IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA575/2022
[2024] NZCA 107

BETWEEN	CHRISTINE EVELYN BOON Appellant
AND	THE ESTATE OF NIKI UENUKUITERANGIHOKA TUWHANGAI Respondent

Hearing: 7 February 2024

Court: Goddard, Thomas and Wylie JJ

Counsel: P V Cornegé and N A Jeffery for Appellant
L L Fraser and K L Vodanovich for Respondent

Judgment: 12 April 2024 at 3 pm

JUDGMENT OF THE COURT

A The respondent's application to strike out the notice of appeal is declined.

B The appeal is dismissed.

C There is no order as to costs.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] This appeal arises out of a dispute about the ownership of 335.184 shares (the shares) in Māori freehold land known as the Kawhia U2B block (the land). There are 415 shares in the land and the shares comprise the majority shareholding. The dispute

arose between the appellant, Christine Boon, and the respondent, the late Niki Tuwhangai. Mrs Boon is the adopted daughter, and administrator of the estate, of the late June Ormsby. Mr Tuwhangai and Mrs Ormsby were whānau; they were raised together and were very close.

[2] In late-1989, Mr Tuwhangai and Mrs Ormsby decided to purchase the shares from the then owner, Moekau Moke. An agreement for sale and purchase was entered into. The sale of the shares required the approval of the Māori Land Court. After various preliminary issues had been sorted out, a meeting of all owners was summoned and, on 6 December 1991, they resolved to approve the sale of the shares to Mr Tuwhangai and Mrs Ormsby as joint tenants. An order was made confirming this resolution by the Māori Land Court on 23 March 1992 (the 1992 order).[1] The purchase price was paid and the shares were transferred to Mrs Ormsby and Mr Tuwhangai.

[3] Mrs Ormsby passed away in November 2016. Some time later, Mr Tuwhangai filed an application for transmission by survivorship of Mrs Ormsby's interest in the shares with the Māori Land Court. Mrs Boon filed an objection. She considered that the 1992 order should have recorded that the shares were to be transferred to Mr Tuwhangai and Mrs Ormsby as tenants in common, with the result that the shares would not pass by survivorship. Rather, a half interest in the shares would form part of Mrs Ormsby's estate.

[4] After unsuccessfully seeking to reverse the effect of the 1992 order in another proceeding before the Māori Land Court,[2] Mrs Boon applied to the Chief Judge of that Court under s 45 of Te Ture Whenua Māori Act 1993 (the Act). Mrs Boon asserted that there had been a mistake in the presentation of the facts of the case to the Māori Land Court in 1992. She asked the Chief Judge to correct the 1992 order pursuant to s 44. Relevantly, s 44 provides that the Chief Judge can cancel or amend an order of the Māori Land Court if the Chief Judge is satisfied that the order was erroneous in fact or law because of any mistake or omission on the part of the Court or in the presentation of the facts of the case to the Court.

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1 *Kawhia U2B Block* (1992) 106 Otorohanga MB 84 (106 OT 84) [the 1992 order].

2 *Tuwhangai v Boon – Kawhia U2B Block* (2018) 173 Waikato Maniapoto MB 99 (173 WMN 99) [Judge Clark's decision].

[5] After a contested hearing, initially on 8 June 2020 and reconvened on 3 August 2020, the Chief Judge found that there had been a mistake in the presentation of the facts and that the Māori Land Court had erred in making the 1992 order.[3] He amended the order to record that Mr Tuwhangai and Mrs Ormsby held the shares as tenants in common rather than as joint tenants.[4] Mr Tuwhangai appealed this decision to the Māori Appellate Court. That Court allowed the appeal and found that there had been no error in the presentation of the relevant facts to the Māori Land Court when it made the 1992 order.[5] The Court revoked the order of the Chief Judge and affirmed the 1992 order.[6]

[6] Mrs Boon now appeals the Māori Appellate Court's decision. The late Mr Tuwhangai resisted the appeal and supported the Māori Appellate Court's judgment. He also made a separate application seeking to strike out Mrs Boon's appeal.

Factual background

[7] The land comprises 5.7111 hectares. It overlooks Kawhia Harbour. The certificate of title issued in July 1958 lists the various owners of the land and records that they hold the estate in fee simple as tenants in common "in the shares set out after their respective names out of a total of 415 shares".

[8] In the certificate of title to the land, one of the shareholders, holding 335.184 shares, was listed as Roy or Rori Moke. He died and a transmission of his interest to his wife, Moekau Moke, was registered in October 1988.

[9] In May 1989, Mrs Moke offered to sell her late husband's interest in the land to Mr Tuwhangai. Mr Tuwhangai researched the matter and found out that Mrs Moke was not the sole owner of the land. Rather, she and a number of other owners held the land. Mr Tuwhangai was still interested in buying Mrs Moke's shares, because he had

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3 *Boon v Tuwhangai – Kawhia U2B Block* [2020] Chief Judge's MB 1084 (2022 CJ 1084) [Chief Judge Isaac's decision] at [41]–[44].
4 At [48].
5 *Tuwhangai v Boon – Kawhia U2B Block* [2022] Māori Appellate Court MB 347 (2022 APPEAL 347) [Māori Appellate Court decision] at [68].
6 At [69].

a strong connection with the area. He (and Mrs Ormsby) had been brought up on the adjoining property and his marae — Mokai Kāinga— had been built on that adjoining property. Mr Tuwhangai had been involved with the marae since the early 1970s. He was given the mana to run the marae by his forebears.

[10] Mr Tuwhangai offered Mrs Moke $11,500 for her shares. Mrs Moke accepted this offer in about August/September 1989. A sale and purchase agreement was prepared. It is not clear whether or not the sale and purchase agreement was signed at this stage. In any event, it was later amended.

[11] As noted, the late Mrs Ormsby and Mr Tuwhangai were whānau. She was his first cousin's daughter. Mr Tuwhangai deposed that Mrs Ormsby was "like a sister to [him]".

[12] In late 1989, Mrs Ormsby visited Mr Tuwhangai at his then home in Otorohanga to ask him about the land. She had heard that Mr Tuwhangai was purchasing the shares and she asked if she could "have a place to put a house onto". Mr Tuwhangai asked her whether her request extended to the rest of her family. She replied that they would never go there, because they already had homes in Tokoroa.

[13] Mr Tuwhangai was open to allowing Mrs Ormsby a place to put her house on. He told her that was prepared to include her in the sale and purchase agreement, but only on the condition that she would never sell. She agreed to this, and she and Mr Tuwhangai decided to proceed and to split the purchase price equally between them. Shortly thereafter, Mr Tuwhangai and Mrs Ormsby visited the land together. They talked about where they wanted to build their respective houses.

[14] Mr Tuwhangai accepted that during these early conversations, he and Mrs Ormsby did not use legal terms like "joint tenancy" or "tenancy in common". He did not remember discussing who would receive the shares when one or other of them died. He said that the situation never crossed his mind and he doubted that it crossed Mrs Ormsby's mind either.

[15] Mr Tuwhangai met with his lawyer, Russell Thomson.[7] Mrs Ormsby did not go to the meeting. Mr Tuwhangai could not remember the detail of what was discussed, but he was certain that he did tell Mr Thomson about his condition that Mrs Ormsby was never to sell the shares. In the event, the agreement for sale and purchase with Mrs Moke was amended. Mrs Ormsby was added as a purchaser. The amendment was handwritten. The balance of the document was typewritten. The description of the estate Mrs Moke was selling was recorded as follows:

> 335.184 shares as tenant in common (out of a total of 415 shares) being part Kawhia U2B Block and being part of the land comprised in C.T. 8A/1099 South Auckland Land Registry

The agreement was subject to approval by the Māori Land Court. It was signed by all parties and dated 19 February 1990.

[16] Mrs Moke applied for confirmation of the agreement for sale and purchase under s 225 (contained in pt XIX) of the then applicable Māori Affairs Act 1953 (the 1953 Act).[8] This application was called before the Māori Land Court on 12 June 1990. In a minute, the Court recorded that Mr Tuwhangai's lawyer, Mr Thomson, had advised that there might be "legal reasons" why the application could not proceed. As a result, the application was adjourned to the next sitting of the Court.[9]

[17] On 22 November 1990, Mr Thomson sent a letter to the Registrar of the Māori Land Court, enclosing an application under s 307 (contained in pt XXIII) of the 1953 Act requesting that a meeting of all owners of the land be summoned. The application recorded that the owners would be asked to approve the sale of the shares by Mrs Moke to Mr Tuwhangai and Mrs Ormsby as joint tenants. It was necessary to proceed in this way, rather than under s 225, because of the number of owners of the land.

[18] At much the same time, Mrs Moke filed an application pursuant to s 81A of the Māori Affairs Amendment Act 1967, seeking to transfer her interest in the shares

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7 Mr Thomson has passed away. The legal firm with which he was involved no longer holds any relevant records.

8 The Māori Affairs Act 1953 was repealed, as from 1 July 1993, by s 362(2) of Te Ture Whenua Māori Act 1993.

9 *Kawhia U2B Block* (1990) 104 Otorohanga MB 174 (104 OT 174).

as executrix to herself as a beneficiary under the will of her late husband. As a result, Mr Thomson requested an adjournment of Mr Tuwhangai's and Mrs Ormsby's application to summon a meeting of owners.

[19] In April 1991, the Registrar of the Māori Land Court confirmed that the shares were vested in Mrs Moke as a beneficiary.

[20] The application to summon a meeting of all owners of the land came before the Māori Land Court on 27 May 1991. Various procedural issues were raised by the presiding Judge (Judge Smith).[10]

[21] On 9 July 1991, Judge Carter in the Māori Land Court dismissed Mrs Moke's s 225 application. The Judge considered that it was "obvious" that the order sought could not be made.[11]

[22] The application to summon a meeting of all owners next came before the Māori Land Court on 22 July 1991. The presiding Judge, Judge Carter, sought further information about the application and discussed with the parties how best to advance it.[12] Ultimately, on 8 November 1991, the Māori Land Court issued a notice of meeting to all owners so that they could consider a resolution to approve the transfer of Mrs Moke's shares to Mr Tuwhangai and Mrs Ormsby as joint tenants.

[23] The meeting of owners took place on 6 December 1991. It was attended by a recording officer (either the Registrar of the Māori Land Court or someone appointed by the Registrar) to record what occurred.[13] The minutes of the meeting record that the business of the meeting was to consider the transfer of Mrs Moke's shares to Mr Tuwhangai and Mrs Ormsby as joint tenants. After discussion, the owners unanimously passed a resolution in the following terms:

> That approval be given to the sale by Moekau Myra Moke (now Couch) of Christchurch, formally a widow now a married woman to the sale of 335.184 shares out of the total shares in this block of 415.000 shares which she holds

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10 *Kawhia U2B* (1991) 105 Otorohanga MB 127 (105 OT 127).
11 *Kawhia U2B* (1991) 105 Otorohanga 181 (105 OT 181) [section 225 decision].
12 *Kawhia U2B* (1991) 105 Otorohanga MB 203 (105 OT 203).
13 Māori Affairs Act, s 310.

> as beneficial owner, to Niki Tuwhangai of Te Kuiti, Warden, and June Maanga Ormsby of Tokoroa, Controller, as joint tenants for the sum of $11,500

The resolution was signed by Mr Tuwhangai. It was not signed by Mrs Ormsby, although the minutes of the meeting record that she was present.[14]

[24] The reporting officer reported to the Court and his minutes of the meeting and the resolution passed were deposited as part of the Court's records.[15]

[25] Also on 6 December 1991, Mrs Moke filed an application with the Māori Land Court seeking that the Court confirm the owners' resolution. Further on 11 February 1992, Mr Tuwhangai and Mrs Ormsby filed a similar application, also seeking that the Court confirm the owners' resolution approving the sale of Mrs Moke's shares to them as joint tenants.

[26] On 25 February 1992, Judge Carter in the Māori Land Court reviewed the owners' resolution. He did not however then approve it. He first wanted confirmation that Mrs Moke was happy with the purchase price.[16]

[27] Further evidence was filed dealing with the purchase price and, on 23 March 1992, Judge Carter issued a minute briefly recording that because of the "special circumstances" that existed between the parties, he was satisfied that the consideration being paid for the shares was adequate.[17] He made an order under s 319 of the 1953 Act confirming the owners' resolution to sell Mrs Moke's shares to Mr Tuwhangai and Mrs Ormsby as joint tenants. The order was conditional upon payment of the purchase price, plus commission to the Māori Trustee, within two months of the date of the order. The order was sealed on the following day, 24 March 1992.

[28] The condition imposed by the Court was met. The purchase price was paid (with Mr Tuwhangai and Mrs Ormsby contributing equally to the purchase price) and

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14 Mrs Boon queries whether Mrs Ormsby was in fact present. She notes that there is no reference to the meeting in a diary kept by the late John Ormsby (Mrs Ormsby's husband and Mrs Boon's father).

15 Māori Affairs Act, s 314.

16 *Kawhia U2B Block* (1992) 106 Otorohanga MB 62 (106 OT 62).

17 The 1992 order, above n 1.

the Māori Trustee, as the agent of the owners, gave effect to the owners' resolution and the confirmation order.[18] The certificate of title records that the shares are held by Mr Tuwhangai and Mrs Ormsby jointly.

[29] Mr Tuwhangai thereafter paid all rates levied in respect of the land. He cleared gorse from it and put up fencing and gates. He farmed and maintained the land. He moved onto the land when he retired in 1997. He built his home on it and he lived there for the rest of his life. The land has never been partitioned. Mrs Ormsby told Mr Tuwhangai that he could use the whole of the land until she decided to come and use it as well.

[30] In September 2009, Mrs Ormsby was in financial difficulties and she offered to sell her interest in the shares to Mr Tuwhangai for $220,000. He declined her offer and reminded her of the agreement they had made when they purchased the shares together — namely, that she would not sell the land at any point.

[31] Mr Tuwhangai maintained his strong ties to the land throughout his life. As already noted, it adjoins his marae. He became a kaumātua, responsible for managing bookings and for the day to day maintenance of the marae. He was also a trustee of the marae. In addition, he had strong whānau ties to the land. It was his home and the afterbirth (whenua) of his grandchildren are buried on it.

[32] Mrs Ormsby also had strong ties to the land but she and her family visited the land only rarely. Mrs Ormsby did not make any significant contribution to its upkeep, although she did help with the purchase of a bulldozer (her contribution was $300). Although it was her intention to do so, she never built a house on the land.

[33] As already noted, Mrs Ormsby passed away on 21 November 2016. She left a will but the executor and trustee that she had appointed predeceased her. Mrs Boon applied to be appointed as administratrix of her late mother's estate. That application was granted on 22 June 2017.

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[18] Māori Affairs Act, s 323.

[34] On 21 August 2017, Mr Tuwhangai made an application to the Māori Land Court for the transmission to him by survivorship of the shares he held jointly with Mrs Ormsby. Mrs Boon filed an objection. She asserted that Mrs Ormsby wanted her shares in the land to go to her children and then pass down through her family. Mrs Boon and Mr Tuwhangai met in an endeavour to resolve matters. They were unable to do so.

[35] On 22 November 2017, Mr Tuwhangai's application for an order recognising the transmission of the shares by survivorship was called before the Māori Land Court. It referred the parties to mediation. Mediation was undertaken in January 2018, but it was unsuccessful.

[36] Mrs Boon then brought a proceeding in the Māori Land Court seeking an order severing the joint tenancy and imposing a resulting and/or a constructive trust in respect of the land on Mr Tuwhangai. This proceeding was heard by Judge Clark in November 2018 and his decision issued on 14 December 2018. The Judge dismissed Mrs Boon's proceeding and made an order pursuant to s 18(1)(a) of the Act, determining the joint tenancy held by Mrs Ormsby and Mr Tuwhangai over the shares in favour of Mr Tuwhangai by way of survivorship.[19]

[37] Undaunted, on 19 February 2019, Mrs Boon applied to the Chief Judge of the Māori Land Court pursuant to s 45 of the Act. She claimed that the 1992 order was incorrect because of a mistake, error or omission in the presentation of the facts of the case to the Court. She asked the Chief Judge to amend the order to record that Mr Tuwhangai and Mrs Ormsby held the shares as tenants in common, rather than as joint tenants.

[38] Mrs Boon's application was granted by Chief Judge Isaac on 30 October 2020.[20] He amended the 1992 order made on 23 March 1992 to record that the shares previously owned by Mrs Moke had been purchased by Mr Tuwhangai and Mrs Ormsby as tenants in common in equal shares. The effect of this order was to cancel the subsequent order made by Judge Clark on 14 December 2018 determining

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19 Judge Clark's decision, above n 2, at [91]–[92].
20 Chief Judge Isaac's decision, above n 3, at [48].

that the joint tenancy held by Mrs Ormsby and Mr Tuwhangai vest in Mr Tuwhangai by way of survivorship and instead to vest one half of the shares purchased by Mr Tuwhangai and Mrs Ormsby in Mrs Ormsby's estate.[21]

[39] Mr Tuwhangai appealed the decision of the Chief Judge and the matter came before the Māori Appellate Court in August 2021. The Court issued its decision on 22 September 2022.[22]

[40] Mr Tuwhangai passed away on 31 October 2022.

The Māori Appellate Court's decision

[41] After summarising the factual background, much as set out above, the Court dealt with two preliminary evidential matters and then turned to consider the appropriate approach to appeals against decisions involving the exercise of the power conferred on the Chief Judge under s 44 of the Act. It noted that this Court has confirmed that the powers vested in the Chief Judge involve both evaluative and discretionary decisions.[23] The Court accepted that the approach on appeal differs depending on which of these decisions is being challenged. It held that the decision as to whether or not there had been an error, mistake or omission in the presentation of the facts leading to the 1992 order, was an evaluative decision and that therefore the appeal should proceed de novo.[24]

[42] The Court then summarised the grounds of appeal and the submissions. First, it considered whether or not the Chief Judge had erred by failing to consider materials which, it was argued, suggested that the 1992 order was correctly made.[25] The Court stated that the correct starting point for the Chief Judge's exercise of the special powers conferred under s 44 and 45 was the presumption that the 1992 order was lawfully made and that the burden of proof to rebut that presumption, on the balance of probabilities, was on Mrs Boon as the applicant. It observed that s 45 applications must be accompanied by proof of the flaw identified, through the production of

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21 At [48]–[49].
22 Māori Appellate Court decision, above n 5.
23 At [33], citing *Inia v Julian* [2020] NZCA 423 at [10].
24 Māori Appellate Court decision, above n 5, at [34].
25 At [47].

evidence not available or not known, at the time the order was made.[26] It recorded that the flaw asserted by Mrs Boon before the Chief Judge was that ownership of the shares should have vested in Mr Tuwhangai and Mrs Ormsby as tenants in common and not as joint tenants.[27] The Court considered that the key question for it was whether there had been a mistake or omission in the presentation of the facts of the case to the Māori Land Court in 1992.[28]

[43] The Court recorded that the Chief Judge had relied on two matters to find that Mr Tuwhangai and Mrs Ormsby intended to hold the shares they purchased as tenants in common: first, the wording of 1990 agreement for sale and purchase and secondly, evidence given by Mr Tuwhangai.[29] The Court considered each in turn.

(a) The Court recited the relevant wording in the 1990 sale and purchase agreement.[30] It did not consider that the wording evidenced an intention by Mr Tuwhangai and Mrs Ormsby to hold the shares they were purchasing as tenants in common. Rather, the agreement for sale and purchase described the estate that was being sold, not how it was to be held subsequently.[31]

(b) The Court considered that it was appropriate for the Chief Judge to require Mr Tuwhangai to give evidence in pursuit of the inquiry into the ownership arrangements.[32] It went on to summarise Mr Tuwhangai's evidence, noting, against other things, that he and Mrs Ormsby did not discuss what would happen to the shares if one of them died, that Mr Tuwhangai's previous involvement with Māori land had always been as a tenant in common, that Mr Tuwhangai did not instruct Mr Thomson to change the nature of the ownership to a joint tenancy and that, in hindsight, Mr Tuwhangai would have ensured that the purchase was as tenants in common to protect his family. The Court

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26 At [48].
27 At [49].
28 At [50].
29 At [50].
30 At [52].
31 At [53]–[56].
32 At [57].

held that it was open to the Chief Judge to take into account Mr Tuwhangai's hindsight statements and that they were relevant to the inquiry. It considered however that Mr Tuwhangai's hindsight statements had to be balanced against other evidence to determine whether a mistake occurred before the Māori Land Court in 1992.[33]

[44] The Court proceeded to consider the other evidence. It referred to the following:[34]

(a) the wording of the 1990 agreement;

(b) that the 1990 sale and purchase agreement was filed in support of the initial application seeking confirmation of the sale;

(c) that the sale of the shares was subsequently approved at a meeting of all shareholders and that the application to summons the meeting sought approval for the sale of the shares to Mr Tuwhangai and Mrs Ormsby as joint tenants;

(d) that the notice of meeting, which was published on 8 November 1991, referred to Mr Tuwhangai and Mrs Ormsby as joint tenants;

(e) the resolution, which was put to the owners at the meeting of shareholders held on 6 December 1991, referred to Mr Tuwhangai and Mrs Ormsby as joint tenants;

(f) that Mr Tuwhangai and Mrs Ormsby were recorded in the minutes as being present; and

(g) that the outcome of the meeting of shareholders was considered by the Māori Land Court on 25 February 1992. Mr Tuwhangai attended the hearing. The application was adjourned to enable the adequacy of the

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33 At [58]–[61].
34 At [62].

consideration to be assessed. After evidence on that point was filed, the Court made the 1992 order.

[45] The Court observed that if the references to joint tenancy were in error, there had been multiple opportunities to correct the matter but that none of those opportunities was taken at the time. The Court observed as follows:

> [64] … it is almost inescapable that both Mr Tuwhangai and Mrs Ormsby were aware that they were to be joint tenants of the shares they purchased. No steps were taken during the Court process to change this arrangement. Moreover, no steps were taken over the next 25 years to change it. …

[46] The Court recorded why Mrs Boon had asserted that the 1992 order was flawed, noting she had relied on four factors:[35]

(a) the wording of the 1990 sale and purchase agreement as evidence of the parties' intentions;

(b) the legal presumption of ownership as tenants in common;

(c) the absence of any justification to depart from a tenancy in common; and

(d) the absence of inquiry by the Māori Land Court when making the order.

[47] The Court did not consider that the 1990 agreement evidenced how Mr Tuwhangai and Mrs Ormsby intended to hold the shares they subsequently purchased. The Court described the 1990 sale and purchase agreement as a "red herring".[36] It accepted that shares in blocks of Māori land are ordinarily held as tenants in common, but referred to "the clear and multiple references to joint tenancy" in the documents before it, over a period of some 18 months, while the application progressed through Court.[37] It considered that those references rebutted the presumption that the shares would be held by Mr Tuwhangai and Mrs Ormsby as tenants in common. It did not consider that there was any need to justify a departure

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35 At [65].
36 At [66(a)].
37 At [66(b)].

from the presumption of a tenancy in common, noting the public record clearly showed that a joint tenancy was proposed.[38] It did not agree that there had been an absence of inquiry by the Māori Land Court — the Court file was relatively extensive and it showed that the Court had actively engaged with the application.[39]

[48] The Court then came back to consider Mr Tuwhangai's evidence given before the Chief Judge. The Court considered that Mr Tuwhangai's hindsight view that he would not have agreed to a joint tenancy in 1992, did not displace the facts presented to the Māori Land Court at that time, namely the shares he purchased with Mrs Ormsby were to be held by them as joint tenants.[40]

[49] The Court observed that the Chief Judge had been satisfied, on the balance of probabilities, that the 1992 order was erroneous because of a mistake or omission in the presentation of the facts of the case to the Māori Land Court. The Chief Judge had made that finding because he considered that Mr Tuwhangai and Mrs Ormsby intended to purchase the shares as tenants in common and because he considered that their lawyer had made an error by asking the Māori Land Court to vest the shares in them as joint tenants.[41]

[50] The Court however held that the evidence did not prove, on the balance of probabilities, that Mr Tuwhangai and Mrs Ormsby intended to hold the shares as tenants in common. It was not satisfied that there was an error in the presentation of the facts to the Māori Land Court in 1992.[42] As a result, the appeal was upheld. Under s 56(1) of the Act, the Court revoked the order made by the Chief Judge and affirmed the orders made by the Māori Land Court on 23 March 1992 and on 14 December 2018.[43]

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38 At [66(c)].
39 At [66(d)].
40 At [67].
41 At [68].
42 At [68].
43 At [69].

The appeal

[51] Mrs Boon filed a notice of appeal in this Court against the judgment of the Māori Appellate Court. Mrs Boon asserted that the Court erred in its interpretation of key facts. She alleged that Mrs Ormsby and Mr Tuwhangai intended that the shares would be held by them as tenants in common and that Mr Tuwhangai's evidence before the Chief Judge did not solely reflect his preferences with the benefit of hindsight, but rather demonstrated his intention and understanding at the time he purchased the shares. Further, it was alleged that the agreement for sale and purchase was not a red herring. Rather it was the legal foundation for the transaction which was subsequently approved by the 1992 order. It was noted that it includes the words "tenants in common". It was alleged that the Māori Land Court erred in its conclusion that there was no error or omission by the Māori Land Court in 1992 and that the relevant errors and omissions were correctly identified by the Chief Judge.

The strike out application

[52] As noted above, Mr Tuwhangai applied to strike out Mrs Boon's appeal on the basis that there is no jurisdiction for her to appeal to this Court.

[53] We do not consider that there is any merit in this application. Mrs Boon made an application to the Chief Judge under s 45 of the Act and Mr Tuwhangai appealed to the Māori Appellate Court pursuant to s 49. Mrs Boon's appeal to this Court has been brought under s 58A, which permits a further appeal to this Court from decisions of the Māori Appellate Court.[44]

[54] It was argued for Mr Tuwhangai that a further appeal to this Court lies only from an appeal brought under s 58 and that this section applies only to appeals from any final order of the Māori Land Court. It was submitted that Mrs Boon's s 45 application was not an application to the Māori Land Court; rather it was an application to the Chief Judge, with a bespoke appellate pathway under s 49 which does not allow for a second appeal to this Court.

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[44] Te Ture Whenua Māori Act 1993, s 58A(1).

[55] We do not agree with the arguments advanced on behalf of Mr Tuwhangai, for the following reasons:

(a) Pursuant to s 47(1) of the Act, every order made by the Chief Judge under s 44 is required to be signed by the Chief Judge and sealed with the seal of the Māori Land Court. Every such order falls within the definition of the word "order" contained in s 4.[45] The substance of the order is required to be pronounced orally in open court and a minute of the order is required to be entered in the records of the Court.[46] It becomes the final order of the Court, and the Māori Appellate Court has jurisdiction to hear and determine appeals in relation to it.[47] There is a further right of appeal against such orders of the Māori Appellate Court to this Court pursuant to s 58A(1).

(b) This conclusion is consistent with the approach taken in other cases.[48]

(c) Any different conclusion would create an anomaly. Section 46(2) of the Act permits the Chief Judge to state a case for the opinion of the High Court on any point of law that arises in relation to any application under s 45.[49] There is a right of appeal from any decision of the High Court on that point of law to this Court.[50] It would be odd if there is no appeal where the Chief Judge does not state a case for the High Court, but an appeal if he or she does do so.

[56] In our judgement, there is no jurisdictional impediment to this Court hearing appeals from decisions of the Māori Appellate Court dealing with orders made by the Chief Judge under s 44 of the Act. Mr Tuwhangai's application to strike out the appeal is declined.

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45 Section 4 definition of "order".
46 Section 41.
47 Sections 49(1) and 58(1).
48 See for example *Inia v Julian*, above n 23; and *Trustees of Tauwhao Te Ngare Trust v Shaw* [2016] NZCA 405.
49 Te Ture Whenua Māori Act, s 46.
50 Section 72(3).

Submissions on appeal

For Mrs Boon

[57] Mr Cornegé, for Mrs Boon, submitted that there were "multiple and compounding errors" in the interpretation of key facts by the Māori Appellate Court. Although he did not place any great weight on the point in his oral submissions, Mr Cornegé did refer to the 1990 agreement for sale and purchase. He submitted that it was a record of the terms of the contract between Mrs Moke as vendor and Mrs Ormsby and Mr Tuwhangai as purchasers, and that it used the words "tenant in common".

[58] Mr Cornegé also noted that the words "joint tenants" did not appear in Mrs Moke's application for confirmation which was submitted to the Māori Land Court with the agreement. He argued that the first use of the words "joint tenants" was in the application made by Mr Thomson on behalf of Mrs Ormsby and Mr Tuwhangai to summon a meeting of owners and that it was there used without explanation. He argued that the resolution of the shareholders did not constitute the contract between Mrs Moke, Mrs Ormsby and Mr Tuwhangai, and that it did not override the agreement for sale and purchase. In his words, the resolution was not a substitute for the agreement — it was merely a step in the alienation process. He argued that Mr Tuwhangai's solicitor, Mr Thomson, erred in his presentation of the facts of the case to the Māori Land Court in 1992 by incorrectly referring to joint tenants, instead of tenants in common.

[59] Mr Cornegé further submitted that the Māori Appellate Court failed to consider the nature of a joint tenancy. He argued that Mrs Ormsby and Mr Tuwhangai, while related, were not so closely related as to warrant the extinguishing of either's interest in favour of the other pursuant to survivorship, and that there were no compelling reasons to support a joint tenancy arrangement. It was argued that the fundamental features of a joint tenancy were at odds with Mrs Ormsby's and Mr Tuwhangai's personal circumstances.

[60] Mr Cornegé discussed Mr Tuwhangai's evidence given before the Chief Judge and submitted the Chief Judge correctly concluded that both Mr Tuwhangai and

Mrs Ormsby acted on the assumption that they held the land as tenants in common until the 2017 succession application. He argued that Mr Tuwhangai's evidence demonstrated that he never intended to hold the shares jointly with Mrs Ormsby. He submitted that the Māori Appellate Court did not give appropriate weight to Mr Tuwhangai's evidence, and that the plain conclusion to be drawn from his evidence was that he had no understanding of what a joint tenancy was, that he never discussed it with Mrs Ormsby, and that he did not discuss it with Mr Thomson.

[61] In conclusion, it was submitted that the Māori Appellate Court erred in finding that there had been no mistake in the presentation of the facts to the Māori Land Court in 1992. It was said that the references to a joint tenancy were in error. It was argued that the Māori Appellate Court was wrong to conclude that the Māori Land Court in 1992 gave the nature of the ownership arrangements ample consideration. It was submitted that the Māori Appellate Court should have stepped back and asked whether, given all of the evidence, the parties intended to hold the shares jointly. It was put to us that the answer to that question was "no", that the appeal should be upheld and that the orders made by the Chief Judge should be reinstated.

For Mr Tuwhangai

[62] Ms Fraser, for Mr Tuwhangai, argued that s 45 is unique and that applications under the section must be accompanied by definitive proof of a material flaw, identified through the production of new evidence. She submitted that ss 44 and 45 do not permit the court to revisit the vesting of Māori freehold land in a joint tenancy purely because the Act defaults to tenancies in common. It was noted that the statutory default preference was in force at the time the 1992 order was made and that it must be presumed that this was known to the Māori Land Court at the time. It was acknowledged that an order giving effect to a joint tenancy is unusual in the Māori Land Court context, but it was submitted that such an order was neither suspicious, nor necessarily erroneous.

[63] Ms Fraser took us through both the statutory history and the various applications that were made. She discussed the relevant provisions in the 1953 Act, noting that Mrs Moke's original application under s 225 of that Act was dismissed,

because of the number of owners involved. She referred to the notice summoning owners to the meeting and noted that it included the resolution to be considered, which specifically recorded that approval was sought to Mrs Moke's shares being sold to Mr Tuwhangai and Mrs Ormsby as joint tenants. She referred to the meeting of owners, noting that the resolution for the sale to Mr Tuwhangai and Mrs Ormsby as joint tenants was passed unanimously. She observed that Mrs Moke on the one hand, and Mr Tuwhangai and Mrs Ormsby on the other, then made applications to the Māori Land Court seeking confirmation of the resolution referring to the joint tenancy, and that the Court granted these applications. She also noted that the Māori Trustee subsequently gave effect to the resolution and to the confirmation order, the Māori Trustee being the agent of the owners for the purpose of executing the instruments of alienation necessary to give effect to the resolution.

[64] It was argued that the Māori Appellate Court correctly concluded that the agreement for sale and purchase was not evidence of Mr Tuwhangai's and Mrs Ormsby's intention to hold the shares in the land as tenants in common, because the agreement for sale and purchase was neither the instrument by which Mrs Moke alienated her shares, nor a document which provided any reliable evidence that Mr Tuwhangai and Mrs Ormsby intended to hold the shares they purchased from Mrs Ormsby as tenants in common. It was acknowledged that if Mrs Moke's s 225 application had been granted, the default position under the 1953 Act would have been that Mr Tuwhangai and Mrs Ormsby would have obtained the shares as tenants in common (unless that presumption was rebutted during the course of the court confirmation process). Ms Fraser submitted however that whether this would have occurred can only be speculation, because the s 225 application faced insurmountable jurisdictional difficulties such that it was ultimately dismissed with Mr Tuwhangai and Mrs Ormsby's consent.

[65] It was submitted that there was no error in the facts presented to the Māori Land Court in 1992 and, in particular, that there is no contemporaneous evidence of any error in the presentation of the facts to that Court. It was noted that references to the proposed joint tenancy were repeated and consistent in the court file, that Mr Tuwhangai and Mrs Ormsby were represented and there is evidence from the court file that the Court substantively scrutinised each of the various applications filed. It

was argued that the Court did actively consider the terms of the proposed resolutions and that it raised no issue with a joint tenancy (whilst disallowing another resolution passed at the same meeting).

[66] Ms Fraser referred to Mr Tuwhangai's evidence given before the Chief Judge and argued that it fell materially short of demonstrating that an error occurred in the 1992 order. It was submitted that the Māori Appellate Court was correct when it concluded that Mr Tuwhangai's contemporary evidence had to be assessed against the facts presented to the Māori Land Court in 1992 and that so assessed, it did not prove that any error occurred.

Analysis

Relevant law

[67] Section 44(1) of the Act provides as follows:

> **44 Chief Judge may correct mistakes and omissions**
>
> (1) On any application made under section 45, the Chief Judge may, if satisfied that an order made by the court or a Registrar (including an order made by a Registrar before the commencement of this Act), or a certificate of confirmation issued by a Registrar under section 160, was erroneous in fact or in law because of any mistake or omission on the part of the court or the Registrar or in the presentation of the facts of the case to the court or the Registrar, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

[68] Pursuant to s 45(1), the jurisdiction conferred on the Chief Judge can be exercised only on application in writing, made by or on behalf of a person who claims to have been adversely affected by the order to which the application relates, or by the Registrar. The Chief Judge can require an applicant to deposit in the office of the court such sum as the Chief Judge thinks fit as security for costs, and may summarily dismiss an application if the amount so fixed is not deposited within the time allowed.[51]

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[51] Te Ture Whenua Māori Act, s 45(2).

[69] The Chief Judge has acknowledged that s 45 is "a unique section amongst the Courts of New Zealand" and that "the principle of indefeasibility [is] extremely important and consequently orders should not be easy to overturn".[52] The Chief Judge has also observed that "s 45 applications must be accompanied by proof of a flaw, identified through the production of evidence".[53]

[70] The following principles relevant to applications made under s 45 have been adopted by the Chief Judge:[54]

(a) When considering a s 45 application, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence provided by the applicant (and any evidence in opposition).

(b) Section 45 applications are not to be treated as a rehearing of the original application.

(c) Everything is presumed to have been done lawfully unless there is evidence to the contrary. In the absence of a patent defect in the order, there is a presumption that the order made was correct.

(d) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct.

(e) The burden of proof is on the applicant to rebut the presumptions noted in (c) and (d).

(f) As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decisions. Parties affected by orders must be able to rely on them.[55] The Chief Judge's special powers are to be used only in exceptional circumstances.

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52 *Rameka — Papamoa 2 Sec 2B3C3B1* [2016] Chief Judge's MB 457 (2016 CJ 457) at [9].
53 At [9].
54 *Ashwell* [2009] Chief Judge's MB 209 (2009 CJ 209) at [15], referring to *Grant v Raroa – Ngamoe A1B1B* (1993) 33 Tairāwhiti Appellate MB 35 (33 TRW 35).
55 See Te Ture Whenua Māori Act, s 77.

[71] Before us, both parties accepted that these were the applicable principles. We agree. They are consistent with s 77 of the Act, which provides that:

> (1) No order made by the court with respect to [Māori] land shall, whether on the ground of want of jurisdiction or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any court in any proceedings instituted more than 10 years after the date of the order.

[72] While s 77 yields to the discretion of the Chief Judge to cancel or amend any order under s 44,[56] s 77 nevertheless emphasises the importance of certainty, finality of decisions and indefeasibility of title. Section 44 is not a panacea for disgruntled applicants seeking to overturn court orders which they do not like.

[73] The Chief Judge's discretion under s 44 is tightly constrained. Orders may only be made where the Chief Judge is satisfied that:[57]

(a) the order of the Māori Land Court was erroneous in fact or in law;

(b) the impugned order was erroneous in fact or law because of a mistake or omission on the part of the Court, or in the presentation of the facts to the Court; and

(c) it is necessary in the interests of justice to remedy the mistake or omission.

[74] Against this background, we turn to consider the present appeal.

Is the 1992 order erroneous in fact or in law?

[75] The 1992 order does not appear to be erroneous in law. The statutory process set out in pt XXIII of the 1953 Act was followed. The order was clearly within the jurisdiction of the Māori Land Court under the legislation then in place.

[76] Whether the 1992 order was erroneous in fact depends on whether there was a mistake in presenting the facts to the Māori Land Court about the basis on which

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56 Te Ture Whenua Māori Act, s 77(3).

57 See also *Trustees of the Tauwhao Te Ngare Trust v Shaw*, above n 48, at [19]–[21].

Mr Tuwhangai and Mrs Ormsby had agreed to hold the shares. It has not been suggested that there was any other error in the order or the accompanying minute.

[77] The 1992 order has been in place for some 30 years. Neither Mr Tuwhangai nor Mrs Ormsby raised any issue with it while they were alive. This suggests that there was no error of fact in the 1992 order. However, it remains necessary to consider whether the facts were incorrectly presented to the Māori Land Court.

Was there a mistake or omission in the presentation of the facts to the Māori Land Court in 1992?

[78] Mrs Boon had given evidence in the course of the hearing before Judge Clark in 2018. That evidence was also before the Chief Judge in 2020. Further, her s 45 application had attached to it a statement which alleged various mistakes and omissions. In both, she set out why she believed there had been a mistake in the presentation of the facts in 1992 and why she considered the resulting order was in error. Mrs Boon spoke briefly when the Chief Judge convened the initial hearing to consider her application. She did not however give any oral evidence and she was not cross-examined.

[79] In her evidence at the 2018 hearing before Judge Clark and in the statement attached to her s 45 application, Mrs Boon relied on the evidence of others and on what she thought must have happened. She asserted in her statement that Mr Tuwhangai had accepted, when he gave evidence before Judge Clark on 26 November 2018, that he didn't understand what a joint tenancy was. She went on to suggest that it was unlikely that Mr Thomson advised either Mr Tuwhangai or Mrs Ormsby what the legal implications of a joint tenancy were. She further claimed that there was no evidence that Mrs Ormsby ever agreed to hold the shares as a joint tenant. Rather, Mrs Boon asserted that the available evidence suggests that Mrs Ormsby intended to hold the shares as a tenant in common. In this regard, Mrs Boon referred to the 1990 sale and purchase agreement and to the fact that her mother did not sign the resolution of assembled owners. She also referred to the presumption in the 1953 Act that Māori land held by two or more persons was held as tenants in common and, from there, argued that the Māori Land Court should have

enquired further before confirming the transfer of the land to Mr Tuwhangai and Mrs Ormsby as joint tenants.

[80] With respect to Mrs Boon, her assertions are in very large part speculation. Moreover, they are inconsistent with the contemporaneous documentation. We nevertheless briefly address the various assertions made by Mrs Boon.

[81] Mrs Boon relied on the statutory presumption set out in s 457 of the 1953 Act. It provided that all Māori land that was held by two or more persons beneficially entitled to it for an estate in fee simple, was deemed to be held by them as tenants in common and not as joint tenants.[58]

[82] Mrs Moke applied to the Māori Land Court for confirmation of the proposed transfer of her interest in the shares to Mr Tuwhangai and Mrs Ormsby. That application was made pursuant to s 225 of the 1953 Act. It was supported by Mr Tuwhangai and Mrs Ormsby. Mrs Moke was seeking to confirm the agreement for sale and purchase which she had entered into with them on 19 February 1990. Ms Fraser acknowledged that had this application been granted, the default position would have been that Mr Tuwhangai and Mrs Ormsby would have obtained the shares as tenants in common, unless this presumption had been rebutted during the course of the hearing and recorded on the title.

[83] The courts have held that a joint tenancy arises when land is transferred inter vivos to two or more persons without any words to show that they are to take distinct and separate shares in the land.[59] This rule did not (and still does not) apply to Māori freehold land.[60] In 1992, the default position in respect of such land was found in s 457 of the 1953 Act. The default position did not however apply if a contrary intention was expressed in the instrument of title.[61]

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58 Māori Affairs Act, s 457(1) (repealed as from 1 July 1993). This presumption can now be found in s 345 of Te Ture Whenua Māori Act.

59 *Gateshead Investments Ltd v Harvey* [2014] NZCA 361, [2014] 3 NZLR 516 at [10]; *Austin v Austin* (1908) 27 NZLR 1099 (SC) at 1102; and see Toni Collins "Joint Tenancy" in D W McMorland and others *Hinde McMorland and Sim Land Law in New Zealand* (online ed, LexisNexis) at [13.004].

60 Land Transfer Act 1952, s 61 (repealed as from 12 November 2018, by s 248(1) of the Land Transfer Act 2017). The current provision is s 47(2)(b) of the Land Transfer Act 2017.

61 Māori Affairs Act, s 457(1).

[84] In the event, the argument leads nowhere. The agreement for sale and purchase could not be confirmed under s 225. Section 225 was contained in pt XIX of the 1953 Act. There were more than 10 owners of the land and as a result, alienation under pt XIX was not available.[62] The Māori Land Court recognised this and it ultimately dismissed Mrs Moke's s 225 application, recording that it was obvious that the order sought confirming the transfer of the shares could not be made.[63]

[85] Mr Thomson, as the solicitor instructed to act for Mr Tuwhangai and Mrs Ormsby, appreciated the problem with Mrs Moke's s 225 application. He so advised the Māori Land Court on 12 June 1990. From this point onwards, all relevant documentation recorded that what was proposed, and ultimately confirmed, was the sale of the shares to Mr Tuwhangai and Mrs Ormsby as joint tenants.

(a) Mr Thomson filed an application to the Māori Land Court on behalf of Mr Tuwhangai and Mrs Ormsby to summon a meeting of owners under s 307, contained in pt XXIII, of the 1953 Act. It provided the only available pathway for alienating an interest in Māori land where the land had more than 10 owners. Broadly, the pathway entailed a resolution of assembled owners,[64] followed by court confirmation of that resolution,[65] with the consequent transfer being completed by the Māori Trustee on the owners' behalf as their statutory agent.[66]

(b) The application made by Mr Thomson recorded that the assembled owners would be asked to approve the sale by Mrs Moke of her shares to Mr Tuwhangai and Mrs Ormsby, as joint tenants.

(c) On 8 November 1991, the Māori Land Court, through the Registrar, issued a notice calling a meeting of owners. It recorded that the owners would be asked to consider a resolution to approve the sale of Mrs Moke's shares to Mr Tuwhangai and Mrs Ormsby, as joint tenants.

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62 Section 215(1).
63 Section 225 decision, above n 11.
64 Māori Affairs Act, s 315(1)(b).
65 Sections 317–322.
66 Sections 323–325.

(d) The meeting of assembled owners took place on 6 December 1991. It was attended by a recording officer as required by s 310 of the 1953 Act. He kept minutes of the meeting and reported to the Court pursuant to s 314. His record of the meeting and of the resolution passed was deposited as part of the Court record.

(e) The resolution approving the sale of Mrs Moke's shares to Mr Tuwhangai and Mrs Ormsby as joint tenants was passed unanimously.[67] Mr Tuwhangai and, it seems from the available records, Mrs Ormsby were present. Mr Tuwhangai signed the resolution.

(f) Both Mrs Moke, as well as Mr Tuwhangai and Mrs Ormsby, then made application to the Court seeking confirmation of the owners' resolution approving the sale of Mrs Moke's shares to Mr Tuwhangai and Mrs Ormsby as joint tenants.

(g) The Court granted the respective applications on 23 March 1992.[68] Mr Tuwhangai was present at the Court hearing. Mrs Ormsby did not attend notwithstanding that she was advised of the hearing date by Mr Tuwhangai.

[86] We agree with the Māori Appellate Court's observation that it is inescapable that both Mr Tuwhangai and Mrs Ormsby must have been aware that they were to be joint tenants of the shares they were purchasing.[69] That was expressly provided for in all the documents relating to the owners' meeting and the Court approval of their resolution.

[87] Before us, reference was made to the 1990 agreement for sale and purchase. It was argued, albeit faintly, that it evidenced an error in the presentation of the relevant facts.

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67 Mrs Boon notes that Mrs Ormsby did not sign the resolution. It is not obvious to us that her signature was required; as we understand it, she was not an owner of the land.

68 The 1992 order, above n 1.

69 Māori Appellate Court decision, above n 5, at [63].

[88] As we have noted at [15], the agreement for sale and purchase recorded that Mrs Moke was selling "335.184 shares as tenant in common (out of a total of 415 shares)" to Mr Tuwhangai and Mrs Ormsby. We agree with the Māori Appellate Court that the term "tenant in common" used in the sale and purchase agreement did not refer to the basis on which Mr Tuwhangai and Mrs Ormsby were intending to hold the shares going forward. Rather, it described the interest Mrs Moke was selling.[70] It was clear from the certificate of title to the land (see above at [7]) that the various owners listed on the title held the shares ascribed to each of them as tenants in common. The reference to "tenant in common" in the agreement for sale and purchase was to the arrangement between Mrs Moke and the other owners, not any arrangement between Mr Tuwhangai and Mrs Ormsby.[71] As Mr Tuwhangai explained in his evidence to the Māori Land Court, Mrs Moke was not selling two parcels of shares; she was only selling one.

[89] It was argued for Mrs Boon that Mr Thomson erred in presenting the facts to the Māori Land Court. There is however no evidence to support this assertion.

[90] The agreement for sale and purchase was before the Māori Land Court. It was attached to Mrs Moke's original s 225 application. The later application filed by Mr Thomson seeking that a meeting of owners be summoned was clear in its terms. There is no record of Mr Thomson advising the Court why it was proposed that Mr Tuwhangai and Mrs Ormsby would hold the shares as joint tenants, rather than tenants in common, but that is readily understandable. Mr Thomson was under no obligation to disclose his clients' instructions. Why a joint tenancy arrangement was sought was not an issue for the Māori Land Court and it was entitled to assume that Mr Thomson was acting in accordance with his clients' instructions.

[91] As we have noted above, Mr Thomson has passed away and his files are no longer available. There is no evidential basis on which it can now be asserted that the application Mr Thomson made to the Māori Land Court was contrary to such instructions as he received.

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70 At [53].
71 At [54]–[55].

[92] As we have noted, a reporting officer attended the meeting of owners. This was a requirement imposed by s 310 of the 1953 Act. It required that a recording officer be present throughout the meeting and that he or she keep a record of the proceedings.[72] Section 310(2) provided that the Registrar of the Court or some other officer of the department appointed for the purpose by the Registrar, was to be the recording officer. According to the statement of proceedings of the meeting, the recording officer was Dean Haggie. He was also appointed by the owners to chair the meeting. Mr Haggie went on to prepare a report of the meeting under s 314 of the 1953 Act. He reported the result of the meeting to the Court and he deposited in the Court's records a statement of proceedings of the meeting, together with a copy of the resolution passed.

[93] In these circumstances, it is difficult, if not impossible, to establish that there was any mistake or omission in the presentation of the facts to the Māori Land Court in 1992. The resolution of owners was passed under the Court's supervision and was accurately reported to the Court.

[94] Mrs Boon, is in effect, arguing that the approval of owners was obtained on an incorrect basis. But any order the Māori Land Court made had to be based on what was approved by the owners. If the Court had subsequently been told that Mr Tuwhangai and Mrs Ormsby had wished to purchase as tenants in common, the Court could not have made an order to that effect — it would have been necessary to convene another meeting of owners and seek approval on that basis. The order made by the Chief Judge "amended" the 1992 order in a manner that was not open to the Court in 1992.

[95] It was also argued for Mrs Boon that the Māori Land Court failed to consider the nature of joint tenancies and that its fundamental features (in particular survivorship) were at odds with Mr Tuwhangai's and Mrs Ormsby's personal circumstances.

[96] We do not accept this submission.

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[72] Māori Affairs Act, s 310(1).

[97] The differences between a joint tenancy and a tenancy in common are well known, at least amongst lawyers.[73] A joint tenancy has two key features — the right of survivorship and the four unities (unity of possession, of interest, of title and of time).[74] It must be presumed that the Māori Land Court was aware of the difference between the two types of ownership.

[98] As already noted, a tenancy in common was the default position under the 1953 Act, but it was open to Mr Tuwhangai and Mrs Ormsby to depart from the statutory presumption. In our view, it is clear from the applications made and from the steps taken, that this is what they did. We agree with the submissions advanced on behalf of Mr Tuwhangai that the 1992 order giving effect to the joint tenancy arrangement, while unusual in the context of Māori Land, was not prima facie either suspicious or erroneous.

[99] Further and in any event, we do not agree that a joint tenancy in relation to the legal title to the shares was necessarily at odds with Mr Tuwhangai and Mrs Ormsby's personal circumstances. Mr Tuwhangai and Mrs Ormsby were very close. That is why they were prepared to purchase the shares together. The initial sale and purchase arrangements were entered into between Mrs Moke and Mr Tuwhangai. Mrs Ormsby became a purchaser some months thereafter and only after she agreed to Mr Tuwhangai's condition that she would never sell the shares. This was advised to Mr Thomson and he went on to perfect the transaction. Mr Tuwhangai considered that the arrangements entered into, which were ultimately confirmed in the 1992 order, reflected what he and Mrs Ormsby intended. In the evidence that he gave before the Chief Judge, Mr Tuwhangai stated as follows:

> … To be clear, [Mrs Ormsby] and I never specifically used the term joint tenancy in our discussions. However the arrangement we came to reflects what we intended. …

[100] There was nothing to prevent Mr Tuwhangai and Mrs Ormsby from entering into an arrangement that would sit behind the joint tenancy and govern how they would deal with their joint asset in the future. That arrangement could have been contractual,

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73 See discussion in *Gateshead Investments Ltd v Harvey*, above n 59, at [9]–[16].
74 At [12]–[13].

or it could have taken the form of a trust. Indeed, there is evidence suggesting that some consideration was given to such an arrangement. There is a reference in Judge Clark's 2018 judgment to a diary kept by Mrs Ormsby's husband, the late John Ormsby. Copies of relevant extracts from Mr Ormsby's diary, were made available to Judge Clark. It appears from the transcript of the hearing of Mrs Boon's application under s 45 of the Act that at least some of the diary notes were also before the Chief Judge. They were also before us. In one of the diary notes, there was a reference to the purchase of the land. Mr Ormsby went on to record that "the idea of setting up a trust was discussed". In another entry, he recorded that "we" (which seems to be a reference to Mr and Mrs Ormsby) went to a bank to arrange a loan to pay for the land at Kawhia. He recorded that it was to be "a joint loan between Mum and Nic Tuwhangai".[75] These were contemporary notes and according to Mrs Boon, her father was an assiduous and careful diarist.

[101] If a trust was in contemplation, it would have been entirely orthodox for Mr Tuwhangai and Mrs Ormsby as trustees to be joint tenants at law. That is how trustees normally hold legal title to an asset. Why no trust was settled, or other documentation drawn up, is speculation. The fact remains that a joint tenancy was not necessarily inconsistent with Mr Tuwhangai's and Mrs Ormsby's situation at the time.

[102] Finally, reference was made to Mr Tuwhangai's evidence given before the Chief Judge. The Māori Appellate Court summarised that evidence. Relevantly, Mr Tuwhangai gave evidence before the Chief Judge that he and Mrs Ormsby did not discuss what was to happen to the shares when one of them died, that his previous involvement with Māori land had always been as a tenant in common, that he did not instruct Mr Thomson to change the ownership to a joint tenancy, and that, in hindsight, he would have ensured that the purchase was as tenants in common to protect his family.[76]

[103] This evidence was given in August 2020, with the benefit of hindsight. In our judgement, it falls well short of demonstrating that there was an error in the presentation of the case before the Māori Land Court in 1992. We note the following:

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75 Judge Clark's decision, above n 2, at [43].
76 Māori Appellate Court decision, above n 5, at [58(e)], [58(f)], and [58(i)].

(a) Mr Tuwhangai's evidence was given almost 30 years after the 1992 order was made.

(b) Mr Tuwhangai was elderly (83 years) at the time he gave his evidence. He acknowledged that his memory was not what it used to be, and he said that he could not recall what went on in the course of the 1992 case.

(c) Mr Tuwhangai's evidence was taken in the course of what had become acrimonious litigation involving members of his whanau. The litigation had spanned some three years and had involved multiple proceedings in the Māori Land Court. It is clear from his evidence that Mr Tuwhangai was distressed by some of the allegations made by Mrs Boon, not only against him but also his whānau.

(d) Significant parts of Mr Tuwhangai's cross-examination, and a number of questions put to him by the Chief Judge, were predicated on an assumption — namely that the 1990 agreement for sale and purchase envisaged a tenancy in common. This assumption was, in our view, in error. For the reasons we have set out above, the agreement for sale and purchase did not create a tenancy in common as between Mr Tuwhangai and Mrs Ormsby. No changes were required to it to create a joint tenancy. Unfortunately, the way in which the questioning at the hearing before the Chief Judge proceeded tended to distort Mr Tuwhangai's answers. He was asked, and he tried, as a lay person, to answer a number of questions which were based on an erroneous premise. His answers were then held against him.

[104] In the round, we consider that Mr Tuwhangai's evidence was consistent with the purchase of the shares by him and Mrs Ormsby as joint tenants. Mr Tuwhangai's acknowledgement that he and Mrs Ormsby did not discuss their ownership arrangements in legal terms was to be expected. Neither was a lawyer. Mr Tuwhangai's evidence was broadly to the effect that he explained to Mr Thomson the practical outcomes which he and Mrs Ormsby hoped to achieve and that Mr Thomson, through the application to the Māori Land Court, endeavoured to ensure

that those outcomes were achieved. It may be that Mr Thomson misunderstood his instructions. It is however at least equally likely that a joint tenancy at law was intended, with a trust structure to sit behind that arrangement for legal ownership, but that the trust was never put in place.

[105] We are not persuaded that the 1992 order was erroneous in fact because of a mistake or omission made in the presentation of the facts of the case to the Māori Land Court at that time.

Conclusion

[106] For the reasons we have set out this appeal cannot succeed. We agree with the conclusions reached and the orders made by the Māori Appellate Court.

Costs

[107] Mrs Boon is legally aided. As a result, costs can only be awarded against her if there are exceptional circumstances.[77] We do not consider that there are any such circumstances. Accordingly, we do not make an order for costs.

Result

[108] The respondent's application to strike out the notice of appeal is declined.

[109] The appeal is dismissed.

[110] There is no order as to costs.

Solicitors:
Grayson Clements Limited Lawyers, Hamilton for Appellant
Chapman Tripp, Auckland for Respondent

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[77] Legal Services Act 2011, s 45(2).