IN THE COURT OF APPEAL OF NEW ZEALAND

CA67/2011
[2013] NZCA 33

	BETWEEN	CHIEF EXECUTIVE LAND INFORMATION NEW ZEALAND Appellant
	AND	TE WHANAU O RANGIWHAKAAHU HAPU CHARITABLE TRUST First Respondent
	AND	FRIENDS OF MATAPOURI INCORPORATED Second Respondent

Hearing: 6 and 7 June 2012

Court: Glazebrook, Stevens and Wild JJ

Counsel: H S Hancock and D A Ward for Appellant
S M Henderson, J Browne and C H Prendergast for First and Second Respondents

Judgment: 28 February 2013 at 11.30 am

JUDGMENT OF THE COURT

A The appeal against the substantive judgment of 22 December 2010 is dismissed.

B The cross appeal against the substantive judgment is dismissed.

C The appeal against the costs judgment of 1 August 2011 is allowed to the extent set out at E.

D The cross appeal against the costs judgment is dismissed.

E Costs in the High Court are to lie where they fall, except that the award of $5,000 to reflect attendances in the Māori Land Court stands. Any

disbursements related to the Māori Land Court appearances remain payable to the first respondent.

F There are no orders for costs in this Court.

REASONS OF THE COURT

(Given by Glazebrook J)

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Introduction

[1] This appeal concerns the Otito Scenic Reserve, situated at Matapouri Bay, about 40 minutes drive from Whangarei. In essence, the issue is whether a new survey plan (DP 199214) should have been approved for deposit in 1999. That survey plan is said by the respondents to have transferred land that belonged to the Reserve to the adjoining title, by reducing the length of the western and southern boundaries and changing the shape of the southern boundary of the Reserve.

[2] On 22 December 2010 in the High Court (the substantive judgment),[1] Heath J made a declaration that the Chief Surveyor erred in law by applying the wrong test in making the decision to approve DP 199214 and that it should not have been approved for survey purposes.

[3] In the substantive judgment, Heath J also dismissed the claims of the Te Whanau O Rangiwhakaahu Hapu Charitable Trust (the Trust) based on breach of contract and breach of trust and dismissed the Trust's application to review the subsequent decision of the Surveyor-General not to correct DP 199214.[2]

[4] In a separate judgment of 1 August 2011 (the costs judgment), Heath J awarded costs in favour of the Trust.[3]

[5] The Crown appeals against the making of the declaration in the substantive judgment and also against the costs judgment. It says that costs should lie where they fall in the High Court.

[6] The Trust cross-appeals against the findings in the substantive judgment relating to breach of contract and trust and the refusal to review the Surveyor-

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1 *Te Whanau O Rangiwhakaahu Hapu Trust v Department of Conservation* HC Whangarei CIV-2008-488-548, 22 December 2010 [the substantive judgment].

2 Heath J, in the substantive judgment, also rejected the Trust's claim based on a breach of the principles of the Treaty of Waitangi and dismissed the Trust's application to review the 1999 decision of the District Land Registrar to cancel the existing title and to issue a new one based on DP 199214.

3 *Te Whanau O Rangiwhakaahu Hapu Charitable Trust v Department of Conservation (No 2)* HC Whangarei CIV-2008-488-548, 1 August 2011 [Costs judgment].

General's decision.[4] The Trust also seeks indemnity or increased costs in the High Court.

[7] Before we deal with the issues in the appeals and cross-appeal, we set out the background and a summary of the substantive judgment. We then examine the appeal and cross-appeal against the substantive judgment, before dealing with the costs judgment.

Background

First surveys

[8] The first relevant survey of the boundaries of the Otito Block appears to have been done, probably by Mr Searancke, sometime between September 1863 and 1864. Mr Searancke was a Government Land Purchase Commissioner and Surveyor. The survey was done in the context of negotiating the settlement of Māori claims on the Matapouri Block (which adjoined the Otito Block).[5] The map at appendix 1 shows the location of the blocks of land in the area.

[9] The plan SO 718 appears to be the plan Mr Searancke created of his survey of the Matapouri Block. It defined the inland boundary of the Otito Block and showed the Otito Block as a native reserve, containing 62 acres. The common boundary between the Otito and Matapouri Blocks started at a location on the north side, known as "Otito". It then ran in a straight line inland from Otito, before branching towards the coast on a different angle, touching what appeared to be a watercourse named "Te Wahi Tapu" and then running down to the coast north of a location called "Te Karo". There are some bearings and perhaps distances, but the plan is not clear in either of those respects. There are no measurements of the coastal boundaries of the Otito Block.

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4 The aspects of Heath J's judgment referred to above at n 2 are not the subject of the cross-appeal.

5 For a fuller background of the events surrounding the Searancke survey, see the substantive judgment, above n 1, from [22]–[29].

[10] Plan SO 718 is undated and unsigned and does not contain any notations indicating that it was approved by the Surveyor-General. The plan was not located until 2008 after some of the evidence in this litigation was prepared. An extract of the relevant part of SO 718 is set out at appendix 2.

Survey of Matapouri Reserve

[11] The next relevant survey was in 1871. This resulted in the creation of Māori Land Plan ML 2323. This was again a survey of adjoining land, rather than of the Otito Block. It contains notation indicating that it had obtained the approval of the Provincial Surveyor and the Deputy Inspector of Surveys.

[12] Plan ML 2323 shows the junction of the north-eastern boundary of the Matapouri Block and the coast at a point called "Te Karo", then a line of coast with the words "Te Wahitapu" near the mouth of what appears to be a waterway. This plan shows a new peg placed north of the waterway in a position subsequently depicted on ML 3903 as the south-western boundary angle of the Otito Block.[6] An extract of the relevant part of ML 2323 setting out the boundary between the Matapouri and Otito Blocks is set out at appendix 3.

[13] In January 1872, the land contained in the Matapouri Block came before the Native Land Court at Kawakawa for investigation of title. Unfortunately, the Court's Minute Books for that hearing have been lost. However, it is clear that an order was made, on 29 January 1872, issuing a certificate of title under the Native Lands Act to the Māori owners of the Matapouri Block.

Survey of Otito and Parangarau

[14] In September 1877, the Native Land Court began an investigation into the title to the Otito Block and the neighbouring Parangarau Reserves.[7] This proceeded on the basis of a new plan, ML 3903. Plan ML 3903 shows "Te Wahitapu Creek" as a means of fixing the boundary. It also shows some measurements around the Otito coast. The plan also sets out measurements of the boundaries of the Otito Block: the

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6 See at [14] below.

7 See diagram at appendix 1.

north and north-west sea boundaries being together 6,300 links; the eastern sea boundary together with the Te Wahitapu Creek boundary being 6,100 links; and the south-west and western boundaries with the Matapouri Block being together 2,580 links. ML 3903 contains a notation that it was approved by the Deputy Inspector of Surveys on 22 July 1880. The relevant part of the plan is set out at appendix 4.

[15] A memorial recording ownership of the Otito Block was entered, in accordance with the Native Land Court's decision of 14 September 1877 declaring the Block Māori freehold land. It records the area as 62 acres "be the same more or less". The description of the boundaries on the memorial is:

> Bounded towards the North West and North by the Sea 6300 links – towards the South East by the Sea and Te Wahitapu Creek 6100 links and towards the South West and West by the Matapouri Block 2580 links.

Survey of Section 1 Block X Opuawhanga Survey District

[16] In 1893, another surveyor, Mr Haszard, surveyed and subdivided the northern part of the Matapouri Block for the purpose of a Crown land purchase, creating plan SO 5117. Section 1 Block X Opuawhanga Survey District is the parcel created by that survey that abuts the Otito Block. SO 5117 is relevant because it relied on ML 3903 to define the common boundary between the Otito and Matapouri Blocks,[8] the latter being land from which Section 1 of Block X Opuawhanga Survey District was partitioned. However, the extent to which SO 5117 accurately reproduced the boundary with the Otito Block as shown on ML 3903 is in dispute.

[17] In SO 5117, the southern boundary of the Otito Block was defined by reference to "Te Wahitapu Creek", which was shown on this plan by pecked lines. At the High Court hearing, the evidence of the Surveyor-General, Mr Grant, was that the pecked lines indicate that the surveyor was uncertain as to the location of the stream. His evidence was that, if a stream or evidence of a former stream had been found in 1893, the surveyor would have been required to locate the banks of that stream by survey measurements and show its position as a solid boundary.

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[8] See the substantive judgment, above n 1, at [41].

[18] Plan SO 5117 does not appear to have located or connected to any old survey marks from prior surveys. A new peg was placed by SO 5117 at the south-western corner of the Otito Block. Mr Grant's evidence was that this appears to have been an attempt to reinstate the original position of the boundary. However, Mr Grant deposed that there was "little clear evidence" that SO 5117 had located the original survey marks. Mr Grant noted that the angle peg on SO 5117 is located south of the surveyed position of Te Wahitapu Creek, while the original angle peg on ML 3903 and SO 718 is placed north of the creek.

The Morrison purchase

[19] In 1919, Mr Morrison acquired sections 1 and 2 of Block X.[9] A fully guaranteed freehold title, based on SO 5117, was issued to Mr Morrison in 1921. Mr Morrison was told by Mr Aspden, the vendor of the land, that the northern boundary of his land was Te Wahitapu Creek. The northern boundary of Section 1 was the southern boundary of the Otito Block.

[20] In 1946, Mr Morrison and his wife built their house to the south of the creek as it then flowed. The pecked lines on SO 5117[10] ran through the Morrison house.

Māori Reserve status

[21] On 25 August 1954, the Māori Land Court recommended that an Order in Council be issued to set aside the land known as the Otito Block as a recreation reserve for the common use of the Ngatiwai Tribe.[11] Judge Clarke, in making that order, recorded that the land was in continual and common use by the people living at Matapouri Bay as a recreation area and that it was "the wish of the owners that [it] be set aside as a Māori Reservation".[12]

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9 Miss Mary Morrison had acquired a leasehold interest of the land in 1912. This was converted to a licence to occupy on deferred payments in December 1915 and transferred to Mr Morrison in August 1916. He paid the balance of the money due on the deferred licence in November 1919.

10 See above at [17].

11 *Re Otito Block* (1954) 27 Whangarei MB 316.

12 *Re Otito Block*, above n 11. The recommendation for the issue of an Order in Council was made under s 439 of the Māori Affairs Act 1953.

[22] On 11 January 1957, the Governor-General made an Order in Council to give effect to the recommendation.[13] The land was described, in the Order, as containing 62 acres, "more particularly delineated on the plan numbered MA 21/3/315 lodged in the Head Office of the Department of Māori Affairs, Wellington, and thereon edged red".[14]

Challenges to the boundary

[23] In 1965, Mr Morrison challenged the correctness of the southern boundary of the Otito Block.[15] His contention was that the boundary was Te Wahitapu Creek in the position it currently flowed and not the boundary line shown on SO 5117. In a letter of 21 June 1965 the Morrisons' surveyor, Mr Hosking, wrote to the District Land Registrar asking that the present stream be designated as the boundary of the Otito Reserve.

[24] On 9 July 1965 the District Land Registrar advised that there was "no other evidence available as to the position of this stream and it is the opinion of this office that your client's title boundary is to the position of the stream as shown on SO plan 5117".[16]

[25] On 23 December 1965, Mr Morrison's solicitors forwarded a plan of survey of Part Sections 1 and 2 Block X Opuawhanga (survey LT 56234) and accompanying reports to the District Land Registrar. Survey LT 56234 confirmed the existence of the angle peg defining the western and southern boundaries of the Otito Block. This meant that the angle peg from SO 5117 was "renewed" by LT 56234. However, LT 56234 departed from those aspects of SO 5117 based on the position of the waterway by putting the creek in its position as at the date LT 56234 was made. As a consequence, the creek as positioned in LT 56234 is located entirely to the north of the peg placed by SO 5117, so that the creek crosses the western boundary line of the

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13 "Setting Apart Māori Freehold Land as a Māori Reservation" (17 January 1957) 2 *New Zealand Gazette* 41 at 46.

14 The respondents state in their submissions on the cross-appeal that MA 21/3/315 is ML 3903.

15 For fuller details see Heath J's comments in the substantive judgment, above n 1, at [46]–[66].

16 There is an internal memorandum (dated 25 June 1965) which preceded the District Land Registrar's letter, in which it was said: "It is most unlikely that any acceptable evidence would now be available to refute these early surveys".

Otito Block before that boundary reaches the peg placed by SO 5117. A map illustrating this is set out at appendix 5.

[26] In June 1966, Mr Williams, the surveyor who surveyed LT 56234 on behalf of the Morrisons, again asked that Te Wahitapu Creek (in its current position as surveyed by LT 56234) be recognised as the boundary between the Morrison land and the Otito Reserve.

[27] The Land Transfer Surveyor in August 1966 responded that he was not satisfied that the contemporary location of Te Wahitapu Creek represented the boundary between the Otito Block and the Morrison property. He considered it quite possible that the creek, at the time of ML 3903, followed the course shown in that plan. He noted that the plot of the creek from ML 3903 placed the creek "well to the east of the rock knoll" on the plan provided by the Morrisons' surveyors. The rock knoll referred to is a distinctive rocky mound named "Whitiroa" by local Māori, and it is regarded as wahi tapu due to its former association with the preparation of human remains for burial.[17]

[28] On 9 January 1967 the Chief Surveyor at the time (Mr Reid) asked the District Surveyor in Whangarei to investigate whether it was possible for a stream to have been in the general position shown on the early plans and whether there was evidence that could account for the change in position.

[29] On 17 January 1967, the District Surveyor replied that it was possible that the stream did flow along the line shown in ML 3903, but not that shown by the pecked lines in SO 5117.[18] He noted a distinct hollow immediately below and southeast of the rock knob (Whitiroa), indicating the possibility of an early stream bed. The District Surveyor considered that he could not rule out the possibility that the stream flowed along the line indicated in ML 3903 when that plan was produced.

[30] In March 1968 the Māori Trustees of the Otito Block became involved in discussions. They sent a letter to the District Land Registrar on 15 March 1968 to

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17 Wahi tapu are sacred places.

18 The letter is erroneously dated 1966.

say that one of the Trustees had pointed out that the "rocky knob" had traditions attached to it and that he was sure it would never have left the ownership of Māori. In a further letter of 20 March 1968, the Trustees indicated that they would leave the matter in the hands of the District Land Registrar to be satisfied as to the boundaries of the Otito Block in the first instance, provided there was an opportunity for the Trustees to object to any resulting plan.

[31] On 27 March 1968, the District Land Registrar sent a letter to the Trustees indicating that he did not see how the surveyor defining the boundary of Section 1 would be able to depart from the measurements and bearings of SO Plan 5117. He said that the only question which had to be determined was the position of Te Wahitapu Creek. He said that any alteration in the course of the stream must be satisfactorily established, but noted there was no procedure for giving notice to the owners of the Otito Block in the same manner as notices are given when the boundary of land limited as to parcels is surveyed. However, he said that he was sure that any representations considering the position of the boundary in the new survey would be considered by the Land Transfer Surveyor before the plan was approved as to survey.

[32] On 13 May 1971, the Land Transfer Surveyor wrote to Mr Morrison's surveyor to advise that LT 56234, which used the current position of the stream as the south-east boundary of the Otito Block, had been approved as to survey data only. In this context, the term "approved as to survey data" means a decision to accept the measurements shown on the plan but not the boundaries of the land in question. As the Surveyor-General, Mr Grant, said in evidence before the High Court, an approval of that type would put a District Land Registrar on notice that it might be "risky" to issue a guaranteed title based on the plan.

Crown purchase of Otito Block

[33] The Crown appears to have become interested in acquiring the Otito Block as a scenic reserve in mid to late 1967. Issues arose in the discussions that followed as to the proper boundary of the Block.

[34] A memorandum to the Commissioner of Crown Lands from Mr Phillips, Māori Section, of 22 March 1968 (reporting on a meeting between the Trustees of the Otito Block and himself) says that the Māori owners were not inclined to progress the transfer until the boundary issue had been resolved. It was noted that all the owners were adamant that Mr Morrison had built his home on the Otito Block. It was recorded that Rangitapu Point and also a "rocky knob" near Mr Morrison's house both have sacred significance and should be fenced off. It was also recorded that the whole block should become a scenic reserve for all time, administered by the Crown.

[35] On 2 April 1968, the Commissioner of Crown Lands wrote to the Director-General of Lands in Wellington, advising of an outcome of a meeting with the Trustees indicating that action would be taken to revoke the Order in Council for Māori reservation status, subject to agreement being reached over the boundary definition.

[36] A further file note dated 16 June 1969, from Mr Phillips to the Commissioner of Crown Lands, reported on the outcome of a meeting between himself, the Trustees of the Otito Block and Mrs Morrison. That file note indicated that the Trustees would recommend that the land be sold to the Crown for $13,000 and that the Trustees would lodge the necessary applications to the Māori Land Court. It was noted that, if the Court approved, the sale would be conditional on the land being used for a scenic or recreation reserve and that the Crown would have to permit a life tenancy to Mrs Morrison by virtue of her adverse occupation of part of the Otito Block. It appears that Mrs Morrison and the Trustees were all present when the matter had been discussed with the Judge in Chambers.

[37] On 5 September 1969, the Māori Land Court made orders recommending the revocation of Māori reservation status for the Otito Block and vesting the land in trustees for the purpose of facilitating a sale of the Block to the Crown.[19] Judge Nicholson appointed five trustees[20] (the MLC Trustees) and ordered:

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19 *Re Otito Block* (1969) 45 Whangarei MB 176–177.

20 Under s 438 of the Maori Affairs Act 1953.

> … that the following trusts and conditions be created in respect of the said Otito Block:
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> (a) To sell to Her Majesty the Queen (The Crown).
>
> (b) Consideration for such sale to be not less than Thirteen Thousand Dollars ($13,000).
>
> (c) The nett proceeds of such sale to be lodged with the Māori Trustee and to be held by him pending a further order of this Court.
>
> (d) The two "Wahitapus" on the land to be pointed out to the purchaser and purchaser to respect such sacred grounds.
>
> (e) The trustees to arrange with the purchaser a life tenancy grant for Mrs Morrison as that part of Otito Block occupied by her dwelling house and outbuildings and gardens therearound in adverse possession.

[38] In the Minute Book of the Court dated 5 September 1969, it is recorded that Mr Phillips for the Commissioner of Crown Lands said:

> Will respect wahitapus – require them to be pointed out. Agree to grant life tenancy for Mrs Morrison in adverse possession of part. Agree to use land as scenic or recreation reserve or other consistent purpose and not to enter into any exchanges with this Otito Block and agree to price $13,000.

[39] Heath J, in his substantive judgment, noted that, as one of the purposes of this hearing was to secure the grant of a life tenancy to Mrs Morrison, it is clear that the Morrison interests would have known that the hearing was taking place.[21] No evidence appears to have been adduced by Mrs Morrison at that hearing to suggest that the southern boundary was located incorrectly on SO 5117.

[40] Heath J also noted that, notwithstanding the Māori Land Court's order, nothing has been found relating to the precise terms of the proposed life tenancy. For the purposes of his judgment, he assumed that the life tenancy was intended to ensure that the dwelling, outbuildings and garden situated within the area of land containing 62 acres that was shown in ML 3903[22] could be used by Mrs Morrison, in

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21 The substantive judgment, above n 1, at [61].

22 See above at [14]. ML 3903 was the plan on which the Orders in Council of 1970 and 1972 were based.

adverse possession, for the remainder of her life.[23] Negotiations continued for some time over the proposed life tenancy but the position was never resolved.

[41] The Crown purchase of the Otito Block was completed in January 1970. In his substantive judgment, Heath J said that no document has been found that records the precise terms on which the Crown ultimately agreed to purchase the Otito Block.[24]

[42] The Memorandum of Transfer to the Crown referred to the Māori Land Court Order of 5 September 1969 and also to a diagram attached (where part of the southern boundary was identified as "Te Wahitapu Ck"). It recorded the transfer to the Crown for $13,000.

[43] The Minutes of the Board of Māori Affairs in April 1970 set out the terms of the Māori Land Court Order and said:

> The Crown has agreed to these conditions and has also agreed with the trustees that it will use the land for purposes consistent with a public reserve and will not change the boundaries of the block by way of exchanges. A transfer to the Crown has been executed and the consideration of $13,000 has been paid to the Māori Trustee.

[44] The land was declared Crown Land on 22 May 1970. The proclamation issued by the Administrator of the Government vested in the Crown land described in a schedule. The schedule recorded that the land was "situated in Block X, Opuawhanga Survey District" and contained an area of 62 acres as shown, edged red, on ML 3903.[25]

[45] On 18 August 1972, the Otito Block was declared a public reserve under the Reserves and Domains Act 1953.[26] When this declaration was promulgated, the

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23 The substantive judgment, above n 1, at [63]. ML 3903 was the plan on which the Orders in Council of 1970 and 1972 were based.

24 At [64]. There is a letter from the Registrar of the Māori Land Court to the Chief Surveyor dated 12 December 1969 making it clear that "negotiations for the sale are between you and the trustees" and identifying the need to arrange a life tenancy grant in favour of Mrs Morrison in accordance with the Court order.

25 "Declaring Land to be Crown Land" (28 May 1970) 31 *New Zealand Gazette* 917 at 919.

26 "Definition of the Purpose of a Reserve" (24 August 1972) 70 *New Zealand Gazette* 1817 at 1820.

Otito Block was again described as containing an area of 62 acres, more or less, as being shown in ML 3903.[27]

[46] We note that no registered title has been issued for the Otito Block. At the time of purchase by the Crown in 1970, the Otito Block remained subject to the Native Land Court Act 1894.

Subdivision consent

[47] Mrs Morrison died in 1991 and the house came to be occupied by the Ringers, who are descendants of the Morrisons. The Ringers also owned Sections 1 and 2 Block X Opuawhanga Survey District. On 4 December 1996, an application dated 11 November 1996 was made on behalf of the Ringer (Morrison) interests to subdivide their land into four lots. The plan enclosed with the subdivision application showed the common boundary between the Otito Reserve and the land being subdivided as the present location of Te Wahitapu Creek.

[48] On 28 April 1997, the Whangarei District Council's Environmental Services Manager wrote to the Ringers' surveyors recording the issues and outcomes of a meeting between Ngatiwai's Resource Management Unit and Council Officers. The letter noted the existence of "an anomaly" with respect to the boundaries shown on the subdivision plan when compared to those shown in the Certificates of Title. It stated that this anomaly was important because the area now south of the stream had a house on it which "apparently the Department of Conservation, believing it is part of a scenic reserve, [had] promised to Ngatiwai."

[49] The Manager noted the longstanding nature of the dispute. He said that, in order to satisfy the Council that the boundary on the subdivision plan was correct, written agreement from the Department of Conservation needed to be obtained. He also noted that affected parties' consents "[were] advisable from Ngatiwai Trust Board". He stated that, without those consents, the application would be notified.

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[27] This declaration was renewed under the Reserves Act 1977: "Classification of Reserve" (18 October 1979) 96 *New Zealand Gazette* 3004 at 3026.

[50] Various correspondence then ensued. On 7 July 1997, a Conservation Officer confirmed that the Department of Conservation could find no evidence to show that the house property was to revert to Ngatiwai ownership, but did note that, when the reserve was purchased by the Crown from the Māori owners, it was "apparently recognised that the house which was occupied at that time by Mrs Morrison was located within the reserve boundary within a wahi tapu area but that she be accorded a lifetime tenancy after which time the building would be removed from the site".

[51] That matter was referred to Land Information New Zealand (LINZ) to determine the issue.[28] On 11 September 1997, the Chief Surveyor of the Auckland Land District,[29] Mr Morrison, responded to the Conservation Officer in Whangarei, stating that the "southern boundary of the [Otito] Reserve is the boundary defined by ML 3903" which was the only "registered" definition of the stream. He noted that, while it was possible that the boundary might have been intended to be the left bank of the stream, there was no "field book" reference for ML 3903 and no reference to the physical nature of the boundary on the face of the plan. In those circumstances, the Chief Surveyor said that the points raised by the solicitors about the inaccuracy of ML 3903 "may have some validity however until a new survey defining Otito Block is undertaken the boundary is as defined by ML 3903".

[52] That view was restated on 16 September 1997, in a further letter to the Conservation Officer from the Chief Surveyor. He suggested that possibly the Māori Land Court could assist in confirming the boundary of the Otito Block.

[53] The Conservation Officer advised the solicitors acting for the Ringers of the Chief Surveyor's response by letter dated 30 September 1997. He noted that the Chief Surveyor had confirmed ML 3903 as defining the boundary and said that part of the Morrison house lies within the Otito Reserve. He also noted that, from the Māori Land Court records relating to the sale to the Crown, it is evident that the

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[28] Land Information New Zealand was the government department responsible for the integrity of cadastral survey records.

[29] Under s 9 of the Survey Act 1986 a Chief Surveyor was appointed for each land district. The Chief Surveyor had the power to approve surveys delegated from the Surveyor-General. Section 11 of the Act set out the duties and functions of the Surveyor-General, which included investigating the status and title to lands of the Crown. The position of Chief Surveyor was disestablished by the Cadastral Survey Act 2002.

parties at the time believed that part of the Morrison house was located within the Otito Block.

[54] After further discussion between the interested parties, the Whangarei District Council granted the four lot subdivision application on 8 July 1998. In doing so, it left unresolved the location of the southern boundary of the Otito Reserve. Its decision required the boundary to be resolved by the Chief Surveyor, after final survey.

The Henry survey

[55] Negotiations continued and, on 19 October 1999, a new survey report was obtained by the Ringers. It was prepared by Mr Henry and was designed to establish "a definitive fix of Sections 1 and 2 Block X Opuawhanga Survey District where these sections abut the Otito Reserve". Mr Henry prepared a plan, which after deposit was known as DP 199214, the plan at issue in these proceedings.[30] The plan was lodged with LINZ in late 1999.

[56] In Mr Henry's view, the data and methods of research used in earlier plans to define the boundary adjoining Te Wahitapu Creek "were inconclusive and at times based on suspect assumptions and generalisations". He had therefore carried out his own research.

[57] Mr Henry's report concluded ML 3903[31] clearly showed Te Wahitapu Creek as the boundary between the Otito Reserve and the Ringer (Morrison) land, as did ML 2323.[32] His report stated that the Māori Land Court Minutes of August 1954[33] concurred that part of the southern boundary of the Otito Reserve is Te Wahitapu Creek.[34] Mr Henry's report then went on to refer to other evidence and reports

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30 See above at [1].
31 See above at [14].
32 See above at [11]–[12].
33 See above at [21].
34 Ms Prendergast, for the Trust, said that she could not see anything in those Minutes that referred to Te Wahitapu Creek. We are of the same view. Although there was a sketch attached to one of the copies of the Henry report in the Case on Appeal that has what appears to be a stream as a boundary, this sketch does not seem to be part of the Minute.

suggesting that the boundary was Te Wahitapu Creek, including a statutory declaration by Mr Morrison as to what he was advised at the time of purchase.[35]

[58] Mr Henry concluded that, on the basis of his research and the lack of any other evidence to the contrary, it is clear that the creek had always been identified and accepted as the south-east boundary of the Otito Reserve. He also concluded that the contents of the instruments creating the Ringer (Morrison) land were not in conflict with the definition on ML 3903.

[59] The next task for Mr Henry, having conclusively established that Te Wahitapu Creek is part of the boundary between the Otito Reserve and the Ringer (Morrison) land, was to prove that the stream had not changed its position since ML 3903. In order to do this, Mr Henry attached a report by a geologist dated 22 February 1999, which confirmed that Te Wahitapu Creek was the only stream that in recent geological times had existed in the area and that the stream had been in its present position since the date of ML 3903.

[60] Mr Henry said he had re-surveyed the stream and he confirmed that its alignment is still materially in the same location as it was when it was surveyed in 1965 under LT 56234.[36] He also overlaid his plot of the stream on top of the plot on ML 3903 and said that the shape of the stream is almost identical with ML 3903, LT 56234 and the current survey.

[61] Mr Henry notes that LT 56234 located an old peg from SO 5117 but said that there was no proof of its reliability. This is the angle peg said to have marked the intersection of the western and southern boundaries of the Otito Reserve. As there was no dispute he did, however, accept the alignment as shown on LT 56234 for the eastern boundary.

[62] In terms of the southern boundary, it was stated that ML 3903 is "extremely limited in survey measurements and there is an obvious lack of any mathematical

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35 The report also refers to a statutory declaration made on 15 December 1965 by a Mr Woolley who stated that he had lived in the Matapouri district for the past 78 years and had always understood Te Wahitapu Creek to be the boundary of the Otito Block and that the stream had run its present course for as long as he could remember.

36 See above at [25] .

closes". The report also noted that, where the boundary intersects Te Wahitapu Creek, there is a distinctive bend in the stream near the rock bluff which still exists today. It is from that bend that Mr Henry laid the southern boundary of the Otito Reserve and calculated an intersection with the western boundary as defined on LT 56234, using the angle from ML 3903.

[63] Mr Henry calculated the distance of the southern boundary was 59.05 metres, compared with 80.46 metres on ML 3903. The western boundary of the Otito Reserve was calculated at 399.51 metres compared with 438.55 metres on ML 3903.

[64] It was recognised that these differences are significant but the report said that "the quality of the survey on ML 3903 is so poor that little weight can be put on its measurements". The report then went on to state that, by accepting the location of Te Wahitapu Creek as a starting point and having proven the reliability of its location relative to 1877, this gave the "most appropriate monumentation available for the definition of this portion of the survey".

[65] Mr Henry did not accept that the differences between the surveys could be explained by stream movement or by the existence of more than one waterway in the location at various times. Mr Henry stated that these suggestions "were not supported by any geological or other appropriate investigations".

Chief Surveyor's decision

[66] As already noted, a key issue in this appeal is whether the Chief Surveyor, Mr Morrison, erred in law by applying the wrong test in deciding to approve DP 199214. Under the Survey Act 1986,[37] surveys were considered for approval by the Chief Surveyor, acting under delegated power from the Surveyor-General. To approve a survey the Chief Surveyor had to be satisfied that the survey plan met the requirements of the Act and Survey Regulations then applying.

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[37] This has since been superseded by the Cadastral Survey Act 2002. However, the 1986 Act was in force at the time that the relevant surveys of the Otito Block were carried out.

[67] When DP 199214 was approved, s 58(1) of the Survey Act provided that every surveyor conducting any survey affecting any title under the Land Transfer Act 1952 was to:

> (a) Conduct the survey with such equipment and by such methods as will attain the prescribed standards of accuracy and shall apply such checks and tests to the survey work as may be necessary to obtain those standards:
>
> (b) Locate sufficient old survey marks necessary to prove the accuracy of the survey and connect the survey to those marks:
>
> (c) Supply to the Chief Surveyor and the District Land Registrar all relevant information obtained by him in relation to the survey:
>
> (d) Report to the Chief Surveyor any disturbance or the likelihood of any disturbance to trigonometrical stations or other control survey marks encountered in the conduct of the survey:
>
> (e) Have regard to the consequences of any inaccuracies in the survey.

[68] Under s 60, the surveyor had to examine all relevant documents relating to the land to be surveyed and all adjacent land from the offices of the District Land Registrar, Chief Surveyor and Māori Land Court. The Regulations set out detailed requirements for how a surveyor was to carry out surveys in order to ensure accuracy and to connect new surveys to existing survey marks and boundaries.

[69] DP 199214 was subject to an initial reduced procedure accreditation check by validation staff, and was then referred to the Chief Surveyor for his personal consideration. It appears from two letters from Mr Henry dated 11 and 18 November 1999 that the Chief Surveyor had some queries for Mr Henry about the survey. In the 11 November letter Mr Henry confirmed where the Morrison house was on his survey sheets, and stated that his survey was based on a "better survey fix principle". A claim of a better fix is made where a surveyor attributes a difference between the present position of a natural boundary and the previous definition to the lesser accuracy of the previous definition.

[70] Mr Henry also noted the Chief Surveyor's concerns about the Māori Land Court Minute of 9 September 1969 which referred to the grant of a life tenancy for "Mrs Morrison in adverse possession", and stated that, "because of the lack of any substantiating evidence" to support the Court's statement, he considered that it could

carry no weight in determining the position of the boundary. In the letter of 18 November, Mr Henry attached corrected origin coordinates for trig 2033. Then, on 23 November 1999, the Chief Surveyor wrote to Mr Henry to say that the plans had been approved that day and to "compliment [him] on the thorough and comprehensive reports supporting the plan".

[71] There is no other record of Mr Morrison's decision making process. Nor was he called by the Crown as a witness in the High Court. The Crown informed this Court that Mr Morrison was not considered as a witness as judicial review is generally decided on the papers and there was a full record of his decision on file.

[72] The only further evidence relating to DP 199214 is a handwritten memorandum to the District Land Registrar from Mr Morrison written on 23 November 1999. In that memorandum, the Chief Surveyor states that the issues relating to the survey go back to the mid-1960s. He says that the "Ringers have never been able to establish the boundary of the Te Wahitapu Stream in terms of ML 3903". He notes that a succession of Chief Surveyors have advised that the stream would require resurvey and that the plan surveyor maintains his fix is a better survey fix, that the stream has never moved, and refers to an extensive geological report that is on the plan file to this effect.

[73] The Chief Surveyor went on to say that he can accept the surveyor's argument "however the shift in the stream boundary is substantial, almost 40 m". He says that this degree of shift "may cause concern to the whanau with relationships with the Otito Reserve". He draws the District Land Registrar's attention to the Minutes of the Board of Māori Affairs Meeting of 21 April 1970. These Minutes (which were attached) refer to the condition of sale requiring the Trustees to arrange for the purchaser to grant a life tenancy to Mrs Morrison for that part of the Otito Block occupied by her current house and gardens. The Chief Surveyor goes on to say that this new survey places the buildings outside the reserve if the position of the stream is accepted where it is today. He continues "it is not known why some of the whanau believe the boundary to be further south".

[74] The Chief Surveyor concludes by saying that the plan has been approved in terms of the Survey Regulations, but comments that his "only concern in the determination of the boundary near the stream is that it could have come further south". Notwithstanding this concern, the Chief Surveyor says that the surveyor's report places the position upon the bearing of LT 56234 and the adduced angle from ML 3903, which is "an acceptable method to derive the boundary position". In conclusion he says that, while it appears the Department of Conservation will accept, and "maybe hide behind, a decision from this office, there are people with strong cultural beliefs that the boundary is in a different position".

[75] To give effect to the Chief Surveyor's decision, the District Land Registrar cancelled the certificate of title for the Morrison (Ringer) land, CT 85A/244, and replaced it with CT 127D/669. CT 127D/669 contained the land between the position of the stream on ML 3903 and the current position of the stream. The area of land contained in CT 127D/669 was 1.1136 hectares larger than the area contained in CT 85A/244.

Later attempts to redefine boundary

[76] Having attempted other means of resolving difficulties in relation to the boundary, on 29 January 2008 an application was made to the Surveyor-General, under s 52 of the Cadastral Survey Act 2002,[38] to review DP 199214. The application sought either to have the definition of the boundary confirmed or resolved in some other way.

[77] Section 52 provides:

> **52 Correction of errors in survey**
>
> (1) If an error is found in a cadastral survey dataset affecting any title under the Land Transfer Act 1952 or any title or tenure under any other Act, the Surveyor-General may, in writing, require the cadastral surveyor responsible for the error to undertake, or arrange to be undertaken, the work necessary to correct the error within a time that the Surveyor-General considers reasonable.
>
> (2) Subsection (1) does not limit—

[38] Which replaced the Survey Act 1986.

(a) the powers granted in sections 7 and 46 of the Crown Grants Act 1908:

(b) the powers of the Registrar under sections 80 and 81 of the Land Transfer Act 1952, or the provisions of section 170 of that Act:

(c) the powers of any court under any enactment.

(3) In subsection (1), cadastral surveyor includes a former licensed cadastral surveyor and a person who was a registered surveyor under the Survey Act 1986.

[78] The threshold for exercise of the s 52 jurisdiction is the existence of "an error" in a cadastral survey.[39] Mr Grant, the Surveyor-General, deposed that to exercise the s 52 power he had to be satisfied that:

(a) the effect of the error was sufficiently serious to warrant correction; and

(b) a correcting survey was the best mechanism of correcting the cadastral record, having regard to any impact on the tenure systems that depended on the cadastre.

[79] The application to correct the boundary was refused on 11 February 2008 and, after the receipt of further information, that decision was confirmed on 4 September 2008. Further reports were subsequently provided but these did not lead to a change of the Surveyor-General's decision.

[80] In his affidavit before the High Court, Mr Grant, who at the time of the s 52 application held the office of Surveyor-General under s 5 of the Cadastral Survey Act, opined that the geological report dated 22 February 1999[40] appeared to him to be soundly based on observations made in the field and the application of geological expertise to the analysis. Although it is possible that another expert could refute it (particularly by taking additional soil samples), he considered that Mr Henry and the Chief Surveyor at the time, Mr Morrison, were entitled to rely on the geologist's

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39 Cadastral Survey Act 2002, s 52(1).

40 See at [59] above.

conclusions when considering whether or not the boundary of the Otito Reserve lay to the south of the present stream location.

[81] Mr Grant indicated that there is one aspect of Mr Henry's survey report that he believed to be arguably deficient. He considered that the survey report did not give sufficient attention to the reasons for not accepting the renewed position of the old peg from SO 5117. He stated that the reason could be deduced from the stated reliance on the position of the stream, backed up by a geological report. However, he said that he would have expected the reasons for not accepting the position of the peg to have been expressly stated in the report. In his view, the Chief Surveyor could have sought a better explanation on this aspect from Mr Henry, but that he was not obliged to do so if he was able to deduce the reasons for not accepting the peg from the report.

[82] Mr Grant considered that, on the basis of the evidence before him, the Chief Surveyor had been entitled to decide to accept Mr Henry's arguments. He said that the nature of the conflicting survey evidence then available was such that "any boundary definition would necessarily rely on some evidence in preference to other evidence and in particular, the expert opinion of the geologist".

[83] In addition, the surveyor, Mr Henry, had based his definition on natural features in preference to "a doubtful reinstatement of a boundary monument". This accorded with the generally accepted hierarchy of evidence on boundaries.

[84] The Chief Surveyor also deposed that he had considered all the subsequent reports that had been placed before him but this did not lead him to consider the s 52 test was met.

The substantive judgment

[85] In the High Court, the Trust set out four causes of action:[41]

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41 The substantive judgment, above n 1, at [8].

(a) That the Crown (through its agent the Department of Conservation) had breached contractual obligations to the Trustees evidenced by the Māori Land Court Order of 5 September 1969.[42]

(b) That the Crown breached the terms of the Māori Land Court Order of 5 September 1969 and thereby committed breaches of trust obligations owed by it to the beneficial owners of the Otito Block.

(c) Judicial review of decisions made by public officials within LINZ. Three particular decisions were in issue:

(i) the Chief Surveyor's decision in November 1999 to approve DP 199214;[43]

(ii) the District Land Registrar's decision to cancel an existing title and to issue a new one, in consequence of approval of DP 199214; and[44]

(iii) the Surveyor-General's refusal to exercise his powers to correct DP 199214.[45]

(d) Seeking damages against the Crown for breach of the principles of the Treaty of Waitangi, relying on the partnership between Māori and the Crown and the imposition of "fiduciary" obligations.

[86] On all grounds the Trust sought declarations: that DP 199214 is not an accurate representation of the common boundary between the Otito Block and Section 1 of Block X; and that the southern boundary of the Otito Block was correctly defined by reference to the angle peg in SO 5117 and LT 56324 and Te Wahitapu Creek as shown on ML 3903. Special and general damages were also sought.

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42 See above at [37].
43 See above at [70].
44 See above at [75].
45 See above at [79].

[87] As noted above,[46] Heath J, in the substantive judgment, dismissed the claims based on breach of contract and trust.[47] The Judge said that the two causes of action were fraught with legal difficulties and, on any view of the facts, could not succeed. The Judge held that the land was transferred absolutely to the Crown once the Trustees executed a Memorandum of Transfer to give effect to the order of the Māori Land Court of 5 September 1969. The Judge considered that the time that had passed since the land was transferred to the Crown meant that the claim in contract was statute barred and any claim for breach of trust by analogy cannot succeed on the application of the doctrine of laches.

[88] On the Treaty of Waitangi ground, Heath J held that there is no basis on which a private law action could be brought against the Crown for breach of Treaty principles.[48]

[89] In terms of the judicial review application relating to the decision of the Chief Surveyor to approve DP 199214, the Judge noted that the decision to accept DP 199214 for deposit appears to have been reached with some reservations,[49] but notwithstanding these, the Chief Surveyor was prepared to revisit the pre-existing plans.[50]

[90] The Judge considered that this raised a question of standard of proof. The Judge noted that the Land Transfer Surveyor in 1971 appears to have taken the view that he needed to be satisfied that the earlier plan was incorrect and the available evidence at the time did not convince him of that.[51] By contrast, the Judge noted that the Chief Surveyor, in approving the new plan in November 1999, applied "what seems to have been a lesser standard, (the survey methodology and evidence was "acceptable")".[52] The Judge agreed with the Surveyor-General, Mr Grant, that a

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46 See above at [3].
47 The substantive judgment, above n 1, at [84]–[91].
48 At [92]–[96].
49 See above at [69]–[71].
50 The substantive judgment, above n 1, at [104].
51 At [106].
52 At [106].

very high standard of proof is required under s 52 of the Cadastral Survey Act.[53] This was on the basis of the principle of indefeasibility.

[91] Heath J formulated the test in the following manner: a decision-maker in the position either of the Chief Surveyor (in 1999) or the Surveyor-General (in 2008) ought to have asked himself or herself whether the evidence presented was so compelling that he or she had to conclude that the earlier plan was in error and that it should be replaced, notwithstanding the consequential prejudice that might otherwise be caused to those with interests in the land.[54]

[92] The Judge considered the competing evidence available to him following more detailed reports than those which had been made available to the Chief Surveyor in 1999. He considered it appropriate to take account of those additional reports because they critiqued the survey report provided by Mr Henry that had been the basis on which the Chief Surveyor made his 1999 decision.[55] In the Judge's view, it was fair for the parties to have expected the Chief Surveyor to have carried out the type of robust analysis contained in these later reports.

[93] The Judge then went on to address two issues he considered to be of significance.[56] The first was whether the old peg from SO 5117, as renewed by Mr Williams in 1965 when surveying LT 56234, was reliable.[57] The second issue was whether the 1999 location of Te Wahitapu Creek was the boundary shown on ML 3903 and SO 5117.

[94] As to whether the peg on SO 5117 was identified correctly by Mr Williams in 1965, the Judge concluded that the sum of that evidence suggested to him that there were reasonable differences of opinion among distinguished surveyors as to whether the peg on SO 5117 was correctly identified.

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53 At [107] the Judge sets out examples of how Mr Grant expressed himself on this point. At [119] the Judge indicates his agreement.
54 At [119].
55 At [121].
56 At [122].
57 See above at [25].

[95] The Judge concluded that it would be difficult to see that the Chief Surveyor could have reached a conclusion, based on Mr Henry's report, that the peg was unreliable if he had applied the correct test.[58]

[96] The Judge considered that the situation with regard to Te Wahitapu Creek was not so straightforward. The surveyors appear to agree (and what geological evidence that exists seems to confirm) that the present Te Wahitapu Creek has remained largely in its present location since 1877.[59] In the Judge's view, the reliability of the "creek" shown in ML 3903 seemed to be dependent upon whether there were two water courses running over the land at the relevant time. The Judge summarised the evidence as to the possibility of a second stream running over the land at the relevant time. While not making an explicit finding on the existence or otherwise of a second stream, by implication the Judge appeared to have concluded that the evidence before him did not discount the possibility of a second stream to the south of the rock knob.[60]

[97] The Judge, on the basis of his analysis, drew the conclusion that the high standard of proof required to justify deposit of DP 199214 was not met in 1999. He therefore considered that the Chief Surveyor made a reviewable error in 1999 by failing to apply the appropriate standard of proof.[61]

[98] The Judge held, on the other hand, that the Surveyor-General's approach to the s 52 application applied the appropriate high standard and therefore that his decision not to grant the application had been correct.[62]

[99] As to relief, the Judge did not accept the submission that relief should not be granted because of the delay in seeking judicial review.[63] This is because relief should rarely be refused where an error in law has been established. He did not

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58 The substantive judgment, above n 1, at [131].

59 At [132].

60 At [139] the Judge concluded that the surveyors reviewing the conduct of their predecessors had not been prepared to assume incompetence or other irregularity in the preparation of the early plans requiring alteration of the southern boundary. They had therefore concluded that the high standard to justify deposit of DP 199214 was not met. He said he agreed with that conclusion.

61 At [139]–[140].

62 At [119]–[120].

63 At [141].

consider that there had been any disentitling conduct justifying refusal of relief.[64] He considered, however, that it was not possible to provide relief in the form of rectification of the Register as those who acquired title did so in good faith based on the plan approved by the Chief Surveyor in 1999 and implemented by the District Land Registrar's decision to issue title. Relief in the form of rectification of the Register would undermine the principle of indefeasibility upon which the Land Transfer Act is based.[65]

[100] The Judge noted that it was clear at all times that the reserve was intended to contain 62 acres. That area was consistently shown in all of the plans from SO 718 through to SO 5117 and confirmed by Orders in Council issued in 1957, 1970 and 1972. He noted that, by the issue of a new certificate of title, approximately 1.1 hectares was lost from the Reserve.[66]

[101] He therefore made a declaration that the Chief Surveyor erred in law by applying the wrong test in making the 1999 decision and that DP 199214 ought not to have been approved for survey purposes.[67]

Issues relating to the substantive judgment

[102] The position of the Chief Executive on the appeal is that the material before the Chief Surveyor was sufficient to satisfy him that Mr Henry's survey was a better fix of the southern boundary of the Otito Block. Therefore the Chief Surveyor was entitled (and, indeed obliged) to approve DP 199214 and the High Court declaration should not have been made.

[103] The Trust in its cross-appeal says that the High Court should have granted its application for judicial review of the Surveyor-General's decision and that it should have held that the Crown's acquisition of the land was subject to ongoing private law obligations, which were breached.

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64 At [142].
65 At [143].
66 At [144]. Although the Crown notes that 62 acres never purported to be an exact measure.
67 At [146(c)].

Should the Chief Surveyor have approved DP 199214?

[104] We first examine and discuss the submissions of the Chief Executive on this issue. We discuss one concern we have with the approach taken in the High Court. Finally, we assess whether the Chief Surveyor was in fact satisfied to the requisite standard.

Discussion of the Chief Executive's submissions

[105] The Chief Executive submits that Heath J in his substantive judgment erred in a number of respects:

(a) by requiring the Chief Surveyor to have met an inappropriate beyond reasonable doubt standard;

(b) by ignoring the fact that weight is a matter for the expert decision maker;

(c) by asking the wrong questions;[68]

(d) by ignoring the hierarchy of evidence; and

(e) in holding that 1.1 hectares had been lost from the Reserve.

[106] We deal with each of these in turn.

(a) Inappropriate standard applied?

[107] We accept that, at certain points, Heath J's judgment can be read as requiring a beyond reasonable doubt standard. However, the Judge acknowledged that he had been speaking somewhat loosely. The test he was actually applying is set out at [91] above. We agree with this formulation. We do note, however, that Heath J refers to "a very high standard of proof".[69] We prefer the term "satisfaction" to "proof"

[68] See above at [93].
[69] See above at [90].

because the essence of the test is the state of mind the decision-maker must achieve on the basis of the evidence.

(b) Weight

[108] While we accept that weight is usually a matter for the expert decision maker, the test in this case is one that requires a very high standard of satisfaction. This means effectively that weight is built into the test. The Court on judicial review therefore would be assessing whether a reasonable decision maker could and did consider that the evidence was capable of reaching the required standard.

(c) Questions posed

[109] In posing the two questions he did, we consider that the Judge was applying the above test. He concluded that, if all of the evidence that was before the Court had been before the Chief Surveyor, he could not have been satisfied to the requisite standard. The Judge also noted that the tenor of the Chief Surveyor's report to the District Land Registrar suggested that the Chief Surveyor knew that there were *bona fide* disputes about the location of the boundary.[70]

[110] We consider that Heath J's conclusions on the two questions he posed were justified if all the evidence in the High Court was taken into account. With regard to whether the old peg from SO 5117 was reliable, some experts drew definitive conclusions that the peg was reliable or unreliable, but the majority of experts were inconclusive, finding that, without further evidence, it was not possible to decide that the position of the peg in SO 5117 was inaccurate. We also agree with Heath J's conclusion that, on all the evidence before him, the possibility (though we consider it remote) that there may have been a second stream flowing south of the rocky knob, Whitiroa could not be discounted.

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[70] The substantive judgment, above n 1, at [131].

(d) Hierarchy of evidence

[111] We do not consider Heath J ignored the hierarchy of evidence. The hierarchy of evidence is a principle that accords varying preference to different types of evidence when determining disputed land boundaries. The generally accepted order places greater significance on evidence of natural boundaries than to monumented lines, such as original pegs.[71] The order is:[72]

(a) natural boundaries;

(b) monumented lines (such as original pegs);

(c) undisputed occupations;

(d) abuttals;

(e) calculations based on stated figures, deeds, grants and titles.

[112] The hierarchy of evidence is a guide rather than a straightjacket. The hierarchy places the greatest weight on the points on which the parties were least likely to be mistaken at the time. If the circumstances make it clear that a piece of evidence further down the hierarchy is a more reliable indication of the parties' intention then it may take precedence.[73]

[113] In light of his conclusion that the evidence before him did not discount the possibility of a second stream and that it was not possible to conclude that the position of the boundary peg was inaccurate, Heath J would have been justified in concluding that Te Wahitapu Creek in its current position could not take precedence over the boundary peg.

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[71] See for example *Equitable Building and Investment Co v Ross* (1886) 5 NZLR 229 (SC) at 234–235.

[72] J F Kearns, N T Kerr and M C Smith *Law for Surveyors* (Department of Surveying, University of Otago, Dunedin and the New Zealand Institute of Surveyors, Wellington, 1997) at [5.14.03(d)].

[73] See for example *Cable v Roche* [1961] NZLR 614 (SC) at 616 citing *Attorney-General v Nicholas* [1927] GLR 340 (SC).

[114] The point is that the Judge had decided that it was not proved to the appropriate standard[74] that the current Te Wahitapu Creek is the same stream that was used as the boundary in ML 3903 and SO 5117. If that were the case, it would not be appropriate for the stream in its current position to take precedence over the boundary peg (as it may not be the same natural feature used in the earlier surveys).

(e) Loss of 1.1 hectares

[115] The Crown criticises Heath J for relying on the 62 acres figure when deciding that 1.1 hectares had been "lost" from the Reserve. The Crown says that the 62 acres measure was always approximate, given that the coastal boundaries had never been properly surveyed.

[116] We do not accept that submission. The 62 acres is to a degree irrelevant. The question is the correct location of the southern boundary of the Otito Block. If the southern boundary was in the position maintained by the Trust, then in fact there was 1.1 hectares that had been lost from the Reserve by the acceptance of Mr Henry's survey.

One concern with the High Court approach

[117] We do have a concern, however, with Heath J's reliance on the evidence produced in the High Court that had not been before the Chief Surveyor when he made his decision. The task of the reviewing court should be to assess whether, in the light of the evidence before the decision maker at the time, the decision was one that a reasonable decision maker could come to.[75] The only use of the subsequent evidence should be to decide whether or not the material actually before the decision maker met that standard. Where a decision maker has made a defective enquiry, a court may find it necessary to refer to further evidence that would have been considered had a proper enquiry been made.[76]

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[74] In this case, in order to meet the standard of proof under s 52, the Chief Surveyor would have had to have considered the evidence to be sufficiently reliable as to compel him to conclude that the earlier plan was in error. See above at [90].

[75] *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA) at 658; *A v Refugee Status Appeals Authority* [2001] NZAR 209 (HC) at 226.

[76] Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Oxford, 2012) at 182.

[118] In this case we do not consider that the Chief Surveyor's inquiry was defective to the extent that it was proper for the High Court to refer to expert reports that were not available to the Chief Surveyor, except for the purpose of deciding whether the Chief Surveyor's decision was reasonable. We have considered the subsequent evidence in that light and we do not consider that it reached the standard of showing that the Chief Surveyor should not have relied on Mr Henry's survey and the accompanying geologist's report.

Was the Chief Surveyor satisfied to the requisite standard?

[119] The main problem with the Chief Surveyor's decision is that the Chief Surveyor himself was not in fact satisfied to the requisite standard. This is clear from the memorandum he wrote to the District Land Registrar.[77]

[120] In that memorandum the Chief Surveyor says that he can accept the Surveyor's argument but notes that the shift in the stream boundary is substantial. The Chief Surveyor comments that his "only *concern* in the determination of the boundary near the stream is that it could come further south" (emphasis added). He does not give any reason for his view that it should not do so, apart from the fact that he considered Mr Henry's report to have used "an *acceptable* method to derive the boundary position" (emphasis added).

[121] The Chief Surveyor also was clearly aware that there would be concerns from people with "strong cultural beliefs" that the boundary is in a different position. He was aware that the proposal to grant a life tenancy to Mrs Morrison over that part of the Reserve occupied by her house and gardens was inconsistent with the proposed boundary under the new survey which placed the buildings outside the Reserve.

[122] The Chief Surveyor commented, however, that "it is not known why some of the whanau believe the boundary to be further south". His comment is somewhat odd, given that it would certainly not be unreasonable for the former Māori owners of the Otito Block to consider, upon the basis of the Māori Land Court Conditions of Sale including the grant of life tenancy, that the boundary must have been south of

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[77] See above at [69]–[70].

the house and garden of Mrs Morrison.[78] Further, if the Chief Surveyor had read the files, it would have been clear that there was a concern about another natural feature with major cultural significance, Whitiroa.[79]

[123] The Chief Executive submits that this memorandum was merely warning the District Land Registrar that there may be issues with the former Māori owners with any registration of title. The Chief Executive also points to the letter written to Mr Henry complimenting him on the "thorough and comprehensive reports supporting the plan".

[124] While it is true that the memorandum to the District Land Registrar does have the purpose of alerting the District Land Registrar to the issues that may be raised by the former Māori owners, we consider it also shows that Mr Morrison had concerns about his decision and that he was not satisfied to the requisite standard (despite considering Mr Henry had done a good job).

[125] We also consider that the memorandum shows that the Chief Surveyor had not undertaken the enquiries we would have thought necessary in the particular circumstances of this case as to why there had been such a substantial shift in boundary, the relevance of the Māori Land Court decision and in particular the cultural significance of Whitiroa.

Should the Surveyor-General have exercised his powers?

[126] In its cross-appeal, the Trust challenges the decision of Heath J not to review the decisions of the Surveyor-General refusing to exercise his power under s 52 of the Cadastral Survey Act to correct survey errors.

[127] We do not accept the Trust's submission that the Surveyor-General should have applied a different standard under s 52 from the one that should have been applied by the Chief Surveyor. This follows from the principle of indefeasibility:

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78 See above at [72]–[74].
79 See above at [27].

boundaries that are relied upon to issue titles should not be subject to alteration without compelling reason.

[128] We consider that the Surveyor-General was entitled to consider the material put before him did not reach the standard required under s 52. In order to find that DP 199214 was in "error" for the purposes of s 52, the Surveyor-General had to be satisfied to the requisite standard that Te Wahitapu Creek used to be in a significantly different position than at present and that the peg placed by SO 5117 was in the same position as that shown on ML 3903.

[129] The Surveyor-General was provided with reports from distinguished surveyors that revealed reasonable differences of opinion on these matters. The experts could not agree on whether the angle peg in SO 5117 was in the correct location. The reports tended to suggest that the stream had been in its present position at the time ML 3903 was surveyed, but the possibility of a second stream that flowed to the south of Whitiroa could not be discounted.

[130] The evidence before the Surveyor-General was not sufficient to reach the standard required to allow him to determine that DP 199214 was in error.

Were there private law obligations owed?

The Trust's submissions

[131] The Trust's claim in contract is based on obligations that it says the Crown agreed to when it purchased the Otito Block from the MLC Trustees.[80] The Trust argues that the Crown contracted to:

(a) respect the two wahi tapu located on the land;

(b) secure a life tenancy for Mrs Morrison whose home had been built on part of the reserve and, by way of necessary implication, arrange for the removal of the house once Mrs Morrison had died;

[80] The trustees appointed by the Māori Land Court in 1969. See above at [37].

(c) hold all the Otito land in perpetuity as a scenic or recreational reserve; and

(d) confirm the correct southern boundary by survey (which the Trust says is implicit in the preceding obligations) in order to secure ownership of the whole Block.

[132] It is claimed that these conditions were set out in the Māori Land Court Order that removed the Māori reservation status of the Otito land, thus facilitating the sale. The order, in the Trust's submission, recorded an earlier agreement made between the MLC Trustees and the Crown. The contractual matrix also makes it clear that the terms in the order were the terms of the contract.

[133] The Trust says that it can enforce the contract as the MLC Trustees held the promises on trust for the wider iwi and hapu associated with the Otito Reserve. The Trust argues that it has been recognised in these proceedings by the Māori Land Court as the appropriate body to represent the previous Māori owners and the tangata whenua of the Otito Reserve.

[134] The Trust sets out a fall-back argument in its written submissions. It argues that, when the Crown purchased the land from the MLC Trustees, in addition to taking on the above obligations under contract, the Crown also took on these same obligations as trustee over the Otito land. This argument was not pursued with any vigour at the hearing.

The Chief Executive's submissions

[135] In reply, the Chief Executive argues that the Trust is attempting to elevate preliminary discussions into legally enforceable obligations, contrary to the scheme of the Māori Affairs Act 1953. The Māori Land Court Order created conditions and terms of trust under which the Otito Block was vested in the MLC Trustees for sale. It did not bind the purchaser and preceded any legal contract. In the Chief Executive's submission, the terms of the transfer to the Crown were those set out in the Memorandum of Transfer. The Memorandum of Transfer alienated the land to

the Crown at an agreed price. It is further submitted that the Trust did not exist in 1969 when the alleged contract was made. The Contracts (Privity) Act 1982 had not come into effect at this time and any "equitable exceptions to privity" do not apply in this case.

[136] As to whether any contract was breached, the Chief Executive submits that the wahi tapu were not pointed out to the Crown and their position was still unclear at the time of the Māori Land Court Order. It is submitted further that there was no obligation (implicit or otherwise) to survey the land, that the land has been granted reserve status, that every attempt was made to secure Mrs Morrison's agreement to a life tenancy but she would not do so and that any concerns about how the reserve is administered should be brought under judicial review proceedings.

[137] In any event, it is submitted that the Trust is out of time to bring its claims. As to the trust allegations, the Chief Executive submits that there is no evidence that any trust was intended.

The claim in contract

[138] We accept the Chief Executive's submission that any claim for breach of contract must fail as being out of time. Section 4 of the Limitation Act 1950[81] bars the bringing of any claim in contract after the expiration of six years from the date on which the cause of action accrued. The Trust's claims accrued at the time of any breach.

[139] For the claims relating to the retention of the reserve land and the protection of the wahi tapu, if this breach occurred, it did so in 1999 when the Henry survey was approved and the new Morrison/Ringer certificate of title was issued. For the claim relating to the failure to grant a life tenancy to Mrs Morrison, it could be argued that this breach was ongoing from 1970. However, it clearly came to an end

[81] The Limitation Act 2010 does not apply to actions that accrued prior to 2011.

when Mrs Morrison died in 1991.[82] The Trust brought its claim in 2008, and so is out of time for all claims.

[140] The Trust argues that its claims fall under the exception in s 4(9) of the Limitation Act.[83] We do not accept this submission. As the Chief Executive notes, specific performance was not pleaded and, in any event, the land had been transferred absolutely to the Crown after the Māori Land Court Order. The issue in the proceedings was where the southern boundary of that land lay. In addition, the Crown has already purchased the land in dispute and returned it to the Reserve.

[141] We also reject the Trust's claim that the Crown's breach was continuous. There is a difference between a continuous breach and the failure to rectify a breach that has already occurred. When a person omits to do something that they have contracted to do, the breach (in their failure to act) is said to be continuous.[84] This can be compared with situations, as here, where a person who is under an ongoing obligation acts in a manner that breaches that obligation. Here the time of breach is clear and the cause of action accrues at the time that the breach occurred. There is no additional implied contractual obligation to rectify that breach, which, if not fulfilled, would constitute a continuous breach. If the Trust's argument were to be accepted, then every contractual dispute in which a defendant has failed to rectify a breach (almost every contract claim) would fall within the six year limitation period. This would render s 4 almost entirely redundant.

[142] Given our conclusion that any claim in contract is out of time, it is not necessary for the Court to determine what the terms of any contract were and whether there was a breach. We do, however, make a few points. First, we consider it arguable that the terms of the Māori Land Court Order were incorporated into the contract between the MLC Trustees and the Crown. The Memorandum of Transfer

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82 If not earlier. See *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 (Ch); and *Bell v Peter Browne & Co* [1990] 2 QB 495 (CA).

83 Section 4(9) states that the standard six year limitation period will not apply to any claim for specific performance, injunction or other form of equitable relief, except in so far as an analogy can be drawn between such a remedy and a non-equitable remedy to which the limitation period would apply.

84 The Courts have by no means held that, even in these cases, the claim can be taken to continue to accrue up until the proceedings are brought. Compare *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp*, above n 82, with *Bell v Peter Browne & Co* above n 82.

referred to the order and there was explicit agreement to the terms by Mr Phillips recorded at the Māori Land Court hearing.

[143] We do note, however, that only the first two alleged obligations were contained in the Māori Land Court Order. Any agreement relating to reserve status was not dealt with by the Māori Land Court Order. Assuming the obligation existed, however, we accept the Chief Executive's submission that any obligation was fulfilled at the time the land was declared a public reserve in 1972.

[144] As to whether there was a breach of the first two alleged obligations, we accept the Chief Executive's submission that there were attempts to address the situation of Mrs Morrison but that she was not willing to agree to the terms offered. Without Mrs Morrison's agreement, the boundary issue remained live.

[145] As the claim is out of time, we do not need to resolve the issues relating to the obligation to respect the wahi tapu and standing. We are not, however, to be taken as necessarily endorsing the Chief Executive's submissions on these points.

Trust claim

[146] Turning to the trust allegation, it is alleged that the Crown purchased the land on the condition that it would be used for a recreation or scenic reserve and that it would retain that status. While the Trust's submissions claim that the beneficiaries of the alleged trust over Otito were the former Māori owners, this is not supported by the terms of the agreement between the Crown and the MLC Trustees, given the reserve status of the land. Any trust would have to have been for the benefit of all New Zealanders. Certainty of objects is not required for charitable trusts,[85] and the provision of recreational facilities is accepted as a valid charitable purpose.[86]

[147] A charitable trust must, however, fulfil the requirement of certainty of intention. This case involved a contract between the Crown and the MLC Trustees.

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85 Philip H Pettit *Equity and the Law of Trusts* (12th ed, Oxford University Press, Oxford, 2012) at 249.

86 Charitable Trusts Act 1957, s 61A, see Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2009) at [11.8.3].

There is nothing in the evidence to suggest that the Crown intended to create fiduciary obligations. Indeed, the contractual nature of the agreement strongly goes against the existence of any such intention.[87] This means that Heath J was correct when he dismissed the trust claims.

Crown Grant Road

[148] The Trust submits that the Surveyor-General should have taken into account the plain error that DP 119217 included a Crown Grant road in a private title. We disagree. This is irrelevant to the issue of the location of the correct boundary between the Reserve and the Morrison/Ringer land.

Appeal and cross-appeal on costs

The costs judgment

[149] In his costs judgment, Heath J rejected the Trust's argument for increased or indemnity costs. He also rejected the Crown's application for costs in its favour.

[150] He said that ordinarily for the proceedings he would have awarded costs on a 3C basis with a lesser amount for interlocutory steps.[88] However, given the lack of success of the Trust on all but the declaration, he awarded costs to the Trust on a reduced 2B basis.[89]

[151] He also awarded costs of $5,000 to reflect attendances in the Māori Land Court relating to the Trust's authority to bring these proceedings on behalf of the descendants of Rangiwhakaahu Te Awa Te Rahui or for those who, before the 1970 sale to the Crown, were beneficial owners of the land.[90]

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87 The distinction between contractual obligations to apply money, or here land, for a particular purpose, and trust obligations was discussed by Brightman LJ in *Conservative and Unionist Central Office v Burrell (Inspector of Taxes)* [1982] 1 WLR 522 (CA) at 529.

88 Costs judgment, above n 3, at [22].

89 At [21].

90 At [22]. Te Ture Whenua Māori Act 1993, s 30(1)(b).

[152] This was considered by the Māori Land Court, at Whangarei, on 3 September 2010. Judge Spencer made a determination, on the Trust's application, that the Trust was the appropriate representative body.[91] He reserved the costs of the hearing before it for determination in the High Court proceeding.[92]

The Chief Executive's submissions

[153] The Chief Executive appeals against the award of costs on the basis that there were wasted costs due to the abandonment of claims, the overall success of the parties (the Trust succeeding on one issue only) and Calderbank letters.

[154] The Chief Executive submits that, in determining an award for costs, rather than focusing solely on time spent, the Court should also have taken into account the relative success of the parties in obtaining the relief sought. The Crown had succeeded in all causes of action where significant damages were sought and where orders as to the ownership of the land were sought. The Trust either abandoned or did not receive the relief that it sought, and no alteration was made to the ownership of the land.

[155] In its statements of claim of August and October 2008 the Trust sought up to $11 million in general damages plus indemnity costs (as special damages). If all the disputed land became part of the Reserve, the Trust sought $1 million in general damages, or $11 million or a proportion thereof to the extent that the land did not become part of the Reserve.

[156] In their second amended statement of claim, filed on 5 July 2010, being the first day of the hearing but signalled to the Crown two weeks earlier, the claim for general damages of $11 million was abandoned. The remaining claim for damages was for special damages of $249,812 plus solicitor client costs since the commencement of the proceedings. These costs had been earlier advised as at 15 April 2010 as being $685,228.49.

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91 *Re Te Whanau O Rangiwhakaahu Hapu Charitable Trust* (2010) 9 Taitokerau MB 248 at 264.

92 *Re Te Whanau O Rangiwhakaahu Hapu Charitable Trust*, above n 91.

[157] The Crown had sent three letters offering monetary contributions to the Trust's costs and to purchase portions of the land in dispute. The first offer by the Chief Executive was made on 12 January 2010 for a contribution to costs of $200,000. That letter said:

> 2. On 10 December 2009, the First Defendant made an offer to the Ringer Family to purchase the property in question being proposed Lots 2, 3 and 4 on the Reyburn and Bryant plan S8636 of March 2007, totalling 9100m2. That offer was made in the best interests of the public and the community of Matapouri. It was accepted unconditionally by the Ringer Family on 14 December 2009. Work is now progressing on a number of operational matters to ensure that the property will become part of the adjacent reserve and be subject to the Reserves Act 1977.
>
> 3. While the Crown defendants do not consider your clients had any prospect of succeeding in these proceedings, it is recognised that part of the reason for bringing the proceedings was perceived by your clients to be in the public interest and that your clients will be substantially out of pocket as a result. As a pragmatic approach designed to bring matters to a responsible conclusion and in an attempt to settle the matter between the Plaintiffs and all Defendants, the First Defendant is, therefore, prepared to offer the sum of $200,000 as a contribution towards your clients' costs conditional upon a withdrawal of proceedings by both First and Second Plaintiffs. This offer is made on a *Calderbank* basis as a pragmatic attempt at resolution.

[158] There was a second offer on 8 April 2010 of $300,000. The Crown advised that it would purchase another triangle of land to incorporate into the scenic reserve. The offer of $300,000 was repeated on 16 June 2010 and then a final offer of $450,000 was made on 30 June 2010 to be open until 5.30 pm on the following day.

[159] Referring to *Moore v McNabb*,[93] the Chief Executive argued that these offers should have been taken into account in determining costs. In addition, it was submitted that Heath J should also have taken account of the fact that the bulk of the land allegedly "lost" from the Reserve was purchased by the Crown in February 2010 for $3.5 million. This purchase was intended to meet the Trust's complaints and prevent further expenditure.

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[93] *Moore v McNabb* (2005) 18 PRNZ 127 (CA) at [58].

The Trust's submissions

[160] The Trust submits that indemnity or increased costs should have been awarded.

[161] The Trust submits that this case involved public interest litigation to require the Crown to recover for the community land the Crown lost into private ownership. It is submitted that the proceeding was successful and that costs at or near to indemnity level should have been ordered. It is also submitted that in a number of ways the Crown failed to act as a "model litigant" and this also points to an award of increased or indemnity costs.

[162] In the event the cross-appeal is unsuccessful, the Trust argues that there should have been no discount in costs (from 3C to 2B) on the basis that the additional causes of action did not add any time to the hearing and required little additional effort by the Crown to respond to them.

Our assessment

[163] We do not accept the Trust's submissions with regard to increased or indemnity costs. While there is some element of public interest involved in the judicial review proceedings relating to the Reserve, it is of a very localised kind. Further, the contract and trust claims must be categorised as being related to private interests.

[164] We do not accept that the instances of conduct itemised in the Trust's submissions showed that the Crown in this case failed to act properly in the litigation. We note also that there is no suggestion in Heath J's judgment of any concern about Crown misconduct in the litigation. Indeed, in his costs decision, Heath J said that there is nothing in the conduct of the litigation that could give rise to either indemnity or increased costs.[94]

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[94] Costs judgment, above n 3, at [20].

[165] We do not accept the Crown submission relating to the Calderbank offers: they related to costs only and did not amount to an acceptance of the claim. As to the purchase of the bulk of the disputed land, we accept the submission of the Trust that it did not render the proceedings moot.

[166] We do, however, accept the Crown submission in this case that the wasted costs on the causes of action dropped just before trial and the mixed success in the High Court should have led to an order that costs lie where they fall. If the Trust had merely failed on the Chief Surveyor and District Land Registrar causes of action, the Trust's argument may have been sound but we see the contract and trust actions and the action relating to the Treaty of Waitangi as different in kind.

[167] The Trust was, however, successful in the proceedings before the Māori Land Court and the costs order with regard to those proceedings should remain.

Result and costs

[168] The appeal against the substantive judgment of 22 December 2010 is dismissed.

[169] The cross-appeal against the substantive judgment is dismissed.

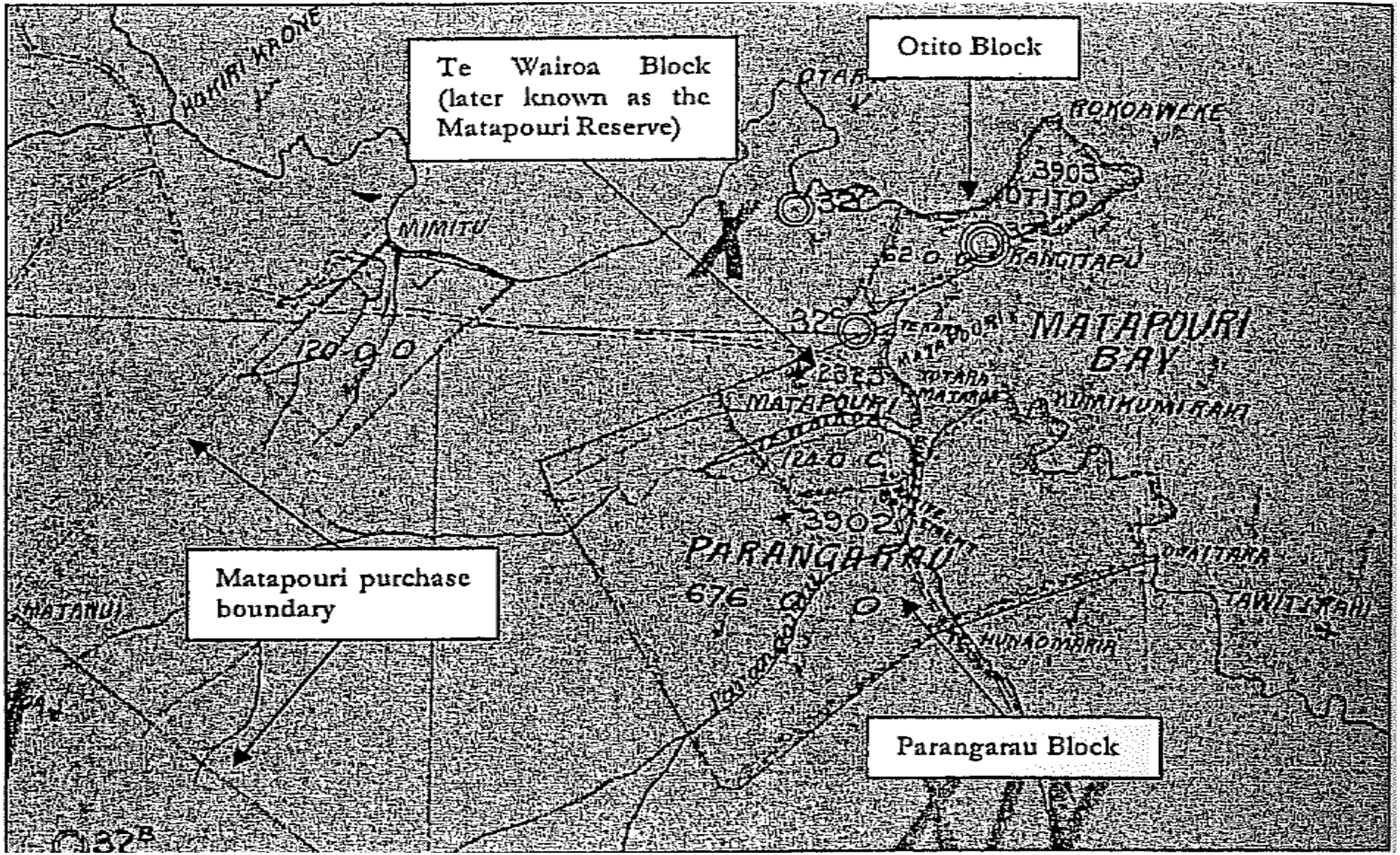
[170] The appeal against the costs judgment of 1 August 2011 is allowed. The cross-appeal against the costs judgment is dismissed.

[171] Costs in the High Court are to lie where they fall, except that the award of $5,000 to reflect attendances in the Māori Land Court stands. Any reasonable disbursements properly related to the Māori Land Court appearances are awarded to the Trust.

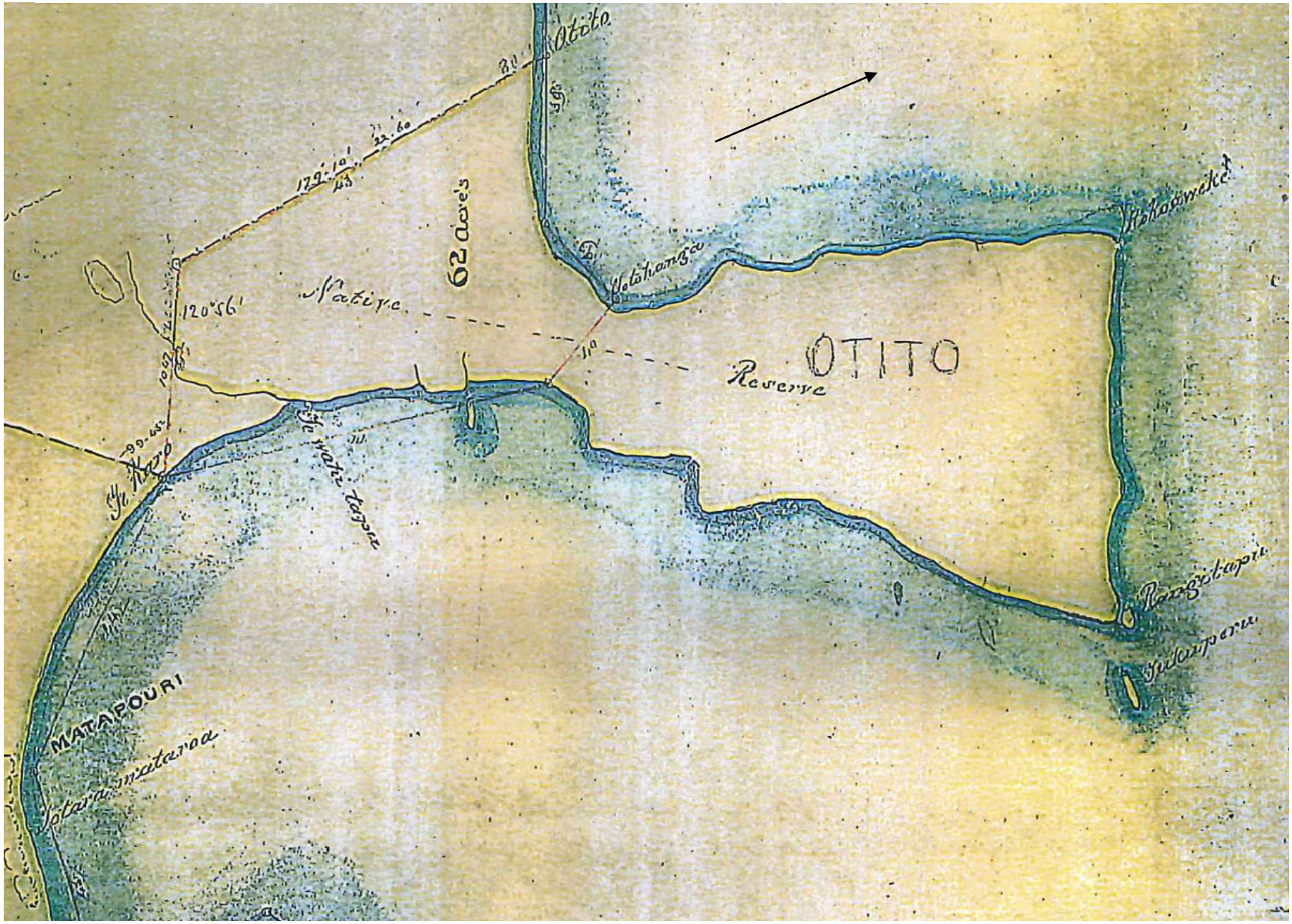
[172] Because of the mixed success of the parties in this Court, costs are to lie where they fall. There will be no order for costs in this Court.

Solicitors:
Crown Law Office, Wellington for Appellant
Henderson Reeves Connell Rishworth, Whangarei for First and Second Respondents

Appendix 1

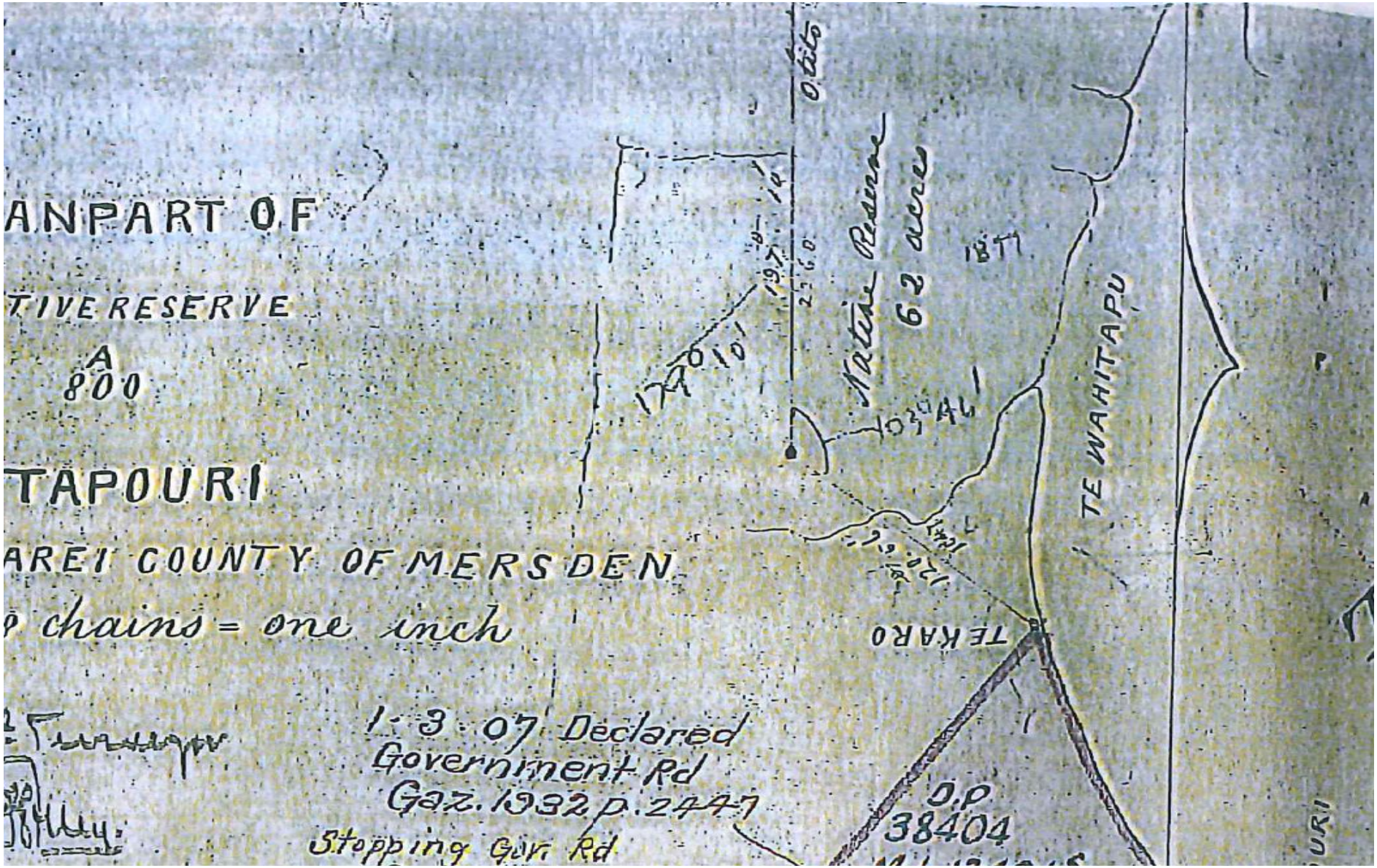

Te Wairoa Block (later known as the Matapouri Reserve)
Otito Block
Matapouri purchase boundary
Parangarau Block
MATAPOURI BAY
PARANGARAU
MATAPOURI
MIMITU
KOKOAWEKE
RANGITAPU
3903
3902

Appendix 2



* The arrow has been added by the Court and points approximately North

Appendix 3


ANPART OF
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TAPOURI
AREI COUNTY OF MERSDEN
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Stopping Gov Rd
Native Reserve
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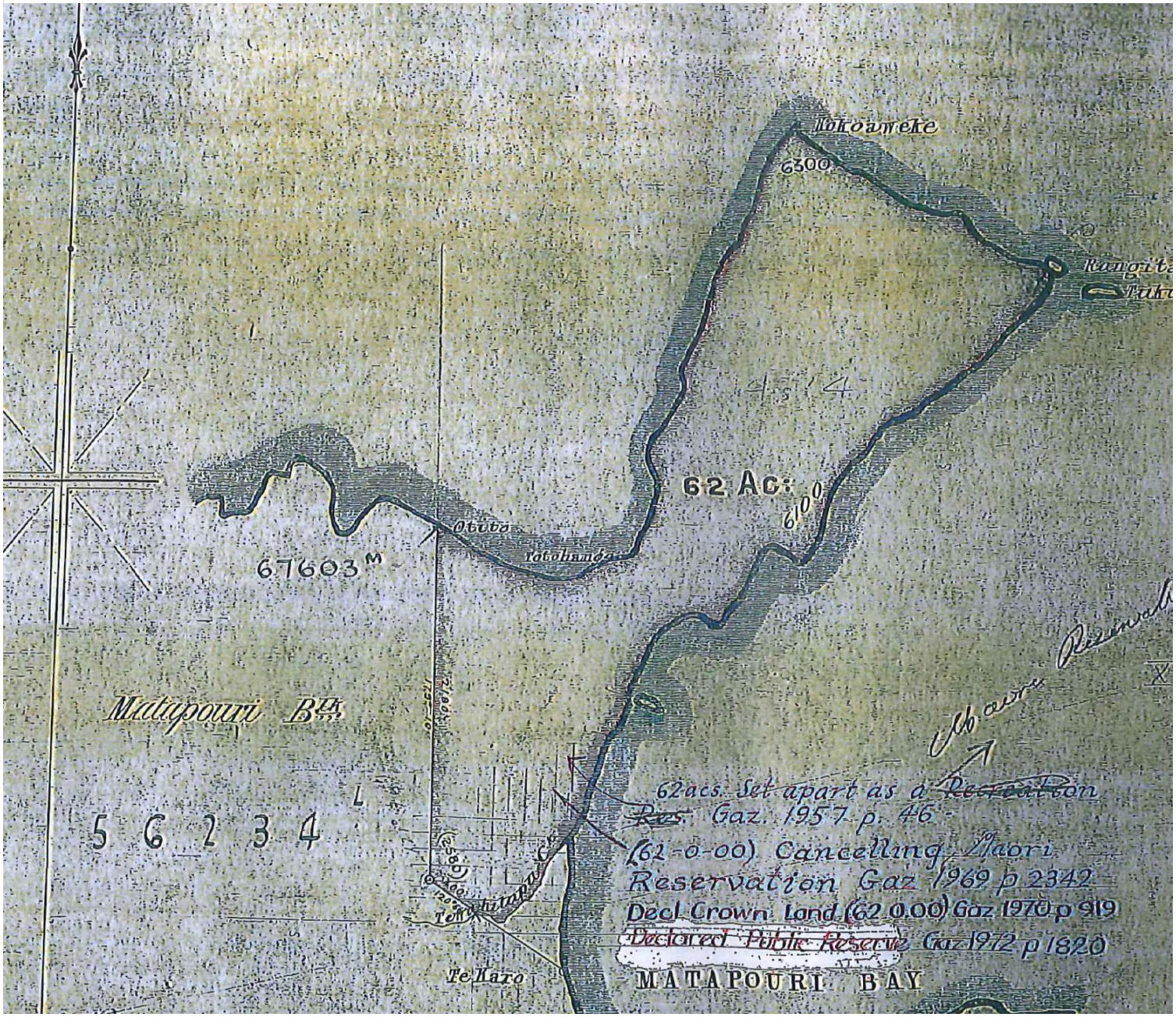
TE WAHITAPU
TE KARO
D.P.
38404

Appendix 4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6300
62 Ac: 0
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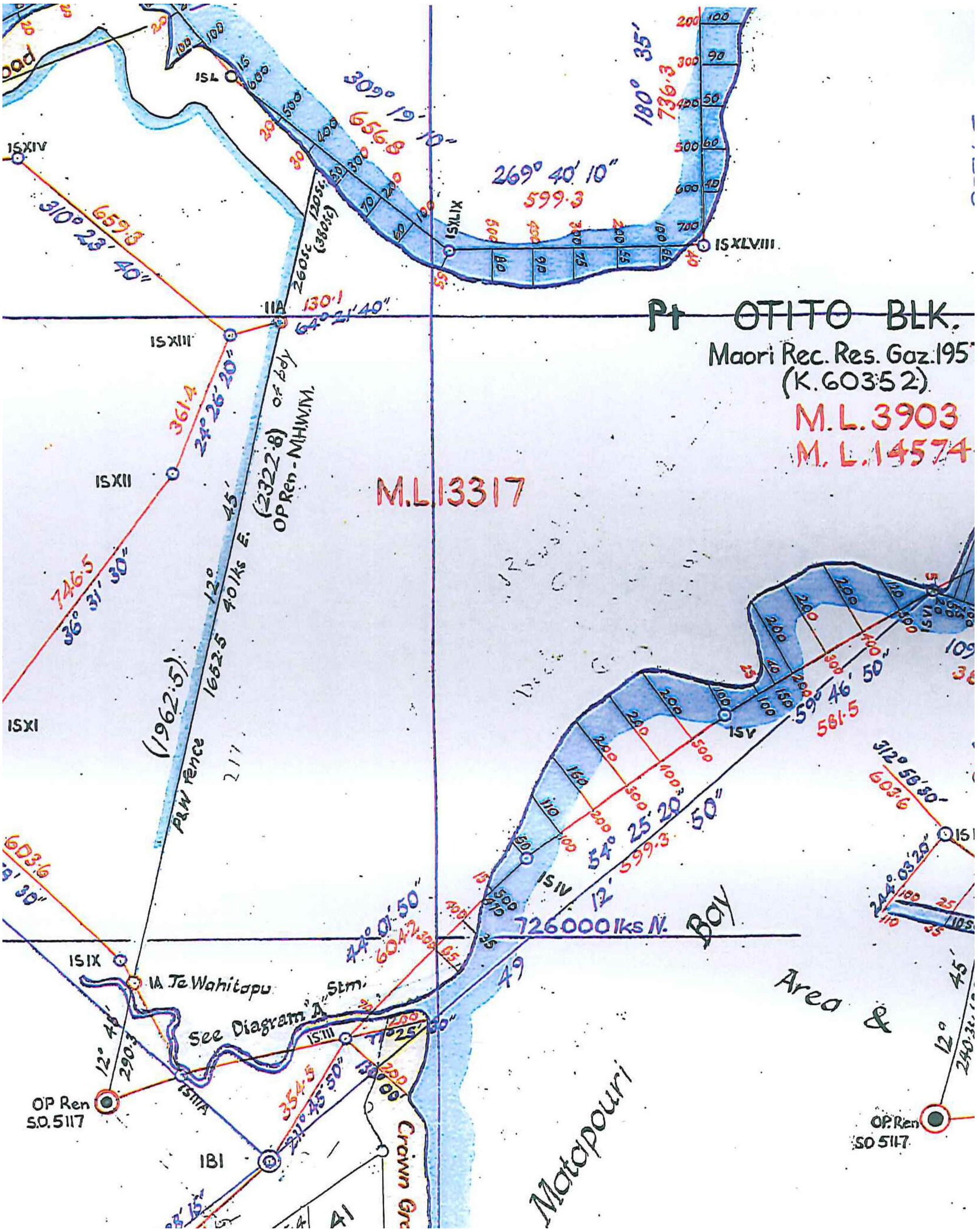
67603M
Otuto
Matapouri Bay
5 6 2 3 4
62acs. Set apart as a ~~Recreation~~ ~~Res.~~ Gaz. 1957 p. 46
(62-0-00) Cancelling Maori Reservation Gaz 1969 p 2342
Decl Crown Land (62 0.00) Gaz 1970 p 919
~~Declared Public Reserve~~ Gaz 1972 p 1820
Te Karo
MATAPOURI BAY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(K.60352)
M.L. 3903
M.L. 14574
M.L.13317
P&W Fence
OP Ren - M.H.W.M.
IA Te Wahitopu
See Diagram "A"
Stm.
OP Ren
S.O. 5117
726000 lks N.
Bay
Area &
Matapouri
Crown Gr
IBI
IS XIV
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IS XII
IS XI
IS IX
IS L
IS XLIX
IS XLVIII
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IS IV
IS III
IS IIIA
IIA