IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-2033
[2020] NZHC 3120

UNDER	the Judicature Amendment Act 1972 and Part 30 of the High Court Rules
BETWEEN	NGĀTI WHĀTUA ŌRĀKEI TRUST Plaintiff
AND	ATTORNEY-GENERAL First Defendant
	MARUTŪĀHU RŌPŪ LIMITED PARTNERSHIP Second Defendant

Hearing: 16 November 2020

Appearances: J E Hodder QC, J W J Graham and R M A Jones for the plaintiff
G H Allan and Y Moinfar-Yong for the first defendant
P F Majurey for the second defendant
L A V Underhill-Sem for Te Ākitai Waiōhua Settlement Trust, intervener
A H C Warren for Ngāi Tai ki Tāmaki Trust, intervener
M K Mahuika for Ngāti Paoa Iwi Trust, intervener
Appearances excused for Ngāti Kuri Trust Board and Ngāi Te Rangi Settlement Trust

Judgment: 25 November 2020

JUDGMENT NO 1 OF PALMER J

This judgment was delivered by me on Wednesday 25 November 2020 at 3.30pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel/Solicitors:
J E Hodder QC, Wellington
M A Keil, Barrister, Auckland
Chapman Tripp, Auckland
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McCaw Lewis, Hamilton
G H Allan, Barrister, Wellington
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Summary

[1] Ngāti Whātua Ōrākei seeks declarations as to its rights of mana whenua and corresponding Crown obligations in applying the Crown's Overlapping Claims Policy in central Auckland. The case will be heard from Tuesday 9 February 2021 for up to 10 weeks. In this preliminary judgment, I express the issues at a high level. I allow cross-examination of witnesses regarding tikanga and historical issues (by consent) and regarding the illustrative application of the Crown's Overlapping Claims Policy. I do not appoint independent pūkenga as court experts to assist the Court, although there is jurisdiction to do so. I direct the expert witnesses called by the parties and interveners in relation to tikanga and historical issues to confer before the hearing.

The proceedings

[2] In 2015, Ngāti Whātua Ōrākei applied for judicial review of decisions of the Minister of Treaty of Waitangi Negotiations to transfer land in Tāmaki Makaurau to Ngāti Paoa and Marutūāhu in settlement of Treaty of Waitangi claims. In 2017, the High Court struck out the claim and the Court of Appeal dismissed Ngāti Whātua Ōrākei's appeal of that decision on the basis the relief sought would interfere with parliamentary proceedings.[1] In 2018, the Supreme Court allowed a further appeal "with the result that Ngāti Whātua Ōrākei can largely pursue its claim for declarations as to its rights", though it could not challenge the proposed transfers of specified properties which would be implemented by legislation.[2]

[3] As I outline in the annex to this judgment, Ngāti Whātua Ōrākei has repleaded its claim. Ngāti Whātua Ōrākei seeks declarations that:

(a) Ngāti Whātua Ōrākei has ahi kā and mana whenua in relation to specified land in central Tāmaki Makaurau.

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1 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648.

2 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [3].

(b) When applying the Overlapping Claims Policy in a way which may affect the land in which Ngāti Whātua Ōrākei has mana whenua, the Crown must act in accordance with Ngāti Whātua Ōrākei tikanga.

(c) The Crown must develop any proposals, to include the land in which Ngāti Whātua Ōrākei has mana whenua in a proposed settlement with iwi who do not have ahi kā over that land, in accordance with Ngāti Whātua Ōrākei tikanga.

(d) In order to comply with tikanga in that situation, the Crown must:

(i) appropriately consult with Ngāti Whātua Ōrākei;

(ii) acknowledge the ahi kā of Ngāti Whātua Ōrākei.

(iii) decline to include the land in the proposed settlement if there is evidence its transfer would unjustifiably erode the mana whenua of Ngāti Whātua Ōrākei as an iwi having aki kā.

(iv) decline to include the land or recognise an interest in land in the proposed settlement where the land has previously been the subject of a gift to the Crown, unless Ngāti Whātua Ōrākei, the gifting iwi, has consented.

[4] The Crown and Marutūāhu Rōpū Limited Partnership oppose the claim. They dispute aspects of the pleaded facts, particularly regarding the status at law and tikanga of the specified land over which Ngāti Whātua Ōrākei claims to have mana whenua. The Crown says it may decide whether to offer that land as redress to other claimant groups having regard to its own policies, practices or processes and political, social, economic and fiscal matters that arise, and (to the extent relevant and subject to considering the previous factors) the general Office of Treaty Settlements (OTS) Guide to Claims and Negotiations.[3]

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3 *Ka tika a muri, ka tika a mua. Healing the past, building a future. A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Office of Treaty Settlements, Wellington, 2015).

[5] Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiōhua Inc was joined as third defendant in August 2019 but, in October 2020, withdrew from the proceeding by consent, on the basis they were exploring their whanaungatanga with Ngāti Whātua Ōrākei. Ngāti Whātua Ōrākei discontinued the proceedings against them.

[6] Other parties have been granted leave to intervene: Ngāti Paoa Iwi Trust; Te Ākitai Waiōhua Settlement Trust; Ngāi Tai ki Tāmaki Trust; Ngāti Kuri Trust Board and Ngāi Te Rangi Settlement Trust; Ngāti Whātua o Kaipara; and Te Rūnanga o Ngāti Whātua. Ngāti Paoa was previously a defendant in the proceedings but engaged in a tikanga process with Ngāti Whātua Ōrākei to resolve issues between them. They were joined as an intervener by consent. The proceedings are set down for hearing for up to 10 weeks from Tuesday 9 February 2021.

[7] On 16 November 2020, I held an interlocutory hearing regarding: the issues for the hearing; applications to cross-examine witnesses; and applications to appoint pūkenga or counsel assisting and to direct a hui of experts. On 18 November 2020, I disclosed to the parties and interveners my various associations with witnesses, counsel and parties. No one took any issues with that.

1 The Issues

[8] I invited the parties and interveners to file statements of issues. They all did so. At the interlocutory hearing, counsel agreed that the statements filed differed in expression but not in substance. I agree. On the basis of what has been filed, as a general and preliminary guide, I would express the issues at a high level as follows:

(a) Has Ngāti Whātua Ōrākei maintained ahi kā and mana whenua in the specified land?

(b) What relationships do the other iwi and hapū parties and interveners have with that land at tikanga?

(c) How do Crown obligations to Ngāti Whātua Ōrākei arising from (a), given (b), impact on the Crown's application of its Overlapping Claims Policy in terms of:

(i) tikanga;

(ii) the Treaty of Waitangi;

(iii) the 2011 settlement of Treaty claims between the Crown and Ngāti Whātua Ōrākei which led to the Ngāti Whātua Ōrākei Claims Settlement Act 2012;

(iv) the 2014 settlement of Treaty claims between the Crown and a collective of iwi (including Ngāti Whātua Ōrākei) which led to the Tāmaki Makaurau Collective Redress Act 2014;

(v) the honour of the Crown; and

(vi) the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)?

(d) Should the Court make the declarations sought, or other declarations?

2 Cross-examination

Witnesses

[9] The parties and interveners have filed and served briefs or affidavits from witnesses regarding history, tikanga and the recent application of the Crown's Overlapping Claims Policy as follows:

(a) nine witnesses for Ngāti Whātua Ōrākei;

(b) six witnesses for the Crown;

(c) 11 witnesses for Marutūāhu;

(d) three witnesses for Ngāti Paoa;

(e) five witnesses for Te Ākitai Waiōhua; and

(f) four witnesses for Ngāi Tai ki Tāmaki.

[10] The parties, interveners and I all agree that the witnesses giving evidence about tikanga and historical issues will need to be cross-examined at the hearing about those issues in order to fairly dispose of the case.

[11] Ngāti Paoa originally applied to cross-examine witnesses of Marutūāhu Rōpu and Ngāi Tai ki Tāmaki. However, the three of them have now agreed that none of them will cross-examine each other's witnesses, on the basis that:

(a) The absence of cross-examination does not mean that the evidence is uncontested. Any contest of evidence will be dealt with through submission rather than cross-examination.

(b) The parties reserve the right to seek leave to ask questions in respect of any new evidence that might emerge during the presentation of evidence or cross-examination by other parties.

(c) There is no issue as to costs between the parties.

[12] Other than the Minister and former Minister who provide affidavits, Ngāti Whātua Ōrākei applies to cross-examine other specified witnesses, regarding the Crown's application of its Overlapping Claims Policy. The Crown opposes that.

Law of cross-examination

[13] Cross-examination is not available as of right in judicial review proceedings and is not the norm. Usually, judicial review is conducted on the basis of evidence filed by way of affidavit. However, the Court may order cross-examination. Matthew Smith's text expresses the principle concerning cross-examination in judicial review proceedings as follows: "Cross-examination is permitted only with leave, which is sparingly granted and only if it can be shown that questioning is necessary fairly to resolve matters".[4]

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[4] Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at 1003.

[14] In *Geary v Psychologists' Board*, the Court of Appeal canvassed the relevant authorities about cross-examination in judicial review cases and stated:[5]

> [22] Judicial review is part of the High Court's supervisory jurisdiction and fact finding is not a central activity. If cross-examination was permitted as of right, there would be a risk of unwarranted dalliance into factual assessments by the courts. The avoidance of that kind of exercise is the core of the presumption against cross-examination in judicial review proceedings, and recognised in the relevant authorities. The rule of practice is a common sense response to the nature of the litigation.
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> [23] Cross-examination is properly constrained by a leave requirement. The criteria for leave – necessity and the requirements of justice – are not particularly onerous. If a party can point with sufficient particularity to a basis upon which cross-examination is necessitated by the shape of the case, then leave will be granted.

[15] In *Edwards v Toime (No 1)*, Wild J in the High Court identified that the situations in which cross-examination in judicial review proceedings may be appropriate include, at least:[6]

(a) where there is a lack of adequate or proper explanation of the decision-making process;

(b) where there exists a material conflict of evidence; and

(c) where the credibility of a deponent is in issue.

Submissions on cross-examination

[16] Mr Hodder QC, for Ngāti Whātua Ōrākei, submits:

(a) Ngāti Whātua Ōrākei has brought these proceedings to clarify crucial aspects of its post-settlement relationship with the Crown. It is not an orthodox judicial review proceeding where the Court does not stray into the merits of a challenged decision, because the focus is not on challenging a particular decision. Rather, in the wake of the Supreme

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5 *Geary v Psychologists' Board* [2009] NZCA 134, [2009] NZAR 338.
6 *Edwards v Toime (No 1)* [2005] NZAR 140 (HC) at [23].

Court's judgment, it is a declaratory exercise about respective rights and obligations.

(b) The scope and force of the application of the Crown's Overlapping Claims Policy are essential narrative and context as illustrative examples. Cross-examination is important to ensure the completeness and therefore accuracy of that evidence, given alleged conflicts, inconsistencies and inadequate explanations in the Crown affidavits and pleadings. That particularly concerns whether Crown decision-making has taken and will take into account the factors Ngāti Whātua Ōrākei says they should.[7]

(c) Attitudes taken by witnesses and their understandings and purposes in applying the Policy, which are relevant here, do not necessarily emerge from the written page. The Crown's pleadings are not clear about its approach to tikanga in relation to overlapping claims and cross-examination is a means of obtaining more clarity.

(d) This dimension of cross-examination is not expected to involve a great amount of time.

[17] Mr Allan, for the Crown, submits:

(a) The Crown admits, in applying its Overlapping Claims Policy, it does not seek to resolve issues of ahi kā and mana whenua. Accordingly, cross-examination is not required to establish that. The Crown's policy is known and is not consistent with what Ngāti Whātua Ōrākei wants declared. Rather, the issue is whether the Crown is wrong. The brief of evidence of Mr Ngarimu Blair for Ngāti Whātua Ōrākei accurately captures the Crown's position in this regard.[8]

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7 Particularly in relation to paragraph [28] of the pleadings.
8 Affidavit of Ngarimu Blair, 5 November 2020.

(b) Ngāti Whātua Ōrākei is wrong to identify Mr Michael Macky as a witness regarding historical matters. Rather, his evidence establishes the historical record that was the basis for Crown decision-making.

(c) Cross-examination on the adequacy of Crown consultation with Ngāti Whātua Ōrākei risks impinging on proposals that will be the subject of legislation which the Supreme Court ruled out of the scope of the proceedings. The Supreme Court's decision does not envisage an open-ended inquiry.

(d) Ngāti Whātua Ōrākei has failed to identify particular facts that are in issue between the parties, let alone how cross-examination would assist. No unfairness would arise from there being no cross-examination. This sort of case ought to be less open to cross-examination than orthodox judicial reviews, given its declaratory nature.

(e) If the Court allows cross-examination of the Crown's witnesses the Crown reserves its ability to cross-examine Ngāti Whātua Ōrākei's witnesses regarding the application of the Policy.

[18] Mr Majurey for Marutūāhu Rōpu, Ms Underhill-Sem for Te Ākitai Waiōhua, and Mr Mahuika for Ngāti Paoa Iwi Trust, abide the decision of the Court on cross-examination of witnesses regarding the application of the Overlapping Claims Policy. But, if leave is granted to Ngāti Whātua Ōrākei to cross-examine, they would also seek to cross-examine.

Should witnesses be cross-examined regarding the Overlapping Claims Policy?

[19] I accept this is not an orthodox judicial review. As the Supreme Court said in its decision in these proceedings, Ngāti Whātua Ōrākei is pursuing a claim for declarations as to its rights. Those rights will shape the ongoing relationship between Ngāti Whātua Ōrākei and the Crown, as well as the relationships between each of them and other iwi and hapū in Tāmaki Makaurau. In particular, Ngāti Whātua Ōrākei seeks clarification of the impact of its status at tikanga, particularly in terms of its mana

whenua, in comparison with that of other iwi and hapū, on the Crown's obligations to Ngāti Whātua Ōrākei in applying its Overlapping Claims Policy. Ngāti Whātua Ōrākei claims its status at tikanga impacts on the Crown's obligations through tikanga, the Treaty of Waitangi and settlements of breaches of the Treaty (reflected in Acts of Parliament), the honour of the Crown and the UNDRIP.

[20] As clarified by the Supreme Court in its judgment, New Zealand courts do not make orders to prevent the introduction of a Bill to the House of Representatives or to dictate what should be placed before Parliament.[9] The Court struck out two claims which it considered could only be characterised as challenges to the decision to legislate to transfer properties to Ngāti Paoa and Marutūāhu Rōpu.[10] Instead, the Court identified four claims by Ngāti Whātua Ōrākei about its asserted rights and four associated claims which flow from those asserted rights regarding: Ngāti Whātua Ōrākei's ahi kā and mana whenua in relation to specified land; the 2012 Act; the ongoing application of the Overlapping Claims Policy; and the Crown's process in including specified land in Treaty settlements with other iwi.[11] This is the basis on which the claim has been repleaded.

[21] Accordingly, as Mr Hodder submits, the focus of the proceedings is now not on challenging a particular decision but on declarations of rights and obligations. Ngāti Whātua Ōrākei seeks declarations referring to its rights and the Crown's obligations in general and in the future. But courts in New Zealand usually come close to abhorring a factual vacuum. Ngāti Whātua Ōrākei pleads facts regarding the 2016 decisions to transfer properties to Marutūāhu Rōpu and Te Ākitai Waiōhua as "examples of the Crown's policy by which it resolves claims by two or more iwi to the same area of land".[12] The Crown denies that. No doubt there will be submissions about the facts and about the legal implications at the hearing. But how the Crown might apply its Policy in the future in general is informed by past instances of how it has applied the Policy. The factual context of how the Crown applied the Policy in the proposed transfers to properties to Marutūāhu and Te Ākitai Waiōhua may (or may

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9 *Ngāti Whātua Ōrākei Trust v Attorney-General,* above n 2, at [36].
10 At [66].
11 At [50]-[66]
12 Fourth amended statement of claim, 22 November 2019, at [23].

not) be illustrative of how it applies the policy to Ngāti Whātua Ōrākei. That is all for the hearing.

[22] Mr Allan may be right that in such circumstances, the threshold for finding cross-examination necessary to fairly resolve the case is even higher than in ordinary judicial review cases. But the illustrative facts which are disputed here are complex and nuanced. My review of the briefs and affidavits suggests there may well be gaps between the witnesses' understandings of the facts. I consider it is likely that cross-examination to test and complete the evidence about the facts in dispute will assist the Court. That should be able to be done without the resulting judgment impinging on the subject of specific legislative proposals.

[23] Mr Allan also makes a good point that the Crown admits that its application of the Policy does not involve it taking into account ahi kā and mana whenua. But that is not all that Ngāti Whātua Ōrākei claims. How the Crown's application of the Policy takes into account the Treaty, the honour of the Crown and the UNDRIP is also relevant. Again, these are all subtle and nuanced issues. As recently as December 2019, the Waitangi Tribunal characterised the Policy as "vague, unhelpful, inadequate and inaccurate as a statement of Crown policy and practice",[13] and the Crown acknowledged there that it did not reflect changes in practice that happened on the ground.[14] I have no reason to doubt the veracity of the affidavits provided by the Crown witnesses. But I consider that cross-examination is likely to add appreciably to the evidence of what the Crown's Overlapping Claims Policy actually is, and to illustrate how it has been applied in relation to Ngāti Whātua Ōrākei, in reality.

[24] Accordingly, I consider cross-examination on these matters is necessary to dispose of this case fairly. I allow cross-examination of witnesses (including Mr Macky, as a witness of fact) regarding the application of the Crown's Overlapping Claims Policy.

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13 Waitangi Tribunal *Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2020) at [7.1.1].

14 At 32.

[25] But I caution counsel that they cannot go fishing by way of cross-examination. Cross-examination in relation to these factual matters is likely to be useful for illustrative purposes in relation to the application of the Policy. But I am not interested in unwarranted dalliance into illustrative facts. Fine distinctions and nice points are not likely to be helpful. I permit cross-examination on the basis that it is undertaken responsibly. I will not hesitate to intervene if I consider it does not assist the issues I have to decide. And I rely on Mr Hodder's estimate that this aspect of cross-examination should not involve a great amount of time.

3 Pūkenga

[26] Previous case management teleconferences in July and August 2020 raised the question of whether I should appoint a counsel to assist the court or pūkenga.[15] I invited the parties and interveners to make applications if they wished to pursue either option. Ngāi Tai ki Tāmaki, Te Ākitai Waiōhua and Marutūāhu Rōpu apply for the Court to appoint a panel of pūkenga and direct expert witness to conference.

Law and pūkenga

[27] Section 99 of the Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act) provides:

> **99 Court may refer to Māori Appellate Court or pūkenga for opinion or advice on tikanga**
>
> (1) If an application for a recognition order raises a question of tikanga, the court may—
>
> (a) refer that question in accordance with section 61 of Te Ture Whenua Maori Act 1993 to the Māori Appellate Court for its opinion; or
>
> (b) obtain the advice of a court expert (a **pūkenga**) appointed in accordance with the High Court Rules 2016 who has knowledge and experience of tikanga.
>
> (2) The opinion of the Māori Appellate Court is binding on the Court but the advice of a pūkenga is not.

[15] Minute No 5, 3 July 2020, at [4] and [6]-[7]; Minute No 6, 11 August 2020, at [5].

[28] Sub-part 5 of part 9 of the High Court Rules 2016 deals with experts. In particular, r 9.36 provides:

> **9.36 Appointment of court expert**
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> (1) In a proceeding that is to be tried by Judge alone and in which a question for an expert witness arises, the court may at any time, on its own initiative or on the application of a party, appoint an independent expert, or, if more than 1 such question arises, 2 or more such experts, to inquire into and report upon any question of fact or opinion not involving questions of law or of construction.
>
> (2) An expert appointed under subclause (1) is referred to in this rule and in rules 9.37 to 9.42 as a **court expert**.
>
> (3) A court expert in a proceeding must, if possible, be a person agreed upon by the parties and, failing agreement, the court must appoint the court expert from persons named by the parties.
>
> (4) A person appointed as an independent expert in a proceeding under rule 9.44(3) may not be appointed as a court expert unless the parties agree.
>
> (5) In this rule, **expert**, in relation to a question arising in a proceeding, means a person who has the knowledge or experience of, or in connection with, that question that makes that person's opinion on it admissible in evidence.

[29] The Court must settle the question to be submitted to the court expert, if the parties cannot agree.[16] The expert must report to the Court.[17] Any part of the court expert's report not accepted by all the parties must be treated as information furnished to the court and given appropriate weight, perhaps similarly to a Brandeis brief.[18] Any party may apply to cross-examine the court expert.[19] If a court expert is appointed, a party may call one expert witness of their own (or more than one, with leave in exceptional circumstances).[20]

[30] In addition, under r 9.44 the Court may direct expert witnesses to:

> (a) confer on specified matters;

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16 Rule 9.37.
17 Rule 9.38(1).
18 Rule 9.38(4).
19 Rule 9.40.
20 Rule 9.42.

(b) confer in the absence of the legal advisers of the parties (if the parties agree);

(c) try to reach agreement on matters in issue in the proceeding;

(d) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement;

(e) prepare the joint witness statement without the assistance of the legal advisers of the parties (if the parties agree).

[31] Under r 9.44(3), the Court can appoint an independent expert to convene or conduct a conference of expert witnesses and given any directions for that which the Court thinks just.

Submissions

[32] Mr Warren for Ngāi Tai ki Tāmaki, Ms Underhill-Sem for Te Ākitai Waiōhua and Mr Majurey for Marutūāhu Rōpu submit:

(a) Tikanga is central to this case, is complex and is highly contested. The concept of exclusive or primary mana whenua is highly controversial in the Māori world. There are fundamentally differing world views in the expert tikanga evidence filed so far which are complex and nuanced in this test case, especially where there is an assertion by Ngāti Whātua Ōrākei of exclusive or predominant mana whenua. Mr Majurey submits the stakes could not be higher because Ngāti Whātua Ōrākei's claim to exclusive mana whenua would literally wipe the place of every other tribe off the face of the map. Accessing multiple sources of expertise is prudent.

(b) Dr Te Kahautu Maxwell provides an affidavit recommending the Court should have as much assistance as possible from independent sources.[21] He suggests the focus of pūkenga should be to assist the Court to understand key tikanga concepts, not to determine who has mana whenua or whether there is exclusive mana whenua, which is best left for the opinions of the iwi and hapū.

(c) The Court will be greatly assisted by pūkenga who should review all the relevant tikanga evidence, attend expert witness conferencing and assist where invited by the tikanga witnesses, record any agreements and submit a final report on the issues prior to the start of the hearing. They submit the pūkenga should attend the entirety of the hearing and be available for examination.

(d) The appointment of pūkenga would not prejudice the other parties.

(e) It is now common practice to appoint pūkenga. None of the difficulties identified by Ngāti Whātua Ōrākei have arisen in other cases. In an affidavit, Ms Horiana Irwin outlines her experience of the use of pūkenga as counsel in two other contexts, which she considered useful in assisting the Court:[22]

(i) In *Ellis v R,* the Supreme Court raised questions about the relevance of tikanga.[23] Counsel agreed on a process involving a wānanga of tikanga experts who met with each other and with all counsel and produced an agreed statement of tikanga under s 9 of the Evidence Act 2006.

(ii) In an application by Te Whakatōhea under the Takutai Moana Act, by consent, Churchman J appointed pūkenga under s 99 and identified questions for them to consider. They attended the hearing, facilitated a tikanga based process between the parties,

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21 Affidavit of Dr Te Kahautu Maxwell, 5 November 2020.
22 Affidavit of Horiana Irwin, 5 November 2020.
23 *Ellis v R* [2020] NZSC 89.

undertook site visits and produced a report on the final day of the hearing. There was an opportunity for them to be cross-examined. Mr Warren, from the bar, was also involved in this case and supported Ms Irwin's affidavit. He submits the parties there also called pūkenga witnesses but Churchman J still appointed two independent pūkenga.

[33] Mr Mahuika, for Ngāti Paoa, was also involved in the Whakatōhea Takutai Moana Act claim. He notes the pūkenga there were not in a position to determine the ultimate issue and, at best, gave guidance. He submits the utility of appointing pūkenga here is questionable, given the extensive evidence filed and the expertise of the witnesses, because it is unclear what a pūkenga would provide to further assist the court. He submits appointment is likely to result in further opinions on tikanga for the Court to consider which will not materially advance the resolution of the differences between the parties. He submits there are a number of very prominent tikanga experts involved in this case already. He submits the question is ultimately about what will assist the Court. Ngāti Paoa abides the decision of the Court.

[34] The Attorney-General does not object to the appointment of pūkenga or counsel to assist the Court. Ngāti Kuri Trust Board and Ngā Te Rangi Settlement Trust abide the decision of the Court.

[35] Ngāti Whātua Ōrākei opposes the appointment of pūkenga but takes no formal position on the conferencing of experts. Mr Hodder, for Ngāti Whātua Ōrākei, submits:

(a) Pūkenga have only been used a handful of times in very different circumstances. In the *Ellis* proceedings, pūkenga assisted the parties who did not themselves have a position on the relevant tikanga. In the Whakatōhea Takuktai Moana case, all parties agreed to the appointment of pūkenga and the procedure was different to an adversarial trial.

(b) The true utility of pūkenga is where the Court has insufficient evidence of tikanga otherwise. Here, at least five of the tikanga experts could be

called pūkenga. Their briefs of evidence have not been prepared on the basis there would be pūkenga. Mr Tamati Kruger provides an affidavit acknowledging a number of witnesses as pūkenga. He disagrees the Court would be assisted by appointing additional pūkenga which runs the risk of confusing the evidence or overcomplicating matters. For example, he says the assessment between different expert opinions about ahi kā or mana whenua belongs to the Court and would not be assisted by a further layer of middlemen. He acknowledges the conferencing of witnesses can be appropriate, practical and helpful and would participate in that, though he does not consider it necessary and considers it premature before reply evidence is filed.

(c) The use of pūkenga would confuse the adversarial process, potentially diminish the value of the parties' tikanga experts and would further compress an already tight timetable. Pūkenga might act as middlemen and obfuscate the tikanga issues or risk stepping into the Court's role. The Court is best to see and hear the experts and directly engage with them rather than adding further voices.

(d) The appointment of pūkenga could itself raise contested tikanga issues. To be independent, pūkenga would have to be from outside Tāmaki Makaurau. But that would be inconsistent with Marutūāhu Rōpu, Te Ākitai Waiōhua and Ngāi Tai ki Tāmaki's challenge to the ability of an expert from outside Tāmaki Makaurau to comment on the application of tikanga within Tāmaki Makaurau.

Should pūkenga be appointed?

[36] Section 99 of the Takutai Moana Act specifically empowers appointment of pūkenga as court experts in tikanga under the High Court Rules, to consider questions of tikanga that arise under that Act. Rule 9.36 is broad enough to empower appointment of pūkenga as court experts in tikanga in other proceedings as well. The wording in r 9.36 excluding questions of law does not affect that. As Mr Hodder submitted, tikanga is law proved as a matter of fact. That is why the parties are calling

expert witnesses regarding tikanga. Even if r 9.36 did not apply, appointment of pūkenga by the High Court would be possible under its inherent jurisdiction. As questions of tikanga arise more frequently in the Courts in future, the power to appoint pūkenga will be of increasing potential value. I am sure pūkenga have been valuable in the cases referred to by counsel.

[37] The relevant considerations are similar to those in allowing an interested party to intervene in proceedings. In deciding whether to appoint pūkenga, the Court will weigh the likelihood the appointment will assist the Court against the risk of prejudice or unfairness to the litigants, guided by the overall interests of justice.[24] The power is more likely to be exercised:

(a) the more important are the questions of tikanga in a case;

(b) the less expert tikanga evidence is provided by the parties; and

(c) the less procedural prejudice or unfairness an appointment would cause to the parties.

[38] The application for appointment of pūkenga here is well made. The issues of tikanga raised in this case are important to the case and the case is important to the parties and interveners. The issues are complex, nuanced and novel for a court. While the question of whether pūkenga should come from within or outside Tāmaki Makaurau is not easy in practice, I expect solutions could be found.

[39] However, the parties and interveners have provided a significant amount of expert tikanga evidence from a number of pūkenga already. As Mr Mahuika submits, it is not clear how much additional utility there would be in appointment of independent pūkenga. If there is a conflict in expert evidence, and if it needs to be

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[24] *Mohamed v Guardians of New Zealand Superannuation* [2020] NZHC 1324, (2020) 25 PRNZ 205 at [2]; *DN v Family Court at Auckland* [2019] NZHC 2028, [2019] NZFLR 150 at [11]; *Capital + Merchant Finance Ltd (in rec and in liq) v Perpetual Trust Ltd* [2014] NZHC 3205, [2015] NZAR 228 at [41]; *Taylor v Key (No 1)* [2014] NZHC 3306, [2015] NZAR 730 at [9]; *Seales v Attorney-General* [2015] NZHC 828 at [43], citing *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25 at [32]; *Ngāti Whātua Ōrākei Trust v Attorney General* [2017] NZCA 183, [2017] NZAR 627 at [11].

determined, it is the Court's role to determine the conflict on the basis of the evidence of the parties and interveners. Mr Kruger says that directly and Dr Maxwell acknowledges it. And, given my decision on cross-examination, the timetable for the hearing will be tight.

[40] I thank the parties and interveners for canvassing the issue. But on this occasion, I decline to appoint pūkenga. I am confident the pūkenga witnesses being called by the parties will provide sufficient expert evidence regarding tikanga on the basis of which the Court can decide the issues it needs to decide.

[41] The issue of whether any expert witnesses should engage in a hot-tubbing procedure can be considered at the hearing. I do consider there is likely to be value in the expert witnesses conferencing. But I do not appoint an independent expert to convene or conduct those conferences. The witnesses will be more than capable of doing so themselves, but I direct them to do so actively. Counsel will need to ensure that occurs. Under r 9.44, I direct:

(a) the witnesses called by the parties and interveners on historical issues (not including Mr Macky, who is a witness of fact), to confer in time to produce a joint witness statement about the matters on which they agree and disagree, and their reasons, after reply evidence has been filed and before **5 pm Monday 21 December 2020**; and

(b) the witnesses called by the parties and interveners on tikanga issues to confer in time to produce a joint witness statement about the matters on which they agree and disagree, and their reasons, after reply evidence has been filed and before **5 pm Monday 21 December 2020**.

[42] I reserve leave to the parties and interveners to seek to vary those timetables.

Timetabling

[43] The timetable for the hearing is likely to be tight. I confirm:

(a) The hearing will commence at **10 am Tuesday 9 February 2021**, with Ngāti Whātua Ōrākei's opening submissions and skeletal openings by the other parties.

(b) We will not sit in the week of 15 February 2021, due to counsel availability issues. We will adjourn after the openings, and any other preliminary issues are dealt with, until **10 am Monday 22 February 2021**.

(c) We will sit up to **5 pm Friday 23 April 2020**.

(d) I will consider at the time whether we should sit in the week of 5 April 2021, after Easter.

(e) I reserve leave for the parties to seek a further case management teleconference to be convened before **5 pm Tuesday 22 December 2020**.

Result

[44] I make the following orders:

(a) I grant leave for the witnesses regarding the application of the Overlapping Claims Policy (including Mr Macky) to be cross-examined, as well as the witnesses of historical and tikanga issues (not including Mr Macky) to be cross-examined.

(b) I decline the application to appoint pūkenga.

(c) I direct the expert witnesses on historical and tikanga issues to confer, as specified in paragraph [41].

(d) I make the timetabling directions specified in paragraph [43].

[45] I award costs for the application for cross-examination to Ngāti Whātua Ōrākei and against the Attorney-General. Given the public importance and novelty of the application to appoint pūkenga, the costs for that application will lie where they fell.

Palmer J

Annex: Outline of Ngāti Whātua Ōrākei Claim

[1] Ngāti Whātua Ōrākei has mana whenua by continuously maintaining ahi kā in land in central Tāmaki Makaurau since 1840, in particular:[25]

(a) land over which the Crown and Ngāti Whātua Ōrākei agreed in 2006 that Ngāti Whātua Ōrākei might have a right of first refusal; and

(b) within that area, approximately 3,000 acres of land at Matahārehare (Hobson Bay), Opou/Opoututeka (Cox's Creek) and Maungawhau (Mt Eden), which was gifted by Ngāti Whātua Ōrākei to the Crown on 22 October 1840 to strengthen their relationship.

[2] In 2011 the Crown and Ngāti Whātua Ōrākei entered into a Deed of Settlement in respect of Ngāti Whātua Ōrākei's claims of breaches by the Crown of the Treaty of Waitangi. The settlement was reflected in the Ngāti Whātua Ōrākei Claims Settlement Act 2012.[26]

[3] In 2014, a collective of iwi and hapū, including Ngāti Whātua Ōrākei entered a further Treaty settlement with the Crown, reflected in the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.[27] This subjected Crown land in the broader Auckland region, including but much wider than the land in which Ngāti Whātua Ōrākei has mana whenua, to a right of first refusal in favour of the Collective.[28] Under s 120, the Crown may give notice of its intention to exclude land from that right of first refusal if it is required for another Treaty settlement.[29]

[4] Under the Crown's policy by which it resolves overlapping Treaty claims (the Overlapping Claims Policy), the Crown will not recognise claimant group boundaries, will not resolve the question of which claimant group has the predominant interest in any particular area and, in the absence of agreement by claimants, makes decisions on overlapping claims guided by its wish to reach fair and appropriate settlements and to

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25 Fourth amended statement of claim, 22 November 2019, at [8], [9], [11], [14].
26 At [13], [16].
27 At [17].
28 At [18]-[19].
29 At [20].

maintain, as far as possible, its capability to provide appropriate redress to and fair settlements with other claimants.[30]

[5] In 2016, there were two examples of the Crown's Overlapping Claims Policy:[31]

(a) On 13 May 2016, the Minister in charge of Treaty of Waitangi Negotiations decided to offer to Marutūāhu Rōpu land on Grafton Rd, the Boston Post Probation Centre, Auckland Grammar School, Epsom Girls Grammar School, Remuera Intermediate, Ponsonby Intermediate, Parnell Primary School, NZTA-administered land at Mechanics Bay and a lookout site in Parnell. These are lands in which Ngāti Whātua Ōrākei has mana whenua.[32]

(b) In November 2016, the Office of Treaty Settlements advised Ngāti Whātua Ōrākei it proposed to offer to Te Ākitai Waiōhua properties in Dominion Road, Hillsborough Road and Mt Eden Normal School, in which Ngāti Whātua Ōrākei has mana whenua.[33]

[6] The Crown is required to develop proposals involving the transfer of the land in which Ngāti Whātua Ōrākei has mana whenua:[34]

(a) in accordance with the following principles of tikanga: ahi kā or ahi kā roa, mana whenua, take tuku and tuku whenua;

(b) in accordance with its commitment in cl 3.10 of the Deed and s 7 of the Settlement Act to repair and maintain in future its relationship with Ngāti Whātua Ōrākei based on mutual trust, co-operation and respect for the Treaty of Waitangi and its principles;

(c) with appropriate acknowledgement of the ahi kā of Ngāti Whātua Ōrākei;

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30 At [25].
31 At [21].
32 At [21.1]-[21.3].
33 At [21.4]-[21.6].
34 At [24].

(d) in a manner which does not erode the mana whenua of Ngāti Whātua Ōrākei;

(e) consistently with the Treaty of Waitangi, its principles, and the honour of the Crown and in accordance with the Crown's relationship with Ngāti Whātua Ōrākei under the Treaty and its 2011 Treaty settlement with Ngāti Whātua Ōrākei;

(f) in a manner which upholds and is consistent with the rights and freedoms affirmed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

[7] Under the 2011 settlement and corresponding 2012 Act, tikanga, the Treaty of Waitangi, the honour of the Crown and the UNDRIP, Ngāti Whātua Ōrākei has the following rights and the Crown has corresponding obligations:[35]

(a) To be fully consulted by the Crown regarding proposals and Treaty redress involving the land in which it claims mana whenua.

(b) To have the Crown acknowledge the ahi kā of Ngāti Whātua Ōrākei.

(c) To prevent the Crown developing proposals for Treaty settlements involving the land in which Ngāti Whātua Ōrākei claims mana whenua if:

(i) the proposal would be offensive to Ngāti Whātua Ōrākei as a matter of tikanga; or

(ii) the proposal would unjustifiably erode the mana whenua of Ngāti Whātua Ōrākei in the land; or

(iii) Ngāti Whātua Ōrākei gifted the land to the Crown in 1840 and does not consent to its transfer.

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35 At [26].

[8] The Minister erred in law, and continues to err, in not accepting the above requirements, rights and obligations as valid.

[9] The Minister erred and continues to err in seeking to apply the Crown's Overlapping Claims Policy to Central Tāmaki Makaurau claims by failing to take into account the above requirements, rights and obligations as mandatory relevant considerations and the Crown must respect the rights.

[10] The Court should declare that:

(a) Ngāti Whātua Ōrākei has ahi kā and mana whenua in relation to the land in which it has mana whenua.

(b) When applying the Overlapping Claims Policy in a way which may affect the land in which Ngāti Whātua Ōrākei has mana whenua, the Crown must act in accordance with Ngāti Whātua Ōrākei tikanga.

(c) Crown development of proposals, to include the land in which Ngāti Whātua Ōrākei has mana whenua in a proposed settlement with iwi who do not have ahi kā over that land, must be made in accordance with Ngāti Whātua Ōrākei tikanga.

(d) In order to comply with tikanga in that situation, the Crown must:

(i) appropriately consult with Ngāti Whātua Ōrākei;

(ii) acknowledge the ahi kā of Ngāti Whātua Ōrākei.

(iii) decline to include the land in the proposed settlement if there is evidence its transfer would unjustifiably erode the mana whenua of Ngāti Whātua Ōrākei as an iwi having aki kā.

(iv) decline to include the land or recognise an interest in land in the proposed settlement where the land has previously been the

subject of a gift to the Crown, unless Ngāti Whātua Ōrākei, the gifting iwi, has consented.