IN THE SUPREME COURT OF NEW ZEALAND SC 17/2009

[2011] NZSC Trans 10

BETWEEN **THE TRUSTEES OF TE HURIA MATENGA WAKAPUAKA TRUST**

Appellant

AND **THE MINSTER OF CONSERVATION**

First Respondent

AND **THE MAORI LAND COURT**

Second Respondent

AND **THE REGISTRAR-GENERAL OF LAND**

Third Respondent

Hearing: 5 April 2011

Court: Elias CJ
Blanchard J
McGrath J
William Young J

Appearances: J P Ferguson for the Appellant
F J R Sinclair and C R W Linkhorn for the Respondents

CIVIL APPEAL

MR FERGUSON:

May it please Your Honours, counsel's name is Ferguson, I appear for the applicant.

ELIAS CJ:

Thank you Mr Ferguson.

MR SINCLAIR:

May it please the Court, Sinclair and Linkhorn for the respondent.

ELIAS CJ:

Thank you Mr Sinclair and Mr Linkhorn. Yes Mr Ferguson, did you want to enlarge at all on your submissions? I think we may have a few questions for you but do you want to start out?

MR FERGUSON:

There were, certainly, Ma'am. I thought there might be some contextual matters that were worth identifying for the benefit of the Court beyond the written submissions. And, you know, just to give a bit more of the fabric to where we are and why it perhaps has taken so long as well.

ELIAS CJ:

There's a lot of material that's not before us that might have been helpful in fleshing it out, for example we haven't got the Minister of Conservation's statement of claim, the judicial review proceedings.

MR FERGUSON:

No that's right Ma'am, in that regard because there were a – in relation to that judicial review application and that proceeding there were a series of orders that were sought, a number of which aren't ultimately reflected in the Court of Appeal's majority judgment.

ELIAS CJ:

What application that was made is reflected in the Court of Appeal's judgment?

MR FERGUSON:

I'll check the aspects of it, but as I understand –

ELIAS CJ:

Because it seems to have developed this case.

MR FERGUSON:

Certainly Ma'am, I'll just make – see whether I have noted that.

ELIAS CJ:

Was there an application – perhaps you should develop it as you see fit, but I had an immediate query as to whether the Minister of Conservation was seeking review of the 1986 determination as well as the 1998 determination?

MR FERGUSON:

Indeed Ma'am, in fact now that I've had my head in the right place and forgive me, the application brought by my friend, well brought by the Minister of Conservation, was comprehensive in that it not only dealt with the 1998 decision and challenged its legality in fact and law, in addition sought orders in relation to the 1986 and actually went back and sought declarations in relation to the 1901 land transfer title, that that as a matter of fact of law excluded the mudflats, in addition sought a declaration that the –

ELIAS CJ:

So, effectively, in its reasons, that proposition has been accepted by the majority in the Court of Appeal even though the form of the judgment doesn't explicitly refer to that?

MR FERGUSON:

I think it was a certainly a common position between myself and my friend that the land transfer title issued in 1901 on its face did not include the mudflats.

ELIAS CJ:

Yes, and that was an agreed position –

MR FERGUSON:

It was an agreed position and therefore –

ELIAS CJ:

– which means that –

MR FERGUSON:

– I think Their Honours in the majority have said to the extent it's necessary to do so we will make a declaration accordingly.

ELIAS CJ:

Yes and so you have no quarrel with the declaration made in "C" of the Court of Appeal judgment?

MR FERGUSON:

No, not that that's what that is doing, the real issue I suppose for the applicants is the critical path up and to 1901, and in particular the application that was made to the Native Land Court, the judgment that was issued in 1883 and the title from the Native Land Court title that emanated from that issued in 1892 but retro-dated back to 18 –

ELIAS CJ:

Yes I'm just wondering really what is live before us at the moment, what is it that you're seeking from this Court by way of relief?

MR FERGUSON:

In terms of, I suppose this gets back to the context to where, where the applicants have got to because of the way in which, at the High Court stage, as will be clear from the Court of Appeal's judgment, it turned into a very different hearing from a judicial review, an orthodox judicial review I should say, and in effect His Honour embarked on a substantive inquiry into determining the nature and extent of the title. And for that purpose joined the Registrar-General of Land. What His Honour then stopped short of doing, however, was dealing with those consequent orders beyond his finding that in his view the Native Land Court title included the estuary and that the subsequent land transfer title was inconsistent with that and should have properly have reflected it. But what we don't have is the, they then left it in my client's hands, Ma'am, to take the next step as to where they're going to the High Court with new proceedings, seeking to correct that or potentially going to the Māori Land Court under their ability to correct, although there's some moot point about where the jurisdiction boundaries lie there.

ELIAS CJ:

What I don't really understand is what harm in the Court of Appeal decision you're seeking to overturn here, because as you've said in the judgment the declaration in "C" is fine, because you accept that the land transfer title doesn't include the mudflats, I would have thought that simply the judgment that the orders were wrongly

made isn't necessarily adverse to your position because it's based simply on the reasoning in 1998. I'm just trying to understand where, what the real problem is here for you?

MR FERGUSON:

Certainly, Ma'am. The concern is as the applicants currently see it, there are three potential courses open to it outside of today's hearing.

ELIAS CJ:

Yes.

MR FERGUSON:

First, if it was accepted that the 1883 title included the mudflats, so if that was established that the 1883 titled issued by the Native Land Court included the mudflats, then it would be a matter for my clients to apply to seek to have the land transfer registrar – register corrected because, in our submission, the land transfer title must necessarily reflect that and to the extend it hasn't since 1901, that's an error that's capable of correction.

BLANCHARD J:

And how do you say that would be done – in the High Court?

MR FERGUSON:

Well I think, I think if we're dealing, strictly speaking, with correcting the land transfer registry, register, then I think that must be done in the High Court – that's the, that's the conclusion I've reached to date on that point.

McGRATH J:

What about the District Land Registrar as a step first, isn't there a step that's in the Act, though somewhat controversial –

MR FERGUSON:

Well, in effect, I suppose we've had that step taken in a de facto sense, well not necessarily a de facto sense –

McGRATH J:

Well –

MR FERGUSON:

– because in 1998 the Māori Land Court, having made its order that this freehold title, that the estuary is included within the freehold title, then submitted that to the District Land Registrar, who refused to adjust the title.

McGRATH J:

So you've gone past section 81?

MR FERGUSON:

I think we've gone past section 81.

McGRATH J:

And you go straight to section 85?

MR FERGUSON:

I think that's where we would sit in that regard.

McGRATH J:

I understand that, thank you.

MR FERGUSON:

And that's premised on the basis that we could establish that His Honour Judge Mair in 1883 did actually include the mudflats in the title and we actually don't have, and this is I suppose is that to some extent whether it's a frustration or not – the Court of Appeal goes 99.9% of the way there in that almost necessarily the ultimate conclusions it's reached, while they're not reflected in the order that my friend sought in the High Court, namely that the 1883 title excluded the mudflats, seemed to say that almost certainly it did and then –

ELIAS CJ:

Well I would have thought there is a real problem for you because it does look like a finding of fact that the Court of Appeal has made. I suppose the question I have is who, which – where should that finding of fact have been made? Your answer seems to be that it's a matter for action in the High Court.

MR FERGUSON:

Well our original position, Ma'am, before His Honour Justice Fogarty was that if my friend was right in advancing the argument that the nature of the inquiry by the Māori Land Court in 1998 was inadequate and should have looked at a fuller range of things, our position was the matter should be, have been – that decision should have been quashed and the matter should have been referred back to the Māori Land Court and then we would have had this full and absolute inquiry.

ELIAS CJ:

On application for rehearing in the Māori Land Court as successor of the Native Land Court, is that effectively what you're seeking?

MR FERGUSON:

Essentially, Ma'am, is that's where we would get to. But the nature of His Honour's judgment in the High Court took a different course than that and then my friend's appealed, which got us into the Court of Appeal when we have that judgment which we are, have been grappling with in our – I think my sense is very much like Your Honours that there is, I think if one was to – if I was to, if my clients were to advance in another Court a reopening of the issue of did the 1883 title include the mudflats, I would undoubtedly be raised – find myself faced with a claim that there was a finding of fact in the Court of Appeal.

YOUNG J:

Mr Ferguson – you said something that I didn't follow. You – I took it from what you just said that your view is that the Court of Appeal has, in effect, found that the Māori Land Court did confer title on –

MR FERGUSON:

Did not confer title.

YOUNG J:

Oh did not, okay, well I thought it did.

MR FERGUSON:

Sorry Sir, did not, yes. The Court then seems at pains to stop slightly short of that by saying almost certainly, I think, in its concluding paragraphs –

ELIAS CJ:

Well I think its reasons make it impossible for you really to contend that in the High Court, because it's reasoning as opposed perhaps to its conclusion is only consistent with a finding that the land was excluded in an 1883 –

MR FERGUSON:

Was not included.

ELIAS CJ:

Well – yes it's not –

YOUNG J:

All it's – I mean your argument throughout has been a rather thin and narrow one. It is that the 1883 and 1886 orders included the estuary and everything follows from that?

MR FERGUSON:

That's correct.

ELIAS CJ:

Yes.

YOUNG J:

If they don't include the estuary then it's entirely open to question whether customary title is still vested in Te Huria Matenga descendants. There's nothing the Court of Appeal says that trenches on their entitlement to make that claim either in the High Court or in the Māori Land Court, whichever is appropriate.

MR FERGUSON:

To be entirely accurate in that regard, obviously since the passing of the Foreshore and Seabed Act in 2004 –

YOUNG J:

Yes, yes.

MR FERGUSON:

– in 2004 obviously one is unable to bring an application for investigation of customary land in the Māori Land Court. As at the 31st of March, of course, that Act is repealed and we now have the Coastal Marine Area (Takutai Moana) Act, which is now in force as I understand it.

YOUNG J:

Yes so, just leaving aside that. The Court of Appeal judgment doesn't say anything about whether customary – the estuary is owned under customary title by the descendants of Huria Matenga?

MR FERGUSON:

No it does not.

ELIAS CJ:

But it would depend, wouldn't it, on the scope of what was decided in 1883, so one investigation of that would be necessary because it may be that the application didn't extend to the mudflats, in which case the status of the mudflats would remain open, but if the block had – the application had included them, then the 1883 decision would have to be an exclusion of the mudflats?

MR FERGUSON:

Precisely, Ma'am, and then one might be left with a slightly different avenue in the Māori Land Court in terms of applying to the Court for its ability to correct errors and omissions, which can, which are retrospective orders that can go back as far as these orders in 1883.

BLANCHARD J:

How is a Court going to address the question of whether in 1883 they were concerned with the mudflats at all? Is it hoped that there is further material there that's going to shed light on that?

MR FERGUSON:

I think there's an awful lot of material that was placed before the Waitangi Tribunal in its hearings, far beyond the evidence of Mr Alexander that was before the High Court. The position, because of the way in which it has developed somewhat

embryonically in terms of these proceedings, is that as you will appreciate the applicants' sole asset, subject to the Court of Appeal's decision of course, was the mudflats themselves so they are impecunious and that's reflected in the way in which the, that representation has occurred and a point that –

YOUNG J:

The decision, I mean the decision of Judge Mair, doesn't imply a rejection of any component of the case?

MR FERGUSON:

No.

BLANCHARD J:

The reason I asked my question was that I would hate to send the parties on a wild goose chase, if there simply isn't any other material which is going to shed any light on things. The Court of Appeal's reasoning on the materials it's looked at is quite strong but could be undermined by further materials.

ELIAS CJ:

Or perhaps could be, and I don't know the answer to this, could be undermined by the appropriateness of the use of the materials, for example we haven't got, and maybe the Waitangi Tribunal has considered it, we don't have the terms of the purchase, the original 1850s purchases which didn't include this. We don't know whether the Nelson survey plans were, for what purpose they were produced, they seem to have been produced for the purposes of enabling Crown grants of the lands within the purchased lands, it's not clear that they were produced for the purposes of the Native Land Court inquiry. I mean, maybe there are answers to these, but it did occur to me that the decision of the Court of Appeal may have been a little bold in assuming that its use of the material before it was sound or was inevitable.

MR FERGUSON:

Yes Ma'am, in that regard the Court of Appeal looked at the application but was quite clear, particularly in the tail piece in response to His Honour Justice Baragwanath's judgment, to make it quite clear they were not proceeding on any premise that the application included or excluded the mudflats and weren't making –

BLANCHARD J:

They didn't have the application documents.

MR FERGUSON:

They had the published –

ELIAS CJ:

The *Gazette* summary, translated.

MR FERGUSON:

– *Gazette* application.

BLANCHARD J:

Is the application document available somewhere?

MR FERGUSON:

Well it appears on the face of Mr Alexander's affidavit, and Mr Alexander gave evidence for the Māori Land Court in the High Court stage. At the High Court stage of this proceeding the applicants, being impecunious, were not intending to participate at all, and the High Court therefore appointed Bill Wilson QC to, as amicus. It was very late in the piece and I can say within four weeks of the hearing that Mr Wilson felt there were matters that properly needed a voice from the Māori owners, therefore an accommodation was made whereby I was able to appear on an extraordinary limited budget to try and deal with that, but up until that late stage the, it was essentially the Crown and the amicus that were dealing with that, so the only evidence that was before the Court in the broader mix was Mr Alexander's evidence, which was evidence from the Māori Land Court so there was no –

YOUNG J:

But is there an application – I mean the question with the application was – I'd assumed there isn't, all there is, is the *Gazette* summary –

MR FERGUSON:

My assumption is to the contrary for the very reason that Mr Alexander, in his brief of, in his evidence to the High Court, notes that the Māori – the application was originally in Māori and it used the word "Takutai Moana". Now how he could have said that without having sighted the original application I'm unsure, and he leaves open the question of how that might have been interpreted and necessarily His Honour Justice Baragwanath notes that as well and says that's open.

ELIAS CJ:

Well it would be odd if the, if the minute book wasn't – I mean one would expect reference to the fact that it wasn't available, well, would it be in the minute book – I don't know, I can't remember the records – those, of what those records – Mr Sinclair knows this sort of stuff.

MR FERGUSON:

But certainly that's –

YOUNG J:

Para 18 of the Court of Appeal judgment says that Mrs Matenga's actual application's not in evidence but the nature of it was summarised in the *Gazette* notice.

ELIAS CJ:

That's the evidence that they had.

BLANCHARD J:

Yes, not in evidence but that was – I was asking whether it actually –

ELIAS CJ:

Existed.

BLANCHARD J:

– is known to be available.

YOUNG J:

Oh I see. Okay because the – Justice Fogarty referred to the Takutai Moana didn't he?

ELIAS CJ:

I think the purchase might be significant too, the original Crown purchase.

MR FERGUSON:

Well I think the – that entire series of events and there was various material in a bundle of documents that were before the High Court but the High Court – and our position as advanced before the High Court was, look if the Court is minded to grant

the application sought, this – it should all be referred back to for a full and comprehensive historical factual inquiry before the Māori Land Court, being the appropriate Court of first instance to embark upon that. His Honour took a different view and thought he could answer the questions, essentially. And we've been heading up rather than back down the judicial chain since that point. But there is a whole range of historical material that, in my view, is relevant, that the very nature of Wakapuaka, which is often referred to as a native reserve, which in itself that title is erroneous because it was never reserved back from Māori –

ELIAS CJ:

Mmm, it was never obtained by the Crown.

MR FERGUSON:

– it was never obtained.

ELIAS CJ:

Yes.

MR FERGUSON:

So Te Tai Tapu and Wakapuaka were quite unique in that regard. And that colours – so the approach, I mean, the Court of Appeal makes a slightly disparaging comment about, well there were 98 other applications, the Crown's got vigorous, it would have clearly been vigorous in its opposition to this if the application had included the estuary. Well those other 98 applications were clearly for land that had been sold and that's why they were so – dismissed so arbitrarily by the Native Land Court but this was a, quite a unique situation and there's a, an enormous wealth of historical material and I suppose it's – the difficulty which the applicants face is having to try and engage at that, on those matters in – at appellate levels where there hasn't been a full inquiry where we say it should have occurred originally in the High Court, but I suppose what we are faced with, and it's the very first issue Your Honour raised –

ELIAS CJ:

Well, sorry, do you say, do you say that the outcome in the High Court should have been that the Crown's application for judicial review should have been declined, leaving or should have been, there should have been an order returning the matter to the Māori Land Court for investigation of the property interests?

MR FERGUSON:

Well, ultimately, only if my friend had been successful in the High Court. At – the High Court's judgment was, actually found for us –

ELIAS CJ:

Yes, of course. Yes, gave you everything.

MR FERGUSON:

– but maybe the Court of Appeal, if one puts it in the sense that it's really looking at the –

ELIAS CJ:

Yes I see.

MR FERGUSON:

I think in a sense His Honour Justice Baragwanath was right. In a different way he was saying what we had said or the way that he was confined to, what's the nature of the application and the decision.

ELIAS CJ:

Well he was saying, effectively, you can say that the 1998 determination seems to be flawed on its face –

MR FERGUSON:

Yes.

ELIAS CJ:

– but the outcome from that should be that the property interests should be examined in an orderly way –

MR FERGUSON:

That's correct –

ELIAS CJ:

Yes.

MR FERGUSON:

– so that – and even if the 1901 land transfer title is what it is and excludes – it's quite important to understand thoroughly the factual, the factual chronology leading up to that point because that has an impact on what is the status or the potential status of this land and what are the avenues, because I think it's fair to say that the applicants do wish to have a – finally get to the bottom of the title to this estuary.

BLANCHARD J:

What is it that you believe that this Court could do for you?

MR FERGUSON:

Well I think there are, there are two things, three potentially, but I think the Court – one is around the issue of did the application include the estuary or not and I think –

BLANCHARD J:

We couldn't make a –

ELIAS CJ:

No.

BLANCHARD J:

– finding on that. We could perhaps say that the Court of Appeal may have approached it prematurely –

MR FERGUSON:

Yes, that is –

BLANCHARD J:

– but we couldn't go further than that.

MR FERGUSON:

No, no and I accept that, but there are concerns around –

BLANCHARD J:

So in that respect we wouldn't be being asked to –

MR FERGUSON:

Make an order – no –

BLANCHARD J:

– alter an order that they've made and therefore there's a question of appealability –

MR FERGUSON:

Secondly, the issue in relation to the Native Land Court title and the finding of fact if we are now agreed that there is one made, a finding of fact that it excluded the mudflats –

YOUNG J:

Did not encompass.

MR FERGUSON:

Did not encompass the mudflats.

ELIAS CJ:

Well, it's more the outcome that you're really concerned about because that flat outcome perhaps, oh well no, you do want to check – it seemed to me that paragraph 69 is a real problem for you in the Court of Appeal decision because it seems to be conflating the registry purposes and indefeasibility with the identification of the property interests.

MR FERGUSON:

Yes. In my view that, if one, if the Court of Appeal had just simply gone to the land transfer title and said it excludes, we agree and left it at that, but this, they go a lot further than that in terms of their analysis of the –

ELIAS CJ:

Yes.

MR FERGUSON:

– interplay between the two and that's a fundamental issue about – where they say the land transfer system effectively reigns supreme and these native titles are a lesser creature that really can't survive there.

ELIAS CJ:

Well it may reign supreme in respect of evidence of property until corrected, but there still has to be some way of ascertaining who has the property in this estuary –

MR FERGUSON:

That's correct.

ELIAS CJ:

– and really the Court of Appeal has determined that you don't, in effect.

MR FERGUSON:

By default almost.

BLANCHARD J:

Well has it determined that?

MR FERGUSON:

I didn't think it had.

BLANCHARD J:

That's the problem.

McGRATH J:

It's acknowledged, hasn't it really said you're going to need more evidence before you would be able to persuade a Court of that?

MR FERGUSON:

I think, I think that's right.

ELIAS CJ:

But it's the Court that you have to persuade on their view.

YOUNG J:

Well sorry – there are two things. Their view is, as I understood it, that you are never going to establish that the 1983 order encompassed the mudflats unless the original plan can be found? That's one view they make.

MR FERGUSON:

One, that is one view.

YOUNG J:

The other, but the other as I understood it is that they say the customary ownership or otherwise of the mudflats is entirely up for grabs. You've got a very difficult task to establish that the 1983 order encompasses the mudflats.

MR FERGUSON:

1883.

YOUNG J:

The 1883 order. But the ownership of the mudflats is entirely up for grabs, isn't that the position?

ELIAS CJ:

Well if there was a determination by the Māori Land Court that, against an application that it was included, that it was excluded, then you don't, because it goes within the Crown's purchases. I mean I think – it does seem to me at the end there's a big question of fact.

MR FERGUSON:

Because from the time of the '98 decision of the Māori Land Court, we have all been grappling with what is within the title, and what's left, the corollary of that is, if it's not within, well what is the nature of that title without the estuary, and that does raise this live issue as to, well is it, or should it have been a Māori field and separately from this title that was granted in 1883 or 1901 or whether it falls into some Crown dominion by common law or other. And obviously we're challenged in that regard by obviously a couple of pieces of legislation, but as I say if we can establish, if it can be established as a matter of fact, regarding the nature and intent of the application which requires a broader, historical context, then it may –

McGRATH J:

Mr Ferguson, I've got your reference to the application and two, I think you had three propositions that you thought that this Court might be able to help you with if you got –

ELIAS CJ:

Three potential courses.

McGRATH J:

Now, we've got the application, we've got the NLC title I think was your second point. Could you just put the phrase for me so I can write it down, your third option, for how you've got an arguable point this Court can –

ELIAS CJ:

In fact, did you develop the three points at all, because you only said, you were in your first one –

MR FERGUSON:

That's right.

ELIAS CJ:

– and I'd like to write down what your second one is as well as your third one.

MR FERGUSON:

Well the first one was this issue around the application. The second one was the finding of fact in relation to the nature and extent of the 1883 order.

McGRATH J:

That it did not encompass the mudflats.

MR FERGUSON:

That it did not encompass the mudflats.

McGRATH J:

Yes we've got that.

MR FERGUSON:

And our position is that it did.

McGRATH J:

Yes.

MR FERGUSON:

And the third is, and this draws somewhat on, this is the position that we advanced in the High Court, and draws somewhat on, I think where His Honour Justice Baragwanath was saying, which was in the event that the Court reached the conclusions that it did in relation to the 1998 decision and overturned that, clarified by way of declaration the status of the 1901 order, that beyond that the entire issue should have been referred back to the Māori Land Court. So that would include the two propositions I've just addressed to Your Honours, the issue of the nature and extent of the application and the nature and extent of that judgment.

McGRATH J:

That would've been under what statutory provision?

MR FERGUSON:

That would've been under the original – having crossed the 1998 order, the matter would've been open for the Māori Land Court to investigate the title.

ELIAS CJ:

It's really, is it the application that was brought, preceding the 1986 determination?

MR FERGUSON:

Yes, the original application for investigation of title, yes.

McGRATH J:

Yes.

ELIAS CJ:

Was that an application for, again we don't have this before us, is that an application for investigation of title, or was it an application for rehearing of the 1883 determination? What was it?

MR FERGUSON:

In 1986?

ELIAS CJ:

Yes.

MR FERGUSON:

No, I think –

BLANCHARD J:

An application for a vesting order.

ELIAS CJ:

Oh, a vesting order.

MR FERGUSON:

It seemed to proceed.

ELIAS CJ:

On the assumption that it was, that's right.

McGRATH J:

It was to determine the ownership of the estuary.

MR FERGUSON:

It simply was, and it seemed to proceed on the assumption that this was Māori freehold land by one course or another.

McGRATH J:

It held that.

MR FERGUSON:

It held that, or necessarily it had to in order to make the vesting.

McGRATH J:

Indeed, yes.

MR FERGUSON:

And whether one might scrub that as unsophisticated or not, and I certainly wasn't appearing in 1986, but that seems to be where that was focussed on. When it came to 1998, and this is in the evidence, there – I think the actual reality of that 1986 decision hadn't been grappled with by counsel then acting, and we ended up with a

situation where the original application, filed in 1996 I think it was, was for, to investigate title, a blanket one, so therefore potentially as customary land, but it was in the engagement with His Honour Justice Isaac that the Native Land Court certificate was identified and the applicants altered their courses and proceeded with the argument that actually, on the fact of the Native Land Court certificate, the estuary is included, and therefore it became not an investigation of title but rather simply again a confirmation of ownership in that regard and a confirmation that the title was included within that 1883 order.

YOUNG J:

Can I just ask you something? If the 1883 order can be treated as a decision that the mudflats were not owned by Mrs Matenga –

MR FERGUSON:

Yes.

YOUNG J:

Then the whole thesis of your case in the lower Courts is demolished, isn't it?

MR FERGUSON:

There are two courses in that case. Oh yes, the thesis. One would be left with arguing what –

YOUNG J:

You're not quite, sorry, I don't want to cross you, but the thesis of your case in the High Court and Court of Appeal was that the order did –

MR FERGUSON:

Include the mudflats.

YOUNG J:

Yes, all right. So –

MR FERGUSON:

As it was necessary to exhaust that argument in order to then ascertain which course there needs to be followed in relation to that block of land.

YOUNG J:

Yes, but if it is the case that the order represented a conscious decision by Judge Mair there was no customary title over the mud flat, then that entirely demolishes the premises on which your case had been developed.

MR FERGUSON:

That it is included, yes.

YOUNG J:

Yes, because your whole case is premised on –

MR FERGUSON:

The case would necessarily have to become one of two things. It would have to become either an application for an investigation of customary land on the basis that there's never been a grant and a certificate of title issued for the mudflats, and therefore its uninvesitgated title, subject to the Foreshore and Seabed and now Coastal and Marine Act, or secondly an application to the Māori Land Court to say that Judge Mair made an error and that the application included the mudflats and he should have included that.

YOUNG J:

But both of those options are open to you on the Court of Appeal judgment?

MR FERGUSON:

Yes. Say, because the Court of Appeal does stop short of making a finding on the application.

YOUNG J:

Well it stops well short of making any finding on customary titles there to the mudflats.

MR FERGUSON:

It does.

YOUNG J:

So what would – so what would you expect this Court to do, if it were disposed to grant leave to appeal, and eventually allowed the appeal? Say the Court was left with the view that the Court of Appeal was right, that the order didn't include the mudflats, what would you expect the Court to do about the Court of Appeal's orders?

MR FERGUSON:

I'll just clarify that. If this Court on appeal determined that the 1883 order excluded –

YOUNG J:

No, please don't – didn't encompass.

MR FERGUSON:

Didn't encompass.

YOUNG J:

Because you're – that's a – when you say "exclude" that's a different, raises a different issue, it raises the point made by Justice Baragwanath. If this Court were left with the view that the map that's missing didn't include the estuary, what orders would you say the Court should make that would differ from those made by the Court of Appeal?

MR FERGUSON:

I think in that regard, I think if that was the order made by the Court, then I think if that was the order that this Court –

YOUNG J:

That's the conclusion.

MR FERGUSON:

– made on –

YOUNG J:

If that's the conclusion.

MR FERGUSON:

If that was the decision, then I'm not sure, I think that would be fatal in that regard.

BLANCHARD J:

Well, all that would mean is that you didn't achieve anything by an appeal to this Court.

MR FERGUSON:

Correct.

BLANCHARD J:

But you'd still be able to go back to either the High Court –

MR FERGUSON:

Or potentially the Crown under the new legislative regime.

BLANCHARD J:

I think that the Māori Land Court route would be the preferable one, because I frankly don't like your chances of application to the High Court to get the title boundaries varied.

MR FERGUSON:

I'm not sure in view of the –

BLANCHARD J:

I think you've got to, I think you've got to attack the underlying problem of customary title or that the, a mistake has been made about the nature of the application in 1883.

MR FERGUSON:

Yes those are the two essential propositions.

YOUNG J:

You can do that anyway, you don't –

BLANCHARD J:

Yes, that was my – what I was about to say. I'm just concerned that we're not going to add any value.

ELIAS CJ:

Well, we might correct some of the bold statements made by the Court of Appeal, that's the problem.

MR FERGUSON:

And certainly the applicants, because the applicants do wish to revisit – do wish to revisit before Your Honours the issue of whether –

YOUNG J:

What the maps says.

MR FERGUSON:

What the map says.

YOUNG J:

Yes.

MR FERGUSON:

Whether it included –

BLANCHARD J:

But really are you going to get any traction unless some new documentation turns up? It's all very well to talk about correcting bold statements by the Court of Appeal, but they're not your underlying problem. I mean they don't look good from your point of view, but they'd be completely trumped if you can find the application, for example, and it says what you hope it says.

MR FERGUSON:

That's certainly, that's certainly correct.

BLANCHARD J:

Or if there is other material pointing in a different direction.

MR FERGUSON:

Well I – the position advanced by the applicants before the High Court and the Court of Appeal was that the 1883 order and the certificate issued by the Court in visual depiction, because there is a colour sketch on that title –

ELIAS CJ:

Would it – it would have been helpful to have seen it.

MR FERGUSON:

I've got a copy of it.

ELIAS CJ:

Yes, well, I think perhaps we should have it passed up.

MR FERGUSON:

So the position that we advance in relation –

BLANCHARD J:

Well, just a moment.

MR FERGUSON:

Sorry.

BLANCHARD J:

Where's the mudflat on this?

ELIAS CJ:

Be in the, within the blue.

MR FERGUSON:

You see the circular island that looks like – that's Pepin Island –

BLANCHARD J:

Yes.

MR FERGUSON:

– that sticks out and the mudflat is bounded between that and the main shore. So you've got Delaware Bay on the right, with a sand spit that encompasses the mudflat –

BLANCHARD J:

Right.

MR FERGUSON:

– on the north, then Pepin Island, and then you've got a boulder bank, a permanent boulder bank across Cable Bay there on the left-hand, western side.

BLANCHARD J:

So it's that, is that sort of vaguely "Y" shape?

MR FERGUSON:

Yes.

BLANCHARD J:

South of Pepin Island?

MR FERGUSON:

That's correct. And the second page attached to that is an enhanced and better copy of the actual map that Mr Alexander took and these were both documents out of the case on appeal documents, 1881 I think.

BLANCHARD J:

Is there a causeway from the telegraph station at Peppin Island?

MR FERGUSON:

Yes there's a road across the top of that boulder bank. That boulder bank is a natural land feature rather than an artificial construct.

BLANCHARD J:

So the tide comes in –

MR FERGUSON:

So it solely comes in through the mouth of the Wakapuaka River –

BLANCHARD J:

– through Delaware Bay, yes.

MR FERGUSON:

So the river actually, you'll see the course of the river marked through the estuary, so that's – so obviously at low tide when it's all mudflat, the river follows that course.

BLANCHARD J:

Oh I see, the estuary extends to –

ELIAS CJ:

Yes.

BLANCHARD J:

– to the east of the river as well?

MR FERGUSON:

Yes so it goes right, right, it goes right to that eastern arm of the "Y", as it were, Your Honour. And the view that was advanced by the applicants was that this depicts the boundary as a thick blue line, the boundary of the block and that northern boundary runs along the Delaware Bay coast, but that thick blue line does not come inside and run alongside the inner edge of the mudflats and so that was one of the arguments advanced, was that the actually boundaries of the block do not purport to exclude the mudflats – to the contrary, they include it. And then the second point which was in relation to that was the boundary description itself, which is as stated on that certificate, which is a little difficult to read but it says, "Bounded on the north eastward and partly by section 2 and partly by the Whangamoa Harbour", and on the south eastward by the River Whangamoa, and then on the north westward, by the high water mark of Tasman and Delaware Bays, so Tasman and Delaware Bays being the bays out there, and in the argument there was on that description as well, consistent with the applicant in which the application was talked about it being bounded by the sea, then intention wasn't of either the applicant or His Honour to exclude the mudflats from this. What obviously is the most telling fact that has pointed the other direction, of course, is the subsequent survey, evidence which suggests that the actual – when the block was surveyed and when the title was issued, the acreage of some 17,000 acres that was certified, can only have, can only be the land without the mudflats and that's the counter-proposition, and really the assumption is that all of the survey evidence clearly reflected the Court's judgment.

BLANCHARD J:

Physically what's there at the moment, is it just an area of mudflats or has there been some sort of development or marine farming there?

MR FERGUSON:

No, it's just purely an area of mudflats. There's some controversy about certain vehicular activities on the mudflats and damage to – and the local iwi are concerned about damage to cockle beds and some burial sites in some of the dunes around the margins of it, but there's no other commercial activity in there.

McGRATH J:

And how do, how would vehicles get there?

MR FERGUSON:

There's a road that runs along the river all the way to the, or should I say the bottom of the "Y", and then there's a road that runs right along that, the western – the eastern I should say, south eastern margin of the mudflat, accessing various Māori land blocks towards the end and a farm section as well. So there are some access points around the base of the, of that sand spit that comes on the eastern margin and so there have been concerns with people – while there is a perfectly good boat ramp at Cable Bay a couple of kilometres away, some people do seem insistent on driving their four wheel drives and yachts right down onto the mudflat and launching there, which is one of the tension points. It's one – when I started my submission I said there were some contextual issues and one of them certainly was around obviously this, we're dealing with a decision in 2008 and it was appealed – the application for leave filed in 2009. The parties sought and were granted an adjournment for a period to have discussions between themselves in a way of trying to resolve the long-term interests in this estuary and trying to find a way forward. That was – those discussions did start and then we had the Foreshore and Seabed Review which kind of cut across those. An application was made by consent by both parties to further adjourn this application for leave to allow those discussions to continues for a further year, but His Honour Justice Tipping wasn't prepared to grant that extension without a fully argued adjournment application, and at that point the parties defaulted to the present application, so I think it's fair to say that the parties would prefer to be in dialogue rather than to be arguing this application today, to be honest.

BLANCHARD J:

Well, that's the first I've heard of this. I wasn't aware of the circumstances in which the matter effectively came before us for hearing of the application. I was under the impression that the negotiations had broken down.

MR FERGUSON:

No, no, there was a joint application for a further 12-month adjournment.

BLANCHARD J:

Well, how would it be if we simply adjourned again for further discussion? Because what's worrying me is that there seems to be an awful lot of money being spent on this and –

MR FERGUSON:

Well certainly –

BLANCHARD J:

– it just doesn't seem worth the candle.

MR FERGUSON:

Well certainly there's a lot of money being spent on the Crown side.

BLANCHARD J:

I don't really understand where the Crown's coming from. I can understand where they may think they're coming from legally, and they may possibly be right, but in a practical sense, putting this in front of the Supreme Court doesn't seem to be a very good idea.

McGRATH J:

I've just – shown to my colleagues Mr Ferguson the minute that Justice Tipping issued, I think that in a sense an ultimatum was indicating the Court would feel, rather than letting the matter be indefinitely adjourned.

BLANCHARD J:

Well, I think Mr Ferguson has actually summarised it pretty well.

MR FERGUSON:

I couldn't comment standing here today, for what the Crown's position in relation to that course is, but I certainly can say, on behalf of the applicants, that they firmly wish to be engaged with the Crown to seek a resolution, because regardless of the outcome here, all that they see is further, in order to realise their aspirations in relation to these mudflats is further litigation, be it in the High Court or Māori Land Court, which in their view is not a constructive way forward, and shouldn't be the manner of engagement between the parties.

BLANCHARD J:

How does the very recent legislation impact on all of this?

MR FERGUSON:

It changes slightly from – essentially where, because this proceeding was all on foot, obviously before even the Foreshore and Seabed Act, and to be frank this line of argument was being pursued in the knowledge at that time, that if unsuccessful then the contrary application will be made to this as uninvestigated customary land. Of course in the midst of the judicial review, application of the Conservation, applied, the Foreshore and Seabed Act was enacted, and that removed that second limb, so the fall-back position was gone, because that Act deemed anything that wasn't included in Māori freehold title to be public foreshore and seabed, and what Māori were left with seeking is various customary rights orders, which are clearly of a much lesser nature than customary title at common law, or in terms of the Te Ture Whenua Māori Act. In terms of the – and in that sense, that's why I think because of that there has been such a level of commitment to try and push as far as reasonably possible, the issue of "Was this included or not", and that's still a live issue, because if it can be established, even if it was erroneous that the issue should have been included in the 1883 title, then it is possible to still have a freehold title corrected and that freehold title would be an exception to the Act, it wouldn't be subsumed by the then public marine area.

ELIAS CJ:

Well you'd have property if that was so, yes.

MR FERGUSON:

Now under the new Act, we do away with the public foreshore and seabed concept and instead you've got a common marine area, which is a different beast altogether, and is essentially deemed to be owed by no one, so it's not invested in the Crown for

the public as such, and that protects the various public access rights and the like, and there is the ability under the new Act for iwi, hapu or whanau groupings to apply for certain orders in that regard in terms of the – that are customary marine title. It's not the same as customary title in the orthodox sense, because there were various accommodating activities such as public access and a range of other limitations on that, and that requires various tests to be met in terms of use and continuous occupation, and then there's a lesser series of protected activity rights that can be applied for by anybody, which essentially tries to protect the exercise of certain customary activities on the foreshore and seabed. So they are different, very different beasts from what would have been before the past passage of the 2004 legislation.

ELIAS CJ:

Mr Ferguson, in another case that we've heard recently, concerning riparian lands, there are statements, I can't remember which case it was, it might've been the *Leighton* case, Mr Sinclair probably will be able to tell me, in which the judges specifically mentioned the fact that surveys don't extend into the land covered by water, but that doesn't preclude the water-covered land going with the land, and similarly that Crown grants in that case always had thick black lines which stopped at the high water mark, but again that didn't preclude the submerged riparian inlands, or the tidal riparian inlands, or water-covered, being part of it. None of that case law is referred to in the Court of Appeal decision. Was there no exploration of that in the hearing?

MR FERGUSON:

Not that I'm aware of, Ma'am, my friend can correct me. I'm not sure if that line has been drawn to the Court's attention.

ELIAS CJ:

Because they are, the Court of Appeal places a great deal of reliance on the fact of the acreage that is identified and also the markings on the survey maps.

MR FERGUSON:

Absolutely, and in fact, I mean, the entire case turns on the acreage and the markings of the surveyors on those plans. And that's the premise upon which it's determined that the title is excluded, or not included.

ELIAS CJ:

Was there anything else you wanted to raise with us?

MR FERGUSON:

No, Ma'am, I think that addresses those issues.

ELIAS CJ:

Mr Sinclair, having heard that is there anything you want to particularly address us on? I'd quite like your comments on that last point I raised. I think – I'm not sure whether it was the *Leighton* case, but certainly some of those that were cited to us in the *Paki* case, the judges might have been, I have some idea it was Chief Justice Stout in particular was talking about, that the thick black line at the edge of the water and the acreage provided for was never determinative.

MR SINCLAIR:

Yes, those matters, Your Honour is right, were not canvassed in this case.

ELIAS CJ:

Yes.

MR SINCLAIR:

One of the reasons for that would be that we're dealing with reflections of the English common law, and of course the presumptions of ownership are reversed as soon as one hits the high water mark.

ELIAS CJ:

Mmm.

MR SINCLAIR:

But perhaps I can also answer that with another point, and that is the argument all along has been about freehold, and the argument for Māori has been, "We own the mudflats because of what the Native Land Court did in 1883". And we are dealing here with two systems of title which are both founded on survey, and the legislative intention from 1874 onwards has been that the two systems will mesh. So to say one has freehold is to say that one has had a title that is based on a survey encompassing that land.

ELIAS CJ:

What – sorry, just pause there. Because I did check the references that the Court of Appeal relied on in Professor Boast's book, and they didn't seem to me to substantiate the propositions taken from them, and I wonder really whether it can confidently be said that – that although the systems were to mesh, one is a system of Crown-backed title, it's evidence of property, but there is a pre-existing concept of property, which moves through the Māori Land Court and ultimately ends up in a certificate of title, but the certificate of title is not, it's not, it doesn't constitute the property, and the reasoning seems to blur that a little.

MR SINCLAIR:

Well, Māori customary rights are one thing, and the expression of those rights as freehold through the Native Land Court process may be another thing, perhaps a subset of the wider category of Māori property rights. Our submission is, or the argument here, is about freehold, it's about the extent to which those customary rights have been embodied in a certificate of title.

ELIAS CJ:

But the freehold is based on the underlying original property, and it goes through the Māori Land Court simply to enable a convenient system of recognition of property rights.

MR SINCLAIR:

Yes it's –

ELIAS CJ:

It's not a new thing. It's a mechanism, it's machinery.

MR SINCLAIR:

It's conceivable that the Native Land Court has, in a case like this, recognised or given expression to the customary property rights only to a certain extent, and there's a number of undefined customary rights lying outside it, but that hasn't been the issue in this case. The issue here has been that the Native Land Court caused a title to be issued that included the estuary. That because the title must be based on survey, there's only been one survey of the block and that very clearly excludes the estuary, and we have the correspondence between the Survey Office and the Native Land Court over the production of the title. There's no suggestion there that the title – that the survey needed to be amended so as to bring in the estuary, and

the land transfer certificate, I think it's worth making the point, by law had to be based on a plan endorsed by the Native Land Court Judge. Now the only candidate for that is the missing plan. That plan was available when the land transfer certificate was created in 1901, which is another reason, I think –

ELIAS CJ:

Sorry, can you just explain that again?

MR SINCLAIR:

The missing plan –

ELIAS CJ:

Yes.

MR SINCLAIR:

– which is the survey plan endorsed by the Native Land Court Judge before the Native Land Court certificate was created.

ELIAS CJ:

Yes.

MR SINCLAIR:

That missing plan was also by law to be the foundation for the land transfer certificate.

ELIAS CJ:

Yes.

MR SINCLAIR:

And at the time the land transfer certificate was drawn up the missing plan was available for consultation. The acreage, of course, has never varied throughout the procedure.

ELIAS CJ:

Yes.

MR SINCLAIR:

So in our submission, the fact that Māori might assert rights in relation to the estuary itself, or the coastline beyond that, is irrelevant to the issue of what the Native Land Court did in 1883 and the following steps towards re-creation of a title based on survey.

YOUNG J:

Do you have the application, the 1883 application?

MR SINCLAIR:

Yes. My recollection is somewhat hazy. I was under the impression that we never found the handwritten application, and that we were relying purely on the gazetted notice for the –

YOUNG J:

Is that both in English, is the *Gazette* notice both in English and Māori?

MR SINCLAIR:

Yes.

YOUNG J:

I see, so that's where Takutai Moana comes from?

MR SINCLAIR:

Yes. But on our argument the application and what it was for was irrelevant. People applied for all sorts of things in the Native Land Court and were cut back for one reason or another. The issue is what was embodied in the title and that must be dependent on what was surveyed, and we can recreate, with a high degree of confidence –

ELIAS CJ:

But if the, oh I see, the survey gets certified by the Native Land Court Judge, before it goes over to the DOR.

MR SINCLAIR:

Yes the survey is conducted by the Survey Office. The plan is produced –

ELIAS CJ:

Yes.

MR SINCLAIR:

– it's approved by the Native Land Court Judge, then becomes the foundation for the vastly reduced diagram that Your Honours have been shown this morning, which I'm afraid is not a particularly good reproduction. There's a lot of blue shading, which signifies continuity between the estuary and the sea beyond, which is not really visible, but our view is that if that's almost a location guide as much as anything. If there's any issue about boundaries, that has to be resolved under this system of statutory-based title by reference to what was surveyed.

ELIAS CJ:

The survey, the original – you say there was only one survey. That's the 1856 one is it?

MR SINCLAIR:

No that's – I was referring to the Murray survey.

ELIAS CJ:

Oh, I see.

MR SINCLAIR:

There was an earlier plan in the – in fact it was the only plan in the block, and that's why our survey expert concluded that it most likely was a plan, a sketch plan before the initial hearing in 1883. That too is missing.

ELIAS CJ:

Yes.

McGRATH J:

So that's the 1886 survey plan, is that the Murray plan?

MR SINCLAIR:

Yes. We have two missing plans. The first is a sketch plan before the Native Land Court in 1883. The Court made its order subject to a proper survey of the block being conducted. That survey results in two plans of the block. One is the

Survey Office copy, which we do have. But what we don't have, was lost in 1928, is the copy that Judge Mair would have signed as approved.

There was some concern, I noted, about the Crown's reason for bringing this proceeding in the first place, and I can just briefly explain that there was considerable local friction over access to the estuary which brewed up in the 1990s, and so it's been partly to correct what appears to be a clear error on the part of the Māori Land Court but also to neutralise a fairly unpleasant situation that boiled over on several occasions earlier.

BLANCHARD J:

You say there was a Survey Office copy which is available and a copy that Judge Mair would have signed. Were there two copies so that one could then go on to the Land Transfer Office? Or were there two copies for some other reason?

MR SINCLAIR:

By law the Survey Office is required to keep a copy of every plan produced for Native Land Court purposes. So we've assumed that the extant copy is the Survey Office record. The record of the missing plan. I'm sorry if that's confusing. I had a flow diagram in the Court of Appeal that assisted the Court.

ELIAS CJ:

Is your position that the earlier plans are irrelevant, because the Court of Appeal refers to the 1856 plan SO930 and I thought another one –

McGRATH J:

1864 –

ELIAS CJ:

And then the 1864 one, and the 1290 one produced in 1864, it's suggested, isn't it, there's been traced –

McGRATH J:

Also the 1877 one, also 1289.

ELIAS CJ:

Yes. So what are the stat – what's the status, have they all been – I know they're superseded for the purposes of the land transfer certificate, but were they not, were they, I mean were they used by the Māori Land Court?

MR SINCLAIR:

No. Our survey expert ran through the entire record for this area and that's why we have reference to the very large scale plan of the district, the very first one.

ELIAS CJ:

Yes.

MR SINCLAIR:

The significance of the second one, 1290, is that it's most likely a tracing of that was made for the purposes of the '83 inquiry.

ELIAS CJ:

Yes.

MR SINCLAIR:

But the plan that really matters, for legal purposes, would have been the survey plan approved by –

ELIAS CJ:

Which was approved by the Judge.

MR SINCLAIR:

– Judge Mair, which alas is the one that we don't have, but in that situation we say it's a matter of reconstructing what that plan must have looked like, which –

ELIAS CJ:

Why wasn't that sent on to the Land Transfer Office, is that what Justice Blanchard was asking? One would've thought that a copy would be kept in the Native Land Court and a copy would've been sent to the Land Transfer Office. It was a certification, wasn't it?

MR SINCLAIR:

Yes. I think the Survey Office holds both sets of records. And in 1928 it sent the Judge Mair-endorsed copy to the Native Land Court for a purpose we can't precisely identify. That's where it disappeared.

McGRATH J:

Mr Sinclair, the title we've been given, which is dated 20th November 1883, is that the date it was issued, or is that a backdated – ?

MR SINCLAIR:

It's backdated.

McGRATH J:

It's backdated from 1892? I think that's what the Court of Appeal said.

MR SINCLAIR:

Yes. It's backdated, there's some statutory authorisation for it to be done in that way.

McGRATH J:

Then between that and 1901 there's a provisional system of title, is that right?

MR SINCLAIR:

Yes, there is a provisional certificate of title which pretty much looks like the title Your Honour has before him.

ELIAS CJ:

The provisional one does?

MR SINCLAIR:

Yes.

ELIAS CJ:

So what's the – before it becomes final, what's the step that's taken?

MR SINCLAIR:

It's brought into the land transfer system –

ELIAS CJ:

Yes.

MR SINCLAIR:

That title has quite a different – it's a larger-scale diagram, but it has a border that goes right around the block and around the edge, into the estuary, around the edge of the estuary and out again.

ELIAS CJ:

Yes.

MR SINCLAIR:

Which is why everyone's –

ELIAS CJ:

But which is – when you said the survey plan was certified by the Native Land Court Judge before it was sent to the Land Transfer Office, is that at the stage of the provisional registration?

MR SINCLAIR:

It's actually before that.

McGRATH J:

Well, it's probably for the provisional register.

ELIAS CJ:

Yes.

MR SINCLAIR:

Yes. This is all happening in the 1880s.

ELIAS CJ:

Yes, I understand, so isn't that the significant plan, i.e. this one that we've got effectively you say, is it?

MR SINCLAIR:

No, we say this is really a very crude summary of representation of the survey plan itself, which is – well it's actually five plans I think, high definition plans of portions of the block, and one summary plan that encompasses the whole block. That's what Murray produced, as Your Honour will see, this little sketch diagram here refers back to the Murray survey.

ELIAS CJ:

Right.

MR SINCLAIR:

So this activity's taken place in the 1880s –

ELIAS CJ:

Yes.

MR SINCLAIR:

With the enactment of the 1894 Act, all existing titles are brought into the land transfer system, and it's at that point that, I think in 1895, it's entered on the provisional register and then brought into the land transfer register in 1901.

ELIAS CJ:

Were there any other matters you wanted to address us on, Mr Sinclair?

MR SINCLAIR:

No, Your Honour, as the Court pleases.

ELIAS CJ:

Thank you. Was there any matter arising out of that, Mr Ferguson?

MR FERGUSON:

Just two matters of clarification Ma'am. The first just in relation to the *Gazette* notice, the *Gazette* notice only was the English version of the application, it doesn't have the Māori translation there, and the reason why I suspected that Mr Alexander had seen one was that after referring to that and noting the English reference to the application, bounded on the west and north by the sea, he then says, at paragraph 12 of his affidavit, "In the Māori version, which was the original (the English version being a translation), the relevant term used for the sea is Takutai Moana," which

suggests he's seen the Te Takutai Moana application, albeit that neither counsel appear to have a copy of that.

MR YOUNG:

Well, it may be that that's the standard expression that was used, but it would be interesting to know – does no one have the affidavit of Mr Alexander?

MR FERGUSON:

Yes I do, it simply states that it doesn't append the Māori application, or the application in Māori. And these applications are all handwritten by different applicants obviously around the country. The second point, just to note also, is that there are two missing maps in this case. Not simply the survey plan that was certified by His Honour Judge Mair, but His Honour in giving judgment in the case, in the actual written judgment where he makes an order in favour of Huria Matenga for the Wakapuaka block, that judgment says "as shown in the map", and that map, which is the map before His Honour at the time he made the judgment, is also missing.

So what with the map we do have, is the one that I've shown you that was the Native Land Court certificate of title issued with that sketch map on it, and then we have this in duplicate, survey map, but the two critical missing maps, which are the ones that were, in both cases, the ones before His Honour, were the map that was attached to his judgment and then the survey map. The only other map that was obviously before His Honour was the one on the Native Land Court certificate of title, which we do have. And those series of factors really went to the heart of why the applicants were vigorously arguing that in this case, as a matter of fact, the title did include the mudflats. And I'll just add in relation to that, a distinction was also drawn to the Court's attention with the Te Tai Tapu block, which was, as I indicated to Her Honour the Chief Justice earlier, was the other block, like the Wakapuaka block that was entirely excluded from the Crown's land acquisitions in the North and South Island.

When the Te Tai Tapu block was investigated, the map that, the description of the boundary in that case for the land immediately to the south of that west Wanganui estuary at Te Tai Tapu, set its bounded in the north by the west Wanganui inlet, referring to the estuary, not by the sea, and the boundary line on that case, goes

along the inside of the southern shore of the estuary. Now that's not one where it was – so, clearly in that case, was expressly excluding that inlet on that part of the North and South Island. Different wording used by the – and a different sketch map at the very least used by the same Judge in this case, which was determined in the same sequence of hearings.

So those were the various issues why, and I think in relation to the acreage issue, just recheck my submissions which certainly indicated that we submitted, without reference to the authorities, that the question of acreage wasn't determinative and that ultimately it was what was the intent of the Judge, and the Judge wouldn't have been there double-checking the survey margins when he was signing off on the 17,000-odd acres. So the acreage itself is not determinative in that sense. And that's one of the reasons the applicants would like to revisit that issue of about what was included in that title in 1883, notwithstanding the difficulties one faces subsequently with the 1901 and other orders of the Court. But again, and I think the preference is still to engage with the respondents, with the Crown in relation to this.

There are ongoing Treaty of Waitangi negotiations, this isn't part of those, because it's been seen as a live contemporary issue, but obviously from the applicants' point of view, and my friend has noted some of the tensions that occurred arising out of this, all those tensions that occurred on the ground, obviously arising out of the 1998 case, continue to manifest themselves as a consequence of the subsequent litigation and judgments of the Courts, so they're not, I think it's one of those cases where, you know, ultimately justice is not necessarily found in the Courts, but we are here.

ELIAS CJ:

It's a very salutary submission you make to us.

MR FERGUSON:

Yes.

MR SINCLAIR:

It's not our application for leave obviously. I take it Your Honour's question relates to the issue of further negotiation?

ELIAS CJ:

Well, whether you want us to determine the leave application or whether we should adjourn it.

MR SINCLAIR:

No, I have no instructions on that, Your Honour.

ELIAS CJ:

Thank you. We'll consider what we will do in this matter. Thank you counsel for your help.

COURT ADJOURNS: 11.21 AM