IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-259
[2021] NZHC 291

BETWEEN	STEWART NGAWAKA, MARILYN 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

Continued . . .

Hearing:	17 December 2020 (by Audio-Visual Link)
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
Judgment:	26 February 2021

JUDGMENT NO 2 OF PALMER J

This judgment was delivered by me on Friday 26 February 2021 at 1.00 pm.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
Harrison Stone, Auckland
C F Finlayson QC, Auckland
S E Wroe, Barrister, Auckland
Smail Legal Ltd, Auckland
T B Afeaki, Barrister, Auckland
Fifth defendant in person

Continued . . .

YVONNE JEWEL WIKI
Second Defendant

CATHERINE HOPE MUNRO
Third Defendant

NICOLA MARIE ATARIA
MACDONALD
Fourth Defendant

RODNEY NGAWAKA
Fifth Defendant

Summary

[1] Two groups of beneficiaries of the Ngāti Rehua-Ngātiwai ki Aotea Trust are in dispute, including about registration of beneficiaries. The Court previously issued a consent judgment and further directions about kaumātua reviewing the register consistently with tikanga Ngāti Rehua-Ngātiwai ki Aotea. The parties have engaged in mediation, which included an agreement to arbitrate unresolved issues. Now, the second to fourth defendants (the defendants) seek that the whakapapa of two people be the subject of independent arbitration by an external arbitrator. The plaintiffs oppose that as contrary to tikanga Ngāti Rehua-Ngātiwai ki Aotea.

[2] Tikanga Māori was the first law in Aotearoa. It is recognised by Acts of Parliament. It is also recognised by the common law of New Zealand. Tikanga Ngāti Rehua-Ngātiwai ki Aotea lies at the heart of this dispute. But a court must be very careful about "finding" tikanga as a fact, even where it is requested by the relevant iwi or hapū to do so. Any recognition by a court can only be a snapshot at a certain point and only for the particular purpose of the particular case before it at the time. What is recognised by a court cannot change the underlying fact of tikanga determined by the hapū or iwi, exercising their rangatiratanga. The trust here constitutes the legal form of the hapū Ngāti Rehua-Ngātiwai ki Aotea. In exercising its supervisory jurisdiction over the trust in relation to a dispute over whakapapa, where there is no conflicting law, I consider the Court is bound to make decisions consistent with tikanga Ngāti Rehua-Ngātiwai ki Aotea. But I do not consider it is the role of the Court, or is even possible for the Court, to determine the whakapapa of the two people. That is for Ngāti Rehua-Ngātiwai ki Aotea.

[3] On the basis of the evidence before me, I accept that an external arbitrator determining whakapapa, without a strong connection to Ngāti Rehua-Ngātiwai ki Aotea and a deep understanding of its tikanga, would be inconsistent with tikanga Ngāti Rehua-Ngātiwai ki Aotea. The parties here are bound not to pursue it for that reason. Doing so would also be inconsistent with the Court's previous orders which seek to uphold that tikanga. So, continuing the external arbitration in relation to whakapapa would be an abuse of the process of the Court, meaning the Court has the jurisdiction to stay the arbitration. The dispute is not arbitrable under s 10 of the

Arbitration Act 1996 for the same reason. Accordingly, the agreement to refer issues of whakapapa to external arbitration is null and void.

[4] The kaumātua of Ngāti Rehua-Ngātiwai ki Aotea can continue to meet to discuss and, if possible, decide the whakapapa in issue. If they cannot do so, they can decide what tikanga-consistent process would achieve that.

Context

Dispute and proceedings

[5] This case involves two groups of beneficiaries of the Ngāti Rehua-Ngātiwai ki Aotea Trust. It is established as a charitable trust to manage assets, including land under Te Ture Whenua Maori Act 1993. If the Trust is wound up, the assets are distributed to the Ngāti Rehua-Ngātiwai ki Aotea people. Aotea is also known as Great Barrier Island. The two groups of beneficiaries disagree about: various aspects of the administration of the Trust; a Treaty settlement initialled by the Trust Board and the Crown in December 2016; and the basis on which beneficiaries should be registered and trustees elected. There has been no Annual General Meeting (AGM) since January 2016.

[6] In February 2017, the plaintiffs brought these proceedings, seeking removal of the defendants as trustees and directions for fresh elections.[1] In May 2017, the parties agreed to a process to review the voting database and registrations. This was the subject of a consent judgment by Muir J.[2] There was disagreement about implementing those orders. In November 2018, the proceedings were amended to challenge the conduct of the defendants. Directions were also sought regarding appointment of new trustees, review of the voting database and transactions and repayment of trust funds. The substantive trial is set down for five days from 22 March 2021.

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1 Regarding this context, see *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board* [2018] NZHC 3398. When I refer to the "defendants" I mean the second to fourth defendants. The fifth defendant has taken no steps in the proceedings.

2 *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board* [2017] NZHC 1155.

Court directions for trustee elections

[7] In an interlocutory judgment of 18 December 2018, I appointed interim trustees and an independent interim chair, who I also appointed as counsel to assist the Court.[3] I gave directions about implementing Muir J's orders, to enable trustee elections to be held, including these orders:[4]

> (d) To facilitate implementation of Muir J's consent judgment:
>
> (i) ENZ must be provided with the database and/or access to it in order to oversee the registration, proxies and election of trustee process.
>
> (ii) Reasonable steps should be taken by the independent chair and ENZ to ensure all beneficiaries are encouraged to contact ENZ directly about the status of their registration and that of whānau members, and to have a reasonable period for new registration applications to be made in the correct form before their validity is assessed.
>
> (iii) 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.
>
> (iv) The Kaumātua Committee will proceed according to the tikanga of Ngāti Rehua-Ngātiwai. They will, collectively, need to decide whether they deliberate in closed or open sessions and whether to invite the independent interim chair, or an agreed alternative, to chair their proceedings (but without a casting vote), if required.
>
> (v) The Kaumātua Committee will need to meet together, collectively, with ENZ in attendance to assist.
>
> (vi) The Kaumātua Committee will need to discuss the whakapapa and decide the registration of each individual and whanau including decisions about the WiTaiawa registrations.
>
> (vii) The Kaumātua Committee will need to meet for as long as it takes to get consensus or, failing that, to make a decision by majority vote of the ten kaumātua.
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> (viii) The Kaumātua Committee should make decisions on the merits, rather than on the basis of technicalities. If applications lack required information the applicant should be given the opportunity to provide it.

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3 *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board*, above n 1, at [45].

4 *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board*, above n 1, at [45](d).

[8] The interim chair and interim trustees have progressed their work. They have held trust board hui and wider information hui, engaged Election Services Ltd, and progressed kaumātua hui about registrations.[5] It appears that there were indeed problems with the previous databases. Some registrations which have now been agreed were previously not on the database or had been removed from it.[6]

Further disputes and mediation

[9] Various disputes continued to arise between the parties. In March 2020, issues arose between the parties concerning registration forms, the database and who was entitled to register.[7] Relevantly:

(a) The defendants proposed the Court would be assisted by an independent expert in tikanga. They were considering whether to pursue directions about the operation of the registration process and kaumātua committee.[8]

(b) The plaintiffs submitted the kaumātua at the hui were the appropriate experts in Ngāti Rehua tikanga, not an external "expert".[9]

(c) Mr Tavake Afeaki, the independent interim chair, noted that he had used his casting vote on the issue of whether applicants must whakapapa to one of the three tipuna or be whāngaied. He considered that issue should be considered by the kaumātua committee.[10]

[10] On 30 March 2020, the defendants applied for urgent directions regarding the process for registering new applicants and reviewing the voting database. This was set down for hearing on 28 May 2020.[11] On 18 or 19 May 2020, however, the parties resolved their differences by mediation with the Hon Mr Lyn Stevens QC. The hearing

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5 Minute No 7, 12 March 2020.
6 Amicus Curiae/Interim Independent Chair's Report to the Court for Ngāti Rehua-Ngātiwai ki Aotea Trust Board, 13 October 2020 [Amicus Report] at [18]–[23].
7 Minute No 7, 12 March 2020 at [7](e).
8 At [4].
9 At [6].
10 At [7](c).
11 Minute No 8, 21 April 2020 at [2].

was vacated by joint request of the parties.[12] On 18 May 2020, the parties apparently resolved the issues through mediation in an agreement:[13]

> 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 i[s] to contact the persons involved and invite registration with ID. (List 1)
>
> 4. Current new applications process (relating to some 250 individuals) continue[s] 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.
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> 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.

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12 Minute No 9, 21 May 2020 at [2]; and Minute No 10, 28 May 2020 at [2].
13 Amicus Report, 13 October 2020 at [9].

> 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.

[11] The steps agreed at mediation were implemented by the plaintiffs providing "List 1" to the defendants.[14] The Trust's AGM was scheduled for 26 September 2020. But it was deferred until 31 October 2020 and then indefinitely. All issues have been resolved by the trustees and between the parties except one: how to resolve a dispute over the whakapapa of two people. Out of respect for their mana, in this public judgment, I refer to them as Person A and Person B.

Whakapapa issue

[12] Mr Afeaki reports that categories of lists were agreed and kaumātua were to advise of any challenges. Contested lists and newly received applications were considered at three hui a kanohi of the combined members of the kaumātua committee.[15] I have received several affidavits from attendees as well as a report by the independent interim chair and counsel assisting the Court, Mr Afeaki.

The first hui and Person A

[13] The first kaumātua committee hui took place on 8 August 2020 at Awataha Marae, Auckland. Mr Afeaki reports they made significant progress in considering, processing and validating people for the register.[16] They worked through the list identified by the plaintiffs from the pre-existing database (List 1), but not other names from that database. They also worked through a second list of people who had registered but were not on the pre-existing database.[17] The Committee resolved to ask

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14 Affidavit of Nicola MacDonald, 7 December 2020 [MacDonald] at [14].
15 Amicus Report at [29]–[30].
16 At [35].
17 Affidavit of Aperahama Kerepeti-Edwards, 19 October 2020 [Kerepeti-Edwards] at [6]–[7].

many applicants for further whakapapa.[18] Where registration forms were deficient, the Returning Officer would contact people to ask for sufficient information.[19]

[14] Mr Afeaki reports that one person who had complained of being earlier removed as a registered member (Person A) was discussed. He and his whānau were validated by a unanimous decision of the Validation Committee.[20] Mr Aperahama Kerepeti-Edwards, nominated to the kaumātua committee by the plaintiffs, confirms that.[21] However, Mr Mook Hohneck, nominated to the committee by the defendants, says the kaumātua present at the first hui agreed that Person A "should be asked to provide more information to confirm his whakapapa".[22] Mr Peter Mita, also nominated to the committee by the defendants, confirms that and says Person A was placed in holding until he provided further information.[23]

The second hui and Person A

[15] The second hui occurred on 11 September 2020 at Terenga Paraoa Marae, Whangārei. Mr Afeaki reports that the committee declined some applications upon discussion of their whakapapa and others were contacted for more information or more whakapapa.[24] Mr Afeaki reports the issue of whāngai and legal adoption arose in the context of one application and that the committee agreed to accept whāngai in both tikanga and in law.[25]

[16] Mr Afeaki reports that Person A's whakapapa was further questioned at the second hui but was again clarified and was validated by agreement of the committee.[26] He reports that all of Person A's whānau were unanimously validated there.[27] Mr Kerepeti-Edwards' evidence is also that he answered a question about Person A's

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18 Amicus Report at [36].
19 At [37].
20 At [41].
21 Kerepeti-Edwards at [13].
22 Affidavit of Mook Hohneck, 5 November 2020 [Hohneck] at [6].
23 Affidavit of Peter Mita, 6 November 2020 [Mita] at [4].
24 Amicus Report [46].
25 At [47].
26 At [49].
27 At [41].

whakapapa which "appeared to clarify the issue" and Person A's validation was "confirmed again unanimously by the committee".[28]

[17] Mr Hohneck's account of the discussion of Person A is quite different. He describes a discussion at the last hui (though he may have meant the second hui). He says the committee noted Person A had not provided further information and did not agree with Mr Kerepeti-Edwards' account of Person A's whakapapa.[29] His evidence is:[30]

> The end result was the Plaintiffs' five kaumatua voted in favour of [Person A] being admitted to membership and the Defendants' five kaumatua did not accept his application. As Tavake Afeaki was keeping minutes I asked him to note that there was not majority agreement in relation to [Person A] and that his application would have to be referred to arbitration under the mediation agreement.

[18] Mr Mita's evidence is that he reviewed Person A's registration form again at the last hui (though he may have meant the second hui), which had not been updated. He states that the whakapapa is not Ngāti Rehua.[31]

The second hui and Person B

[19] Mr Afeaki reports that Person B and her whānau were on the "pre-approved" list of 1,600 provided to Election Services and were not challenged or required for review.[32] Ms Hiria Rata, nominated to the kaumātua validation committee by the plaintiffs, supports this, saying:[33]

> We were shown List 1 at the first hui with Mr Afeaki and told that the names not on the list would be going through as accepted without the need for kaumatua validation, this included [Person B] who was not on list 1.

[20] But Mr Afeaki reports that, at the end of the second hui, Mr Hohneck and Mr Billy Wii, a trustee nominated by the defendants, raised a take about the status of Person B and her whānau. They objected to Person B's late mother having been

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28 Kerepeti-Edwards at [16]–[18].
29 Hohneck at [7].
30 At [8].
31 Mita at [11].
32 Amicus Report at [42].
33 Affidavit of Hiria Rata, 14 December 2020 [Hiria Rata] at [11].

whāngai.[34] Mr Afeaki reports that he explained they were whānau whāngai and had also been pre-approved as part of the list validated by kaumātua.[35] He reports, following discussion, it was agreed the whānau of Person B and of Mr Wii would hui on Aotea to discuss the issue, supported by two kaumātua.[36] Later, Mr Wii emailed to say he had agreed to hui but, contrary to Mr Afeaki's recollection, that the committee had unanimously agreed Person B must apply for membership.[37]

[21] Mr Hohneck's evidence is that there was majority agreement at a hui in 2018 that Person B was not a valid member of the Trust, referring to a view put by Mr Michael Beazley.[38] He says that the view of the defendants' kaumātua was that all members on the existing database were properly validated apart from Person B.[39] Ms Hiria Rata, for the plaintiffs, recalls Mr Beazley saying that Person B did not whakapapa but also said that Mr Hohneck did not whakapapa.[40] Her evidence is "[i]t is not the case that committee members had previously resolved to remove [Person B] or proposed this occur".[41] She says Person B remained on the register and was never removed and, "[a]s it was decided that those of de[s]cent which involves a whangai connection would be beneficiaries, this was not raised again as an issue".[42] She says "[i]f whangai is now not going to be accepted or there's going to be some new test about what determines a whangai, which is news to me, then we would have to revisit a number of registrations . . .".[43]

[22] Mr Hohneck's evidence is that kaumātua discussed Person B's registration at the last hui (though he may have meant the second hui) "and remain firm in our opinion that she did not have a legitimate claim to Ngāti Rehua" and "no one said she had a whakapapa and belonged in Ngāti Rehua".[44] He says kaumātua wished to give Person B an opportunity to provide more information to explain her whakapapa but

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34 Amicus Report at [54]. Mr Kerepeti-Edwards confirms this. Kerepeti-Edwards at [19]–[20].
35 Amicus Report at [55].
36 At [60].
37 At [61] and [62].
38 Hohneck at [10].
39 Affidavit of Mook Hohneck in opposition to plaintiffs' application, 7 December 2020 [Hohneck Reply] at [8].
40 Hiria Rata at [8].
41 At [17].
42 At [9].
43 At [10].
44 Hohneck at [12].

she did not do so.[45] Mr Mita supports that.[46] Mr Wii, who attended the hui and is an interim trustee nominated by the defendants, also supports that, saying there must be a bloodline connection to whāngai.[47]

[23] Ms Hiria Rata does not agree with Mr Hohneck's account of the database, with which she says there was previously a lot of issues.[48] Her evidence is that Mr Hohneck and Mr Wii raised the issue about Person B "when we had completed our mahi and were packing up and about to leave".[49] She understood Mr Wii and his whānau were to meet with Person B to discuss the issue. She says:[50]

> This is the full extent of the discussion about [Person B's] whakapapa. There was not any discussion at all and there was certainly no vote.

[24] Mrs Ruahuihui Rata is a kaumātua kuia on the kaumātua committee.[51] She says of Persons A and B that "[w]hen their tatai was explained I had thought there was agreement, but I now understand that this has changed and this is not the case".[52]

> … I did not even know there was a disagreement for us to discuss some more and try to get an understanding. If there is more information required, then this should have been requested and then we have more discussion. There was no discussion because we did not know there was disagreement.
>
> 6. It is important that we try and get consensus. I am aware that if this is not possible, then as a last resort there should be a vote. We have not had a vote despite working through hundreds of registrations. We didn't have a vote for these two either. There needed to be further discussion and I am sure that if this does occur, we can reach consensus.

[25] Ms Rosanna Whaanga, who supported her brother at the earlier kaumātua validation hui and took his place following his passing, does not agree with the affidavits of Mr Mita, Mr Wii and Mr Hohneck.[53] She says she thought the issues with the two registrations had been resolved.[54] If not, she says Mr Hohneck and Mr Wii

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45 At [14].
46 Mita at [5].
47 Affidavit of Bill Wii, 4 November 2020 at [4].
48 Hiria Rata at [5].
49 At [14].
50 At [16].
51 Affidavit of Ruahuihui Rata, 26 November 2020 [Ruahuihui Rata] at [1].
52 At [2].
53 Affidavit of Rosanna Whaanga, 25 November 2020 at [3]–[4].
54 At [4].

should not have left it until after the hui to make this known.[55] They would have had more discussion and, if needed, gathered more information.[56] She says some of the issues raised in the affidavits were not raised in the hui and, if they had been, could have been addressed with more information or completed records.[57] She says:

> 8. We have until now resolved issues by consensus, but there is the last resort of a vote. We did not get to attempting consensus or a vote in this case. At the very least, this should have been explored and a vote taken to see what the position of the committee was for these two registrations. This was never done and it's my view that we should at least follow through on this process.

[26] Ms Whaanga says she raised the point that Person B was not on the list for review, but Mr Hohneck said they were able to raise an issue of whakapapa despite this. She says, "[i]f this is the case, then we should be consistent for everyone".[58] She refers to other issues fuelling suspicion about the integrity of the previous database.[59]

[27] Mr Hohneck disputes Ms Whaanga's status as a kaumātua and her interpretation of the validation process.[60] He says:[61]

> We met and discussed the issues in relation to [Person B and Person A] on more than one occasion. The kaumaatua had ample opportunity to comment on them and both individuals had an opportunity to provide information. Each kaumaatua made their views known and it was clear there was no majority in relation to either person. The issues in relation to [Person B] in particular are long-standing and well-known amongst the hapu. Consensus is very unlikely in my view.

[28] In response to Ms Whaanga's evidence, Mr Hohneck says:[62]

> My fellow kaumaatua and I remain in support of these ongoing disputes being resolved between ourselves with arbitration as a last resort. Until there is resolution, the arbitration process has to continue. The defendants' kaumaatua are prepared to attend the arbitration in February to resolve these matters if we have not reached agreement before then.

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55 At [5].
56 At [5].
57 At [7].
58 At [10].
59 At [11].
60 Hohneck Reply at [9]–[11].
61 At [13].
62 At [17].

[29] In reply, Mrs Hiria Rata, a member of the kaumātua committee, agrees with the recollections of the hui of Mr Kerepeti-Edwards, Mrs Ruahuihui Rata and Ms Whaanga.[63] Mr Kerepeti-Edwards confirms:[64]

> 4 Rosanna Whaanga and Aunty Suie Rata's recollection of the validation process is correct. We had understood that my recital of [Person A's] whakapapa was accepted by all committee members, there was no ongoing discussion of any nature – no alternative view was expressed about whakapapa and certainly no vote was taken.
>
> 5 I have had no idea about what the issue is with [Person A's] whakapapa until after Mr Hohneck and Ms MacDonald started the arbitration process. They have since prepared and filed evidence, but very little of it address[es] any issue they have with [Person A] or his tupuna whaea . . .
>
> …
>
> 8. Mr Mita and Kare Rata are not from Te Whānau a Rangiwhakaahu and they do not know the whakapapa of those of us from Te Whānau a Rangiwhakaahu.
>
> 9. There was a tangi at our marae . . . on Sunday 6 December 2020. This issue of [Person A's] whakapapa was raised and discussed by our kaumatua and kuia, all of whom were in attendance. They were upset and concerned that [Person A's] whakapapa could be determined outside of our hapu and they have directed that the rightful place to arbitrate any mokopuna of theirs is at Matapouri on our hapu marae.
>
> 10. Pita Mita and Kaumaatua Taki Paama came to pay their respects on Wednesday 9 December 2020. Taki Paama is a well-known kaumatua from Whananaki who is steeped in his knowledge of things Maori and of whakapapa. I sit on the taumata of our marae and during my mihimihi, I raised the issue of [Person A's] whakapapa and directed it at them in both maori and pakeha in the presence of Te Whanau a Rangiwhakaahu kuia / kaumatua who were all in the wharehui. I relayed to them [Person A's] whakapapa, directing them both to photos hanging in our whare of [Person A's] tupuna whaea . . . along side those of her siblings and her parents . . .
>
> 11. In Taki Paama's reply, he spoke in acknowledgement of [Person A's] whakapapa and accepted it as relayed in my mihimihi. Pita Mita did not stand to take issue with this, he had the opportunity, but did not dispute what was said or the acceptance by Taki Paama.

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63 Hiria Rata at [3].

64 Affidavit of Aperahama Kerepeti-Edwards, 15 December 2020 [Kerepeti-Edwards Reply].

The third hui

[30] The third kaumātua hui occurred on 3 October 2020 at Te Awataha Marae and Mr Kerepeti-Edwards' evidence is that it was relatively short.[65] Mr Kerepeti-Edwards says a kaumātua from Motairehe Marae set out Person B's whakapapa and that was accepted by the committee without issue.[66] He states "I am clear from having attended these hui that there was acceptance of their registrations and that there were no issues".[67]

The proceedings

[31] At a judicial teleconference on 13 October 2020, the defendants advised that there was an issue relating to the whakapapa of two people that the defendants said was unresolved by the kaumātua committee. The defendants indicated they intended to refer the issue to arbitration under cl 8 of the mediation agreement. The plaintiffs signalled they would oppose the referral to arbitration. I stated that, if either party wished the Court to make a decision regarding the issue, they would need to make an application or take up the leave reserved in the judgment of 18 December 2018.[68] On 14 October 2020, the defendants gave notice of referral to arbitration, under the mediation agreement, of the entitlement of two people to membership of the Ngāti Rehua-Ngātiwai ki Aotea Trust.

[32] The plaintiffs requested a further teleconference, which was held on 30 October 2020. Mr Harrison, for the plaintiffs, sought a direction that the two people are entitled to vote and stand as candidates for election.[69] The defendants opposed that. In Minute No 14, of 17 November 2020, I stated:

> [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.

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65 Kerepeti-Edwards at [4] and [22].
66 At [23]–[24].
67 At [25].
68 *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board*, above n 1, at [45](f).
69 Minute No 14, 17 November 2020 at [5].

> [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".
>
> [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". 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.
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> [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 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.

[33] Counsel for the parties were unable to agree a way forward. The plaintiffs did not engage with the defendants on the identity of the arbitrator. The defendants requested the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) to appoint a suitable arbitrator. AMINZ appointed Ms Nicole Smith, a Tauranga barrister, as arbitrator. She held a number of conferences and reserved dates of 15–17 February 2021 for a hearing, possibly on a marae.

The current application

[34] On 27 November 2020, the plaintiffs applied for orders:

> (a) Setting aside the agreed process arising out of the mediation on 18 May 2020.
>
> (b) Directing the continuation of the kaum[ā]tua committee validation process in relation to all remaining registrations for review including any unresolved registrations in accordance with the Court Orders in the Judgment of Justice Palmer dated 18 December [2018] and the Consent Judgment of Justice Muir dated 29 May 2017.

[35] The defendants oppose the orders sought. I have received affidavits from Person A and Person B about their whakapapa. Person A believes there is no issue about his whakapapa and the challenge derives from the defendants who wish to remove him as a candidate in the elections.[70] Person B believes the defendants and Mr Hohneck are seeking to disenfranchise her and her whānau, particularly her son who is a candidate for election.[71] Other affidavits were filed. I heard counsel's submissions on 17 December 2020. At the hearing, both parties agreed kaumātua could continue to meet, which I encouraged. Mr Afeaki indicated he is willing and able to continue to facilitate hui.

[36] On 24 December 2020, counsel for the defendants advised that the registrations of Persons A and B were scheduled to be discussed at a kaumātua hui on 16 January 2021 and any subsequent hui the kaumātua deem appropriate. Counsel said they had advised Ms Smith that the parties wished to allow time for the hui to take place before taking steps in the arbitration. Counsel for the defendants advised that, if the arbitration is to take place, it would be scheduled after the substantive trial set down for 22 March 2021.[72] On 27 January 2021, counsel for the defendants advised that attempts to find a suitable date and venue for a meeting of kaumātua were continuing.[73]

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70 Affidavit of Person A, 19 October 2020 at [7], [14] and [16].
71 Affidavit of Person B, 20 October 2020 at [28].
72 Memorandum on behalf of Counsel for the 2nd to 4th Defendants updating the court, 24 December 2020.
73 Memorandum on behalf of Counsel for the 2nd to 4th Defendants seeking urgency, 27 January 2021 at [6].

Relevant law of arbitration and mediation

[37] In *Hildred v Strong*, the Court of Appeal rejected the argument that an agreement reached through mediation on a wrong factual and legal basis should not be upheld.[74] The Court held it would not enter into a critique or analysis of what took place at mediation, except for inquiries as to whether a settlement was in fact reached or whether there was fraud.

[38] Rule 7.80 of the High Court Rules 2016 and cl 8 of the Arbitration Act 1996 provide that parties to a proceeding may agree to arbitration of any part of their dispute at any time during the course of legal proceedings. The court must, on application of a party, stay those parts of the proceeding to which the agreement to arbitrate relates. There has been no such application here.

[39] 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.[75] But, in accordance with principles established before the Act, the power to do so is exercised sparingly and only where injustice would arise. In line with those principles, Randerson J 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".[76] Despite this, Williams and Kawharu say there exists a "general presumption of non-intervention":[77]

[40] Section 10 of the Arbitration Act 1996 provides:

> **10 Arbitrability of disputes**
>
> (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.

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74 *Hildred v Strong* [2007] NZCA 475, [2008] 2 NZLR 629 at [45]–[46].
75 *Carter Holt Harvey v Genesis Power Ltd* [2006] 3 NZLR 794 (HC) at [33].
76 At [33](c).
77 David A R Williams and Amokura Kawharu *Williams and Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) at [3.4.1].

> (2) The fact that an enactment confers jurisdiction in respect of any matter on the High Court or the District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

[41] Many of the provisions of the Arbitration Act are derived from the Model Law on International Commercial Arbitration.[78] In 1991, the Law Commission interpreted the Model Law and called for legislative change in New Zealand arbitration law.[79] The Commission's Report discussed the issue of arbitrability. It supported a presumption of arbitrability, which may be displaced by an agreement that is contrary to public policy or a dispute that may not be submitted to arbitration under any other enactment.[80] The report noted that Québec was one of the few jurisdictions to specify in statute which disputes are not arbitrable there, including "[d]isputes over the status or capacity of persons, family matters".[81]

[42] Section 10 on arbitrability of disputes was included in the first Arbitration Bill in 1995 and its language is unchanged in the Act.[82] The Select Committee Report noted that the section imposes a presumption of arbitrability.[83] However, the section does not specify what is and is not arbitrable in order to leave "some room for judicial discretion".[84] According to the Law Commission report, an agreement to arbitrate a non-arbitrable dispute is typically null and void.[85]

Tikanga

Tikanga and law

[43] Tikanga Māori was the first law in Aotearoa.[86] It arose "as a necessary and inevitable expression of self-determination" of Māori.[87] It is "an old system based

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78 United Nations Committee on International Trade Law *Model Law on International Commercial Arbitration* (UNCITRAL, Vienna, 1985) [Model Law], art 8.

79 Law Commission *Arbitration* (NZLC R20, 1991).

80 At [231].

81 Civil Code of Lower Canada (1865) 29 Vict ch 41, s 1926.2 (repealed); Civil Code of Québec SQ 1991 c 64, s 2639; and Law Commission, above n 79, at [229].

82 Arbitration Bill 1995 (117-1), cl 8.

83 Arbitration Bill 1996 (117-2) (select committee report) at iii.

84 At iii.

85 Law Commission, above n 79, at [227].

86 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 2–5.

87 At 9.

around kinship…adapted to the new circumstances of this place".[88] Tikanga is still law for many iwi and hapū.

[44] Tikanga is recognised by Acts of Parliament.[89] For example, s 114A of Te Ture Whenua Māori Act 1993, as inserted in 2020, provides that "the tikanga of the relevant iwi or hapu determines whether there is a relationship of descent" between a child and a birth parent or a new parent after the child became a whāngai, for specified legal purposes.[90]

[45] Tikanga is also recognised by the common law of New Zealand. Chief Justice Elias in *Takamore v Clarke* observed that s 1 of the English Laws Act 1858 introduced English common law to New Zealand "so far as applicable to the circumstances of the … colony".[91] The effect of that is preserved by s 5 of the Imperial Laws Application Act 1988. She observed that "[v]alues and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case".[92] Accordingly, she said, "Māori custom according to tikanga is therefore part of the values of the New Zealand common law".[93] Tipping, McGrath and Blanchard JJ agreed that "the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation".[94]

[46] In *Attorney-General v Ngati Apa*, Tipping J said that the tikanga around Māori customary land "is an ingredient of the common law of New Zealand".[95] In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* the Court of Appeal recently characterised tikanga as "an integral strand" of the common law of New Zealand.[96]

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88 At 5.

89 See, for example, Oranga Tamariki Act 1989, s 2, the Resource Management Act 1991, s 2; and Taumata Arowai – The Water Services Regulator Act 2020, s 5.

90 See also Te Ture Whenua Maori Act 1993, ss 29, 32 and 32A.

91 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

92 At [94].

93 At [94].

94 At [164] (and see [150]).

95 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [185] per Tipping J.

96 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [177].

[47] In *Takamore v Clarke*, Elias CJ states that "what constitutes…tikanga…is a question of fact for expert evidence or for reference to the Māori Appellate Court in an appropriate case".[97] I have recently accepted the submission in another case that "tikanga is law proved as a matter of fact".[98]

Plaintiffs' tikanga evidence

[48] Mr Taipari Munro has provided an affidavit for the plaintiffs as a pūkenga, hereditary rangatira and expert witness in Ngāti Rehua-Ngātiwai ki Aotea tikanga.[99] He is of Ngai Tahuhu and Ngātiwai descent and both lines of his descent link to Ngāti Rehua-Ngātiwai ki Aotea.[100] His evidence is that whakapapa is regarded by Māori as sacred.[101] The passing of traditional Māori knowledge is not so easy as it may have been in the time of his elders. Today's pūkenga in Ngātiwai are small in number and highly valued by the hapū.[102] He says:

> 20. The mana to carry such knowledge is recognised, acknowledged and accepted within a tribe. In order to resolve issues concerning whakapapa, this requires the appropriate pukenga either from within the hapu itself, or, who has a connection to the hapu and is recognised or widely accepted as a whakapapa expert.
>
> 21. Whakapapa cannot be determined by someone outside the tribe who has no connection or who is not an acknowledged expert in whakapapa, it is essential that they are recognised and accepted by the tribe. They can only defer to someone who they accept has the background and knowledge. Despite my background, knowledge and expertise in this field, I would not be involved in helping resolve whakapapa issues unless there was a connection and acceptance by the hapu. It would be a major transgression from our customs and culture to do such a thing.
>
> 22. It would also be an insult to a hapu to have a non-Maori person without any connection to arbitrate on their whakapapa. I have no doubt that many across Maoridom would be taken aback and concerned if this were to occur. We would never suggest determining the whakapapa of another people with whom we do not have a connection or acceptance.
>
> 23. Where there are issues of whakapapa then it can take time to resolve as it raises sensitive issues sometimes. Provided this is done properly, it will be resolved. I have known of record keepers to deliver whakapapa nonstop over a period of several days. There can be a lot of information

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97 *Takamore v Clarke*, above n 91, at [95].
98 *Ngāti Whātua Ōrakei v Attorney-General No 1* [2020] NZHC 3120 at [36].
99 Affidavit of Taipari Munro, 25 November 2020 [Munro].
100 At [1] and [3].
101 At [17].
102 At [18]–[19].

to share and digest, going back many generations of what is mainly an oral history. This cannot be done by paper records alone.

24. It is not possible for a person without these connections or this knowledge to make a decision about a person's whakapapa and their connection to the tupuna of a tribe. This defines us as Maori and no person outside the hapu has the standing over such important decision-making.

25. If there is disagreement between kaumatua, and that would want to be explored fully, then it would be appropriate to defer to a tribe's chronicler. The genealogical record keeper and expert in customary practice. I am aware that such people exist within Ngati Rehua-NgatiWai ki Aotea and to defer to such a person is in keeping with the word tikanga, the root word of which is tika; meaning what is proper, right or correct.

26. Any disagreement which cannot be resolved by kaumatua should be referred to a pukenga that has received the training that I received from my elders and is recognised as a repository and practitioner of tribal culture. It is tika that this person assist kaumatua and in some cases be the final arbiter of any disagreement, as they have the knowledge and connection to the tribe.

[49] Mr Kerepeti-Edwards, who attended the hui and is an interim trustee and Chair of the Ngātiwai Trust Board, supports that, saying:[103]

26. If there were any genuinely unresolved issues concerning whakapapa, then this should not involve decisions outside the hapu. The issue of whakapapa is very important and sensitive to us as Maori and for each hapu that make up our iwi of Ngatiwai. Whakapapa and tatai is knowledge that is taught and handed down from our old people, many of whom have passed. There are some records through the Maori Land Court, but it also remains an oral tradition. There is no one from outside the Hapu that could determine these things, nor should they.

27. It would be a gross insult and humiliation to have whakapapa decided in the way being suggested by the defendants' counsel. Such a process would usurp our tino rangatiratanga.

28. If there was to be any independent assessment outside of the kaumatua committee of whakapapa, then this must be by designated people who have a recognised leadership role of kaumatua from the hapu or marae. There are qualified kaumatua within the hapu that have not been involved in the kaumatua validation process to date.

[50] Ms Ruahuihui Rata says:[104]

5. I do not agree that Mr Hohneck and others from our committee should be taking the whakapapa of [Person B and Person A] to arbitration by an outsider. This is not tika. . .

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[103] Kerepeti-Edwards at [26]–[28].
[104] Ruahuihui Rata.

7. This is what I said in my affidavit of 30 April 2020 at paragraph 44:

> The tikanga of our hapu is that we alone are responsible for whakapapa, those of us who have had this knowledge passed down from our elders and who are the keepers of this information. There is no one else who can or should advise us on these matters or interfere with them.

8 Tikanga guide how we as Maori conduct ourselves. It is one of our core values that we would never change as our whanaungatanga and kotahitanga – our being whole as one whanau and hapu collective.

9 I stand by these statements. I have never heard of having a stranger make decisions about our people's whakapapa. I don't know who this arbitrator is and she has no connection to us. This person does not know us, and we don't know who she is, who her people are and where she is from. I am one of the oldest kaumatua and in all my time I have never experienced such a thing. They question of whether someone is of our tupuna is something that only we can decide.

10 There are those within the various whanau that are recognised as being the guardians of our whakapapa and traditions. If we are not able to agree between kaumatua, then any final decision should be referred to those who are known to be pukenga of our knowledge and traditions. If the issue involved someone affiliated to our marae in Whananaki, for example, then there are those on our taumata such as Taki Palmer.

11 Rawiri Wharemate is also well respected as a pukenga of our genealogy and has been a member of our kaumatua committee. Like myself, he focusses on the whakapapa and is not interested in who or what people might vote for or support. When the issue of [Person B's] whakapapa was raised by Billy Wii, Rawiri offered to chair a hui on Aotea as there is obviously raruraru between these two whanau. This is the role of kaumatua and often these disputes are interlinked with other historical issues that can be quite complex.

Defendants' tikanga evidence

[51] Mr Hohneck says:[105]

> Membership to all hapu and iwi relies upon tribal tikanga and kawa and none so higher than whakapapa which ties the individual to the ancestors and to their tatai / customary associations and places of belonging. The tikanga related to whangai is an extension of an individual's whakapapa through bloodline to the tupuna and to the whanau who will whangai the child.

[52] He also says:[106]

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105 Hohneck at [13].
106 Hohneck Reply at [6].

> The possibility of an arbitration as a means of resolving any outstanding issues following the kaumaatua hui was raised with myself and the rest of our group. We agreed with the proposal. It seemed to me a sensible way to get past any deadlock.

[53] Mr Hohneck opposes Mr Munro's statements as an expert on Ngāti Rehua-Ngātiwai ki Aotea tikanga and says Mr Munro is not a descendant of tupuna Rehua, Ranginui and Te Awe.[107] Mr Hohneck says:

> 19. Mr Munro appears to adopt a generic wide interpretation of the tikanga and kawa of Ngati Wai and his own hapu Te Parawhau. He appears to apply this tikanga over the top of the tikanga of Ngati Rehua-Ngatiwai ki Aotea. I do not believe that this is appropriate as the issue in question is the tikanga of Ngati Rehua-Ngatiwai ki Aotea and the whanau involved.
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> 20. I do not think Mr Munro has been fully briefed on the origins of this take. The plaintiffs chose to commence proceedings in the High Court against the Trust and the defendants instead of engaging in dialogue and holding hui to discuss the issues which is what one would expect if one was applying tikanga.
>
> 21. The issue of the eligibility of [Person B] and [Person A] has been referred to arbitration as no majority agreement has been reached. Mr Munro makes comments that whakapapa cannot be determined by an outside person. I understand that to be a reference to the arbitrator and yet he himself as an outsider to Ngati Rehua-Ngatiwai ki Aotea has chosen to make comments on Ngati Rehua-Ngatiwai ki Aotea tikanga.
>
> 22. The decision to have a mediation agreement and a clause for arbitration was agreed to and signed by both parties. Both sides are able to call upon expert witnesses to provide evidence and assist with determining a final outcome related to the eligibility of [Person B and Person A] and look forward to Ngati Rehua-Ngatiwai ki Aotea settling these outstanding issues.

[54] Ms MacDonald says:[108]

> 18. Part of what we agreed at mediation was to refer any unresolved issues to mediation. This was discussed and freely agreed by the plaintiffs and the defendants. Whilst I agree that it would be better if the kaumatua could themselves resolve their differences in relation to these two people, it cannot be allowed to hold up the election process and the AGM which stands in the way of our treaty settlement. I agreed to an arbitration as it seemed to me to be the best way to resolve any remaining disputes quickly so that we move forward. I understand that was why we all agreed to arbitration.
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> …

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[107] At [18].
[108] MacDonald.

20. Through our counsel, my co-defendants and I have proposed to the plaintiffs that in the period between now and the arbitration, which is likely to be rescheduled to early next year, the kaumatua can continue to meet if they wish to have further korero on [Person A and Person B]. It would be preferable if they are able to reach an agreement among themselves, but if not the process which we have all agreed to should be allowed to take place. It is important to us that the issues are resolved promptly through a fair process that allows each party to present expert evidence in relation to tikanga to allow an independent person to make a decision. Without this, I fear that several more years may pass before these issues are resolved and that will only compound the financial, social, and cultural loss that our people has already suffered as a result of the plaintiffs starting this pākehā process.

Submissions

[55] Mr Harrison, for the plaintiffs, submits:

(a) The principle of whakapapa is fundamental to Te Ao Māori. It is who you are – the very essence of a person. It links animate and inanimate objects, explains how the universe emerged, and is central to the identity of an individual who is linked to others by whakapapa. Through a legal lens, tikanga is the legal structure that gives effect to basic principles. Concepts such as mana and tapu assist in the regulation of the relationships or whakapapa between people, the environment and the spiritual world. The aim of tikanga Māori is to achieve balance. Tapu and noa, the regulators, assist in restoring any imbalance and are relevant for any dispute resolution process. Any independent arbitration was always intended by the plaintiffs to be within the context of tikanga Ngāti Rehua-Ngātiwai ki Aotea. Tikanga can only be restored by returning to the kaumātua validation process. Decisions need to be in accordance with Ngāti Rehua-Ngātiwai ki Aotea tikanga. Kaumātua need to make final and binding decisions on whakapapa. This is consistent with the Court's orders.

(b) The mediation agreement was not agreed by one plaintiff nor the first defendant. Mr Harrison submits it is not a binding agreement on the parties. It is not enforceable as a mediated agreement where parties settle matters on a full and final basis. Rather, it was an agreed process

that required cooperation and ongoing negotiation to succeed. The signed mediation agreement agreed on in full and final settlement in *Hildred v Strong* is nothing like the situation here.

(c) The process breaches the Court's orders in two ways. First, the orders require the kaumātua committee to review the validity of every registration on the existing database. But it has not, in respect of the 1,600 names agreed by the parties in the mediation agreement to be accepted. Singling out Person B and her whānau from that list is unfair. The shortcut of the parties has not worked. Secondly, the orders require the committee to make final and binding determinations on the question of whakapapa and those entitled to vote. Reference to external arbitration by a Tauranga barrister without expertise in whakapapa or a connection with the hapū would conflict with that and with tikanga. Tikanga-consistent arbitration must be to a pūkenga accepted by kaumātua.

(d) There is no evidence of voting by the kaumātua committee which has always reached consensus so far. There was no engagement by the kaumātua committee regarding the whakapapa issues raised in relation to either Person A or Person B and the Court's orders require there to be. If members of the committee did not even appreciate there was disagreement, they cannot understand or test the other view before voting, if necessary. If there is stalemate, there might be more hui, such as a hui at Matapouri.

(e) If the Court does not grant the orders sought, alternatively, it would be appropriate to direct that:

(i) Person B's registration remain on the database and not be subject to further whakapapa review, in accordance with the mediation agreement.

(ii) The kaumātua validation process should continue to review other outstanding registrations, including Person A, which has not yet occurred. The committee needs to take time to try to find consensus before having a deciding vote.

(iii) Any unresolved issues are to be referred to the Court or the Māori Land Court, consistently with the arbitration provision in the Ngāti Rehua-Ngātiwai ki Aotea Trust Deed.

[56] Mr Finlayson QC, for the defendants, submits:

(a) As a result of the proceedings, the hapū is no closer to signing the deed of settlement with the Crown, initialled in December 2016. The parties have complied with the substance and spirit of the Court's orders. The plaintiffs and defendants were represented at the mediation, which addressed how to implement the Court's directions and the consent judgment. Person B attended, outside the mediation room. Following agreement, both parties worked together to deal with outstanding issues. The validity of Person B's registration was an issue from day one and needs to be addressed. The dispute does not open up the status of other beneficiaries; the defendants' kaumātua have reviewed the list of 1,600 and raised issues where appropriate.

(b) There is no legal basis to set aside the mediation agreement. None of the principles in *Hildred v Strong* apply here. There are no circumstances warranting further court directions which could interfere with the arbitration process. None of the plaintiffs' arguments provide a valid reason for setting aside the mediation agreement. The purpose of mediation was to cut through some of the intractable problems. The process was agreed and has worked successfully to date. There has to be a circuit breaker to kōrero about the two outstanding issues. Arbitration is the circuit-breaker. Pūkenga could be appointed to assist. It would be contrary to law and justice for the mediation agreement to be set aside.

(c) Arbitration is appropriate to resolve the outstanding issues and would be consistent with tikanga with appropriate guidance and assistance of pūkenga. The directions sought by the plaintiffs would have the effect of staying the arbitration. An applicant for a stay would have to satisfy the Court that continuance of the arbitration would be oppressive and vexatious or otherwise constitute an abuse of process. The defendants cannot. The arbitration is the culmination of a protracted process which has gone on for some years and it is in the interests of justice that it be concluded as soon as possible. Arbitration is the best way to achieve that.

(d) But the defendants are "willing and indeed desirous" for kaumātua to continue to meet if they wish to have further kōrero about Persons A and B.

Should I make directions regarding the proposed arbitration?

Tikanga, law and trusts

[57] Tikanga Ngāti Rehua-Ngātiwai ki Aotea lies at the heart of this dispute. That very description demonstrates that the relevant tikanga belongs to, and perhaps even constitutes, Ngāti Rehua-Ngātiwai ki Aotea. The common law recognises tikanga and its binding force on those subject to it. But a court does not determine, create or change tikanga. The relevant iwi or hapū does that, as Parliament recognises, for example in relation to whāngai in s 114A of Te Ture Whenua Māori Act 1993.

[58] As noted above, I have previously accepted that tikanga is law proved as fact. Usually, a court "finds" facts for the purposes of a case. But a court must be very careful about "finding" tikanga as a fact, even where it is required by the relevant iwi or hapū to do so. Whereas most facts relevant to a case are created by circumstance, I understand tikanga to be created by the relevant hapū or iwi through a mixture of practice, tradition and deliberation. Tikanga can change over time. Any recognition by a court can only be a snapshot at a certain point. And a court recognises tikanga only for the particular purpose of the particular case before it at the time. What is

recognised by a court cannot change the underlying fact of tikanga determined by the hapū or iwi, exercising their rangatiratanga.

[59] This case arises under trust law. Courts have an inherent supervisory jurisdiction over trusts, to protect the interests of the beneficiaries consistent with the trust deed.[109] The trust here constitutes the legal form of the hapū Ngāti Rehua-Ngātiwai ki Aotea. In these circumstances, in exercising its jurisdiction where there is no conflicting law, I consider the Court is bound to make decisions consistent with tikanga Ngāti Rehua-Ngātiwai ki Aotea.

Tikanga Ngāti Rehua-Ngātiwai ki Aotea

[60] Neither the hapū nor either of the parties have asked the Court to determine the whakapapa of Person A or B. And, in accordance with my observations above, I do not consider it is the role of this Court, or is even possible for the Court, to determine the whakapapa of Person A or Person B. That is for Ngāti Rehua-Ngātiwai ki Aotea.

[61] The evidence before me does not demonstrate that the kaumātua process that has been established has yet reached an impasse. There is a conflict in the evidence about whether Person A's whakapapa was resolved at the kaumātua hui. There is evidence it was resolved at a tangi. Mr Hohneck and Mr Wii appear to have raised the take about Person B's whakapapa on the margins of the kaumātua hui. The evidence indicates kaumātua have not fully deliberated on the issue. As I understand it, tikanga is not to be hurried, however tempting the prospect of a Treaty settlement.

[62] Yet the second, third and fourth defendants, individual beneficiaries of the hapū, supported by some kaumātua, have asked an external arbitrator appointed by AMINZ to determine the whakapapa of Person A and Person B in relation to Ngāti Rehua-Ngātiwai ki Aotea. Mr Finlayson submits no one disputes that arbitration has to be in accordance with tikanga. In response to a question from me, Mr Finlayson said that the defendants consider arbitration, with appropriate guidance and assistance from pūkenga, is consistent with the tikanga of Ngāti Rehua-Ngātiwai ki Aotea. Yet

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109 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [51] and [66]; and see *Laws of New Zealand* "Courts" (online ed) at [133].

the evidence before me is that it is not. Despite guidance and assistance from pūkenga, the process the defendants have embarked upon would have an external barrister deciding the whakapapa of Ngāti Rehua-Ngātiwai ki Aotea. On the basis of the evidence before me, I accept the submission from the plaintiffs that this would be inconsistent with their tikanga:

(a) Mr Munro says whakapapa is "sacred" and "cannot be determined by someone outside the tribe who has no connection or who is not an acknowledged expert in whakapapa, it is essential that they are recognised and accepted by the tribe".[110] He says it would be a "major transgression from our customs and culture to do such a thing" and "an insult to a hapu to have a non-Maori person without any connection to arbitrate on their whakapapa".[111]

(b) Mr Kerepeti-Edwards confirms that, saying "it would be a gross insult and humiliation" to have whakapapa decided in this way.[112]

(c) So does Mrs Ruihuihui Rata, one of the oldest kaumātua who says, "we alone are responsible for whakapapa" and "[t]here is no one else who can or should advise us on these matters or interfere with them".[113]

[63] Mr Hohneck says that no tikanga is so high as whakapapa, and challenges Mr Munro's authority to speak for Ngāti Rehua-Ngātiwai ki Aotea. But regarding arbitration, he simply says it "seemed to me a sensible way to get past any deadlock".[114] Ms MacDonald concedes "it would be better if kaumatua could themselves resolve their differences in relation to these two people".[115] Despite this, she says she agreed to an arbitration as "it seemed to me to be the best way to resolve any remaining disputes quickly so that we can move forward".[116] Neither of them gives evidence that an external arbitrator determining whakapapa is consistent with

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110 Munro at [17] and [21].
111 At [21] and [22].
112 Kerepeti-Edwards at [27].
113 Ruahuihui Rata at [7].
114 Hohneck Reply at [6].
115 MacDonald at [18].
116 MacDonald at [18].

Ngāti Rehua-Ngātiwai ki Aotea tikanga. On the basis of the evidence before me, at this point in time, it is not.

Legality of external arbitration

[64] I have found that deciding on whakapapa by external arbitration is inconsistent with tikanga Ngāti Rehua-Ngātiwai ki Aotea. The parties here are bound not to pursue that for that reason. Doing so is also inconsistent with the Court's orders on 18 December 2018, the "animating dynamic" of which is "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".[117] So continuing the external arbitration in relation to whakapapa would be an abuse of the process of the Court, meaning the Court has the jurisdiction to stay the arbitration.

[65] I am also satisfied that determining whakapapa in the circumstances here is not arbitrable under s 10 of the Arbitration Act. As discussed above, determining whakapapa is a matter for the relevant iwi or hapū in accordance with their tikanga at the time. I cannot see how, under tikanga, the disputes over whakapapa in this case are capable of determination by an independent arbitrator without a strong connection to Ngāti Rehua-Ngātiwai ki Aotea and a deep understanding of its tikanga. Accordingly, under s 10 as envisaged by the Law Commission, the agreement to refer issues of whakapapa to arbitration is null and void.

[66] For those reasons, the plaintiffs and second to fourth defendants are not legally able to arbitrate about the whakapapa of Ngāti Rehua-Ngātiwai ki Aotea contrary to tikanga Ngāti Rehua-Ngātiwai ki Aotea. To that extent, at least, tikanga has legal effect.

[67] At the hearing, I encouraged the kaumātua of Ngāti Rehua-Ngātiwai ki Aotea to continue to meet to discuss and, if possible, decide the whakapapa of Persons A and B. If they cannot do so, they can decide what tikanga-consistent processes would achieve that. The evidence before me from the plaintiffs suggests such processes exist,

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[117] Minute No 14, 17 November 2020 at [16]. And see, for example, *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board,* above n 1, at [45](d)(iv).

including, if there is really an impasse after sufficient deliberation, appropriate pūkenga, with a strong connection to Ngāti Rehua-Ngātiwai ki Aotea and a deep understanding of its tikanga, making decisions.

Result

[68] I grant the application and:

(a) set aside the agreed process arising out of the mediation insofar as it relates to referring issues of whakapapa to arbitration; and

(b) direct the interim independent chair to convene the kaumātua validation committee to consider the registrations of Persons A and B, and any other registrations they consider are outstanding, consistent with tikanga Ngāti Rehua-Ngātiwai ki Aotea; and

(c) award costs on a 2B basis to the plaintiffs.

Palmer J