votes at general meetings, particularly annual general meetings. From the converse view, it can mean that no other shareholding is large enough to hold the majority of votes. Control must be regarded as a concept which is difficult to pin down, it has been described as a relative concept, dependent on what purpose it is being used for. Whatever its precise nature, there is no doubt that in large corporations, some control is essential as it ensures that the executive officers of a company and its directors concur with the objectives of the company and strive to achieve the objectives.[19]

Control in the Maori incorporation is even more nebulous. It is not likely to rest in the hands of shareholders who have achieved their majority holding as a result of outstanding success. Rather, majority shareholders have inherited their large holdings, and there is no relationship to ability or knowledge of commercial principles. Family rivalries can often underlay competition for control and in some incorporations any profit making potential of the land has been ignored so that old scores can be settled. The committee's of management which control incorporation's business, have been varied in performance.

COMMITTEES OF MANAGEMENT

The procedure for appointment of company directors is set out in the articles of association. It is usual that the first directors are appointed by subscribers to the memorandum of association, and thereafter by shareholders in a general meeting.[19a] Section 184 of the Companies Act 1955 sets out the conditions which must be satisfied before an appointment of a director can be valid. The general functions of the directors is not dealt with in the statute and the law commission in its proposals to reform company law suggests that the Companies Act should specifically require the directors to manage the business of the company. The Preliminary

Paper on Company Law released by the Law Commission notes that in large companies the directors do not manage the company and may not even exercise effective supervision.[19b]

The Maori incorporations are managed by a committee of management who are usually members, nominated on behalf of the owners. It is not necessary that the person elected or appointed be a shareholder in the incorporation.[19c] The steps are quite different from that of a company, with the Maori land court taking a supervisory role.

By way of clarification, the steps for appointment or election to a Maori incorporation are illustrated in diagrammatic form in Table 5.

In 1940 Sir Apirana Ngata who is widely credited as the architect of Maori incorporations, described the role of the committee of management. He said;

> The system known as incorporation of native land owners is in effect an adaptation of the tribal system, the hierarchy of chiefs being represented by a committee of management.

The committee of management occupies a pivotal role in the affairs of the incorporation, and the success or failure of the Maori land based enterprise can depend upon whether the committee is indeed a hierarchy of chiefs who exhibit the required leadership ability.

Section 52 of the 1967 Amendment. The Maori land court appoints a Committee of Management consisting of not less than 3 and not more than 7 members for a term of three years.[20] The Maori Land Court has a discretion to appoint people elected to be a member of the committee of management or may if sufficient cause so shown, refuse to appoint a person elected.[21]

In re The Committee of Management of the Proprietors of Mangatu

COMMITTEES OF MANAGEMENT

NOMINATION OF MEMBERS BY ELECTION OF OWNERS SECTION 52 (1)

MEMBERS MAY OR MAY NOT BE OWNERS SECTION 53 (1)

MAORI LAND COURT MAKES APPOINT TO COMMITTEE OF MANAGEMENT S.52 (1)

3 - 7 MEMBERS

COURT MAY REFUSE TO APPOINT ELECTED MEMBER S.52 (4)

COURT MAY APPOINT ANY QUALIFIED PERSON S.52 (5)

MAORI LAND COURT MAY REMOVE FROM OFFICE ANY MEMBER OF COMMITTEE OF MANAGEMENT S.53 (4)

MAORI LAND COURT MAY APPOINT EXAMINING OFFICERS TO INVESTIGATE AFFAIRS OF INCORPORATION. S.61

DIAGRAM 3; THE MAORI LAND COURT ROLE IN APPOINTMENT OF COMMITTEES OF MANAGEMENT, REMOVAL AND SUPERVISION.

No's 1, 3, 4 Blocks Incorporated,[22] a case was stated to the Supreme Court on the grounds on which a Maori Land Court can refuse to confirm the election of a committee of management. The provision in the statute then was identical to the present provision. The Court could refuse to make an order confiriming appointment, "if sufficient cause was shown". Hutchinson J examined the section and phrse carefully and concluded,[23]

> These words are wide and unqualified. Whether sufficient cause is shown in a question for the Maori Land Court. I see in those words, on the face of them, nothing restrictive, nothing that confines the court to any particular cause, nothing that disqualifies it from refusing to confirm an election on any grounds that it holds sufficient.

Like companies, incorporations experience crises of management. The impasse in a company that results is resolved by internal action to remove the source of trouble and only in extreme cases by litigation. Matters are more problematic in an incorporation where a sense of corporate identity is forged from descent, and to a lesser extent marriage. Shares represent kinship bonds. Tension between rival family groups is not uncommon in incorporations, these rivalries being articulated through the families spokesperson on the committee of management.

The level of skill required to manage such large enterprises is high and a failure to co-operate can be costly from the incorporations point of view. The Mangatu Block Incorporation from 1950 for a ten year period experienced a protracted series of litigations as a result of disputes over appointments to the committee of management. The struggle was between two main groups of owners who wanted to achieve dominance. Much quarrelling, dissention and litigation was the result.[24]

In re Waihirere and Waihirere No. 2 Inc. Te Ua v Halbert,[25] an application was made for removal of members of the committee of management and the appointment of others to replace them. This was an appeal against the decision of the Maori Land Court. It was held that the Court has complete control over the appointment of committees of management. In this case it was apparent that the chairman and secretary of the incorporation had been inefficient and even dishonest. The administration costs were excessively high, with substantial payments to the chairman and gifts to selected persons. The order made by the Maori Land Court removing the members of the committee of management was affirmed. The Maori Land Court was able to appoint the new members as the court had sufficient knowledge of various lands and incorporations and the character and ability of many of the persons involved with them, by reason of the work of the court in dealing with applications.

In Re Proprietors of Te Hapua 42 Incorporated, Murupaenga,[26] was an appeal to the Maori Appellate Court against a decision of the Maori Land Court which refused to appoint a solicitor who had been elected and another person was appointed by the Court instead. The committee of management had resigned in 1971 and in that same year the Maori Land Court had appointed an examining officer to look into the incorporations affairs under Section 61 of the Amendment Act. The Maori Land Court considered that factions on the committee of management had caused the problems, the solicitor concerned represented one faction only and the committee of management must act in the interests of the owners as a whole. The solicitor was not given a proper hearing and the Appellate Court went on to consider whether a rehearing was appropriate or whether the applicant should be appointed to the committee. The Court held that on all the evidence available to it, the applicant should be appointed.

The Court may refuse to appoint members to a committee of management if an election had not been conducted in accordance with the law. A proxy vote in Re the Proprietors of Tahora 2 C 1 Section 3 Inc,[27] was crucial to achieve a majority as there was clear support for alternate nominees from the majority of these present in person at an annual general meeting. The issue of proxy voting was examined by the Maori Land Court and it was held that proxy votes were not invalid if they were incorrectly dated.

It is apparent that there is considerable cultural and kinship obligations on members of committees of management who must meet kinship expectations often at the cost of business efficiency.

Not all incorporations are divided by factionalism. The more successful present a united front with a clear acceptance of business principles. Puketapu 3A Block is renown for its extraordinary success with major developments in the timber milling and then the farming industry. The committee of management of Puketapu 3A Block were described as a group of men who had

> Wide experience in administrative and secretarial work, or have responsible posts in bushwork or are experienced farmers.[28]

The factionalism which almost destroyed the Mangatu Blocks incorporation has now disappeared and the incorporation is extremely successful. In 1985 the committee

of management recommended a dividend of 36 cents per share or a total of $317,376.[29]

The outlook for the farming industry is not optimistic. The prices for exports have dropped, farm support prices, incentives and subsidies have been removed. The need to ensure high liquidity and a light debt ratio is very important when major challenges lie ahead for committees of management.

As we have discussed earlier Maori management has been criticised for its lack of ability. A. Paul,[30] claimed in his report that the requirement that there be consent by the Maori Land Court before committees of management are appointed, is recognition of the lack of management ability. He described the situation graphically in the following way,[31]

BUSINESS AND INDUSTRY DECISIONS MADE BY PAKEHA

MAORI'S FOLLOW

It is submitted that it is desirable that the overseeing role of the Maori Land Court is essential for a kinship-based organisation of such a diverse nature as an incorporation. The Maori Land Court has moved from a paternalistic role in management matters to a more inquisitorial role which allows all matters to be explored and discussed, and removes the potential for future conflict on the part of the committee of management.

It is further submitted that A. Paul's analysis of the failure of Maori to control the Pakeha dominated business world, is not correct and fails to recognise the major cultural differences underlying the two systems. As we have seen, it is difficult to generalise about management abilities in incorporations (or Section 438 trusts). Each incorporation or trust must be looked at separately for the individuals who make up a committee of management are the crucial factors in business success. At the same time it is acknowledged that a kinship-based system will inevitably mean that selection processes are different and the result may not mean that management efficiency is at a premium.

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(1) [1923] AC 7444 @ 767

(2) Law Commission Preliminary Paper No. 5
Company Law A Discussion Paper (1987) Page 21

(3) Section 31(2) Maori Affairs Amendment Act 1967.

(4) Section 32(1) Maori Affairs Amendment Act 1967.

(5) Section 32(2) Maori Affairs Amendment Act 1967.

(6) Section 32(3) Maori Affairs Amendment Act 1967.

(7) Section 32(4) Maori Affairs Amendment Act 1967.

(8) Section 32(5) Maori Affairs Amendment Act 1967.

(9) Section 32(6) Maori Affairs Amendment Act 1967.

(10) Section 32(7) Maori Affairs Amendment Act 1967.

(11) Section 33 Maori Affairs Amendment Act 1967.

(12) Section 33(2) Maori Affairs Amendment Act 1967.

(13) Section 37A Maori Affairs Amendment Act 1967.

(14) Section 41(2) Maori Affairs Amendment Act 1967.

(15) Clause 270 Maori Affairs Bill

(16) Farrar & Russell Company Law & Securities Regulation in NZ (Butterworths, Wellington 1985)

(17) Section 41(5)

(18) The Modern Corporation and Private Property ibid.

(19) Farrar & Russell Page 281

(19a) Table A. Article 75, Articles 89 - 97

(19b) Preliminary Paper No. 5 Company Law, A Discussion Paper. Law Commission (1987 Wellington, NZ)
Paras 171 - 172.

(19c) Section 53(1) Maori Affairs Amendment Act 1967

(20) Section 54(1) Maori Affairs Amendment Act 1967

(21) Section 52(4) Maori Affairs Amendment Act 1967

(22) [1954] NZLR 624

(23) (a) 627

(24) In re Mangatu 1, 2 & 4 Inc. Te Va v Hooper & Ors.
(1960) 29 Gisborne ACMB 287

(25) (1960) 29 Gisborne ACMB 271

(26) (1972) 2 Tokerau ACMB 71

(27) (1962) 66 Wairoa MB 83

(28) The Tribe That Made A Million
e.g. Schwimmer, Te Ao Hou Vol. 9

(29) The Proprietors of the Mangatu Blocks
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(30) A. Paul. The Future Role of Maori Economic Authorities July 1985
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(31) Ibid. Page 20.

CHAPTER 7

MAORI AFFAIRS ACT 1958 - SECTION 438

The Section 438 trust is a statutory application of the trust concept. It is a unique legislative solution to the problems of Maori land ownership. As we have seen, Maori land is multiple-owned land. With succession of the land to family members on an equal share basis, an inevitable result has been fragmentation of shares in the land. The administrative problems presented by multiple owned Maori land are enormous. The Section 438 trust has been designed to provide a flexible solution to land utilisation when the land has many owners, some of whom are absent.

The trust concept illustrates the wide range of situations to which it can be applied. As Roxburgh, J., has observed:

> As the principles of equity permeate the complications of modern life, the nature and variety of trust forever grow.[1]

Definition of Section 438 Trust

A Section 438 trust is constituted by an order of the Maori Land Court. An application must be made by representatives of the owners, or the court can exercise its discretion and on its own motion establish a trust.[2] A trust requires Maori freehold land, customary land or general land owned by Maoris[3] and this comprises the trust property which is held in trust for the person's beneficially entitled to the land in proportion to their respective interests in the land.[4]

Even a cursory examination of a Section 438 trust reveals features which differ from the usual intervivos trust. The fundamental qualities of a trust remain. Underhill's definition[5] of a trust describes the essentials of a trust as an equitable obligation which binds the trustees to deal with the property over which he or she has control for the beneficiaries or cestuis que trust. The Section 438 trustees have an equitable obligation to deal with their trust property, comprised of Maori land, for the beneficiaries who are owners of the land or descendants of owners of the land.

Expansion of Section 438 Trusts

The Maori Land Court itself has been open in promoting the formation of Section 438 trusts as the most appropriate means of land management.[6]

The flexibility of the trust means that it can be tailored to fit the circumstances of the land and the wishes of the owners. The combination of a discretionary power to create a trust and the wide range of purposes to which the trust order can be made to fit has meant that the Maori Land Court has had many appeals made against its decisions. The appeal decisions are useful in that the boundaries of Section 438 trusts have been carefully drawn.

In Hereaka v Prichard,[7] a decision of the Court of Appeal, the submission made by the appellant's counsel, Cooke, Q.C. (as he was then) agreed that the issue before the Court was the interpretation of Section 438(8) and then went on to say:

> There has been growing up in the Maori Land Court a disposition to use Section 438 for purposes for which it was not intended.[8]

The case concerned Maori Land which was subdivided for sale. An order was made by the Maori Land Court creating recreation reserves under Section 438. North, P. examined the Maori Affairs Act 1953 and agreed with the Court at first instance that there was no reference in any of the partition sections to the need to create recreation reserves. North, P. went on to say:

> To achieve its purpose, then, the Maori Land Court had to look elsewhere for the necessary authority, and it came to the conclusion that it could invoke the powers contained in Section 438.[9]

It was held that the Court did not have the authority to use Section 438 to transfer lands to a local authority for reserves.

Conflicting authority has developed as to the independence of Section 438 from other parts of the Maori Affairs Act.

In Albert v Nicholson,[10] Wilson, J., in the High Court described the argument before him as a question of whether Section 438 was independent of procedures under other parts of the Act. Alternatively, was the Section ancilliary to those other procedures in the Act. The Chief Judge of the Maori Land Court in Re Poole and Horowhenua 9A6B,[11] reached another conclusion following a different line of rea-

soning. In that case the Chief Judge relied on the inherent discretion of the Maori Land Court to make a Section 438 trust order. He reached the conclusion that when the court exercises its discretion it could have regard to, but not be bound by, the purpose and principles underlying other procedures and provisions of the Maori Affairs Act.

It is submitted that Re Poole is the correct interpretation of the section; the discretion of the Maori Land Court is of overriding importance in the section and in the Act. To deny reference to other parts of the Act is to limit the exercise of that discretion. The Court can also make amendments to the trust deed so that changed circumstances can be taken into account.[12] The trustees can be added to or reduced or replaced,[13] the terms of the trust can be varied,[14] and the trust can be terminated whether for all of the land or a portion of the land.[15] The Court has indicated that it will not exercise its discretion to vary a trust lightly.[16] The ability to alter the terms of the trust order has been an incentive to make an application to the Court under the section.

The steady growth in the popularity of Section 438 Trusts has also been because the trust concept is one which is very acceptable to Maori landowners, the status of the land remaining unaltered. The owners retain their interest in the land rather than in the more abstract shares in an incorporation, which are defined as "personality" in legal terms.[17] The significance of this distinction to the Maori should not be underestimated. The Maori culture that places great emphasis on having turangawaewae or "a place to stand" the ability to identify a particular piece of land as belonging to a particular person is highly significant. The retention of original land as a trust property is no usual. It is more common that a trust is created in which the trust property is pure personality. Trust funds are transferred to trustees who hold them on trust for persons or purposes intended to benefit from that trust.

Land presents more difficulties in that a sole beneficiary must be entitled to the whole equitable interest. Section 438 creates a trust for several beneficiaries who are entitled to the equitable interest proportionate to their shareholding. The trustees do have power to alienate land.[19] It is submitted that on the exercise of the power of sale of the corpus of the trust property, then the trust must be comprised of personality not reality, if the proceeds of sale are retained as a trust fund and income from rents and profits distributed to the beneficiaries.

A Section 438 trust is regarded by the Maori Land Court as being more appropriate than an incorporation, being considerably easier to administer. In many instances Maori incorporations are impossible because of the rigid statutory criteria required before they can be established. In particular, a meeting of assembled owners presents insuperable barriers as notice of the meeting cannot be given to absent owners of fractional interests.

The Maori Land Court has declared its favourable attitude to Section 438 Trusts as a sensible solution to the problems created by multiple ownership. Judge Russell sitting in the Maori Appellate Court has declared:

> It would be difficult to imagine any circumstances in which a Section 438 Trust would not be desirable.

Judge Russell draws the analogy of a urban section of land with a house on it. He says it is a much better alternative to have the house vested in a trustee with the power to grant a tenancy to a person agreed upon by the other owners. The trustee would ensure that the house is maintained and insured and tenanted. By contrast, to leave the land in ever increasing multiple ownership,

> With every owner having the right to occupy the house and no-one having any obligation to insure and maintain it is the best way of ensuring that it disappears in the shortest time possible.[20]

It has been argued that the evils of fragmentation have been exaggerated by those who perceive the world in Western terms, rather than in the spiritual sense of the Maori. Nonetheless, land tenure is a significant consideration when land use demands considerable investment in planning and development. Unproductive Maori holdings are not such an immense problem in New Zealand as they have commonly been believed to be as Maori land is such a small proportion of the total land holding.[21] The emphasis on productivity of all land was misused politically, in that it became grounds for increased alienation of Maori land to Europeans.

The concept of uneconomic interests was introduced by the Maori Affairs Act 1953. Section 137(3) of the Act defined "uneconomic interest" to mean a beneficial freehold interest the value of which, in the opinion, of the Court does not exceed the sum of $25". No beneficiary was able to take on uneconomic interest unless specific circumstances applied. The Maori Trustee purchased these interests. The 1974 amendment altered the law substantially and repealed the provisions which vested land compulsory in the Maori Trustee if they were uneconomic.[22] Individualisation of

the title has been seen as something of a mixed blessing by many commentators who believe that if the traditional restraints were preserved, in particular the need "to keep the fires of occupation burning", then none of the present difficulties would arise.

The wide acceptability of the trust concept by Maori land owners today and the Maori Land Court has been acknowledged by the Maori Affairs Bill which provides for considerable expansion of the concept. The commentary on the Bill acknowledges the trust as the most approximate organisation to the Maori concept of "rangatiratanga" or evidence of chiefly breeding and greatness by Maori leaders which encouraged concern for the welfare of all members of the tribe. Ownership of large amounts of land was not a prized quality of chiefs in traditional society. Position in the descent group, intelligence, leadership and courage in battle were much more valued. The trust provides a means of expressing leadership talents by "the wise administration of all the assets possessed by a group for the group's benefit."[23] The numbers of trust orders made have expanded considereably since 1961, and can be shown in the table below.[24]

Numbers of Orders Under Section 438
Made by Maori Land Court Since 1961

Year	No.	Year	No.	Year	No.	Year	No.	Year	No.
1962	84	1966	319	1970	491	1974	316	1978	432
1963	62	1967	262	1971	570	1975	272	1979	688
1964	228	1968	241	1972	363	1976	361		
1965	373	1969	331	1973	435	1977	4250		

The acceptance of trusts set up under Section 438 is encouraging for it indicates an increasing willingness to utilise land in a form well-suited to multiple ownership. The expansion of the Section 438 Trust has not been without some criticism and the expertise of the Maori Land Court to make the sorts of complex orders required for major land-holding enterprises has been questioned.

The Purpose of Section 438

The purpose of the Section 438 Trust is described clearly in the legislation. Section 438(1) begins with the words:

> For the purpose of facilitating the use, management or alienation of any Maori freehold land, or any customary land or any general land owned by Maoris.

The wording has been taken to mean the better use and management of Maori land, all statutes being remedial. The existing method of managing the land must be inadequate.

In re Tahoraiti 1B Ratima Estate v Waitai[25] Chief Judge Durie described the intention of the Section as promoting better land utilisation, facilitating maximum owner involvement in land management and effectuating owner decisions for maximising land use. The Judge concluded that the appeal should be dismissed as it was not an

appropriate use of the Section, but was a device to enable sale of the land in question.

The result of a trust order in this case would have been the disposition of individual interests rather than the use, management or alienation of Maori land. The applicants did not meet the requirements of Section 213 of the Maori Affairs Act 1953 which insists that vesting orders made by the court are made in favour of particular persons. The application was an attempt to achieve the sale of the two major land owners who wanted to sell to an adjoining landowner interests in the Tahoraiti 1B Block.

On the other hand, applications which would achieve the desired purposes and promote better management of the land can fail. The need for better management of the land in Re Murihiku Lands and Ngaitahu Maori Trust Board[26] was pressing. The Ngaitahu Trust Board endeavoured to have a Section 438 Trust declared for a large area of scattered lands in Southland. The geographical spread of the lands at issue was equalled by the diversity of uses that the land was put to. The diversity of land use was a result of the geographical spread, the land being situated in remote and inaccessible areas of Southland and in residential areas. The land comprised indigenous stands of timber, pastoral farmland, urban land, and and "on which only the hardiest bread of opposum and deer could survive".[27] In all, the decision involved over 300 different blocks of land over 35,000 hectares in area, which were to come under the umbrella of a single Section 438 Trust.

In the Maori Land Court, Judge M.C. Smith rejected the proposal by exercising his discretion and refused to make the order sought after considering all the evidence. The main reason for dismissing the proposal in the Maori Land Court was that its magnitude meant that trust income would not be distinguished but would be pooled into a collective fund. He commented that in fact what was sought was 397 trust orders, "one in respect of each of the 397 titles affected." An exploratory or caretaker trust would not be objectionable, but the receipt of income for distribution meant:

> Monies derived from the land on one title cannot, without the consent of all the persons entitled, be applied by the trustees for the benefit of the owners in any other title.[28]

In the Maori Appellate Court, in his dissenting judgment, Judge Russell concluded:

> A project of this magnitude cannot be accomplished with one stroke of the pen.[28]

But he believed that this did not prevent the Appellate Court making orders which were directional and in stages. He thought that the Board's proposal had only come to the first stage, the formation of a trust proposal and consultation with owners enabling the Board to conduct a preliminary investigation of the lands, followed by an investigation and report and then the issuing of a final trust order. Judge Russell declared:

> The only limits to Section 438 Trusts are the limits to the ingenuity of the Judges of the Maori Land Court and those making applications to them.[29]

After a careful examination of the history of the Section, Judge Russell concluded that the jurisdiction of the court had been considerably enlarged by the 1967 amendment which promotes the use, management, or alienation of the land. The only test is contained in those words and:

> As long as the order passes this new test the Court can continue to make any sort of order that it considers appropriate.[30]

It is submitted that Judge Russell has failed to convincingly answer the legal difficulties which were identified by his fellow judges in the Maori Appellate Court. The deficiencies in the draft order presented to the court were the failure to clearly identify blocks of land and individual shareholders interests in that land as separate trust property. A composite financial account would apply to all the blocks collectively and the intention of the Ngaitahu Trust Board was to:

> Set up a single administration in which the larger or more potentially valuable blocks could shelter or make economically viable the smaller and non-productive areas.[31]

All the beneficiaries to the trust must consent to a proposal of this nature. The submission made on behalf of the respondent argued the unfairness and impropriety of taking funds from a profitable block of land and pouring it into "a bottomless pit" of undeveloped land, many miles away in separate ownership. Although not adopting the counsel's language, the majority of the judges substantially agreed with his opinion and dismissed the appeal.

The decision reveals the limitations of Section 438 Trust orders. The court's guidelines mean that individual trusts will need to be established for each block of land rather than an amalgamation under one trust order of several blocks of land. The scope of Section 438 has been more precisely determined as a result.[32]

Consultation with Owners

A major principle of Section 438 Trusts is that the owners be consulted and some agreement reached by the owners present at a public meeting before the proposed trust order comes to the Maori Land Court for consideration. The court must be satisfied that, as far as is practicable, the owners of the land have been given a reasonable opportunity to express their opinion about those proposed to be appointed as a trustee or trustees.[33] The difficulties of multiple ownership and succession orders which may not have been made against titles to land, outdated addresses, a range of names not commonly used and differing descriptions of the individual owners, mean that, the difficulties in obtaining consensus are immense.

The Maori Land Court requires evidence to show that every effort has been made to locate owners. Consent of owners is not as imperative as notice and opportunity to be heard.

The North Island Tenths is a large Wellington and Palmerston North based trust with a rich history, the trust property being derived from a negotiated sale with Governor Grey in 1840. It was agreed that one-tenth of the land sold would be returned to the owners in consideration of the sale. A fraction of the one-tenth land area was returned and is held under the Maori Reserved Land Act 1955. The land is immensely valuable but held in 21 year leases with perpetual rights of renewal. The sale of such leases in Wellington now fetch huge sums of money because the ground rents were set at a very conservative level and the lessee had the right to occupy the sites forever.

The decision, Re The North Island Tenths,[34] was an application by the owners to form a Section 438 Trust as this was the most advantageous form of administration. A Section 438 Trust would enable the land to be transferred from the administrative control of the Maori Trustee to the owners. The Maori Trustees pointed out:

> A trust would ensure that the individual owners relationship with the land would endure; that trustees appointed under a wide-powered trust would have authority and latitude to take advantage of investment and development opportunities.[35]

The scale of the difficulties in obtaining a consensus can be appreciated when it is realised that at the time of the Court hearing in 1985 there were 1185 owners hold-

ing between them in unequal shares, 182929.681 shares. The shares were valued at $15.90 per share as at 31 March 1977.[36]

Evidence of meetings by owners was called on two occasions by the Maori Land Court. The Maori Trustee established to the satisfaction of the Court that all the owners whose addresses were known were written to. Varying numbers of owners attended at the meetings called by the Maori Trustee, but the largest attendance was approximately eighty owners.

Judge McHugh in the Maori Land Court determined:

> There has been adequate consultation with the owners in terms of the requirements of Section 438 of the Maori Affairs Act 1953.[37]

The low percentage of owners who attend meetings would tend to show a high degree of shareholder apathy, or alternatively, considerable shareholder satisfaction with the proposed management by a trust.

The requirement of notice requires extensive steps on the part of the applicant. In Re Waiwhariki 1D1B and Noel,[38] the appellant was a major owner in one of the three blocks which had been constituted a Section 438 Trust on the application of the Maori Trustee. The Maori Land Court had given directions for service including individual service, display of notice in eight Post Offices and display in other places in the district. The appellant appealed against the order in respect of one of the blocks involved, claiming that he had no notice of the application. His appeal was successful as the terms of the directions for service had not been complied with. No individual notices had been issued to owners and it was held that there was insufficient enquiry as to the whereabouts of owners in the three blocks.

The Waiwhariki case establishes the importance of notice and the necessity to make extensive inquiry as to the whereabouts of owners. It is detrimental to the future of a Section 438 Trust if a particular form of organisation and management by court-appointed trustees were to be imposed by a minority decision against the tide of invisible opinion. A small but vocal minority who are dissatisfied with the management decisions made can have a deeply divisive effect on a Section 438 Trust. The traditional approach to decision making is preferred. It is submitted that the applicants for a trust order who ignore the requirements for notice and who do not make a serious attempt to contact all those affected by the making of the order, face a stormy path

ahead. Support is much more likely to be achieved if the consultation process has been undertaken in the traditional way. Any differences of opinion are sorted out in an open meeting which can last for many hours. The venue is usually a marae and the marae protocol, which is an essential part of such visits, must be observed. The decision-making process may be costly in terms of time and money but it will ensure that a smoother way lies ahead. It is further submitted that it is essential to include those owners who would prefer to attend a more formal meeting in more accessible locations, particularly urban marae. In a structured meeting there is less risk of serious dissention, but owners must be given the opportunity to be heard and to participate if the goals of autonomy and self-determination will ever be achieved.

REFERENCES

(1) Re A Solicitor [1952] Ch. 328 @ pp. 136, 332.

(2) Section 438(2) Maori Affairs Act 1953.

(3) Section 438(1).

(4) Section 438(10).

(5) Underhill's Law of Trusts and Trustees, p. 3, (12th Ed.).

(6) Report of the Royal Commission of Inquiry: The Maori Land Courts Chairman, T.P.McCarthy, 1980, page 27, para. 30.

(7) [1967] NZLR 18.

(8) Ibid @ 19.

(9) Ibid @ 27.

(10) [1976] 2NZLR 624.

(11) Maori Appellate Court, Levin, 29 July 1981 (1980/3).

(12) Section 438(3).

(13) Section 438(3)(a).

(14) Section 438(3)(b).

(15) Section 438(3)(c).

(16) In Re Waitahanui Forestry Trust (1975) 53 Taupo MB 18 Alexander v Maori Appellate Court [1979] 2NZLR 56.

(17) In Re Hautu 53 2B2 R. Whatapuhou v Trustees (1962) 12 Whangaui MB 107.

(18) P.H. Pettit Equity and the Law of Trusts (London, Butterworths, 1979, 4th Edition), page 14.

(19) In Re Tahoraiti 1B Ratima Estate v Waitai (1981) 9 Ikaroa ACMB 190.

(20) In Re Ngaitahu Trust Board Gisborne, 1 October 1982 Appeal 1981/5.

(21) G. Rosenburg 'Maori Land Tenure and Land Use "A Planners Point of View', P.S.J. Vol. 75, '966, p. 210-222.

(22) The Maori Affairs Amendment Bill 1974, 1974, R.L. 260.

(23) Commentary, Maori Affairs Bill.

(24) Ibid, Report of Royal Commission of Inquiry: The Maori Land Courts, page 26, para. 26.

(25) (1981) 9 Ikaroa ACMB 190.

(26) Appeal at Invercargill 15, 16 June 1982. Delivered Gisborne 1 October 1982.

(27) Application - Maori Land Court, Palmerston North 29 May 1981, p. 1.

(28) Ibid, page 5 - appeal decision.

(29) Ibid, page 10.

(30) Ibid, page 33.

(31) Ibid, page 8.

(32) P.G. McHugh, Trusts for the Utilisation of Maori Land in Multiple Ownership, NZULR Vol. 10, 1983 @ 341-361.

(33) Section 438(1), Maori Affairs Act 1953.

(34) 88 Otaki Minute Book, 72-104.

(35) Ibid, p. 1 of the judgment.

(36) Supra, para. 2.3.

(37) Supra, para. 7.5.

(38) (1964) 1 Auckland ACMB 213.

CHAPTER 8

MANAGEMENT OF SECTION 438 TRUSTS

The Maori Land Court declares a Section 438 Trust by first, making an order vesting the land in any person or persons with their consent, and, second, making a separate trust order. The lands are declared subject to the trust declared by the Court.[1] That order cannot be registered under the Land Transfer Act 1952. The Court has a wide discretion in making the trust order and is able to confer on the trustees such powers as it thinks fit. Unless expressly restricted the trustees have all the powers and authorities as are necessary for the effective performance of the trust.[2] The steps required for the formation of a Section 438 trust are illustrated in Diagram 4.

In Re Maraehako (C30) and Smith,[3] partition orders of the Maori Land Court which were issued "in terms of the will of Hamiora Hei deceased" were sought to be varied as the order contravened Section 128 of the Land Transfer Act 1952. The Maori Land Court varied the orders accordingly and the decision was appealed to the Maori Appellate Court. It was held that an order be rectified if orders were erroneously drawn so that they were uncapable of registration. A Section 438 Trust was not an appropriate order for the administration of an estate which was the subject of the dispute in this case. Accordingly, the Section 438 orders were cancelled.

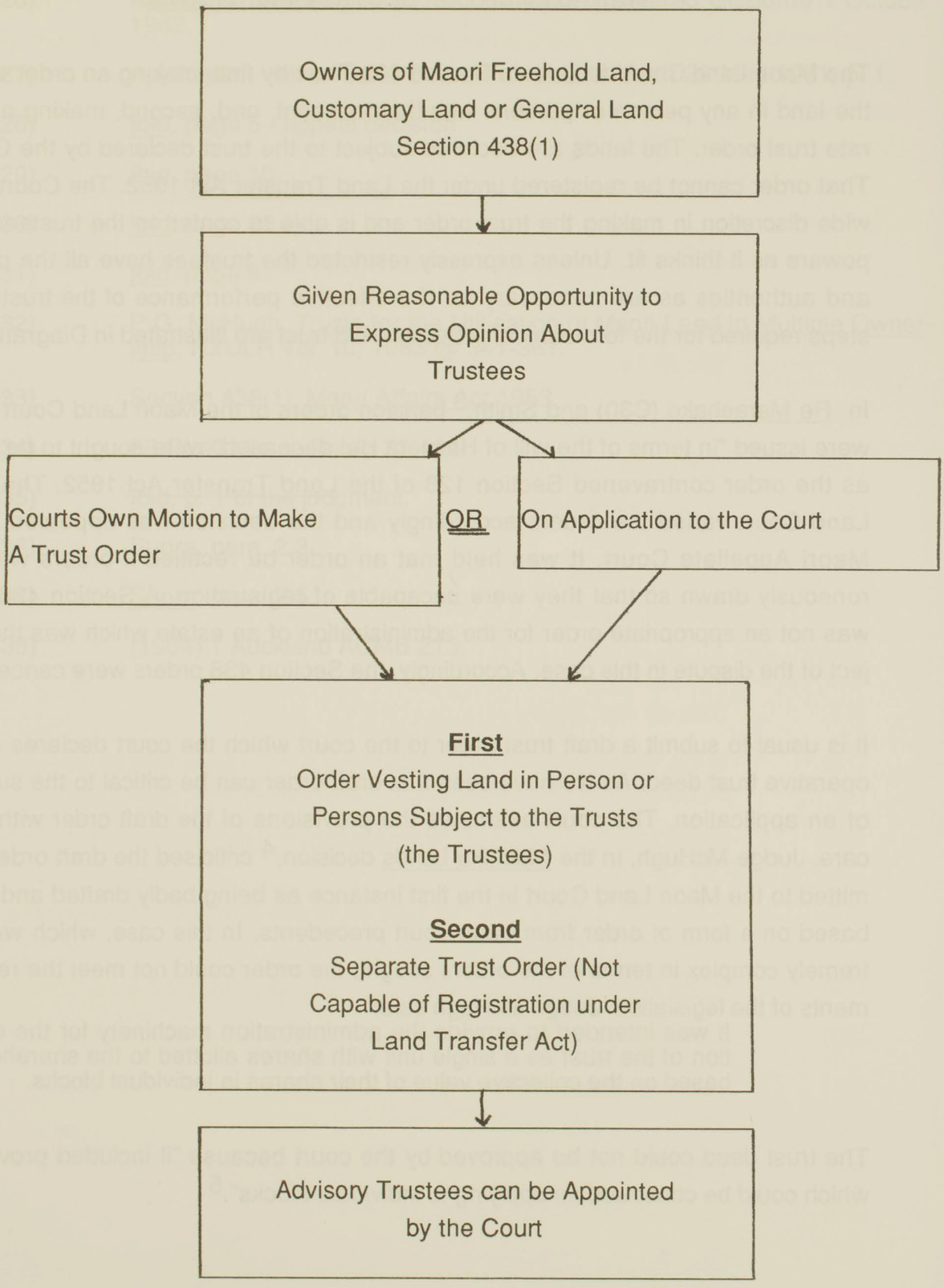
It is usual to submit a draft trust order to the court which the court declares as the operative trust deed. As we have seen that draft order can be critical to the success of an application. The court examines the provisions of the draft order with great care. Judge McHugh, in the Murihiku Lands decision,[4] criticised the draft order submitted to the Maori Land Court in the first instance as being badly drafted and being based on a form of order from other court precedents. In this case, which was extremely complex in terms of the orders sought, the order could not meet the requirements of the legislation. Judge McHugh said:

> It was intended to provide the administration machinery for the operation of the trust as a single unit with shares allotted to the shareholders based on the collective value of their shares in individual blocks.

The trust deed could not be approved by the court because "it included provisions which could be construed as applying to individual blocks".[5]

DIAGRAM 4

STEPS IN FORMATION OF SECTION 438 TRUSTS



The court is able to appoint advisory trustees who act with the trustees of the trust.[6] It is usual to appoint an advisory trustee or a custodian trustee who is responsible for the administration of the trust including investment, accounting, effecting distribution, advising, and calling meetings of beneficial owners under the directions of the managing trustees.

In Re Waitahanui Stream Reserves Trust,[7] Maori land with numerous owners bordered the Waitahanui Stream, internationally renowned for trout fishing. In 1970 the lands were vested in a trustee insurance company pursuant to Section 438. In 1972 some of the owners were appointed as advisory trustees. In 1973 a meeting of beneficial owners resolved that a local Maori Trust Board be appointed to replace the insurance company as trustee. The company concerned had negotiated a sale of the lands in question, but could not conclude an agreement without further directions from the court.

It was held that the court would not replace a trustee without good cause. A meeting of beneficial owners is not sufficient cause. Trustees must adhere to the terms of their trust, beneficiaries should not incur additional administrative costs because of changes, and outsiders who are entitled to expect that the administration will not change without substantial cause.

It is submitted that the decision would have been decided differently if the beneficial owners had taken greater care in giving notice and arranging public meetings over a longer period, so that the process of consultation was unimpeachable.

Limitations for Commercial Enterprises

Is the trust organisation, with the close scrutiny and continuing supervision of the Maori Land Court, the most appropriate form of organisation for the large commercial enterprises being at present undertaken by some Section 438 Trusts.

Together, the legal requirements of trusts and the Maori Land Courts jurisdiction make a formidable protective armoury. Whether such protection is necessary or even sensible in the commercial sense is increasingly debated in Maori circles. We

will explore some of the issues which we will argue imposes restrictions on commercial development of Maori land assets.

The trust order and trusts in general

Section 438 trusts are specific to the land to which the orders apply. Trust orders may be made for specific purposes, for example to subdivide and sell the land. In Re Waimana 266C2 and Maori Trustee,[8] it was held that an order to subdivide and sell is not inconsistent with use, management, or alienation.

The fundamental principles of all trusts is that a trustee must faithfully observe the directions given in the trust instrument. The court cannot, as a rule, sanction any deviation from the trust instrument by the trustees. There must be clear authorisation of the trustees acts in reference to the trust estate.[9] The only true exception is that if the beneficiaries, being of full age and capacity, act together they can consent to what would otherwise be a breach of trust and free the trustees from any liability.[10] The consent must be free, be informed, and given by a person who is not an infant or under a disability. The high standard required almost ensures that in the case of Maori land, the beneficiaries would not consent to any breach of trust, such general consent being impossible to achieve.

It is essential that the trust order be framed widely enough so that all the potential requirements are contained within it. Nonetheless difficulties can still occur.

Re Rangitaiki 2952B2B3F2 Pahunui,[11] had 18 owners. A partition order was refused and the Maori Land Court on its own motion vested the land in the Maori Trustee under a Section 438 Trust to lease and accumulate rentals to meet the costs of future subdivision of the land. There were no difficulties with the trust instrument in this case, but there were problems with establishment of a trust order. On appeal it was held that partition was more appropriate. The establishment of a trust was not objectionable but the provisions as to the accumulation of rents for future subdivision of the land were. The Court considered that the owners should have enjoyment in their lifetimes of the revenue to which they were entitled as they were elderly, in impoverished circumstances and two of them were in bad health.

Major commercial enterprises, which are now being undertaken by Section 438 trusts, may find that their activities are not covered with sufficient precision in a trust order. The scale of some operations is large. Rising Maori unemployment has pro-

vided an incentive to enter into new developments in an effort to achieve financial independence.

The strong social motivation of providing employment for rural Maori youth can be an additional pressure on trustees. The pressure to provide employment leads to business failure when resources are stretched to impossible levels to meet social objectives rather than profit-making goals.

The level of government funding has been high with loans reasonably easy to obtain. In 1986 the Rotorua office of Maori Affairs had $17 million loaned out on rural loans with the total loans for development and housing in the vicinity of $43 million. Horticultural ventures have been assisted considerably, with 49 schemes in the Tauranga area assisted with $10.3 million of government funding. Economic advancement has been achieved with the attendant risks.[12] It is likely that trust deeds will be examined much more carefully in the future to see whether or not trustees have exceeded their powers if trusts become insolvent. Maori land is a security which requires particular procedures if it is to be alienated, and even the Official Assignee is restricted by provisions requiring the confirmation of the Maori Land Court before alienation.[13]

The trustees must ensure that they are not acting ultra vires the trust order or exceeding the powers that they are given by the order. The prudent trustee would be in order to seek directions from the Maori Land Court if in doubt.

A variation of an order may not be necessarily be given. In Re Waitahanui Forestry Trust,[14] the court declined to vary the trust order so that lands could be leased to a company:

> A court direction to a trustee to execute a precisely spelt out contract might affect the rights of interested parties to proceedings under the general law not reasonably contemplated when the orders were made.

In any case the delay in seeking variation of orders is an additional obstacle. If the variation is a significant one, the court may order consultation with owners which would involve lengthy administrative procedures.

The Maori Land Court Making Management Decisions

Each trust order is tailor-made to fit the requirements of the application. The Maori Land Court is involved in setting up systems of management for very large commercial organisations. Owners may have serious differences of opinion about the most appropriate use for that land. In Alexander v Maori Appellate Court,[15] the application applied for judicial review of the decisions of the Appellate Court and the Maori Land Court when a proposal was made to adapt a large block of Maori land, (5514.55 ha) for forestry purposes. All of the appointed trustees except one, Alexander, agreed with a decision to transfer the land on a long term lease to Carter Holt. His application succeeded and earlier orders directing the execution of the lease and removing Alexander as a trustee were set aside on the grounds that the Maori Appellate Court had exceeded its jurisdiction. Mahan J., declared:

> The nature and substance of the order [for variation], therefore, was to deprive the trustees of their statutory right to administer the trust in accordance with the terms declared by the Maori Land Court, and to vest that power in delegates appointed by the Maori Appellate Court.[16]

The Court has the responsibility for assessing technical information and land management issues. Given the high level of investment in some of the trusts under the Act, the responsibility is one which the Court does not discharge lightly. Nonetheless, it is submitted that it is an inappropriate use of the court's role. It is preferable that the administrative and judicial arms of the court are pushed further apart. To be involved in declaring large schemes of land management is no longer appropriate.

Accountability of Trustees

The trustees' duty to do as well as a reasonable person of business is a high one. The first duty of a trustee is to know the terms of the trust. Every trustee must be careful to obtain a copy of the terms of the trust as made by the order of the Maori Land Court and to familiarise themselves with it. If the trust order does not give precise powers to do a certain task then "the trustees shall have all the powers and authorities as are necessary for the effective performance of the trusts."[17] A careful examination of the trust order is essential. If an action is necessary for "the effective performance of the trust" then it is submitted that the court must be able to approve it.

To rely upon the provisions of the section in cases which are not clear cut is to invite difficulties for the trustees. A precise power or seeking directions from the High Court under its inherent jurisdiction is always preferable. The alternative is to face lengthy and expensive litigation in the High Court.

An application for judicial review under the provisions of the Judicature Amendment Act, 1972. Alexander v Maori Appellate Court,[18] was first heard on 6 October 1977 in the Maori Land Court, on appeal to the Maori Appellate Court on 12 August 1976 and finally in the Supreme Court on 28 July 1978.

The scope of the trustee's powers under trust orders made by Section 438 was at issue in Crawford v McGregor,[19] heard by Ongley, J. in the High Court in Palmerston North. The owners of Maori land leased the land to the respondent in 1960 for a term which expired in 1980. The owners claimed that they had suffered loss as a result of the breach of covenants in the lease. The term of the lease had expired when the land was vested in the applicant and others as trustees under a Section 438 trust. The terms of the order contained a power:

> To institute proceedings against a prior lessee in respect of any breaches of covenant under a prior lease.

In an action by the trustees for damages, the respondent argued that there was a question of law to be determined before trial, which was that the Maori Land Court could not empower trustees to sue and accordingly the action must fail.

Ongley, J., examined the provisions of Section 438 which empowers the Maori Land Court to vest land in trustees to facilitate its use, management or alienation. The Maori Land Court has jurisdiction to confer on the trustees all the powers and authorities that are necessary for the effective performance of the trusts. The court does have jurisdiction to confer powers which are reasonably incidental but not necessary to the performance of the trusts. The use, management and alienation of the land is the limiting requirement of the trust. The action against the leasee was a right which belonged to the lessors and owners of the land and the court could not pass on that right to the trustees as it was not reasonably incidental to the use, management, or alienation of the land. Subsection 10 was not able to save the action.

This subsection provides that property other than land held by the trustees shall be held for the owners in proportion to their shares. The trustees had never owned the right of action and so it could not be passed to them.

It is submitted that the respondent's application had no merit; it was only successful because of a gap in the legislation. Individual owners are not able to sue for the whole group but can only take action for their individual loss. The Maori Trustee may take action on behalf of owners,[20] but may decline to do so and, in any case, may be joined as a defendant. The trustees are limited to taking legal action for causes which have occurred during the term of their trusteeship, not for those which occurred prior to taking office.

The trustees have a duty to make enquiries about the trust property. Maori land is scattered and often inaccessible, knowledge of the trust property is not so easily acquired. Trust orders can provide for an investigation and report trust where the trustees must find out about the land and the options for development that are available. After discussion with the owners the trustees return to the court for a full trust order.

One such situation was Re Ahipara B2, Clarke v Berghan,[21] undeveloped blocks of Maori land were proposed to be vested in the Maori Trustee to investigate their future use and development with some indication that the land could be used for forestry or a mixture of afforestation with pastoral farming. Some owners were in opposition to the proposal as a right to partition was sought. In poorly attended meetings the objecting owners were the majority of shareholders. Despite their objections, the court vested the land in the Maori Trustee for the investigation under a Section 438 trust. The appeal to the Maori Appellate Court was dismissed, on the grounds that the rights of owners were not prejudiced.

Trustees have several duties in relation to their trust property. Trustees must consider whether the proposed investment or development project is one which the trustees are able to make. The trustees must examine the terms of their trust deed carefully to see if the proposal is an appropriate one for the trust to make and covered by objects and powers of the trust.

As we have seen the scale of operations of some Section 438 trusts is very large, involving major financial commitment and debt structuring. These projects test the boundaries of the trust powers and it is submitted that cautious trustees would be well advised to take legal and accounting advice before entering into major business

undertakings. The risk of failure is too high if the preliminary steps are not negotiated carefully.

To illustrate the significance of some of the enterprises developed under Section 438 trusts we will consider two projects, first, the Okawa Bay Lake Resort, a Section 438 trust formed 4 years ago and secondly, the Wellington Tenths Trust, a Section 438 trust formed 5 years ago.

(1) The Okawa Bay Lake Resort

The Okawa Bay Lake Resort is on the shores of Lake Rotoiti near Rotorua. The development potential of the land had been recognised for many years and it had been a popular camping ground until the lease of the property ran out and the owners established a Section 438 trust. Financing the development of a 44 room hotel and 15 self-contained condominiums for time share units, presented a major challenge. The trust had a land asset worth $280,000 but no equity or capital base for a development project of this magnitude. The capital cost of the project was estimated at between $4 and $5 million, and a 100% funding of the loans was required. A $3.5 million offshore loan was arranged by the Hall Group who entered into the project as the developer, associated with the Section 438 trustees.

The Okawa Bay Resort was launched with a burst of enthusiasm from the media in 1985. The development of underutilised Maori land was seen as a major step forward in the commercial world. The potential for difficulties or clashes of respective roles had seemed to be ironed out by the appointment of a management committee to liaise between the trustees of the property and the resort management. Firm management principles were declared to be the clear objective of the Resort, who when faced with a choice of trustee expectations and business principles promised that there would be a clear and unambiguous choice in favour of the latter. The time in generating profits was optimistically put at 2 years, when it was anticipated that dividends would be available to the owners. The resort quickly ran into difficulties. Cost overruns were enormous. Acquiring money for development purposes for a project of this sort, based on Maori land, was not difficult. A lot more money was available from both public and private sources than initial cost-estimates suggested was necessary. In addition to the $3.5 million offshore loan, the Maori Trustee underwrote the project to the tune of $1.8 million. The Housing Corporation provided $1.5 million, and Nat West Lombard (as it was then) provided up to $4 million. The

ready availability of money encouraged unrealistic expectations on the part of the owners and developers alike and the costs ballooned. Financial projections proved to be superficial, the sale of the timeshare units was difficult to accomplish, and the relationship between trustees and management was not as soundly based as had been assumed, the gap widening progressively as the different expectations of each party were not, and could not be, met.

The Okawa Bay Resort ended up as a financial failure, costing its owners and developers a great deal of time and money. The Maori Trustee was forced to salvage the Resort and provide refinancing to keep the project afloat.

Some questions remain to be answered in relation to the trustees powers. Can a general power to say, develop and improve trust lands or "to borrow money", cover such enormous borrowings in association with an outside consulting and investment group as in this case. The trustees could have effectively lost control of the project, and may have had insufficient information to make the decision that an informed power of business would make. Unfortunately, the cases give few clues to an answer, but it seems that trust powers must be both specific and general. In Re Waimana 266C2 and Maori Trustee,[22] the Court doubted its ability to specify the precise terms of a trust under Section 438. It was held that as long as the powers were not inconsistent with the requirement in the legislation that the trust be for the purpose of facilitating the use, management or alienation of any Maori freehold land,[23] then the Maori Land Court did have jurisdiction to make the orders in question.

The presumption in favour of the validity of an order of the Maori Land Court, must be rebuilt by an applicant claiming that an order exceeded the jurisdiction of the Court. The approach of the High Court was outlined by F.B. Adams in Hami Paihana v Tokerau District Maori Land Board,[24] when he said:

> The Court must therefore disregard all questions of mere form, practice and procedure, even though they might be such as, apart from the section, would go to jurisdiction; and it may interfere only if the order was one, which in its nature or substance, exceeds the jurisdiction. Moreover, the presumption in favour of the order must be borne in mind, and, unless the excess of jurisdiction appears on the face of the order, the burden of proving it must be discharged by the person who attacks the order.

Hami Paihana's case was an application by way of certiorari to quash an order of the Maori Land Court. The case supports the decision in Re Waimana in that the issue

of jurisdiction can only arise if it is apparent that the effect of the order was a clear misinterpretation of the empowering legislation.

It is submitted that large scale development projects of the type undertaken at Okawa Bay require precise authorisation by the terms of the trust order or the project will be scrutinised by the Maori Land Court if the dissenting view from owners and/or trustees is considerable enough. The decision of the trustees must be unanimous. In Alexander's,[25] case, Mahan, J said:

> The decision of the trustees had necessarily to be unanimous. If the applicant, as one of the trustees, declined to sign the lease because he insusted on the afforestation project being submitted for public tender, then he was acting well within his rights.

It is clear that the need for care when consultation with trustees and a good flow of information with high-quality professional assistance, are essential requirements if projects based on Maori land are to be successful.

(2) Wellington Tenths Trust

The Wellington Tenths Trust was established by court order on 11 April 1985. The trust was one of two trusts set up in respect of a block of land known as the North Island Tenths, made up of 115 properties with a total area of 88.0368 hectares, being a mixture of both urban and rural land. The urban titles are situated in Wellington. All but nine of the properties are leased under the Maori Reserved Land Act 1955. By the terms of this Act all of the properties are leased for 21 years with perpetual rights of renewal. Rent is reviewed at the end of the 21 year period and is set by statute at 4% of the unimproved value of the urban land and 5% for rural land.

The objects for which the trust was established is set out in the order declaring a trust, and apart from the use, management and alienation of the land include:

> The retention of the land for the present Maori beneficial owners and their successors

which appears to be an objective at variation with the ability to alienate the land. The specific powers of the managing trustees include the power to buy the land with the proviso that:

> No purchase or exchange shall be effected unless they are satisfied that the land so acquired can be vested in the appropriate beneficiaries as Maori freehold land

and the power to

Purchase, lease or otherwise acquire interests in land including the lessees interests in the said lands

None of the powers of the lessees include a power to alienate land, and it seems as though the trustees do not have complete flexibility of use. The trust has recently concluded a major agreement to purchase the lessees interest in land which will become Maori freehold land and provide housing for "special needs of owners as a family group or groups" in the terms provided by the trust order. The purchase involved two properties, one with 20 flats situated on it, the other a site eminently suitable for redevelopment with an older-type wooden hostel and residential building located on it.

The Housing Corporation provided finance of $1.06 million as a contribution toward the purchase price of $1.3 million. The flats located on one property will meet the criteria of the trust order with no outstanding problems. The site suitable for development presents some difficulties. The Wellington Tenths Trust is asset rich, but income poor. The properties that are leased by the trust do not return a high income because of provisions relating to the rates of rental contained in the Maori Reserved Land Act 1955. The trust does not have access to the large amounts of capital required for development from its own resources, it is necessary to borrow substantially. In addition the use that the developed project will be put to is a crucial decision for the trustees. It is necessary to determine how the land will be utilised, in high density, high quality housing for sale or lease. The development of the land into unit titles suitable for sale would result in considerable funds which could in turn be realised for future projects but, as we have seen alienation of the land presents considerable barriers, whether cultural, in that consent of all of the trustees will be difficult to obtain, or legal, in that the trust deed may not be wide enough to cover a proposed alienation of this type. The duty of a trustee to act even-handedly and impartially between beneficiaries is particularly difficult at this point, all Maori land of this type being for a life interest. To safeguard the position of the successors to the title and potential beneficiaries is not an easy path to tread.[26]

As we have been the duties of a trustee are high. The trustee, even if he or she is an owner of the property, cannot treat the property as if it were his or her land. The responsibility of the trustee is always to the beneficial owners. The trustees mut supply information to the beneficial owners on demand and provide an explanation about the investment of and dealings with the trust property.

Proper accounts must be kept to allow inspection by a cestiu que trust. The trustee cannot act for remuneration, unless there is a provision in a trust deed which provides for remuneration of trustees and as a trustee is in a fiduacy position, he or she cannot profit from a trust. "He [or she] is not allowed to put himself [or herself] in a position where his interest and duty conflict".[27]

Trustees of Section 438 trusts have generally managed to overcome the almost universal suspicion of trustee by Maori people in the past. Bad decisions by trustees and even outright cheating of beneficial owners by trustees appointed to represent tribal groups of land titles, are a legacy of history. Under the Native Land Act 1867 certificates of titles could be issued to ten owners. The names of all other owners were endorsed on the back of the certificate of title. Transferring land in this way left owners rights in limbo and many registered proprietors sold land without the consent of the tribal groups they represented.[28] The system was favoured by some chiefs as it enabled then to be "downright extravagant, living in flashy imitation of the settlor gentry" or needing "cash to provide traditional feasting and hospitality for the large and frequent political meetings which developed throughout the 19th century.[29] Te Kooti named such chiefs the "money rangatira" which were an increasingly important phenomena between 1865-1910. Complaints of chiefs taking land for themselves were numerous others in the tribe sought declarations in the Supreme Court that the land was held as a trustee only, but did not succeed. In the Court of Appeal it was held that the certificate of title was conclusive and the chief must be taken to be the absolute owner.[30]

To this day, problems arise when trust land is proposed to be vested in the trustees on behalf of the cestiu que trust. The common law principle of not notifying the existence of a trust continues with Maori land. The vesting order for land, made by the Maori Land Court contains no reference to the existence of a trust.[31] The registration of a vesting order does not constitute notice of a trust.[32] A separate trust order, not registerable under the provisions of the Land Transfer Act 1952 declares the trust, conferring on the trustees such powers as the court's think fit.

It is widely believed that trustees are not accountable enough to beneficial owners and that trustees are autonomous and powerful bodies that have no relationship with the owners, but prefer to take their own counsel. Clause 246 of the Maori Affairs Bill attempts to address a particular concern of owners regarding alienation of the land.

This clause provides that despite the terms of a trust order, the trustees cannot sell or lease the land for a term exceeding 42 years unless this is approved by a specified percentage of owners. On the other hand, Clause 245 of the Maori Affairs Bill provides greater decision-making power to trustees. Clause 245 allows trustees to act by a majority decision, rather than unanimously. The clause also protects from personal liability any dissenting trustee.

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(5) Judge McHugh, page 8.

(6) Section 438(2A).

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(8) (1968) 4 Rotorua, ACMB 192.

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(28) Orakei Report Waitangi Tribunal, November 1987.

(29) A. Ward, A Show of Justice Racial Amalgamation in Nineteenth Century NZ, (Australian University Press, Canberra), page 213.

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(32) See In Re Maraehako Cc30 and Smith, ibid.

CONCLUSION

Different cultural values and aspirations are part of and must underlie any discussion of Maori land utilisation. We have examined the two forms of organisation for Maori land utilisation, Section 438 trusts and Maori incorporations. Both organisations require reform, some legislative, some attitudinal.

Legislative reform to widen the objects for which Section 438 trusts and Maori incorporations can be formed is a pressing objective.

The Maori Land Court must urgently reassess its role as the paternalistic saviour of Maori people and develop as a judicial rather than an administrative body.

The potential clash between the traditional attitudes and the new economic directions in which land is an asset to be put to use has been ameliorated and will diminish even more as land utilisation studies exhibit greater awareness of cultural values and each point of view is respected as having merit.

It is likely that in the future, management of the trust and the Maori incorporation will alter significantly with the arrival of the highly educated, Maori urban professional to the committees of management and as trustees. Their perspective will not necessarily be liked but as long as they do not tread on too many toes they will be tolerated. A strong element of conservatism will always be present in Maori society. Change to some extent is always accepted as inevitable but change which erodes traditional values will always be rigorously opposed. Increasing support for the retention of the Maori land base as a national treasure, unique to New Zealand and part of its history, can be discerned. Reckless schemes by ill-informed managing trustees or committees of management must always be deplored. Great care and skill is required to utilise the land well. The legislative provisions can assist in this objective by meeting the needs for reform when required. The legal profession can meet the challenge by attempting to come to grips with the more demanding provisions of the current legislation and providing the quality professional advice which is essential for success in any project.

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