

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-259

BETWEEN

STEWART NGAWAKA,
MARYLIN STEPHENS, MARK
ANTHONY McMATH, ALLAN
JOHN MOORE, HORI TE
MOANAROA PARATA and
ELDERS and registered
members of NGĀTI REHUA-
NGĀTIWAI KI AOTEA
Plaintiffs

AND

NGĀTI REHUA-NGĀTIWAI KI
AOTEA TRUST BOARD
First Defendant

YVONNE JEWEL WIKI
Second Defendant

CATHERINE HOPE MUNRO
Third Defendant

NICOLA MARIE ATARIA
MACDONALD
Fourth Defendant

RODNEY NGAWAKA
Fifth Defendant

**WHAKAPĀ TUHINGA NĀ TE ROIA TAUTOKO KI TE KŌTI/HEAMANA Ā
WĀ MO TE POARI TARAHITI MŌ NGĀTI REHUA-NGĀTIWAI KI AOTEA**

**AMICUS CURIAE/INTERIM INDEPENDENT CHAIR'S REPORT TO THE
COURT FOR NGĀTI REHUA-NGĀTIWAI KI AOTEA TRUST BOARD**

Tēnei te Rā 13 o Whiringa a Nuku, 2020
Dated this 13th Day of October, 2020

Presented for Filing by:

Amicus Curiae, Independent Interim Chair

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**MĒNĀ KA PAI KI TE KŌTI,
MAY IT PLEASE THE COURT,**

**WHAKAPĀ TUHINGA NĀ TE ROIA TAUTOKO KI TE KŌTI/HEAMANA Ā
WĀ MO TE POARI TARAHITI MŌ NGĀTI REHUA-NGĀTIWAI KI AOTEA**

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**WHAKATAUKI WHAKATAKI
[INTRODUCTORY PROVERB]**

*“Ko te tao rākau, e taea te pare,
ko te tao kupu e koe e taea te pare.”
[The wooden spear can be parried,
the spoken spear cannot]*

*He mihi ki ngā mate, ngā rangatira o te moana, whenua, o ngā hapū
whakaminenga, o ngā marae maha o ngā motu, huri noa. He mihi maioha ki
te Rangatira Kaumatua o Aotea, a Tony Palmer i hinga atu ki te po – Haere,
haere. Moe mai i te maru o ou matua tipuna. E kore e ngaro ou mahi mo tou
hapu, whanau. He mihi hoki ki te whanau pani e mokemoke ana.*

*He mihi anō ki a tātou katoa, ngā karangamaha o Te Ao e whai ora
ana i tenei Waipuke Korona. No reira ngā manākitanga ki o tātou whānau
katoa i a tātou e whai ora ana.*

*[Respects to our dead, the chiefs of the land and the sea, of the tribal
nations, of the marae of these isles; Farewell. Sleep well. Greetings to Aotea
Kaumatua Tony Palmer who passed last month and whose work continues
Condolences to his bereaved family.*

*Greetings also to us all, the peoples called throughout the world
pursuing life in the Coronavirus Pandemic. Blessings to all our families as
we work to survive.]*

- 1) Sadly I acknowledge the passing of another Rangatira of Aotea, kaumatua Tony Palmer who passed away last month and whose work for his hapu will be missed. To his whanau and to Ngati Rehua-Ngatiwai ki Aotea hapu we send our condolences and blessings. No reira, moe mai e te Rangatira.
- 2) I last provided a written report to the Court on 20 April 2020 during COVID19 Level 4 Alert Lockdown, following legal counsel applications for orders.
- 3) Our interim board of trustees with support from whanau, marae and in collaboration with local and central government made significant contributions to support the wellness and safety of Aotea whanau during Lockdown. We also made further progress despite further delays and another Auckland Lockdown.
- 4) At the time of the 29 June Judicial Tele-Conference we believed as a board that we could proceed to Combined

Kaumatua Validation hui during July, complete validations and hold duly notified and properly run postal elections and an AGM by 26 September just passed. We then encountered a number of delays, also receiving the earlier undiscovered hapu database information and resultant resurgence of issues and complexities arising.

This Report

- 5) As independent chair and amicus it is timely at this junction to appraise the Honourable Court of the circumstances and decisions which might be necessary in exercising its supervisory jurisdiction of this trust.
 - 6) This report records some milestones, achievements reached, matters of contention which have arisen, reasons for delays, decisions made, principled approaches and processes.
 - 7) Following that I make some observations, recommendations and seek orders to assist us to progress completing these matters so we can move on to elections and the long-awaited AGM.
1. I will discuss:
 - a. the 19 May 2020 mediation between the parties as advised later to myself as interim chair;
 - b. recently uncovered extensive hapu database information;
 - c. combined kaumatua validation committee hui of 8 August 2020;
 - d. combined kaumatua validation committee hui of 11 September 2020;
 - e. Validation issues of eligibility arising and impacts;
 - f. Trustee election candidates' eligibility;
 - g. Election processes, timetable and independent returning officer, Independent Election Services;
 - h. Trustees' conduct and behaviour; and
 - i. Next steps

A. Mediation Agreement of 19 May 2020

- 8) The parties and their legal counsel organised and attended a mediation on 19 May 2020. I was not advised nor invited notwithstanding that I am court-appointed chair of the first defendant board and counsel assisting the court. I was later provided a copy of the agreement they reached. It appears that despite the Court inviting Learned Counsel to provide a copy to the Court, this does not appear to have occurred.

- 9) A copy of the Mediation Agreement is reproduced below for the Court's information: -

“NRNWTB Summary of process agreed at mediation 19 May 2020

1. *Does the individual whakapapa or tatai to the founding tupuna by virtue of being descended from:
 - a. Ranginui, the son of Hikihiki; or
 - b. Rehua, the son of Mataahu and Te Kura; or
 - c. Te Awe, the son of Te Whaiti.(Clause 8.6 to 8.8 Deed of Settlement)*
2. *Can guidance be found through prominent whanau names in the person's whakapapa? These names include:
 - a. Ngawaka
 - b. Davies / Pito kino / Reweti*
3. *By no later than 26 May 2020 the plaintiffs are to provide highlighted names (said to number 400) from the list of approximately 1600 names to the defendants and Election Services. Election Services it to contact the persons involved and invite registration with ID. (List 1)*
4. *Current new applications process (relating to some 250 individuals) continue through Election Services on the existing registration form with proof of identity (List 2) until [date TBA].*
5. *Lists 1 and 2 shall be provided to the parties [by date TBA] to identify issues with whakapapa, and if so, to identify the nature of the issue by [date TBA].*
6. *A committee of 10 kaumatua shall address whakapapa on the basis of paragraph 1 (claimant definition) by date TBA. 5 kaumatua shall be nominated by each party. As per paragraph 6 of Consent Judgment neither party may dictate the composition of the other party's nominated kaumatua committee.*
7. *Any unresolved issues shall then be referred to independent arbitration to make a ruling.*
8. *Substance of the above agreed, dates for implementation to be agreed.*

Mediation adjourned.

Counsel to make inquiries and then confer with a view to reaching agreement on outstanding matters including dates. If no agreement is reached, the matter can be referred to the mediator with a list of outstanding issues and a position paper of no more than one page from each side. The parties can then meet with the mediator via zoom to discuss further. If dates are not agreed the

parties agree to abide by the direction of the mediator in relation to dates.

Acknowledgement from 4 plaintiffs that the above is agreed.

Acknowledgment from 4 defendants that above is agreed.”

10) Clause 8.8 of the proposed 2016 Deed of Settlement is reproduced below for completeness of context: -

“NRNW Deed of Settlement

8.8. For the purposes of clause 8.7.1 -

8.8.1. a person is descended from another person if the first person is descended from the other by -

(a) birth; or

(b) legal adoption; or

(c) Māori customary adoption in accordance with Ngāti Rehua - Ngātiwai ki Aotea tikanga (Māori customary values and practices); and

8.8.2. Ngāti Rehua - Ngātiwai ki Aotea tupuna means an individual who -

(a) exercised customary rights by virtue of being descended from -

(i) Ranginui, the son of Hikihiki; or

(ii) Rehua, the son of Mataahu and Te Kura; or

(iii) Te Awe, the son of Te Whaiti; or

(iv) a recognised ancestor of any of the descent groups of Ngāti Rehua - Ngātiwai ki Aotea described in clause 8.7.2; and

(b) exercised the customary rights in 8.8.2(a) predominantly in relation to the Area of Interest at any time after 6 February 1840.

8.8.3. customary rights means rights according to tikanga Māori (Māori customary values and practices), including -

(a) rights to occupy land; and

(b) rights in relation to the use of land or other natural or physical resources.”

11) Following the mediation the parties, trustees, learned counsel, Election Services and I have sought to navigate our way towards interpreting and implementing both the Court’s judgment and extant consent orders, together with the

mediation agreement. This has also been in train with the ongoing trustee duties to the Court and the hapu beneficiaries.

B. Recently Uncovered Hapu Databases

- 12) As we began to embark on engaging in implementing the next steps towards the long-awaited Kaumatua Combined Validation Committee, in June 2020 Richard Kerry, Information Technology Manager of Independent Election Services discovered in the Ngati Rehua website 'back office', a hapu database containing 733 records of hapu member names and details.
- 13) I was concerned to have this revelation because during February to June 2019 I had actively asked the former trust chair and secretary via their legal counsel and also in person. I was variously told that the database had been destroyed, that it did not exist and that they did not know.
- 14) My problem with this was that the Court ordered that the trust's records be provided to myself and the interim trustees. My understanding is that legal control of all the trust's records, including any hapu databases, was to have been transferred to the court-appointed trustees, especially following the Court's orders in Minute No 3 of 27 March 2020.
- 15) It took until approximately September 2019 to gain access to the Ngati Rehua website via passwords.
- 16) It was not until June 2020 that Richard Kerry found this first trust database list containing 733 names and advised us of it.
- 17) In August 2020 further sets of trust databases were discovered attached to emails in the Ngati Rehua email server between the former trust chair, Nicola MacDonald and former secretary, Ngaire Pera and to Electionz.com.
- 18) To appraise the Court of the nature of the trust's information received recently, below is an analysis of the databases I sought and received from Richard Kerry of Independent Election Services: -

The '733' trust database found in June 2020

The '733' database was accessible through the website administration page, under the forms section, under the

registration form and submissions page, where you can view submissions received through the forms.

While I was working on the new registration form, I noticed that there was a tally (733) next to the old registration form, suggesting that there were submissions recorded there which is when I raised it with the trust board.

The 733 list was the backend database of the old registration page used in 2016/2017 on the Ngati Rehua website (based on the dates of the submissions received). It had a disclaimer, signature, ID upload and whakapapa fields, this would suggest that it was used for registrations.

After excluding duplicated records, and names that already appear on our current database, we imported 114 records as new registrations. 101 of these went on to be validated at our hui of the 9th September, 12 required more information and 1 was declined so it would suggest that at least 101 of these records didn't make it through the registration/validation process in 2016/2017.

The two further trust databases found August 2020

In respect of the spreadsheets attached to emails in the Ngati Rehua mail server I reviewed them in an attempt to gain clarity about their purpose and the point in time that they are from. There appear to be 3 instances of spreadsheets in emails being used as outlined below.

An email dated 11/04/2016 – The attachment containing a total of 1674 records

This email is from Ngaire Pera to Nicola MacDonald which appeared to be a conversation around removal of duplicate names and database clean-up.

Summary

This spreadsheet has 4 tabs

'Full list' – The full list of records (which may still have duplicates etc) totalling 1674

'Sheet1' – A duplicate of 9 names starting with 'M' from Full List

'A-L Full List With Postcodes' – A list of records from A-L (by surname) which looks like it was tidied up – 638 records

'A-L Missing Information' – A list of records from A-L which are missing some information – 117 records

This list contains amongst others - Mook Hohneck, Vern Rosieur, Marilyn Stephens and five members of the Toki whanau

An email dated 10/01/2017 from Ngairi Pera to Electionz.com. The attachment containing a total of 1198 records + 297 incomplete records with several rows highlighted where she was requesting voting documents to be sent (specials/replacements)

Summary

This spreadsheet has 3 tabs

'A-L Full Clean List #475' – Records from A – L (by surname) – 475 records

'M-Z Full Clean List #723' – Records from M – Z (by surname) – 723 records

'Incomplete to Finish A-Z #297' – Records that are missing information – 297 records

*This file is called 'Ngati Rehua Final Database A - Z 18+' which suggests it is their database. [Counsel's **emphasis added**]*

There is a slight reduction of records from the 2016 spreadsheet to this spreadsheet, this may be due to removal of duplicated records.

Marilyn Stephens and Freda Toki are no longer on this version

An email dated 09/06/2017 which contains the data supplied by Nicola MacDonald to Electionz.com – (Containing a total of 1592 registrations) + 314 incomplete records

The first two tabs of this list were imported by Electionz.com as per their email response stating that they imported 1592 records from the first two tabs.

Summary

This spreadsheet has 3 tabs

'Wai A-L Clean List 601' – Records from A – L (by surname) – 921 records

'Wai M-Z Full Clean List 913' – Records from M – Z (by surname) – 669 records

'More Info to Finish A-Z (297)' – Records that are missing information – 314 records

Marilyn Stephens and Freda Toki are not in this version

Election Services received a spreadsheet of 1621 names as a starting point for managing the membership database. This is from a file named 'Ngati Rehua 2017 AGM Members Loaded in Oracle Electionz.com'

We de-duplicated the two lists from 11/04/2016 and 10/01/2017 against the database we are working on (1621 names plus any new registrations received). This identified 374 unique records (including those that were marked as having insufficient information).

We imported the unique records as new registrations in the new database and 168 records have since been approved at validation hui. These records were either removed from the data or were not received by Election Services from the data Electionz.com provided (as they didn't import incomplete records).

- 19) I disclosed the existence of this private information in confidence to my co-trustees and to legal counsel and asked them to comment on why these trust records were not provided to the board when I asked for them in 2019.
- 20) Defendant Counsel Ms Wroe indicated her clients' instructions that the emails to Electionz.com were only concerning a process for special votes to be sent for the then ratification process of the hapu vote on the Crown's 2016 deed of settlement offer. She also advised to the effect that the trust had received access to the trust's website and that it is not an important issue at this time.
- 21) However, upon advice from Election Services, it appears that only one of the emails referred to above was sent to Electionz.com for that purpose, being the email of 10 January 2017 from Ngaire Pera to Electionz.com containing 1,495 records, of which only 18 were highlighted to be sent special voting papers. This leaves 1,477 people on that list.
- 22) This also leaves the other above emails and attached databases which were not sent for the purpose of special votes.
- 23) Cumulatively these are lists of between 374, 1,495, 1674 and 1,906 peoples' names. It is very significant that in the earlier lists are validated and registered members. The changes in the databases show that some of those people were later removed from lists by the former trustees who were in control of the hapu database.

- 24) It is also significant as counsel assisting the court that although I had repeatedly asked for trust records during February to June 2019, and the court ordered in its 27 March 2019 minute no 3 that the former chair was to provide trust records to the board – I was not provided any trust databases. The only one received was from ElectionNZ.
- 25) We now know that the databases were nevertheless in the trust's website and email system, passwords for which were not provided until around September 2019. Not having any IT expertise, it was not until mid 2020 that the databases were found by experts because of the new online registration process and form being loaded in the site.
- 26) Early and full disclosure of databases last would have helped our process immensely because we would have had nearly 2,000 peoples' names, including many whakapapa and many contact details with which to have proceeded earlier to action, communication and the long awaited validation process.
- 27) Instead we had very little information with which to proceed. This delayed matters and exacerbated the disquiet amongst the hapu members who have a right to the responsible custodianship of their names, whakapapa and information. The board was also roundly criticised for those delays.
- 28) The Court may consider whether any appropriate orders are necessary.

Parties' Agreed Process for Pre-Validation and Validation Hui

- 29) Also relevant is that the parties agreed to a process during mediation and after subsequent Zui of counsel with myself whereby categories of lists were agreed upon and each parties' kaumatua were to hui and consider those and advise of any challenges, and conversely to accept those others on the existing lists as validated.
- 30) This process was carried out and agreement and or disagreement on those names was settled in this way, leaving the contested lists and newly received applications to be considered at actual hui a kanohi of the Combined Kaumatua Validation Committee.
- 31) The rationale for this process was that in this way the Committee would be able to do the large majority of the work in advance, which would reduce the time required to process the balance of names; those in lists in contention and newly received applications.

First Combined Kaumatua Validation Committee Hui of 8 August 2020, Awataha Marae, Auckland

- 32) The Kaumatua convened a Combined Validation Committee hui at Awataha Marae, Auckland, on Saturday 8 August. During and after the whakataui I reiterated the process and explained the nature of the day's work to the large group of support whanau who attended, including that the Committee hui was only for the nominated kaumatua and any specific support whanau for those who needed physical support, the Returning Officers and myself.
- 33) Given the accounts of earlier validation hui and AGMs where some peoples' behaviour had been very disruptive, I had earlier engaged with the North Shore Police. I had explained my role and the hui were going to have and asked them to remain on standby in case I needed to call them as Counsel Assisting the Court to keep the kaumatua and Returning Officers safe. I did so reluctantly and had explained this to my co-trustees, counsel because all of them needed to responsibly advise the whanau of this. I was pleased that I did not need to resort to calling in uniforms to the marae. I followed the same process for the next two Kaumatua hui.
- 34) Ka tika kia mihi ki nga mana whenua, a Omeka, raua ko Lyn me nga ringawera o Awataha Marae mo o ratou manakitanga ki a matou nga manuhiri.
- 35) After lengthy of debate about the composition of the Committee, they compromised and made very significant progress in considering, processing and validating many people as members in the two lists of names to be processed as earlier agreed between the parties.
- 36) In respect of many applicants the Committee also resolved to ask those people, via the Returning Officer to provide further whakapapa.
- 37) The Committee also acknowledged that a number of registration forms were deficient in other ways such as not having been signed by the applicant themselves, not providing an acceptable address and or not providing ID as required. It was acknowledged that as a matter distinct to whakapapa validation to be done by the Committee, the Returning Officer would contact those people to ask them to provide sufficient information with which to complete their applications. This was done to protect the integrity of the registration and elections.

- 38) At 5 pm that Saturday, time ran out, with several hundred names still to be considered on the second list, so I asked the Kaumatua when they would next be available to hui. The Committee resolved to convene another hui on Monday 17 August.
- 39) Unfortunately we were stymied by another COVID19 Level 3 Alert Lockdown in Auckland. The hui was postponed.
- 40) In some correspondence following the hui, there appeared to be variations of what was resolved from what I recalled and had taken notes of at the time. The hui had agreed to not be electronically recorded, a decision instigated by Mr Hohneck. I emailed my recollections assisted by my notes of the process and resolutions made to counsel, trustees and Election Services.
- 41) For the purposes of issues raised later on, I note here that in respect of one member who had complained of having earlier been a registered member and then being removed, Mr Tipi Howe, was discussed and validated. In so considering him it was also noted that Mr Howe had also filed his application to become a candidate for the trustee election. His whakapapa was discussed and explained, then it was questioned and the queries were clarified. Mr Howe and his whanau were validated by a unanimous decision of the Validation Committee.
- 42) It was also noted that Mr Howe and others had an election candidate nomination pending approval. At the following hui (11 September 2020) it was noted that all of the Howe whanau were unanimously validated. With reference to Ms. Toki and her whanau it may be worth noting that she and her whanau were all on the “pre-approved” list provided to Election Services, therefore not challenged or required for review. Further discussion below.

**Second Combined Kaumatua Validation Committee
Hui of Friday 11 September 2020, Terenga Paraoa
Marae, Whangarei**

- 43) The Kaumatua eventually convened another Validation Committee hui at Terenga Paraoa Marae in Whangarei on 11 September once the Auckland residents could again travel to a location where we were legally free to hui in a group larger than ten, comprising a gathering of Kaumatua and support whanau, Election Services and myself to facilitate. Thanks are again due to the hosts, Mana Whenua o Terenga Paraoa.

- 44) Ka tika kia mihi ano ki nga taumata mana whenua o Terenga Paraoa Marae, a Taipari ma me nga ringawera mo o ratou mahi Rangatira hei manaki a matou nga manuhiri.
- 45) After whakatau, whariru, kai whakawatea, we commenced the hui and Mr Hohneck asked myself and the Returning Officers to leave the whare so they could have a korero by themselves. We returned after that.
- 46) The Committee continued to consider the remaining applications on the list and processes for them. Some were declined upon discussion of their whakapapa, some were to be contacted for more information or for more whakapapa to be provided. I wrote some notes as did the Returning Officers.
- 47) During the hui, the issue of whangai and legal adoption arose in the context of one applicant's application. That application was confirmed and a discussion ensued about whether or not as a matter of principle that the Committee would accept both whangai in tikanga and ture (law) in the form of legal adoption. They agreed to accept both. Whangai and legal adopting was relevant to both that applicant and also to the whanau of Ms Toki and I was later led to understand of Mr Hohneck and his whanau as whangai.
- 48) I also note that the provisions of clause 8 of the Draft Hapu Deed of Settlement of 2016 contained specific whangai and legal adoption processes, which were included in the mediation agreement by consent. I have also reported on those in respect of the trust membership application form.
- 49) This hui included a further question from one side about Mr Howe, whose validation had occurred at the first 8 August hui. His whakapapa was again clarified and was again validated by agreement of the Committee.
- 50) Questions were raised by Mr Hohneck about the names and membership applications we had validated at the first 8 August hui and why many of those names were again on the list we were reviewing that day 11 September?
- 51) I explained that I had checked everyone's understanding at the time (11 Sept) and had later emailed everyone about that to avoid confusion. I recorded that for some of the applicants, they were validated in principle, but because their applications were incomplete, that approval of their applications was subject to their completing their whakapapa chart set out in the form which shows their direct link upwards to their tipuna. Further for some applicants, they

needed to provide their own application signed by the applicants themselves (as opposed to having been signed by kaumatua on their behalves), a form of ID and their address. Their registration cannot be completed until they provide that information.

- 52) Mr Hohneck added that it is for those to provide that information and if they do not get that information to Election Services then they cannot be sent a voting pack. I confirmed.
- 53) After further queries about process, we discussed and it was agreed and reiterated that the distinct categories of the lists are
- 54) At the end of the hui, Mr Hohneck and the defendants' nominees advised that they would like to raise a take about Ms Toki and her whanau and her status. Mr Billy Wii said that his whanau told him that they as a whanau wanted to object to Ms Toki's membership by her late mother Mrs Freida Toki having been a whangai. They directed the Returning Officer to bring Ms Toki and whanau's whakapapa up on the projector screen.
- 55) As facilitator I said that I could not speak on behalf of Ms Toki or her whanau, who were not present, but that it was my understanding that first, they were whanau whangai because the late Mrs Freda Toki had been whangai and then legally adopted. Secondly they had been pre-approved as part of the list validated by the kaumatua before the parties agreed for their kaumatua to convene the validation committee.
- 56) This was the understanding that the defendants and plaintiffs had agreed to in their mediation and we implemented that with the independent Returning Officer being in effect the kaitiaki of the database and the first two lists and then the series of member lists developed as we received further databases. The rationale as explained to me by counsel was that having both sides' kaumatua do pre-approvals in advance of the hui a kanohi would save time at that actual hui so they could concentrate on names who were in contention.
- 57) That process was completed before the 8 August Committee hui.
- 58) The Returning Officer had been in charge of maintaining those lists, the names they contained and we had a series of correspondence and a series of Zui with them and all parties and trustees to discuss that process.

- 59) It was therefore a surprise that the Toki Whanau whangai matter was raised at that second committee hui after the understanding of their being pre-approved. I raised that it was their lawyers who had brokered and implemented the process and all had been relying on that. Mr Hohneck referred to the Court's (18 December 2018) judgment orders that the kaumatua committee were to review all the members. I responded that they had done so through the agreed process.
- 60) This matter caused some contention and following discussions it was agreed that the Toki whanau and the Wii whanau would hui on Aotea to discuss this matter. Two Kaumatua; Rawiri Wharemate and Mr Mook Hohneck said they would attend to facilitate and support those whanau to discuss this. One committee member said that Ms Toki should apply to be a member.
- 61) Later on the weekend, Mr Hohneck copied me an email from Mr Billy Wii who informed Ms Toki that he had not agreed to hui with her and her whanau, but that the validation committee had unanimously agreed that she must provide an application to the kaumatua committee for membership.
- 62) This is not my recollection of what happened at the hui. The Hui agreed that the Toki whanau and the Wii whanau would hui on Aotea to discuss this matter.
- 63) Ms Toki has maintained in correspondence that her late mother was whangai in tikanga, then legally adopted and land was gifted to her. She maintains that she and her whanau were already approved by the respective kaumatua earlier on.
- 64) I am not empowered to make a decision about this but I am responsible to independently facilitate the Returning Officer's carrying out duties to uphold a proper process. The Returning Officers have been involved as court-ordered independent professionals because of the circumstances.
- 65) In my independent opinion it appears that, if this current about turn is allowed to continue, then it will mean that at any stage any approved member can later be challenged, whether or not they have been legitimately validated by the Combined Kaumatua Validation Committee.
- 66) In these circumstances I ask the Court to consider making orders it deems fit to proceed with.

- 67) I am also mindful to ensure that the Court is appraised of the circumstances and any decisions which might be necessary in exercising its supervisory jurisdiction over the trust.
- 68) I have been told to only undertake administration work for the trust, but that is not my understanding of my role as kaitiaki for the court and the trust. I am not prepared to refrain from providing this report to the Court.
- 69) If the Court so orders, I am prepared to remain in these roles to use my best endeavours to carry out my duties both to the Court and the beneficiaries and potential beneficiaries of the Ngāti Rehua-Ngatiwai ki Aotea Trust. This includes the process of facilitating the completion of the hapū database, registrations, resourcing, assisting and supporting the combined kaumatua validation committee, completing trust financial accounts, arranging audits, supporting the Returning Officer and his processes, heading to elections and then to the first AGM in five years.

CONTINUING CONSENT ORDERS

- 70) As independent interim chair I have taken guidance from the Court's 18 December 2018 judgment to provide the main focus for the interim trustees' work. The Court specifically directed me at para 40 of its judgment as interim independent chair, to facilitate the implementation of the consent judgement procedures¹, concluding that:

“The parties agreed to those procedures, they have the legal authority of the High Court behind them and they are sensible.”

- 71) It remains my approach that the Court's Orders are continuing and subject only to parties' consent as we have achieved.
- 72) I add of course that such matters as arise and which need further orders must remain at the discretion of the court.

¹ *Ngāwaka v Ngāti Rehua-Ngatiwai ki Aotea Trust Board [2018] NZHC 3398, para 40*

73) The proceedings have been complicated by variations in understandings and interpretations of the processes, which underscores the importance of independent services and advisors who can provide objective views and standards to the work to be done.

Election timetable

74) The election timetable is of course delayed from September due to the above impasses and matters now requiring consideration and in my submission order from the Court. A further delay of the election timetable is necessary and we can work to prepare and implement it, subject to decisions on these matters.

Trustees' Conduct and Behaviour

75) In carrying out our work as a Board I have been at pains to remind my colleague interim trustees and all participants that despite the litigation and personal conflicts, the real and ultimate stakeholders in this process are at all times and in all ways, the very large number of hapu members who deserve integrity and dignity from those put in positions to represent all of them. It is for the tipuna, the whole living group and the mokopuna that this process must succeed in a manner which is tika, principled, fair, legally compliant, transparent and accountable to them. To that end I have reiterated to my co-trustees the Court's exhortation in the 18 December 2018 judgment to trustees that:

*"... none of the trustees are "representative" of one group or another. Each of them owes, to all beneficiaries, the exercise of their independent judgment unclouded by animus concerning the wider dispute."*²

76) At the risk of being repetitive, the Court mentioned this again in Minute No. 4 of 6 September 2019³ following my 30 August 2019 report to the Court and some confusion about a resolution of the Board and trustees' conduct for all beneficiaries. The Court stated:

"... it will be important for all trustees to leave aside the animus of the various confrontations and differences which led to the litigation and get on with the very work to be done for all beneficiaries. I am sure all trustees will do that. If, contrary to my expectation, the chair considers that any individual trustee displays a consistent and persistent pattern of destructive

² *Ngāwaka v Ngāti Rehua-Ngatiwai ki Aotea Trust Board [2018] NZHC 3398, at [27]*

³ *Ngāwaka v Ngāti Rehua-Ngatiwai ki Aotea Trust Board, Minute No.4, 6 September 2019, at [5]*

behaviour in trustee meetings, I expect he would advise me of that. In that event, I would consider whether the trustee should remain or not.”

77) I record here that trustees acting with respect to those whom we serve, without fear or despite attempts to influence them in consideration of our collective need to support all the beneficiaries and not one litigation party's stance or another - is more important at this stage of our duties than ever.

78) Our interim board have recently had our 45th hui, not including the board information hui and kaumatua wananga whakapapa we convened last year. I recite this to indicate how busy this board has been and how complex the duties we are charged with are.

79) In my roles as chair and counsel assisting, I have been increasingly concerned at the behaviour of my colleague interim trustee, Mr Wii, which has been challenging for our collective responsibilities as a board over this year in hui and in correspondence after hui, both to trustees and to others. Whilst Mr Wii has been active in attending hui, he has reversed his support of our board decisions on a number of occasions after they have been resolved and implemented. This includes contesting decisions which were resolved in hui when he was present and also of those when he was not.

80) On those occasions, I raised and discussed it with the board and reminded us all that our duty includes respecting each other and the processes we are involved in, which includes that we expect the highest quality behaviour at all times, regardless of any partisan interest. I reminded us that we are all responsible to uphold our decisions.

81) More recently at two of our board hui Mr Wii has become very angry, raised his voice and sworn at others, including at myself. I addressed it at that hui and again at the next hui, by saying that none of us could use such language in the presence of rangatira, a wahine, a kaumatua and with us all as trustees.

82) In our board hui #44 on 22 September, Mr Wii again became very angry, raised his voice and swore at me because he said a decision the other four trustees had made at an earlier board hui was not fair and had he been there, we would not have decided what we did.

83) At that earlier meeting he referred to the other four of us trustees had discussed the particular issue at length before making a principled decision based on all information we

had. We had to do so to advance the work. That decision was unanimous of the four of us attending.

84) Other than his difference of view of the decision which all of us had made weeks prior, it was also clear was that his understanding of the nature of the information we considered had changed since we had earlier met and discussed it, indicating either that he had been influenced to change his view during the intervening time or, that he had read part of it and still did not understand the whole of the information before us. Regardless of his considerations, we had to make a decision which was fair to all and not exclusionary of election candidates being considered for the merits of their application, including the police record checks. We did so.

85) Part of the subject matter at Hui #44 was of very sensitive nature with confidentiality and privacy issues arising concerning criminal records and eligibility of trustee election candidates who had as a part of the process consented to a Ministry of Justice Police criminal records check, which information I had applied for as chair and received information on for consideration by the trustees. I did not want to email that information to anyone given earlier experiences of leaks of unconfirmed draft board hui minutes to others by someone in the board. Given nature of that information, we agreed to go 'into committee' for the purposes of those matters, so that the information we discussed would not be provided to anyone outside of our board, but a principled decision had to be made. We made a decision. He abstained. After further discussions he became enraged because he said if we do disqualify those two candidates then the defendants' side will only have four candidates and the other side will have more, which will be unfair. He added that we should not have approved Mr Tipi Howe. He swore and left.

86) Considering this disrespectful behaviour unbecoming a trustee, I asked him not to swear and to calm down. He swore again and left the hui. I closed with a karakia whakawatea.

87) Mr Wii later emailed we trustees raising issues and openly discussing private details of convictions of potential trustee election candidate applicants. He also got key details wrong about the conviction records in that email which was why I had wanted the information to remain in committee. He argued that the decision could not stand because of a conflict and wanted it rescinded. I do not accept that we did not have the duty to make that decision on the grounds we had and

that we should have made it. Such information given to other people can be destructive in an already volatile situation.

88) Problems such as breaches of agreed to 'in committee' confidentiality by trustees in emails to other trustees or in conversations with other non-trustees manifests a breach of trust and such conduct disrespects the court and the mana of all the beneficiaries of the hapu. I have raised expectations of confidentiality with the trustees and now again it has arisen.

89) For the Court's benefit, I had drafted that decision for the Board in that hui and it was to the effect that any applicant who had a criminal conviction record would not be allowed to stand for election. It was Mr Davies' who raised the issues of his concerns about people who have criminal records representing the hapu. The proposal discussion centred around the reputation, the mana of the hapu. It was decided that in the history of intense conflict, the climate of acrimony, that any person with any criminal convictions should not be permitted to stand for election to represent the hapu as a trustee. That they all must have clean records.

90) Here is the resolution:

"Given the ongoing legal proceedings and tensions in the community, and the need to have unquestionable trustees, the Board do not accept any election candidates who have criminal conviction records.

Moved Valmaine, seconded Bruce. Jason abstained. Kua Mana."

91) The decision in effect was to disqualify two candidates out of the twelve who applied, leaving ten candidates for the election of five trustee positions. As it transpired there was one candidate disqualified from either side of the litigation. But the numbers of candidates from either side of the divide was not my concern, nor should it have been an issue for trustees responsible for all of the hapu members.

92) In his email later that night, Mr Wii raised that Ms Toki was conflicted and should not have moved that resolution because she had a son who was one of the candidates who would remain and that her whanau would gain benefit from disqualification of candidates. What Mr Wii did not mention, is that he also had his father and wife as candidate applicants. Mr Wii also has criminal convictions but at the hui he did not raise any of these matters, did not object to Ms Toki voting about the motion, abstained and only raised it in writing after he had abused us and left the meeting.

- 93) Neither was it mentioned that all of the candidates are members of the same hapu and are therefore all related. This is relevant because the trustees' duties are to consider the best interests of all of the hapu and act accordingly.
- 94) It is my view and that of the interim trustees that we are charged with making such decisions on behalf of the hapu beneficiaries pursuant to the Deed of Trust.

Issue of Convictions

- 95) The Trustee Act 1956 is not very helpful in respect of whether or not persons with criminal convictions are precluded from being candidates for trustee elections in this context, although the purpose it is helpful in providing context of the character and quality of behaviour expected of trustees.
- 96) Section 51 of the Trustee Act is of some assistance in what it empowers a court to consider relevant when appointing new trustees, namely:

“51. Power of court to appoint new trustees

(1)

The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

(2)

In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who—

(a)

has been held by the court to have misconducted himself in the administration of the trust; or

(b)

is convicted of a crime involving dishonesty as defined by [section 2](#) of the Crimes Act 1961; or

(c)

is a mentally disordered person within the meaning of the [Mental Health \(Compulsory Assessment and Treatment\) Act 1992](#), or whose estate or any part thereof is subject to a property order made under the [Protection of Personal and Property Rights Act 1988](#); or

(d)

is a bankrupt;”

97) The Ngati Rehua-Ngatiwai Ki Aotea Deed of Trust of 11 September 1985 provides limited help with a conceptual threshold, in which clause 24 reads:

“24. VACANCY OF A TRUSTEE

a. The office of a trustee hereunder shall become vacant if the trustee dies or resigns (with immediate effect) in writing to the trustees, or becomes bankrupt or becomes a person of unsound mind within the meaning of the Mental Health Act 1969, or after appointment is convicted of an offence for which the maximum penalty is imprisonment for a term of six months or longer unless he has served his sentence or otherwise suffered the penalty imposed on him or if he is removed by the Court, or he or she dies.”

98) Although the provision can appear somewhat equivocal, when considered in context of the recent half decade history of this trust, the volatile clashes of personalities, verbal and actual physical abuse and a relatively low threshold of a penalty of six months or more imprisonment, the trustees made the above decision to disqualify.

99) I hold the two Ministry of Justice conviction records and am happy to discuss those with the Court. I am not happy to file them, given the sensitivity of their content.

100) I have been clear and transparent in my expectations within trust operations, including on this and related matters, that we must make decisions based on information and sound principles.

101) I am very concerned at recent these events and although we have made much progress over the past year, this repeated and persistent conduct of reversing position on decisions made and then abusing others with foul language places me in a position where as both chair and counsel assisting the court, I have no choice but to report to the matter to you. It is disruptive and destructive behaviour. It has caused hurt and disillusionment within our board. It disrespects the solemn role and duties we are appointed by the Court to do. It brings abuse into the hapu and before the Court.

102) Given the circumstances and repeated behaviour I have lost confidence in the current board's composition being tenable. I ask that you consider whether or not he should remain as a court-appointed trustee.

103) Thank you for your consideration. Of course I will abide the Court's orders.

Whakakapi/Final Comments

104) I make this report and seek orders as the Court sees fit under the provisions of the Trustee Act 1956 and in reliance on the Court's inherent jurisdiction to supervise this trust and its independent professional servants to properly and lawfully carry out its business.

105) I add that in the interests of natural justice the hapu beneficiaries' best interests must be paramount.

106) Should the Honourable Court or any parties require me to investigate further or provide any further information, I would of course abide by such orders of the Court.

107) In this tumultuous year of upheaval, I wish to thank the Court, its hard-working staff for your service and guidance, with best wishes also to all the uri and whānau o Aotea for good health, prosperity and blessings as we confront our future.

Hei whakakapi, ko te tumanako kia tau ngā manākitanga o te ki te Kaiwhakawā, me ngā kaimahi katoa, ki ngā tarahi me ngā roia tautoko, me ngā uri o Ngāti Rehua-Ngātiwai ki Aotea, huri noa, huri noa. Mauri ora.

**MĒNĀ KA PAI KI TE KŌTI,
MAY IT PLEASE THE COURT,**

Kei Tamaki Makau Rau,
At Auckland,
Tēnei te Rā 13 o Whiringa a Nuku, 2020
Dated this 13th Day of October, 2020



**Tu'inukutavake Barron Afeaki
Amicus Curiae**

**Independent Interim Chair, Ngāti Rehua-Ngātiwai ki Aotea
Trust**

To: The Registrar, High Court, Auckland (Kevin Yu/Tony Mortimer)
To: Counsel for the Plaintiffs, R Harrison

To: Counsel for the Defendants, C Finlayson QC & S Wroe
To: Rodney Ngawaka, Fifth Defendant