IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 67 / 2023

BETWEEN	**PAKI NIKORA on behalf of TE KAUNIHERA KAUMĀTUA O TŪHOE** First appellant
BETWEEN	**PAREARAU POLLY ALICE NIKORA on behalf of TE KAUNIHERA KAUMĀTUA O TŪHOE** Second appellant
AND	**TAMATI KRUGER on behalf of TŪHOE TE URU TAUMATUA TRUST** Respondent

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APPELLANTS' OUTLINE OF ORAL ARGUMENTS

Dated: 26 February 2024

Counsel for the appellants certify that this outline contains no suppressed information and is suitable for publication

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TĒNĀ, E TE KŌTI | MAY IT PLEASE THE COURT:

A. The context: A distinct Trust to hold inalienable whenua

1. Ahikāroa whenua: (i) whenua tuku iho within the ahikāroa (¶8-¶9; DOS p163-4); (ii) subject as such to collective rights/interests/responsibilities [**Rangatiratanga Estate**] prior to and after any Torrens titles (DOS p42, 60, 84; TCSA, ss 8(6), 9(15); Recital F; Durie, pp71-2; *Ngāti Whātua*, [418]); (iii) seen as so important settlement legislation had to vest it as collective redress (¶8, ¶18); and (iv) which is to be inalienable (cl 3.5)

2. The beneficiaries: (i) a class, being Tūhoe Iwi Members (i.e. a "group of… Māori"; s 4(1) definition); (ii) comprising the customary collective; (iii) where whakapapa/mana/whanaungatanga explain why Members' undivided Rangatiratanga Estate exists; (iv) including to maintain the tribal unity and cohesion that customary land tenure supports: Recital F; *Ngāti Whātua*, [579]; *Muriwhenua Land Report* p23; NZLC SP24 p200

3. The Trust: (i) relevantly intended and empowered to be Tūhoe's vehicle to receive whenua tuku iho within the Tūhoe ahikāroa, and to re-acquire more of it over time (cl 3.1(c), (f)-(g)); (ii) approved for that purpose by Tūhoe (and the Crown); (iii) legislatively endorsed for that role (TCSA; Te Urewera Act); (iv) enabled to endure forever through ouster of perpetuity period (s 19; Trusts Act s 16(6)(d)); (v) not allowed to alienate ahikāroa whenua to third parties, not even to a beneficiary (cl 3.5); and (vi) expected to credibly present Tūhoetanga (Recitals A-B; cls 3.1(a), 8)

B. Institutional fit of the MLC to supervise this distinct Trust

4. MLC judges have the tikanga and reo Māori expertise to assist with any necessary dispute resolution of this distinct Trust: s 7(2A), Part 3A. The MLC is also more accessible: ¶50-¶55; NZLC R92 pp91, 120-1, 124

5. For trusts, MLC has the same powers as NZHC: ss 237, 24C; **101.0133**

6. Purposively (Preamble) TTWMA fits: the Trust is a vehicle to advance Tūhoe rangatiratanga and to that end retains inalienable whenua tuku ihu

7. TTWMA differentiates corpus/Art.2 (cl 3.5 ahikāroa) from investment/ Art.3 general land: ss 243, 256. This means that MLC supervision will not unreasonably impede Trust investments in land. Note ss 17(2)(c), (d), (f)

8. If/when NZHC is a better forum for a dispute, the s 18(2) transfer power exists. It is a mechanism to promote ToW Arts.2/3, principle of options

C. Statutory gateway #1: "owned for a beneficial estate in fee simple"

9. Starting point is that Anglocentric trust law applies only to the extent consistent with (i) TTWMA (*Fenwick*, [55; 114]) and (ii) higher order principles/values comprising the fabric of our law; i.e. tikanga, ToW

10. Both gateway #1 elements must also be read (i) together in context of TTWMA, TSCA, and (ii) to promote active protection and options ToW principles. The outcome can be different to elsewhere in the legal system: *Clayton*, [38]; *Stafford* [2020] 3 NZLR 731 (property); *Ryan* (agency)

11. Importantly, "owned" is not defined in s 4(1). But "beneficial estate" is. Applying that s 4(1) definition here, the "beneficial estate" must reside not with the Trust but with Tūhoe Iwi Members as a "group of… Māori"

12. That conclusion is consistent with:

    12.1 The Trust's Deed: Recital D, cl 23.1(a), Sch 1 cls 1(a), (c), (d)

    12.2 The DOS/TCSA: see **[1]** above

    12.3 Tikanga more generally: Durie pp63-4

13. Thus the Rangatiratanga Estate – a 'bundle' of whenua rights/interests/ responsibilities – is a "beneficial estate". Noting *Ngati Apa*, [31-33]

14. That collectively held Estate is "owned" by the Trust's beneficiaries, in the sense it is them (compare e.g. the customary collective of Ngāi Tahu Whānui) whose whakapapa/mana/whanaungatanga empower them

15. While "ownership" is not the most apt concept for this beneficial estate (*da Silva,* p26), one must work within the statutory text. As this Court did with mana moana/"existing interests" in *Trans-Tasman*. Note too Dr Moana Jackson's tipuna title, and the use of "owners" as a shorthand:

    15.1 For TTWMA customary title holders: ss 131A, 132, 145

    15.2 For TTWMA rights holders generally (Preamble, s 2(1)). Noting TCSA also uses the shorthand "Māori owners": ss 8(7), 9(12)(a)

    15.3 In decisions by this Court on customary rights: e.g. *Wakatū*; *Trans-Tasman*, [172]; *Wairarapa Moana*, [75], [104]

16. Reading "owned" broadly (cf. individual property rights to the exclusion of others, which can be used and alienated independent of the collective; Durie p67) better promotes tikanga. It also avoids collateral damage: ¶60

D. Statutory gateway #2: "<u>constituted</u> in respect of"

17. The Trust's holding of ahikāroa whenua must be viewed in context, and with a focus on substance over form. Holding this is central to its existence

18. Trust as 'resettled' by TCSA (s 19) was constituted in respect of that land

19. Primary purpose analysis runs against text/scheme, arbitrary: **101.0290-1**

Dated: 26 February 2024

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