

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 19 o Haratua, 2021
Dated this 19th Day of May, 2021

Presented for Filing by:

Amicus Curiae, Independent Interim Chair

TU'INUKUTAVAKE BARRON AFEAKI
BARRISTER,
AFEAKI CHAMBERS
PO BOX 13-397, Onehunga Mall, Auckland 1643
Tel: 09 909 4904
Email: tavake@afeakichambers.co.nz

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

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

**WHAKATAUKI WHAKATAKI
[INTRODUCTORY PROVERB]**

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

- 1) I last provided a written report to the Court on 13 October 2020, following which there were a number of intervening events, applications, interlocutory hearings, the Honourable Palmer J's Judgment No. 2 of 26 February 2021¹, further interlocutory applications and the first week of evidential hearings of 22 to 26 March 2021².
- 2) Our board of trustees are grateful for the ongoing support and engagement of whānau, marae kaitiaki, community organisations, businesses, local and central government departments who have helped the trust to serve and help Aotea whānau, hapū during the past year and a quarter of Covid plague lockdowns and responses.
- 3) The numerous delays we have dealt with since last winter include revelations of further hapū databases, contests about whakapapa, scope of disclosure of trust financial and register documents, tikanga and whether or not arbitration of whakapapa by a non-hapū lawyer is appropriate, parties revisiting pleadings and interlocutory hearing thereto, resurgence of conflicts and complexities arising with engaging the parties' kaumātua to convene the combined kaumātua whakapapa committee. We have made progress.

This Report

- 4) It is timely that I report to the Honourable Court about the latest developments of the case including:
 - a. the most recent successful work of the combined kaumātua whakapapa validation committee;

¹ *Ngawaka v Ngati Rehua-Ngatiwai ki Aotea Trust Board* [2021] NZHC 291 [26 February 2021]

² Before her Honour Duffy J

- b. and update on the reinvigorated plans for election of trustees and a draft timetable leading to an AGM;
 - c. discovery of documents and update;
 - d. trust finances, accounts and compliance with regulators; and
 - e. funding and trust relationships with other entities.
- 5) 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.

A. Combined Kaumātua Whakapapa Validation Committee

- 6) I am very pleased to advise that the Combined Kaumātua Whakapapa Validation Committee was able to convene on Saturday 8 May 2021 at Awataha Marae.
- 7) The remaining issues to be discussed were recently received applications for registration and also the reviews of the hapū membership by whakapapa of Mr Tipi Howe via his late father, Claude Howe and Ms Valmaine Toki's membership via her late mother Freda Toki.
- 8) After presentations of whakapapa, examination of birth certificates, Māori Land Court records, minutes and evidence, including succession to whenua, and considerable intense discussion, debate and deliberation by all of the kaumatua, by consensus the Combined Kaumātua Whakapapa Validation Committee validated the whakapapa of both Tipi Howe and Valmaine Toki.
- 9) As invited chair, I was able to facilitate, ask some questions to bring some aspects of matters into focus. Of course it was the kaumatua themselves who came to their unanimous decisions. Kua whakamana ano ngā whakapapa o ngā whanau, e te komiti.
- 10) The Committee also considered a further set of applications, validated some and asked for the Returning Officers to contact some of the applicants to seek more whakapapa information from them.
- 11) Humbly I also observe that in terms of best processes for hapū Māori, because the kaumatua were able to hui a kānohi, kei runga marae, kia wānanga whakapapa i roto i ō rātou tikanga, they were in fact able to surmount the difficulties and misunderstandings when they had the right people in the proper environment to together make their decisions. No less

than the protection of their collective and individual whakapapa, whanaungatanga and their tikanga was at stake.

- 12) Na te mana o ngā kaumātua ka taea rātou kia āta kōrerohia ngā kaupapa taumaha nei, kia whakatauria e rātou ngā raru. Ka tika. [Because the kaumatua were able to fully discuss these important issues, they were able to settle the disputes. It was proper.]
- 13) I was humbled to witness te Tino Rangatiratanga o Ngāti Rehua-Ngatiwai ki Aotea. I am grateful to all involved for their work and their patience.
- 14) No reira kei te mihi ki ngā kaumātua katoa moe o rātou whānau e hāpai ana te kaupapa nui mo ngā whānau katoa o te hapū whānui. Tēna koutou katoa e ngā Rangatira kaitiaki.

Defendants' Application for Leave to Appeal Judgment No 2

- 15) Given confirmation of the successful work of the kaumatua, as Amicus and Interim Independent Chair of the First Defendant Trust, I invited the second to fourth defendants to withdraw their application for leave to appeal the Court's Judgment No 2 filed in March 2021, so that we may proceed with collective focus to the election of new trustees, setting down the AGM and also to completion of the substantive hearing during 2-6 August 2021. I am pleased to note that Learned Counsel for those defendants gave notice to the Honourable Court on 18 May 2021 that they have sought to withdraw their application.

B. Trustees' Elections, Preparations

- 16) I have maintained active communications with Election Services Ltd and the Returning Officer and they are ready to proceed with serving the hapū trust. Due to the lapse of time since election preparations and the public notice of Election was issued last 3 July 2020, we will need to re-invigorate the process with an updated election timetable and new public notices in the NZ Herald and Barrier Bulletin newspapers in order to properly conduct elections.
- 17) I propose that we continue with the existing group of twelve (12) nominated trustee election candidates last year, all of whom are now confirmed registered and eligible members of the hapū beneficiary roll.

18) To this end, I refer to my Amicus Report to the Court dated 13 October 2020³ and to the Court's Minute No 13 dated 14 October 2020⁴ in respect of eligibility of candidates to stand for election and to the Court's direction confirming that Mr Cleave and Ms Wiki are both eligible to stand for election as trustees⁵.

19) Election Services have been instructed to contact all the twelve candidates to confirm whether or not they remain willing to stand as candidates for the election.

C. Trustee Elections Draft Timetable

20) The current proposed trustees' election timetable has the Returning Officer's public notices to be issued a week before voting opens, to give the hapū whanau and candidates time to prepare. The proposed timetable is as follows:

- a. Friday 28 May 2021: Public Notices to be lodged in NZ Herald and Barrier Bulletin, with the trustees to also post the same on the hapū trust website and hapū FaceBook page;
- b. Friday 4 June 2021: Voting papers to be posted by the Returning Officer with voting to commence on 4 June 2021;
- c. Tuesday 6 July: close of postal and online voting ;
- d. Friday 9 July 2021: 3-day postmarked votes received by the Returning Officer will be accepted and the Returning Officer will then complete vote processing; and
- e. Saturday 10 July 2021: Trust's AGM is proposed to be convened at a venue to be decided by the interim board upon consultation with the interim trustees and hapū.

21) The Court will please find **attached** a DRAFT copy of the election timetable is as '**Appendix A**' to this report.

22) The interim trust board have yet to work through the final details, logistics, venue and a support process for the kaumātua and whānau beneficiaries as able. We are keen to get this work done to culminate in a successful election, AGM and handover of the Trust's information, including the trust board laptop containing the trust board's information. It is hoped that at the AGM we will be able to give the incoming trustees as complete a set of information as possible.

³ Tu'inukutavake Barron Afeaki *Amicus Curiae/Independent Chair's Report to the Court for Ngati Rehua-Ngatiwai ki Aotea Trust Board*, (13 October 2020)

⁴ *Ngawaka v Ngati Rehua-Ngatiwai ki Aotea Trust Board*, Palmer J's Minute No. 13 14 October 2020 at [5-16]

⁵ *Ibid*, at [17]

All Trust Board's original documents sought

- 23) I am concerned that our interim board of trustees do not have a complete set of all the trust's information. These concerns have mounted since the commencement of the evidential hearings of the case earlier this year.
- 24) During the first week of evidential hearing before Her Honour Duffy J during 22 to 26 March 2021, Her Honour asked me why, as interim chair of the trust board, I did not have a particular document to be able to verify a detail from a trust board hui some years ago about which evidence was being discussed during cross-examination of a witness.
- 25) I answered Her Honour that I had not been given all the trust's documents which I had asked for.
- 26) Her Honour commented to the effect that this was not satisfactory and that discovery is necessary as an ongoing duty of all concerned. Her Honour directed counsel for the second to fourth defendants to provide full disclosure of all the trust's information to the board.
- 27) I add that as a matter of accountability and transparency for the benefit of the hapū trust's beneficiaries and for the Court to be able to properly supervise the trust's operations, clear unfettered disclosure is required.

Trusts Act 2019, Trustees' Duties

- 28) Discovery by former trustees in respect of their duties to the trust, the Court and parties and my duties to the Court and to the trust's beneficiaries are set out under the repealed Trustee Act 1956 and by transition, under section 45 of the Trusts Act 2019 (the "Trusts Act") which came into force on 30 January 2021, provides:

"Subpart 3—Trustees' obligations to keep and give trust information

Documents to be kept by trustees

45 Trustee must keep core documents

Each trustee of a trust must keep, so far as is reasonable, the following documents relating to the trust:

- (a) the trust deed and any other document that contains terms of the trust;
- (b) any variations made to the trust deed or trust;

- (c) records of the trust property that identify the assets, liabilities, income, and expenses of the trust and that are appropriate to the value and complexity of the trust property:
- (d) any records of trustee decisions made during the trustee's trusteeship:
- (e) any written contracts entered into during that trustee's trusteeship:
- (f) any accounting records and financial statements prepared during that trustee's trusteeship:
- (g) documents of appointment, removal, and discharge of trustees (including any court orders appointing or removing trustees):
- (h) any letter or memorandum of wishes from the settlor:
- (i) any other documents necessary for the administration of the trust:
- (j) any documents referred to in paragraphs (a) to (i) that were kept by a former trustee during that person's trusteeship and passed on to the current trustee."

Further, at Section 48, the Trusts Act requires:

“48 Trustee must pass on documents

At the time that the trusteeship of a trustee ends, if the trust continues, the trustee must give at least 1 replacement trustee or continuing trustee the documents that the trustee holds at that time.”

- 29) In my submission, full disclosure by all former trustees must include all financial documents, trust board minutes, correspondence and emails, whether 'hard copy' or 'electronic' in form, which are held by the defendants or their servants including legal counsel, if such information is not legally privileged in contemplation of the present litigation.
- 30) During the March 2021 first week of hearing, Learned Counsel for the second to fourth defendants tendered documents to a witness in cross-examination, being emails and attachments of a board meeting, which had not been discovered, either in initial discovery in December 2019, or in February 2021 within supplementary defendants' disclosure. Those trust documents Ms Wroe tendered were said to have been from Ms Ngaire Pera, former trust secretary who was co-opted as a trustee at some stage, but who is not a defendant. This increased Her Honour's and my concerns about lack of discovery. Ms Wroe advised to the effect that she would provide further discovery. However to date this has not occurred.
- 31) To provide further context to this matter, in October 2019 I spoke with the former trust board's accountant, Mr James Nair who in response to my request for all the trust's

financial accounts and documents, advised me that he did not have any of the trust's information because he had been instructed to deliver all the trust's documents and information in his possession to the second to fourth defendants' legal counsel, Ms Wroe and that he had done so. Mr Nair advised me that he saw the files which he had sent at Ms Wroe's offices during a hui with them during 2019.

32) Some reliance by defendant counsel was placed on what they advise they were instructed was supposed to have been contained in the Trust's Onehunga 'Storage King' unit, insofar as it was supposed to have contained all financial records and board minutes from 2011 until 2018, but I confirm this is not the case.

33) The most recent financial documents, trust board minutes, correspondence and records contained in the trust's storage unit are from 2013, whereas the trust's hard copy financial documents, board minutes and the like from 2014-2018 are not in my possession.

Contents of Trust's Storage King Unit #476 at Onehunga

34) For the avoidance of doubt, the Court will please find **attached** as **Appendix B** my 27 March 2019 'Independent Trust Chair Report, Storage King, Onehunga, Unit 476' in which I list all the files and documents contained in the trust's storage unit which I accessed that day, inspected and recorded. I circulated that list to my co-trustees and to legal counsel. Of all the documents in that storage, the most recent are from December 2013.

35) This means that the trust's archived documents all pre-date the years 2015-2018 for which the present case's allegations arise from. For convenience my list is reproduced below:

NGĀTI REHUA-NGĀTIWAI KI AOTEA TRUST BOARD **INDEPENDENT TRUST CHAIR REPORT, 27 March 2019** **STORAGE KING, ONEHUNGA, UNIT 476**

On 27 March, 2019, Tavake Afeaki attended on Storage King ("SK"), Onehunga branch, 11 Gloucester Street, Onehunga. Tavake met the manager, Ms Barbara Crarer and discussed the replacement agreement with SK as the Independent Interim Chair of the Trust.

This agreement entered on behalf of the meant I could take possession of storage unit 476 and inspect the trust's records said to be stored in there. As I had not been given a swipe card or key for the door, I was given a new vehicle access swipe card and for \$25 purchased a new SK padlock and set of 3 keys for the unit. At 2pm, a staff member of SK attended with me and used a bolt

cutter to cut the old key off the door. I, Tavake Afeaki, certify that the following is a list of the files contained in the unit.

There is one metal filing cabinet stored there. It has 3 compartment drawers. The top two drawers held files, the lower third drawer contained nothing. There was nothing behind or underneath the cabinet. This is an initial inventory of the contents of the trust's storage as inspected:

Filing Cabinet Contents

1. Samsung Galaxy III small telephone cardboard box with a 2 degrees card and number written on it. There was no phone in the box.
2. Eastlight Folder of Minutes and Agendas, April 2012 to August 2012
3. Eastlight Folder of Minutes and Agendas, September 2012 to [no end date]
4. NR Correspondence Register April May 2013 (yellow manilla folder)
5. NR New Zealand Petroleum Dec 2013 (yellow manilla folder)
6. NR Correspondence Register 2013 (yellow manilla folder)
7. NR Correspondence Register Sept 2013 Settlement Negotiations (yellow manilla folder)
8. NR bound Agenda & docs February 2013 for hui
9. NR bound Agenda & docs January 2013 for hui
10. NR bound Agenda & docs December 2012 for hui
11. NR bound Agenda & docs April 2013 for hui
12. NR bound Agenda & docs March 2013 for hui
13. NR Minutes 04 2007 (brown manilla folder)
14. NR Minutes & Reports 2005, 2006 (brown manilla folder)
15. NR Eastlight Treaty Operations creditors & debtors April 2010 to March 2011
16. NR Eastlight Treaty Operations, bank statements, session reports, bank operations, receipts April 2011 to March 2012
17. NR Eastlight Treaty Operations, bank statements, session reports, bank operations, receipts April 2012 to March 2013
18. Hard Box File – Correspondence from Feb 2010 & 2011 w DOC, IRD, Trustees etc, including pink note, “some not all”
19. Green Note saying “missing p 103 corres”
20. White cardboard box NR Strategy July 2000, Hapu management plan & supporting docts
21. Red Plastic untitled file from 2010, bank account statements of deposits, withdrawals, from 2009, Treaty account ledger of itemised payments etc
22. White Cardboard file entitled “Auditor Peter O’Brien” Year Ended 2012
23. White Cardboard file entitled “Finance 3 Treasurer Reports, 20 April 2013 term deposits
24. White Cardboard file entitled “Finance 2, Budget” projections and expenditure
25. White Cardboard file entitled “Finance 1” Bank account statements, printouts for work, negotiations, reconciliation reports
26. White Cardboard file entitled “Debtors” 26 Nov 2012

36) No trust financial documents from the 2014-2018 period have been disclosed to me other than in three electronic pro-forma annual trust returns to the Charities Services for 2016, 2017 and 2018 years received from counsel, Ms Wroe in early 2019. One hard copy of 2015 AGM minutes were handed to me in June 2019 by the fourth defendant herself.

37) I received some electronic copies of trust board minutes via electronic discovery filed and served in a very large tranche by the second to fourth defendants in December 2019 and received some more supplementary disclosures of some documents by the fourth defendant, former trust chair Ms MacDonald, by her affidavit dated 23 February 2021⁶ in which she deposed:

“On 20 December 2019, I swore an affidavit of documents in these proceedings. Since that date, my co-defendants and I have discovered further documents as listed in the attached schedule. These documents were identified and retrieved from archives in the course of preparing briefs of evidence. Many of them are electronic copies of records which are in the control of the first defendant and available to the plaintiffs. We do not have access to the storage unit.”⁷

38) I confirm again, which I have done in correspondence and in person numerous times to counsel, trustees and to the court no hard copies of any trust documents, financial records, invoices nor receipts or board minutes from the years 2014 to 2018 are contained in the storage unit.

39) It concerns me that two years after my requests, that the second to fourth defendants are still finding archives and electronic records of the trust’s financial records, board minutes and other relevant documents. The documents belong to the trust itself and its beneficiaries, not to the former officers.

40) Apparently as late as in March 2021, Ms Pera, whether as a former contracted trust secretary or as a co-opted trustee but nevertheless who is not a defendant, is providing defendant counsel further discovery of financial records, board minutes and such documents via emails, which are directly relevant to the matters before the court and which have not been disclosed to me as Independent Chair and Amicus.

⁶ Supplementary affidavit of Nicola Maree Ataria Macdonald on behalf of second to fourth defendants, sworn 23 February 2021.

⁷ Ibid, at para [4]

41) I advised my co-trustees and learned counsel that anyone with valid reason could have approached me to confirm this or to inspect those stored files. I offered to do this by emailing all trustees and counsel on 24 and 25 February 2021 when I received a copy of the fourth defendant's affidavit of 23 February 2021 referred to above.

42) I was concerned also that in respect of Hon Harland J's 23 February 2021 interlocutory judgment concerning the plaintiffs' application to amend pleadings⁸, it appeared the second to fourth defendants' counsel had advised Harland J in respect of certain allegations arising during the 2011-2016 period that:

"The invoices/receipts are in the Trust's storage unit to which the Defendants no longer have access."⁹

43) The problem is that is not correct. The invoices and receipts from that period are not in the trust's storage unit and the Defendants via counsel were always free to inspect them, had they asked. They did not. Instead at best they assumed this to be the state of facts and did not ask me as Independent Chair and Amicus.

44) This has also meant that Hon Harland J was not properly or at least completely appraised of the facts by counsel when he found that:

"I was also advised that the financial records for 2011 to 2016 are contained in a storage unit which has been accessible to the Trust Board since 2019."¹⁰

45) I confirm that the board's financial records, invoices, receipts and board minutes for the period 2011 – 2013 are contained in the storage unit, but not for any years since. This has a material implication for the conduct of the case.

46) Responding to my 24 and 25 February 2021 emails with attached 27 March 2019 List of documents and analysis of what had been discovered, when and what had been advised to the Court about it, Learned Senior Counsel for the second to fourth defendants, Mr Finlayson emailed me on 1 March 2021 to effectively challenge whether or not I was 'confused'

⁸ *Ngawaka v Ngati Rehua-Ngatiwai ki Aotea Trust Board*, interlocutory judgment, Harland J [2021] NZHC 260 [23 February 2021]

⁹ Second to fourth defendants memorandum of counsel in opposition to plaintiffs' application to amend pleadings, in respect of Third Cause of Action, Te Puawaitanga and payments made to Ms Ngaire Pera, dated 19 February 2021, at para [9]

¹⁰ *Ngawaka v Ngati Rehua-Ngatiwai ki Aotea Trust Board*, interlocutory judgment, Harland J [2021] NZHC 260 [23 February 2021] at [28]

about the contents of the trust's storage unit. He did not take up my February offer to come and inspect the files himself. In respect of his suggestion that I should again check what is in the storage unit I responded to him by email of 23 March that I had in fact checked the storage unit again upon my return to Auckland on Sunday 21 March 2021 and confirmed the contents as per my 2019 List.

47) As to Learned Counsel's other suggestion that I and follow up with previous trustees, administrators and accountants to ask if they hold trust information, I replied that I had already done that with all of those people and their counsel and still no one had disclosed all the trust's documents to me.

48) The Court will please find **attached** as **Appendix C** a thread of email correspondence about these matters between myself, my co-trustees and Learned Counsel for the parties from 24 February to 23 March 2021, reproduced here for the convenience of the Court: -

From: Tavake Afeaki

Sent: Wednesday, 24 March 2021 9:47 am

To: Christopher Finlayson <christopher.finlayson@bankside.co.nz>;

Richard Harrison <Richard@harrisonstone.co.nz>;

sarah@sarahwroe.co.nz; Bruce Davies <jbdavies8@gmail.com>;

valmaine.toki@waikato.ac.nz; Aperahama.Edwards@outlook.co.nz;

Jas Wii <jwii05@live.com>; pou@tupono.co.nz

Cc: Tavake Afeaki <tavake@afeakichambers.co.nz>

Subject: RE: NRNWTB Trust Board records - defendant counsel reply: Tavake Afeaki's response

Tena koe Mr Finlayson, otira koutou katoa,

1. Thank you for your message and pardon the delay in this response due to other commitments. I was also away from Auckland working (and therefore not able to access to the Trust's Storage Unit) during the last level 3 lockdown and then away again last week in a hearing. I was able to check the Storage Unit again upon my return to Auckland on Sunday 21 March.
2. Sir, I thought it useful if I used your original text and interspersed my comments and responses therein. Your text is *italicised*.

Thank you for your emails about storage. It seems there may be some confusion on your part about what information the Trust has in storage.

3. [** Tavake: - Thank you Sir. With all due respect, having looked at this for two years and having inspected the trust stored archives once on 27 March 2019 and again this past

weekend, I am not confused about what information the Trust has in storage. I know what I have and what I do not have custody of as the independent chair of the Trust and counsel assisting.]

I am instructed that, several years ago, the Trust rented a storage unit to bring all archives, files and records together in one place as information was all over the place and stored in a number of homes. It is most unfortunate but it seems much of the earlier information may have been lost or destroyed, which is why a decision was made to rent the storage unit.

4. [** TAVAKE: - I had been advised that that rationale was the reason for the renting of the storage unit so the trustees could as you say: “to bring all archives, files and records together in one place”

When you were appointed, apparently you did not meet with Ms MacDonald for a handover until some six months later. During that time, Ngaire Pera provided a full handover to the interim trustees and provided all access to bank accounts, records, files and archives that were on file and held at the storage unit. Ms MacDonald was not involved in that handover and does not have access to the unit. Our understanding is that you changed all the bank accounts and postal boxes, and then replaced Ngaire with Kelly Klink.

5. [** TAVAKE: - I first met with Ms MacDonald on 12 February 2019 on Aotea when my colleague interim trustee, Mr Bruce Davies, was taking me to a powhiri at Motairehe Marae to hold our first Interim Trustee Hui and hui a kanoahi with ahi kaa whanau there and also to go over to visit with whanau at Kawa Marae. On the way, he took me to an unscheduled visit to a home in Okiwi where Ms MacDonald was present with another interim trustee, Ms Hillarey McGregor and they greeted me. During the next while, I corresponded with both parties via their counsel and with the trustees to ask for trust board documents to be provided to me for our interim board. Once I knew about it, my requests included asking for those in the storage unit. I asked to hui a kanoahi with Ms Pera to receive trust property and records. I asked for hui a kanoahi with her because I was advised she had been the trust secretary who had it or had access to it. We were not able to hui on a few occasions arranged because her counsel, Ms Wroe advised me that she was not available. On 14 March 2019, in response to my requests for trust documents from the defendants, Ms Wroe sent me an email with 14 documents, which she advised were the relevant disclosure from the defendants. That email is **attached** for your ease of reference. In terms of financial information, the trust’s returns to Charities Services for 2016, 2017 were disclosed at that time. Later Ms Wroe also sent me a copy of the trust’s 2018 return to Charities Services. Those three returns are **attached** for your convenience.

Some correspondence and telephone calls later, to try to get access to trust records, in mid-March I arranged to attend the Storage King compound in Onehunga with two of my trustees, Ms Toki and Ms McGregor to access the storage unit to take and inspect trust records. We arrived but were told we were not able to do so on that day because we were not given a key and were not allowed to access the unit. We later came to understand that Ms MacDonald had paid the outstanding \$400+ of storage rental arrears and penalties for which she was reimbursed after we were able to access the trust's bank accounts.

On 27 March, Palmer J made orders in his Minute No 3 acknowledging logistical difficulties and ordering the former chair to provide all the trust's records to myself and the other court-appointed interim trustees, see para 2(a).

On 27 March, I attended the Storage King compound, showed the manager Palmer J's orders, as Interim Chair, I entered a replacement rental agreement for the same Unit 476, had the staff bolt-cut the padlock off, paid for a new padlock and inspected the unit, which was the filing cabinet with some files in the top two drawers. I made a video of my inspection and from that video, wrote the attached 27 March 2019 File note, which is again **attached** for your convenience.

Given your comments about my knowledge of what is in the trust's storage unit which I inspected and have been protecting - I took the opportunity to inspect the unit again Sunday and again went through every one of the files contained in the trust's storage. There is nothing in the trust records from the former trustees contested financial activities during the financial calendar years of 2015- 2018. The youngest of the information in any of those files was from 2013. It is good to have those older records as an archive for the hapū, but I do not have any further information that I can provide and to enlighten this process. It is not accurate that I have had access to financial information for the relevant time of the litigation focus: 2015-2018.

I was able to hui a kanohi with Ms MacDonald and Mr Hohneck in June 2019. They were hospitable to me and we discussed whakapapa and the events leading to this litigation. It is my recollection that at that hui she handed me the Trust's 2015 AGM agenda, meeting minutes.

Ms MacDonald understands that Ms Klink has accessed the files and records. We also understand that the storage unit had several overdue bills and the owners were threatening to destroy the contents. Ms MacDonald sent numerous emails to you asking you to pay the bills but you did not, so she did.

6. [** Tavake: your client is mistaken in understanding that Ms Kelly Klink has accessed the Trust's stored unit of files and records. She has not. I have control of those files and trustees may view them or legal counsel if they so wish. Hence my offer to Counsel and trustees made last month upon receiving communications to the Court and not to myself about what was or was not held in the storage unit. After we gained access to the trust's bank accounts, during about May 2019 we reimbursed Ms MacDonald's \$400.]

Before you were appointed, the operating practice was that all trustees had a year folder containing a twelve-month divider, and inside were monthly minutes with financial records and bank statements. An additional folder contained trust records and archives, and that was used for accounting and auditing purposes. The accountants also received the folder. To the best of my clients' knowledge, those folders are in the unit and all trustees could access the unit at any time.

7. [** Tavake: Some of the files I inspected in the Trust's stored records from the 2010-2013 years match the above description of trustee folders. However as advised there is nothing in the trust's storage unit from any of the years since 2013. Other than discussed above, I did not receive any other financial records or documents.]

You need to check thoroughly what exactly is in the storage unit and follow up with previous trustees, administrators and accountants to ask if they hold trust information.

8. [** Tavake: Thank you. I have thoroughly inspected the trust's storage unit twice. I provided my trustee colleagues a copy of that information two years ago and circulated it again last month. I have not misdescribed or hidden any documents nor withheld the information held from any party. I have followed up in correspondence, in phone calls with, in person with and via legal counsel with the former trustees, administrators and with the accountant himself Mr James Nair. I reiterate what I advised above. I spoke with Mr Nair last October after writing to him to ask for the trust's records. He confirmed that he was instructed by the former trustee defendants to send all the trust's files to the defendants, via their counsel, Ms Wroe. He confirmed that he did so and saw the boxes of files which he had sent to Ms Wroe's office when he met with her there to discuss them.]

Yours sincerely,

Chris Finlayson

9. I hope this clarifies the circumstances concerning what information was stored and what I was given.

Naku noa, na

Tavake Afeaki

Independent chair, counsel assisting

From: Christopher Finlayson

<christopher.finlayson@bankside.co.nz>

Sent: Monday, 1 March 2021 1:26 pm

To: Tavake Afeaki <tavake@afeakichambers.co.nz>

Cc: Richard Harrison <Richard@harrisonstone.co.nz>;
sarah@sarahwroe.co.nz

Subject: NRNWTB Trust Board records - defendant counsel reply

Kia ora,

Thank you for your emails about storage. It seems there may be some confusion on your part about what information the Trust has in storage.

I am instructed that, several years ago, the Trust rented a storage unit to bring all archives, files and records together in one place as information was all over the place and stored in a number of homes. It is most unfortunate but it seems much of the earlier information may have been lost or destroyed, which is why a decision was made to rent the storage unit.

When you were appointed, apparently you did not meet with Ms MacDonald for a handover until some six months later. During that time, Ngaire Pera provided a full handover to the interim trustees and provided all access to bank accounts, records, files and archives that were on file and held at the storage unit. Ms MacDonald was not involved in that handover and does not have access to the unit. Our understanding is that you changed all the bank accounts and postal boxes, and then replaced Ngaire with Kelly Klink.

Ms MacDonald understands that Ms Klink has accessed the files and records. We also understand that the storage unit had several overdue bills and the owners were threatening to destroy the contents. Ms MacDonald sent numerous emails to you asking you to pay the bills but you did not, so she did.

Before you were appointed, the operating practice was that all trustees had a year folder containing a twelve-month divider, and inside were monthly minutes with financial records and bank statements. An additional folder contained trust records and archives, and that was used for accounting and auditing purposes. The accountants also received the folder. To the best of my clients' knowledge, those folders are in the unit and all trustees could access the unit at any time.

You need to check thoroughly what exactly is in the storage unit and follow up with previous trustees, administrators and accountants to ask if they hold trust information.

Yours sincerely,

Chris Finlayson

From: Tavake Afeaki

Sent: Thursday, 25 February 2021 12:45 pm

To: Bruce Davies <jbdavies8@gmail.com>; valmaine.toki@waikato.ac.nz; Aperahama.Edwards@outlook.co.nz; Jas Wii <jwii05@live.com>; richard@harrisonstone.co.nz; Sarah Wroe <sarah@sarahwroe.co.nz>; Christopher Finlayson <christopher.finlayson@bankside.co.nz>

Cc: Tavake Afeaki <tavake@afeakichambers.co.nz>; kelly klink <kellymoanna@gmail.com>

Subject: RE: Judgment: CIV-2017-404-000259 Ngawaka v Ngati Rehua - Ngatiwai Ki Aotea Trust Board: Harlan J of 23 Feb 21: Storage King Unit Files and Inspection List of Contents: Update

Tena ano koutou katoa,

1. Further to my email **below**, about files and information stored in the trust's Onehunga Storage King unit and in particular that I have now received from Defendants' legal counsel a copy of the affidavit of the former trust board chair (**attached**), in which she says at paragraph 4:
 4. On 20 December 2019, I swore an affidavit of documents in these proceedings. Since that date, my co-defendants and I have discovered further documents as listed in the attached schedule. These documents were identified and retrieved from archives in the course of preparing briefs of evidence. Many of them are electronic copies of records which are held in the Trust's archives and are therefore in the custody and control of the first defendant and available to the plaintiffs. We do not have access to the storage unit.
2. A copy of that affidavit is **attached** for your information.
3. As I had advised yesterday I cannot recall viewing any stored trust files which were entitled: "Financial Records for 2011" or any of the years from 2012 to 2016.
4. My List of Trust documents from my inspection is again **attached** for your convenience. Because none of the stored documents arose from the times and years – eg the years from 2015, 2016, 2017, 2018 contained in the allegations contained in the pleadings during 2019, I did not provide those in discovery disclosure by the Trust as the first defendant.

5. The newest or most recent documents I can recall seeing in the Trust List are from December 2013, which is a long time before the matters being contested in the present legal proceedings. I could be mistaken in this, but do not want to leave these files without an opportunity for inspection by counsel for both parties so that either party may choose what to do with them, if appropriate – in terms of the upcoming hearing.
6. In terms of electronic copies of such financial information, I cannot recall being given any electronic copies of financial information, other than sets of draft performance reports accounts for 2016, 17, 18 which were filed with the Charities Services – and which have not yet been ratified by a duly convened trust AGM called by duly elected trustees. Those 3 years performance reports are **attached** for your ease of reference. A factor in this for your consideration is that the trust do not hold financial records that I know of. It is news to me now that former trustees appear to have held externally - electronic records of the trust's financial activities. I would have expected as a matter of transparency and duty that such material information belonging to the trust and the beneficiaries of the trust might have been provided to the trust much earlier, perhaps two years ago.
7. The trust documents in storage have not been requested by either counsel for the plaintiffs nor counsel for the defendants. They would have been made available had any request been made, based upon what I believe would be a legal right to access relevant trust information for the purposes of the litigation process. I would have been and am still happy to facilitate inspection of them. I cannot definitively say how relevant they are or may be - because it is for the counsel to the parties in litigation to inspect and advise, not for me as independent chair.
8. I have offered in my **below** email - to confer and find a suitable time to be available to accompany legal counsel for both parties to inspect those files in the Onehunga Storage site with me, so counsel can themselves see what is and is not in that trust storage. We can do this in the next week or so, in order to facilitate hearing preparation.
9. Thank you again for your mahi. I have to return to hearing now.

Noho ora mai

Tavake Afeaki

Naku iti noa, na/Faka'apa'apa atu/Respectfully

Tu'inukutavake Barron Afeaki

Barrister

Kahungunu, Rakaipaaka, Rongomaiwahine, Kurupakiaka, Ha'a Afeaki

From: Tavake Afeaki

Sent: Wednesday, 24 February 2021 7:23 pm

To: Bruce Davies <jbdavies8@gmail.com>; valmaine.toki@waikato.ac.nz;

Aperahama.Edwards@outlook.co.nz; Jas Wii <jwii05@live.com>;
richard@harrisonstone.co.nz; Sarah Wroe <sarah@sarahwroe.co.nz>;
Christopher Finlayson <christopher.finlayson@bankside.co.nz>
Cc: Tavake Afeaki <tavake@afeakichambers.co.nz>; kelly klink
<kellymoanna@gmail.com>

Subject: FW: Judgment: CIV-2017-404-000259 Ngawaka v Ngati Rehua -
Ngatiwai Ki Aotea Trust Board: Harlan J of 23 Feb 21: Storage King Unit Files
and Inspection List of Contents

Importance: High

Tena koutou e nga tarahi, me nga roia tautoko

1. Trustees, please find **attached** the 23 February 2021 Judgment of Hon. Justice Harland issued yesterday concerning the Plaintiff's interlocutory application to amend their statement of claim.
2. At the last sentence of paragraph 28 of His Honour's judgment he records that:
"I was also advised that the financial records for 2011-2016 are contained in a storage unit which has been accessible to the Trust Board since 2016."
3. In the Defendants' legal submissions, Ms Wroe at paragraph 9 discussing the third cause of action, Te Puawaitanga allegations – that:
"The invoices/receipts are in the Trust's storage unit to which the Defendants no longer have access." I take the inference that this matter was raised with Justice Harland at hearing.
4. Please find **attached** for your information a File Note I made when I gained access to the NRNWTB trust storage on 27 March 2019. It lists what I inspected and which files are still in that cabinet in the Onehunga Storage King. I was advised by the former chair that all the trust's records were in that unit, which were relevant because I was looking for the trust's beneficiary database, so we could prepare for validation committee hui and then elections. But there was no such database in that cabinet. After inspection of the files which were in the cabinet, I wrote the list using the video footage I took of those files and sent it to my colleague interim co-trustees for their information.
5. I cannot recall viewing any files which were entitled: "Financial Records for 2011" or any of the years from 2012 to 2016. The Defendants may be able to locate those within the storage files I have described in my attached 27 March 2019 list.
6. I could be mistaken that there are none, but I am happy for Plaintiff and Defendant Counsel to attend the Storage Unit with me to inspect the documents therein. We can arrange a date later next week if you so wish as I am in tangihanga and then a hearing this week and away with my Iwi, Hapu and Whanau mahi until at least Tuesday 2 March.
7. Nga mihi ki a koutou me o koutou whanau.

Noho ora mai

Tavake Afeaki

Naku iti noa, na/Faka'apa'apa atu/Respectfully

Tu'inukutavake Barron Afeaki

Barrister

49) For the sake of clarity, since 1 February 2019, when I accepted the Court's appointment to this role, it appears that I have not received full disclosure, even as late as the March 22-26 hearing this year and since.

50) Despite requests for the same and Court orders¹¹ for full disclosure of trust records, I have been variously advised that other people would be providing documents or that others were responsible, including Ms Pera, whom I was advised was the former trust secretary, and a defence witness, but whom Learned Counsel Ms Wroe advised the Court in March 2021 is not a defendant and as possibly as a result has not yet disclosed all documents she holds, but whom apparently was at some stage co-opted as a trustee to the board.

51) The lack of disclosure is frustrating the process. The trust board needs all of the actual, original hard-copy of documents and that this has not occurred is not at all optimum, because as Hon Duffy J observed at on 22 March at the evidential hearing:

“... documents that are relevant to the issues I have to determine, that purport to be official trust documents, are not coming from.. the interim trustee who was ordered to have them, but are coming from persons who are defendants in the proceeding who are former trustees, who seemingly have retained copies. And whether these are their own copies or what I don't know.¹²”

52) To which Ms Wroe responded:

“Yes your Honour, as I say, we will work with Ms Pera who is not a party, who is not a defendant. But we will get documents from her.¹³”

And in her cross exchange with witness Mr Kris MacDonald:

¹¹ Palmer J's Minute No 3, 27 March 2019 at [2], [2a]

¹² Court Notes of Evidence 22-26 March 2021, Duffy J, page 168, line 10

¹³ Ibid, Ms Wroe, page 168, line 19

“Q. You weren’t aware of Ms Ngaire Pera being co-opted onto the Trust board?

A. Well I think you were disputing that weren’t you? So she was co-opted

Q. Are you aware that she was co-opted onto the Trust board? Not the PSGE, the Trust board.

A. Okay, all right.¹⁴”

53)The import is that the second to fourth defendants and their counsel apparently have or can access trust records which should be discovered. Ms Pera as a former trust secretary and co-opted trustee appears to have documents, but how much and which ones we are not sure of yet.

54)Affidavits have been sworn and legal arguments advanced based upon assumptions that I have in my possession documents which have not been stored by the former trustees in the storage unit, nor have been given to me as Independent Chair. And yet others such as the plaintiffs have been said to have had access to, but had not accessed because they had not yet been discovered.

55)I still do not have possession of actual, original hard-copy trust board documents, which I am duty bound to seek and to hold for the Court and the beneficiaries.

56)It may be that once I have in my possession all the trust’s original hard copy documents as might be reasonably expected from a responsible trust board properly maintaining its own records, that I will be in a better position to assist the Court and protect beneficiaries’ interests.

57) I ask that the Honourable Court consider the above and consider whether to make further orders.

Trust Accounts, Finances, Taxes, Returns

58)The trust has managed to hui with, correspond with and maintain relationships with some key funders and have raised some funds with which to prepare for and run elections and administer the activities until handover at the AGM.

59)The trust have commissioned and received some draft financial statements and accounts for the two years during which we have been mostly responsible for the trust bank accounts and operations, YE 31 March 2019 and 2020 and we will get the further work done for the year ended 31

¹⁴ Ibid, Ms Wroe, page 169, lines 30-33, page 170 lines 1-3

March 2021. These will need to be tabled, considered and if in order, approved at the AGM.

- 60) The trustees resolved to commission independent audits of the earlier years of trust accounts, 2015-2018 given the issues raised within the litigation. For those audits we sought scoping reports from one audit firm, but which firm was not willing to take on the years earlier than YE 31 March 2019. Therefore we resolved to advertise for tenders from other audit firms to conduct this process.
- 61) Alternatively it may be that the new trustees to be elected will themselves as a board wish to commission audits and take up that responsibility when they are elected and the Court confirms the Returning Officer's APPElection results, if in order.
- 62) Thanks to the significant voluntary work by our interim administrator Ms Klink, the trust's IRD tax returns and returns to the Charities Services Department are in order and up to date, pending filing with government full sets of AGM-confirmed sets of trust accounts after the hapū have elected new trustees and hold the AGM.
- 63) Thanks are also due to my co-trustee Ms Toki and interim administrator Ms Klink for attending paid meetings with various local government entities, government departments and some private entities, from which they have donated all those fees to the trust as income for mahi to be done.
- 64) I thank all my co-trustees for the unpaid work, meetings, correspondence, board hui and other mahi they have done for the hapū trust beneficiaries over the past two years.
- 65) If the Court is so minded, I am prepared to remain in this role to carry out my duties both to the Court and the good folk who are beneficiaries of the Ngāti Rehua-Ngatiwai ki Aotea Trust.

Whakakapi/Final Comments

- 66) I make this report and seek orders as the Court sees fit under the provisions of the Trusts Act 2019 and in reliance on the Court's inherent jurisdiction to supervise this trust for the benefit of the hapū trust beneficiaries.
- 67) Should the Honourable Court require me to investigate further or provide any further information, I would of course abide by such orders of the Court.

68) In this era of modern plague disruptions and uncertainty, 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 uri whakaheke o Ngāti Rehua-Ngātiwai ki Aotea, huri noa, huri noa. Mauri ora.

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

Kei Māngere, Tāmaki Makau Rau,
At Mangere, Auckland,
Tēnei te Rā 19 o Haratua, 2021
Dated this 19th Day of May, 2021



**Tu'inukutavake Barron Afeaki
*Amicus Curiae***

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

To: The Registrar, High Court, Auckland (Shaoreeq Ali/Tony Mortimer)
To: Counsel for the Plaintiffs, R Harrison
To: Counsel for the Second to Fourth Defendants, C Finlayson QC & S Wroe
To: Counsel for the Fifth Defendant, J Pou