IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA217/2021
[2022] NZCA 469

BETWEEN	PHILLIP PEACOCKE, SUSAN PEACOCKE AND CR REJTHAR TRUSTEES LIMITED AS TRUSTEES OF THE TOTORO TRUST Appellants

Hearing:	6 July 2022
Court:	Brown, Clifford and Gilbert JJ
Counsel:	J P Koning and D W Ballinger for Appellants J K Goodall and S C I Jeffs as counsel assisting the Court
Judgment:	5 October 2022 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] In 2019 the appellants, the trustees of the Totoro Trust (the Trustees), attempted to sell land to which we will refer as Puketiti 2B2B1. However a Land Information

New Zealand pre-validation report identified the land as potentially being Māori freehold land. That state of affairs stemmed from a previous transfer of the land in 1980 which had been governed by the since repealed Māori Affairs Act 1953 (the 1953 Act).

[2] On the Trustees' application for determination that Puketiti 2B2B1 was General land, the Māori Land Court determined that it was Māori freehold land.[1] An appeal by the Trustees from that decision was dismissed by the Māori Appellate Court, which confirmed that the land was Māori freehold land.[2]

[3] The Trustees' appeal concerns the interpretation of provisions of the 1953 Act and their application to the 1980 memorandum of transfer (the 1980 transfer). As there is no respondent to the appeal, Mr Goodall and Mr Jeffs were appointed as counsel assisting the Court.

Relevant background

[4] The relevant events in 1980, which were not in dispute, were summarised by the Māori Appellate Court in this way:[3]

> (a) On 3 May 1976, the Māori Land Court issued a consolidated order recording that [Puketiti 2B2B1] was owned in fee simple by Raimona Lee (as to 44.8125 shares) and Puku Doherty (as to 9.1875 shares).
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> (b) On 6 June 1980, Raimona Lee and Ian Walsh entered into an agreement for the sale and purchase of rural land. The agreement provided for Raimona Lee to sell her shares in the block to Ian Walsh. It recorded Raimona Lee as a tenant in common as to 44.8125 shares out of a total of 54.0000 shares.
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> (c) On 9 July 1980, the Māori Land Court confirmed the sale and purchase agreement. The minutes of the hearing record that Puku Doherty was deceased, but attempts had been made to contact his widow. Raimona Lee indicated to the Court that she was sure that Ian Walsh would make further endeavours to contact Puku Doherty's widow.
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> (d) Subsequently, on 6 August 1980, Raimona Lee and Ian Walsh signed a memorandum to transfer her 44.8125 shares. Consistently with the

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1 *Peacocke – Part Puketiti 2B 2B 1 Block and Lot 1 Deposited Plan South Auckland 33533* (2020) 205 Waikato Maniapoto MB 202 (205 WMN 202) [Māori Land Court decision].

2 *Peacocke – Part Puketiti 2B2B 1 and Lot 1 Deposited Plan South Auckland 33533* [2021] Māori Appellate Court MB 48 (2020 APPEAL 48) [Māori Appellate Court decision].

3 At [3] (footnote omitted).

> sale and purchase agreement, this memorandum of transfer recorded Raimona Lee as a tenant in common as to 44.8125 shares out of a total of 54.0000 shares.
>
> (e) On 25 August 1980, the Māori Land Court confirmed the memorandum of transfer per s 226 of the 1953 Act. The Court therefore only confirmed the transfer of Raimona Lee's shares to Ian Walsh. It did not confirm the transfer of Puku Doherty's shares at all.
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> (f) By this stage, [Puketiti 2B2B1] was not registered under the [Land Transfer Act 1952]. On 10 October 1980, the [District Land Registrar] entered [Puketiti 2B2B1] into the Provisional Register and registered the 3 May 1976 consolidation order, which had vested [Puketiti 2B2B1] in Puku Doherty (9.1875 shares) and Raimona Lee (44.8125 shares).
>
> (g) On 31 October 1980, the 6 August 1980 memorandum of transfer was registered on the Provisional Register. On the same day, the [District Land Registrar] created a certificate of title for the block. It recorded Ian Walsh as the sole owner. This was a mistake. The certificate of title should have recorded Puku Doherty as an owner as to 9.1875 shares. It did not.

[5] Following the transfer of the block in 1982 by Mr Walsh to another party, in 1983 the land was subdivided into two lots: Part Puketiti 2B2B1 (comprising 17.5775 hectares, as described in SA30A/85) and Lot 1 Deposited Plan South Auckland 33533 (comprising 3.9740 hectares, as described in SA30A/84). Those lots were subsequently transferred to various parties until they were acquired by Phillip and Susan Peacocke in 1992. In 2006 they transferred the land to the Totoro Trust for estate planning purposes.

The 1953 Act: relevant provisions

[6] The 1953 Act recognised three main types of land: customary land, General land and Māori freehold land.[4] This appeal concerns the difference between General land and Māori freehold land, which were defined in s 2(1) of the Act as follows:

> **General land** [originally, European land] means any land other than Māori land which has been alienated from the Crown for a subsisting estate in fee simple and includes any land which … ceases to be Māori land:
>
> …

[4] Customary land and Māori freehold land were defined together as "Māori land": s 2(1).

> **Māori freehold land** means land other than General land which, or any undivided share in which, is owned by a Māori for a beneficial estate in fee simple, whether legal or equitable:[5]

[7] The practical difference between General land and Māori freehold land can be understood as follows:

(a) General land is ordinary private land derived ultimately from a Crown grant.

(b) Māori freehold land is primarily land that has never been alienated by Māori, so will be comprised predominantly of customary land that has been converted to a freehold estate by the Māori Land Court. However, it also includes General land whose status has been changed by order of the Māori Land Court to Māori freehold land.

[8] It was common ground that while in the common ownership of Ms Lee and Mr Doherty, Puketiti 2B2B1 was Māori land. Section 211 of the 1953 Act permitted Ms Lee to transfer her shares in Puketiti 2B2B1 to Ian Walsh. It relevantly provided:

> **211 General provisions as to alienation of land by Māoris**
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> (1) Subject to the provisions of this or any other Act, a Māori may alienate or dispose of any land or any interest therein in the same manner as a European, and Māori land or any interest therein may be alienated or disposed of in the same manner as if it were General land.
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> …

[9] Section 224 of the 1953 Act required the transfer to be confirmed by the Māori Land Court. It relevantly stated:

> **224 Alienations by Māoris to be confirmed**
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> (1) Except as may be otherwise expressly provided in this or any other Act no alienation of Māori land by way of transfer by a Māori shall have any force or effect unless and until it has been confirmed by the Court.

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[5] The definition of the term Māori in s 2(1) was broadened in 1974 to include any person of Māori descent, in particular: "a person of the Māori race of New Zealand; and includes any descendant of such a person".

(2) An appeal shall lie to the Appellate Court from any decision of the Court to grant or refuse confirmation of an alienation or from any variation by the Court of the terms of any alienation.

…

[10] The consequences of confirmation were explained in s 226(2):

226 Effect of confirmation

…

(2) On confirmation being granted the instrument of alienation shall (if otherwise valid) take effect according to its tenor, subject to the requirements (if any) of registration under the Land Transfer Act 1952, as from the date on which it would have taken effect if no such confirmation had been required.

…

[11] Thus a confirmed transfer took effect in accordance with its tenor, subject to any registration requirements under the Land Transfer Act 1952 (LTA). However, pursuant to s 36 of the 1953 Act registration under the LTA was permitted but not mandatory.

[12] The central focus of this appeal is s 2(2)(f) of the 1953 Act, which stated:[6]

2 Interpretation

…

(2) 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,—

…

(e) Māori freehold land which has been vested in any person by an order of the Court or of a Registrar for a beneficial freehold interest shall, except where it appears on the face of the order that the land has become General land, be deemed to remain Māori freehold 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 General land; or

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6 It is convenient also to set out the similar provision in s 2(2)(e).

(ii) Any other order is made by the Court as a consequence of which the land becomes or is deemed to have become General land;

(f) Māori freehold land the legal fee simple in which has been transferred otherwise than by an order of the Court or of a Registrar shall, except where it appears on the face of the instrument of transfer that the land has remained Māori 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 Māori freehold land; or

(ii) Any other order is made by the Court as a consequence of which the land becomes Māori freehold land.

The Māori Land Court judgment

[13] The Trustees argued that, as the 1980 transfer was correctly executed and confirmation was obtained from the Māori Land Court, all the requirements of the 1953 Act were met. Consequently, notwithstanding the error of the District Land Registrar (DLR), the Trustees were entitled to rely upon s 2(2)(f) and the irrebuttable presumption recognised in *Haddon v Rahui Te Kuri Inc – Pakiri R.*[7] However, if for some reason that provision did not apply to the 1980 transfer, it was the Trustees' contention that subsequent transfers which occurred prior to the commencement of Te Ture Whenua Māori Act 1993 (TTWMA) on 1 July 1993 cured any defect.

[14] While acknowledging that the Land Transfer Office (LTO) had treated the 1980 transfer as including not just part of but the entire legal fee simple, counsel appointed by the Court to act for the descendants of Mr Doherty noted that the intention was to transfer only the shares owned by Ms Lee. The transfer did not, and could not, transfer the shares owned by Mr Doherty. He submitted that the LTO error could not be saved by s 2(2)(f), with the consequence that when Mr Walsh became the owner of Puketiti 2B2B1 its status remained Māori freehold land. Subsequent transfers prior to 1 July 1993 were registered incorrectly by the LTO in breach of the requirements of the 1953 Act. Hence Puketiti 2B2B1 continued to have Māori freehold land status.

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7 *Haddon v Rahui Te Kuri Inc – Pakiri R* (1994) 3 Taitokerau Appellate MB 178 (3 APWH 178) at [25].

[15] Judge Clark recognised that the Court's role related solely to the issue of the status of the land. It did not extend to an examination of the legal ownership of the land, attempting to restore Mr Doherty's ownership interest or providing a remedy to his descendants.[8] The Judge identified two issues for determination:[9]

(a) In a case where a transfer has been confirmed by the Court but the LTO incorrectly transferred the entire legal fee simple rather than part only, what effect does that have on the status of the land?

(b) What was the effect of the subsequent transfers from Mr Walsh and others on the status of the land?

[16] The Judge observed that the Māori Land Court could only grant confirmation in relation to the subject matter of the transfer before it. He reasoned that there had been no transfer before the Court purporting to transfer the entire legal fee simple; the confirmation related only to the transfer of Ms Lee's interest; and the Court did not confirm any transfer of Mr Doherty's interest.[10] Hence there had been no confirmation of a transfer to Mr Walsh of the entire legal fee simple in Puketiti 2B2B1.

[17] The Judge rejected the submission that s 2(2)(f) applied in these circumstances, explaining:

> [81] The transfer violated the provisions of s 226(2) of the 1953 Act. It did not take place according to its tenor and if it had done so then only the interests of Raimona Lee would have transferred to Ian Walsh and the block would have remained Māori freehold land. In my opinion s 2(2)(f) was not intended to capture a situation in which a transfer did not take place in accordance with what was intended. Therefore, I conclude that following the transfer to Ian Walsh, Puketiti 2B2B1 remained Māori freehold land.

[18] The Judge went on to observe that it would be flawed logic to rely upon the confirmation granted in respect of Ms Lee's interest as also capturing Mr Doherty's interest.[11] Because there was no confirmation of a transfer of Mr Doherty's interest, the transfer also violated s 224(1).[12]

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8 Māori Land Court decision, above n 1, at [59].
9 At [57].
10 At [71].
11 At [83].
12 At [84].

[19] In the alternative, the Judge "somewhat tentatively" posed the question whether there was enough of an indication on the face of the transfer that Puketiti 2B2B1 was to remain Māori freehold land. As he considered it was self-evident from the face of the transfer that there was another owner, the Judge tentatively concluded that there was enough of an indication on the face of the transfer that Puketiti 2B2B1 would remain Māori freehold land.[13]

[20] Finally the Judge concluded that, as Puketiti 2B2B1 remained Māori freehold land following the transfer to Mr Walsh, subsequent transfers required confirmation pursuant to s 224(1). As such confirmations were not obtained, the subsequent transfers were of no force or effect so far as the status of the land was concerned.[14]

The Māori Appellate Court judgment

[21] The Māori Appellate Court commenced by identifying three broad categories of cases in which the import of s 2(2)(f) had been considered:[15]

(a) cases dealing with the effect of s 2(2)(f) when transfers have breached the 1953 Act: in such cases, although a transfer registered in breach passed indefeasible title, it did not automatically change the status of the land so transferred;

(b) cases turning on the meaning of the express exception in s 2(2)(f); and

(c) cases concerning transfers of undivided shares in Māori freehold land: the general principle was that such a transfer did not trigger s 2(2)(f) and the land remained Māori freehold land.

[22] The Court addressed as a first issue whether the 1980 transfer took effect in accordance with its tenor.[16] The Court recognised that the unintended transfer of Mr Doherty's shares as a consequence of the DLR's error resulted in the 1980 transfer having an effect contrary to its tenor. However it concluded that that did not invalidate

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13 At [85]–[89].
14 At [91] and [95].
15 Māori Appellate Court decision, above n 2, at [15]–[19].
16 Pursuant to s 226(2) of the Māori Affairs Act 1953.

the Court's confirmation of the transfer.[17] Furthermore it reasoned that, if an instrument is not given effect in accordance with its tenor after the instrument is confirmed, that is not a breach of s 226(2) but a breach of the instrument itself.[18]

[23] Consequently the Court concluded that s 2(2)(f) applied, stating:

> [26] Because the 1980 transfer took effect in accordance with its tenor per s 226(2), the transfer can be distinguished from transfers that breached the 1953 Act. The transfer between Raimona Lee and Ian Walsh was not in breach of the 1953 Act. It was permitted by s 211. It had to be confirmed by the Court per s 224(1). It was so confirmed per s 226(1), as a certificate of confirmation was written on the instrument of transfer, under the seal of the Court and the hand of the Judge by whom it was granted. Section 226(2) declared that it took effect in accordance with its tenor. The fact that the instrument of transfer took effect other than in accordance with its tenor after it was confirmed was due to DLR error, but that did not violate s 226(2). Accordingly, s 2(2)(f) applies.

[24] The Court also agreed with the tentative view of the lower court that the exception in s 2(2)(f) applied. While rejecting the approach taken in previous Māori Land Court decisions of requiring "something unequivocal" in the instrument of transfer indicating the land has remained Māori freehold land,[19] the Court was reluctant to formulate an alternative test, stating that a more considered and nuanced approach was required in each case.[20]

[25] The Court drew attention to four features of the 1980 memorandum of transfer:[21]

> (a) It expressly records that the transfer relates to Raimona Lee's 44.8125 shares out of a total of 54.0000 shares. It was clear on the face of the instrument that there was at least one other owner.
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> (b) It refers to the block as all of the land in a Partition Order of the Māori Land Court dated 19 May 1921. Although this is not an express acknowledgement that the block was Māori freehold land, it indicates that as a possibility, if not a probability.

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17 At [23]. See below at [43].
18 At [22].
19 See *Deputy Registrar v Te Bach 2007 Ltd – Ohawini D8* (2010) 15 Taitokerau MB 3 (15 TTK 3) at [37].
20 Māori Appellate Court decision, above n 2, at [29].
21 At [30].

(c) It refers to the agreement for sale and purchase dated 6 June 1980 that was duly confirmed by the Māori Land Court on 9 July 1980. Confirmation was only required if the land was Māori land.

(d) It contained the certificate of confirmation by the Māori Land Court. This certificate was issued under s 226 of the 1953 Act. Again, a certificate of confirmation was only required if the land was Māori land.

The Court concluded:

> [32] An instructed reader, being familiar with the background and context and knowing that the transfer of an undivided share of Māori freehold land did not change its status, would have understood from the face of the 1980 memorandum of transfer that the land was to remain Māori freehold land. We therefore conclude that it appears on the face of that memorandum that the land was to remain, and has remained, Māori freehold land.

The ambit of the appeal

[26] The notice of appeal challenged the finding that on the face of the 1980 transfer Puketiti 2B2B1 was to remain, and has remained, Māori freehold land. Three primary grounds were specified, namely that the Māori Appellate Court:

(a) was wrong to reject at [29] the "something unequivocal" test for the phrase "except where it appears on the face of the instrument of transfer" in s 2(2)(f) of the 1953 Act;

(b) was wrong to conclude at [32] that on the face of the 1980 transfer Puketiti 2B2B1 was to remain Māori freehold land; and

(c) erred in treating the 1980 memorandum of transfer as the relevant instrument of transfer for the purposes of s 2(2)(f).

Although the submissions of counsel assisting contested grounds (a) and (c), they agreed with ground (b).

[27] However, counsel assisting also challenged the proposition that s 2(2)(f) applied at all. They supported the conclusion of the Māori Land Court that, because the Court had not confirmed a transfer of Mr Doherty's share, a breach of s 224(1)

had occurred. For that reason the transfer of Mr Doherty's share was of no force or effect and therefore Mr Walsh held Puketiti 2B2B1 as Māori freehold land.

[28] Consequently the scope of the appeal broadened, as reflected in counsel's agreed issues list:

- Were any of the transfers of Puketiti 2B2B1 not in compliance with the provisions of the Māori Affairs Act 1953?
- Does s 2(2)(f) … apply to transfers that were not in compliance with the provisions of the Act?
- Does s 2(2)(f) … apply to any transfers of Puketiti 2B2B1?
- Is the proper approach to the exception to s 2(2)(f) … to apply the "something unequivocal" test?
- Does the exception to s 2(2)(f) apply to any transfers of Puketiti 2B2B1?
- If s 2(2)(f) did not apply to any transfers of Puketiti 2B2B1, did the status of Puketiti 2B2B1 change from Māori freehold land to general land upon transfer to a person who was not Māori?

[29] With the benefit of hearing oral argument we address the appeal in the following sequence:

(a) Did s 2(2)(f) apply to the 1980 transfer?

(b) Did the actions of the DLR result in a change in the status of the land?

(c) If Puketiti 2B2B1 remained Māori freehold land after Mr Walsh's acquisition, did any subsequent transfer cause the land to become General land?

(d) Did the Māori Appellate Court err in rejecting the "something unequivocal" test?

(e) Did the Māori Appellate Court err in concluding that it appeared on the face of the 1980 memorandum of transfer that Puketiti 2B2B1 remained Māori freehold land?

Before addressing those issues it will be useful to briefly traverse the background to the introduction of s 2(2)(f) of the 1953 Act.

The introduction of s 2(2)(f)

[30] At the outset we acknowledge the informative submissions of counsel assisting, from which the following analysis is in large part derived.

[31] The 1953 Act took a very protective stance toward Māori land and made the Māori Land Court a "guardian"[22] of that land. Thus any "alienation" of Māori land had no force or effect until the alienation was confirmed by the Māori Land Court.[23] Before confirming an alienation by way of transfer, the Māori Land Court needed to be satisfied it was not in breach of any trust and that the consideration was adequate.[24] The Court could make an order changing the status of General land to Māori freehold land.[25] It could also make an order changing the status of Māori freehold land to General land but could only do so if the land could "be conveniently used or otherwise dealt with and that no undue difficulty or inconvenience will result".[26]

[32] Mr Goodall, in his capacity as counsel assisting, noted that there were conflicting decisions of the Māori Land Court and the Māori Appellate Court on whether the ethnicity of the owner could automatically affect the status of land. Based on the scheme, purpose and language of the 1953 Act, it was Mr Goodall's submission that during the period between 1953 and 1960 the status of Māori freehold land changed automatically to General land upon a transfer to a non-Māori, provided the transfer was in accordance with the provisions of the Act.[27] We agree with that analysis.

[33] Because prior to 1960 the status of land was dependent upon the ethnicity of the transferee, the status of the land could be uncertain where the ethnicity of the new

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22 See *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC) at 199.
23 Māori Affairs Act, s 224. The term "alienation" was defined very broadly, in s 2(1).
24 Section 227(1)(b) and (e).
25 Section 433A.
26 Section 433(3).
27 It was submitted that the decision in *Moore – Part Oakura F2A* [2020] Māori Appellate Court MB 209 (2020 Appeal 209) was to be preferred to the decisions of the Māori Land Court in *Deputy Registrar – Te Keti A2* (2011) 15 Taitokerau MB 76 (15 TTK 76) and *Dobson – Ahipara 2B47 Block* (2014) 74 Taitokerau MB 139 (74 TTK 139).

owner might be unknown or unclear.[28] The objective of s 2(2)(f) was to provide certainty by creating the presumption that, unless otherwise apparent from the face of the instrument, the land would become General land upon transfer.

[34] Following the introduction in 1960 of s 2(2)(f),[29] it was generally unnecessary to rely on an automatic change of status upon the acquisition of land by a non-Māori. However there remained three avenues by which a change of status to General land could be avoided:

(a) through the "on the face of the instrument" exception;

(b) when the Court made a status order under s 30(1)(i) determining that the land remained Māori freehold land; and

(c) when the Court made an order changing the status of the land from General land to Māori land under s 433A.

[35] In 1967 the 1953 Act was amended, and provisions were inserted directing the Registrar of the Māori Land Court to make declarations changing the status of certain Māori freehold land owned by four or less persons to General land.[30] In 1973 a new s 433 was introduced to enable land status to be changed on application to the Māori Land Court by either a Māori or a non-Māori.[31]

[36] The 1953 Act was repealed by the TTWMA, which contains no equivalent to s 2(2)(f). Consequently in order to change the status of land upon a transfer (and more generally) it is now necessary to procure an order from the Māori Land Court.[32] In the absence of a Court order Māori freehold land retains its status after a transfer, even if owned by a non-Māori.

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28 This was apparent from cl 3 of the explanatory note accompanying the Māori Purposes Bill 1960.

29 Section 2(2) of the Māori Affairs Act was amended by s 3 of the Māori Purposes Act 1960, which added paragraphs (e) and (f).

30 Māori Affairs Amendment Act 1967, ss 2–14. Pursuant to s 7 of that Act, such declarations would take effect upon their registration under the Land Transfer Act 1952.

31 Māori Purposes (No 2) Act 1973, s 13(1).

32 Te Ture Whenua Māori Act 1993, ss 135–137.

Did s 2(2)(f) apply to the 1980 transfer?

[37] Section 2(2)(f) addresses the scenario of a transfer by an instrument of the legal fee simple in Māori freehold land. Mr Goodall submits, and we agree, that the reference in s 2(2)(f) to the legal fee simple in Māori freehold land must refer to the entire legal estate, not just part of it. This is consistent with the third broad category of cases identified by the Māori Appellate Court.[33]

[38] If the position were otherwise, a transfer could have given rise to a dual status in land, that is Māori freehold land (in part) and General land (in part). As Mr Goodall submits, that cannot be correct because the 1953 Act did not recognise concurrent dual status. As stated in *Savage-Pickett – Section 15B3 Block VIII Tairua Survey District*:[34]

> It would be very strange indeed if that share of the land was deemed general land while the rest of the land was Māori freehold land.

[39] This view was acknowledged by the Māori Appellate Court in the present case when, with reference to *Savage-Pickett*, it said:

> [19] These principles were subsequently confirmed in *Taukiri – Parish of Karamu Lot 197A*. The facts are pertinent. Four-fifths (80 per cent) of the undivided shares in the block were transferred in 1933 to a non-Māori owner. That transfer was confirmed and registered by the Māori Land Court in 1966. The other one-fifth (20 per cent) remained in Māori ownership. Judge Milroy referred to the earlier decisions in *Scott* and *Savage-Pickett* and found that the land did not become General land by virtue of s 2(2)(f), as only an undivided share was transferred:
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> …
>
> (Footnote omitted.)

[40] That very point was made by the Registrar of the Māori Land Court to Mr Walsh's solicitors in a letter dated 15 August 1980, which stated that Puketiti 2B2B1 would remain Māori freehold land until the remaining interest (namely that of Mr Doherty) had been purchased.

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33 See [21(c)] above.

34 *Savage-Pickett – Section 15B3 Block VIII Tairua Survey District* (2011) 30 Waikato Maniapoto MB 201 (30 WMN 201) at [21].

[41] On 25 August 1980 the Māori Land Court confirmed the transfer of Ms Lee's share to Mr Walsh.[35] However, because the transfer was only of Ms Lee's interest in the land, there was no transfer of the entire legal estate in Puketiti 2B2B1 at that time. Hence s 2(2)(f) did not operate at that point.

Did the actions of the DLR result in a change in the status of the land?

[42] On 31 October 1980 the DLR erroneously registered a transfer to Mr Walsh of the entire fee simple estate in Puketiti 2B2B1 against the provisional title and issued a certificate of title to that effect.

[43] Both the lower Courts analysed the implications of the DLR's action by addressing the question whether a breach of s 226(2) had resulted. As noted above,[36] Judge Clark considered that the transfer violated s 226(2). The Māori Appellate Court reached a different conclusion, reasoning as follows:

> [21] Section 226(2) sets out the effect of confirmation by the Court of an instrument of transfer. Until confirmation is granted, the instrument of transfer is of no force or effect per s 224. But once confirmed, the instrument of transfer takes effect according to its tenor.
>
> [22] Section 226(2) is declaratory in nature. It simply brings into effect an instrument of transfer that is otherwise of no force or effect. It does not *require* the instrument to be given effect in accordance with its tenor. Therefore, if an instrument is not given effect in accordance with its tenor after the instrument is confirmed, that is not a breach of 226(2). It is a breach of the instrument itself.
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> [23] Of course, the confirmed transfer was not intended to transfer Puku Doherty's shares to Ian Walsh. That resulted from an error by the DLR following the Court confirmation process. As a result, ultimately the 1980 instrument of transfer had an effect that was contrary to its tenor. But that does not invalidate the Court's confirmation of the transfer.
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> (Footnote omitted and emphasis in original.)

[44] Mr Koning, counsel for the Trustees, contended that the Māori Appellate Court's conclusion was correct and he adopted its reasoning. However Mr Goodall submitted that the actions of the DLR in transferring the entire legal estate in fee simple to Mr Walsh was a breach of s 224(1). He endorsed the supplementary

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35 See [4(e)] above.
36 At [17] above.

reasoning of Judge Clark[37] that the confirmation by the Māori Land Court of the transfer of Ms Lee's interest did not extend to Mr Doherty's interest and consequently there had been no confirmation of a transfer of Mr Doherty's share. Mr Goodall observed that the Māori Appellate Court decision was silent on the s 224(1) issue.

[45] In Mr Goodall's view, the effect of a breach of s 224(1) was that:

(a) the transfer was of no force or effect under the Act;

(b) Mr Walsh acquired an indefeasible title under the LTA but that did not affect the status of the land;

(c) section 2(2)(f) did not apply to change the status of Puketiti 2B2B1 because the transfer to Mr Walsh was not "in accordance with the Act", posited as a requirement to be read into s 2(2)(f) in order to give effect to the terms of ss 224 and 233; and

(d) Mr Walsh therefore held Puketiti 2B2B1 as Māori freehold land.

[46] We agree with Mr Goodall's analysis and with Judge Clark's view on this issue. The DLR's action resulted in the extinguishment of Mr Doherty's interest in Puketiti 2B2B1. Mr Walsh became the sole owner of the land. However there had been no confirmation by the Māori Land Court of the alienation of Mr Doherty's interest and the acquisition by Mr Walsh of that interest was in contravention of the 1953 Act. Section 2(2)(f) was not engaged at this point and the status of the land remained Māori freehold land.

Did any subsequent transfer change the status of the land?

[47] There were subsequent transfers of Puketiti 2B2B1 to Falkirk Farms Ltd in 1982, to Mr and Mrs Booth in 1987 and to Mr and Mrs Peacocke in 1992. There was no suggestion that any of those transferees were Māori. Hence confirmation was not required from the Māori Land Court.

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[37] See [18] above.

[48] However Mr Goodall submits, and again we agree, that although confirmation was not required, s 233(1) of the 1953 Act required every instrument of alienation to be endorsed and noted in the records of the Māori Land Court. It states:

> **233 Instruments to be produced to Registrar**
>
> (1) No alienation of Māori 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.

[49] There being no evidence that s 233 was complied with by Mr Walsh or any of the other subsequent transferees, it follows that there were breaches of s 233 in respect of each transfer with the consequence that they were of no force or effect under the 1953 Act. Consequently s 2(2)(f) did not apply so as to cause those subsequent transfers to change the status of Puketiti 2B2B1.

[50] The final transfer by Mr and Mrs Peacocke to the trustees of the Totoro Trust in 2006 was governed by the TTWMA. Section 130 of the TTWMA provides that land status does not change except in accordance with the terms of the Act.[38] The transfer to the Totoro Trust was not in accordance with the TTWMA because the confirmation which was required from the Māori Land Court under s 150C(3) was not obtained. Because s 156(1) of the TTWMA provides that any alienation without confirmation, where such confirmation is required, is of no force or effect, the transfer to the Totoro Trust did not effect any change in the status of Puketiti 2B2B1.

[51] However if, contrary to our conclusion above, s 2(2)(f) did apply, we proceed to address:

(a) whether the "something unequivocal" test is the correct approach; and

(b) whether the exception in s 2(2)(f) applied to the 1980 transfer.

[52] Shortly before the hearing, the Trustees filed an application for leave to adduce as further evidence a memorandum of transfer dated 16 July 1980 relating to another

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[38] Or as expressly provided in other legislation, which is not applicable here.

block of Māori freehold land known as Puketiti 2B2F1. The transferors were both the co-owners (Raimona Lee and Doreen Tangihaere) and the transferee was again Mr Walsh. The wording of the document was materially similar to the Puketiti 2B2B1 memorandum of transfer. However, in 2013 the Māori Land Court made an order under s 131(1) of TTWMA declaring that Puketiti 2B2F1 was General land.[39] As counsel assisting did not oppose the admission of the new evidence, the application to adduce the evidence is granted.

Did the Māori Appellate Court err in rejecting the "something unequivocal" test?

[53] It appears the genesis of the phrase "something unequivocal" was the Māori Land Court's decision in *Re Succession to Nehe Kopua*, in which the Court had to determine the status of land to ascertain whether it had jurisdiction to make a succession order.[40] Although by reference to the instrument of transfer the Court recognised that Mr Kopua might have had Māori ancestry, the Court went on to say:[41]

> … for it to appear on the face of the instrument of transfer within the meaning of the Act that the land has remained Māori [freehold] land something unequivocal is required such as a recital in the transfer that the transferee is a Māori within the meaning of the Act and that therefore the land remains Māori freehold land. A transferee named Nehe Kopua might have had less than the half Māori blood ancestry then required to be a Māori within the meaning of the Act, while a transferee with the name of William Smith might have been of more than half Māori ancestry.

[54] Although that case has been cited subsequently, the "something unequivocal" test appears to have been expressly endorsed only once, in *Deputy Registrar v Te Bach 2007 Ltd – Ohawini D8*.[42] The Māori Land Court there held that s 2(2)(f) contemplated that those completing the transfer would take an active step to indicate the land was to remain Māori freehold land. The Court considered that a mere recital of existing registered encumbrances on the transfer, such as a reference to a previous status order, would not be sufficiently unequivocal to indicate that the land was to remain Māori freehold land.[43]

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39 *Deputy Registrar – Puketiti 2B2F Block* (2013) 70 Waikato Maniapoto MB 125 (70 WMN 125).
40 *Re Succession to Nehe Kopua* (1978) 15 Ruatoria MB 238 (15 RUA 238).
41 At 242.
42 *Deputy Registrar v Te Bach 2007 Ltd – Ohawini D8*, above n 19.
43 At [37].

[55] In the present case, noting it was not bound by the test, the Māori Appellate Court recorded reservations about the test for seven reasons, and concluded:

> [29] Although we express some reservations with the test set out in *Deputy Registrar v Te Bach 2007 Limited – Ohawini D8*, we are reluctant to formulate an alternative test at this stage. Assessing what appears to be the case on the face of a transfer instrument is likely to be case specific. It is sufficient for our purposes to say that requiring "something unequivocal" is not the appropriate test and a more considered and nuanced approach is required in each case.

[56] Mr Ballinger, who presented this part of the appellants' case, challenged that conclusion. He submitted that the words "has remained" in s 2(2)(f) required more than just an indication that prior to the transfer the land was Māori freehold land, contending that there must be something to indicate the intended status following the transfer. He drew attention to the fact that, as the Māori Appellate Court noted in *Haddon v Rahui Te Kuri Inc – Pakiri R*, the transferee could have it noted on the transfer that the land was to remain Māori freehold land.[44] The Court was also able to endorse the memorandum of transfer with an express statement that the status was to remain Māori freehold land as part of the confirmation process, which was said to be not an uncommon occurrence.[45]

[57] He submitted that the requirement for an active step to indicate the land was to remain Māori freehold land was consistent with the equivalent wording in s 2(2)(e), which requires an indication that land "has become" General land in order to apply the exception to the general presumption that land vested by order of the Court is Māori freehold land.

[58] A further feature of the exception on which Mr Ballinger focused was the use of the word "appears". He submitted that the Māori Appellate Court had erred in encouraging a more liberal rather than literal approach to that requirement, in particular by having regard to the overall impression or semblance created by the instrument of transfer.[46] He submitted that a more liberal and impressionistic approach is at odds with the goal of promoting certainty for those dealing with the land, and that

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44 *Haddon v Rahui Te Kuri Inc – Pakiri R*, above n 7, at [25].
45 See *Deputy Registrar – Waimamaku E* (2010) 11 Taitokerau MB 153 (11 TTK 153) at [16].
46 Māori Appellate Court decision, above n 2, at [28(a)–(c)].

a more natural reading of "appears" is to mean things that are "visible" or "noticeable" on the instrument of transfer.

[59] Clearly, as the Māori Appellate Court recognised, the Court cannot look behind the instrument of transfer but is limited to considering what is "on the face" of the instrument. However it is not a requirement that the document must include an unequivocal statement that the land is to remain Māori freehold land. We agree with the reasoning of the Māori Appellate Court that it is possible for something to "appear" on the face of an instrument by reference to a number of factors, none of which might be sufficient when considered alone.[47] Consequently we agree with the contention by Mr Jeffs, who presented this aspect of the submissions of counsel assisting, that the "something unequivocal" test is an unnecessary gloss on the language of s 2(2)(f) and it was rightly rejected by the Māori Appellate Court in this case.

Did the Māori Appellate Court err in concluding that it appeared on the face of the 1980 transfer that Puketiti 2B2B1 remained Māori freehold land?

[60] In reliance on four features of the 1980 transfer, the Court concluded that an instructed reader would understand that the land was to remain Māori freehold land.[48] As earlier noted,[49] counsel were unanimous that that conclusion was erroneous. For the brief reasons which follow we consider counsel are correct.

[61] Two of the four factors to which the Court referred, namely the 1921 partition order and the Māori Land Court's confirmation of the 1980 transfer, indicated that the land was previously Māori freehold land. However they indicated nothing about the status of the land subsequent to the transfer.

[62] With reference to the remaining factors, it was not apparent from the 1980 transfer that after transfer there would be a Māori owner (or co-owner). Although that was a possibility which could be drawn by inference from the 1980 transfer, other possibilities included:

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47 At [28(e)–(f)].
48 See [25] above.
49 At [26] above.

(a) Mr Walsh was the co-owner and was consolidating his ownership;

(b) there was a co-owner or co-owners that were not Māori; or

(c) there were co-owners, some of whom were Māori and some not so.

[63] So although one possibility from a reading of the 1980 memorandum was that the land would remain Māori land, there were other possibilities, none of which were more probable than the other. Therefore, the exception was not engaged and the general rule in s 2(2)(f) applied so as to deem the land to be General land. We note that this conclusion is consistent with that reached in relation to the materially similar contemporaneous memorandum of transfer for Puketiti 2B2F1.[50]

Conclusion

[64] Section 2(2)(f) did not apply to the 1980 transfer because it was a transfer of only a partial interest in Puketiti 2B2B1 and not of the entire legal fee simple estate. Nor did s 2(2)(f) apply to the DLR's actions because the alienation of Mr Doherty's interest without the confirmation of the Māori Land Court was in contravention of s 224(1) of the 1953 Act. Puketiti 2B2B1 therefore remained Māori freehold land. That status was unaffected by subsequent transfers.

[65] If, contrary to our conclusion above, s 2(2)(f) did apply, Puketiti 2B2B1 would have been deemed to be General land because it did not appear on the face of the 1980 transfer that it remained Māori freehold land and hence the exception to s 2(2)(f) did not apply.

Result

[66] The appeal is dismissed.

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50 At [52] above.