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

Teleconference:	30 October 2020
Appearances:	R M Harrison for the plaintiffs C F Finlayson QC and S E Wroe for the second to fourth defendants No appearance for the fifth defendant T B Afeaki, counsel assisting and interim chair
Date of minute:	17 November 2020

MINUTE NO 14 OF PALMER J

The issue

[1] The defendants' application for interim directions in relation to the AGM and election was to be heard on 28 May 2020. On 18 May 2020, the parties apparently resolved the issues through mediation. Mr Afeaki has reproduced the Agreement, which is headed "NRNWTB Summary of process agreed at mediation 19 May 2020", in his report of 13 October 2020. The agreement outlines a process by which new applications, and around 400 names from the existing list of registered beneficiaries identified by the plaintiffs, would be provided to a committee of 10 kaumātua to address whakapapa. Clause 7 provides "[a]ny unresolved issues shall then be referred to independent arbitration to make a ruling". Clause 8 indicates the substance was agreed but dates remained to be agreed and the mediation was adjourned. There was also provision for "outstanding matters including dates" to be referred to the mediator. The mediation agreement was made without reference to the interim independent Chair of the Board, or to the Court.

[2] Mr Afeaki's report indicated that the whakapapa of Mr Tipi Howe was questioned, discussed, clarified and validated by a unanimous decision of the kaumātua validation committee at a hui on 8 August 2020. He says all the Howe whānau were unanimously validated at another hui on 11 September 2020, which also confirmed that whāngai would be accepted in tikanga and ture.[1] That is consistent with cl 8 of the Draft Hapu Deed of Settlement of 2016. Mr Afeaki also reports that at the end of the 11 September 2020 hui the defendants' nominees and Mr Hohneck raised a take about the status of Dr Toki and her whānau.[2] He reports that he explained they were whānau whāngi and had also been pre-approved as part of the list validated by kaumātua.[3] There is apparently dispute as to how the issue was to be resolved. Mr Afeaki observes that, in his opinion, if this issue is allowed to continue "then it will mean that at any stage any approved member can later be challenged, whether or not

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1 Amicus Curiae/Interim Independent Chair's Report to the Court for Ngāti Rehua-Ngātiwai ki Aotea Trust Board, 13 October 2020, at [41]-[42].
2 At [54].
3 At [55].

they have been legitimately validated by the Combined Kaumatua Validation Committee".[4] He asked me to consider making orders.

[3] The defendants referred to arbitration, under the mediation agreement, the entitlement of Dr Valmaine Toki and Mr Tipi Howe to membership of the Ngāti Rehua-Ngātiwai ki Aotea Trust.

[4] In Minute No 13, of 14 October 2020, I outlined the positions of the parties, and the report of the interim independent Chair, regarding an issue the defendants intended to refer to arbitration. I said:

> [2] First, Mr Finlayson QC advises that there is an issue relating to the whakapapa of two people that the defendants say is unresolved by the kaumātua committee. One of them is an interim trustee and the other is a candidate for election as trustee. The defendants intend to refer the issue to arbitration, pursuant to cl 8 of a mediation agreement between the parties of 18 May 2020. Mr Finlayson submits some aspect of this may come back to the Court at some point, but the defendants are not asking the Court to do anything about it at present.
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> [3] Mr Harrison submits the plaintiffs will oppose the issue going to arbitration and asks me to consider it before it does. Mr Afeaki's report provides helpful relevant background about the issue and suggests the Court consider making orders it deems fit to proceed with.
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> [4] Neither party has made an application to the Court concerning this issue. One party intends to refer the matter to arbitration. I do not consider there is anything before me to decide at present, so I do not comment further. If either party wishes the Court to make a decision regarding this issue, they will need to make an application or take up the leave I reserved in the judgment of 18 December 2018.[5] It seems clear that the election and AGM will need to be deferred pending resolution of this issue but the parties will need to resolve it with alacrity.

Submissions

[5] On 21 October 2020 Mr Harrison, for the plaintiffs, requested a further teleconference about this matter, which occurred on 30 October 2020. Mr Harrison seeks a direction that Dr Toki and Mr Howe are members of the Trust and are entitled to vote and stand as candidates for election.

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4 At [65].

5 *Ngawaka v Ngāti-Rehua-Ngatiwai ki Aotea Trust Board* [2018] NZHC 3398 at [45](f).

[6] Mr Harrison submits:

(a) Dr Toki and Mr Howe were on the existing list and not included in the 400 names whose whakapapa was to be addressed by the kaumātua committee so they must be taken to have been confirmed. Being whāngai is not a valid reason to be excluded, as is clear from the mediation agreement criteria and from cl 8.8.1(c) of the NRNW Deed of Settlement of 2016. There is no unresolved issue, as demonstrated by the interim Chair's report and an affidavit by Mr Aperahama Kerepeti-Edwards. Mr Kerepeti-Edwards provides an account of a third hui of 3 October 2020 which he says also accepted Dr Toki and her whānau.[6] Mr Kerepeti-Edwards says it would be a gross insult and humiliation to have whakapapa decided in the way suggested by defendants' counsel. Mr Harrison says he cannot emphasise enough the upset this will cause.

(b) The reference to independent arbitration was not discussed or defined and was left open as to what it may be. The plaintiffs did not agree to a costly process under the Arbitration Act 1996 (the Act) nor one that is not in accordance with tikanga. The process advanced by the defendants is inappropriate and insensitive to tikanga. It is causing considerable mamae for those singled out, whose whakapapa were presented during the kaumātua validation hui and in accompanying affidavits. The defendants' approach opens up the registration of all those on the registered beneficiary list and not identified by the plaintiffs. It is unnecessary and the plaintiffs cannot afford to go through an arbitration process, with delays. He submits the Court has jurisdiction to make orders because it has oversight of the process and because while there is an unresolved issue from the kaumātua process there is no unresolved issue between the plaintiffs and defendants.

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6 Affidavit of Aperahama Kerepeti-Edwards, dated 19 October 2020, at [23].

[7] Mr Finlayson QC, for the defendants, invites me to decline to give directions on matters that should be addressed in arbitration. He submits the Court would have to determine what was agreed at mediation, what was agreed and discussed during the kaumātua hui and witnesses would have to be called to give evidence. He submits these matters ought to be determined by the arbitrator and the plaintiffs may dispute the agreement to arbitrate and scope of arbitration as part of the arbitration. He disputes the lack of an unresolved issue. He advises that, because the plaintiffs had not responded to the request to agree on an arbitrator, the defendants would request AMINZ to appoint a suitable arbitrator to deal with the matter urgently. He submits the only direction required of the Court is that no further steps may be taken in publication of candidates for election until the arbitration process is complete. He submits that if the Court is to deal with the issue there would need to be a hearing with submissions and evidence. Mr Finlayson assures me this is not the defendants seeking to delay the AGM because they have been pushing for it.

[8] At the end of the hearing on 30 October 2020 I indicated I would take some time to consider my decision and that I presumed the arbitration would proceed in the meantime. As promised, the defendants subsequently provided me with affidavits of Mr Mook Hohneck, Mr Bill Wii and Mr Peter Mita. The information in these affidavits regarding the process at the kaumātua validation hui, particularly that of Mr Hohneck, is not consistent with the affidavits of Mr Kerepeti-Edwards or the report of Mr Afeaki.

Relevant law of arbitration

[9] Schedule 1, art 5 of the Act provides that "[i]n matters governed by this schedule, no court shall intervene except where so provided in this schedule". Sir David Williams and Amokura Kawharu describe this article as reflecting:[7]

> ...a general desire to minimise judicial intervention in the running of arbitrations in situations where the parties or the arbitrators can resolve issues for themselves in the interests of speed, finality and reduced costs.

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7 Sir David A R Williams and Amokura Kawharu *Williams and Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) at [3.3.1].

[10] Clause 8(1) of sch 1 requires litigation to be stayed if a party so requests, unless the Court finds "there is not in fact any dispute between the parties with regard to the matters agreed to be referred". In *Zurich Australian Insurance Ltd v Cognition Education Ltd*, the Supreme Court found that cl 8(1) refers to situations where it is immediately demonstrable there is nothing disputable at issue, not where there is a weak basis for one side disputing something.[8] Where there is a dispute, it must fall within the scope of the arbitration agreement, construed in light of the contract.[9] Under cl 16 of sch 1 of the Act, "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement".

[11] Rule 7.80 of the High Court Rules 2016 provides that parties to a proceeding may agree to arbitration of any part of their dispute at any time during the course of a proceeding and the court must, on application of a party, stay those parts of the proceeding to which the agreement relates.

[12] However, the Act does not disturb the inherent jurisdiction of the Court. In *Carter Holt Harvey Ltd v Genesis Power Ltd*, Randerson J held that the Court retained its jurisdiction to stay arbitral proceedings though, in line with principles established before the Act, the power to do so is exercised sparingly and only where injustice would arise.[10] In line with those principles, he held an applicant for a stay "was required to satisfy the Court that continuance of the arbitration would be oppressive or vexatious or would otherwise constitute an abuse of the process of the Court".[11] Despite this, Williams and Kawharu say there exists a "general presumption of non-intervention":[12]

> ...the modern tendency is to acknowledge what may be called a general presumption of non-intervention and to carefully calibrate the proper occasions for intervention depending on the particular circumstances.

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8 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [36].

9 *136 Fanshawe Ltd v Wilson Parking New Zealand Ltd* [2016] NZHC 1854, at [12], citing *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 43.

10 *Carter Holt Harvey v Genesis Power Ltd* [2006] 3 NZLR 794 (HC) at [33].

11 At [33](c).

12 Sir David A R Williams KNZM, QC and Amokura Kawharu, above n 7, at [3.4.1].

Should I make directions?

[13] The parties are able to agree to take disputes to arbitration and they appear to have so agreed. Consistent with the presumption of non-intervention, I am reluctant to interfere with that. I am not persuaded that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. It seems to me that there is such a dispute and the conflicting affidavits filed by the parties demonstrate that.

[14] But I would be prepared to take action if a party were breaching the orders of the Court that have provided the legal framework for this dispute so far and were made exercising the Court's supervisory jurisdiction for the proper administration of a trust. And it seems that the mediation agreement reached by both parties may not be consistent with the Court's order of 18 December 2018 that "the Kaumātua Committee will have to review not only each new application for registration but also the validity of every other registration on the existing database".[13]

[15] Mr Harrison submits that the plaintiffs made a concession to the defendants in agreeing not to have the Committee review every registration on the existing database. He says that agreement "has in part enabled the progress which has been made to date and commented favourably on by both parties".[14] That may be so. And the parties are able to make agreements between themselves. But it is exactly the sort of dispute that has arisen, in what has clearly been an acrimonious environment, that was the reason for the order. Mr Harrison is correct when he observes that the dispute about the status of the two beneficiaries here opens up the status of all the other beneficiaries that were on the existing database.

[16] I also observe that the animating dynamic of the Court's orders to date has been the desire to have disputes about whakapapa resolved consistently with the tikanga of Ngāti Rehua-Ngātiwai, even if that is not the consistent desire of the parties. It is not obvious to me that commercial arbitration is consistent with that tikanga. Further consideration by kaumātua seems more likely to be consistent with tikanga. But that

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13 *Ngawaka v Ngāti Rehua-Ngatiwai ki Aotea Trust Board* [2018] NZHC 3398 at [45](d)(iii).
14 Memorandum of Counsel for Plaintiffs Seeking Directions, 21 October 2020, at [22].

may need to extend to all beneficiaries on existing lists if the Court's previous orders are to be carried out. I am aware of the parties' desire for alacrity. But, as this incident may demonstrate, agreed short cuts are not necessarily quicker if agreements do not stick.

[17] If the parties wish to agree to alternative arrangements to those ordered by the Court, and to resolve disagreements about that agreement through arbitration or negotiation, that is up to them. I decline to interfere in the arbitration process at this stage. It may be that the process has made constructive progress since the teleconference. But if a party wishes to enforce the Court's orders in the 18 December 2018 judgment, it may apply to do so and the arbitration process does not appear to prevent that. In considering their next steps, I suggest counsel for the parties meet to discuss about the implications of their respective options and see if they can agree on a constructive way forward.

Palmer J

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