IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT

A20130004250

UNDER	Section 117 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	the Estate of Rachel Ngeungeu Zister
AND	Part Maraetai 3B, Lot 1 DP 95348 and Lot 2 DP 95348
BETWEEN	DEIRDRE FOREMAN & OTHERS Applicants
AND	JANICE SANDERS, EXECUTOR OF THE ESTATE Respondent

Hearing: 2 and 3 September 2013
63 Waikato Maniapoto MB 162-262
(Heard at Hamilton)

Appearances: K R M Littlejohn, Counsel for the Applicants
B O'Callahan and A C Poole, Counsel for the Respondent

Judgment: 27 September 2013

RESERVED JUDGMENT OF JUDGE S R CLARK

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Introduction

[1] During her lifetime Rachel Ngeungeu Zister was the acknowledged matriarch of Ngai Tai Ki Tamaki. She was also the owner of lands in the Maraetai district of Auckland and while alive utilised some of those lands for the establishment of a Ngai Tai marae at Umupuia.

[2] Rachel Zister died on 22 May 1997 aged 104. She left a Will dated 24 January 1996.[1] Probate was granted in the High Court at Auckland on 11 August 1997 and Janice Sanders and Maurice Wilson were appointed as the executors of the estate.

[3] This case concerns the interpretation of the late Mrs Zister's Will. The subject matter concerns three blocks of land at Umupuia in which Mrs Zister's estate holds either the legal or beneficial interests.

[4] Since her death in 1997 there have been considerable differences of opinion between the executors of the estate and members of Mrs Zister's wider whānau as to what Mrs Zister's Will meant. The task before this Court is to interpret the clauses in dispute.

Background facts

[5] The first block of land is Part Maraetai 3B, comprising 190.7778 hectares, CFR Identifier NA54A/782. The block is Māori freehold land. A s 438 Māori Affairs Act 1953 trust (now an ahu whenua trust) was established over that block on 25 March 1991.[2] The legal interests are vested in John Karl and William Crist as trustees. The beneficial interests in that block are currently held by Janice Sanders as the executor of Mrs Zister's estate. The majority of the block comprises native bush and regenerating bush. Approximately 50 acres is available for grassland and there is a small hobby farm in place on the block. This block is colloquially known to all as "the Farm Block". Throughout this decision I will refer to it as the Farm Block.

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[1] The Wills Act 2007 does not apply.
[2] 92 Hauraki MB 160-163 (92 H 160-163).

[6] The second block comprises 7,156 square metres, the legal description being Lot 1 Deposited Plan 95348, CFR Identifier NA51C/189. This block has Māori reservation status, the reservation being established on 1 March 1983.[3] The Gazette Notice describes that the reservation is:

> Hereby set apart as a Maori reservation for the purpose of historical significance for the common use and benefit of Te Ngeungeu Zister and her descendants.

[7] No trustees have been appointed to administer this reservation. The legal interests are vested in Janice Sanders and Maurice Wilson as executors. There are two houses and a small shop situated on this block. It is colloquially known as "the Home Block" and will be referred to as such during the course of this decision.

[8] The third block comprises 2.3889 hectares, the legal description being Lot 2 Deposited Plan 95348, CFR Identifier NA51C/190. This block too has Māori reservation status and was gazetted as such on 1 March 1983.[4] The Gazette Notice refers to the fact that the reservation is set apart:

> as a Maori reservation for the purpose of a meeting place and church site for the common use and benefit of Ngaitai Umupuia.

[9] Trustees are in place for this reservation. The Umupuia Marae comprising a wharenui, wharekai and historic church are located on this block. Throughout this decision I will refer to this block as "the Marae Block".

[10] The LINZ title records that the proprietors of this block are the executors of the estate being Janice Sanders and Maurice Wilson. Trustees for this reservation were in fact appointed by the Māori Land Court on 8 October 2007.[5] This is not reflected on the CFR, a matter that I will return to later in this decision.

[11] The lands comprised in all three blocks were at one stage owned by Mrs Zister's grandfather, the late Anaru Makiwhara. He was the grandson of a well known Ngai Tai tupuna, Tara Te Irirangi. Mrs Zister was raised by Anaru Makiwhara. In the 19th century lands at Maraetai were investigated by the Native Land Court and in 1869 title for the

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[3] 29 *New Zealand Gazette* 683 at 684.
[4] Ibid.
[5] 112 Hauraki MB 252 (112 H 252).

Maraetai block was issued. Thereafter a series of further hearings, rehearings, partitions and sale of the Maraetai lands occurred. By 1896 Anaru Makiwhara and other members of the Maxwell whānau owned Maraetai 3.

[12] In February of 1927, Anaru Makiwhara died leaving his interests in lands at Maraetai to Rachel Zister and her sister Maata Reweti also known as Maata Beamish. What is significant is that Anaru Makiwhara left an explanatory note attached to his Will, in which he urged his daughters never to sell Maraetai 3.

[13] Maraetai 3 was partitioned in 1934. One of the new blocks created was Maraetai 3B of which Rachel Zister and Maata Reweti also known as Maata Beamish were the owners. Maata Beamish died in July of 1972. She left her interest in Maraetai 3B to Rachel Zister and in 1974 she came to be the outright owner.

[14] There is a wealth of evidence before the Court confirming various steps Rachel Zister took to protect and retain the Maraetai 3B lands and the eventual establishment of a Ngai Tai marae on those lands.

[15] In 1980 Mrs Zister was successful in changing back the status of Maraetai 3B from general land to Māori freehold land. In 1983 she successfully established the Home and Marae reservations. Subsequently she arranged for the subdivision of Maraetai 3B into the three blocks, the Farm Block, the Home Block and the Marae Block. On 25 March 1991 she established a s 438 trust (now an ahu whenua trust) over the Farm Block. At that time in answer to a question from the Court as to whether she wanted to sell Part Maraetai 3B Block, Mrs Zister responded as follows:[6]

> No, no way. I want it to go on forever.

[16] Throughout Mrs Zister fundraised and arranged for the necessary legal, planning and administrative tasks to be achieved for the establishment of a marae at Umupuia. The wharenui was dedicated at an opening ceremony on 2 November 1990.

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[6] 92 Hauraki MB 162 (92 H 162).

[17] As can be seen from the above discussion, all of which is uncontested, Mrs Zister worked tirelessly to ensure the retention of lands inherited from her grandfather, Anaru Makiwhara and for a Ngai Tai marae to be established.

[18] In recognition of her efforts for Ngai Tai and the wider Māori community, Mrs Zister was awarded a CBE in October of 1989.

The Will and the proceedings

[19] Mrs Zister has now been deceased for over 16 years. Whilst some steps have been taken by the executors to finalise the administration of her estate, a large part of that task remains incomplete particularly in relation to her land interests.

[20] That part of the Will in dispute are clauses 2.2, 3 and 4. They read in full as follows:

> 2.2 I APPOINT **STEPHEN MAXWELL NGEUNGEU ZISTER** (also known as **STEPHEN BARKER**) of Paeroa, Engineer and **BEN STONE** of Clevedon, Teacher and **MERLE MCKENZIE** of Clevedon, Counsellor (hereinafter referred to "as my Trustees") as trustees of this my will.
>
> 3. **I GIVE DEVISE AND BEQUEATH**
>
> (i) All my interest beneficial or otherwise in the Maori Freehold land comprising 190.778 hectares more or less being part Maraetai 3B Block subject to Court Order B.150854.1 declaring that land to be Maori Freehold land pursuant to Section 68 of the Maori Affairs Amendment Act 1974 and Court Order registered under C.56211.1 declaring pursuant to Section 438(2) Maori Affairs Act 1953, vesting the said land in the Trustees for the time being; and
>
> (ii) All my interest in the Maori Land containing .7156 hectares being more or less Lot 1, Deposited Plan 95348 and being part Maraetai 3B Block which was set aside as a Maori Reservation.
>
> To my trustees to hold the same in trust for so long as is legally possible for the benefit of *the whenua of the Ngai Tai Umupuia Iwi Marae as represented by the Trustees appointed by the Maori Land Court for the time being* and all such trustees from time to time who are appointed. The determination and administration at all times of the operation of my interest in my said land is to be determine by my trustees of this my Will.
>
> 4. I DIRECT MY EXECUTORS to:
>
> (i) Pay my debts and funeral expenses, my executor, administration expenses and any duty payable on my estate.
>
> (ii) Establish over the land known as William Zister Island being lots 469A and 472 in the Parish of Taupiri containing 9 acres, 3 roods as comprised in

> Certificate of Title Volume 666 Folio 14 a reserve and memorial in perpetuity to my deceased husband **WILLIAM ZISTER**, and
>
> (iii) Transfer all my interests in Maori land situated at Rangiriri to my nephew **BARRY KINGSFORD LOGAN** of Pukekawa, and
>
> (iv) Pay and transfer the residue of my estate to my trustees for the benefit *of the whenua of the Ngai Tai Iwi Umupuia Marae as represented by the trustees appointed by the Maori Land Court for the time being*.
>
> (Emphasis added).

[21] Precisely what the late Mrs Zister meant by leaving her interests for the benefit of "the whenua of the Ngai Tai Iwi Umupuia Marae" has caused significant differences of opinion amongst the Ngai Tai community which have been festering away for a considerable amount of time.

[22] These proceedings were initiated on 1 May 2013 by the descendants of Rachel Zister's brothers and sisters. Rachel Zister died without issue. The applicants argue that the Will fails for uncertainty, is not saved by the residue clause and must be dealt with on an intestacy basis.

[23] Prior to the substantive hearing, counsel filed a joint memorandum setting out four preliminary questions for decision by the Court. It was accepted by the Court that although those questions were preliminary in nature, depending upon the answers given, they might be determinative. The questions posed are:[7]

> ...
>
> (a) Does the Will direct the executors to apply to the Court for the establishment of a whenua topu trust over the land contained in part Maraetai 3B Block (as described in clause 3 of the Will)?
>
> (b) Is it lawful for a Will generally to give such a binding testamentary direction?
>
> (c) Is such a direction permitted by s 108 of the Act?
>
> (d) Is the Maori Land Court able to receive an application from an administrator to constitute a whenua topu trust?
>
> 3. If the Court answers 'yes' to all the above questions, the administrator of the Estate will apply to the Court to establish a whenua topu trust over the land contained in clause 3 of the Will.

[7] Joint memorandum of counsel dated 2 July 2013.

4. If the Court answers 'no' to any of the above questions then subject to pursuing any right of appeal or review the Estate will not oppose the granting of the applicants' succession order.

[24] The preliminary questions have been useful in focusing the minds of counsel, the witnesses and the Court. The evidence filed was largely based around attempting to answer the four preliminary questions. Having said that I have approached the task in front of me slightly differently than as cast by counsel. I do not disregard to the four questions that were posed, but consider that the major issue for me to address is, what were the late Mrs Zister's intentions, gleaned from an objective appraisal of the Will as a whole?

The competing arguments

[25] The Farm and Home Blocks are the subject of specific devises in clauses 3(i) and 3(ii) respectively of the Will. The Marae Block is not the subject of a specific devise and falls to be dealt with in the residue clause being clause 4(iv) of the Will.

[26] Regardless of whether the Court is considering clause 3 or 4 of the Will, the issue that immediately confronts it is what was meant by "*the whenua of the Ngai Tai Umupuia Iwi Marae as represented by the trustees appointed by the Maori Land Court for the time being*".

[27] The applicants argue that clauses 3 and 4(iv) are contrary to s 108 of Te Ture Whenua Māori Act 1993 ("the Act"). A testator can only leave their Māori freehold land interests to one or more of the following class of persons:

a) Children and remoter issue of the testator;

b) Any other persons who would be entitled under s 109(1) of this Act to succeed to the interest if the testator died intestate;

c) Any other persons who are related by blood to the testator and are members of the hapū associated with the land;

d) Other owners of the land who are members of the hapū associated with the land;

e) Whāngai of the testator;

f) Trustees of persons referred to in any of the paragraphs (a) to (e) of this section.[8]

[28] The applicants argue that the word *whenua* used at clauses 3 and 4(iv) of the Will should be given its plain and ordinary meaning which is *land*. They say that Mrs Zister in leaving the three blocks in question for the benefit of the land of the Ngai Tai Iwi Umupuia Marae, failed to devise her lands to a class of persons set out in s 108 of the Act.

[29] The applicants submitted that as the words of the residue clause largely mirror the offending words of clause 3 the Will fails giving rise to an intestacy and s 109 of the Act applies. In turn the applicants have gone on to identify a schedule of persons whom they argue are entitled to succeed pursuant to s 109(1)(c) of the Act.

[30] The estate argues that the meaning of *whenua* is not equivocal. They submit that if the Court was simply to substitute the word whenua with the word land in the Will, clause 3 directs the trustees to hold land in trust for the benefit of the land, which does not make sense in the context of the Will.

[31] They submit that the word *whenua* should not be limited to meanings such as *land* or *placenta* but that it has a wider meaning including *people*, those who are intrinsically connected with the land. They encourage the Court to adopt a common sense interpretation of the Will and for the Court to read *people* where the word *whenua* appears in the Will.

[32] They go on to argue that if that approach is adopted the Will creates an express and valid trust in which the three certainties, the requirements for the establishment of an express trust exist. The estate argues that it is clear that Mrs Zister intended to create a trust, that the property which is to be subject of the trust is sufficiently identifiable and that by the insertion of the word *people* for *whenua* the objects of the trust can be identified and such a class exists.

[8] Section 108(2) of the Act.

[33] As an alternative the estate argued that clause 3 of the Will directed the executors to apply to the Court for the establishment of a Whenua Tōpū trust. As the arguments developed before me they widened that argument to mean that the Will directed the trustees to apply to the Court for the establishment of a Whenua Tōpū or Whānau trust.

[34] Regardless of whether the Will created a valid express trust, or directed the executors to apply to the Court for the establishment of a Whenua Tōpū or Whānau trust, the executors argue that such a class of persons falls within the s 108(2)(c) criteria which permits a testator to leave their Māori land interests to persons who are related by blood and are members of the hapū associated with the land. The estate argued that the persons who fall into that criteria are the descendants of an eponymous ancestor Te Whatatau and/or his son Te Wana.

Principles of construction

[35] The key to interpreting this Will is what is meant by the use of the word *whenua*.

[36] In approaching this task I bear in mind the following principles of construction:

a) The overriding objective is to give effect to the intentions of the testator. The testator's intentions are to be gleaned from an objective appraisal of the Will read as a whole;

b) The words and expressions used in the Will must be given their ordinary meaning. If the language is unambiguous and discloses no obvious error, the Court must give effect to it;

c) If possible the Will should be read so as to avoid intestacy;

d) The Court is entitled to take into account extrinsic evidence in ascertaining the facts known to the Will maker at the time he or she made their Will – "the armchair principle";[9]

[9] Nicky Richardson, *Nevill's Law of Trusts, Wills and Administration* (11th ed LexisNexis, Wellington 2013).

e) Where the words are plain in their meaning, a Court cannot depart from that meaning even if it seems that a Will maker may have misunderstood the legal effect of the gift;[10]

[37] As the Māori Appellate Court noted in *Nicholas v Kameta*[11] the general principles of construction apply to Wills involving gifts of Māori land. The Māori Appellate Court did note however that there are exceptions to the general rule created by statutes including Te Ture Whenua Māori Act 1993 and they cited the example of s 108(2) which creates a restricted list of persons to whom a Will maker may devise their interests.

[38] In the same category I would also add s 17(2)(a) of the Act which states as a general objective that the Court shall seek "to ascertain and give effect to the wishes of owners of any land to which the proceedings relate." This principle applies equally to a situation involving the interpretation of a Will.

What does the Will mean?

[39] The first point I note is that Rachel Zister intended to create a testamentary trust in her Will. That is obvious by her, at clause 2.2 of the Will appointing named persons as trustees. She then attempted to gift to them both the Farm and Home Blocks. By virtue of the residue clause the Marae Block was also intended to vest in the trustees. Thus her intention in creating a testamentary trust is self evident.

[40] The issue that causes concern of course is what were the objects of that trust? Who was to benefit from the establishment of that testamentary trust?

[41] I note that apart from reference to the Ngai Tai Umupuia Iwi Marae, clearly a reference to a place, the only other occasion in which Rachel Zister uses a Māori word is at clauses 3 and 4(iv) of the Will. Rachel Zister was a native speaker of Māori and did not speak English until at least seven years of age. She was raised by Anaru Makiwhara, a well known Rangatira of Ngai Tai. One must assume therefore that by using the word *whenua* in her Will, Rachel Zister did so deliberately.

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[10] *Laws of New Zealand* Wills (online ed) at [236].
[11] *Nicholas v Kameta – Estate of Whakaahua Walker Kameta* (2011) 2011 Māori Appellate Court MB 500 (2011 APPEAL 500) at [21].

[42] As an adult Rachel Zister had a distinguished career working in law firms, the Public Trust and the Māori Trustee. In all of those roles she was tasked to work on Māori land issues. Later she worked as a secretary for Princess Te Puea and at times did Māori Land Court work, working as a Māori agent at Auckland and Hamilton. Rachel Zister was well versed in English and Māori and thus one would assume that her use of the word *whenua* was a deliberate choice on her part.

[43] Put another way, had she meant to use the word *people* one would have thought she would have used that word or something similar such as *persons*, *beneficiaries* or *members*. Had she wished to have used a Māori word referring to people or a class of people then the options of *iwi, hapū, whānau, tāngata, hunga, mana whenua, tangata whenua* or *uri*, all words which she was undoubtedly familiar with, could have been used to convey that she actually meant, *people*. I therefore reach the conclusion that in choosing to use the word *whenua* Rachel Zister did so deliberately.

[44] I have little difficulty in accepting that the ordinary meaning of the word *whenua* translated into English means *land* or *placenta/afterbirth*. Respected Māori dictionaries also include the definitions *country, ground* or *region*.[12] He Pātaka Kupu is an authoritative Māori language dictionary endorsed by Te Taura Whiri i Te Reo Māori. None of its definitions or examples provided at page 1169 or 1170 of that dictionary include people or persons as a possible meaning.[13]

[45] The executors argue that there is evidence before the Court which would justify a liberal interpretation of the word *whenua* to mean people. The executor Janice Sanders deposed at paragraph 36 of her affidavit that the word *whenua* should be given a wide interpretation. In support of that she attached as exhibit "K" to her affidavit an extract from the Raupō Concise Māori Dictionary (2009). None of the definitions set out in that extract support the contention asserted by Ms Sanders. The translations provided are *country, ground, land, afterbirth* and *placenta*.

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[12] H W Williams – *Dictionary of the Maori Language* (7th ed, Legislation Direct, Wellington 2008) at p 494, P M Ryan – *The Raupō Dictionary of Modern Maori* (2nd ed, Penguin Group (NZ), 2006) at p 407, J C Moorfield – *Te Aka Online Maori Dictionary* <www.maoridictionary.co.nz>.

[13] Te Taura Whiri i te Reo Maori/Maori Language Commission, *He Pātaka Kupu: te kai a te rangatira* (Penguin Group (NZ) 2008).

[46] Ms Sanders also attached an article written by Dr Manuka Henare, Associate Dean of Māori and Pacific Development at Auckland University. Dr Henare is an acknowledged expert in tikanga Māori. His article intituled "Tapu, Mana, Mauri, Hau, Wairua" is a discussion of Māori philosophy of vitalism and cosmos. In his article Dr Henare cites a speech from Sir James Henare given in 1981. Sir James Henare described *whenua* as meaning land and is the term used for both land and the placenta or afterbirth. Therefore land for Māori people has the same deep significance as a placenta which surrounds the embryo giving it warmth, security and a *mauri* – life force. Whilst Dr Manuka Henare's article is reasonably wide-ranging, nowhere does he ascribe the definition *people* for the word *whenua*. The closest he comes to it is when he indicates that philosophically people do not see themselves as separate from nature, humanity and the natural world being descendants of the earth mother, thus the resources of the earth do not belong to humankind but rather humans belong to the earth.

[47] Ms Sanders also attaches an extract from a well known Māori academic Dr Ranginui Walker, being exhibit "M" to her affidavit. Again that article does not translate or refer to *whenua* as meaning people. There is a recognition that each generation of Māori is bonded to the land at birth and also he discusses the concept of planting a pito (umbilical cord) also known as whenua, in the land.

[48] Ms Sanders was a longstanding friend of Mrs Zister's, she is not Māori nor does she profess to speaking or understanding Māori. She admits that when she first was asked to be executor she had little knowledge of Māori tikanga, whakapapa and the complexities of Māori land interests however acquired some of that knowledge since the mid 1980's. I mean no disrespect to her, but the proposition she argues for that *whenua* should equate to *people* is not something within her particular expertise and nor is it referred to in the sources she cites.

[49] Merle McKenzie is one of the persons whom Rachel Zister appointed as a trustee pursuant to clause 2.2 of her Will. Ms McKenzie deposes at paragraph 28 of her affidavit that *whenua* has a deep meaning. She attaches as exhibit "I" to her affidavit a publication from the Ministry of Justice. In a section intituled "The Relationship of Māori with the Land" the following extract appears:

> The land is a source of identity for Maori. Being direct descendants of Papatuanuku, Maori see themselves as not only of the land, but as the land. The living generations act as the

> guardians of the land, like their tipuna had before them. Their uri benefit from that guardianship, because the land holds the link to their parents, grandparents and tipuna, and the land is the link to the future generations.

[50] I do not place much weight on this evidence. This is the only piece of evidence which comes close to suggesting that the word *whenua* can be translated to mean *people*. I note that the quote set out in the previous paragraph is contained in a general Ministry of Justice document describing the importance of whenua to Māori. The article is unauthored. There is no indication that it has been prepared by an expert in tikanga or te reo Māori. I prefer the authoritative dictionary definitions I have referred to earlier in this decision. Although Ms McKenzie is of European and Māori descent (she has Ngai Tahu whakapapa) she does not profess any great knowledge of tikanga or te reo Māori and I do not place much weight upon her proposition that *whenua* should be replaced with the word *people* in the context of Mrs Zister's Will.

[51] As I have set out above, the ordinary meaning of the word *whenua* is *land, placenta/afterbirth, ground, country* or *region*. Clearly for Māori there is a very close link between whenua and identity. The dictionary definitions I have referred to earlier do not support the suggestion that *whenua* should automatically be transposed with the word *people*. The academic articles provided by the respondent do not support that proposition either. Other than one Ministry of Justice publication from an unidentified author, there is little suggestion that *whenua* should also mean *people*. It would have taken evidence from expert/s in tikanga and reo to convince me otherwise.

[52] I prefer for example the description of *whenua* by noted Māori academic Sir Hirini Moko Mead who states that:[14]

> The Māori word for land is whenua. But the word whenua means more than land; it also means 'placenta', 'ground', 'country' and 'state'. Williams (1957: 494) adds the further meaning of "all together" or "entirely". Thus whenua carries a wide range of meanings. Whenua, as placenta, sustains life and the connection between the foetus and the placenta is through the umbilical cord. This fact of life is a metaphor for whenua, as land, and is the basis for the high value placed on land.

The armchair principle – extrinsic evidence

[53] In reaching a decision that *whenua* should be given its ordinary and plain meaning which in this context means *land* I was conscious of the submission by the estate that if that interpretation was adopted then the Will directs the trustees to hold the Farm and

[14] H M Mead, *Tikanga Māori – Living by Māori Values* (Huia Publishers 2003) at pp 269 and 270.

Home Blocks in trust for the benefit of the land of Ngai Tai Umupuia Iwi Marae. Counsel for the estate submits that interpretation does not make common sense.

[54] I am also conscious, as I have set out in some detail earlier, that Rachel Zister inherited a remnant part of a tribal estate via her grandfather Anaru Makiwhara who injuncted her and her sister never to sell the land. There is ample uncontested evidence before the Court that throughout her lifetime Rachel Zister expressed a strong desire to retain and hold the lands she had inherited for the benefit not of herself but for her wider community. With that in mind she made her own lands (the Marae Block) available for the establishment of the marae complex. She had, in establishing that reservation, ensured that the class of beneficiaries encompassed not simply herself and her whānau but also the Ngai Tai people of Umupuia.

[55] She had also transferred her legal interests in the Farm Block to trustees and created an ahu whenua trust. When establishing that trust, Mrs Zister emphasised that the land was not for sale, that she wanted it to last forever, that her grandfather had been born there as had other ancestors and she would have liked to carry that on.[15]

[56] I also remind myself of the statutory objective outlined in s 17(2) of the Act which requires the Court to ascertain and give effect to the wishes of the owners of the land. Thus I have asked myself the question whether my interpretation of the word *whenua* defeats the intentions of the late Mrs Zister? To that extent I am of the view that it is open to this Court to invoke "the armchair principle" whereby I am entitled, on a limited basis, to take into account extrinsic evidence and to be made aware of such facts and circumstances as were known to Mrs Zister at the time her Will was made.[16]

[57] There is a wealth of extrinsic evidence before the Court contained in the affidavits. Without being critical, much of the evidence before the Court comprises assertions and submissions supportive of the positions adopted by the two respective parties. Therefore I have limited myself to three items of extrinsic evidence only, all of which relate to events in the lead up to the execution of Mrs Zister's Will.

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[15] 92 Hauraki MB 161-162 (92 H 161-162).
[16] *Re Beckbessinger* [1993] 2 NZLR 362 (HC) at 367.

[58] The evidence I have referred to comprises of two file notes prepared by a solicitor Mr David Burns and a letter from him to Rachel Zister. I understand these documents to have been sourced by Mr Stephen Zister, who obtained Rachel Zister's legal files from Mr Burns following her death.

[59] The first file note relates to an attendance Mr Burns had with Mrs Zister on 9 October 1995. He had travelled to her house to discuss her Will.[17] The file note records that Mr Burns discussed the provisions of an existing Will dated 14 March 1995 with Mrs Zister. Mrs Zister indicated to Mr Burns that she wanted the Farm Block to go to "her family". Mr Burns' file note discloses that:

> When I tried to get her to define this, it was very difficult, she was unable to give me a whole list of names and Ben Stone raised the issue of whether this included her husband's family who have been involved with her life over many years, who are Pakeha or just the Maori side. There are quite a lot of issues to be resolved then.

[60] Mr Burns then went on to discuss with Rachel Zister the option of the land supporting the marae. On this point the file note records:

> She seems to invisage that it remains farmland to support the Marae and her family generally but it is very hard to get her to define exactly who those people are.

[61] Shortly thereafter Mr Burns sent a letter to Rachel Zister dated 1 November 1995.[18] Mr Burns rightly indicated at paragraph 2 that the law requires any beneficiaries that Mrs Zister named to be certain and easily defined. He noted that there was a considerable difficulty in trying to leave it on the basis of "your family".

[62] Perhaps somewhat presciently Mr Burns went on to say:

> These issues have troubled me because I am aware that the Will has to be precise so that there is no ambiguity in it. I do not wish a situation to be created where your Will creates another set of potential conflict with members of your family.

[63] Mr Burns went on to indicate that if it was Mrs Zister's wish to set aside the lands for the benefit of the community or a nominated institution, any group had to be clearly definable. He went on to say:

> It could be set for the benefit of the Marae, or it could be set up for the benefit of a member of a tribe. As long as there are criteria that can be established so that the beneficiaries can be readily identified, then we will have no difficulties.

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[17] See Common Bundle of Documents in relation to opposition to succession application Volume 2 at p 374.
[18] Ibid, p 373.

[64] The second file note[19] follows an attendance with Mrs Zister on 24 January 1996. The relevant part of the file note reads as follows:

> Discussing issues largely to do with her Will. In the end after a lengthy discussion of what she wished to happen with respect to the land and all the rest of it, she confirmed her existing Will which I had prepared with one alteration, but other than that we discussed the option that she wished to have her estate go to her mokas. I explained to her the difficulties of that because of the uncertainty and vagueness as to precisely who that would be, after a number of generations the family is now very diverse and without naming them specifically as individuals, it would be extremely difficult as to who fitted into that category. This is the reason why we had prepared the previous draft Wills on the lines of the Whenau of the Marae which effectively indirectly benefit those people, but *the spirit and intention of Mrs Zister is that she wishes her family to be benefited as well as the community through the Marae and the land effectively is going to be there to support the ongoing continuance of the Marae*. (Emphasis added).

[65] This file note is significant, referring to events the day Mrs Zister executed her Will. I first note that the option was discussed with Mrs Zister of her leaving her estate to her "mokas". I read this reference to clearly mean mokopuna. It is known that Mrs Zister had no grandchildren or great-grandchildren. I assume this was as a reference to the descendants of her brothers and sisters. Regardless the important point is that a class of people was discussed with her solicitor. According to the solicitor's file note there was difficulties in precisely identifying that class or category of person which is the reason why the words *whenua of the marae* was preferred.

[66] The second point is that the words *whenua of the marae* were deliberately chosen. The spirit and intention of that is that Mrs Zister's family would indirectly benefit from such a devise through being members of the marae.

[67] The third point is that the words emphasised in the extract set out above are important. It was clearly envisaged that the land was to be used for the ongoing continuance of the marae.

[68] Thus I summarise that the intention of Mrs Zister was to use the word *whenua* deliberately in her Will. In doing so she thought she would benefit her family, the marae community and provide ongoing support and maintenance of the marae complex itself. The possibility of leaving the lands to a class of people – her family – had been considered and rejected. Mrs Zister did not use the word *people* or a similar term in an attempt to define a class of people in her Will and that choice was deliberate.

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[19] Ibid, page 365

[69] Mrs Zister, after advice, used the word *whenua*. Unfortunately this has an unintended consequence. That is that there are no class of persons identified in the Will to whom the lands have been validly left in accordance with s 108(2) of the Act. That is unfortunate and the very problem which the parties were attempting to avoid.

[70] Although this result is an unintended consequence, I cannot see how this Court is in a position where it can rewrite the Will of the late Mrs Zister by including the word *people* for *whenua* in an attempt to bring clause 3 and 4(iv) within the s 108 criteria set out in the Act.

Preliminary decision

[71] Viewed objectively and after considering her Will as a whole I reach the conclusion that it was Mrs Zister's intention to use the word *whenua* deliberately at clause 3 and 4(iv) of her Will. The ordinary meaning of the word *whenua* in this context is *land*. In attempting to establish a trust for the Farm and Home Blocks for the benefit of the land of the Ngai Tai Umupuia Iwi Marae, Mrs Zister failed to leave her lands to any person or class of persons set out within s 108(2)(c) of the Act.

[72] The failed gifts then fall to be considered in terms of the directions set out in the residue clause. Neither the Farm, House or Marae Blocks are saved by the residue clause which uses similar wording.

[73] **My decision is that pursuant to s 108(5) of the Act, clauses 3 and 4(iv) of the Will are void and are of no effect and the interests shall pass in accordance with the rules on intestacy – s 109 of the Act**.

[74] Section 109 of the Act deals with those entitled to succeed on an intestacy. Section 109(b) is the relevant section which provides inter alia that the interests shall pass first to any of Mrs Zister's brothers and sisters living at her death in equal portions, together with the issue living at the death of the deceased of any brother or sister who died before Mrs Zister.

[75] The application was put before the Court on the basis that 42 persons set out in Schedule A to the application were entitled to succeed on an intestacy basis. During the course of the hearing I raised the issue of who might be entitled to succeed on an intestacy

basis with counsel for the applicant. I referred to the table of descendants set out in the application commencing at page 24 and running through to page 46 of the common bundle. The assumption appears to have been made that the children of E E Beamish and L C Beamish being nieces and nephews of Mrs Zister were entitled to succeed. An assumption was also made that in relation to the children and great-grandchildren of M Beamish, and the children of R P Beamish, M N Beamish, A H Beamish, N E Beamish that they were all entitled to succeed.

[76] Two of Mrs Zister's siblings, E E Beamish and L C Beamish were alive at the date of her death. They are entitled to succeed. I understand that they are now deceased and separate succession applications need to be filed in relation to each of them.

[77] In relation to M Beamish, R P Beamish, M N Beamish, A H Beamish and N E Beamish, I understand that they all predeceased Rachel Zister. On the face of it their respective children are entitled to substitute in for whatever interests their parents would have received at the date of Mrs Zister's death. If they in turn are now deceased, separate succession applications need to be filed.

[78] I provide an example to illustrate. At page 45 of the common bundle M Beamish is mentioned. M Beamish is the sister of the late Mrs Zister. She died in 1963, thereby predeceasing her sister. She left three children being L L Heslop, N Wilson and B W Alley, all of whom are now deceased leaving children of their own. I do not know for example if L L Heslop died before or after Rachel Zister. If she died before Rachel Zister then her children, D Foreman, M A Heslop, B O Heslop and N E Heslop are entitled to be substituted in on an intestacy basis. If L L Heslop was alive at the time of Rachel Zister's death and subsequently died then a separate succession application needs to be brought in her name.

[79] Suffice to say further work is required by the applicants until such time that any s 113 determinations can be made and any s 117 vesting orders can be made. To that extent I consider this to be a preliminary decision. I acknowledge that considerable work has been carried out by the applicants to date, however I cannot short circuit the approach which the Court has to take.

[80] **In that respect I direct counsel for the applicants, within 21 days upon receipt of this decision, to notify the Court as to what steps are proposed for finalisation of the application**.

Further directions and orders

[81] In reviewing the records of the Court and LINZ it is apparent that they need updating and amendment. In addition there are other steps which need to be taken to regularise the position of all three blocks.

[82] The Memorial Schedule for the Marae Block wrongly refers to *Ngati Umupuia*. The correct reference as set out in the Gazette Notice is to *Ngaitai Umupuia*. The reference date in the Memorial Schedule is also incorrect the correct date being 1 March 1983. **I direct the Registrar to correct the entry errors**;

[83] The trustees of the Farm Block are described in CFR NA54A/782 as Mr John Morris Karl and William Frank Crist. There is evidence before the Court that Mr Crist died in December 2012.[20] **Therefore of my own motion pursuant to s 37(3) of Te Ture Whenua Māori Act 1993 I make the following orders:**

a) **Pursuant to s 239 reducing the number of trustees to one, that being John Morris Karl, upon receiving evidence that William Frank Crist is deceased;**

b) **Pursuant to s 239(3) vesting the land and assets of the trust in John Morris Karl as the sole remaining trustee**.

[84] Recommendations concerning the creation of the two reservations were made by the Māori Land Court on 22 April 1982.[21] Both reservations were then gazetted on 1 March 1983.[22] Both reservations were created prior to the subdivision of the Maraetai 3B block. For reasons which are inexplicable, neither the recommendations or Gazette Notice references were recorded on the Memorial Schedule for Maraetai No 3B prior to subdivision. Nor does it appear that the Gazette Notices were ever forwarded to LINZ for

[20] Affidavit of Mr John Karl, para 48.
[21] 88 Hauraki MB 56-57 (88 H 56-57).
[22] 29 *New Zealand Gazette* 683 at 684.

registration as a memorial against the Maraetai 3B title prior to subdivision. Nor does it appear that the order appointing trustees to the Marae Block reservation on 8 October 2007 was ever forwarded through to LINZ for registration as the CFR continues to record Janice Sanders and Maurice Wilson as having the legal interests vested in them.

[85] The result of all of that is that the CFRs for both the Home Block (NA51C/189) and the Marae Block (NA51C/190) do not refer to the fact that both blocks have Māori reservation status. Nor are the trustees of the Marae Block recorded as the legal owners of the Marae reservation.

[86] **Of my own motion pursuant to s 37(3) of Te Ture Whenua Māori Act 1993 I make the following orders to correct that situation:**

a) **An order pursuant to s 338(5)(b) cancelling the reservation of 2.3889 hectares over Maraetai 3B – reference TN46/123**;

b) **An order pursuant to s 338(5)(b) cancelling the reservation of 7,156 square metres over Maraetai 3B – reference TN46/124**;

c) **An order pursuant to ss 338(1) and (3) recommending as follows:**

(i) **That all those lands comprised in Lot 1 Deposited Plan 95348 – CFR Identifier NA51C/189 (North Auckland), be set aside as a Māori Reservation for the purpose of historical significance for the common use and benefit of Te Ngeungeu Zister and her descendants;**

(ii) **That all those lands comprised in Lot 2 Deposited Plan 95348 – CFR Identifier NA51C/190 (North Auckland), be set aside as a Māori Reservation for the purpose of a meeting place and church site for the common use and benefit of Ngai Tai, Umupuia.**

[87] **The orders set out at paragraphs [83] and [86] are to be released immediately pursuant to rule 7.5(2)(b) of the Māori Land Court Rules 2011.**

[88] **Following confirmation of gazettal the Registrar is directed to forward copies of the following to LINZ:**

a) **The recommendations set out at paragraph 86(c)(i) and (ii);**

b) **The relevant Gazette Notices;**

c) **A copy of the order made at 112 H 252 appointing trustees to Lot 2 Deposited Plan 95348 – CFR Identifier NA51C/190 (North Auckland).**

[89] **The Registrar is to report back to me within 21 days of the date of this decision confirming the steps taken to attend to the directions and orders I have referred to above**.

Additional comments

[90] During the course of the hearing, counsel for the applicants commented that any suggestions from the Court in relation to the estate of the late Mrs Zister would be welcome and taken into consideration by the clients he represents. I have considered this closely and somewhat reluctantly provide some additional comments which I accept, strictly speaking, are unnecessary to decide the issues in front of me. I do so solely in order to provide some assistance to the parties and with the knowledge that there has been widespread confusion and misunderstanding by members of Ngai Tai concerning Mrs Zister's estate.

The Farm Block

[91] There is now only one trustee of this block, Mr John Karl. I do not consider it wise for any trust constituted over Māori land to have only one trustee. If Mr Karl dies or is for any other reason unable to carry out his duties as a trustee, that is not a good position for the block itself nor the beneficiaries of the trust. I suggest that at the next AGM the issue of the election of at least one or more trustees is placed on the agenda.

[92] Once the Court has finally determined those persons who are entitled to succeed to this block, they will become the beneficial owners. There is however evidence before the Court that Mrs Zister when establishing the trust wanted it to last in perpetuity and for it to benefit a wide class of persons.[23]

[93] There are also some undated handwritten notes of Mrs Zister in the common bundle in which she describes the purpose of this trust. She said:[24]

> To be set aside as a trust under the Maori Land Court in keeping with the wishes of my grandfather Anaru Makiwhara, to be retained as a farm with the regenerating bush areas at present set aside.
>
> The purpose of the Trust is to retain the land as a taonga of the hapu any surplus income to be directed to the upkeep of the Umupuia Marae and the land itself to be available for the passive recreation of the hapu members for ever.

[94] Assuming for the moment that Mrs Zister's purpose in establishing the trust as recorded in her handwritten note, remained constant until the date the trust was established, her wishes were not reflected in the objects of the trust order. The reference to "retaining the land as a taonga of the hapū", for any "surplus to be directed towards the upkeep of the Umupuia Marae" and the availability of the "land for recreation purposes for hapū members" are not reflected in the objects. That is something which those persons who become the beneficial owners may wish to turn their minds to and seek a variation of the trust order to reflect those wishes.

[95] Perhaps, and I accept this is a more controversial suggestion, those who become the beneficial owners should consider whether or not in reality the late Mrs Zister would have wished to establish a whenua tōpū trust for the benefit of the iwi/hapū. Whenua tōpū trusts were not available as a form of trust when the trust was established in 1991. They are available now and exist to promote and facilitate the use and administration of the land in the interests of the iwi or hapū – s 216(2). Whilst in existence no person is entitled to succeed to any interest vested in the trustees for the purpose of the trust – s 216(6). The beneficial owners may wish to consider this in light of the wishes expressed by Mrs Zister whilst she was alive as to the purpose of the trust.

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[23] 92 Hauraki MB 162 (92 H 162).
[24] See Common Bundle of Documents in relation to opposition to succession application Volume 2 at p 274.

The Marae Block

[96] The Marae Block is a Māori reservation. Eventually a number of people will become the beneficial owners of it. Having said that I stress to the parties the following:

a) The Marae Block is vested in trustees who have been appointed by the Māori Land Court. The legal estate vests in the reservation trustees while the owners and their successors retain the beneficial estate;

b) Importantly the marae exists for the beneficial owners and a wider class of beneficiaries namely Ngai Tai, Umupuia. On matters relating to the administration of a Māori reservation, the trustees should consult not only with the beneficial owners but also that class of persons for whom the reservation has been set aside.[25] Put another way, the fact that various people will become beneficial owners, does not detract from the fact that the marae is set aside for the benefit of Ngai Tai, Umupuia.

Zister Island – Lot 469A and Lot 472 Parish of Taupiri

[97] At clause 4(ii) of her Will, Mrs Zister directed her executors to establish a reserve and memorial in perpetuity to her deceased husband William Zister over Lot 469A and Lot 472 Parish of Taupiri – CFR Identifier SA666/14. I record that an application is currently before the Court (A20130007205) to determine the status of the land. At this stage it is not entirely clear whether the block is Māori freehold land or general land. Following the hearing involving the Farm, Marae and Home Blocks, this application was called. A direction was made that the executor was to file a memorandum with the Court by 24 September 2013 informing the Case Manager of her intentions concerning that application. To date no such memorandum has been filed and the Court continues to await the advice of the executor as to her intentions.

[98] If the Court does not receive a response from the executor, then that matter will eventually be listed to be called again alongside any determination of the succession application in relation to the Farm, Marae and Home Blocks.

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[25] See *Bristowe – Section 4C I Block II Tuatini Township & Ors* (2002) 151 Gisborne MB 250 (151 GIS 250).

Parish of Whangape Lot 15C (Urupā) – CFR Identifier 350287 and Part Parish of Whangape Lot 15B Block – CFR Identifier 387679 (South Auckland)

[99] A one half share in Parish of Whangape Lot 15C is vested in Janice Sanders and Maurice Wilson as the executors of the estate of Rachel Zister. There is currently no application before the Court in relation to that block.

[100] In relation to Part Parish of Whangape Lot 15B, Rachel Zister was recorded on CFR 387679 as the administrator of the estate of her sister Maata Beamish. On 3 September 2013 I heard an application by the executors seeking to vest those interests currently held by Rachel Zister as administrator in Rachel Ngeungeu Zister, being the person entitled to succeed to the interests of her late sister. Orders were accordingly made on 3 September 2013.

[101] Clause 4(iii) of Rachel Zister's Will directs her executors to transfer her interests in Māori land situated at "Rangiriri" to a nephew by the name of Barry Logan. There seems to be no contest that the Whangape blocks are situated in the Rangiriri district. There was an indication from those present at the hearing that Barry Logan does not fall within the class of persons set out at s 108(2) of the Act and is deceased. Be that as it may, there are currently no succession applications before me in relation to either of these blocks.

[102] However, separate succession applications should be brought in relation to both blocks. They can be filed by either the executor or any interested person to determine who is entitled to succeed to those interests. I make this suggestion as there seems little point in the administration of Mrs Zister's estate remaining incomplete.

Pronounced in open Court at am/pm in Hamilton on the day of September 2013.

S R Clark
JUDGE