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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

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AP 30/94

HIGH PRIORITY

IN THE MATTER of the Land Transfer Act 1952

AND

IN THE MATTER of a claim for compensation pursuant to s 172(a) of the Land Transfer Act

BETWEEN THE REGISTRAR-GENERAL OF LAND

Appellant

AND EDWARD CHARLES MARSHALL

Respondent

Hearing: 13 July 1994

Counsel: J A L Oliver for the Appellant
J J O'Shea for the Respondent

Judgment: 19 December 1994

RESERVED JUDGMENT OF HAMMOND J

SOLICITORS:

Crown Law Office (Wellington) for the Appellant
O'Sheas (Hamilton) for the Respondent

INTRODUCTION

This appeal from a decision of a learned District Court Judge raises two issues. First, did the respondent sustain loss or damage within s 172(a) of the Land Transfer Act 1952? Second, if the answer to that question is "yes", was such loss or damage sustained through any omission, mistake or misfeasance of the particular District Land Registrar or any of his officers or clerks in the execution of their respective duties under the Land Transfer Act 1952?

The Judge found against the Registrar-General. The amounts in issue in this case are small in monetary value. But the Registrar-General has appealed the Judge's decision to this Court. It was suggested to me the issues raised by the case are of general public importance. For this reason, the Registrar-General agreed to meet the respondent's costs on this appeal in order that the matter should be fully argued. That, with respect, was a responsible course for the Crown to adopt in a matter of this kind.

THE BACKGROUND FACTS

The facts were agreed in the Court below. In 1915 Henare Maiho was gifted land in the Tuakau area ("the land"). The land was the subject of a Maori Land Court Partition Order made on 12 February 1915. This Order was registered in the Land Transfer Office in 1917, and on the 25th June 1917 a land transfer title was issued in Mr Maiho's name. Part of the land was transferred away in 1926, and in the same year a small amount of land was taken for a road, leaving a balance of 54 acres, 1 rood and 31 perches.

Mr Maiho had five children. In 1938 he gifted the land then owned by him to his children. This transfer was recorded in the Maori Land Court Registry, but not in the Land Transfer Office. Mr Maiho died intestate in 1948 but his estate

was not in fact administered until 1974. The administration was undertaken by Mr G H C Corbett, a Hamilton solicitor.

In November 1974 Mr Corbett arranged for the issue of a new Land Transfer Act title to the land in the name of Mr Maiho. Then, on being granted letters of administration in the estate in the Maori Land Court on 24 March 1975, Mr Corbett registered a transmission of the land to himself in the Land Transfer Office. To comply with s 83 of the Maori Affairs Amendment Act 1967, this transmission should have been produced to the Maori Land Court for noting and endorsement. But this was not done. The District Land Registrar accepted the transmission without the endorsement, and registered it.

In 1978 Mr Corbett, as administrator, then sold the land to the plaintiff/ respondent, Mr Marshall. Mr Corbett acted at that time both for himself and Mr Marshall. This transfer should also have been produced to the Maori Land Court for noting and endorsement. But it was not. The District Land Registrar accepted and registered the transfer.

The result of these transactions was that the Land Transfer Office and the Maori Land Court had different people recorded as owners. The land transfer title now showed Mr Marshall as the owner, whereas the Maori Land Court records showed Mr Maiho's five children as the owners.

In 1986 Mr Marshall wanted to borrow money from the Department of Maori Affairs, such advance to be secured by a mortgage over the land. The Department refused to make the advance. It was unhappy with the state of the title. And Mr Marshall by now also had a further practical problem: Mr Maiho's five children and their relatives had entered onto the land and claimed to be the owners of it.

Faced with these two pressing practical problems, Mr Marshall and his advisers considered it appropriate to apply to the Maori Land Court to prove his title. Proceedings were commenced in the Maori Land Court. On 3 September 1990, in the Maori Land Court of New Zealand (Waikato Maniapoto District), Judge Carter delivered a reserved decision confirming that Mr Marshall was the owner of the land.

I interpolate here to note that prior to Mr Marshall's application to the Maori Land Court coming on for hearing, the District Land Registrar advised Mr Marshall's solicitors that it was his view that, as the registered proprietor in the Land Transfer Office, Mr Marshall held an indefeasible title, and that consequently the Maori Land Court proceedings were unnecessary. The District Land Registrar specifically referred Mr Marshall's advisers to *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662.

In any event, Judge Carter's decision having been delivered, Mr Marshall then claimed the costs of the proceedings in the Maori Land Court against the District Land Registrar. These amounted to $10,064.71. Relying on s 172(a) of the Land Transfer Act 1952, Mr Marshall's claim was that the Registrar was at fault in not ensuring the documents were properly endorsed in the Maori Land Court. The Judge held that the Registrar had made an error. But he upheld an argument that Mr Marshall (or more precisely, his solicitor, Mr Corbett) had contributed to the loss. He ruled that the responsibility for the correct documentation lay primarily with Mr Corbett, and that the Registrar was therefore liable for only 40 per cent of the loss, or $4025.88. For the sake of completeness, I note that I was advised from the Bar that there is no possibility of recovery from the late Mr Corbett's estate.

THE MAORI AFFAIRS LEGISLATION

Where there are two systems of registration of interests in land running side by side within one jurisdiction, the noting of interests as between those two systems will necessarily give rise to difficulties. Certain provisions of the Maori Affairs legislation address this problem in New Zealand. It is convenient to note those provisions now.

The Maori Affairs Act 1953 and the Maori Affairs Amendment Act 1967 applied at all relevant times to the various transactions which are the subject of these proceedings. Those provisions have since been replaced by the Te Ture Whenua Maori Act 1993.

Section 83 of the 1967 Act provided:

> (1) The transmission to an administrator of a freehold interest in Maori freehold land and the transfer by the administrator of any such interest to any other person (whether a beneficiary in the estate or otherwise) shall not be deemed to be alienations of Maori land by way of transfer by a Maori for the purposes of Part XIX of the principal Act so as to require confirmation thereunder.
>
> (2) Any such transmission and any such transfer to or by an administrator shall be produced to the Registrar for a memorial thereof to be made in the records of the Maori Land Court, and the District Land Registrar shall not accept any such transmission or transfer for registration under the Land Transfer Act 1952 unless it bears an endorsement by the Registrar of the Maori Land Court to the effect that the instrument has been recorded in the records of the Maori Land Court.

Section 233(1) of the 1953 Act provided:

> (1) No alienation of Maori freehold land which is not by this Part of this Act required to be confirmed by the Court shall have any force or effect unless and until the instrument by which the alienation is effected has endorsed thereon a memorial that it has been produced to the Registrar and has been noted in the records of the Court.

And for the sake of completeness, it is also convenient here to set out s 2(2)(f) of the 1953 Act, which provided:

> Unless expressly provided in this or any other Act with respect to any specified or defined area, and notwithstanding anything in the foregoing definition of the term 'land' or in any of the subsidiary definitions included therein, -
>
> ...
>
> (f) Maori freehold land the legal fee simple in which has been transferred otherwise than by an order of the Court shall, except where it appears on the face of the instrument of transfer that the land has remained Maori freehold land, be deemed to be General land until either -
>
> (i) An order is made by the Court under paragraph (i) of subsection (1) of section 30 of this Act determining that the land is Maori freehold land; or
>
> (ii) Any other order is made by the Court as a consequence of which the land becomes or is deemed to have become Maori freehold land.

There is no dispute between the parties before me that both the transmission and the transfer were not endorsed as required. Both parties agreed that the transfer did not require to be confirmed by the Maori Land Court.

Had the transfer been endorsed in the manner contemplated by the legislation, then of course the "ownership" records would have been the same in both registries; and Mr Marshall's practical problems would not have arisen.

THE DECISION IN THE COURT BELOW

In the District Court counsel argued, and the Judge seems to have accepted this approach, that the issue came down to whether or not it was "reasonable" for Mr Marshall to have taken his proceedings in the Maori Land Court. The Judge thought the answer to that question to be, "yes". But with all due respect to the Judge and to counsel, it seems to me that the issue in this case is whether the loss sought to be recovered comes within the terms of s 172(a) of the Land Transfer Act. Such liability as the Registrar-General may have arises solely under s 172. No claim was made in common law negligence or under any other head of law.

THE REGISTRAR-GENERAL'S ARGUMENT

The Registrar-General's overall position is that by virtue of the registration of the transfer in his favour in 1978, Mr Marshall received an indefeasible title to the land under the Land Transfer Act 1952. The Registrar-General further contends that: (a) Mr Marshall's title was not liable to be impeached in the absence of fraud; (b) there was no evidence of fraud; and (c) the fact that the relevant provisions for noting by the Maori Land Court were not met in no way affects the indefeasibility of Mr Marshall's title. Because the respondent had and has an indefeasible title, there was no necessity for him to apply to the Maori Land Court to establish his title. His application to the Maori Land Court was thus superfluous, or at the very least personal to him, and the "loss" is not compensatable under the statute. The "loss" it is contended, was not caused by the District Land Registrar.

DOES SECTION 172(A) COVER LOSSES OF THE KIND AT ISSUE IN THIS CASE?

Section 172 of the Land Transfer Act provides as follows:

> Any person -
>
> (a) Who sustains loss or damage through any omission, mistake, or misfeasance of any Registrar, or of any of his officers or clerks, in the execution of their respective duties; or
>
> (b) Who is deprived of any land, or of any estate or interest in land, through the bringing of the land under the Land Transfer Acts, or by the registration of any other person as proprietor of that land, or by any error, omission, or misdescription in any certificate of title, or in any entry or memorial in the register, or has sustained any loss or damage by the wrongful inclusion of land in any certificate as aforesaid, and who by this Act is barred from bringing an action for possession or other action for the recovery of that land, estate, or interest -
>
> may bring an action against the Crown for recovery of damages.

I begin by reminding myself that the underpinnings of a Torrens system of title are:

- A prospective purchaser or mortgagee should not have to investigate the history of a registered proprietor's title;
- Everything which can be registered and is registered should in the absence of fraud give an indefeasible title;
- The interest so created under the system is of such importance that it should be secure, in the sense that it is state guaranteed; monetary compensation for the loss of that interest should be paid.

In the original work which gave rise to the Torrens system (*The South Australian System of Conveyancing by Registration of Title* (1859)) Robert Richard Torrens himself said that one consequence of the Torrens system must be "... the necessity of providing a fund from which rightful heirs and others may be compensated for the value of land which they are debarred from reclaiming against persons who have acquired title by registration ..." (p 9).

Although not articulated as such at that time, the contemporary public policy reasons for such compensation fall, I think, under two heads.

First, in economic terms this is a classic case for insurance. The registered owner has a large financial interest in the land. That land is at risk from a defined peril which applies to a large group of owners and which strikes infrequently and randomly. If there was no compensation, insurance in some form would need to be created. As Mapp, *Torrens' Elusive Title* (1978), put it: "Because the risk is created by a state imposed title registration system, it seems imperative that the indemnity system designed to distribute that risk must be provided by the state as an integral part of the title registration system." (p 70).

The second policy reason is one of efficiency in public administration. Mapp puts that concern this way:

> The Registrar has the responsibility for determining whether or not transfers are authentic. There seems little doubt but that stringent registration procedures could reduce the incidence of errors. However, documentary requirements imposed on users of the system to insure the authenticity of transactions submitted for registration fall on all users. As most transfers are in fact authentic, the cost to society of increased documentation could be far in excess of the cost of accepting risks and paying for them on an insurance basis. In short, if the Registrar knows that an insurance fund is available and will be utilized on sound insurance principles, he can tailor protective requirements to meet only risks of sufficient frequency to justify them. (p 70).

The thesis is therefore that it is better for the Registrar to make a few mistakes and pay for them, rather than spend more in trying to prevent those mistakes. This question of risk management in Land Transfer Registries is further explored by the New South Wales Law Reform Commission in Issues Paper #6 (1989) "Torrens Title: Compensation for Loss" (pp 26-29; 35-36). Risk management is now apparently practised, to a greater or lesser degree, in all Torrens jurisdictions.

As a matter of pure policy analysis, the first concern might suggest that loss in a Torrens system should be restricted to "land loss"; but the second concern clearly transcends that and would suggest that "loss" should be given a wide meaning.

Of course, once the importance of compensation provisions in a Torrens system was appreciated, the framers of that legislation had to give the generalised concerns statutory expression. There are in fact comparable provisions to s 172 in the state and provincial Torrens legislation in Australia and Canada.

Two general conclusions emerge from a survey of this large body of legislation around the British Commonwealth. First, some jurisdictions specifically only allow relief for deprivation of land. A typical example is s 60 of the Land Transfer Act 1980 (Ontario, Canada) which only allows compensation for deprivation of land. But most of the other Commonwealth statutes allow relief

in a much wider range of situations. A typical example - very close to the New Zealand situation - is s 158 of the Land Titles Act 1980 (Alberta, Canada) which allows damages for "omission, mistake or misfeasance of a Registrar" (s 158(a)) or "deprivation of land" (s 158(b)). But the preponderance of legislative opinion, if I can term it thus, around the British Commonwealth appears to be that the absence of any deprivation of land is not, in itself, justification for denying recovery.

A second broad conclusion which can be drawn is that in some jurisdictions, compensation schemes are so guarded by statutory procedural hurdles which a claimant must surmount, and are so closely defended by the state, that their very existence is something of a mockery. This has attracted a good deal of criticism: see Simpson, *Land Law and Registration* (1976) pp 179-183; Mapp, (*supra*), p 69; Sim, "The Compensation Provisions of the Act" in Hinde, *The New Zealand Torrens System Centennial Essays* (1971) pp 138-157; McCrimmon, "Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Change" (1993) 67 ALJ 904. If the policy analysis suggested earlier is correct, this is unfortunate. Narrow compensation provisions may indeed favour the state, but they are not necessarily in the overall public interest.

There has been an ongoing debate as to whether the existing Commonwealth compensation provisions are necessary at all; their scope; and as to the way in which they should be expressed. (See, for instance, the New South Wales Law Reform Commission Issues Paper (*supra*) and the joint Victoria/New South Wales Discussion Paper (June 1989) "Torrens Title: Compensation for Loss". Queensland recently overhauled its Torrens legislation in a new Land Title Act 1994. There is a useful discussion of the compensation provisions in that statute by Mr Peter Butt in (1994) 68 ALJ 675, 679-680).

At the end of the day, the compensation provisions in any given jurisdiction turn on the precise formula settled by the Legislature in that jurisdiction. New Zealand is one of the jurisdictions which allows wider recovery. In this country, s 172 covers two different kinds of loss. The statute recognises that there may be deprivation of an estate or interest in land, which was Torrens' original concern. But of course, there may also be loss arising from the actions of Government officials in the particular registry office. Under the older systems of conveyancing, same were party initiated and controlled, and (with the assistance of the Court) party enforced. Torrens' system, however, brought about a sea-change; it is the very act of the responsible state official in effecting registration which creates the registered title to any estate or interest.

In my view, it is not necessary with respect to a claim under s 172(a) to demonstrate that there has been any deprivation of any estate or interest in land. In the first place, on orthodox principles of statutory construction, it seems difficult to see why s 172 would have been drafted in the way in which it was if the result was to be otherwise. Loss of land is covered by s 172(b). It follows that to give s 172(a) operational scope, it must apply to other kinds of loss as well. Second, to the extent that there is any authority on this point, it is at least implicit in the decision of Edwards J in ***Wells and Johns v Registrar-General of Lands*** (1909) 29 NZLR 101, 104; 12 GLR 200, 202, that s 172(a) has the wider scope here suggested. Academic opinion also appears to favour this view: see Sim (*supra*) pp 140-141. Thirdly, as a matter of legal policy, a wide scope for compensation is to be preferred in advancing the general philosophy of the statute.

By way of conclusion under this head therefore, it seems to me that, in terms, s 172(a) of the New Zealand Torrens statute envisages recovery for a wide range of damage. It is not to be interpreted as limited to cases involving deprivation of land.

WAS THIS LOSS OCCASIONED BY THE OMISSION, MISTAKE OR MISFEASANCE OF THE REGISTRAR?

The second issue in this case is not so readily disposed of: was the loss in this case occasioned by any omission, mistake or misfeasance of the Registrar? The Judge held it was. He said there was some "uncertainty in the legal position" of Mr Marshall's title (p 4). This because the Registrar might have exercised his powers under ss 80 or 81 of the Land Transfer Act to recall or correct the relevant documents. The Judge considered that the Registrar "should have realised that the land was Maori land and was negligent in not doing so." (p 6). And, given that the Judge seems to have thought that he was dealing with a case of negligence, it is easy enough to see how he then considered that he could apportion the loss, and how he reached the (admittedly) arbitrary result he did.

I begin by asking: what is the nature of the claim under s 172(a)? In my view, it is not appropriate to describe it as a "negligence" claim in anything but the loosest sense. And such a loose sense is, with respect, dangerous. For a claim - where it exists - is a statutory claim to compensation, upon the terms contained in the legislation itself.

The inception of the Torrens system gave rise to two possibilities which conveyancers had not up until that time had to contend with. The system implemented title by registration. The very act of registration was of signal importance for, as we now know, any possibility of "deferred indefeasibility" of title has been rejected by the Privy Council: ***Frazer v Walker*** [1967] 1 AC 569; [1967] NZLR 1069. It was this very powerful consequence (in law) which left open the two possibilities to which I have already adverted: that there may have been a mistake or misfeasance in the Registrar's office, and the guillotine of immediate indefeasibility operates with ruthless efficiency with respect to other interests.

And so the statutory claim to compensation was put in place to redress these concerns.

As to the meaning of the statutory words "omission, mistake and misfeasance", there is not a great deal of case law. It is not that there are not claims. The Australian Law Reform papers referred to *supra* indicate 582 claims in Victoria, Australia, in the period 1981-1987. Of those, 570 were for Departmental error (as opposed to fraud or misdescription). New South Wales had only 28 claims for 1977-1988; 10 were for Departmental error. The Annual Report for the Department of Justice in New Zealand for the year ended 30 June 1994 records 17 compensation claims in that year. This shows that the pattern seems to be, as Mr Oliver said to me in argument, that the vast majority of claims settle.

Of the reported cases, ***Daly v Papworth*** (1906) 6 SR (NSW) 572, involved a failure to note a rent charge; compensation was awarded to the persons equitably entitled to such. There is also ***Russell v The Registrar-General of Land*** (1906) 26 NZLR 1223 (over inclusion of land in lease; owners sued in trespass; compensation available from the Registrar); ***Gordon v Hipwell*** [1952] 3 DLR 173 (wrongful lapsing of caveat; loss followed; compensation payable); and ***Tolley & Co Ltd v Byrne*** (1902) 28 VLR 95 (improper reception of a declaration). It is difficult to discern any single thread of principle through those decisions. Sim (*supra*) and Hinde McMorland & Sim, *Land Law*, Vol 1, para 2.114 suggest, on the basis of the decisions there cited, that no claim can be made when a Registrar was acting in a purely ministerial capacity or where the Registrar is exercising a discretionary power (citing ***Lee Wong Kow v Registrar*** (1923) 32 BCR 148).

The very spread of the case law surely highlights the potential breadth of the application of s 172(a). And, in the end, it is the precise words of the statute in the

overall scheme of the statute to which regard must be had. When broken down, the legislation requires:

(a) that a person;

(b) has sustained loss or damage;

(c) through;

(d) any omission, mistake or misfeasance;

(e) of specified officers;

(f) in the execution of their duties.

As to (b), I have already given my reasons for holding that a narrow view of the kind of loss or damage recoverable is inappropriate.

As to (c), the word "through" is surely a major limitation on the subsection. It immediately separates the Registrar-General from the position of a guarantor of the system in respect of all actions of he or his officers. The word comprehends that there must be a causal nexus between the loss or damage sustained and the actions complained of. The mere fact that something "went wrong" does not trigger a right to compensation. There has to be a relationship between the Registrar's wrong and the result. The public purse is thereby protected in the sense that it is only the wrongful consequences of acts by public officials that redound in a public debit. To the extent that there is any authority on this point, I note that O'Regan J in *Bradley v The Attorney-General* [1978] 1 NZLR 36, held (after a concession from counsel) (at p 45) that causation is a necessary element in a claim under this subsection. Because of that concession His Honour did not have to deal with that matter fully.

How the causal nexus is to be established in a given case under this provision may at times be no less difficult than in other areas of the law. As elsewhere in the law, causation is a necessary, but not a sufficient condition for

liability. Traditional juristic thought has seen causation as being susceptible of judicial elaboration of rational principles, tested against the common sense meaning of casual (everyday) language (see, eg, Hart and Honoré, *Causation and the Law* (1959)). But a more sceptical tradition this century has held that the ability of rational analysis to come to grips with the difficulties of causal arguments is such that (and in any event) causation should be subordinated to duty issues. The question of the proper scope of "the duty" is therefore paramount and the one on which a court should expend its energies. To the same effect, the law and economics analysis is that the very exercise of attempting to determine "cause" is a waste of time because the problem is routinely one of a "reciprocal nature": see Coase, "The Problem of Social Cost" (1960) 3 J Law & Econ 1, 2. (Now, apparently, the most widely read and cited law review article of all time). There is the further difficulty that finding an appropriate doctrinal vehicle is very difficult: the familiar enough "but for" test can be over-inclusive, or under-inclusive. In the end, every jurist has to make her peace with the weasel-word "cause". But this much at least can be said: in the workaday world, the word is one of limitation. It is concerned with connections, with how far the law ought to go, and the articulated reasons why the line should be drawn in a particular place. This more sceptical tradition appears to have informed much of the thinking of the New Zealand Court of Appeal on both causation and remoteness in recent years. Thus (in a contract case), the President of the Court of Appeal said, in *McElroy Milne v Commercial Electronics* [1993] 1 NZLR 39:

> [R]easonable foresight or contemplation ... are always an important consideration. I doubt whether they are the only consideration. Factors including directness, "naturalness" as distinct from freak combinations of foreseeable circumstances, even perhaps the magnitude of the claim and the degree of the defendant's culpability, are not necessarily to be ignored in seeking to establish a just balance between the parties ... In the end it may be best, and may achieve more practical certainty in the New Zealand jurisdiction, to accept that remoteness is a question of fact to be answered after taking into account the range of relevant considerations, among which the degree of foreseeability is usually the most important. (p 43).

But the point thus made is surely of wider import, and goes to civil obligations generally.

As to (d) (omission, mistake or misfeasance), the words "omission" and "mistake" doubtless have their natural and ordinary meaning. And, I would have thought that same necessarily comprehend an omission in relation to something that the Registrar is required to undertake.

The word "misfeasance" is not an easy term. So far as I know it has not been the subject of judicial interpretation in relation to this section. There is such a thing as a tort of misfeasance in a public office: ***Dunlop v Woollahra Municipal Council*** [1982] AC 158. In one Australian authority it was said, "if a public officer does an act which, to his knowledge, amounts to an abuse of his office and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person." (***Farrington v Thomson and Bridgland*** [1959] VR 286, 293). And it has been said that "the real interest being protected is the public interest in fair administration" (Carty, "Intentional Violation of Economic Interests: The Limits of Common Law Liability" (1988) 104 LQR 250, 284). But the boundaries of the tort are not clear. Wade (*Administrative Law* (7th ed, 1994)) considers same to include malicious abuse of power, deliberate maladministration, "and perhaps also other unlawful acts causing injury" (p 790). After reviewing the Commonwealth authorities, that distinguished authority suggests: "These various authorities, together with those on breach of duty discussed previously, are still in need of exposition and synthesis ..." (p 795). Whether the term "misfeasance" in s 172(a) comprehends the elements of this embryonic tort, or whether it is used in some different sense, does not I think arise for determination here. For the case as put for the plaintiff/ respondent was that what is in issue here is an "omission" on the part of the Registrar. But doubtless the existing authorities on this tort would be useful, at the

very least by way of analogy. I note, for whatever assistance it may give in future, that the term "misfeasance" also appears in some commercial statutes.

AN OMISSION CAUSING LOSS?

Mr Oliver devoted much of his energies in the Court below, and again in this Court, to emphasising that Mr Marshall always had - from the very act of registration - an indefeasible title. The strength of such a title was, with respect, accurately summarised by McGechan J in ***Housing Corporation of New Zealand v Maori Trustee*** (*supra*) when he said at p 671, line 30: "That immediate indefeasibility was subject only to (i) fraud, (ii) other specific ss 62 and 63 weakness recognised by [the Land Transfer Act], (iii) the possibility of *in personam* rights, and (iv) the question of the Registrar's powers pursuant to ss 80 and 81 of that Act." His Honour expanded on what was meant by each of those categories in light of the more modern case law, at pp 671 and 672 of his judgment. And in that case, McGechan J specifically held that on its registration at the Land Transfer Office, a Housing Corporation mortgage, by operation of the principle of immediate indefeasibility, became valid and enforceable against all parties notwithstanding the provisions of s 233 of the Maori Affairs Act. Thus, Mr Oliver contended, all that Mr Marshall needed to have done *vis-a-vis* Maori Affairs, or for that matter the outside world, was to point to his Land Transfer Act title. Mr Marshall was entitled to say: "Notwithstanding the lack of the Maori Land Court endorsement, I have got a perfectly good title which you, Maori Affairs, must recognise." In short, on this sort of question of primacy, the Land Transfer Act trumps the Maori Affairs legislation. At the end of the day, as a matter of high principle, that must be so: if there is any area of the law in which absolute security is required - without any equivocation - it must be in the area of security of title to real property. I completely agree with the premise that, with respect, lies behind much of McGechan J's reasoning that any watering down of the primacy of

indefeasibility of title through failure to carry out collateral notifications to other Registries ought to be resisted strenuously.

The Maori Land Court is an important institution in New Zealand. It is an institution to which many Maori in fact look before turning their attention to the Land Transfer Office. Maori rightly regard the Court as an important guardian of their interests. But, at the end of the day, as I have said, there can be no equivocation on a matter of such importance as where paramountcy of title lies. To say that non-compliance with other reporting requirements can or might somehow affect indefeasibility of title is simply untenable. McGechan J rejected such a proposition. So did Judge Carter. So do I.

The issue before me is a narrower one: did the Registrar omit to do something that he ought lawfully to have done? Mr O'Shea's basic proposition was that the Registrar failed to recognise that land in both the transmission and the transfer, as registered in the Land Transfer Office, might be Maori land. He says that s 83(2) was a positive direction and that given such, "it is not sufficient for the Registrar to say that the responsibility for obtaining any necessary endorsement rests [solely] with Corbett and that the Registrar cannot be held responsible for Corbett's failure to do so." Mr O'Shea therefore contended that the Registrar was effectively "folding his arms" and blaming someone else. He further argued that there was a good deal of evidence before the Registrar in 1975 and 1978 when the transmission and transfer respectively were registered which "absolutely littered the way with signs that the land might be Maori land." There were the names of the parties (which included obviously Maori names). The legal description of the land was Allotment 65B2B. That is very significant: such lettering is distinctive of land which is or has been Maori land. The letters of administration would had have to have been produced to the Land Transfer Office. They stated that Mr Marshall was Maori. The great delay in obtaining letters of administration is not uncharacteristic

of Maori estates. The locality in which the property was situated contains many other Maori titles. All of this, it was said, were clear signals to the District Land Registrar. And, the Judge found, and I agree this has to have been most significant of all, that the prior Land Titles had either PR (Provisional Register) numbers, or references to the (then) Native Land Amendment Act 1913 and the Maori Affairs Act 1953. The inference was there to be seen that this was Maori land. The appellant, in this Court, did not contest this.

Mr O'Shea suggested the second omission of the Registrar was that he failed to comply with reg 16 of the Land Transfer Regulations 1966 (SR 1966/25). That regulation provides:

> No application, instrument, dealing, or other matter shall be received for registration unless it complies in all respects with the requirements of the Act and of these and any other regulations for the time being in force thereunder, or if it is contrary to any other law or regulation in force, or if there appears to be fraud or improper dealing.

And then Mr O'Shea said that the Registrar committed a third "omission" for the purposes of s 172(a) in that he did not exercise his powers of requisition under s 43 of the Land Transfer Act 1952 once he was on actual or constructive notice that he was dealing with Maori Land. As was said in *Re Hinewhaki (No 3 Block)* [1923] NZLR 353, 363: "It is for the Registrar to determine what the nature of the requisition is to be, subject to this, that his demands must be reasonable and proper. If they are objected to, the Court or a Judge upon appeal has power to determine their propriety." (*per* Hosking J). Hence, it is said, it would have been reasonable and proper for the Registrar to require Mr Corbett either to have the documents endorsed, or to satisfy the Registrar that he (Mr Corbett) had verified by search at the Maori Land Court that the land in question was not Maori land. I do not overlook that this third point - although Mr O'Shea did not address me on it - perhaps confronts the difficulty I adverted to

earlier that failure to exercise a discretionary power is not an "omission", on the existing authorities.

Mr Oliver's reply to all of this was to say that the provisions in the Maori Affairs Act 1953 and in the 1967 Amendment Act "prevent registration in the Land Transfer Office if they are noted prior to or at the time of registration. A District Land Registrar could reject documents on presentation and prior to registration. However, once registration has been effected then these provisions have no application to somehow invalidate registration." And he reminded me of s 164(1) of the Land Transfer Act (which requires the correctness of an instrument to be certified), and reg 17 as to the form of the certificate. The latter is a powerful regulation in that the certificate as to correctness is a personal one. It must be signed by the solicitor in his own name and not in the name of his firm. Adams, in the second edition of his *The Land Transfer Act 1952*, says:

> The certificate of correctness probably is a guarantee that the Registrar may accept an instrument at its face value, ie that the person signing the certificate is aware of the antecedent circumstances which culminated in the execution of the instrument ... The Registrar only sees what actually appears in the instrument, hence it seemed necessary to have the dealing vouched for. In other words, the Registrar places a trust in the solicitor or broker, and when a person certifies an instrument, only reasonably close contact with the facts which culminate in the execution of that instrument would appear to discharge that trust ... (p 382)

The central problem in this case is: who is responsible for tending the gate between the Maori Land Court paddock, and the somewhat larger paddock represented by the Land Transfer Office? The Registrar-General apparently wants me to say, on Mr Oliver's argument, that he is not a gatekeeper at all. If he has issued an indefeasible title - correct in all its respects - he has then carried out his duty.

I decline to so limit the District Land Registrar's responsibilities. Both practitioners and the District Land Registrar have distinct obligations in law.

The practitioner has the heavy burden placed upon him by s 164 and reg 17. Doubtless the primary purposes of those provisions is to endeavour to avoid fraud in the system, by ensuring that the parties to a transaction are those they actually claim to be. But when a solicitor certifies a transaction correct, she surely also certifies that any collateral matters - such as proper advice to the Maori Land Court of the transaction - has been given where such is required by law. Mr Corbett was hopelessly negligent. The Registrar has a number of statutory obligations. Amongst them, he is obliged to comply with reg 16. That obligation extends beyond a concern over the integrity of his own Register. What else can the words "... or if it is contrary to any other law or regulation in force ..." mean?

Here the Judge found, and on the evidence I think he was entitled to find, that there was knowledge in the Land Registry of the nature of the landholding. What the position might be if there was not knowledge on the part of the Registrar is not something I am required to resolve for the purposes of this case. And, I have no hesitation in saying that the loss suffered by Mr Marshall was, in part at least, in fact caused by the Registrar's omissions. He omitted to note the obvious in that this was Maori land - and in consequence omitted to give effect to reg 16. Moreover, it is well known to Registrars that Maori people, and the Maori Affairs Department, make extensive use of the Maori Land Court records in considering loans and other matters in relation to Maori. Both public and private reliance is an obvious and known factor in this particular situation. There is no policy reason I can discern - and certainly none was suggested to me - to cause the Court to restrict liability. If there is a policy point, it is surely the other way: the high desirability of seeing conformity of information in public registries in New Zealand.

If then, both Mr Corbett and the Registrar had obligations in law in this instance to see that the Maori Land Court endorsement was attended to, but did not

adhere to them, could liability be apportioned between them? The Judge answered that affirmatively. I think he was correct in that approach. As long ago as 1889 the Court of Appeal held, in ***Miller v Davy*** [1889] 7 NZLR 515, that the general doctrine of contributory negligence applies to compensation claims under the Act. At that time, contributory negligence operated as a complete bar. The Contributory Negligence Act 1947 now allows apportionment (s 3(1)). That provision is not limited to pure tortious liability (***Helson v McKenzies (Cuba Street) Ltd*** [1950] NZLR 878 (CA)).

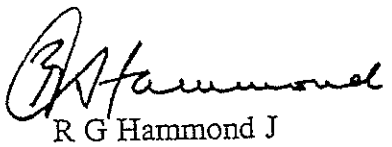
In my view, the Judge was right to apply the statutory provision here. That is not to say that I would necessarily have agreed with his apportionment of 60 : 40. The heaviest responsibility surely lay on the solicitor in control of the transaction, and certifying it. But that apportionment was not put in issue before me, and hence it is inappropriate that I should say anything further about it now. And, again because it was not raised before me, I have nothing to say as to whether there might be subrogation issues as between the Registrar-General and a practitioner in a matter of this kind.

Perhaps I might usefully make one final observation. In an important Maori Appellate Court decision (***Pakiri R Block***, Tai Tokerau District, Case Stated 1/93, 23 March 1994) that Court said:

> The questions raised in this case stated are of considerable importance to Judges of the Maori Land Court. They concern the administration, control and preservation of the integrity of the Maori Land Court record as opposed to the Land Transfer system and the resolution of any conflict between the two systems having regard to the doctrine of indefeasibility of Land Transfer Title as developed by case law. It would be fair to say that since the decision in ***Housing Corporation of New Zealand v Maori Trustee*** [1988] 2 NZLR 662, a feeling has arisen amongst some Judges that the Land Transfer Office has adopted a somewhat cavalier attitude towards Maori land and the protective mechanisms of the Maori Affairs Act 1953. (p 2, para 3).

There was not the necessity, and it was not appropriate, in this instance to systematically investigate whether the concerns of that Appellate Court are justified. But this much at least is surely uncontroversial. The decisions of this Court have affirmed the continuing power of an indefeasible title under the Land Transfer Act. That is an overriding concern. But every reasonable effort, in the interests of Maori, should be made to ensure that the quality of information in the Maori Land Court Registry is supported. This judgment of course suggests that - at least in the circumstances of this case - both the legal profession and the District Land Registrars have legal obligations in that respect.

In the result, the appeal is dismissed. As I understand it, I need not make any order for costs, but if I have misapprehended the position, leave is reserved to counsel to apply on that matter, in writing.



R G Hammond J