IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA292/2020
[2022] NZCA 38

BETWEEN	ROBERT MATTHEW URLICH Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	1 June and 20 August 2021
Court:	Kós P, Miller, Cooper, Clifford and Gilbert JJ
Counsel:	P M Hoskins and J K Harper-Hinton for Appellant N C Anderson and N G Julian for Respondent M J Sharp for Zhan Urlich
Judgment:	4 March 2022 at 3 pm

JUDGMENT OF THE COURT

A Leave is granted to the respondent to adduce further evidence.

B Leave is granted to Zhan Urlich to adduce further evidence.

C The appeal is dismissed.

D There is no order as to costs.

REASONS OF THE COURT

(Given by Kós P)

Table of Contents

[1] Robert and Zhan Urlich are descendants of two brothers, Simon and Richard Urlich, who in 1953 gifted land on the Karikari Peninsula, Northland, to the Crown for use as a Māori school. The school closed in 2016 and the land is being offered back to former owners or successors under the Public Works Act 1981. Simon and Richard have died. Robert, Simon's son, was not offered the land because he was not the residuary beneficiary under his father's will. Zhan, Richard's grandson and Robert's first cousin once removed, is the residuary beneficiary under Richard's will. The land was offered to him alone.

[2] Robert protests. He says he too is the successor of a person from whom the land was acquired under s 40(5) of the PWA. He lodged a caveat over the land. Application was made to the Registrar that the caveat lapse. Robert then applied for an order that his caveat not lapse, under s 143(4) of the Land Transfer Act 2017.

[3] Associate Judge Andrew held it was not reasonably arguable that Robert is a "successor" given the terms of s 40(5) and prior case law. Accordingly, the caveat would lapse, but the Judge made interim orders sustaining the caveat pending appeal.

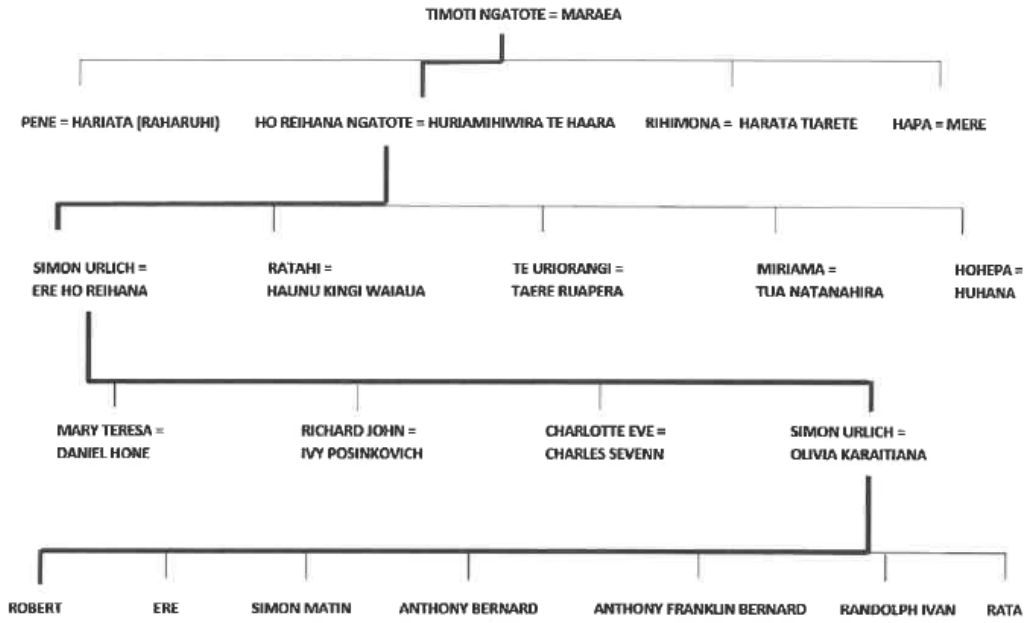
[4] Robert now appeals. An attempt to leapfrog this Court by appealing directly to the Supreme Court was refused by that Court.

[5] At the hearing on 1 June 2021 we raised with counsel the potential, alternative application of s 134 of Te Ture Whenua Māori Act 1993. We also suggested the need for Zhan to be represented.

[6] At the resumed hearing on 20 August 2021, Mr Sharp appeared for Zhan. In essence, Zhan's position is that he would be happy if the land was split 50/50 between Simon's whānau and himself (as Richard's successor). Indeed, he states in his affidavit that if the land is transferred to him by the Crown, he will retransfer half of it to Simon's whānau.

Background

[7] Robert and Zhan are of Ngāti Kahu descent. We will start with their whakapapa, so far as we have evidence of it:



Not shown above is that Zhan is the son of Marlaine Urlich, Richard's daughter.

[8] The land concerned is 1.82 ha of general land on the Karikari Peninsula, being part of the Parakerake No 576N block and first sold into European ownership in 1872 after investigation by the Native Land Court. The Parakerake block was originally purchased by Simon and Richard in 1952. In 1953, part of the Parakerake block was gifted to the Crown to be used for a Māori school, Rangiāwhia Māori School and later Te Kura Kaupapa Māori o Rangiāwhia. Although gifted in substance (in exchange for one shilling), in legal form it was taken by proclamation made under the Public Works Act 1928. The remainder of the Parakerake block was sold to a development company in March 1954.

[9] Simon died in November 2002. His wife, Olivia, Robert's mother, died in December 2010. The property was not the subject of any express bequest in Simon's will. That means that had the property been in Simon's ownership at the time of his death, it would have passed as part of his residual estate to Olivia. Nor was it the subject of any express bequest in Olivia's will. On the same basis, had it been in Olivia's ownership at the time of her death, by her will it would have passed to her residuary beneficiaries, Robert and his two sisters, Ere and Rata.

[10] Richard died in 2008. Under his will, the residue of his estate passed to his grandson, Zhan. Zhan was a whāngai child of Richard and Eva, his grandparents, and was brought up by them.

[11] During the time of the events just related, the property was held for a public work pursuant to the PWA. The omission to provide for the land in Simon, Richard and Olivia's wills is hardly surprising. Doubtless no one had thought the school would close and the land might be offered back to them.

[12] However, the school did close, in December 2016. In March 2018 the property was declared by the Ministry of Education to be no longer required for educational purposes. Nor was it required for any other public work or land exchange.

[13] Land Information New Zealand, the responsible agency, with the assistance of an accredited supplier, analysed the wills of the former owners. An affidavit by Janine Stocker, a LINZ employee, explains the analysis done:

> Simon Urlich's will bequeaths specific properties and Māori blocks, none of which are the property. Simon Urlich's rights to the property form part of his residual estate. Simon Urlich's residual estate was given to Olivia Urlich, his wife. Olivia Urlich died on 16 December 2010. As the s 40 process only deals with immediate successors, any right to offer back of Simon Urlich's interest in the property ended with the death of Olivia Urlich.
>
> Richard Urlich's will also bequeaths specific properties and Māori blocks, none of which are the property. Richard Urlich's rights to the property form part of his residual estate. Richard's residual estate was given to his grandchild [Zhan] Howard Urlich, who is alive.

[14] In February 2019 the property was offered to Zhan, the successor to Richard's residual estate under s 40 of the PWA, at a price of $125,000. That price reflects the fact that the land was gifted rather than taken and paid for, and relates only to improvements thereafter made to the land. A registered valuation prepared for the Crown as at November 2018 values the land and buildings at $800,000. Zhan has accepted the offer-back.

[15] Robert lodged the caveat at issue over the property on 12 July 2019. He says he is beneficially entitled to the land as a successor to one of the original owners under s 40(2) of the PWA and is also entitled to have the land offered back to him. He accepts that his sisters Ere and Rata may also be entitled on that basis.

Statutory framework

[16] Section 40 of the PWA provides:

> **40 Disposal to former owner of land not required for public work**
>
> (1) Where any land held under this or any other Act or in any other manner for any public work—
>
> (a) is no longer required for that public work; and
>
> (b) is not required for any other public work; and
>
> (c) is not required for any exchange under section 105—
>
> the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority, as the case may be, shall endeavour to sell the land in accordance with subsection (2), if that subsection is applicable to that land.

(2) Except as provided in subsection (4), the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority, unless—

(a) he or it considers that it would be impracticable, unreasonable, or unfair to do so; or

(b) there has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held—

shall offer to sell the land by private contract to the person from whom it was acquired or to the successor of that person—

(c) at the current market value of the land as determined by a valuation carried out by a registered valuer; or

(d) if the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority considers it reasonable to do so, at any lesser price.

(2A) If the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority and the offeree are unable to agree on a price following an offer made under subsection (2), the parties may agree that the price be determined by the Land Valuation Tribunal.

(3) Subsection (2) shall not apply to land acquired after 31 January 1982 and before the date of commencement of the Public Works Amendment Act (No 2) 1987 for a public work that was not an essential work.

(4) Where the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority believes on reasonable grounds that, because of the size, shape, or situation of the land he or it could not expect to sell the land to any person who did not own land adjacent to the land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties.

(5) For the purposes of this section, the term **successor**, in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person.

[17] The focus here is on s 40(5) and the definition it gives to "successor". To be eligible to receive an offer under s 40(2), Robert must be successor to either his father, Simon, or Simon's brother, Richard. Only the former is in issue in this appeal.

History of s 40(5) of the PWA

[18] We start with the Public Works Act 1876. Section 29(2) of that Act provided:

> The Minister, County Council or Road Board, as the case may be, shall cause the land proposed to be sold to be valued by one or more competent valuers, and shall offer such land at the price fixed by such valuation, first to the person then entitled to the land from which such land was originally severed; and, if he refuse it, or cannot after due inquiry be found, then to the owner of the adjacent lands, or, if there be more than one such owner, then to each of such owners, in such order as the Minister, County Council or Road Board thinks fit; and, if no such owner accepts such offer, may cause the land to be sold by public auction.

There was no discussion in the parliamentary debate of the general rationale for the introduction of an offer-back provision, or the specific words "to the person then entitled to the land from which such land was originally severed". The provision itself is drawn from s 100 of the Lands Clauses Consolidation Act 1863. Parliamentary debate on that provision merely noted that the legislation was an adoption of the equivalent English Act, modified to reflect specific local conditions.

[19] The same provision was carried through into s 29(2) of the Public Works Act 1894 (but with the word "severed" replaced with "taken"), s 30(b) of the Public Works Acts Compilation Act 1905, s 30(b) of the Public Works Act 1908 and s 35(b) of the Public Works Act 1928.

[20] The Public Works Amendment Act 1954 then changed who was entitled to an offer-back. Section 4(1) amended s 35 of the 1928 Act so that the Minister or local authority might only offer the land to the owner of any adjacent lands by private contract or to a member of the public at large by way of public auction — removing altogether rights of a successor to an offer-back. In the parliamentary debate there is no reference to the reason for this change. So from 1954, both Robert and Zhan would be out of the picture.

[21] The exclusion of successors lasted from 1954 to 1981. Clause 39(2)(a) of the Public Works Bill 1980 as introduced allowed for *optional* offer back to "the person from whom the land was acquired or to the descendant or successor in title of that person, or to the owner of any adjacent land". The explanatory note to the 1980 Bill stated cl 39 introduced a new provision

that land "may also be sold to the person from whom it was originally acquired or to his descendant or successor in title". That terminology would mean Robert and Zhan would have both qualified, but only at the option of the Crown.

[22] In select committee, the Lands and Agriculture Committee recommended cl 39 be revised in the form ultimately adopted as s 40. That is, *mandatory* offer back to "the person from whom [the land] was acquired or to the successor of that person", with successor defined by cl 39(5) in terms now found in s 40(5). The Lands and Agriculture Committee appears to not have provided a written report explaining the change. But it did report back to Parliament in debate. One member stated that cl 39 made it mandatory for land surplus to requirements to be offered back to the "former owner". Another member stated cl 39 "tidies up the Bill in relation to the disposal of land" and requires land to be offered back to the "previous owner". There was also some limited mention of Māori land. He stated cl 39A dealt with concerns about the disposal of Māori land:

> If there is difficulty in defining the ownership of Māori land, the matter can either be dealt with under [clause 39] of the Act, … or be referred to the Māori Land Court for definition.

[23] In the Bill's second reading the Minister of Works and Development, the Hon Bill Young, stated that one of the "most significant" changes recommended by the select committee was the rewriting of cl 39:

> That clause will now give effect to the general principle that when land has been acquired by the Government or by a local authority for a public work, and subsequently ceases to be required for a public work in respect of which there is a power of compulsory acquisition, the land should be offered back to the original owner, or his representative, except in circumstances when there was no element of compulsion at the time the land was originally acquired.

[24] Clause 39 was not then discussed in the Bill's third reading. The essential question we will need to consider, under the first issue below, is whether the definition of "successor" in s 40(5) encompasses second-line successors such as Robert — the residuary of the original owner's residuary. The Crown's argument before us is that s 40(5) is narrower; it includes Zhan, a first-line residuary, but excludes Robert, a second-line one.

Other relevant PWA provisions

[25] Sometimes relevant in the case of former Māori land that is no longer required is s 41(1) of the PWA. That section provides:

> **41 Disposal of former Māori land when no longer required**
>
> (1) Notwithstanding anything in sections 40 and 42, where any land to which section 40(2) applies was, immediately before its taking or acquisition,—
>
> (a) Māori freehold land or General land owned by Māori (as those terms are defined in section 4 of Te Ture Whenua Māori Act 1993); and
>
> (b) beneficially owned by more than 4 persons; and
>
> (c) not vested in any trustee or trustees—
>
> the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority, as the case may be, shall—
>
> (d) comply with the requirements of section 40; or
>
> (e) apply to the Māori Land Court for the district in which the land is situated for an order under section 134 of Te Ture Whenua Māori Act 1993.

[26] Section 41(1) does not apply in this case. Although the land taken was general land owned by Māori, not vested in trustees, it was not, when taken, beneficially owned by more than four persons. Just by Simon and Richard.

[27] Also relevant is s 42(1) of the PWA. It provides:

> **42 Disposal in other cases of land not required for public work**
>
> (1) Where—
>
> (a) any offer to sell land under section 40(2) has not been accepted within 40 working days or such further period as the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority considers reasonable; or
>
> (b) any land is no longer required for a public work and subsections (2) and (4) of section 40 do not apply,—
>
> the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority may—

(c) cause the land to be offered for sale to the owner of any adjacent land at a price fixed by a registered valuer; or

(d) cause the land to be offered for sale by public auction, public tender, private treaty, or by public application at a specified price.

[28] Section 42(1) therefore carries forward the former (non-mandatory) power to sell the land to owners of neighbouring land or at public auction. But two important changes are made. First, the chief executive may only choose to do so if not obligated to under s 40(2) or a s 40(2) offer is not accepted within the requisite time period. Secondly, the chief executive may offer the land for sale to the public at large by means other than public auction, including — importantly — by private treaty.

[29] Relevant to the operation of s 42(1) is the Gifted Land Policy. Ms Stocker for LINZ deposes that that policy requires that, where land was originally gifted to the Crown and no former owner or successor can be identified, the chief executive will consider whether there are other individuals the land should be offered to under s 42(1). This may include beneficiaries of wills who are not successors under the PWA, but to whom the Crown owes a moral obligation.

Section 134 of TTWMA

[30] As noted earlier, at the initial hearing in June we drew counsel's attention to s 134 of TTWMA. That provides:

134 Change to Māori freehold land by vesting order on change of ownership

(1) This section applies to—

(a) any land (other than Māori freehold land) that the beneficial owner wishes to have vested in or held in trust for any Māori or any group or class of Māori, or any Māori incorporation; and

(b) any land (other than Māori freehold land) acquired for or on behalf of any Māori or any group or class of Māori or any Māori incorporation; and

(c) any Māori land or General land owned by Māori that has at any time been acquired by the Crown or by any local authority or public body for a public work or other public purpose and is no longer required for that public work or other public purpose; and

(d) any Crown land reserved for Māori; or

(e) any Crown land (other than Crown land reserved for Māori).

(2) The Māori Land Court shall have jurisdiction in accordance with the succeeding provisions of this section to make a vesting order in respect of any land to which this section applies and to declare in that order that the land shall become Māori freehold land.

(3) An application to the court for the exercise of its jurisdiction under this section shall be made,—

(a) in any case to which subsection (1)(a) applies, by or on behalf of the beneficial owner of the land; or

(b) in any case to which subsection (1)(b) applies, by or on behalf of the person who has acquired the land; or

(c) in any case to which subsection (1)(c) applies, by or on behalf of—

(i) the Minister of the Crown under whose control the land is held or administered; or

(ii) the chief executive within the meaning of section 4 of the Cadastral Survey Act 2002; or

(iii) the local authority or public body by which the land was acquired; or

(d) in any case to which subsection (1)(d) applies, the Minister of Māori Affairs; or

(e) in any case to which subsection (1)(e) applies, any Minister of the Crown.

(4) Notwithstanding anything in subsections (1) to (3), any Minister of the Crown having responsibility in regard to the matter may apply to the court for the exercise of its jurisdiction, and on such an application the court may exercise its jurisdiction, under this section in respect of any Crown land that has not been formally set aside for the benefit of Māori.

(5) An application may be made to the court, and the court may exercise its jurisdiction, under this section notwithstanding the provisions of any Act to which the land is subject, and notwithstanding any terms and conditions imposed by the Act on the sale or other disposition of the land.

(6) In any application under this section, the applicant may specify—

(a) the person or persons in whom it is proposed the land shall be vested; and

(b) the price to be paid for the land, and the terms and conditions of payment; and

(c) any other conditions to which it is proposed the order shall be subject.

(7) On an application under this section, the court may make an order vesting the land in—

(a) such person or persons as the court may find to be entitled to the land or otherwise in accordance with the terms of the application, in such shares as may be specified in the order; or

(b) a Māori incorporation or a Māori Trust Board or trustees for or on behalf of such person or persons, and on such terms of trust, as the court may specify in the order.

[31] Section 134 of TTWMA also raises a question as to the interrelationship between that provision and s 41 of the PWA. We address that when the second issue is considered in the judgment.

Judgment appealed

[32] The High Court identified the critical issue to be whether it is reasonably arguable that Robert is a successor for the purposes of s 40(5) of the PWA. That would give him a caveatable interest with which to sustain the caveat.

[33] The Associate Judge noted that in *Robertson v Auckland Council* the High Court interpreted "successor" as meaning the persons benefiting under the will of the former owner or on his or her intestacy but excluding beneficiaries of those beneficiaries. In that case, Fogarty J relied on this Court's decision in *Port Gisborne Ltd v Smiler* confining "successor" to the former owner's immediate beneficiaries. The Judge however held a contingent beneficiary of the former owner's estate under his or her will (who had not become an absolute beneficiary by the time of the former owner's death) was an immediate beneficiary and therefore a successor.

[34] However, on appeal this Court did not accept that extended interpretation of s 40(5) — in what was now *Williams v Auckland Council*:

> The s 40(5) test is plainly formulated, even though its application may prove problematic in a particular case — it is whether a person would have been entitled to the land under the will or intestacy of the person who owned the land at the time of acquisition had that person owned it at the date of his or her death. There is an assumption that ownership of

> the land has not changed between the dates of acquisition and the owner's death, meaning … that Parliament intended only one level of succession.

A contingent entitlement that had not become absolute at the time of the former owner's death was therefore insufficient.

[35] The Associate Judge noted in the present case there is some support for the proposition that s 40(5) should extend to contingent beneficiaries of the original owner's estate, and that the Supreme Court in denying leave to appeal in *Williams* at least expressed some doubt about whether this Court's interpretation of s 40(5) was correct. (In fact the Supreme Court simply noted that the point was arguable if a second appeal were permitted, which is not the same thing.)

[36] The Associate Judge noted that Robert had substantial personal, familial and cultural ties to the property. But his case was "on all fours" with that of the appellant in *Williams*. As the Associate Judge put it:

> … the decisive factor against Robert is that he would not have been entitled to the land on the death of his father, Simon. The residual estate of Simon was bequeathed to his wife, the mother of Robert, Olivia. Robert is thus not a successor under s 40(5) of the PWA.

Is Robert his father's "successor" under s 40 of the PWA?

[37] We turn first to further evidence filed in support of the appeal. Leave had earlier been granted to Robert to adduce further evidence on appeal in this Court in the form of an updated affidavit from himself, and an affidavit from a Professor Margaret Mutu. The Crown and Zhan also seek to adduce further evidence. No objection was taken to its admission, and we are satisfied it should be received. Leave is granted accordingly.

[38] Evidence filed for the Crown has been summarised already in the background section of this judgment.

[39] Turning to Robert's evidence, Professor Mutu is a professor of Māori Studies at the University of Auckland. Her whakapapa is to Ngāti Kahu, Te Rarawa and Ngāti Whātua. Her

Ngāti Kahu hapū is Te Whānau Moana — to which Robert, her cousin, also belongs. Professor Mutu gives evidence that the Crown offer of the land to only Zhan contravenes Te Whānau Moana and Ngāti Kahu tikanga in two respects.

[40] First, that tikanga requires decisions as to important matters of land and succession be made in hui on the marae of the hapū. In the course of preparing for the settlement of the Treaty claims of Ngāti Kahu, many hui-ā-iwi were held between 1995 and 2000. At these, the hapū determined the land should be offered back to both the previous owners — Richard and Simon, both then still living. Now that Richard and Simon have died, tikanga dictates the property should be offered to their descendants.

[41] Secondly, the gift of the land was a tuku whenua. Tuku whenua involves the allocation of particular use rights to a person and his or her whānau for a particular purpose. When the land is no longer to be used for that purpose, it reverts back to those who gave it or their descendants. Richard and Simon gifted the land to the Crown for the purpose of using it for a school. When that purpose was served, the Crown should have offered the land back to their descendants — Robert *and* Zhan.

[42] Professor Mutu states that tuku whenua is a well-known part of the tikanga of Te Whānau Moana/Te Rorohuri, of Ngāti Kahu, and of all the Far North iwi, as well as throughout New Zealand and the Pacific.

[43] Zhan also filed an affidavit in this Court prior to the resumed hearing. He explains that, when contacted about an offer-back in late 2018, he had assumed that the land would be offered back to his mother (as Richard's descendant), along with Simon's children. But in February 2019 he was told he was the only person entitled to an offer-back, which he then accepted. When contacted by Randolph — Simon's son who occupied the schoolhouse — Zhan explained that he felt entitled to his grandfather's share of the land, but wanted Simon's share to go to his whānau. Further discussions with Randolph and Matt — another of Simon's sons — led to them putting forward options including subdivision (with Zhan taking the schoolhouse) and Simon's whānau contributing to subdivision costs.

[44] But before any agreement could be finalised, Robert caveated the property. Zhan and Robert had not previously had discussions about the property. On 16 June 2021 Zhan made an offer to Robert and the Crown under which half of the land would be returned to Simon's whānau. Robert rejected that offer.

[45] Zhan's present position is that he does not mind if the land is returned to himself and Simon's children. He is however opposed to the land being dealt with in the Māori Land Court where there may be uncertainty as to who would get the land and in what shares. If the land is transferred from the Crown to him, he intends to transfer half the land to Simon's whānau.

Submissions

[46] Mr Hoskins, appearing for Robert, argues first that the *Williams* approach is inconsistent with a purposive interpretation of s 40. References to "representative" and "descendant" in the parliamentary debates and explanatory note show Parliament contemplated a broad class of relevant offerees, "arguably including contingent beneficiaries such as Robert". The *Williams* interpretation undermines the remedial purpose of s 40. It fails to vindicate the rights of the former owner by ensuring land acquired for public works is offered back to its previous or equivalent ownership. It also produces manifestly unjust results contrary to its remedial purpose, given testators are unlikely to specifically bequeath inchoate rights in their wills when they no longer own the land. The likely effect then is to extinguish the ownership rights of all of a previous owner's descendants. Instead, s 40 should compensate for the loss of personal interests in land. Robert has substantial personal, familial and cultural ties to the property. Offer back to Robert is consistent with the s 40 purpose.

[47] Secondly, Mr Hoskins submits that while the approach taken by the High Court in *Robertson* may have been too broad, this Court in *Williams* defines "immediate beneficiaries" too narrowly. A possible interpretation on the present facts would be to construe "immediate beneficiaries" as persons entitled to the land under the will of the former owner, including contingent beneficiaries, or on the former owner's intestacy — but excluding beneficiaries of

those beneficiaries. This definition could be further restricted in application to only land acquired from Māori.

[48] Thirdly, at the resumed hearing, Mr Hoskins suggested a second possible interpretation of s 40(5), whereby this Court was to read in a proviso that where the person entitled is deceased or not of sound mind at the date the land is surplus to requirements, "successor" means the person who would be entitled under intestacy if the person had no will. This interpretation is highly problematic, as we explain in due course.

[49] Fourthly, and relying on the evidence of Professor Mutu, Mr Hoskins submits the *Williams* interpretation is inconsistent with the Ngāti Kahu tikanga of tuku whenua. Under tuku whenua, land use rights are allocated to a person for a particular purpose and once the land is no longer used for that purpose, it reverts back to those who gave it or their descendants. Richard and Simon gifted the land to the Crown for a particular use. It should revert back to both owners — or in this case, the descendants of both. Tikanga is part of the values and common law of New Zealand. "Successor" should be interpreted as consistently as possible with tikanga.

[50] Mr Hoskins also submits "successor" should be interpreted as consistently with the Treaty of Waitangi as possible. Treaty principles place on the Crown an active duty to protect Māori use of their whenua. The Treaty guarantees exclusive and undisturbed possession of whenua which naturally includes tikanga associated with that whenua. The PWA interferes with Māori whenua rights and the tikanga governing succession attached to that whenua. Generally, courts favour Treaty-consistent interpretations where possible. This is particularly so given the PWA, and its 1928 predecessor, facilitated the alienation of whenua Māori. Section 40 should be interpreted as broadly as possible to facilitate the return of ancestral whenua Māori consistent with its remedial purpose.

[51] Mr Sharp, appearing for Zhan, takes a neutral stance on this issue. He accepts that if Robert's argument is upheld, the Crown's offer to his client must be set aside. He records that will not cause prejudice inasmuch as Zhan has already accepted that a half-share of the property should be transferred to Simon's (Robert's) whānau.

Discussion

[52] We are unable to accede to Mr Hoskins' argument. We make five points.

[53] First, we start with the wider purpose underlying s 40. In *Aztek Ltd v Attorney-General* this Court emphasised the section's remedial purpose. We traversed the authorities in relation to the purpose of s 40, beginning with this Court's earlier statement in *Port Gisborne* that:

> … The background to the offer-back concept is that land is being acquired from a private person for a public work purpose, possibly under the threat or contemplation of compulsion. The rationale must be that it is only fair, if that purpose disappears, the land should so far as practicable revert to the previous or equivalent private ownership.

[54] We then noted the approval of that rationale in *Waitakere City Council v Bennett*, stating that the land should, "so far as practicable, revert to the previous or equivalent private ownership". We concluded in *Aztek* that:

> … the statutory provisions are designed to ensure that, so far as practicable, the land is offered back to the persons from whom it was taken or their successors on the basis that that is the right thing to do where it has been initially acquired from a private landowner for public interest purposes which have ceased to exist. The statute should be construed and applied in a way which best reflects that objective.

That is our starting point here.

[55] Secondly, substantially coincident with those stated purposes is the presumption that Parliament intended to legislate in terms consistent with the Treaty. The duty of active protection of rangatiratanga over whenua Māori must be borne in mind in the interpretation of "successor", but without doing violence to parliamentary purpose or the words Parliament adopted. Specific provision is made for whenua Māori in s 41 of the PWA. There is also s 134 of TTWMA, which we discuss in more detail under the second issue. As Mr Anderson accepts for the Crown, the Waitangi Tribunal has held that the manner in which offers-back are made under

ss 40–42 of the PWA is inconsistent with the Crown's obligation to actively protect rangatiratanga over ancestral lands.

[56] The conclusion we ultimately reach under the second issue — that s 134 could and should have been engaged in this case — suggests however that a more flexible approach is open to the Crown to do justice to tangata whenua under ss 41 and 134 than hitherto has been taken. And one more flexible than was taken here, where the potential in s 134 to effect a broader offer-back, consistent with tuku whenua, was simply overlooked. It also suggests, therefore, that s 40(5) may bear its ordinary meaning without offending either the general purposes identified above or the duty of active protection of rangatiratanga over whenua Māori.

[57] We will return to these points shortly.

[58] Thirdly, the legislative history of the PWA is illuminating. Indeed we consider it determinative, inasmuch as it demonstrates clearly Parliament's intention in adopting the meaning expressed in s 40(5). The history is discussed above at [18]–[24]. The 1876 formulation — "person then entitled to the land" — encompassed a broad target group of potential successors where land had been severed for a public work. There was no limit to the number of lines of succession. In the absence of specific devise, it would be a matter of tracing residual beneficiaries, potentially through a succession of wills and intestacies.

[59] But when successor offer-back was resumed in 1981, after a quarter-century intermission, that formulation was not resumed. As we have seen, in the Bill an optional offer-back in similar terms — to "the person from whom the land was acquired or to the descendant or successor in title of that person, or to the owner of any adjacent land" — was proposed. But it was not proceeded with. Instead we have s 40: mandatory, but narrower in scope. Hansard illuminates the shift to a mandatory offer-back, but does not illuminate the redrafting of the qualifying "successor" in s 40(5). But we may proceed on the basis that the change made was deliberate. The inference that there was something of a trade-off between the impulse to make the offer-back mandatory and the potential subjects of that offer is difficult to resist.

[60] Fourthly, the wording of s 40(2) and (5) is we think very clear. The qualifying subjects entitled to an offer-back are the original owner from whom the land was taken, and (if deceased) "the successor of that person" — being the further person or persons entitled to the land under the will or intestacy of the original, now deceased, owner (and proceeding on the fiction that the land had not been taken). That is the conclusion this Court reached in *Williams* and we think it right because of the legislative history, words adopted and contextual further provision made for whenua Māori in ss 41 of the PWA and 134 of TTWMA. It is the second consideration we focus on here: the wording.

[61] Had Parliament intended to encompass second-line succession, it could either have resumed the previous statutory formulation ("person then entitled to the land") or persisted with the drafting in the 1980 Bill ("the person from whom the land was acquired or to the descendant or successor in title of that person"). As we have seen, deliberately it did not. That s 40(5) excludes second-line succession (that is, persons in Robert's position, as opposed to Zhan), seems to us the clear effect of the text eventually settled upon by Parliament.

[62] The question then becomes one of whether, irrespective of the clear meaning of the words it chose to adopt, Parliament intended s 40(5) to have the broader meanings Robert argues for. There is no equivalent to the doctrine of rectification in the construction of legislation. Courts may notionally "correct" obvious errors in legislation where the wording does not properly express what was properly intended. As Lord Nicholls explained in *Inco Europe Ltd v First Choice Distribution*, a court may add, omit or substitute words where the court is abundantly clear as to the intended purpose of the provision in question, that Parliament failed to give effect to that purpose through inadvertence, and the substance of the provision Parliament would have enacted had the error been noticed. This process has been likened to contractual rectification. A more active approach to construction may be compelled where the plain or literal meaning produces an outcome repugnant to fundamental human rights or to duties arising under the Treaty of Waitangi, provided it neither does violence to the text nor contravenes discernible parliamentary intention. Construction in any context must remain tenable in light of the text and inferred statutory purpose.

[63] This is not that case. Fundamental human rights are not in issue, and given the conclusions we reach under the second issue, Treaty repugnancy can be avoided. History and text suggest single-line succession is exactly what Parliament intended when, in 1981, it reintroduced successor offer-back entitlement. We infer Parliament intended s 40(2) and (5) to work in a relatively simple manner. Identification of those entitled to an offer-back would require a measure of analysis, either finding the original owner or the person mandated by the owner as his or her successor to that right. But it would not then encompass further, multi-generational research into who ultimately was mandated by *those* successors to receive the land. The text hypothesises the offer back of land to the original owner prior to death, and asks, if he or she is deceased, who then would have received it under the original owner's will or intestacy? The relevant timeframe is confined to the immediate aftermath of the original owner's death. Section 40(2) in the first instance comprehends offer to a living person; s 40(5) likewise, a single act of transmission.

[64] We acknowledge, as does Mr Anderson, that the *Williams* approach may lead to arbitrary outcomes — as this case demonstrates. But if Parliament had intended to include second-line succession, alternative drafting to that effect would easily have been feasible. Parliament may not have foreseen this exact situation at hand, but equally it may have considered the right to an offer-back should focus on the original owner and *his or her* choice of successor only — rather than introducing a series of more distant determinations by other persons and generations. It has focused on the will of the former owner, in both senses of that word. The provision is clear, and there is no warrant based on evident or presumptive parliamentary intent warranting a wholesale rewrite of s 40(5) under the guise of construction. If revision is required, that is Parliament's task.

[65] Fifthly, the primary interpretation Mr Hoskins advances falls into an essential error. It seeks to construe (and enlarge) the expression "immediate successors" adopted in *Williams*, rather than the statutory wording in s 40(5). The former is an apt description of Parliament's apparent intent, but it does not and cannot replace the words Parliament used. For the same reasons, Mr Hoskins' alternative suggestion of an interpretive proviso extending the rules of intestacy even where the original owner had a valid will — noted at [48] above — is untenable.

Even if tenable on the wording of s 40(5), the proposed proviso, as we foreshadowed, lacks internal coherence. The rules of intestacy cannot determine succession entitlements where the original owner executed a valid will. That the land is not devised specifically is of no matter. To hold otherwise confuses residual entitlements with entitlements under intestacy.

Conclusion

[66] For these five reasons we are not persuaded the reasoning of this Court in *Williams* was erroneous such that we ought to revisit it. Robert is not a "successor" within the meaning of s 40(5). That is not, however, the end of this appeal.

What effect does s 134 of TTWMA have?

[67] This provision we set out at [30] above. At the initial hearing of this appeal we noted this provision had not been adverted to by counsel. We suggested it offered an alternative mechanism to the s 40 offer-back procedure where Māori-owned general land taken for a public work is no longer required for that purpose. It was not limited by owner numbers in the way s 41 is. We noted, as our provisional view, that s 134 ought to have been considered by the Crown in this case before electing to proceed under s 40. Having now heard from counsel, we are confirmed in that view.

History of s 134

[68] The explanatory note to the Māori Affairs Bill 1987 (later renamed Te Ture Whenua Māori Bill) explained that what became s 134:

> … gives the Māori Land Court jurisdiction to make a vesting order having the effect of converting certain land to Māori freehold land. This clause applies where the owner wishes to have the land vested in or for the benefit of any Māori, where land is acquired for any Māori, where land that has been taken for a public work or other public purpose is to be returned to any Māori, and to the Crown land reserved for Māori. In large part, the clause brings together the jurisdiction of the Court conferred by sections 436 and 437 of the present [Māori Affairs Act 1953].

There was no discussion of the provision in the parliamentary debate, but the key to that lies in the last sentence of the extract: the provision largely replicated provisions in the preceding Māori Affairs Act. And, it may be noted, in ss 7 and 9 of the Native Purposes Act 1943 before that. The explanatory note to what became s 7 of that Act stated:

> From time to time cases arise where it is desired to return to Natives land acquired from or gifted by them for public works, Native school sites and so forth. This clause is a general one, designed to obviate the necessity for special legislation in particular cases, giving the Native Land Court power to make, on the application of the Minister or other authority who controls the land, an order vesting the land in the persons determined as being entitled to it, subject, in proper cases, to payment for it.

[69] To make an obvious point, those provisions were extant at the time (1) the land here was gifted and taken in 1953, and (2) the PWA was enacted in 1981.

Submissions

[70] Robert contends that if he falls within neither ss 40 nor 41, then s 134 ought to have been considered by the Crown before electing to make an offer under s 40(2) to Zhan only. Mr Hoskins submits we should set aside the decision to offer to Zhan, and the ensuing agreement for sale, and direct reconsideration.

[71] Zhan accepts that if this Court finds the Crown should have considered the option of making an application under s 134, but failed to do so, we may set the agreement aside and refer the matter back for reconsideration. However, Mr Sharp suggests the Court not exercise its discretion to do so on the premise that Zhan undertakes to transfer half the land to Simon's whānau.

[72] The Crown accepts the decision maker in this case proceeded on the basis s 134 was inapplicable. It acknowledges the force of the contrary argument, accepted provisionally by us. But it would still contend otherwise. In particular, Mr Anderson submits ss 40 and 41 are specifically directed provisions; that s 41 is intended to limit those who may have recourse to the Māori Land Court; and that if s 134 still applied, s 41 is redundant and robbed of any meaningful effect.

Discussion

[73] Our view does not accord exactly with any of these submissions.

[74] This appeal arises in the context of an application for orders that a caveat not lapse. The matter in issue is whether Robert has a caveatable interest in the land. This pleading point is important and has a number of consequences. One is that this is not a judicial review; we shall not be setting aside decisions by the Crown or agreements entered into by it. To do so would be entirely premature; it is for the Crown to reassess its position in light of this judgment, as far as it goes. A second consequence is that s 134, even if applicable here, does not create a caveatable interest in the land on Robert's part. If s 134 is applicable, Robert has a legitimate expectation that the Crown will correct the error it made and reconsider its position. The Crown has in effect undertaken to do so. But that expectation does not create a legal or equitable interest in land; it cannot support a caveat, and it makes no difference to the formal outcome of this appeal.

[75] We are satisfied s 134 is applicable here, in the sense that it was an available option requiring consideration by the Crown. We reject the suggestion that such an approach renders s 41 redundant and robs it of meaningful effect. There are a number of reasons for these conclusions, which we now explain.

[76] Section 134 in effect both predated and post-dated the PWA. Section 41 of the PWA was enacted against the background of s 436 of the Māori Affairs Act, and expressly referred to that provision in s 41(2)(e) at the original time of enactment. Section 436 (and s 7 of the Native Purposes Act before that) served an important enabling function: in exactly the circumstances arising in this case, it enabled the Crown to apply to the Māori Land Court for orders vesting the land in persons nominated by it, or otherwise determined by the Court. At the time these provisions were introduced, the Public Works Act 1928 did not require sale of surplus land, but if sale was to be undertaken, then required offer back to persons "then entitled". The history suggests ss 7 and 436, interweaving independently with the Public Works Act, created an alternative path, albeit one not explicitly mandatory. This enabling jurisdiction given the Māori Land Court by s 134 to make vesting orders in place of going down the Public Works Act

offer-back and sale process is now of long standing. It ought not be read down restrictively unless it is plain Parliament intended that consequence.

[77] The question here is whether s 41 has such limiting intent. In our view it does not. It does not do so explicitly, when to do so would have been straightforward. Section 134 — following s 41 in time, but substantially re-enacting s 436 — remained in general terms without any s 41 counterpart inserted in subs (1)(c). Nothing in the parliamentary debate indicates Parliament's wish to exclude the alternative s 134 pathway in cases beyond s 41. Should we nonetheless infer that intention from the drafting alone? That rather depends on whether limitation of the pathway makes compelling sense in the context of TTWMA. There is here a link to s 40(2)(a) of the PWA, which permits the Crown *not* to offer back where to do so would be unreasonable or unfair. Let us then imagine a case where that is so, but s 41 does not apply. Perhaps, because the land was taken from two persons, rather than five or more. Perhaps, this case. If the Crown is right as to the effect of s 41, then the former owners and their descendants may gain no offer-back preference. The Crown may keep the land, or it may sell it to an adjacent owner, or to any person at all by public auction or private treaty: s 42(2). It is not obvious to us why the long-standing option of application to the Māori Land Court in such a case should now be forestalled. As a determinative mechanism to avoid dispute, there seems every reason why it should still exist, enabling a reasonable and fair outcome among hapū to be resolved by the Court rather than the Crown. And above all, as Mr Anderson had to concede, maintaining unfettered access to the Court will better achieve one of the guiding purposes of TTWMA in securing the retention of whenua Māori in the hands of hapū and whānau.

[78] For these reasons we find s 134 remains available as an alternative statutory pathway to s 40 disposal procedures, in any case falling within s 134(1)(c).

What happens now?

[79] Because no caveatable interest is held by Robert, his appeal must be dismissed.

[80] Formally, we do not set aside the decision made by the Crown to offer back to Zhan. However, in light of our decision it is clear (and accepted by the Crown) that the decision maker

erred in disregarding s 134. As noted earlier, Robert has a legitimate expectation that the Crown will now correct the error it made and reconsider its position. The Crown has in effect undertaken to do so. In doing so, it will need to consider, first, whether this is a case where — under s 40(2)(a) — it is unreasonable or unfair to offer back to the s 40(5) successor only and, secondly, whether application should be made to the Māori Land Court under s 134(1)(c) of TTWMA.

[81] We express our appreciation to counsel, and in particular to Mr Sharp, lately engaged for Zhan. Given the responsible approach taken by his client in these proceedings, we doubt further orders will be required. Should the position evolve otherwise, any further application should be made to the High Court.

Result

[82] Leave is granted to the respondent to adduce further evidence.

[83] Leave is granted to Zhan Urlich to adduce further evidence.

[84] The appeal is dismissed.

[85] The appellant being legally aided, there is no order as to costs.

Solicitors:
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