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**
	APPELLANT
AND	**TAMATI KRUGER ON BEHALF OF TŪHOE TE URU TAUMATUA TRUST**
	RESPONDENT

Outline of oral argument

27 February 2024

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Facts/background

1. TUT was established to be Tūhoe's PSGE, i.e receive settlement assets and be its legal embodiment. (COA101.0004: Recitals B–E and G, cls 3.1 and 12.)

2. The settlement assets were predominantly cash (c.$169m including CNI on account), plus two CNI forests and three fee simple estates (approx 14 ha).

3. The appellant filed MLC applications in 2018 and 2019. The underlying issue is whether a hapū trust (which selects candidates for Trustee) is the marae trustees or the marae komiti. This is now subject to the Trust Deed dispute resolution process.

4. The appellant's submissions in this Court wrongly state that TUT Trustees are required to re-acquire ancestral lands and that the settlement cash was to be used for this purpose. (Appellant subs at [22] and [39].)

Land held by TUT is not General Land "owned" by Māori

5. TTWM Act is a clear legislative scheme in relation to beneficial interests in land. It uses technical legal terms in a manner consistent with their legal meaning to interact with the Land Transfer Act and trust law (CA at [91]).

6. The object of a discretionary trust holds a mere hope. They have no proprietary interest in trust assets or any right to a definable part until an appointment is made. Beneficiaries here are current and future Tūhoe uri.

7. Definition (s 4) of "General land owned by Māori" includes two parts that clearly require vesting (not simply an interest as a discretionary beneficiary): **owned** and **estate in fee simple**. Section 129(c) is to similar effect. "Estate in fee simple" has a settled meaning: the fullest rights allowed by law and equivalent to full ownership.[1]

8. It is dangerous to erode meaning of technical property and trust terminology in legislation. (TUT subs at [24].) For example, a discretionary beneficiary cannot lodge a caveat over trust land, while a beneficiary with a specific interest in land can.[2]

9. The Act is consistent with "General land owned by Māori" having a specific, technical meaning:

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1 *Rotorua District Council v Ngati Whakaue Education Endowment Trust Board* [2018] NZCA 143 at [29]; *Clearspan Property Assets v Spark New Zealand Trading Ltd* [2017] NZHC 477 at [48]; *ANZCO Foods Ltd v CIR* [2016] NZHC 1015 at [54]

2 *Mau Whenua Inc v Shelly Bay Investments Ltd* [2019] NZHC 3222; *Rutherford v Rutherford* [2015] NZHC 878; *Holt v Anchorage Management Ltd* [1987] 1 NZLR 108 (CA).

9.1. Section 129(2)(b): Māori freehold land is land which has had its beneficial ownership determined by the Māori Land Court.

9.2. Section 133: General land owned by Māori can be converted to Māori freehold land if the land is beneficially owned by one or more Māori and all the owners agree.

9.3. Section 141(b): beneficial owners vs general benefit of beneficiaries.

9.4. Section 170: "owners" means persons beneficially entitled to land in fee simple or other beneficial freehold interest less than fee simple.

9.5. Section 345: all Maori land held by two or more persons beneficially entitled for an estate in fee simple shall be deemed to hold as tenants in common. This would make no sense in respect of the interest of a discretionary beneficiary.

10. Further, an application could be made to constitute a whānau trust over the land (s 214) even though this requires the consent of the "owners of the interests" (another indication that the beneficial interest must be owned).

11. To similar effect, an ahu whenua trust (s 215) assumes those having a beneficial entitlement will hold proportionately.

Act concerned with retaining and administering traditional, fragmented Maori landholdings (Appellant's submissions paragraphs 34 to 55)

12. Legislative history, preamble, s 2 and predominant focus on Māori freehold land all demonstrate the Act is focussed on the retention by Māori of land, particularly that taonga tuku iho of existing interests in fragmented land.

13. There is strong historic reason for why the Act needs to extend to General land owned by Māori. The Māori Affairs Amendment Act led to 96,000 hectares of Maori freehold land being converted to General land. This is why s 236(1)(c) (and s 133) are needed.

14. Sections 2 and 17 do not readily apply to TUT which holds a bundle of assets, many for investment purposes. There is no policy or other apparent reason as to why the Act should apply to TUT. (See CA at [98] to [103].)

TUT not constituted in respect of land

15. Parliament could have worded s 236(1)(c) to engage jurisdiction if an entity simply held or owned General land owned by Māori. It did not. Instead, it used the words "constituted in respect of". Consistent with the overt

purposes of the Act, those words emphasise that the holding of the land must be the raison d'etre for establishing the trust. (Preamble, ss 2 and 17.)

16. TUT was constituted for a number of reasons as set out in the Trust Deed recitals and clause 3.1. Simply because the eventual settlement assets included some land does not mean that TUT was "constituted in respect of" that land, taking into account the context and purpose of the Act.

17. Tūhoe itself has decided, as is apparent from the Trust Deed, which land it wishes to retain. This exercise of mana motuhake should not be an invitation to invite in the jurisdiction of the Māori Land Court.

Inconsistency across PSGEs (TUT submissions [76]–[86])

18. The history of settlement entities does not support a wide MLC jurisdiction. Early settlements took different approaches (eg Māori Trust Boards not subject to the Act, s 438 trusts under the Māori Affairs Act, and Trust Boards in respect of financial assets). PSGEs under modern settlement policy are not uniformly trusts subject to the Act either. Some are not trusts at all. Following *Moke*, many settling iwi expressly exclude MLC jurisdiction.

19. On the appellant's case, MLC jurisdiction would be an accident of Crown policy, and apply inconsistently across settling groups. The better analysis is that MLC jurisdiction should be slow to be inferred where it is not expressly contemplated by the settling iwi.

Te Tiriti analysis supports no jurisdiction (TUT submissions [87]–[98])

20. Active protection serves a useful purpose when the Crown's commitment to tino rangatiratanga is absent, and the Treaty relationship is unbalanced. But active protection is in tension with the foundational constitutional bargain of Te Tiriti: tino rangatiratanga, and partnership.

21. Tino rangatiratanga, mana motuhake o Tūhoe, and partnership are the framework of Tūhoe's settlement. Tūhoe has chosen to exercise its mana motuhake in the shape of its Trust Deed, and did not consent to kāwanatanga oversight via the MLC.

22. Interpreted consistently with Te Tiriti principles, Te Uru Taumatua is not a trust constituted in respect of General land owned by Māori, but in respect of a constitutional bargain to give effect to mana motuhake o Tūhoe.

Counsel certify they have made appropriate inquiries to ascertain whether these submissions contain any suppressed information, and certify that, to the best of their knowledge, the submissions are suitable for publication (that is, the submissions do not contain any suppressed information).