WGL Set 7

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

C.P. No.173/92

UNDER Part I of the Judicature Amendment Act 1972

IN THE MATTER of an application for review of a decision made under the Maori Affairs Act 1953

BETWEEN THE PROPRIETORS OF MAWHERA
Applicant

A N D THE MAORI LAND COURT
First Respondent

A N D RUDOLPH CECIL LOUSICH
Second Respondent

C.P. No.280/92

BETWEEN STEPHEN GERARD O'REGAN
Applicant

A N D RUDOLPH CECIL LOUSICH
First Respondent

A N D THE MAORI LAND COURT
Second Respondent

Hearing: 7, 8 November 1994

Counsel: J.O. Upton, Q.C. & K.J. Crossland for Applicants
R.W. Raymond for the Maori Land Court (granted leave to withdraw)
T. Woods for R.C. Lousich

Judgment: 19 DEC 1994

JUDGMENT OF TIPPING, J.

Introduction

These two consolidated applications arise out of proceedings in the Maori Land Court. The first is an application for judicial review by the Proprietors of Mawhera, who are a Maori incorporation constituted under Part IV of the Maori Affairs Amendment Act 1967 (the 1967 Act). The second is an application for certiorari and a declaration by Sir Stephen O'Regan. The Respondents are Mr Rudolph Lousich and the Maori Land Court (the Court). Mr Raymond sought and was granted leave to withdraw after indicating that the Court would abide the decision of this Court and did not wish to present any submissions.

Mawhera was incorporated by the Mawhera Incorporation Order 1976. Pursuant to that Order the beneficial owners of the land described in the schedule to the Order, were constituted a Maori incorporation to be known as the Proprietors of Mawhera under and subject to the provisions of Part IV of the 1967 Act. The land referred to was reserved land within the meaning of the Maori Reserved Land Act 1955. Sir Stephen was the Chairman of Mawhera from its incorporation in 1976 until 1988. In August 1991 Mr Lousich applied to the Court for an examiner to be appointed to investigate and report on the affairs of Mawhera pursuant to s.61 of the 1967 Act.

The application was supported by affidavits from Mr Lousich himself together with an affidavit from Ms Sandra Lee. Sir Stephen swore an affidavit on behalf of Mawhera. He was not asked to attend the hearing for cross-examination. The proceedings were set down for hearing in Hokitika on 15 and 16 October 1991. The Judge for some reason refused to deal with an application for adjournment by Mawhera in advance of the hearing. Mawhera realistically decided not to pursue the application at the start of the hearing. By then everyone involved had of necessity gathered in Hokitika.

Mr C.L. Bull appeared as counsel for Mawhera and Mr T. Woods appeared for Mr Lousich, as he did in this Court. The proceedings were recorded. A transcript was ultimately produced by the Court for the purposes of the present proceedings. Initially the transcript was seriously deficient but finally a satisfactory record of the omitted parts of the official transcript was compiled by Mr Bull and presented to this Court, along with the original and incomplete official transcript. Sir Stephen, having not been called for cross-examination, was not present at the hearing in Hokitika. He had important public business elsewhere. He went to the trouble of having a memorandum filed explaining his absence.

Other deponents gave supplementary oral evidence in chief and were then cross-examined and re-examined. After that the Judge allowed unsworn evidence to be given from those present in Court. This was done pursuant to s.54 of the Maori Affairs Act 1953 (the 1953 Act) which provides that the Court may act on any testimony, sworn or unsworn, and may receive as evidence any statement which, in the opinion of the Court, may assist it to deal effectively with the matters before it, whether the same would otherwise be legally admissible as evidence or not. However, no cross-examination was allowed of those permitted to speak from the public gallery. Some of those so speaking made substantial allegations and criticisms about the way in which Sir Stephen had behaved as Chairman of Mawhera. It should be noted that for the purposes of the present proceedings both the 1953 Act and the 1967 Act continue to apply in spite of the subsequent coming into force of the The Maori Land Act 1993.

Judge Hingston reserved his decision and delivered it in writing nearly six months later. In his decision the Judge said:

> "The evidence before me highlighting the overbearing manner of the former Chairman [Sir Stephen] when dealing with dissenting shareholders engendered a disquiet that has not been lessened with the evidence, demeanor [sic] and observed attitude of the present

> Chairman and some Committee members, I gained the impression that not only are the minor shareholders considered by them to be a nuisance but the Court itself in taking them seriously is out of line." [punctuation as in original]

On reading the decision Sir Stephen was concerned that the Judge appeared to have found that he had adopted an overbearing manner when dealing with dissenting shareholders and, further, that the Judge's words were open to the construction that he was included in the expression "considered by them" and thus the Judge considered that he regarded the minor shareholders as a nuisance and held the view that the Court itself was out of line in taking the minor shareholders seriously.

Sir Stephen contends that the Judge's observations were made in circumstances amounting to a breach of natural justice. His contention is based on the premise that he was given no notice that the allegations were to be made against him, no notice that the Judge had in mind to say what he did and thus no opportunity to speak to and rebut what was said. The Judge's remarks were given wide currency in the news media. Indeed in some quarters, as is not uncommon, they were given much greater prominence than what the judgment was really about.

Sir Stephen, whose affidavit in this Court was unchallenged, says that he has been seriously damaged by what the Judge said. In his evidence Sir Stephen said that the Judge's comments about him came as an absolute bombshell. He was totally unaware of what had been said about him at the hearing. He says that if he had been given any indication of what the Court had in mind to say so far as he was concerned, he would have been in a position to arrange representation and to call evidence to answer the allegations about him. He then described the publicity which had been given to the comments, referring to material published in various newspapers and in the North & South magazine. Sir Stephen says that, in addition, the decision has been the subject of much adverse comment in Maori circles and

indeed to his face. He also says he was disturbed at the level at which notice was taken of the remarks of the Judge by senior figures in the commercial world and by Ministers of the Crown.

Sir Stephen is a director of a number of companies and chairman of several. He is also Chairman of the Maori Fisheries Commission. He says that as such he is bound to ensure that correct and proper information is communicated to shareholders and beneficiaries. He says that he is jealous of his reputation for conducting meetings fairly and scrupulously and according to relevant laws and regulations. He also says that in his conduct of successive general meetings of Mawhera he went to inordinate lengths to ensure proper treatment of minority views and took great care to fully appraise shareholders of the various options open to them. He always carefully adhered to the Maori Incorporation Regulations 1967, especially those governing voting procedures.

In his proceeding, which is not brought under the Judicature Amendment Act 1972, Sir Stephen seeks a declaration that the findings and comments of the Court referred to above are invalid and of no effect and in breach of the rules of natural justice. He also seeks an order in the nature of certiorari to bring up and quash the paragraph in question, this having the effect of striking the paragraph in question from the decision. It is not the correctness or otherwise of what the Judge said that is in issue in this Court but rather the proposition that there was procedural unfairness in the way the Judge acted. On Sir Stephen's proceeding the following issues arise:

1. Whether, in general terms, the Judge's remarks are susceptible to the relief sought.
2. Whether the remarks were made in breach of the rules of natural justice so far as those rules pertain to procedural unfairness.
3. Whether, if so, the relief sought is precluded by s.64 of the 1953 Act.

4. Whether, if this point is reached, the relief sought should be granted as a matter of discretion.

Mawhera's application for judicial review, which is brought under the Judicature Amendment Act 1972, derives from another aspect of the same judgment. In the course of discussing Mr Lousich's application for the appointment of an examiner, the Judge made observations and findings about Mawhera's ability to sell the land which it held and further observations and findings about its ability to purchase land. As to the former the Judge found "that the land selling programme of Mawhera is ultra vires". As to the latter the Judge found "that any land purchases by Mawhera that cannot be so classified [as being incidental to other objects] would be ultra vires the Incorporation's objects". In the end the Judge declined to appoint an examiner but of his own motion adjourned the case for two months to see whether Mawhera should be wound-up. Two issues arise on this aspect of the case. The first is whether the Judge was correct in his ultra vires rulings. The second is whether his conclusion can be challenged in the light of s.64 of the 1953 Act.

Sir Stephen's Case

Section 64 - Privative Provisions

The first thing I will consider is whether Sir Stephen's application for relief, by way of certiorari and a declaration, is precluded by s.64 of the 1953 Act which is in these terms:

> **"64. Proceedings not removable into High Court -**
> (1) No order or other proceeding of the Court shall be removed by certiorari or otherwise into the High Court.
> (2) No order made by the Court shall be invalid because of any error, irregularity or defect in the form thereof or in the practice or procedure of the Court.
> (3) Nothing in the foregoing provisions of this section shall apply to any order which, in its nature or substance, and independently of its form or of the practice or procedure of the Court, was made without or in excess of jurisdiction.

> (4) Every order made by the Court shall be presumed in all Courts and in all proceedings to have been made within the jurisdiction of the Court, unless the contrary is proved or appears on the face of the order."

Section 64 is what is generally known as a privative provision; that is a statutory provision preventing the High Court from examining the decision of another person or body. Subsection (1) is the starting point, but, whatever its effect, ss.(3) makes it clear that the capacity of this Court to intervene is not ousted if the order of the Maori Land Court was one which in its nature or substance was made without or in excess of jurisdiction. There is a strong argument that the same should apply if what is in issue is not an order in the strict sense but some lesser determination or conduct on the part of the Court. That, of course, is on the assumption that ss.(1) is apt prima facie to catch such lesser conduct. At first sight ss.(3) appears to involve the now out-moded distinction between errors made within jurisdiction and errors which take the decision maker outside jurisdiction.

The general concept of jurisdiction is a notoriously fickle one: see the differences of approach in the Court of Appeal in the recent case of Harvey v. Derrick C.A. 291/93 (judgment 24/8/94). The decision in that case was in a somewhat different context. In the present case the question of jurisdiction relates squarely to a privative provision and to the way administrative or public law has developed the idea of jurisdiction. The leading case on privative provisions in New Zealand is the decision of the Court of Appeal in Bulk Gas Users Group v. Attorney-General [1983] N.Z.L.R. 129.

The concept of jurisdiction in administrative law terms has developed in recent years through a series of decisions of the House of Lords. The first was Anisminic Ltd v. Foreign Compensation Commission [1969] 2 A.C. 147. There then followed Re Racal Communications Ltd [1981] A.C. 374, South East Asia Fire Bricks v. Non-Metallic Mineral

Products [1981] A.C. 363 (this being a decision of the Privy Council); O'Reilly v. Mackman [1983] 2 A.C. 237 and more recently Page v. Hull University Visitor [1993] 1 All E.R. 97.

Anisminic rendered immaterial the former distinction between errors going to jurisdiction and errors within jurisdiction. It also made immaterial the previous distinction between errors of law on the face of the record and errors of law generally. This development, and those that followed, have been achieved by a widening of the concept of ultra vires: see the speech of Lord Diplock in O'Reilly at 278 and the speech of Lord Browne-Wilkinson in Page at 107. The widening of the concept of ultra vires has proceeded on the following basis.

Parliament grants the decision maker the power to decide on the footing that the power is to be exercised lawfully (i.e. correctly in law), fairly (i.e. according to the rules of natural justice, if applicable) and reasonably (i.e. within the bounds of reason - the Wednesbury principle). If the decision maker goes wrong in law, acts unfairly or makes an unreasonable decision, the decision is regarded as having been made ultra vires and thereby the decision maker exceeds his or her jurisdiction.

In O'Reilly Lord Diplock said that if a decision maker, whose jurisdiction is limited by statute, mistakes the law, he has asked himself the wrong question, i.e. a question into which he had no power to inquire. Thus it was a question which he had no jurisdiction to determine. This was the approach of Geoffrey Lane, L.J. in Pearlman v. Keepers & Governors of Harrow School [1979] 1 All E.R. 365 approved by the Privy Council in the South East Asia case.

On this basis the question is not whether the decision maker has made a wrong decision but whether he has inquired into and

decided a matter which he had no right and therefore no jurisdiction to consider. This analysis was developed in cases where the decision maker had made an error of law. In doing so he had made a wrong decision and thereby asked himself the wrong question. If the decision maker acts unfairly it is not a case of asking himself the wrong question. It is rather that the power to decide is given on the implicit basis that it will be exercised fairly. Parliament gives no power to decide unfairly and therefore by doing so the decision maker exceeds his powers. His decision is therefore ultra vires and outside his jurisdiction. Similarly, if a decision is unreasonable in the relevant sense it is ultra vires and in excess of or outside the decision maker's jurisdiction.

The process of reasoning whereby a person misdirecting himself in law was said to have asked himself the wrong question can now be simplified into saying that a power to decide is given on the basis that it must be exercised on the correct legal basis. Thus if the decision maker errs in law the decision is ultra vires: see Lord Browne-Wilkinson's speech in Page at 107. Thus we are back to the proposition with which I started, namely that if a decision maker goes wrong in law, acts unfairly or makes an unreasonable decision he will have acted ultra vires and in excess of jurisdiction.

It is, of course, perfectly possible for Parliament to provide, if it chooses, that the decision of a particular decision maker shall not be impugned on certain bases or indeed on any basis. With most types of tribunal and decision maker there is a presumption that Parliament does not intend the decision to be conclusive irrespective of errors of law, unfairness or unreasonableness: see Anisminic and Racal. It is nevertheless possible for Parliament to make such a decision conclusive, in the sense of being immune from review by the High

Court on any basis, if sufficiently clear words are used. In general, privative provisions are strictly construed against such a conclusion.

With decisions entrusted to Courts of law which are lower in status than the High Court there is no such presumption; but it is still necessary for Parliament, if it wishes such decisions to be immune from review by this Court, to say so with sufficient clarity to leave no doubt that this was Parliament's wish. In other words, Parliament must indicate clearly that even if a decision is ultra vires, whether for error of law, unfairness or unreasonableness, it must stand because it is incapable of review. It is unlikely that Parliament will wish to give such absolute protection to a decision in spite of its being ultra vires and thus outside the decision maker's jurisdiction; but nevertheless Parliament is sovereign and may do so if it chooses and says so clearly.

What I have said is in harmony with the essential thrust of the decision of the Court of Appeal in the Bulk Gas case which was that the High Court may intervene unless Parliament has clearly given the decision in issue conclusive status in spite of its being ultra vires for whatever reason. That way of putting it is my own, but it fuses the approach of the Court of Appeal in Bulk Gas with recent English developments in the field of ultra vires as evidenced especially by Page.

It must follow from this analysis that s.64 of the 1953 Act does not prevent the High Court from intervening if what was done by the Maori Land Court in this case can be characterised as ultra vires, viz erroneous in law, unfair or unreasonable. I recognise that s.64(1) says: "no order or other proceeding" whereas s.64(3) speaks only of "any order". I shall be discussing in a moment whether the comments of the Judge which are attacked are susceptible to an order for certiorari or a declaration. If the "order or other proceeding" was made or undertaken

without jurisdiction I do not consider s.64(1) protects it from review even if, strictly speaking, s.64(3) is confined to orders.

Section 64(1) is not clear enough to protect ultra vires proceedings of the Maori Land Court from certiorari or other review. In any event s.64(1) cannot possibly be construed to preclude relief by way of declaration. A declaration does not involve the order or proceeding the subject thereof being removed into the High Court. Section 64 as a whole does not preclude relief by way of declaration. Nor does it preclude relief by way of certiorari if Sir Stephen can show he is otherwise entitled to such relief on the basis that the Judge acted ultra vires and therefore beyond his jurisdiction.

Availability of Certiorari

It will be recalled that Sir Stephen has not applied for judicial review under the Judicature Amendment Act 1972. His proceeding seeks an order for certiorari to bring up and quash that part of the Judge's decision to which Sir Stephen takes exception. There is also a claim for a declaration. Mr Upton explained that there was no application for judicial review because it was thought that in the relevant respect the Judge was not exercising a statutory power, as defined by s.3 of the Judicature Amendment Act 1972. It is clear that when saying what he did the Judge was not exercising a statutory power of decision as defined, but it may well be possible to say that the Judge was exercising a statutory power under paragraph (d) of the definition, in the sense that he was exercising a power or right conferred on him by the 1953 Act which set up the Maori Land Court "to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person".

I can understand why this was not argued.I observe only that it might be possible to hold that the Judge's enabling legislation empowered him to do an act or thing, i.e. write the words in question, which, but for the

power or right, would be a breach of Sir Stephen's legal rights, i.e. his right not to have his reputation wrongly impeached. The reason why the Judge's words could be said to be a breach of Sir Stephen's legal rights, but for the power or right given to the Judge by his enabling statute, is that the enabling statute implicitly, if not expressly, gave the Judge absolute immunity against any claim for defamation. I mention this at the start of my discussion of this aspect of the case because I should not necessarily be thought to have accepted the proposition that an application for judicial review was not available.

The history and development of the remedy of certiorari is traced in Professor Sir William Wade's Administrative Law 6th edition (1988) at 624 ff. and in de Smith's Judicial Review of Administrative Action 4th edition (1980) at 381 ff. A succinct modern statement of the essential purpose of certiorari is to be found in the speech of Lord Griffiths in Page at [1993] 1 All E.R. 97, 100 where his Lordship said that certiorari became "available to correct an error of law of an inferior Court". His Lordship noted that at first the remedy was confined to an error on the face of the record but it is now available to correct any error of law made by an inferior Court. Of course the remedy is not confined to Courts.

The logical starting point in New Zealand is Rule 626 of the High Court Rules from which it is apparent that the remedy of certiorari is available in appropriate cases, notwithstanding the parallel availability or the non availability of judicial review. This conclusion is supported by the decision of the Privy Council in Mercury Energy Ltd v. Electricity Corporation of N.Z. Ltd [1994] 2 N.Z.L.R. 385, 388. Rule 626(1) speaks of an application to the Court to review "any judgment or decision given or order made in any action or proceeding in any inferior Court". A critical question for present purposes is whether certiorari lies only to review judgments, decisions or orders. The conventional view is that certiorari lies only to bring

up and quash "something which is a determination or a decision": see R v. St Lawrence's Hospital Statutory Visitors ex parte Pritchard [1953] 1 W.L.R. 1158, 1166 per Parker, J. That, however, in the light of later developments, can now be regarded as a statement deceptive in its simplicity.

Before examining this point further I go back to the classic statement of Atkin, L.J. in R v. Electricity Commissioners ex parte London Electricity Joint Committee (1920) Ltd [1924] 1 K.B. 171, 205:

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs".

The decision of the House of Lords in O'Reilly v. Mackman (supra) demonstrates that certiorari is now somewhat wider than Atkin, L.J.'s formulation and I do not consider that the scope of the remedy should be regarded as defined by or confined to the circumstances set out in Rule 626.

It was emphasised by Lord Parker, C.J. in R v. Criminal Injuries Compensation Board, ex parte Lain [1967] 2 Q.B. 864, 882 that the limits of certiorari have never been and ought not to be specifically defined. They have varied over the years and have, when appropriate, been extended to meet changing conditions or new circumstances. The lack of rigid parameters and the capacity of the remedy to develop as necessary was also emphasised by Sir John Donaldson, M.R. in R v. Panel on Take-overs and Mergers, ex parte Datafin plc [1987] 1 All E.R. 564, 576-577. I agree with His Lordship that a key point is that the remedy is available only against someone exercising a public power. It is not available when the power is privately conferred, e.g. by contract. There is, of course, no problem in that respect in the present case.

It has been conventional to analyse the criteria for the issue of certiorari in terms of the various ingredients in the formulation of Atkin, L.J.

I shall briefly do that but it will soon be apparent that most of the classic criteria are clearly fulfilled. The expression "body of persons" does not necessarily denote a plurality. It can apply to a single adjudicator, hence to the Judge in the present case. Clearly the Judge had legal authority to determine questions affecting the rights of subjects. Clearly he had the duty to act judicially which, in the present context, simply means fairly. The question whether the Judge acted in excess of his legal authority is, of course, the ultimate point to be reached if certiorari is otherwise available.

The real problem is whether by making the comments which he did about Sir Stephen the Judge was doing something sufficient for the purposes of certiorari. In what he said the Judge was not making a determination, a decision or an order in the conventional sense. The question what kind of conduct qualifies short of a formal determination or decision is discussed in Wade at 637 ff. and in de Smith at 387 ff. It is apparent from the authorities that actions which amount only to recommendations will not normally be susceptible to certiorari. During his discussion Sir William Wade says at 638 that the question is whether some issue is being determined to some person's prejudice in law. Sir William goes on to point out at 639 that all conduct can in a sense be said to have been preceded by a decision to do or say what is in issue. He says that the fact that every deliberate act is preceded by some sort of decision to do it is legally irrelevant.

This was a reflection on the approach of Lord Diplock, particularly in R v. Inland Revenue Commissioners ex parte Rossminster Ltd [1980] A.C. 952 which dealt with seizure of documents under a search warrant. In that case Lord Diplock said that the seizure involved a decision by the officer as to what documents he was going to seize. It was the act of seizure which was challenged rather than the decision anterior to it. Nevertheless Lord Diplock was able to take the view that there was a sufficient decision involved.

The concept of rights in the expression "questions affecting the rights of subjects" has always been broadly understood. It is not confined to rights with regard to which there are correlative duties in the Hohfeldian sense. As de Smith puts it at 390, the concept of rights comprises an extensive range of legally recognised interests, the categories of which have never been closed. In the present case Sir Stephen in my judgment had an interest in not having his reputation wrongly impeached and thus the Judge's words affected his rights in the relevant sense.

It is, in my judgment, stretching the concept of a decision or a determination in the conventional certiorari sense a long way to say that the words which are impugned in this case can properly be regarded as amounting to a decision or a determination. However, I do not consider that the law should remain static or confined in this area. In my judgment the law ought to provide a remedy in a case such as the present. The issue can be tested by assuming for the moment that the Judge had said something completely outrageous about Sir Stephen in his decision. Let us assume that the Judge had said that he found Sir Stephen to be a fraud, a cheat and a liar. That is obviously more vivid than what the Judge did say, but there is no real difference in principle between an extreme statement such as that which I am assuming, and what was said. In neither case could Sir Stephen take proceedings for defamation because the words of the Judge enjoy absolute privilege.

Unless there were a remedy a wrong would have been committed without the capacity for redress. There is no difference in principle between my extreme example and the present case. The only difference is one of degree. The question of degree can be controlled by the fact that remedies by way of judicial review and the prerogative writs are discretionary. I would not wish to encourage applications for judicial review whenever someone considers they have been wrongly criticised by a judicial

officer or tribunal. Whether a remedy should be granted in the Court's discretion will depend upon all the circumstances, including the gravity of what has been said and the effect on the plaintiff.

If I were to hold that certiorari was not available in present circumstances then equally it would not be available in the extreme circumstances which I have posited. It could be said that certiorari should not lie because the remedy of declaration may be available. Declaration simply declares something to have been unlawful. Certiorari takes the further step of quashing the illegality. Taylor in his Judicial Review (1991) refers at paragraph 2.17 to Sir William Wade's adverse comments on the tendency to see judicial review as applying only to decisions: see GCHQ and Judicial Review (1985) 101 L.Q.R. 153; and at para 2.20 Taylor says that the old writ of certiorari had the effect of quashing the action which is brought before the Court.

No case on all fours with the present was cited to me on either side. In my judgment there ought as a matter of principle to be a remedy in circumstances such as the present, subject to the Court's discretion. I would hold that if a person or body wielding public powers does something unlawful and thereby affects the plaintiff's rights, the plaintiff may challenge the action of that person or body by appropriate public law proceedings. The normal procedure will be to apply for judicial review. If, for some reason, that procedure is not open, the remedies of certiorari and declaration can be sought. Conduct will be unlawful in this context if it is erroneous in law, unfair or unreasonable.

It is to be noted that in the decision of the Privy Council in Re Erebus Royal Commission [1983] N.Z.L.R. 662, 687 Lord Diplock, giving he judgment of their Lordships, said:

> "For the like reasons their Lordships will refrain from going into the question whether upon an application for judicial review of a report of

> a tribunal of inquiry there is jurisdiction in the reviewing Court to set aside a finding of fact that is gravely defamatory of the applicant for review, or to make a declaration that such finding is invalid. This too is a matter which, in their Lordships' view, is best left to be developed by the New Zealand Courts, particularly as these remedies, if they do exist, are discretionary."

Those observations, which have encouraged me to take this further step in the development of what can loosely be called the law of judicial review, lead logically to the next question, which is what exactly the Judge was saying.

Meaning of Impugned Passage

The passage in question is set out earlier. It will be recalled that the Judge spoke of "the evidence before me highlighting the overbearing manner of the former Chairman, [Sir Stephen] when dealing with dissenting shareholders". It was argued by Mr Woods that this did not amount to any formal finding about Sir Stephen's conduct or indeed any finding at all. Semantically and to a lawyer there is justification, albeit tenuous, for that proposition. However, in substance the ordinary reader would, in my judgment, read the Judge as saying that Sir Stephen had in fact adopted an overbearing manner when dealing with dissenting shareholders. The expression "the evidence before me highlighting" carries clearly with it the connotation that the Judge was accepting and adopting as true the evidence to which he was referring. Any fair reading of this part of the passage could be expected to leave the reader with the view that the Judge was making a finding of fact.

The second part of the impugned passage is more problematical. The Judge's reference to the "evidence, demeanour and observed attitude of the present Chairman and some Committee members" cannot be read as including Sir Stephen. It is just possible to read the following expression "considered by them" as including not only the present Chairman

and some Committee members but also the former Chairman, Sir Stephen, but that construction is not the natural one and is, in my view, very strained.

The sting of the Judge's words, from Sir Stephen's point of view, is that he was found as a fact to have adopted an overbearing manner when dealing with dissenting shareholders. Clearly such a conclusion coming from a judicial officer, ostensibly after hearing all relevant evidence, had the capacity substantially to damage Sir Stephen's reputation, particularly in the light of the activities in which he engages. Thus we have a case, as Lord Diplock forecast in Re Erebus, of a finding of fact defamatory of the person complaining. The circumstance that the finding was made by a Court in the course of a decision rather than by a commission of inquiry in the course of a report does not seem to me to affect the issue in principle.

Procedural Unfairness

The next question is whether the finding was made in circumstances which render it open to judicial review. The proposition advanced by Mr Upton is that the finding is susceptible of judicial review because it was made in circumstances of procedural unfairness. Sir Stephen was given no notice that the Judge had in mind to make the finding in his decision and he was given no opportunity to put his side of the story. It is a fundamental principle of justice that adverse conclusions or findings are not made against people without their having notice of what is said against them and having an opportunity to reply. A conventional manifestation of this principle is the well known audi alteram partem rule. I was informed that as a matter of Maori protocol the same general principle applies.

What should be regarded as adequate notice for present purposes and what should be regarded as an adequate opportunity to make reply are matters which depend on individual circumstances. The simple fact in the present case is that Sir Stephen was given no notice that his conduct might be criticised and no opportunity to make reply. In Campbell v. Mason

Auckland Registry M. 146/88 (judgment 14/10/88) Robertson, J. held that when there was a likelihood of adverse comment in the report of a one man committee of inquiry the person about whom the adverse comment was intended should have been given an opportunity to comment.

The public are entitled to take the view, and do take the view, that if a Judge criticises someone in a judgment the Judge has carefully weighed the evidence after giving the person criticised an opportunity to be heard. Thus comments such as that which the Judge made in the present case carry considerable weight. The greater the apparent authority of the person making the finding the greater is the harm likely to ensue to the person criticised; the greater therefore is the responsibility of the person making the comment or finding not to do so without observing the rules of procedural fairness. In my judgment those rules were not followed in the present case and Sir Stephen has reason to feel aggrieved. The present point is not whether the Judge's comments are correct. Sir Stephen, of course, says they are not. The point is that he has never had the opportunity which should have been afforded to him to put his position. In my judgment the Judge's finding was made in breach of the rules of natural justice.

Discretion

I have already held that s.64 does not bar relief. The final matter is whether the relief sought by Sir Stephen should be granted or withheld as a matter of discretion. This is clearly a matter of degree. In its context, and by dint of its ramifications the Judge's finding did, I am satisfied, have a serious effect on Sir Stephen's reputation. The failure to observe natural justice was, in my judgment, a substantial one. There was a serious breach of elementary fairness. After weighing the degree of harm and the seriousness of the breach against the view that no encouragement should be given to people to seek this kind of judicial review on minor or

trivial grounds, I reach, without difficulty, the conclusion that Sir Stephen should be granted a remedy.

Formal Order

I therefore order that the passage in question commencing "The evidence before me" and ending "has not been lessened with" be brought up into this Court and quashed. In case it might be held that certiorari is not open, I declare that the passage in question was unlawful in that it was included in the decision in breach of the rules of natural justice; specifically in circumstances of procedural unfairness. The balance of the passage complained about obviously requires editing so as to allow it to commence grammatically after the quashing of the earlier part of the long sentence. I am not prepared to quash or declare unlawful the balance of the passage because I do not consider that on a reasonable reading it can be regarded as referring to Sir Stephen.

Mawhera's Case

Ultra Vires - General

Section 30 of the 1967 Act required every order of incorporation of a Maori incorporation to specify a number of things. One of those things was "the object or the several objects for which the incorporation is established". The Mawhera Incorporation Order 1976 was expressed to be made pursuant to s.15A of the Maori Reserved Land Act 1955. That section, inserted in 1975, provides in ss.(1):

> "15A. Constitution of Maori incorporations to administer reserved land - (1) The Governor-General may from time to time, by Order in Council, constitute the beneficial owners of any one or more parcels of reserved land, a Maori incorporation under Part IV of the Maori Affairs Amendment Act 1967, from a date to be specified in the Order. Every such Order in Council shall specify the objects for which the incorporation is constituted and shall take effect according to its tenor as if an order of incorporation under section 29 of that Act had been made in respect of the land by the Court, and, except as otherwise provided in this section, all the provisions of Part IV of that Act

> (including section 28 of that Act which empowers the Court, on application, to redefine the objects of an incorporation or add new objects) shall, with all necessary modifications, apply accordingly."

Pursuant to s.31 of the 1967 Act the owners of the land, on incorporation as Mawhera, became a body corporate with power to do and suffer all that bodies corporate may lawfully do and suffer and with all the powers expressly conferred upon the body corporate by or under the 1967 Act. Section 48(1) of that Act provided:

> **"48. Incorporation's powers to deal with assets -**
> (1) Whether or not any such power is specifically included in its objects of incorporation, a Maori incorporation shall, acting by and through its committee of management, have power to alienate, mortgage, charge, or otherwise dispose of or deal with the assets from time to time vested in it in the same manner as if it were a private person of full capacity:
> Provided that the incorporation shall not sell any land except pursuant to a resolution of a general meeting of shareholders."

Section 50(1) provided:

> "50. Incorporation may acquire land - (1) A Maori incorporation may acquire any land or interest in land, whether by way of purchase, lease, or otherwise."

Thus, subject to their terms, ss.48 and 50 gave Mawhera <u>power</u> to sell and buy land but, as Mr Upton rightly accepted, that power could be exercised only to implement or advance a legitimate <u>object</u> of the incorporation. So far as selling is concerned, it is argued that s.48(1) in its terms elevates the power of sale into an object. This, so it is said, is the effect of the words with which s.48(1) commences: "Whether or not any such power [i.e. of sale] is specifically included in its objects of incorporation". It is also argued that Mawhera's original objects were lawfully redefined or added to so as to include an express object of sale.

Power to redefine or add to the objects of an incorporation was found in s.28 of the 1967 Act. I should first notice s.27 which allows orders of incorporation to specify a number of objects of the incorporation, namely:

(a) to farm the land; (b) to use the land for growing timber and allied activities; (c) to engage in coal mining on the land; and:

> "(d) To arrange for the alienation by sale, or lease, or otherwise of the land or of any portion thereof:
>
> (e) To carry on any other enterprise or do any other thing in relation to the land that may be specified in the order of incorporation."

Section 28 provides:

> **"28. Alteration of objects of Maori incorporations -**
> Upon application made to it by or on behalf of a Maori incorporation, the Court may, from time to time, redefine the objects for which the incorporation was established, or add any other objects specified in or authorised by section 27 of this Act:
> Provided that no application shall be made to the Court under this section except pursuant to a resolution of a general meeting of shareholders."

Mawhera's original objects, as set out in the 1976 order of incorporation, were expressed as being:

> "(a) To receive from the Maori Trustee all land transferable by him to the incorporation in accordance with the provisions of s.15A(6) of the Maori Reserved Land Act 1955:
>
> (b) To use, manage, and administer any land or interests in land for the time being vested in or owned by the Incorporation."

There were two redefinitions, or purported redefinitions of, or additions to, Mawhera's objects pursuant to s.28. The first was by an order of the Maori Land Court dated 5 December 1978. The second was by an order dated 21 May 1984. The first order redefined Mawhera's objects to include, amongst others, the following objects:

> "(b) Pursuant to s.50 of the [1967 Act] to acquire any further land or interests in land, whether by way of purchase, gift, lease or otherwise.
>
> (f) Pursuant to s.48 of the [1967] Act and subject to the proviso thereto, to alienate, mortgage, charge or otherwise dispose of or deal with the assets from time to time vested in the Incorporation."

Paragraph (b) is, of course, relevant to buying land and paragraph (f) is relevant to selling land. Paragraph (f) speaks of the assets from time to time vested in the incorporation. It therefore covers the land originally vested in Mawhera on its incorporation and clearly, according to its tenor, it includes as an object the selling of land subsequently acquired.

The second order, made in 1984, added the following object to Mawhera's list of objects:

> "To carry on any other enterprise or do any other thing that may be specified in the order of incorporation (whether any such other enterprise or thing relates to the land or to any other real or personal property of the incorporation whatsoever) provided that such other enterprise or thing advances the interests of the incorporation and its shareholders."

There is an immediate and obvious difficulty deriving from the words which I have underlined. The underlining is mine and does not appear in the original. Literally read the underlined words are illogical because if the object was already there it did not need to be added. Indeed, literally read the purported additional object adds nothing. There is no alternative but to ignore the underlined words because the underlying purpose of the additional object (leaving aside its validity in other respects) is obvious.

Prima facie the additional objects set out in paragraphs (b) and (f) of the first order clearly include as objects of Mawhera both the selling of land and its purchase. Why then is it said that when Mawhera appeared to have both the power to buy and to sell land and the objects of doing so, its buying and selling of land was nevertheless ultra vires - absolutely in the case of selling and unless incidental to another lawful object in the case of buying?

Land Sales

I shall look at selling first. The starting point is s.28. This section gave the Court power to redefine Mawhera's objects and to add to

them. Bearing in mind the terms of the original objects, what was done in 1978 and 1984 was clearly the addition of or the purported addition of objects. However, in the case of the addition of objects s.28 makes it clear that additional objects must be specified in or authorised by s.27. Thus in terms of s.28 the objects of an incorporation cannot be widened beyond the ambit of the objects specified in or authorised by s.27. In the case of selling land s.27(d) does permit as an object arranging "for the alienation by sale" of the land vested in an incorporation or any portion thereof. It can therefore be seen that new object (f) in the 1978 order was authorised by the combination of ss.27 and 28.

From the date of the 1978 order Mawhera was entitled to sell its land, it having both the power to sell and the object of selling; subject, of course, to the passing of a resolution of a general meeting of shareholders in terms of the proviso to s.48(1). There was no suggestion that there had been a breach of that requirement. Why was it then that the Maori Land Court held Mawhera's land sales to be ultra vires? The Judge started by saying that whether land selling was intra vires depended on "clause (f) in the 1978 order or clause 2(b)" of the original order of incorporation. It must be said that the necessary power could not have been found in clause 2(b) of the original order. That was not even suggested. After citing clause (f) of the 1978 order the Judge said:

> "The words 'pursuant to s.48 .....' impose a requirement that is unambiguous - sales can only be effected pursuant to s.48; there is no other interpretation possible."

The Judge then noted an argument of Mr Woods that the general law of incorporations was applicable and the distinction between objects and powers determined the matter. He made reference to an unreported decision of White, J. in Ngati Whakaue Tribal Lands v. Rotorua District Council M.436/80 Wellington Registry (Administrative Division)

judgment 11/2/82. The Judge, rightly, construed the judgment of White, J. as making a distinction between powers and objects and then said that s.48 of the 1967 Act gave a power that could only be exercised "in the implementation of an actual object of the incorporation". He added that s.48 could not on its own allow alienations.

That construction of s.48 appears to give no force to its introductory words which say that the power to sell can be exercised whether or not such power is specifically included in the objects of incorporation. The judgment of White, J. on this point is, with respect, not an easy one to follow. On page 13 of the judgment His Honour said:

> "Further, the nature of the power enacted by s.48(1) is by its nature (sic) general and incidental. In my opinion it is not necessarily to be construed as an object or purpose for which an incorporation has been established. In my opinion, in the context of the legislation, the power created by s.48(1) is a general and incidental power to deal with a corporation's (sic) assets whether or not that appears as incidental to a particular object created by the statute. In the circumstances I consider the usual construction referred to in the quoted passage from Halsbury, from para 1337, applies so that the power created by s.48(1) must be interpreted 'as ancillary to the dominant or main objects for which the corporation was formed'."

With great respect it is not clear what White, J. was endeavouring to say. Part of the passage is internally contradictory in that His Honour appears to be saying both that the power is incidental and that it can be exercised whether or not its exercise is incidental to a particular object.

A little later in his decision in the present case the Judge said that the 1978 redefinition made no specific reference to sale being an independent object. This, in my judgment, was a misconstruction of clause (f) in the 1978 order. The misconstruction seems to have arisen from the Judge's understanding of the words "pursuant to". To the extent that those words had any sensible meaning in the context of clause (f), they were empowering not limiting. Their use was, in any event, probably unnecessary

and represented a lack of understanding of the difference between a power and an object. Section 48, subject to its terms, undoubtedly gave the power to sell land. The purpose of clause (f) can only have been to elevate what was already a power into an object and thus remove any argument about whether the power undoubtedly given by s.48, was being exercised for a legitimate object.

The Judge then went on to say that only a clear unambiguous "initial" object authorising sale would justify him accepting that Mawhera could embark upon the land sales programme in issue. He returned to his "pursuant to" theme by saying:

> "I note that, the Court in 1978 rather then (sic) allow unfettered selling required that alienations be only pursuant to s.48 of the Act. If I am wrong in so assuming and the Court then intended to allow unrestricted sale I would be obliged to conclude that the Court had erred; I realise the Judge in 1976 had not the advantage of the Ngati Whakaue decision available."

Several comments can be made about this passage. In any event sale was not to be unrestricted under s.48. The proviso required an appropriate resolution. Thus, there is in truth no fetter inherent in the words "pursuant to s.48", save the need for a resolution of shareholders. In addition the Judge, in understandable circumstances, has, in my view, misinterpreted the Ngati Whakaue decision. If there was no such misinterpretation then I am bound to say that I find White, J.'s formulation in Ngati Whakaue difficult because it appears to give no effect to the introductory words of s.48(1). What is more Ngati Whakaue provides no guidance about the issue surrounding the clause (f) additional object.

Having considered the Judge's reasoning very carefully and having had the benefit of the submissions of both Mr Woods and Mr Upton on the issues arising, I hold that Mawhera was entitled to sell its land. The necessary authority came first from s.48(1), which gave it the power to sell

without the need for a specific land sales object. If that is not so, clause (f) of the 1978 order made land selling a specific object. Its addition to the list of Mawhera's objects was lawful in terms of the requirements of ss.27 and 28 of the 1967 Act. The Judge's view that Mawhera's land selling programme was ultra vires was mistaken and wrong in law.

Land Purchases

The position here is more difficult. First there is the difference between s.48 and s.50. The latter, which dealt with acquisition of land, did not include the introductory words in s.48(1) whereby, in the case of land sales, the power was given whether or not any such power was specifically included in the objects. So that basis of authority is not available in the case of land purchases. For its ability to purchase land Mawhera relies upon clause (b) of the 1978 order and the whole of the 1984 order. There are, however, difficulties with both. Clause (b) purported to be an addition to the original objects. Therefore it had to be specified in or authorised by s.27 in order to comply with s.28. There was no power to add as an object the buying of land unless that object was specified in or authorised by s.27.

Land selling is clearly not specified in s.27. The only possible authority suggested as deriving from s.27 comes from paragraph (e) which allows an incorporation as an object "to carry on any other enterprise or do any other thing in relation to the land that may be specified in the order of incorporation". The words "in relation to the land" must mean the land vested in the incorporation at the outset. The conjunction of those words with the concept of an enterprise or thing specified in the order of incorporation points inexorably to "the land" as meaning the land originally vested in the incorporation on its incorporation.

Mr Upton sought to circumvent this difficulty by reference to ss.(2) of s.50 which read:

> "The provisions of this part of this Act shall apply to any land or interest in land acquired at any time by a Maori incorporation under subsection (1) of this section in the same manner and to the same extent as they apply to land vested in the incorporation by its order of incorporation."

Mr Upton pointed out that ss.(2) was inserted into the 1967 Act in 1976. He submitted that this was done in order to negate the effect of the decision of Judge Cull in the Taharoa case (Hamilton Registry judgment 28/4/76).

In his judgment Judge Cull held that the words "the land" in s.27(e) could not refer to what was described as after acquired land. It is certainly correct that the 1976 amendment, which inserted ss.(2), followed quite soon after the Taharoa decision. It is possible that the subsection was inserted for the purpose suggested by Mr Upton, but, whatever may have been its intention or purpose, all ss.(2) actually does is to apply Part IV of the 1967 Act to later acquired land in the same way as Part IV applies to land originally vested in an incorporation.

Subsection (2) gives no wider power to purchase land than that given by ss.(1). Nor does it make land purchase an object in itself. It follows, therefore, on ordinary principles, that the power to buy land was still circumscribed by the need for it to be exercised for or to advance a lawfully independent object. Thus there is a power to buy land for the purpose, inter alia, of farming, timber growing or coal mining. The addition of ss.(2) to s.50 does not make it possible to construe the words "the land" in s.27(e) as if they read "the land and any after acquired land".

Even if that were possible, the enterprise or other thing of which s.27(e) speaks, must be specified in the order of incorporation. It is not possible, in my view, to read s.27(e) as if the words "any other enterprise" were general. The "other enterprise", like "any other thing", is limited by its need to be specified in the order of incorporation. If it had been the draftsman's intention to make such a radical change in s.27(e) that intention is hardly likely to have been effected by an addition to s.50. Putting it the

other way, the addition of ss.(2) to s.50 can hardly have been intended to achieve such a fundamental impact on the earlier and key provisions of s.27. If this was the intention it was an extraordinarily oblique and tortuous piece of draftsmanship. Indeed there is a further point. The addition of ss.(2) to s.50, which is a section dealing with a power, is hardly likely to have been intended to have a radical effect on a wholly different section dealing with objects. I am entitled to assume the draftsman knew the difference between a power and an object.

Thus I am bound to hold that the addition of clause (b) as an object by the 1978 order was ultra vires the 1967 Act. It was not authorised by s.28 read in conjunction with s.27. While Mawhera can be completely excused for thinking that clause (b) gave it the additional object of acquiring land, unfortunately that addition was not legally valid because the Maori Land Court had no power to add such an object because it was neither specified in nor authorised by s.27.

Nor does the 1984 addition help either. This is because its reference to "any other real ..... property" was, for similar reasons, ultra vires the 1967 Act. Indeed the way the 1984 addition is worded is, in any event, of dubious effect. It purports to add the object of carrying on any other enterprise or doing any other thing whether that other enterprise or thing relates to the land, i.e. the original land or to any other land of the incorporation. It must be observed that the words used do not expressly confer as an independent object on the incorporation the object of land acquisition. All they do is to make it an object to do any other enterprise or thing on land either original or later acquired. While it might be said that by implication there was an attempt to add an additional object of land acquisition the words used do not achieve that result.

All this derives from the way in which s.28 is worded. The enterprise or thing referred to in s.27(e) cannot be expanded by an order

under s.28 unless specified in or authorised by s.27. If it were so specified or authorised the additional enterprise or thing could be added in any event in reliance on one of the other paragraphs of s.27. Alternatively it would already be an object in terms of the order of incorporation. Be all that as it may, it is quite clear that s.28 does not permit the addition of the object of land purchasing, on the authority of s.27(e), if only because s.27(e) must be construed as referring to the land vested in the incorporation by its order of incorporation. It may seem odd that Mawhera has as an independent object the selling of land but no independent object of buying land. I have not examined whether the 1993 Act has a bearing on the point. Counsel did not refer me to any provision of the 1993 Act because this case is, of course, governed by the earlier legislation.

For the reasons given, which in part are similar to those of the Judge, it must follow that, as the Judge held, Mawhera's power to buy land can be exercised only when the purchase is properly incidental to a valid and independent object. I am therefore constrained to hold that the Court was right when it decided that any land purchases by Mawhera that could not be classified as incidental to a lawful independent object were ultra vires Mawhera's objects. I understand that Mawhera's case is that all of its purchases can be so classified. That issue did not arise in this proceeding and therefore I do no more than note what I was told.

Nothing which I have said should be construed as touching upon a case to which s.46(1)(h) of the 1967 Act applied. This is the provision allowing revenues derived by a Maori incorporation from its operations to be applied in the purchase of any land or any interest in land in accordance with s.50. Whether that gives a power which can be exercised independently of a formal object or only to advance such an object is not a point which was in issue before me. I note that paragraph (g) of s.46(1) was

added in 1976, as was ss.(2) of s.50. Clearly s.46 dealt with the application of revenue which is a different matter from capital expenditure.

While the point was not in issue and may not be material, my initial impression is that revenue could not be applied in the purchase of land unless that purchase was reasonably incidental to a lawful object. What I have said should not be taken as a formal ruling on the point. My first impression is based on the proposition, that it is, or was at the relevant times, a general principle of the law of corporations that a corporation's funds can be spent only in the furtherance of the objects of the corporation. A power to spend money, whatever the source, should therefore generally be construed as having to be exercised for one or more of the corporation's objects. I should emphasise again that I was not asked to consider, on this or any other aspect, the provisions of the 1993 Act.

Availability of Right of Appeal

Mr Woods argued that Mawhera should have appealed to the Maori Appellate Court rather than seeking judicial review. It was argued that as a consequence I should decline relief. A right of appeal is not an absolute bar to an application for judicial review, although in some circumstances it may be a discretionary bar. Section 4(1) of the Judicature Amendment Act 1972 says that the remedy of judicial review is available notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application. Section 42 of the 1953 Act gave the Appellate Court jurisdiction to hear and determine appeals from any final order of the Maori Land Court.

It is very doubtful whether the Judge's ultra vires determinations could properly have been characterised as final orders. They were not expressed as such. They were, in essence, findings leading to the Judge's conclusion that there was no case for the appointment of an examiner but there might be a case for winding-up. For that purpose the

Judge adjourned the proceedings to a later date. In a case where it is doubtful whether an appeal lies and the matter is of grave import, it is much more convenient for the point of law involved to be brought direct to this Court so that it can give a definitive answer.

Mr Woods pointed out that if there was no final order and thus no right of appeal under s.42, Mawhera nevertheless could have gone to the Chief Judge of the Maori Land Court under s.452. This unusual provision gave the Chief Judge a quasi appellate jurisdiction from orders made by other Judges of the Court. Mr Upton explained that although this jurisdiction might have theoretically been open, it was not thought appropriate to exercise it because Mr Lousich's solicitor was the Chief Judge's wife. That seems to me to be a perfectly proper and sensible reason for the bringing of an application for judicial review rather than application to the Chief Judge under s.452.

It was then pointed out by Mr Woods that there was a right to seek a rehearing under s.28(5) of the 1953 Act. It is true that Mawhera might have applied for a rehearing but it had no certainty of getting one and no appeal would have lain to the Appellate Court from the refusal of the Judge to grant a rehearing. I do not regard Mawhera's failure to adopt this avenue as in any way undermining its entitlement to proceed by way of judicial review.

Mr Upton also referred to the fact that the ultra vires points are ones of general importance, not only to Mawhera, but to Maori incorporations throughout the country. I agree that this is another valid reason why judicial review in this Court was the appropriate avenue for Mawhera to follow. Another matter raised by Mr Upton, which has some force, is that the issue of ultra vires was not one within the specialist area of the Maori Land Court. The issue was one of general law and thus Mawhera, being dissatisfied with the Judge's conclusions, had reason to bring the

matter to this Court rather than to a specialist appellate Court. There will be cases in which this Court decides as a matter of discretion that an applicant for judicial review should have exhausted other remedies before making application. In my judgment this is not a case of that kind. Section 4(1) expressly gives me the power to review, notwithstanding a right of appeal has not been exercised. I am not persuaded by Mr Woods submissions that I should withhold the remedy to which Mawhera is otherwise entitled on this basis.

Section 64

It is now necessary to consider whether s.64 of the 1953 Act, discussed extensively above, prevents me from giving effect to my conclusion that the Judge was wrong in law in holding Mawhera's land sales to be ultra vires. In this case, as opposed to that of Sir Stephen, the application is for judicial review. Mawhera seeks declarations and the quashing of the Judge's ultra vires findings. For the reasons discussed earlier, I am of the view that when the Judge decided wrongly in law that Mawhera's land sales programme was ultra vires, he was acting in excess of his jurisdiction in terms of s.64(3).

In addition, the present application for judicial review is not, in my judgment, caught by s.64(1). No order or other proceeding of the Maori Land Court is to be removed by certiorari or otherwise into the High Court. I am asked to exercise the declaratory powers of this Court and also the power to set aside which is granted by s.4(2) of the Judicature Amendment Act 1972. Thus I do not see s.64 as standing in Mawhera's way.

Conclusion - Formal Orders

For the reasons discussed I consider Mawhera is entitled to relief as regards the Maori Land Court's determination concerning its land sales but not as regards land purchases. Accordingly I make the following declarations and orders:

1. I declare erroneous in law the determination of the Maori Land Court in its decision of 31 March 1992 that Mawhera's land sales programme was ultra vires.
2. The said determination is hereby set aside.
3. I declare that Mawhera's land sales programme, as discussed in the said decision, was intra vires and lawful.
4. I declare correct in law the determination of the Maori Land Court, in its said decision, that any of Mawhera's land purchases which could not be classified as incidental to an independent object would be ultra vires.

Costs

Both Sir Stephen and Mawhera have succeeded, although Mawhera only in part. The Maori Land Court, as was appropriate, adopted a neutral stance and abided the decision of this Court. Mr Lousich endeavoured to uphold the approach of the Court both in relation to Sir Stephen and in relation to the ultra vires issues. As between Mawhera and Mr Lousich each has succeeded in part. I consider it appropriate to leave costs lying where they fall between those parties and I so order.

As between Sir Stephen and Mr Lousich it is fair to record that Mr Lousich did present argument against Sir Stephen's case of a reasonably extensive kind. I have found in Sir Stephen's favour and I think it reasonable to follow that with an order for costs. I order Mr Lousich to pay Sir Stephen $1,500.00 for his costs together with disbursements of Court. As Mr Upton argued both aspects of the case I do not propose to add to the order against Mr Lousich anything on account of travel or accommodation. The disbursements are deliberately confined to fees of Court.

J.

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

C.P. No.173/92

UNDER — Part I of the Judicature Amendment Act 1972

IN THE MATTER — of an application for review of a decision made under the Maori Affairs Act 1953

BETWEEN — THE PROPRIETORS OF MAWHERA
Applicant

A N D — THE MAORI LAND COURT
First Respondent

A N D — RUDOLPH CECIL LOUSICH
Second Respondent

C.P. No. 280/92

BETWEEN — STEPHEN GERARD O'REGA
Applicant

A N D — RUDOLPH CECIL LOUSICH
First Respondent

A N D — THE MAORI LAND COURT
Second Respondent

JUDGMENT OF TIPPING, J.
