IN THE MĀORI LAND COURT OF NEW ZEALAND
TAIRĀWHITI DISTRICT

A20170003832
CJ 2017/11

UNDER	Section 45, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Tutaekuri B13
CONCERNING	HURU COTTER Applicant
AND	RAWITI COTTER, JOHN RUEA COTTER, SHARLENE COTTER, PUKEHUIA COTTER, and RUSSELL MANAHI COTTER Respondents

Hearing: 23 April 2019, 2019 Chief Judge's MB 516-575
(Heard at Gisborne)

Judgment: 6 September 2019

JUDGMENT OF DEPUTY CHIEF JUDGE C L FOX

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Introduction

[1] Huru Cotter (the applicant) seeks an order under s 45 of Te Ture Whenua Māori Act 1993 (the Act) to cancel a vesting order made on 11 July 2001 in relation to Tutaekuri B13 (the block).[1] Tutaekuri B13 lies approximately 20 kilometres from Wairoa, at Rangiahua. It is described as 'Wairoa hill country.'

[2] The applicant claims that the said orders are incorrect due to a mistake, error or omission in the presentation of the facts of the case to the Court, because:

(a) The number of shares vested in the transferees was more than what was intended; and

(b) The applicant agreed to transfer some of his shares in the land to be set aside to protect the pito buried there;

[3] The applicant claims that he has been adversely affected by the orders complained of because he completely trusted the transferees to abide by the terms of the agreement to transfer the shares and is now left with the same amount of shares as each of the transferees.

Background

[4] The Registrar's Preliminary Report and Recommendation dated 28 January 2019 sets out the background to the application. The report is reproduced in full as follows:

APPLICATION UNDER SECTION 45 OF TE TURE WHENUA MĀORI ACT 1993
PRELIMINARY REPORT AND RECOMMENDATION

Introduction

1. Huru Cotter (the applicant) seeks to cancel a vesting order made at 103 Wairoa MB 244-245 dated 11 July 2001 (order complained of) relating to Tutaekuri B13 (the block).

2. The applicant claims that the said orders are incorrect because of a mistake, error or omission in the presentation of the facts of the case to the Court in that the number of shares vested

[1] 103 Wairoa MB 244-245 (103 WR 244-245).

into the transferees was more than was intended under the agreement he made with the transferees. The applicant further claims:

a) That the agreement between the applicant and the transferees was not for the amount of shares transferred;

b) The applicant agreed to transfer some of his shares in the land to be set aside to protect the pito buried there;

c) The applicant was informed and re-assured that only a small part of his shareholding would be required and that he would be left with the "lions share";

d) He was living in Australia when the transfer occurred and relied on what he was told. He was not told of the full extent of his shareholding and would never have transferred the majority of his shares;

e) There was a mistake as to the effect of the transfer and the amount of shares;

f) He was misled as to the amount of shares to be transferred and the effect of that;

g) The nature of the transaction was misrepresented to the applicant and this misrepresentation was passed on to the Court as if he had agreed to it;

h) He only agreed to transfer a small part of his shares so that land could be set aside to protect the pito buried there;

i) The transferees have not complied with their part of the contract;

j) The transferees failed to make the Court aware of the underlying contract and have not met their part of the bargain;

k) He only agreed to transfer shares to protect the pito. The pito has not been protected;

l) The Court should have been made aware of the underlying contract.

3. The applicant's Counsel Bennett in her covering letter of 29 May 2017, shows that they had attempted to resolve the matter directly with the transferees, but that resolution was not possible.

4. The applicant claims that he is adversely affected in that he completely trusted the transferees to abide by the terms of the agreement to transfer the shares. The applicant claims that this was a whānau arrangement and does not believe that he was negligent.

Concise history of Order sought to be amended/cancelled

5. On 30 January 2001, applications pursuant to section 164 of Te Ture Whenua Māori Act 1993 (the Act) were filed by the transferee's solicitor. The applications sought to transfer .428571 shares out of a total shareholding of .500000 shares in the block into his brother's six children equally;

6. The Court minute sets out the following:[2]

[2] 103 Wairoa MB 244-245 (103 WR 244-245).

Court:

Counsel Peter Johnson of Solicitors Burnard Bull & Co has filed an application on behalf of his client John Ruea Cotter and five others, being the proposed transferees in respect of .428571 shares out of a total of .500000 shares in Tutaekuri B13, which are at present in the name of Huru Cotter, the transferor in this case.

Huru Cotter resides in Melbourne, Australia and is unable to attend the Court sitting in New Zealand. In clause 3 of the affidavit it states that the transferees are blood related to the transferor, they are the nieces and nephews and children of Charles Manahi Cotter who is the brother of the transferor.

Clause 9 states that the pito of the transferees are buried on the land and that it is of special importance to them….

7. The matter was heard by the Court at the order complained of and the Court made vesting orders as follows:

Transferor	Shares	Transferee	Shares
Huru Cotter	.5000000	Rawiti Matene Richard Cotter	.0714286
		Reina Winifred Cotter	.0714285
		Sharlene Matekino Cotter	.0714285
		John Ruea Cotter	.0714286
		Pukehuia Catherine Cotter	.0714286
		Russell Manahi Cotter	.0714286
			0.4285714

Identification of evidence that may be of assistance in remedying the mistake or omission

8. The applicant has provided the following documents in support of his application:

   a) Application for vesting order dated 30 January 2001;

   b) Affidavit of the applicant dated 30 January 2001. In brief, the relevant points are set out as follows:

      i. Understands the nature and implications of the applications by himself to the transfer by way of gift to the transferees;

      ii. That the transferees are related by blood, being the children of his brother, and requests that his shares in Tutaekuri B13 block be vested in the transferees equally;

      iii. That the shares were derived by his father;

      iv. That he was aware of the value of the land;

      v. That he verily believes that the pito of the transferees are buried on the land and that it is of importance to them; and

      vi. That he has one daughter and was to retain an interest in the block for his daughter to receive in due course.

vii. That it was in the best interest of the land, to be transferred by way of gift to the transferees;

c) Agreement between the applicant and the transferees dated 30 January 2001. In brief, the relevant points the applicant sets out are as follows;

i. He agrees to transfer to the transferees as tenants in common, equal shares part of his interests amounting to .428571 out of a total shareholding of .500000 in the block;

ii. That the transfer is by way of gift;

iii. The transferees agree to accept such gift and that the transferees are of the preferred class of alienees by them being the children of his brother.

d) Copy of the Solicitors Certificate dated 30 January 2001. This certificate sets out in part the following;

….. THAT on the day of the date hereof **Huru Cotter** ("the Deponent") personally came and appeared before me at Gisborne and the aforesaid Huru Cotter, the Deponent named and described in the annexed affidavit marked ("A") who, in my truth of the several statements, matters and thing mentioned and contained in the said affidavit, after the nature of the said affidavit had been fully explained to him by me, which he appeared perfectly to understand the same.....

e) Copy of Enduring Power of Attorney in relation to property dated 5 October 1993 by Russell Manahi Cotter who appointed John Ruea Cotter as his attorney, along with a declaration of non-revocation;

f) Copy of an application for exemption from furnishing a special valuation;

g) Copy of an application for partition dated 8 June 1993;

h) Copy of minutes from 93 Wairoa 88-90 dated 28 February 1995 where the Court made an order of partition of Tutaekuri B1B block; and

i) Copy of the partition order for Tutaekuri B13 block.

The Court records shows that:

9. Tutaekuri B13 contains an area of 8.797 hectares;

10. The applicant and his brother, Huatahi Cotter were ½ successors to their father, Haami Kaata or Sam Cotter at 84 Wairoa MB 151-152 on 19 March 1986 in the block Tutaekuri B1B.

11. At 93 Wairoa MB 88-90 dated 28 February 1995, the Court made two partition orders pursuant to section 289 of Te Ture Whenua Māori Act 1993 from the parent block, Tutaekuri B1B. Tutaekuri B13 was vested in Huru Cotter solely with an area of 8.797 hectares, and; Tutaekuri B14 was vested in Huatahi Cotter's children with an area of 9.330 hectares;

12. The applicant's agreement between parties indicated that the transferor was aware of how much shares he would be transferring to his nieces and nephews; the agreement marked "B" reads as follows:

> …….as tenants in common in equal shares part of my interests amounting to .428571 shares out of total shareholding of .500000 shares in each of the six children of his brother, Charles Manahi Cotter.

13. The agreement had been signed by the applicant, Huru Cotter and witnessed by Alan John Hall, a solicitor of the same firm Burnard Bull & Co Solicitors, Gisborne;

14. The transferees are currently the major shareholders in the block with 0.4285714 shares; and

15. The applicant currently has a balance of .0714286 shares.

Details of subsequent Orders affecting lands to which this application relates

16. On 2 July 2012, at 23 Tairāwhiti MB 160-163, the Court made an order vesting the applicant's shares in the block in the Teo Hami Kaata Whānau Trust.

Details of payments made as a result of the Order

17. There are no payments made as a result of the order

Reference to areas of difficulty

18. The applicant states in this application to the Chief Judge that the orders erroneously transferred significantly more shares than he intended under the agreement he made with the transferees. He also states he would never have transferred the number of shares he did if he knew the amount of shares transferred;

19. The applicant was living in Australia when the transfer occurred and relied on what he was told. He was not told of the full extent of his shareholding and would never have transferred the majority of his shares;

20. There was a mistake as to the effect of the transfer and the amount of shares;

21. He was misled as to the amount of shares to be transferred and the effect of that;

22. The nature of the transaction was misrepresented to the applicant and this misrepresentation was passed on to the Court as if he had agreed to it;

23. He only agreed to transfer a small part of his shares so that land could be set aside to protect the pito buried there. The pito has not been protected;

24. Paragraph 10 of the affidavit sets out the following:

> I have one daughter aged 40 who is living in Otaki New Zealand. I have retained an interest in the block so that my daughter will receive her shares in due course. I believe that it is in the best interest of the land that the land be transferred by way of gift to the transferees, who are my nieces and nephews through my brother Charles Manahi Cotter.

25. It is unclear from the Court record whether the applicant had discussed the transfer of his shares with his daughter and the effect of the transfer. The order complained of at folio 245 sets out the following:

> Court
>
> The other question I had was to ensure that he had spoken to his own children about the transfer, do you know whether he did?
>
> Peter Johnston

I understand he has one child paragraph 10 of his affidavit refers to that daughter. It refers to the transferor not transferring all his shares so that his daughter would effectively have a share in that block as well. I can't say for certain whether he discussed with his daughter, all I can say is that from the affidavit his mind certainly was that he had thoughts of his daughter at the time.

Notice of Intention to appear

26. On 8 August 2017, Counsel Curtis Bidois filed a notice of intention to appear upon the application opposing the application to the Chief Judge upon the following grounds:

    a) The vesting order was not erroneous in fact or law;

    b) There was no mistake or omission in the facts presented to the Court;

    c) The applicant was not misled or mistaken as to the amount of shares to be transferred; and

    d) The applicant has filed no evidence to displace the presumption that the vesting order was made lawfully.

Consideration of whether matter needs to go to full hearing

27. This matter needs to go to a full hearing. It is recommended that the matter be set down for hearing in Gisborne via AVL for Counsel Bennett to be given an opportunity to present further evidence and for Counsel Bidois to file in response.

Recommendation of course of action to be taken

28. If the Deputy Chief Judge is of a mind to exercise her jurisdiction, then it would be my recommendation that;

    a) The application be set down for hearing at the Gisborne Māori Land Court by audio visual link on **Monday, 25 February 2019 at 10.30am**;

    b) A copy of the Case Manager's Preliminary Report and Recommendation be sent to both Counsel Bennett for the applicant and Counsel Bidois for the respondents for any objections to the report prior to the hearing; and

    c) If any objections are received, then the matter be referred to the Deputy Chief Judge Fox for directions.

On 8 August 2017, a notice of intention to appear was on behalf of Counsel Bidois for the respondents (transferees), filed a memorandum seeking a timetable for applicant's evidence. The memorandum is summarised below:

i. Counsel requested timetabling directions for filing of the applicant's evidence; and
ii. The applicant has not produced evidence to prove that the order is erroneous

Submissions:

i. Counsel claims that the applicant has no success without evidence to prove there was an error in order complained of. Counsel quotes *Omnia Praseumutur Rite Esse Acta;*

ii. Counsel seeks direction the applicant to file and serve the evidence to prove the order was in error within 21 days and respondents to file in response within 21 days thereafter;

iii. Counsel has quoted and made references to s 44 and 45 of Te Ture Whenua Māori Act 1993 of the Chief Judge's jurisdiction at:

a) 23 June 2017 at 2017 Chief Judge's MB 499-566 Morrell v Waikaremoana Trust Board at paragraph 43-47;

b) Ashwell decision dated 2009 Chief Judge's MB 2009 at paragraph 15; and

c) Tau v Ngā whānau o Morven and Glenavy – Waihou 903 section 1X block at 2010 Māori Appellate Court MB 167 paragraph 61.

iv. Counsel Bennett in her email 23 August 2017 has no objections and is agreeable on a timetable once the preliminary report had been undertaken. This will require time for the applicant to provide further information.

On 22 January 2019, the Court directed:

1. Complete Preliminary Report and Recommendation and send to all parties for any objections:

2. The hearing to remain for 25 February 2019, unless Counsel is unavailable and agree to a different timetable for filing, and file such by consent subject to the Courts availability; and

3. The case manager to work in with Counsel of courts availability.

On 29 January 2019, the Courts directions of 22 January 2019, the case manager's preliminary report and recommendation, and the hearing date for 25 February 2019 at 10.30am in Gisborne was distributed to both counsel.

On 11 February 2019, a joint memorandum by Counsel was filed to an agreed timetable.

On 15 February 2019 at 2019 Chief Judge's MB 10-11 the Court directed:

i. The hearing set down in Gisborne on 25 February 2019 at 10.30am is cancelled pursuant to rule 3.8(1)(c) of the Māori Land Court Rules;

ii. Ms Bennett is to file and serve the applicant, Mr Huru Cotter's affidavit evidence no later than Friday, 8 March 2019;

iii. Mr Bidois for the respondents, to file and serve in reply no later than Friday, 22 March 2019; and

iv. Ms Bennett to file and serve any evidence in reply no later than Friday, 5 April 2019;

v. The application be set down for hearing on Tuesday, 23 April 2019 at 10.00am in the Gisborne Māori Land Court; and

vi. Counsel to serve their submissions to the case manager, Samantha Nepe no later than 15 April 2019.

Ms Bennett filed her submissions with the Court and Mr Bidois via email on 8 March 2019 and hard copy on 19 March 2019.

Counsel Bidois filed his submissions via email to Ms Bennett and the Court in response on 22 March 2019.

Ms Bennett filed on 5 April 2019 in response to Mr Bidois submissions of 22 March 2019 via email with a copy to Mr Bidois.

Procedural history

[5] On 28 January 2019, the Registrar's Preliminary Report and Recommendation was distributed to all affected parties for whom addresses were known.

[6] The application was heard before me in Gisborne on 23 April 2019 and evidence was given by parties.[3]

Position for the applicant

[7] The first affidavit referred to relates to the application before the Māori Land Court for vesting orders filed under s 164 of the Act. In that affidavit, dated 30 January 2001, the applicant stated at paragraph [9] that he believed that the "pito of the Transferees are buried on the land and that it is of special importance to them." He also indicated in paragraph [10] that he had one daughter living in Otaki, New Zealand, and that "it is in the best interests of the land that the land be transferred by way of gift" to the transferees.

[8] The applicant, in his affidavit prepared for these proceedings dated 7 March 2019, claims that he did not know before 2001 that Tutaekuri B1B had been partitioned into two parts. I note that the applicant and his brother, Huatahi Cotter, were equal successors to their father, Haami Kaata or Sam Cotter, ordered on 19 March 1986 in the block Tutaekuri B1B.[4]

[9] On 28 February 1995, the Court made two partition orders pursuant to s 289 of the Act in relation to the parent block, Tutaekuri B1B.[5] Tutaekuri B13 was vested in Huru Cotter solely (the applicant in these proceedings) with an area of 8.797 hectares, and Tutaekuri B14 was vested in Huatahi Cotter's children with an area of 9.330 hectares. I note that the Court was merely confirming orders, first pronounced as conditional orders

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3 2019 Chief Judge's MB 516-575 (2019 CJ 516-575).
4 84 Wairoa MB 151-152 (84 WR 151-152).
5 93 Wairoa MB 88-90 (93 WR 88-90).

by Deputy Chief Judge McHugh on 2 November 1993.[6] The evidence of the applicant was that he knew nothing about the partition. The minutes of the Court for the partition appear to verify this as he was not present at the hearing. Unfortunately, the partition file has not been located in time before the release of this decision. Staff have located the power of attorney he granted to his brother Charles Cotter (Charlie) dated 29 August 1988. I have seen this document as it is attached to the requisition for survey file held by the Court. It forms part of our record.

[10] The applicant claimed there was no discussion with him about the partition, noting that he would not have agreed to taking the hilly Tutaekuri B13 block, which was smaller in size than the Tutaekuri B14 block.

[11] The applicant deposed that he returned to New Zealand in December 2000 – January 2001. At the time, his brother Charlie was living next to Tutaekuri B13. The hill-top B13 block has pito buried there and he was shown where those places were. Charlie asked the applicant to give some land to his family (approximately 50 m^2 the applicant thought) so they could look after the pito buried there and bury future pito in the same place. The applicant claimed he trusted his brother and believed that the small area gifted would be fenced off. He submitted that he only ever agreed to give up a small piece of land, and he certainly did not intend to gift 18 acres. In explaining why he signed the papers, he claimed he did so without carefully looking at them.

[12] The applicant does not deny that he signed the relevant papers. His counsel, Ms Bennett, acknowledges that he did and that it is clear that the Court made no mistake or error. What the applicant does contend is that there was a mistake and omission in the presentation of facts to the Court, as he did not understand that he had agreed to gift so much land. He did not understand that he had gifted the majority of his shares. He did not receive independent legal advice and his shareholding was not explained to him on an acreage basis. The applicant claims he would have understood his shareholding had it been talked about in acres.

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6 91 Wairoa Minute Book 190-192 (91 WR 190-192).

[13] The applicant claimed that the papers he signed were a mistake made by him because he relied upon what his brother told him. The mistake led him to enter into the agreement. Thus, there was a mistake in the presentation of facts to the Court.

[14] Finally, the applicant claimed that he had raised the matter with the children of his brother, but they have refused to give shares back to him.

[15] The daughter of the applicant, Neisha Bernadette Robertson, also gave evidence. She added to her father's evidence that her uncle made it clear that he wanted his children to get shares in Tutaekuri B13 in the area where the pito were buried, as the area was tapu. She recollected that he was referring only to a small area where the pito were buried. She supported her father giving up the small area to her cousins on that basis. She claimed that there was no way she would have supported her father giving away 85 per cent of his shares.

[16] Counsel also argued that the facts indicate that the applicant would be able to establish a constructive trust in his favour in relation to the shares transferred and detailed submissions were made on when equity recognises such trusts.

[17] In terms of the evidence before the Court when the orders complained of were made, counsel acknowledged the Court made the proper inquiries regarding s 164 applications. She also acknowledged that the first affidavit made by the applicant for that hearing was correct. However, it is also clear from the evidence in these proceedings that the affidavit did not reflect the correct subject matter due to the mistake made.

Position of the respondents

[18] Evidence was given by John Ruea Cotter of Wairoa. He is one of the five respondents in this matter, all of whom are siblings. The applicant is their uncle. John's brother Rawiti uses Tutaekuri B13 as part of his farming operation. He submitted that when the land was first transferred, it had unpaid rates on it, part of which he acknowledged may have related to Tutaekuri B14 before the partition. His brother Rawiti now pays the rates on Tutaekuri B13. Rawiti has since paid for fencing and for helicopter spraying to clear blackberry and other weeds and has renewed the pasture.

[19] John clarified that the hill referred to as the pito area is named Pukewai and is directly behind his parents' home at Rangiahua. From the top you can see all the landmarks of the family hapū, Ngāi Tama-te-rangi, namely the "Waiau River, across to Panekire at Lake Waikaremoana, the Matakuhia Range, and around to Wairoa".

[20] John and his siblings do not accept the evidence of his uncle that he was acting under a mistake. He believes that, at the time, his uncle was fully aware of what he was doing. He produced a letter written by his uncle on 31 January 2001. The letter was written when the applicant was in New Zealand for his brother's tangi. Richard Cotter (brother of the applicant) died on 24 January 2001 and was buried on 27 January 2001. The application for the vesting orders is dated 30 January 2001 and John considers that the letter from his uncle was written the following day.

[21] John believes that the transfer of shares was made for reasons other than protecting the pito. In John's view, the letter demonstrates that the applicant understood that he was transferring the majority of his shares and that he would retain a small percentage to pass on to his daughter and her children.

[22] John contends that the applicant transferred his shares knowingly and quite deliberately, out of "love and affection" and to be certain that the land would be retained and looked after for future generations, including for his own mokopuna. John claimed there was never any mistake or misunderstanding on the applicant's part.

Position for the applicant in reply

[23] The applicant noted that he receives no rental from his nephew Rawiti for the use of the land. He does not recall being asked to pay rates arrears. He submitted that he never agreed to transfer his shares in Tutaekuri B13 to any of his nieces and nephews – either because of rate arrears or because they could farm the land.

[24] Under cross-examination, the applicant noted that he was 80 years of age. He left his home prior to his 21st birthday. He only returned to New Zealand when he was 76 years old, after living in Australia for most of his life, from 1968. During his time in Australia he worked as a plant operator.

[25] After hearing all of the evidence, I reserved my decision.[7]

The Law

[26] The Chief Judge's jurisdiction to amend or cancel an order of the Māori Land Court is set out in s 44(1) of the Act:

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

[27] The principles that are applied to s 45 decisions have been previously set out in numerous decisions made by the Chief Judge and myself. These are to be found in the judgments *Ashwell - Rawinia or Lavinia Ashwell (nee Russell),*[8] and in *Tau v Nga Whanau O Morven and Glenavy - Waihao 903 Section IX Block.*[9] I do not propose to repeat those principles again in this judgment.

[28] However, for the benefit of the parties, I note that s 44 explicitly refers to situations where the Court has made an incorrect decision due to a flaw in the evidence presented, or in the interpretation of the law, and it is necessary in the interests of justice to correct its record. For this reason, s 45 applications must be accompanied by proof of the flaw identified, either through the production of evidence not available or not known of at the time the order was made, or through submissions on the law.

Issues

[29] The issues to determine in this case are:

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7 2019 Chief Judge's MB 516-575 (2019 CJ 516-575).

8 *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)* [2009] Chief Judge's MB 209 (2009 CJ 209).

9 *Tau v Nga Whānau O Morven and Glenavy – Waihao 903 Section IX Block* [2010] Māori Appellate Court MB 167 (2010 APPEAL 167).

(a) Whether there was a mistake in the presentation of facts to the Court; and

(b) If so, is it necessary in the interests of justice to remedy the mistake or omission.

Was there a mistake or omission in the presentation of the facts of the case to the Court?

[30] The principle of *omnia praesumuntur rite esse acta* (everything is presumed to have been done lawfully unless there is evidence to the contrary) is one of the key principles to be considered when hearing s 45 applications. In the absence of a patent defect in the order, there is a presumption that the order made was correct.[10]

[31] This approach to s 45 applications was affirmed in *Rameka – Papamoa 2 Sec 2B3C3B1*, where the applicant asked the Court to cancel a vesting order on the basis that he did not understand he was transferring his shares in Papamoa 2 Sec 2B3C3B1 to his nephew.[11] The applicant provided a medical certificate advising he had profound hearing loss in both ears and difficulty communicating. Chief Judge Isaac considered this did not mean he did not understand what he was doing when he agreed to the transfer of shares at the 2005 hearing. The Court record showed he signed the application initiating the vesting order and the accompanying consent form. The Judge cited the *omnia praesumuntur rite esse acta* principle and dismissed the application, stating:

> [13] In my view the applicant clearly knew what he was doing and advised the Court accordingly. It seems that his circumstances may have changed, and he has now changed his mind and no longer wishes his nephew to have the shares.
>
> [14] This change of mind does not substantiate that the Court order was made in error or that there was an error in the presentation of the facts of the case to the Court.

[32] In another case *Rudolph – Paihia 2F2B2*, Mr Rudolph claimed that an order vesting shares (from his parents to his sister) was incorrect due to a mistake, error or omission in the presentation of the facts of the case to the Court, as the amount of shares transferred to

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10 *Grant v Raroa – Ngamoe A1B1B* (1993) 33 Tairawhiti Appellate MB 35 (33 APGS 35) as summarised in *Ellis - Matapihi No 1B No 2C No 2D* [2010] Chief Judge's MB 25 (2010 CJ 25) at [14].

11 *Rameka – Papamoa 2 Sec 2B3C3B1* [2016] Chief Judge's MB 457 (2016 CJ 457).

his sister were more than his parents intended.[12] Mr Rudolph claimed his parents always intended that their four children would each take seven shares equally in Paihia 1F2B2.

[33] In that case, Mr Rudolph's parents signed the application before a solicitor in 1984 and there was agreement by the transferee. No appeal was lodged against that order. Some of the shares were returned in 1993, but again no appeal was lodged. The Court commented that both parents are now deceased and that they and the respondent were the only ones who understand what was said or done in 1984. The applicant could not prove that the respondent misled her parents. The Court determined that the principle of *omnia praesumuntur rite esse acta* applied, and concluded:[13]

> Therefore, in the absence of a patent defect in the order, there is a presumption that the order made was correct. On the face of the Court record, there was no mistake or omission on the part of the Court or in the presentation of the facts of the case to the Court, and the applicant has been unable to prove otherwise.

[34] Thus, the principle of *omnia praesumuntur rite esse acta* applies unless the applicant in this case can demonstrate that there was a patent defect in the order made.

Discussion

[35] Whether there was a mistake or omission in the presentation of facts to the Court can indicate there is a patent defect in the order made. Counsel for the applicant submitted that I should apply the ordinary and plain meaning of the word "mistake" as defined in the Concise Oxford Dictionary, namely: "a misunderstanding of a thing's meaning; thing incorrectly done or sought through ignorance or inadvertence".[14]

[36] In this case, counsel contended the applicant was induced into signing the documents agreeing to vest a small amount of his land interests in Tutaekuri B13 to protect the pito of the whānau. The transfer of a modest interest was, she contended, a material factor to the applicant. As a result of the representations made to him, he signed documents containing the mistake. The mistake in the presentation of the facts to the Court was comprised of the documentary mistake, or in other words, the applicant was mistaken as to the meaning and effect of the documentation signed by him. He was

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12 *Rudolph – Paihia 2F2B2* [2019] Chief Judge's MB 327 (2019 CJ 327).
13 At [15].

requested to make the transfer so that the pito could be protected. Through his ignorance, he relied upon the oral discussions with his wider whānau and signed the documentation, which he believed was consistent with those discussions. Counsel further contended that the existence of the mistake was either known to the transferees or all parties were influenced in their respective decisions by the same mistake – the mistake being the amount of shareholding in the block to be transferred. It is the applicant's case that the transferees knew of the mistake as they were engaged in land matters while he was not. He was resident in Australia and said he was "foolish not to take a greater interest".

[37] I note that counsel for the applicant also submitted that analysing the ability of the applicant to make a claim for relief under the contractual mistakes legislation can assist in determining whether or not a mistake had been made in the current proceeding. She pointed to the Contractual Mistakes Act 1977 where s 2 defined a mistake as a "mistake, whether of law or fact". A mistake of law included a mistake in the interpretation of a document. She noted the Contractual Mistakes Act 1977 has been repealed and replaced with the Contract and Commercial Law Act 2017. Section 23 of the 2017 Act continues to use the same definitions for the word "mistake". The new legislation sets out when parties to a contract can use these mistakes to apply for relief as per s 24, subject to the exceptions provided in ss 25-26.

[38] Counsel relied on the authority of *Johnstone v Johnstone* which states: [15]

> [18] There is a mistake of fact when a person has a mistaken belief as to the past or present facts or state of affairs. Where a person is under a mistake of fact, it should be possible to state at the time whether a belief as to a state of affairs is correct or not. …

[39] Counsel also submitted that the applicant was induced to enter into this arrangement, which she claims is a contract. She says the transfer of shares, once completed, resulted in an unequal exchange of values and the conferment of benefit which was in all the circumstances a benefit substantially disproportionate to the consideration. In this case the applicant did not agree to giving up 85 per cent of his shares in the land by way of gift with nothing in exchange. As a result, the documentation was entered into

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14 J B Sykes (ed) *The Concise Oxford Dictionary* (7th ed, Oxford University Press, Oxford, 1982) at 648.
15 *Johnstone v Johnstone* [2018] NZHC 1541.

under a mistaken belief. Counsel considers there was a breach of contract or promise with the transferees.

[40] I do not consider that these provisions from the Contractual Mistakes Act 1977 and the Contract and Commercial Law Act 2017 assist the applicant because there was no contract and there was no consideration paid. This was purely a gift and it was recorded as such between the parties.

[41] I make this finding because all the parties agree that the documents before the Court in 2001 were correctly signed by Huru Cotter. It is not in dispute that he signed the documents at a solicitor's office in Gisborne. The affidavit, for example, was initialled and signed by the applicant on 30 January 2001 and the relevant parts of it state that:

> …
>
> 2. That I understand the nature and implications of the Application by myself to the Transfer by way of gift part of my Māori Land Interests in Tutaekuri B13 Block to the Transferees.
>
> …
>
> 5. That the transfer is to give effect to an arrangement between myself and the Transferees.
>
> 6. That annexed hereto and marked with the letter "A" is a copy of my Application for Vesting Order dated the 30th day of January 2001.
>
> 7. That annexed hereto and marked with the letter "B" is a copy of the said agreement and signed by myself on 30th January 2001.
>
> …
>
> 9. That I verily believe that the pito of the Transferees are buried on the land and that it is of special importance to them.
>
> 10. That I have one daughter aged 40 who is living in Otaki New Zealand. I have retained an interest in the block so that my daughter will receive her share in due course. I believe that it is in the best interests of the land that the land be transferred by way of gift to the Transferees, who are my nieces and nephews through my brother Charles Manahi Cotter.

[42] Also filed was a solicitor's certificate in which the solicitor states he saw the applicant in person, he fully explained the nature of the supporting affidavit he was signing, and he confirmed the applicant seemed to perfectly understand the affidavit.

[43] The application (initialled on each page and signed) filed under s 164 and dated 30 January 2001, indicates that Huru Cotter agreed to transfer, in accordance with the agreement between the parties, 0.428571 shares out of a total shareholding of 0.500000 shares in the Tutaekuri B13 block to Rawiti Matene Richard Cotter, Russell Manahi Cotter, Pukehuia Catherine Cotter, John Ruea Cotter, Sharlene Matekino Cotter and Reina Winifred Cotter in equal shares. The agreement attached to the application and dated 30 January 2001 (initialled and signed by Huru Cotter) states the transfer is to be "by way of gift" and that the transferors agreed to accept the transfer "by way of gift".

[44] The documents are clear and unambiguous. They indicate that this transfer was a gift. It was not enforceable at the time it was entered into because it could not be effected until an order of the Māori Land Court had been made. At any time before then it could be revoked. No consideration was required, there were no mutual obligations created and there has been no issue raised as to competency, other than the applicant claiming to be ignorant of such matters. That in itself is not sufficient to sustain the argument that there was a contract.

[45] Under cross-examination, the applicant could not explain why the letter from Burnard Bull attached as an exhibit clearly indicated that he was gifting the shares: [16]

> **C Bidois:** Mr Cotter I would like you to go to my clients' affidavit exhibit B?
>
> **H Cotter:** Yes.
>
> **C Bidois:** That is a letter from Burnard Bull.
>
> **H Cotter:** Yes.
>
> **C Bidois:** The final sentence in paragraph 2 of that letter. So, if you go to the second paragraph the final sentence reads, "Huru also made it clear that he now did not wish to gift all his shares, preferring to keep some shares for himself to pass onto his daughter who lives in Otaki."
>
> **H Cotter:** Yes well I'll tell you what. That parcel of the discussion was very, very vague and extremely vague. My mokopuna was with me in that meeting and all this was, it was only as you say who was there within that room was one other, Mark and myself. Who was the one other? Well it says name mentioned here. Alan is it? Right, yes.
>
> **C Bidois:** Ra was not with you on that day was he?

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16 2019 Chief Judge's Minute Book 516-575 (2019 CJ MB 516-575) at 540-541.

H Cotter: His father was in the office with I think it was with Wilson and Ra. I think was out on the street somewhere or something or might have been there. My brother was in next door in the office.

C Bidois: Look I am putting this to you. I am duty bound to put this to you. In fact, this last sentence in paragraph 2 indicates that you had started off with the intention of transferring all the shares and then when you arrived at Burnard Bull you changed your mind about that and you decided to keep some back as a gift for your daughter. Now that is what really happened is it not?

H Cotter: Now, well look it seems to me it's confusing. It's not, was not my intention of what's here is, to me is foreign because it definitely was not my intention. I am sorry but that's what I mean. There were three of us in that room, my mokopuna who is sitting there, me and this other fella.

C Bidois: Now one of the things that John will say in his evidence or has said in his evidence is that the land is now divided in eight ways, eight equal portions and that he and his siblings and Neisha they are equal shareholders although Neisha's shares are in the whānau trust. But yet they were all going to be equal shareholders as though they were all siblings. Now that is what he puts in his affidavit and I am putting it to you that that was your intention on this day 13th of January?

H Cotter: Incorrect. Incorrect.

C Bidois: Are you saying therefore that the lawyer who wrote this letter was this is a fabrication that the lawyer was?

H Cotter: Kao. I was, I was not aware. This to me is, is not my, was not my intention. I assure you of that, that wasn't the intention.

C Bidois: And I am going to put this to you respectfully that is in hindsight is it not? That is a reconstruction?

H Cotter: No, no, no, no. Could 12, 20 acres of freehold land would I give that away when I have mokopuna of my own?

[46] Under re-examination he stated that: [17]

C Bennett: Whose lawyer was the firm of Burnard Bull?

H Cotter: I think my brother's.

C Bennett: So, on the 30th of January, you went there and signed some paperwork?

H Cotter: Yes.

C Bennett: Who made that appointment?

H Cotter: My brother, Charlie.

C Bennett: You didn't ring up?

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[17] 2019 Chief Judge's Minute Book 516-575 (2019 CJ MB 516-575) at 545-546.

H Cotter: No, of course not. It wasn't me.

C Bennett: So, you don't know what the lawyer, that you went there was expecting you to be there for?

H Cotter: No, I didn't know.

The Court: Well hold on, he said he thought Wilson was there.

C Bennett: Yes.

The Court: Yes. So, who is Wilson?

H Cotter: Isaacs.

C Bennett: Yes.

The Court: So, he knew the lawyer?

C Bennett: Oh yes, no he knew the firm. But my point of that is that there is an inference that Mr Cotter phoned or rang or said, "I was doing something," then changed his mind. So, my question is to say, who made that appointment? Who went there? So, the interpretation of Mr Johnston's letter could of course be quite completely different to the inference that was put to Mr Cotter by my friend. So just to be clear, you did not ring up Burnard Bull and make the appointment?

H Cotter: Definitely not.

C Bennett: Thank you for that.

[47] From the evidence and these exchanges it is clear that the applicant gifted these shares. Peter Johnson of Burnard Bull was the solicitor for the Cotter whānau and he records this in his letter to the family. When the applicant attended at that office, Mr Alan Hall (an independent solicitor) explained the content of the documents that he was to sign. This was explained by the applicant during cross-examination. When this meeting took place with Mr Hall, only the applicant and his mokopuna were in the room alone with him. There could have been no influence from the respondents or their father at this point.

[48] Thus, the applicant pursued this arrangement as a gift, of which there was eventual possession and acceptance. He did this because he believed that the "pito of the transferees are buried on the land and that it is of special importance to them". At the time, he noted he had one daughter living in Otaki, New Zealand, but that "it is in the best interests of the land that the land be transferred by way of gift" to the transferees – they being the respondents for the proportions listed. Reference to the decision of *Johnstone v Johnstone*

does not assist because there was no contract. The applicant was independently advised by a solicitor before he signed all the relevant documentation.

Was there a constructive trust?

[49] That raises the question of whether the facts give rise to a constructive trust or whether a remedial constructive trust should be ordered?

[50] Counsel for applicant contended that her client was promised that only shares equivalent to the size of land needed to protect the pito would be transferred. He acted in reliance on this by signing documentation which upon later analysis was far in excess of what the applicant believes would be required to protect the pito. Counsel for the respondent submitted that the applicant provided no sufficient objective evidence to support the allegation that the shares were transferred under the influence of mistake or misrepresentation. On that basis, there is also no constructive trust.

[51] In *Piahana v Makea – Estate of Philip Makua Makea*, a 2016 decision pursuant to s 45 of the Act, the nature of constructive trusts was considered.[18] That decision followed *Morrison v Trustees of the Trevor and Dina Maxwell Whanau Trust – Arataua A*, where the Māori Appellate Court stated:[19]

> **Types of trust**
>
> [18] Counsel contended that Adelaide Maxwell held the legal title for the whānau of Temuera Morrison as the equitable and beneficial owner and that it would be an unjust enrichment, against equity and good conscience to allow the retention of the property by the holder of the ostensible legal title. Counsel referred us to the explanation of the term remedial constructive trust in the Court of Appeal decision in *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh*. The Court of Appeal described three types of trust as follows:
>
> > ...for present purposes, these three types of trusts can be described as follows. An express trust is one which is deliberately established in which the trustee deliberately accepts. An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the Court simply recognises in a declaratory way. A remedial constructive trust is one which is imposed by the Court as a remedy in circumstances where, before the order of the Court, no trust of any kind existed.

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18 *Piahana v Makea – Estate of Philip Makua Makea* [2016] Chief Judges MB 977 (2016 CJ 977).

19 *Morrison v Trustees of the Trevor and Dina Maxwell Whānau Trust – Arataua 5A* [2013] Māori Appellate Court MB 189 (2013 APPEAL 189).

> The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises upon the happening of the events which bring it into being. Its existence is not dependent on any Order of the Court. Such order simply recognises that it came into being at the earlier time and provides for its implementation in whatever way is appropriate. A remedial constructive trust depends for its very existence on the Order of the Court; such order being creative rather than simply confirmatory. This description should not be regarded as definitive or as precluding further developments in this area of the law when greater refinement may be necessary.
>
> The question of existence and certainty of subject-matter has to be viewed in a different light in the case of a suggested remedial constructive trust. As indicated at the outset, this kind of trust does not exist until the Court imposes it. This all that is necessary, from the point of view of subject-matter, is for there to be some asset or assets in the defendants hands in respect of which the Court considered it appropriate to impress a trust in favour of the plaintiffs…But before the Court can contemplate declaring that assets owned in law by A should by way of remedy, be held by A in trust for B, there must be come principled basis for doing so, both vis-à-vis A and vis-à-vis any other person who has a proper interest in the subject matter which would be affected by the imposition of the trust.

[19] In that decision the Court of Appeal had no need to consider further the Court's power to impose a remedial constructive trust noting that whether such power exists in New Zealand, and if so on what basis and in what circumstances, can await another case in which those issues necessarily arrives.

[20] In *Commonwealth Reserves I v Chodar*, Glazebrook J considered that there must be a principled basis for the imposition of a remedial constructive trust. She noted that:

> There appear to be two potential triggers for the exercise of the Court's discretion to grant a remedial constructive trust. One is unjust enrichment. The other is unconscionability.

[21] The appellants must therefore demonstrate that there has been unjust enrichment or unconscionability that favours the finding of a remedial constructive trust.

[52] The applicant in this case must also demonstrate that there has been unjust enrichment or unconscionable behaviour on the part of the transferees or their spokesman – Charles Cotter. In this regard the evidence is limited. What is known is that the applicant made no contributions to the land either directly or indirectly. He only expected an interest in the shares he retained. Neither did he make demands for a proportion of any income from the balance of Tutaekuri B13. I note when the land was first transferred, Rawiti paid the unpaid rates on the land, paid for fencing and helicopter spraying, and had renewed the pasture. Conversely the applicant was never asked to contribute, either for rates or otherwise and when the block was under his ownership, he never received any rent. Although arguments on these points can be made both ways, I consider that none of these

factors alone demonstrate that there has been unjust enrichment or unconscionability that favours the finding of a remedial constructive trust.

[53] What is at issue is the applicant's claim that he received a promise that only the area for the pito was to be transferred. Counsel for the applicant pointed to the *Laws of New Zealand* where a promise is described as follows: [20]

> Where one party has made a clear and unequivocal promise or assurance by words or by conduct to another party which was intended to affect the legal relations between the parties and to be acted on accordingly, then once the promisee has taken the promisor at his or her word and acted on the promise, the promisor is bound by it.

[54] The full argument here was that the applicant's belief or expectation was encouraged by clear and express statements by his brother Charlie (on behalf of the transferees) that an interest in the block was sought to protect the pito. The applicant acted in reliance on that belief or expectation and met with a lawyer (at the behest of his brother) to sign the documentation. As a result, the applicant suffered detriment. The applicant, it was stated, never agreed for the transferees to have equal shares with his daughter and it was her evidence that, while she knew about the transfer of shares, she did not understand 85 per cent of the shares would be transferred. She would not have agreed to that. The applicant also claims this is not a case of simply changing his mind. This is not a case where he did not understand what he was doing, rather it is one where he misunderstood what he was giving. Therefore, it was submitted, it would be unconscionable for the transferees to remain owners of the shares transferred in light of the mistake, creation and encouragement of his belief and expectation. Finding in favour of the applicant would also be consistent with the Preamble ss 2 and 17 of the Act and it would be in the interests of justice to cancel the orders approving the s 164 vesting and a restoration of his original shareholding.

[55] This promise rests on the discussion the applicant had with his brother Charlie, who is now deceased. The meeting where he alleges the promise was made occurred between December 2000 and January 2001. I note paragraph [19] of his affidavit of 2019 indicates that there are a number of burial areas on the family land and because of that he was not surprised that there were pito buried on the hilltop. During questioning, the applicant

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[20] *Laws of New Zealand* Promissory and Proprietary Estoppel (online ed) at [68].

stated that he initiated the visit with his brother and both he and his daughter explained what happened during that visit. The relevant part of the minutes of the Court recording his evidence are reproduced below: [21]

> **C Bidois:** When I asked you earlier why you had visited your brother Charles you said to me and I made a note of it, your answer was, "To say g'day," you visited him to say g'day, but you had been on the paepae with him for three days prior to that.
>
> **H Cotter:** I always visited – I mean yes, of course, that's all right, I find nothing strange about that visiting my brother.
>
> **…**
>
> **H Cotter:** No, no. I went – okay, let's get back to when I went up to see Chas, went up there, Neisha was with me, my daughter was with me and the discussion was, it was about the pito, about the block. I wasn't quite aware of how much was involved to be honest with you and the pito came up and it was agreed that we would, you know, section off a bit or whatever was involved. These I refer to the shares is over the few shares that I had left to be transferred, or some of them to be transferred to Neisha, that was the crux of it. The discussion was with Chas was there wasn't anything – he brought up the subject of a pito, that's what it was.
>
> **C Bidois:** So, I put it to you that when you read this letter, this letter indicates that you had already decided to gift B13 to my clients?
>
> **H Cotter:** No, no. I am very clear on that.
>
> **C Bidois:** And that when you informed my client's father, he would've been overjoyed because of the pito that was on that block?
>
> **H Cotter:** He was still arguing about the pito. I said, "Yes, it's okay." He had – it's nothing to do with – it was those shares, I'm referring in this letter. I'm sure my daughter will confirm, as to the shares of Tahora, which weren't many.
>
> **C Bidois:** So, it was my client's father who introduced the idea of the – who informed you about the pito being on the land?
>
> **H Cotter:** Ah, that's right, by the way that's the first time I've ever heard of it.
>
> **C Bidois:** But I'm putting it to you that you had already decided to make the gift of shares before you learned about the pito?
>
> **H Cotter:** No shares, I was not aware of any shares. But the pito, yes, of course he put that proposition through, I said, "Oh well fair enough," it was for pito. He didn't tell me there was so many X amount of shares in B13 and to give them X amount or whatever it was. No way that discussion didn't come up. It was very, it was – he didn't want to go into a lot of detail to be honest with you.
>
> **C Bidois:** So, he didn't actually ask you for any specific amount of shares?
>
> **H Cotter:** No, definitely not.

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[21] 2019 Chief Judge's Minute Book 516-575 (2019 CJ 516-575) at 538-539.

[56] The applicant's evidence that only a "bit" of the hill was to be sectioned off is to be compared with what the applicant's daughter said:[22]

> **C Bennett**: … So, there was an exchange that you would have heard just before your father finished giving evidence about what knowledge you may have had about the transfer of shares.
>
> **N Robertson:** Yes.
>
> **C Bennett:** And in Tutaekuri, so not Tahora or anywhere else, but Tutaekuri B13.
>
> **N Robertson:** Mhm, yes.
>
> **C Bennett:** Can you just tell us about your knowledge of that please?
>
> **N Robertson:** Yes, I was present at a meeting with Uncle Charlie on the hilltop with my dad and my son. They had discussion and Uncle was describing the significance of the hill behind me, how sacred it is because of the pito that is buried there and they were talking about how long it had been in the family and that, giving me the history of where that came from, for that situation, the discussion had come up regarding the initially dividing up, so to speak, of what was happening, of what was happening with that particular hill. So, I wasn't aware of it prior to that, because I knew that Dad, my understanding was that my dad and my other uncle had had half each of that particular, as I was aware initially.
>
> **C Bennett:** And can you recall in what time period around what year this discussion was?
>
> **N Robertson:** In 2001 after Uncle Dick had passed away. Dad was visiting at the time. He had come over from Australia for that. We were living in Ōtaki at the time with my family and then we came down for the tangi and then it was after the tangi had completed that Dad came and got me and said, "Uncle Charlie wants to see you," so I went with him to this meeting.
>
> **C Bennett:** And this is when you were given the history of the hill and pito?
>
> **N Robertson:** Yes, because John was present at the same time as I.
>
> **C Bennett:** And from there, you understood that your father had agreed to transfer some shares to your cousins?
>
> **N Robertson:** Yes, correct, I understood that, yes.
>
> **C Bennett:** And did you understand why these shares were to be transferred?
>
> **N Robertson:** I understand why – not fully, no, but I was just listening to what I was told and just doing as I was told what was happening, so that is where I was at, at the time.
>
> **C Bennett:** And do you recall any discussion about the number of shares or an equivalent land area?

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[22] 2019 Chief Judge's Minute Book 516-575 (2019 CJ 516-575) at 549-550.

N Robertson: No.

[57] So according to Ms Robertson, the discussion that took place with Charlie was about Tutaekuri B13. It was about the significance of the hill and how sacred it was because of the pito that were buried there. The hill area was to be divided. This is to be compared to what her father said when he claimed that only a "bit" of it was to be set aside. Despite this inconsistency between the witnesses, their evidence in chief and cross-examination did consistently demonstrate that they both understood that the land was to be gifted and that in doing so the gift would protect the pito. Their recollections concerning the gifting and the pito are also consistent with the contemporaneous documents filed in the Māori Land Court. What the evidence does not do, is establish that the applicant was promised that only an area needed to protect the pito would be gifted. After all, the detail of the gift was still to be recorded.

[58] I turn now to the applicant's letter dated 31 January. Under questioning, the applicant agreed that the letter was probably written in January 2001. The letter is reproduced below:[23]

Otaki

Wednesday, Jan 31

[Tena] koe John,

Firstly, the block that's been transferred as you will be now aware, [t]he reason is twofold.

1 My brother & Stella who I dearly love, as you are aware Haroto was my second home.

2 You & Ra who are contributing to Tamaterangi in a very significant way, the work, time, passion, integrity, and purpose for the Tamaterangi whanau

For these two reasons only and not the one that my brother espouses to.

Secondly my daughter Neisha, there is no doubt that she is my daughter. … Having said that I have made a will so that she inherits my shares etc, not that its much but at least what is there will be my moko's. To this I hope you will expedite the transfers that she requires. I know it is very little but it will establish them as part of Tamaterangi. John this is important to me as you understand.

I would [have] liked to have spoken to you personally but I had to speak to my brother first. I know I had the opportunity on the marae but the discussion between Chas & I had to be first and at Haroto.

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[23] Affidavit of John Ruea Cotter dated 22 March 2019, Exhibit A.

> Funerals are inevitable but we must deal with them in our own way which I have difficulty with.
>
> Dick of course held you in high esteem as I do also and how you have grown up to lead our family in this new millennium. To you & Ra rests that transition of this generation to the up and coming next. We have a good whanau and hopefully we will all work together to make it better.
>
> As history, and the future will show the mantle will rest upon you two, after my brother joins the rest of our line.
>
> John this is a personal letter to you to which the mana has surfaced and your grandfather and past kaumatuas will be exceedingly proud.
>
> To you, Ra, Pukehuia and the rest ka nui nga aroha.
>
> Your Uncle - Huruhuru Te Manu Karere Cotter

[59] In my view, the first paragraph is clearly a reference to Tutaekuri B13. It also indicates that the applicant wanted to gift the majority of his shares in the block to the respondents, even if he did not specifically state the number of shares he wanted to keep or from which block he wanted to gift those shares. He only ever intended to retain a small number of shares for his moko. I also note the date of the letter is linked in time to the signing of the s 164 application for Tutaekuri B13.

[60] The applicant claimed the reason he wrote the letter was because the family had disputed that Neisha is his daughter. His letter was written to 'mihi' to his family and to acknowledge the hard work they had done in the past and what the younger generation would do in the future. That is also clear from the first paragraph.

[61] However, the applicant claimed that the letter was only about shares he owned in a Tahora block and not in Tutaekuri B13. I did not find his evidence convincing on this point, primarily because of the wording of the letter. His letter records:

> Having said that I have made a will so that she inherits my shares etc, not that its much but at least what is there will be my moko's. To this I hope you will expedite the transfers that she requires. I know it is very little but it will establish them as part of Tamaterangi.

[62] He does not mention what block or blocks he is referring to. It is more likely that the sentence addressed whatever shares in whatever lands he would have left upon death, whether held in Tahora or Tutaekuri or any other block. I find this because, in 1988, Huru Cotter transferred 740 shares in Tahora 2C1 Section 3 Incorporation to Rawiti Cotter.

Huru Cotter retained 435 shares in that Incorporation. John Cotter is the secretary of the Incorporation and the letter is addressed to him. There is also an element of inconsistency with this evidence because the applicant claimed that he thought the amount of shares that should have been transferred was only 10 shares, whereas 740 shares were transferred to his nephew. He also claimed that he had not received any dividends despite another alleged agreement made, that he would.

[63] Having addressed the evidence, I find that there is no evidence of a promise made that would justify finding that the respondents had been unjustly enriched. I note that the case for the applicant was that he:

(a) Did not know he was the owner of Tutaekuri B13 as he did not know the land was partitioned;

(b) Did not think in shares when he discussed gifting his interests in Tutaekuri B13 with Charlie in December 2000-January 2001;

(c) Did not agree to give so many shares in Tutaekuri B13 despite having it explained to him by an independent lawyer;

(d) Was misled by that lawyer, or alternatively, the nature of the gift was not fully explained to him;

(e) Did not know 740 of his shares in Tahora 2C1 Section 3 Incorporation were transferred – rather than the 10 shares he claimed he agreed to;

(f) Did not pursue any attempt to follow up on any agreement to pay dividends for his interests in Tahora 2C1 Section 3 which he alleges he was promised.

[64] To find in his favour would require accepting his account of events to be correct, when there is no independent evidence to substantiate these claims made. It would implicate his brother Charlie, who is deceased. Yet there is no evidence that a promise was made leading to unjust enrichment. Nor is there any independent evidence of unconscionable behaviour. It would also implicate highly respected lawyers. In my view,

and contrary to his claims, all the independent evidence verifies that he knew or should have known the full nature and extent of this gift.

[65] Therefore, I find there was no mistake in the presentation of facts to the Court and it is not necessary in the interests of justice to make an order.

Decision

[66] Having regard to the above, I decline to exercise my jurisdiction under s 44 of the Act. The application is dismissed.

[67] The Case Manager is directed to distribute a copy of this decision to all parties.

Pronounced at 4.00 pm in Gisborne on Friday this 6th day of September 2019.

C L Fox
DEPUTY CHIEF JUDGE