THE STATUS AND FUNCTIONS OF THE MAORI LAND COURT

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I OVERVIEW

This paper examines the scope of the jurisdiction of the Maori Land Court (hereinafter "the Court"), the grounds upon which its orders[1] may be reviewed,[2] and the relationship between it, the Maori Appellate Court (hereinafter "the Appellate Court"), the Chief Judge of the Maori Land Court and the Courts of general jurisdiction.

On 21 March 1993 the Te Ture Whenua Maori Act[3] (hereinafter "the Act") was enacted.[4] The Act is aimed at reforming "the laws relating to Maori land in accordance with the principles set out in the Preamble . . .".[5] Although the Act introduces significant changes to the underlying policy of the repealed Maori Affairs Act 1953, it leaves mostly intact those former provisions applying to the status and functions of the Court.

The Act is lengthy[6] but it is not a code of the law on Maori affairs. The application of other statutes to Maori land, eg the Income Tax Act 1976, the Land Transfer Act 1952 and the Property Law Act 1952, is not excluded by the Act. The Act must be read and applied in conjunction with other legislation. However, the proceedings and authority of the

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1 "Order" is defined very broadly in s4 of the Act and means any order, judgment, decision or determination of the Court or the Maori Appellate Court; and includes a refusal to make an order.

2 I have deliberately used the word "review" so to include both appeal and judicial review.

3 Also "The Maori Land Act 1993".

4 The Act had a prolonged gestation period. In 1978 a consolidating Bill of all the amendments of the Maori Affairs Act 1953 was introduced into Parliament. The New Zealand Maori Council was invited to make submissions and its legislation review committee presented its report to the Government in February 1983. The resulting Bill was introduced in serial form, which was incomplete before the change of government in 1984. The new Government did not support the introduction of the original Bill because it desired greater consultation with Maoridom — Parliamentary debates: 1987 NZ Parliamentary Debates 8619 per Hon K T Wetere.

Politicians regarded the Bill as a New Zealand political milestone:
"The Bill represents a significant departure from the agenda of dispossession, alienation, and fragmentation that has characterised the trend of Maori land law in this country . . . It has as its foundation the Treaty of Waitangi, and reflects the Maori philosophy that land is a treasure, a taonga tuku iho, to be preserved and passed on to future generations and that it should remain in whanau, hapu and iwi structures . . . It introduces into the law of our country the concept that, for matters relating to tikanga maori, . . . it is appropriate that the adjudicating tribunal must include members who possess knowledge and experience in such matters." — Parliamentary debates: 1993 NZ Parliamentary Debates 13656-58 per Hon Doug Kidd.

5 Long Title.

6 The 1953 Act contained 473 sections and this Act has 362 sections.

Court, which is a court specially established primarily to determine the rights of Maori over Maori land, and the limits to its jurisdiction, are governed essentially by the Act.

Despite its appellation, the Court is essentially a specialist tribunal. It is not a court of general jurisdiction, although some aspects of its jurisdiction and procedure are similar to those of the genuine courts. It is possibly accurate to describe the Court as a hybrid of both tribunals and courts (eg grantee of very wide discretionary powers; must conform to the principles of natural justice; subject to the doctrine of ultra vires).

Unlike the more restrictive, and uncertain, provisions of the 1953 Act,[7] Court orders are now fully subject to judicial review by the High Court under its inherent supervisory jurisdiction. Therefore, it might be argued, the greater procedural powers conferred on the Court and Appellate Court under the new regime (Part III of the Act) has been at the expense of a loss of independence. Presumably the discretionary powers of the High Court to scrutinise, and change, the Court's orders will not be exercised lightly, given the quite clear legislative directive in the Act (especially the Preamble) that issues concerning Maori land should be *determined* as much as possible by the Court and Appellate Court. However, the potential for judicial review by the High Court may pose some difficulties when, for example, there is a *conflict* between the more inflexible and foreign orthodoxy of English administrative law, and the flexible and informal standard of "customary" law.[8]

The general position, however, is complicated by the peculiar role of the Chief Judge of the Court. Section 44 provides the Chief Judge with the power to consider written applications by aggrieved individuals who believe themselves to have been adversely affected by an order "erroneous in fact or in law because of any mistake or omission on the part of the Court . . ." The Chief Judge may then state, pursuant to section 46(2), a case for the opinion of the High Court, or cancel or amend any order of the Court (s44(1)). Section 4 states that "Court" means, as the case may require, the Maori Land Court or the Maori Appellate Court. Which "Court" is included in section 44 depends therefore on the context. Section 49(1) of the Act provides that any order made by the Chief Judge is subject to an appeal to the Appellate Court, whose decision on the issue is final (s49(2)). The Chief Judge may not, thus, by virtue of this section

7 Section 64 of the 1953 Act prevented *appeals* on issues of fact or law to the High Court or Court of Appeal although, anomalously, there was a right of appeal direct from the Appellate Court to the Privy Council by special leave of the Judicial Committee (*Re Wi Matua's Will* [1908] AC 448).

8 For example, s66(1)(a) allows for proceedings to be subject to "such rules of marae kawa as the judge considers appropriate". Would a European High Court judge have a suitable cultural background to decide what was "appropriate" if the need arose? Other difficulties can also be foreseen. For example, what might be the reaction of more traditionalist Maori, conditioned to patriarchal values, to proceedings in the High Court presided over by New Zealand's first woman High Court judge, Dame Silvia Cartwright? Might this be possibly culturally offensive?

cancel or amend any order of the Appellate Court. Presumably the decisions of the Chief Judge are subject to judicial review by the High Court. Therefore, it might be more expedient, and cheaper, to apply *directly* to the High Court for the review of Court orders. Also, as the section 4 definition of "order" excludes "orders" of the Chief Judge made pursuant to powers within section 44(1), it is debatable whether "orders" of the Chief Judge *are* subject to judicial review.

With the relatively recent resurgence of the legal and social importance of the Treaty of Waitangi,[9] and the undoubted importance of the "spirit" of the Act which is most obvious in the Preamble, any exercise of the Court's discretion in breach of the spirit of the Treaty could now provide new grounds either for appealing to the Appellate Court, invoking section 72 of the Act,[10] appealing to the Chief Judge under section 4(1) of the Act, or applying to the High Court for judicial review (on the grounds of an improper exercise of discretion).

II Jurisdiction of the Maori Land Court

A Nature of the Court

Section 6 of the Act provides for the continuation of the Court. It is not a court of general jurisdiction although it shares some of the features of the courts that form the central judicial hierarchy. For example, it is a court of record,[11] has the power to punish for contempt of court,[12] is presided over by specialist Maori Land Court judges and reaches binding decisions. The Court has been described as forming part of an important group of semi-independent agencies that use special "judicial" procedures to ensure that individuals affected by what are effectively administrative decisions are given the opportunity to appeal (to the Appellate Court[13]), give evidence (although the strict rules that govern the admissibility of evidence in adversarial trials have been relaxed in this Court; its procedure is "inquisitorial"[14]), to be represented by legal counsel and to be eligible

9 Associate Professor Kenneth Palmer argues that the Maori rights renaissance began in 1975 and involved a process of attitudinal change, political innovation, legislative recognition and judicial activism – K A Palmer, "Law, Land, and Maori Issues" (1988) 3 Canta LR 322 at 346.

10 Stating a case for the opinion of the High Court.

11 A court whose proceedings/decisions are written out and stored (and published if addressing more significant legal issues) and which may be used as binding or persuasive authority.

12 Ss89-91 of the Act.

13 S72 of the Act also provides the right for the Appellate Court and, with the special permission of the Chief Maori Land Court Judge, the Court to state a case for the opinion of the High Court on any point of law. Also s61(3) allows the *High Court* to state a case for the Appellate Court, with additional powers for the Appellate Court to enlist the aid of other members (non-judges) versed in tikanga maori to help the determination (s62).

14 This means that the Court places greater importance and emphasis on ensuring that "fairness" and "justice" is achieved, through informality, rather than permitting rigorous, doctrinal legal principle to dominate the settlement of any dispute.

for legal aid.[15] The Court has been categorised as a special class of administrative court[16] designed to administer and implement the policy of the Ministry of Maori Development[17] in respect of Maori land. It deals with a particular class of case, where it is essentially an *alternative* to the ordinary courts.

B Maori Land

Section 18 of the Act sets out the general jurisdiction of the Maori Land Court. Both this section and the long title to the Act presuppose that the land in question is Maori land.

In section 4 the Act distinguishes Maori land, which consists of customary land and Maori freehold land eg land vested in the Maori Trustee, from Crown land and General land (alienated land). The Court is most often required to determine the rights of Maori over multiply-owned Maori freehold land.

One of the functions of the Waitangi Tribunal is to determine whether disputed land is Crown land or Maori customary land. Section 6A of the Treaty of Waitangi Act 1975 provides that the Tribunal may state a case to the Appellate Court concerning Maori custom or usage, rights of Maori ownership, occupation of particular lands and determination of tribal boundaries.

The decision of the Appellate Court is binding on the Tribunal: section 6A(6) of the Treaty of Waitangi Act 1975. The Waitangi Tribunal itself has only recommendatory powers; its decisions are not binding on the Crown. Presumably any order of the Appellate Court made pursuant to this section is subject to challenge in the High Court through judicial review.[18]

Alternatively, there is some authority for the proposition that the right to extinguish native title to land may only be exercised by the constitutional Ministers of the Crown in accordance with the empowering statutory authority. The Privy Council has decided that the suggestion of the extinction of the Maori title by the exercise of the prerogative outside the statutes if the Maori title is in existence.[19] Any assertion of title to land

15 S98 of the Act provides for the establishment of a fund called "The Maori Land Court Special Aid Fund" from which the Court may make orders for the payment of legal costs. Section 98(5) expressly precludes assistance under the Legal Services Act 1991.

16 L Cleveland and A D Robinson (eds), *Readings in New Zealand Government* (1972), 17.

17 In 1989 the Department of Maori Affairs was replaced by Te Manatu Maori and Te Tira Ahu Iwi. With the change of Government in 1990 both were replaced by Te Puni Kokiri (Ministry of Maori Development). The Department of Justice is now responsible for administering the proceedings of the Court (ie appointment of judges, clerks and administrative staff, providing resource materials and forums for hearing, reporting decisions etc.). Both changes were implemented by the Maori Affairs Restructuring Act 1989.

18 Also appeals from the Cook Islands and Niue Land Courts involve New Zealand Maori Land Court judges acting in an appellate capacity.

19 *Nireaha Tamaki* v *Baker* [1901] AC 561 at 576 per Lord Davey.

by the Attorney-General or other state functionary representing the Crown can be treated as a pleading only and requires proof by evidence.[20] It is questionable whether land previously held under Maori custom which has been appropriated by the Crown under an imperfect (illegal) proclamation could be challenged in the High Court.[21]

C Other Functions

Section 18 is not exhaustive. Unlike the 1953 Act, this Act is concerned only with issues over Maori land. The main areas of the Court's jurisdiction have been summarised, and subsequently updated, as follows:[22]

(1) The investigation of the title to customary land, and the transformation of that land into Maori freehold land by the issue of freehold orders to the Maori entitled (s132). Maori customary land is inalienable (s145).
(2) The making of orders for the conversion of General land into Maori freehold land (s133).
(3) The partition of Maori freehold land among owners in common (Part XIV).
(4) Changing the status of Maori land into General land (s135).
(5) Sanctioning the exchange of Maori land (ss310-312).
(6) Granting succession orders (Part IV).
(7) Appointing trustees for Maori land interests who are minors (s222).
(8) Confirming land alienations (Part V).
(9) Enforcing or administering any trust of Maori land (Part XII).
(10) Vesting Maori land in trustees (Part XII).

III Review of the Orders of the Maori Land Court

A Maori Appellate Court

Section 58 of the Act sets out the general jurisdiction of the Appellate Court. Unless expressly prohibited by the Act or any other statute the Appellate Court may hear and determine appeals from *any* final order of the Court, provided the notice of appeal is given within two months of the date of the original order: section 58(3). Section 59(1) also provides the Appellate Court with the power to determine provisional or preliminary decisions of the Court provided it is sanctioned by the Court if appropriate.

The powers of the Appellate Court are listed in section 56. This section is inclusive not exhaustive. Section 56(2) provides the Appellate Court with the same discretionary powers as those possessed by the Court.

The power of the Appellate Court (and the High Court on an application for judicial review) to review the actions of the Court is founded on

20 *Tamihana Korokai* v *Solicitor-General* (1912) 32 NZLR 321 at 358 per Chapman J.
21 The question is raised but not explored as it lies outside the scope of this article. Dicta to the contrary is contained in *Te Whana Whanau Trust* v *Hawera District Council,* unreported, High Court, Wellington, 3 September 1991, AP 157/90 Greig J.
22 E J Haughey, "The Maori Land Court" [1976] NZLJ 203 at 208-209.

the allegation that the Court, as a tribunal and therefore subject to administrative law principles, has usurped, exceeded or abused its powers, or failed to comply with its public duties. One of the most important grounds for applying for review is the misuse of discretionary powers. This is the most common form of intervention by the Appellate Court.

The circumstances in which the Appellate Court may set aside the Court's exercise of discretion include cases where there has been a failure to take account of or give due weight to relevant matters or where an erroneous inference has been drawn from the available facts or where the order would result in injustice. However, as stated in a leading English decision:[23]

> The Appellate Tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the Judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them in a different way. If, however, the Appellate Tribunal reaches a clear conclusion that there has been a wrongful exercise of discretion, in that no weight, no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

The Appellate Court must thus be satisfied that the exercise of the discretion was wrong: it must not reverse the Judge's decision on a mere "measuring cost" or on a bare balance, but a reasonable danger of injustice justifies a review.[24]

In *Wi Kupe* v *Acheson*[25] a grant of probate over a Maori estate was successfully contested in the Court. The Appellate Court reversed the decision and directed the Court to make an order granting probate with the will annexed. The Court subsequently granted probate subject to conditions. The plaintiff successfully applied to the Supreme Court for a writ of mandamus. Sim J held that the Court judge had exercised a discretion and judicial function which he did not possess. Once he had decided upon the questions submitted to him by the Appellate Court, he was *functus officii* in his judicial capacity over the probate of the will, and his only duties were ministerial, ie to sign and seal the order that probate be granted. If the facts were to be repeated today the plaintiff could re-appeal to the Appellate Court which could then issue a writ of mandamus under its powers contained in section 56(d) of the Act. This would compel the performance of the appellate order and remove all discretion.

Section 61(1) of the Act provides that if any question of fact or Maori custom or usage relating to the interest of Maori in any land or personal property arises in the High Court, pursuant to proceedings which have

23 *Charles Ostenton & Co* v *Johnston* [1941] 2 All ER 245 (HL), at 250 per Viscount Simon LC.

24 *Evans* v *Bartham* [1937] AC 473 (HL), at 486 per Lord Wright.

25 (1923) XXV GLR 10.

been transferred into the High Court as a case stated under section 72(1) of the Act, the High Court shall refer the issue back to the Appellate Court for determination.[26] However, the High Court has no jurisdiction to inquire into purely native titles, nor can it investigate questions arising out of the proceedings/practice of the Court so long as that Court confines itself within the limits of its peculiar jurisdiction.[27]

As a general rule all orders, whether from the Court or the Appellate Court, are final and therefore unchallengeable after the expiration of ten years: section 77(1) of the Act. However, the paramount discretion of the Chief Judge to cancel or amend any order pursuant to powers in section 44(1) has been retained in the Act. Presumably this authority includes a residual power to affect orders that would otherwise be out of time under section 77(6).[28]

The Appellate Court, or the Court with the sanction of the Chief Judge, has the power to state a case for the opinion of the High Court on any question of law arising within the proceedings: section 72(1). In *Harris Simon and Co Ltd* v *Manchester City Council,*[29] Lord Widgery CJ considered the meaning of an appeal by way of cased stated. His Lordship concluded that it is a form of *consultation* made to obtain an answer on a point of law.

Generally speaking, questions or points of law include such issues as which rules of law are applicable to some issue, what the proper formulation of the rules are, and what they require or permit. Questions of law have to be ascertained, failing admission, by the interpretation of statutes, cases and other authoritative sources of the law, aided by the arguments of counsel. The interpretation of documents, for example, is always a question of law. An appeal on matters of fact allows an investigation of the evidence and the proper inferences to be drawn from it, whereas an appeal on a point of law limits consideration at the appeal to such questions as whether facts admitted or held proved justify or permit, by the rules of law, a particular decision or disposal of the case before the court.

The issue of what constitutes an error of law was considered by Lord Radcliffe in *Edwards* v *Bairstow.*[30] In what is now considered to be a classic statement His Lordship said:[31]

26 S61 of the Act provides that any question of fact relating to Maori interests in land in the High Court may be referred to the Appellate Court for final determination. This general provision applies to *any* proceedings in the High Court. S62 provides that non-judges with expertise in tikanga maori may assist the Appellate Court. These provisions raise interesting precedent questions. Presumably the Court of Appeal would be the only court capable of judicially reviewing Appellate Court decisions made under s61.

27 *Tamihana Korokai,* supra n20, at 349 per Edwards J.

28 A conclusion confirmed somewhat by s77(3) of the Act: "Nothing in this section shall limit or affect the authority of the Chief Judge to cancel or amend any order . . . ."

29 [1975] 1 All ER 412 (QB).

30 [1956] AC 14 (HL).

31 Ibid at 36.

> If a case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But without any such conception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there too, there has been an error in point of law.

His Lordship explained how this second manifestation of error of law can be articulated:[32]

> I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with and contradictory of the determination made, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

The decision of the High Court on any case stated to it under section 72(1) may be appealed to the Court of Appeal (s72(3)). The hearing may also be removed to the Court of Appeal by the Chief Judge under section 77(2). It is not clear whether the decision of the High Court or Court of Appeal on any case stated under section 77(3) is binding *and* final on the Court and Appellate Court, or whether there is still a residual right of appeal to the Privy Council.

Section 66(2) of the Act confers on both the Court and the Appellate Court powers to conduct hearings inquisitorially.[33] Strict laws of evidence are not considered appropriate in these trials.[34]

Generally speaking the Appellate Court will not receive evidence. It places greater reliance on the evidence that was adduced in the Court and almost without exception an Appellate Court will not grant leave to hear any fresh or new evidence relative to the matters that were dealt with in the Court.[35] Consequently it is vital that cases should have been thoroughly prepared and fully argued by counsel in the Court.

Section 71(1) of the Act provides the judges of the Court (or Appellate Court) with the authority to amend any defects or errors in the proceedings. It might be argued that this section implicitly extends to the importation into the Act the equitable doctrine of rectification.

32 Idem.

33 S67(1) provides that Judges may call a conference of parties and give directions "for the purpose of ensuring that any application or intended application may be determined in a convenient and expeditious manner".

34 S68 of the Act provides that evidence may be given in Maori.

35 *Ham* v *Ham* unreported, Maori Appellate Court, Aotea District, 24 August 1989, Appeal 1989(4) at 3 per Deputy Chief Judge McHugh.

B The Chief Judge

The Chief Judge has been given separate jurisdiction which is contained in section 44 of the Act. This jurisdiction arises if the Chief Judge, on consideration of a written application from an individual who alleges she has been adversely affected by an order of the Court, because the order was erroneous in fact *or* law by reason of any mistake or omission by the Court, or in the presentation of the facts of the case to the Court, is satisfied that the claim is valid. The Chief Judge "may make such . . . order as in the *opinion of the Chief Judge* is necessary in the interests of justice to remedy the mistake or omission" (emphasis added). The section is designed to avoid injustices by enabling errors of the sort it outlines to be put right.[36] If the Chief Judge is persuaded that a mistake has been made out she has the power to cancel or amend the order.

This section raises two particularly important points. The Chief Judge's powers are *subjective;* they may be exercised on wider grounds than the more restrictive objective criteria based on the implicit concept of "reasonableness". Consequently, secondly, the orders of the Chief Judge may be more difficult to review in the High Court *and,* under the very wide powers conferred by section 44(1) of the Act, the Chief Judge has the power to make partition and alienation orders.

All orders *made* by the Chief Judge under s44 are subject to appeal to the Appellate Court (s49(1)). The Chief Judge may also state a case for the opinion of the High Court (s46(2)), and there is a potential right of appeal to the Court of Appeal available under section 72(3). There is also jurisdiction to potentially remove a special case stated *directly* to the Court of Appeal under section 72(2).

C The High Court/Court of Appeal

The orders of the Court, Appellate Court and the Chief Judge are subject to the doctrine of ultra vires (the doctrine that agencies created by statute have only such powers as statute has conferred on them); and the application of the doctrine may be regarded as the enforcement of the "rule of law".[37] Persons or bodies given limited statutory powers must be subject to challenge before the courts if they misuse their powers, or purport to exercise non-existent powers. Although there are numerous grounds of challenge available under this doctrine, it could be argued that the general tenor of the Act has eliminated procedural improprieties as a ground of review unless blatantly unacceptable.

Section 64(1) of the 1953 Act provided that no order or other proceeding of the court could be removed by certiorari or otherwise into the High Court. A writ of certiorari is a way of preventing the inferior courts from exceeding their powers. It requires the record or order of the inferior court to be sent up to the High Court to have its legality inquired into, and, if necessary, to have the order quashed. The power to quash an order under

36 *Maori Affairs Board* v *Jeune* [1971] NZLR 283, at 286 per Woodhouse J.
37 J F Garner and B L Jones, *Garner's Administrative Law* (6th ed 1985), 105.

certiorari depends on an error of law on the face of the record. The error of law does not go to jurisdiction. It depends on errors in the record; the record consists of the document that initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the Court chooses to incorporate them. The error must appear on the record itself.

A section 64(1) equivalent has been omitted from the Act. Presumably this is a deliberate act of Parliament. If so, then all orders of the Court and Appellate Court are potentially subject to judicial review. It is submitted that this change is a mistake. The underlying policy of excluding certiorari in the former Act may have reflected the desire to retain proceedings in the Court at an informal level, due to latent cultural dissimilarities over the way of resolving disputes. Europeans are accustomed to giving legal recognition to the written, documented records of land tenure or contracts affecting land; the deed is all-important. For the Maori, working with the oral culture, the spoken words are crucial, especially if spoken publicly and solemnly by important men especially at the Marae.[38] Hence, one rationale for section 64 may have been the desire of the legislature to preserve the Maori traditions. Realising the inherent evidential problems that inevitably occur in settling disputes in reliance of oral and hearsay evidence, the section's existence could have been understood as representing a compromise between the necessity for certainty and the desirability of customary flexibility. It may have embodied a deliberate policy decision by Parliament that the principle of "near enough is good enough" will suffice in this instance. If orders were required to consider studiously *all* evidence there was a danger that some disputes over Maori land could have become subject to interminable review. Now the omission of a section 64 counterpart provides an opportunity for arguing, despite section 74, that it may be "necessary in the interests of justice to remedy the mistake or omission" in an order, resulting from underlying procedural impreciseness.

Arguably, provisions in the Act that permit procedural informality and implicitly limit grounds for judicial review[39] are not sufficient to prevent a *right* of review by the High Court. The courts have traditionally taken a conservative approach to privative provisions. As a general rule, courts are usually reluctant to construe them literally or apply them strictly. For example in a reserved decision of Stout CJ,[40] His Honour said that despite the fact that the writ of certiorari had been removed by statute under the previous legislation, it can be restored " . . . where no other remedy is available and the court is of the opinion that injustice has been done."[41] Similarly in *Tutua Teone* v *Jones,*[42] a case that involved the jurisdiction of the Chief Judge to exercise a discretion under the modern statutory

38 Also the Maori did not originally have a written language – K. Sinclair, *A History of New Zealand* (4th ed 1991), 22.
39 Eg ss69, 74.
40 *Re Harawira Pikirangi* (1915) XVII GLR 563.
41 Ibid at 566.
42 [1936] NZLR 494 (CA).

equivalent of section 44(1), the reserved decision of the Court of Appeal unanimously held that the Chief Judge had the jurisdiction to remedy a mistake made by the Court on the grounds that the Court had not known of a vital piece of evidence that would have affected their decision. Kennedy J justified his decision by saying that: "[t]here does exist mistake or error when the conclusion of fact reached does not accord with the actual facts although it may happen to accord with and be consistent with the evidence before the tribunal."[43] In a later passage he added:[44]

> If the intention be, as I think it is, to prevent miscarriage of justice, there is little reason why the Legislature should give a power, with all the safeguards indicated, to reverse a determination of the Court or of the Appellate Court as being erroneous in law, or to reverse its order because, upon the material before it, there was a mistake, error, or omission and should stop short of granting the same relief when such mistake or error lay in the Court only in this sense: that it was under mistake or error because the real facts were not before it.

IV The Potential Impact of Modern Treaty Jurisprudence

The Act is the most recent in a line of statutes devoted entirely to the amendment and consolidation of the law relating to rights in Maori land, and some other aspects of law that apply especially to Maori which date back to the original Native Lands Act 1862. The Preambles are very similar with both mentioning Article 2 of the English text of the Treaty of Waitangi.[45] One interpretation is that the essence of this Article was the cession of all land to the Crown with the guarantee of Maori customary title over it for as long as the land remained in the full, exclusive and undisturbed possession of those Maori able to establish title, and the acceptance of the Crown's right of pre-emption over the land if, and when, Maori decided to sell it. A brief analysis of the caselaw of the 1862 Act and its early amendments, before judicial distortions began to appear, may thus help to reveal the true legislative intention and underlying policy of the Act. Further, in view of the rapid changes occurring in the interpretation of the Treaty of Waitangi, which arguably revive the more accurate earlier interpretive principles expounded by the courts, it is necessary to examine the nature of the Act and its likely interpretation in the context of contemporary New Zealand society.[46]

43 Ibid at 507.

44 Ibid at 508.

45 The Preamble of the Native Lands Act 1862 expressly acknowledged and conceded the importance of Article 2 of the English version of the Treaty of Waitangi. The Preamble of the Act includes both the Maori and English versions, the latter stating, *inter alia*: ". . . And whereas it is desirable that the spirit of the exchange of kawanatanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable . . . to promote the retention of . . . land in the hands of its owners . . . : And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles: . . ."

46 It would be fair to say that the Court has caused much notoriety in New Zealand since its inception in 1862. Norman Smith, a Maori Land Court judge, argued that the early history of New Zealand is inextricably linked to the relations between Maori and Europeans concerning land and he refers to an unsourced statement made by Chief Judge Fenton that it was the want of a tribunal empowered to investigate Maori land titles,

The courts initially held that the Native Lands Act 1862 was the first effort by the legislature to define and regulate the lands and estates of Maori under the Treaty. In 1900 Edwards J recognised the importance of the relationship between the Treaty and the Native Lands Acts of 1862 and 1865:[47]

> The Native Lands Act 1862, recites the Treaty, and the rights of the Natives thereunder; and the whole of the legislation relating to native lands up to the present day recognised the existence of these rights.

Similarly Chief Judge Fenton, the first Chief Judge of the Native Land Court ("Native" was changed to "Maori" under the 1953 Act), said that "These two Acts entirely coincide with the Treaty, and must be regarded as a complement of it."[48]

Unfortunately, despite this understanding, it is well documented that the subsequent history of the interpretation and application of the spirit and principles of the Treaty and, by implication, the provisions of the

and to rectify errors, that caused the Taranaki war. (N Smith, *Maori Land Law* (1960), 7). Unfortunately the author failed to refer to the "errors" made by Chief Judge Fenton, unlike Professor Sorrenson, for instance, who has chronicled the social devastation of Maori caused by unscrupulous land dealings in the mid-nineteenth century:

"The policy initiated by the Native Land Acts . . . meant that European dealers were free to exploit the Maori landowners . . . European purchasers could nearly always find one or two individuals of the tribe who were willing to sell land. If they did not make a cash advance they called on the assistance of the local storekeeper or publican, who often acted as "Native land agents" and who offered the Maori liberal supplies of goods and liquor on credit. Through debts a hold was obtained on the Maori and his land and the next stage was to bring the law to bear on the transactions . . . If they failed to obtain a freehold title immediately the credit-debt procedure was applied again until the final conveyance was obtained . . . At Court they usually had to face a lawyer employed by the European dealer to fight the case, . . . and in employing lawyers themselves as well as paying court and survey expenses, on top of the cost of living in European towns sometimes for several months, generally lost the land even if they did win the case" (M P K Sorrenson, "Land Purchase Methods and their Effect on Maori Population, 1865-1901" (1956) 65 Poly Soc J 183 at 186).

Professor Sir Hugh Kawharu has suggested that the individualisation of Maori title by partition and alienation through the operation of the Court contributed to the Maori cultural hiatus. Sir Hugh claims it caused a diffusion of control over tribal estates, a reduction of incentive to live locally and dissipation of resources through fragmentation. The right to alienate land regardless of kin obligations and tribal authority has exacerbated the phenomenon. See I H Kawharu, *Maori Land Tenure* (1977), 108.

Smith also wrote that the advent of the Maori Land Court introduced to Maori a new form of warfare. The physical struggles, which formerly took place, in which *ringakaha,* or the strong arm was the deciding factor, were transformed into verbal contests in the Court itself – N Smith, supra at p8.

47 *Mueller* v *Taupiri Coal-Mines* (1990) 29 NZLR 89 at 122.

48 *Kauwaeranga judgment* (1983-84) 13-14 VUWLR 227 at 239.

Native Lands Acts in particular,[49] is fraught with inconsistency and injustice. The reports of the Waitangi Tribunal are a testimony to this legacy. Consequently, it might be argued that the specific decisions of the Native and Maori rights to land under the earlier legislation were similarly tarnished by the pervading and what now appears to be often legally incorrect attitudes towards the status of the Treaty. For example, the infamous words of Prendergast CJ in *Wi Parata* that the Treaty ". . . must be regarded as a simple nullity . . ."[50] must now safely be said to be incorrect law.[51]

A similar New Zealand case which was prejudicial to Maori interests was the judgment of Turner J in the Supreme Court in *Re Ninety Mile Beach,*[52] a case involving a dispute over the title of land described as the foreshore of the Ninety Mile Beach between high and low water marks. His Honour said that ". . . with the establishment of British rule in this country, the whole of its area became the property of the Crown, from which all title must be derived".[53] At least two comments can be made of this judgment.

First, the reasoning is inconsistent with an earlier reserved decision of the full court of the New Zealand Court of Appeal in *Tamihana Korokai* v *Solicitor-General*[54] where, for example, Cooper J said:[55]

> Customary lands owned by the Natives which have not been ceded to His Majesty or acquired from the Native owners on behalf of His Majesty cannot, in my opinion, be said to be land vested in His Majesty by right of His prerogative. It is true that, *technically* the legal estate is in His Majesty, but this legal estate is held subject to the right of the Natives, recognised by the Crown, to the possession and ownership of the customary lands which they have not ceded to the King, and which His Majesty has not acquired from them.

Further authoritative dicta are found in the Privy Council's decision in *Nireaha Tamaki* v *Baker.*[56] Lord Davey, who gave the advice of the Council, overruled *Wi Parata* and said that the Native Lands Act 1865 clearly assumed the existence of a tenure of land under custom and usage which is "either known to lawyers or discoverable by them by evidence."[57]

49 Many of the more significant judicial principles on Maori land were developed over a relatively shorter period of activity up to about the end of the second decade of the twentieth century. Possibly this coincided with the eras when the demand for land for early European settlement purposes was at its greatest (eg the influence of the New Zealand Company) and when more land was required to settle returned servicemen after the First World War.

50 *Wi Parata* v *Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 at 78.

51 "With the advent of legislation invoking recognition of the principles of the Treaty, no longer is it to be regarded as a "simple nullity . . . and the application of its principles does not involve the enforcement of the Treaty itself as if totally incorporated in municipal law . . ." *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641,715 (the "State-Owned Enterprises Case") per Bisson J.

52 [1960] NZLR 673.

53 Ibid at 675.

54 Supra n20.

55 Ibid at 352-353 (emphasis added).

56 Supra n19.

57 Ibid at 577.

His Lordship did not need to specify the exact nature or incidents of such title, because it was not required on the facts. If necessary those rights could be ascertained by the Supreme Court with the assistance of the Native Land Court.[58]

Secondly, the precedent value of some of the previous decisions of all New Zealand courts addressing Maori land issues[59] might now require qualification and reconsideration. It is suggested that in the last decade both the New Zealand courts *and* the New Zealand Government have entered into a belated era of unprecedented concern and evaluation of the implications of the Treaty of Waitangi in New Zealand society.[60] The last decade has been a period where the focus of the jurisprudence of the Treaty of Waitangi has been subtly shifted to the natural or moral rights of Maori, and where correspondingly the seemingly implacable role of positive law (common law or legislative rules) and the rigours of formalism,[61] have been greatly undermined. In short, it is submitted that New Zealand has entered a revolutionary era where the positivist tradition over Treaty issues which was so entrenched in the reasoning of New Zealand courts has or will be usurped by a different approach based largely in natural law theory;[62] where the courts will be more aware and sensitive to Maori rights and attempts will be made, over time, to restore some of the mana which has been lost to Maori over the past one hundred and

58 Ibid at 578.

59 Particularly those determined before 1987, the year in which the Court of Appeal's historic decision in the "State-Owned Enterprises Case", supra n51, was delivered. See R P Boast, "New Zealand Maori Council v Attorney General: the case of the century?" [1987] NZLJ 240: "The statements of the court itself were somewhat muted, but there emerges from all of the judgments a strong sense of history in the making" (at 240); "Although legally predictable, the decision is a constitutional landmark in recognising for the first time the substance of the "principles of the Treaty of Waitangi", and in accepting again . . . the importance of the Treaty of Waitangi Act 1975 in the legislative recognition of the wording of the Treaty, with the appointment of the Waitangi Tribunal as a specialist body to advise and report as to the interpretation of both the Maori language and English language versions." – K A Palmer, supra n9 at 339. Contrast the less sympathetic comments of Jane Kelsey, who says in one case that the court addressed the "principles" of the Treaty and not the Treaty itself, and criticises the inequality of the "partnership" – the Government to consult Maori but the Maori owe *absolute loyalty* to the Crown – J Kelsey, "Rogernomics and the Treaty" in H Yensen et al (eds), *Honouring the Treaty* (1989), 128-129. In another polemical article Kelsey, amongst other things, challenges the authority of five Pakeha male judges without specialist knowledge of the Treaty to determine "the principles", especially when the Waitangi Tribunal was specially created for the task and bipartisan members selected for their expertise – J Kelsey, " 'Rogernomics' and the Treaty of Waitangi, An Irresolvable Contradiction?" (1989) 7 Law in Context 66 at 77.

60 Eg refer to the Preamble of the Act: supra n45.

61 For the purposes of this paper "formalism" may be summarised as the legal system's preoccupation with the orderly hierarchical structures of power eg the doctrine of precedent.

62 "Natural law is the sum total of all those norms, which are validly independent of, and superior to, any positive law and which owe their dignity not to arbitrary enactment but, on the contrary, provide the very legitimation of the binding force of positive law." Max Weber *Economy and Society: An Outline of Interpretative Sociology* (G Roth and W Wittich eds, 1968), 867.

fifty years. For example in *Huakina Development Trust* v *Waikato Valley Authority*[63] Chilwell J said that "There can be no doubt that the Treaty is part of the fabric of New Zealand society".[64] Similarly Cooke P wrote that although the Treaty is not a fundamental New Zealand constitutional document, or that its rights can be enforced without statutory recognition, His Honour accepted that it should be interpreted widely and effectively as a living instrument.[65] As one commentator has said, the legal situation is in an extremely fluid and formative state.[66]

Consequently, for example, previous narrow and artificial court-imposed distinctions between Maori rights to land, fisheries, lake-beds, river-beds and foreshore could now be viewed as falling within the concept of "taonga", an elastic expression used in the Maori version of the Treaty, the copy signed by the majority of Maori chiefs, which very roughly translates as "things treasured".[67] For instance, if the facts of *In re the Bed of the Wanganui River*[68] were to recur today, extensive legal argument over the application of the *ad medium filum aquae* rule that dominated much of the analysis in that case,[69] would not necessarily assume the same level of importance. To rebut the presumption counsel would simply need to adduce evidence that the river was an important customary fishery resource which had not been voluntarily surrendered. The burden of proof would rest with the party relying on the traditional presumption to prove to the satisfaction of the court, on the balance of probabilities, that the presumption should indeed be applied. In *Attorney-General* v *New Zealand Maori Council*[70] Cooke J was prepared to concede, for instance, that ". . . the Treaty principles of partnership and protection of taonga . . . can be argued to combine to make it incumbent on the Crown to take reasonable steps to enable Maori language and culture to be provided by broadcasting".[71]

This new perspective on interpretation potentially raises a number of previously unconsidered issues. For example, can the Court, and the courts of general jurisdiction, prevent the legal alienation of Maori land if *they* consider that the results of the partition or alienation would be detrimental in some way to the rights and interests or functional integrity of other tribal co-owners of the land? Could it be argued that the spirit of the Treaty should prevail over the letter of the law, so that the strict adherence to

63 [1987] 2 NZLR 188.
64 Ibid at 210.
65 The "State-Owned Enterprises Case", supra n51 at 655-656.
66 P McHugh, *The Maori Magna Carta* (1992), xiii.
67 S2(3) of the Act states: "In the event of any conflict between the Maori and the English versions of the Preamble, the Maori version shall prevail."
68 [1955] NZLR 419 (CA).
69 This common law rule presumes that the boundaries or riparian lands extend to the midway point of adjoining streams or rivers.
70 [1991] 2 NZLR 129 (CA), the "Radio Frequencies Case".
71 Ibid at 135. Perhaps His Honour's reasoning was influenced by the Preamble of the Maori Language Act 1987 (Te Reo Maori) which acknowledges that the Maori language is to be a taonga under the Treaty.

introduced European notions of (feudal) land tenure[72] should now, where appropriate, be held subservient to proven Maori custom and usage of land, reflecting traditional Maori values of communal ownership?

There is already some case law indicating that the courts have started to adopt a new line of reasoning, embodying fundamental elements of natural law, which has possibly been sparked by the heightened awareness of the traditional value of land to Maori following the work of the Waitangi Tribunal. The judgment of Williamson J in *Te Weehi* v *Regional Fisheries Officer*[73] was a watershed. His Honour, contrary to previous New Zealand authority which had held that traditional property rights could have a legal basis, but only as a result and to the extent of statutory recognition,[74] concluded that legislation had not extinguished the common law right as part of an aboriginal title to a fishery held by Maori. In reaching his decision His Honour relied upon more developed North American case law on indigenous rights and a previously unacknowledged but very important Privy Council decision[75] where it was held that a mere change in sovereign is not to be presumed to disturb the rights of pre-existing private owners of land. *Te Weehi* possibly admits a form of legal pluralism directly into the New Zealand judicial system *without* the aid of any ushering statute.[76]

Even assuming it does apply, the exact scope of this proposition is not clear. The Court of Appeal seems to be divided on the point. In *Attorney-General* v *New Zealand Maori Council* Cooke P implied that courts could consider the Treaty of Waitangi as a "relevant consideration" in the exer-

72 In feudal theory and at common law all land is ultimately held of and under the Crown. The origins of this doctrine date back to the Norman conquest of England under which the Monarch, William the Conqueror, appropriated all lands and subsequently introduced a system of land tenure designed to enlist the loyalty and services of landowners in exchange for landholdings (feudalism).

73 [1986] 1 NZLR 682.

74 In *Waipapakura* v *Hempton* (1914) 33 NZLR 1065, a case involving issues over freshwater fishing rights, Stout CJ said that the Treaty would not of itself be sufficient to create a right in the native occupiers of land *cognisable in a court of law* (at 1071). His Honour also said that he considered that the New Zealand law on fisheries was identical to the imported English Law, "except in so far as it has been altered by our statutes" (at 1071).

75 *Tijani* v *The Secretary, Southern Nigeria* [1912] 2 AC 399.

76 The word "possibly" is important because this proposition is a moot point. For example, the dicta of Sir Robin Cooke in the "State-Owned Enterprises Case", in the text accompanying supra n65, appear to negative it. Similarly, Smellie J was reluctantly not prepared to make an interim injunction against the sale of Crown land, not governed by s9 of the State-Owned Enterprises Act 1986, but which was subject to a claim before the Waitangi Tribunal, on the grounds that he could not convert a moral question into a legally enforceable right – *Nga Iwi Katoa v District Land Registrar,* unreported, High High Court, Auckland, 22 December 1992, M2067/02. See similar comments in *Application by Tasman Gold Developments Ltd,* unreported, Planning Tribunal, 22 February 1992, A14/93 at 18: "It is for the Planning Tribunal to consider the application in accordance with the law as it is, and not as it might be if Parliament had chosen to give fuller effect to the Crown's Treaty obligations (assuming, without expressing an opinion, that they are capable of being given fuller effect)."

cise by public officers of discretionary powers.[77] However, Casey J did not accept that the principles of the Treaty necessarily apply to decision-making where there is no statutory provision requiring them to be taken into account.[78]

This new approach based on principled reasoning may now have started to inculcate itself into the proceedings of the Appellate Court, which in itself has pre-empted the changes expressed in the Act.[79] In *Re Kairakau 2C5B; Kapiti Farm Ltd's Appln,*[80] the land which was subject to a dispute was created by a Partition Order[81] in 1919 which vested it in 5 owners. By 1974 there were 9 owners and in that year Kapiti Farm Ltd (the appellants) purchased the shares of 3 of those owners. It purchased the shares of 2 more owners in 1978 so that at the time of the dispute it owned 1444.134 shares out of a total shareholding of 2344.00 shares. The Court refused to partition the land pursuant to its discretionary right now in section 152 of the Act. In an appeal to the Appellate Court, Judge Russell, who delivered the judgment of the Court dismissing the appeal, made a number of important comments. His Honour canvassed the authorities which had basically held that the Court should be careful to permit applications for partition from applicants with Maori ancestry, and should fully consider the interests of all owners of the land. Collective development was preferable to the fragmentation of title and individualisation of ownership. He extended the principle to an applicant who is merely an abstract concept (a company) saying that when Kapiti Farm Ltd made its first purchase of an interest in the undivided block of land it only obtained the right to stand in the shoes of its Maori vendor. He agreed with previous authority and held that where the Act is silent on any point, the Court will not necessarily follow the common law rules that are applicable to General land (ie non-Maori land). His Honour therefore concluded that a purchaser of an undivided interest in Maori land acquired only the *possibility,* and not the certainty, of partition.

It might thus be argued, first, that the authority of *some* of the legal principles on Maori land are of questionable value in that their underlying reasoning might well be inconsistent with the modern approach to the Treaty as it has been more explicitly expressed in the Act.

Secondly, this modern Treaty jurisprudence may now provide sufficient grounds in many cases for appealing to the Appellate Court for a reconsideration of the lower Court's exercise of its inherent discretion, and pos-

77 "What is clear, in my opinion, is that at the present day the Crown, as a Treaty partner, could not act in conformity with the Treaty or its principles without taking into account any relevant recommendations by the Waitangi Tribunal": supra n70 at 135.

78 Ibid at 149.

79 Eg s154 sets out some of the grounds upon which the Court's discretionary right to refuse to confirm an alienation order may be invoked, including "The historical importance of the land to the alienating owners or any of them . . ." (s159(a)(i)).

80 Unreported, Maori Appellate Court, Hastings, 12 September 1990, Appeal 1990/1, Judge R M Russell.

81 Partition involves the destruction of the unity of possession by the division of the land held in co-ownership into parts to be held by the former co-owners in separate ownership.

sibly also as grounds for applying to the High Court for the judicial review of any order, on the basis that it was unreasonable, made in bad faith or contrary to public policy, being in breach of the principles of the Treaty. This conclusion derives some support from the fact that it has been explicitly recognised by the New Zealand Court of Appeal that ". . . the Treaty must be interpreted according to principles suitable to its particular character . . .",[82] suggesting that a flexible and open-textured approach is required.

V CONCLUSION

The jurisdiction of the Maori Land Court is somewhat limited; it is called a "court", although it is actually a specialist tribunal, which has been specifically established to consider existing Maori land rights to recognised Maori land and/or whether the land in question *is* Maori land.

The decisions of the Maori Land Court are subject to appeal to the Maori Appellate Court. There are very broad grounds under section 44(1) by which the Chief Judge of the Maori Land Court may consider written applications for an appeal of the Court's decisions. *If* the Chief Judge exercises jurisdiction, her decisions are final in terms of any right of appeal to the Appellate Court (s44(5)). Only *actual* orders of the Chief Judge are subject to appeal to the Appellate Court (s49(1)). Presumably the High Court may judicially review the decisions of all these statutory authorities.

The grounds upon which judicial review applies to orders of the Court and Appellate Court are not totally clear. As section 64(1) of the 1953 Act has not been re-enacted in the Act, only implicit arguments against the availability of a writ of certiorari may be made out, eg reliance on sections 69, 71 and 74. Possibly this change has introduced unnecessary uncertainty.

Only the Appellate Court has the right to state a case on any point of law to the High Court (s72(1)). The Court has similar powers provided prior permission has been granted by the Chief Judge. Such permission may subsequently be revoked by the Chief Judge before any deliberation by the High Court (s72(2)).

The Maori Land Court could be regarded as being on the verge of entering into a new era due, for the most part, to the growing legal, social and political importance of the Treaty of Waitangi and the direct implications of this for Maori land. The results of this change are more likely to be immediately important in disputes in the High Court, because of both its constitutional significance and the fact that disputes concerning substantive Maori rights will be more common in trials heard within that court and above. However, it is anticipated that the Maori Land Court will similarly have to incorporate more and better recognised Maori values in its decisions where appropriate.

The Act appears to indicate an intention of the legislature to alter the *functional operation* of this Court and the Appellate Court. The reinsertion of Article 2 in the Preamble of the Act seems to clarify explicitly what

82 Supra n51 at 673 per Richardson J.

has hitherto been essentially an implicit caselaw development. The underlying policy of the Act is to alter the *focus* of the proceedings of the Court as the specialist agency of first resort dealing with Maori land issues, by explicit recognition of the Treaty of Waitangi as the basis upon which to ensure retention of Maori land in Maori hands. Consequently, it is suggested that future proceedings within the Maori Land Court may concentrate on a more pragmatic approach to dispute resolution influenced by a developing body of customary law.

It is suggested that the continuing unchanged *status* of the Court is undesirable. Possibly the Maori Land Court should be *integrated* into the judicial mainstream by converting the Court into a specialist District Court, similar to the Family Court, consisting of Maori Land Court judges, and by changing the Appellate Court into a specialist division of the High Court, similar to the former Administrative Division of the High Court, presided over by judges with a record of expertise and sensitivity to Maori issues.[83] In this way some form of legal pluralism could be introduced into the New Zealand legal system through the recognition and development of unique Maori cultural and customary practices and perspectives. This suggestion is more consistent with current general policy of awarding greater general importance to substantive indigenous rights.

83 This comment is not particularly original. The 1980 Commission of Inquiry suggested that the Court would need to be abolished in the future – *The Maori Land Courts* – Report of the Commission of Inquiry 1980).