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IN THE SUPREME COURT OF NEW ZEALAND SC 67/2023

I TE KŌTI MANA NUI O AOTEAROA [2024] NZSC Trans 1

BETWEEN **PAKI NIKORA AND PAREARAU POLLY ALICE NIKORA on behalf of TE KAUNIHERA KAUMĀTUA O TŪHOE**
Appellant

AND **TĀMATI KRUGER on behalf of TŪHOE TE URU TAUMATUA TRUST**
Respondent

Hearing: 27 February 2024

Court: Winkelmann CJ
Glazebrook J
Williams J
O'Regan J
Collins J

Counsel: M S Smith, P T Harman and L J L Hemi for the Appellant
M G Colson KC, M R G van Alphen Fyfe and K O M Fitzgibbon for the Respondent

B R Arapere, I T F Hikaka and J T H Kohu-Morris for
Te Hunga Rōia Māori o Aotearoa as the Intervener

CIVIL APPEAL

WINKELMANN CJ:
Mōrena. I understand that Mr Pitau is going to offer a karakia. I invite him to come forward. You can do it from there if you're happy to.

5 ***Karakia Tīmatanga – Reremoana Pitau***

MR SMITH:
E ngā Kaiwhakawā, tēnā koutou. Ko Smith ahau kei kōnei mātou ko Harman ko Hemi. Kei kōnei ahau mō te kaitono pīra tuatahi rāua ko te kaitono pīra tuarua. If it pleases the Court, counsel's name is Smith and I appear together
10 with Harman and Hemi for the appellants Paki Nikora and Parearau Nikora, both on behalf of Te Kaunihera Kaumātua o Tūhoe.

WINKELMANN CJ:
Tēnā koutou, Mr Smith, Mr Harmon and Mr Hemi.

MR COLSON KC:
15 E ngā Kaiwhakawā, tēnā koutou. Ko Colson ahau kei kōnei mātou ko Ms van Alphen Fyfe ko Ms Fitzgibbon mō te Te Uru Taumatua Trust. May it please the Court, Colson with Ms van Alphen Fyfe and Ms Fitzgibbon for the respondent trust.

WINKELMANN CJ:
20 Tēnā koutou, Mr Colson, Ms van Alphen Fyfe, Ms Fitzgibbon.

MS ARAPERE:
Tēnā, e te Kōti Mana Nui. Ko Ms Arapere tōku ingoa. Ka tū mātou ko Hikaka, ko Kohu-Morris, hei māngai kōrero mō Te Hunga Rōia Māori o Aotearoa. May

it please the Court, Ms Arapere, Mr Hikaka and Mr Kohu-Morris for the intervener Te Hunga Rōia Māori o Aotearoa.

WINKELMANN CJ:

Tēnā koutou, Ms Arapere, Mr Hikaka and Mr Kohu-Morris. Now, there are
5 some preliminary matters to attend to. We received the application from the respondents to file an affidavit in relation to the issue of tikanga and the appellant's response this morning. Our proposal is that we receive the affidavit de bene esse allowing the appellant to file any reply by Friday and that reply will also come in de bene esse, which means we receive it and determine in the
10 course of determining the appeal whether it is relevant and helpful and therefore determining its admissibility.

I apprehend, Mr Smith, it's likely there's a possibility people will wish to file further submissions in response to that evidence?

15 **MR SMITH:**

I can't answer your Honour's question with any helpfulness because we haven't really engaged with that evidence at the moment and the nature of the evidence is such that we're mindful and grateful of the time to this Friday to consider what, if anything, needs to be said by way of reply and what issues might come
20 out of that. Maybe it's that the best approach would be to leave it in your Honours' hands to determine after, in light of the receipt of that evidence and whether or not there might be a need, a helpfulness from the Court's perspective to receive any further submissions on anything arising from the two affidavits that were then there before the Court.

25 **WINKELMANN CJ:**

Well, that's very self-sacrificing of you but I wouldn't preclude the possibility that you'll feel the need once you've thought about it to file further evidence, so in those circumstances, you can just make – so further submissions, you can just make contact with the registry about that. Mr Colson, are you happy with that
30 approach?

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MR COLSON KC:

Of course, yes.

WINKELMANN CJ:

Mr Smith?

5 **MR SMITH:**

The appellant's case on appeal is that the Māori Land Court does have jurisdiction over the respondent trust, which is referred to in these submissions as the Trust, and there are two important foundation stones to the appellant's case to that end. The first is that ancestral whenua is not merely soil beneath
10 he feet of Ngai Tūhoe, the Tūhoe iwi members in the language of the Trust deed, but a manifestation of their identity giving rise to ongoing and collective rights/interests/responsibilities in respect of the whenua. Matemate-ā-one, a key aspect of Tūhoetanga reflects this, and your Honours will find that defined in our written submissions, and there's reference to where it appears in the
15 deed of settlement, and it's also one of the objectives of TKKoT, and matemate-ā-one as a concept, as we defined it in the submissions, is nurturing relationships between people and with the whenua which nurtures them, a concept which encapsulates Te Urewera as people, as place. A concept that Paki Nikora has described to me as the love one has for the land, and the love
20 that the land has for you in return. This is important because the nature of the beneficial estate of Tūhoe iwi members in respect of their ancestral lands, being the whenua which and the language of clause 3.5 of the Trust deed, lies within the Tūhoe ahikāroa area, and whether that land is owned, which as an important statutory concept for the purpose of the appeal, they must be looked
25 at in our submission through this Tūhoetanga lens.

The second important foundation stone to the appellant's case is tino rangatiratanga in the words of the late Tūhoe kaumātua John Rangihau, which is quoted in our written submissions, "rangatira was people bestowed".
30 This means that the authority of the Trust to act on behalf of Tūhoe whānau and hapū, in furtherance of their mana motuhake to live according to Tūhoetanga, must be grounded and maintained in community support and in community

accountability. It is important to look at the suitability of the Māori Land Court's jurisdiction through this Tūhoetanga lens, particularly as this proceeding has risen from the concerns of Tūhoe kaumātua that trustees were not properly elected, and that Ngai Tūhoe's internal mechanism for addressing those
5 concerns, the dispute resolution mechanism in clause 19 of the Trust deed, was not made accessible, as it should have been. It's in that context that the oral submissions that I will elaborate for the appellants, and which are reflected in the structure of the written outline that we filed just before, earlier yesterday, is that the Trust in issue here is a distinct trust in respect of what we've referred
10 to in the outline as a collective rangatiratanga state, and this is what I want to talk to in section A of the outline that is before your Honours, and that this rangatiratanga estate and the Trust that recognises and reflects it, does fit comfortably within the jurisdiction of the Māori Land Court. This is cascading down section B of the oral submission and outline before your Honours.

15 **WILLIAMS J:**
Why didn't Paki Nikora apply to the High Court?

MR SMITH:
Because the thought was that it was a matter within the jurisdiction of the Māori Land Court and was seen to be more accessible as a result through that.
20 I accept that there is no evidence directly on this point, but the application was made to the Māori Land Court in the first instance, and an important feature of ultimately the argument that's being advanced for the appellants, is that practically the jurisdiction of the Māori Land Court would be concurrent with that of the High Court, and this is the significance of the section that transfer power
25 of section 18(2) of Te Ture Whenua Māori Act 1993 that if there is a particular matter that is more suitable for the High Court rather than the Māori Land Court, that power is available in that way. The option of going to both courts is there, but coming back to your Honour Justice Williams' question, there's no evidence directly on that point, but it is, as the submissions outline for the appellants, it is
30 a more tikanga fluent and accessible court in a practical sense.

WINKELMANN CJ:

You've got a note there from your junior.

MR SMITH:

Your Honours will see in the, it is in the case on appeal, but in one of the earlier
5 documents Mr Nikora does also refer to the *Moke* decision as being one of the reasons for his filing, or his proceeding in the Māori Land Court. If I find that reference, rather than take the time now, I'll find that reference in the break.

WINKELMANN CJ:

Well it's certainly taken into account by the courts, isn't it, that he relied on *Moke*
10 because he, because they take it into account in their costs decisions.

MR SMITH:

Yes, and certainly by the time it got into the Māori Appellate Court the applicability of *Moke* was central to the case for why the Māori Land Court should have jurisdiction, and it was engaged with in a fulsome way that decision
15 by the Court of Appeal really reflected that as well, but the judgment of the Māori Appellate Court in this case really does need to be read alongside in light of the *Moke* decision of the Court, including the judgment of the Māori Appellate Court here does specifically refer to and endorse aspects of that reasoning. So that connects the *Moke* decision to the choice that was made to access the Māori
20 Land Court as the dispute resolution forum in this instance.

WILLIAMS J:

So is the reason accessibility trust, small "t", or because the sorts of arguments Mr Nikora wanted to run could be run perfectly while in the High Court.

MR SMITH:

25 I accept that both arguments, or the arguments could be run here as well, the accessibility and –

O'REGAN J:

You just need to stay a bit closer to the mic.

MR SMITH:

Sorry, accessibility was certainly one of the matters, and your Honours will find reference in the case on appeal material to, and we've referred to it in our written submissions, special aid funding was sought and granted at both levels
5 of the Te Ture Whenua Māori court system, so there was an access to justice dimension to the accessibility that was relevant as well.

WINKELMANN CJ:

Te Hunga Rōia Māori I think make submissions about the importance of the accessibility of Te Kōti Whenua Māori.

10 **MR SMITH:**

Yes, and those submissions are, to that extent they're endorsed by us and are consistent with the case that we're advancing, and we've addressed in our written submissions why accessibility and tikanga fluency of that Court is important and in my submission it's not just that, it's more accessible in an
15 access to justice sense because of the special aid mechanisms and approach to costs in that court. You don't need to have lawyers acting in the Māori Land Court, and of course you don't in the High Court as well, but it's a distinct impediment, in my submission, not facing, with litigation, with lawyers on one side and non legally represented parties on another side, particularly in respect
20 of novel and complicated issues of law or mixed fact in law.

The other point, and this is a point that, pick up the reference, and it's in paragraph 2 of my road map. One of the things that the New Zealand Law Commission looked at back, and it's the SP24 report which is the
25 *Waka Umanga* report of the Law Commission in 2006, and if I take your Honours there briefly, this is in the respondent's authorities, and it is tab 35, and this was a report of the Law Commission on a proposed law for Māori governance entities that my learned friends for the respondent have cited. It includes in there at chapter 9, this is a commission that, as
30 your Honours will see over on page 9 of the report, which is page 10 of the PDF: "The Commissioners responsible for this project were Helen Aikman QC and Hon Justice Eddie Durie." As he then was.

1020

Within chapter 9 of this report is a chapter on dispute resolution where in a policy sense the Law Commission considered well what's the, amongst other things, what is the appropriate court or jurisdiction for resolving matters in respect of what we would now call post-settlement governance entities, and I just want to invite your Honours please to go to that report, and in particular to, if you start at page 91, which is page 92 of the PDF, and your Honours will see there there's a paragraph 7.61: "Why the Māori Land Court?" The Law Commission summarises its position there. "We have proposed initial access to the court system through the Māori Land Court. We have done so because of that Court's experience in managing group issues, its capacity to deal expeditiously with claims, to adopt the protocols of a marae, to avoid unnecessary formality and to call conferences at which issues may be determined." And there is a reference that your Honours will see if you go down and track footnote 177 there to section 66 and 67 of Te Ture Whenua Māori Act, which are the jurisdictional provisions conferring that greater flexibility in respect of hearings.

So that's the position of the Law Commission in summary, and if your Honours' – the position is elaborated further on in that chapter, and if I take your Honours first to PDF page 121, which is page 120 of the report, and I emphasise paragraph 9.52, and in fairness 9.53, and the point made at 9.52 is that the Law Commission is there to say: "We believe the Māori Land Court is preferable to referring matters to the High Court because of its existing and growing experience with Māori entities." Bearing in mind this was 2006 from memory. "There also appears to be a general feeling among Māori that the Māori Land Court is 'their court'. This is largely because of their long association and familiarity with the Court, and despite its earlier history in facilitating the alienation of Māori land." It's coming to your Honour Justice Williams' question. "Its relative ease of access, less formal procedures and lower costs, its high proportion of Māori and Māori-speaking staff and the special expertise of its judges and staff, therefore make it the court of choice by Māori in many cases."

It does, in fairness, go on in the next paragraph to say that there is: "… sometimes a reluctance to submit matters to what is regarded as the interference and restrictions of that Court." And that is very much, I apprehend,
5 the case that's advanced for the respondent in this, before your Honours. But nonetheless in considering those objectives the recommendation of the Law Commission was that the Māori Land Court jurisdiction was the best forum of choice, or at least in a concurrent sense.

10 That's added to over the page, if your Honours look at paragraph 9.55, and just, I emphasise or pick up in particular the second sentence: "Māori Land Court judges are often highly knowledgeable about the dynamics of Māori organisations and can sometimes intervene before an organisation gets into serious trouble, in a way that the High Court is usually unable or unwilling to
15 do."

Then if your Honours look down to the very bottom of this page, the tail end of paragraph 9.58, there is, and this is the transfer power that we rely upon. "By the same token," it's the final sentence "however, disputes raising complex
20 commercial or other issues (including third party interests) may be more appropriately retained in the High Court or moved from the Māori Land Court into the High Court." And that's the, in my submission that's the significance of the transfer power in section 18(2) of Te Ture Whenua Māori Act because it recognises where the Māori Land Court does have jurisdiction that jurisdiction
25 can be held concurrently with another court, relevantly the High Court, and that for a particular matter that is more appropriately adjudicated in the High Court, rather than the Māori Land Court, that power exists and enables the transfer for its adjudication there, assuming it hasn't been commenced there by the party that wishes to commence proceedings in the first place.

30 **COLLINS J:**
Mr Smith, where a party such as the Trust refuses to engage in the dispute mechanism, is there a power for the Māori Land Court to compel them to do so, or would you have to go to the High Court to get an injunction?

MR SMITH:

It depends on the jurisdictional answer. If the Māori Land Court has jurisdiction then the Māori Land Court has the ability to grant an injunction in those circumstances, and that is a power conferred by section 237, which says that 5 the Māori Land Court has all of the powers of, relevantly all of the supervisory powers of the High Court, and it's underscored by a provision which is more recently been inserted into Te Ture Whenua Māori Act, which is section 24C which sets out the equitable powers that the Māori Land Court has in its – let me just go there very briefly. It's a significant provision that was inserted in 10 2021, and it confers on the Court, the power to make any orders for equitable relief for the purposes in subparagraph (a) of subsection (1): "For the purposes of or as a result of exercising jurisdiction conferred on it by or under this Act or any other Act." So in my submission it wouldn't be necessary to give that power because section 237 does, but the existence now of section 24C really 15 reinforces that the same suite of equitable remedies are the same, to use a different metaphor, the same toolbox of equitable remedies is available to the Māori Land Court in this context, would be available to the High Court. That is important because, and this is a point that we make in paragraph 5 of the road map, prior to, one of the earlier stages of this proceeding was a decision in 20 respect of just this issue that your Honour Justice Collins has raised, does the Māori Land Court have any jurisdiction to issue injunctions in respect of general land owned by Māori, and Judge Coxhead concluded that it didn't reading down the power of section 237 as well as raising a pleadings point, and that was appealed to the Māori Appellate Court, and it overturned Judge Coxhead on 25 that point and concluded that section 237 did confer that power, albeit in terms of the application of law to facts before the Court it wasn't an appropriate circumstance to exercise it. That's the reference to the relevant, the case on appeal reference at paragraph 5 to 101.0133 there, that's a reference to the relevant part of that decision of the Māori Appellate Court that stands for that 30 proposition.

So standing back from things in terms of the points that have been raised by your Honours so far, there is a, is an equality and jurisdictional senses between the Māori Land, concurrent jurisdictions of the, on our case, of the Māori Land

Court and the High Court as to what powers are available to be exercised. The differences and the material differences that we place particular emphasis upon are the tikanga fluency of the Māori Land Court by definition, because it's in the criteria of judges of that court, and it's recognised by the fact that, it can 5 be said in my submission that the Māori Land Court it is, of course, a specialist court in respect of land but in some regards it could be referred to or understood as the Māori Affairs court because the jurisdiction that is conferred is not just in respect of land, but is in respect of wider issues.
1030
10

This was a point that the Court of Appeal noted in its judgment at paragraph 41, if we just go there very briefly on this point, please. The Court there just helpfully sets out the wider jurisdiction of the Māori Land Court including in respect of fisheries matters, if I can use that phrase broadly, but there's also the 15 representation jurisdiction of the Māori Land Court which is under section 30 of Te Ture Whenua to determine and advise on appropriate representative Māori groups for relevant purposes. Then to that can also be added, albeit it sits with the Māori Appellate Court, but that comprises Māori Land Court judges, section 61 of Te Ture Whenua Māori Act which is the power of the High Court 20 to refer a matter to the Māori Appellate Court to advise on questions of tikanga.

I emphasise these points because they underscore, in my submission, that the Court is seen by Parliament and given a place within our judiciary, using that as a constitutional branch sense, that has expertise and the tikanga fluency that 25 enables it not only to deal with questions of land but interrelated issues of Māori affairs in circumstances where those arise, and that's a – which is a long-winded way of saying the jurisdiction of the Court is recognised to be particularly significant in its tikanga fluency and the relationship between the High Court and the Māori Land Court reflected in section 61, for instance, of Te Ture 30 Whenua Māori Act, recognises and reflects that.

The other significant aspect of the jurisdiction is part 3A, the dispute resolution part that was relatively recently inserted into Te Ture Whenua Māori Act which does give, in my submission, a suite of powers which are more far-reaching,

potentially, in their potential to effectively resolve disputes between Māori parties as situations like this than the High Court might have under its judicial settlement conference powers, for instance, because it provides for mediation and it provides for other dispute resolution processes that are undertaken by
5 the Court and informed by tikanga and have the ability to identify the real issues which might be sitting beside or which might be motivating and driving and explain a dispute that has come before the Court in whatever way the dispute has been framed up in legal terms. The combination or putting all of those things together shows, in my submission, that the Māori Land Court does have
10 a unique and special jurisdiction that, over and above the High Court, that can mean that there are greater dispute resolution powers and abilities to ultimately reach resolutions of the real underlying issues in terms of what the Law Commission was identifying as one of the concerns, at least back then, of the High Court in some of the earlier litigation.

15 **O'REGAN J:**
But all of that is just telling us that it would be a good idea if the Māori Land Court had jurisdiction. It doesn't tell us it does have it, does it?

MR SMITH:
No, I accept that, and the legal question, and it is ultimately a legal question for
20 this Court, is whether it does have jurisdiction, but all of those things that point to it being a good idea to have it are considerations that are relevant to ultimately the outcome of that legal issue, and one might conceptualise those, oh, they're just part of the policy considerations that are relevant to whether or not the jurisdiction should be available to be held by the Māori Land Court
25 concurrently by the High Court in respect of trusts of this kind or not. But I accept, if your Honour's saying they don't answer the question, they clearly don't, but they are ingredients to one – for want of a better term, they are ingredients that are in the mix and relevant to answering it.

O'REGAN J:

You can't define a court's jurisdiction by what it would be good if it had jurisdiction for, can you? You have to look at the statute and decide it confers the jurisdiction.

5 **MR SMITH:**

Yes, I accept that, and that is the ultimate task. That is really the ultimate issue and the ultimate question that is before this Court, whether properly interpreted Te Ture Whenua Māori Act, section 236(1)(c) of Te Ture Whenua Māori Act is a gateway that enables the jurisdiction of the Māori Land Court to be exercised
10 in accordance with well-established and non-controversial principles of interpretation. The text of the provision, the purpose, the wider scheme and context of the Act, and where it fits into the statute book as a whole, and the policies and the fabric of the law. All of those things are important and relevant and give the various ingredients that are relevant to ultimately that statutory
15 interpretation question because that's –

WINKELMANN CJ:

So if we were to convert your submissions to the conventional statutory interpretation terms, you'd be saying this is part of the context, when you look at the legislation as a whole you can see that this is the purpose that this
20 legislation is serving.

MR SMITH:

Yes.

WINKELMANN CJ:

So when you come to interpret that provision, bearing in mind that
25 circumstances change over time, and the legislation has to continue to speak to the circumstances as society, structures et cetera, evolve and change, that can assist us, that purpose and context that you can glean from the broader legislation in interpreting that provision.

MR SMITH:

Yes, that's it, and it's consistent with that ambulatory principle of statutory interpretation that your Honour is alluding to, that we have, in a sense, with Te Ture Whenua Māori Act we've got a problem that wasn't necessarily envisaged
5 at the time it was drafted because the modern Treaty settlements didn't, on one view of it the modern Treaty settlements reflecting at least what is the large natural group in the red book, if I can call it that, policy approach of the Crown in that context, didn't begin until the mid-1990s, after Te Ture Whenua Māori was enacted, so that the question then is applying those principles and looking
10 at the contextual factors embedded within the statute in that way, what direction do they point us in, in terms of the answer, and how does that square with the text and particularly the purpose of the legislation, and there is, in my submission, there is a connection to, terms of your Honour the Chief Justice's point, there's a connection between looking at these in a wider statutory context,
15 or through a wider statutory context lens, and the purpose of the statute, because those are the affirmation of rangatiratanga in the preamble, which section 2(1) of the Act says the Act must be interpreted to promote. These are features, if we have accessible a dispute resolution mechanism, a dispute resolution court that is able to better assist in promoting and realising and
20 achieving rangatiratanga consistent outcomes, then there is a purposive hook in there as well. That does, I accept, require your Honours to agree with us that there is a, these features that are unique and special, in my submission, to the Māori Land Court and what it offers disputing parties, there is that nexus to the purpose, and those aspects that I've just emphasised as the Māori Land Court
25 as a court in terms of its function and role, can be tied into the, ultimately the preamble and the purpose that is reflected in the preamble.

WILLIAMS J:

The downside for you is that Parliament specifically did not do what the Law Commission suggested it should.

30 **MR SMITH:**

Yes, I accept that. There was a Bill, as I understand, that was introduced and was ultimately not enacted, but the proposal reflected in that Law Commission

report was for something new and different in terms of the Waka Umanga entity, and if your Honours read the report more leisurely than the extracts that I'm taking your Honours to at the moment, one of the things that your Honours will see in there is a discussion of the existing legal entities including trusts and
5 corporation, do they fit in the context of Māori governance entities that the Commission was concerned with, and the Commission's conclusion there was they don't, they were an awkward fit, and that was the impetus for looking at a, through a Te Ao Māori lens, looking at a better vehicle, and that was the idea of the Waka Umanga as a new legal entity that would be able to serve as the
10 basis for really a default, to use the – chained by the language of modern Treaty settlement policy, but is the default post-settlement governance entity.
1040

WINKELMANN CJ:
So what's your point on that? I'm not sure I follow it.

15 **MR SMITH:**
The point there is, responding to his Honour Justice Williams, that ultimately the proposals that were reflected ultimately in the *Waka Umanga* report of the Law Commission, they didn't – they took the form of the Bill that was introduced into the House but ultimately not enacted, and one way of looking at that is that
20 the analysis that sits behind – ultimately that Bill is introduced including the analysis that I place the emphasis on of the Māori Land Court is a dispute resolution mechanism, that can be seen as rejected by ultimately by parliamentarians when the Bill went through, and I accept that's one way of looking at ultimately those proposals and what happened to them when they
25 went across the road to that constitutional actor.

WINKELMANN CJ:
But you say that doesn't argue against your interpretation?

MR SMITH:
I do say that, and the benefit of the report and the reason for relying on it in the
30 way that I have is that it is looking at things, in my submission, from what are

the benefits of – when we stand back, what are the benefits that the Māori Land Court can offer to resolving disputes and it's articulated, those benefits, in circumstances where the commissioner's Helen Aikman QC and Justice Durie as he then was, where they've considered the litigation that had
5 gone before, including, from their point of view, the success including as in terms of resolving the underlying disputes that took form and litigation as success of the High Court and its processes for resolving matters.

WINKELMANN CJ:
All right. Thank you.

10 **GLAZEBROOK J:**
Is another way of putting it that you're saying the generalised discussion can be equally applicable to the existing entities as to the new entity, it's just that the new entity they thought would provide those advantages better than the existing entity, so the rejection of the new entity or new mechanism doesn't
15 mean the same things that they saw as advantages don't apply to the existing ones? Is that…

MR SMITH:
Yes, precisely. That entity can be disconnected from the discussion of the dispute resolution mechanism.

20 **GLAZEBROOK J:**
From the discussion as to what the advantages of – yes.

MR SMITH:
Yes. We're at, in terms of my road map, I've addressed paragraphs 4 and 5, so I started to address the question of, as I framed it, institutional fit of the
25 Māori Land Court. What I haven't spent time on doing but subject to the direction of travel your Honours would like to go in is just deal or say a few things as to section A of the road map, and the purpose here is – if I give a road map of section A of the road map, the purpose here is really to try and underscore what makes this trust so distinct that it engages really the policies

and objects of the Māori Land Court and the jurisdiction that it offers, and I start there, and this is paragraph 1 of the road map, with the actual whenua itself.

The first point here is – and this is, I apprehend, perhaps a point where there is 5 a difference of view between the parties. Our starting point is, and it's not – it's common ground that the Trust does own – the Trust is the legal owner of general land, and we say, significantly, not only does it own general land which the Trust accepts, but that land is whenua tuku ihu, and that's because at least some of the land, and we don't know what land the Trust owns and there was 10 a point about what general land it owns and what quantities and where all of the titles are, a point that we made in our written submissions, but we do know at least that it owns the general land that was vested by statute through schedule 2 ultimately of the Tūhoe Claims Settlement Act 2014, and we set out, and this is paragraphs 8 and 9 of the written submissions that are referred to in 15 a bit shorthand with reference to paragraph number in the first line of the road map. Sorry, this is the road map still. We've set out in the first line of paragraph 1 there a reference to our written submissions, and that makes a point there that the general land that they own includes the fee simple titles that were vested as cultural redress properties through schedule 2 of the Tūhoe 20 Claims Settlement Act, and at least some of these, if not all of them, appear, and we've set out our reasoning in the written submissions, to fall within the ahikāroa, which is significant because clause 3.4 of the Trust deed says that that land falling, whenua falling within the ahikāroa is inalienable.

WILLIAMS J:

25 Is there any dispute that it was established in part for the purpose of holding some land? There's no dispute about that, is there?

MR SMITH:

No but the significance, and this is, in my submission this is an important part of the case that we advance, is it's not just any general land that's held.

30 **WILLIAMS J:**

I get that, okay, land within the ahikāroa.

MR SMITH:

Yes.

WILLIAMS J:

There's no dispute about that either is there? So the only dispute is about
5 whether it's primarily or not.

MR SMITH:

Yes.

WILLIAMS J:

It seems to me, which is, you know, a rather narrow point, it must be said, but
10 there you have it. Was this a trust constituted for the purpose of holding general land owned by Māori.

MR SMITH:

Yes.

WILLIAMS J:

15 Primarily, one side says. At all, the other side says. Isn't that right?

MR SMITH:

We're not, if your Honour is summarising our case as being the Trust was intended to primarily hold general land.

WILLIAMS J:

20 No, that's why I said "at all". To hold Māori land – general land owned by Māori *at all*. Not just primarily. But some.

MR SMITH:

Yes. So if –

GLAZEBROOK J:

25 So by *at all* you mean *some*?

WILLIAMS J:

Yes, sorry, bad English. To hold general land owned by Māori, and it appears Māori freehold land actually, along with other property referred to in the Trust deed.

5 **MR SMITH:**

Yes but to that I would add there is an important, the general land that it holds falls into two categories. There is the ahikāroa and the non-ahikāroa land.

WILLIAMS J:

I understand that. So you're saying the ahikāroa is caught clearly.

10 **MR SMITH:**

Yes.

WILLIAMS J:

And is core asset that can't be alienated.

MR SMITH:

15 Yes.

WILLIAMS J:

I think we understand all of that.

MR SMITH:

And that is, the significance of that is that that engages the policies and objects
20 of Te Ture Whenua reflected in the preamble.

WINKELMANN CJ:

We've got all of that. You can probably move on a bit more pace at this part Mr Smith. Make the big points you want to make.

MR SMITH:

25 Yes, quite. What I did want to identify, and this goes to the purpose of the spelling and the level of detail that it has been spelt out in paragraphs 1 through

3 of the road map the features of the ahikāroa general land that is held by the Trust is that, is to come to the point that there are features of that land which make it very different to, and the Trust holding of that land here, that make it very different to the ordinary discretionary trust, and call into question the
5 application of the law of, equitable law of discretionary trusts in an unmodified way as the Court of Appeal applied it, and rather going through the points in paragraphs 1 through 3 of the road map, the features, kind of coming to where I wanted to go with setting out those points, the features of the ahikāroa general land, and the discretionary trust that exists here that relates to that land,
10 which do not fit an ordinary discretionary trust, if I can call it that, or the archetypal discretionary trust, it seems to me that there's at least five of them, and the first is that the law on, the principles on the proprietary rights of beneficiaries of a discretionary trust, firstly it assumes that there's no proprietary interests on the part of the beneficiaries independent of that established in
15 the Trust, and for ahikāroa land that's not the case because irrespective of what the Torrens title says, the customary rights interests and responsibilities will exist, so there is a proprietary in the sense of the rights and interests and responsibilities that are connected to that particular whenua. So there's one difference between –

20 **O'REGAN J:**
What's the proprietary interest?

MR SMITH:
So as a matter of tikanga for ahikāroa lands, which is lands in respect of which the fires of occupation have burned throughout, so your whakapapa land, your
25 ancestral land, and this is the point made in the *Ngāti Whatua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 paragraph reference, for instance, at 418, which I won't take your Honour to.
1050

O'REGAN J:
30 Don't get sidetracked by the references, just tell me what the proprietary interest is.

MR SMITH:

That as a matter of tikanga there are rights/interests/responsibilities in respect of that ancestral land, regardless of what the Torrens title is, and who is the registered proprietor on the Torrens title. So before there was a Torrens title for that land, there were tikanga rights/interests/responsibilities, and when, and regardless of who the registered proprietors are on that title, there are also those tikanga granted rights/interests/responsibilities, and if you step outside of our immediate context that really explains much of modern environmental law, even if Māori customary rights holders don't own a particular parcel of land that is proposed for development, their kaitiaki obligations in respect of that land because of the whakapapa connections to it, mean that there are rights/interests/responsibilities that are there regardless of the Torrens title position.

O'REGAN J:

Are they proprietary though?

MR SMITH:

In terms of your Honour Justice O'Regan's question, they're proprietary in the sense that they relate to some land, or they relate to particular lands, so for Tūhoe ahikāroa in terms of how we've put it in the road map, they're proprietary in the sense that it's Ngāi Tūhoe not Ngāi Tahu Whānui who are the customary rights and responsibilities holders in respect of that land, and the location of the land, and the relationship between the people and that land, can be seen as proprietary in that sense because whether the geographic location determines who it is that are the customary rights/interests/responsibilities holders. I accept, and this is a bit like the ownership issue, it's not the right, it's an awkward term to use, and this is the warning that our appeals courts have often given including, and there's a reference in the road map to paragraphs 31 to 33 of the former Chief Justice's judgment in *Attorney General v Ngāti Apa* [2003] 3 NZLR 643 (CA) citing, as this Court I think did in *Paki v Attorney-General (No 2)* [2014] NZSC 118 , [2015] 1 NZLR 67, the *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) decision of the Privy Council, that it's important not to look and conceptualise customary

rights/interests/responsibilities through the lens of legal principles and a legal system that has been developed without reference to that.

WINKELMANN CJ:

Well that is what I was going to ask you, because why do you use the word
5 "proprietary" because the definition for our purposes does not, doesn't use the word "proprietary", it doesn't in the statutory definition. It uses the word "beneficial".

MR SMITH:

And I'm not, yes, it's beneficial estate in terms of the statutory definition. It's –

10 **WINKELMANN CJ:**

Can I, okay, carry on.

MR SMITH:

The reason for, and I accept it's including for the reasons that I just mentioned, it's a clunky term but the concept that I'm trying to convey in answer to
15 his Honour Justice O'Regan's questions is that the geographic location of the whenua will determine who it is that has rights/interests/responsibilities in respect of that whenua, and it's –

WILLIAMS J:

Isn't your point that the underlying customary and cultural or tikanga-based
20 dimension to the relationship between these people and that land asset, mean the ordinary English law understanding of a discretionary trust may not be all that may be said.

MR SMITH:

Yes.

WILLIAMS J:

And there may be some circumstances where the cultural and tikanga drivers would produce a result that ordinary English principles of spes, is that how you say it, or hope, are inapt, right,

5 **MR SMITH:**

Yes.

WILLIAMS J:

So isn't that enough? You don't need to use either beneficial ownership or proprietary to get to that point. It's much more subtle than that.

10 **MR SMITH:**

Yes.

WINKELMANN CJ:

You do need to use the words in the statute though.

WILLIAMS J:

15 Well not necessarily, that's the point, because if the Court of Appeal's view was that a discretionary trust automatically excludes the category referred to in the definition, your argument is, well, maybe, but maybe not.

MR SMITH:

Yes.

20 **WILLIAMS J:**

because there is a dimension here that's not present in those leading authorities, and you've got to make sense of that dimension in order to decide what discretionary trust means in this case.

MR SMITH:

25 Precisely.

WINKELMANN CJ:

I suppose, I think it does fit the words of the statute though, so I don't know why you would eschew the statute. You're just rejecting the notion that beneficial is to be given a very narrow meaning that was given by the Court of Appeal, and
5 if you look at the authority that's relied upon, which is the Queensland authority, the Judge there does talk about beneficial interests in different sense, and you're saying that there are realms of beneficial interest which are tikanga sourced, which should be taken into account in this context I think.

MR SMITH:

10 Yes. In terms of the exchange between your Honour the Chief Justice and Justice Williams, there is, it seems to me there is a need for better and for worse, work within the statutes, so we do need to engage with the concept of owned and the concept of beneficial estate, because those are the gateway terms to get ultimately to the jurisdiction that we are contending for the Māori
15 Land Court having, and if, I was thinking about this over the weekend, there's two ways. If you look at it in terms of legislative drafting, this was, a legislative drafting approach is very different today, and that's a good thing, but one doesn't assume, and this is really the Court's jurisprudence over the last few years on the integration of tikanga into the korowai of the law, is that even
20 though a statute might not be drafted using words or concepts that are the right fit in terms of the Te Ao Māori world view, that doesn't mean that there isn't an ability, a responsibility to interpret those awkwardly fitting concepts and words in a manner that best gives effect to and promotes tikanga values and principles and Treaty principles, Bill of Rights principles as well, all of which overlap for
25 the reasons that we've outlined in our submissions, and that's why it seems to me that we do have to grapple with owned and what as a concept it means, and whether or not it's a vehicle for a differently conceived type of ownership than that which is reflected in the law on discretionary trusts as applied by the Court of Appeal, and as your Honour Justice Williams put it much more eloquently
30 than I, can look at the impact and influence of tikanga on that, and that's the first, I think your Honour's term was, if my memory serves me right, it's the first dimension of difference, potential difference. Another dimension of difference that's important is that the average, or the archetypal, the, for want of a better

term, the archetypal discretionary trust property will ultimately vest in someone, that's the purpose of the rule against perpetuities, and one of the features of this trust is that by statute the rule against perpetuities has gone so there will, as the Court of Appeal recognised, there will never be a vesting potentially of
5 any of the Trust property, including the ahikāroa general land in anyone, and that then leads to your Honours coming back to those, that statutory concept of a beneficial estate.

WINKELMANN CJ:

In fee simple.

10 **MR SMITH:**

In fee simple. So the fee simple, in my submission, isn't significant because the titles are fee simple titles, they're freehold titles, so it's the difficult question, the difficult ingredient is the beneficial estate, and at one level, I don't understand it to be disputed that the Trust owns the legal estate, and the definition of
15 "beneficial estate" in section 4, I think it is, of the Te Ture Whenua Māori Act says that an estate held by trustees is not a beneficial estate, so through that definition the trustees can't own the beneficial estate, so someone must own it, and our simple point is if it's not the beneficiaries, the Tūhoe iwi members, who is it?

20 **WINKELMANN CJ:**

So this is a high water case really, isn't it, because of the permanent suspension through the evolution of the rule of application of abolition of the rule against perpetuities.

MR SMITH:

25 Yes.

WINKELMANN CJ:

That equitable common law has always recognised the ability to suspend the beneficial estate in a discretionary trust, but it has never recognised the

permanent suspension, I think, of the beneficial estate, but this is what this Trust contemplates.

MR SMITH:

Yes.

5 1100

WINKELMANN CJ:

But does it contemplate at all, does it place the beneficial estate in a second or third or fourth dimension, I don't know, which is, to pick up your dimension point, is it's never going to vest in anyone, but it's perpetually held for the collective of

10 the iwi.

MR SMITH:

Yes, and it's the, going backwards to move forward in many ways, and some of the references, if I'd taken your Honours there, in paragraph 1 of the road map, the deed of settlement, they're just grounding the estate that exists now, a

15 perpetually existing customary collective estate, it's grounding the estate in terms of what it was previously, and what ultimately the native land legislation and a range of other Treaty inconsistent Crown laws practices and policies over generations destroyed, and it's, so it's no, which is a way of saying, I guess, it's no accident that the rule against perpetuities has gone if you look at it through

20 the lens of the history and context to the loss of the land, the rangatiratanga, the mana motuhake of Tūhoe that explains why there was a need for the Crown to atone through the settlement itself, and for the general land that falls within the ahikāroa to ultimately come back to ngā uri of the beneficiaries of Ngāi Tūhoe but to be inalienable thereafter. That was what was sought to be

25 achieved through some of the actions amongst Tūhoe leaders, including the 1895 accord that as ultimately, had those aspirations and the collective understandings that had been thought to have been reached with then Crown representatives breach leading to the loss of land and all of the inequities that have followed that, that explain why there had to be a Treaty settlement, and

30 why the Crown had to begin atoning in the way it has.

WINKELMANN CJ:

So the analysis that I put to you, which is a different way of viewing the beneficial estate, it's not, it's stopped from vesting so it can be perpetually held for – stopped for vesting in individual Māori at any point so it can be perpetually held for the collective that is the iwi. That's a different analysis to your tikanga rights one and I want to ask you about the implications of your, you know, tikanga interests are interests. Could that extend the application of that section massively because there are, there's, you know, tikanga interests that could be exercise in respect of land quite extensively so for instance the Ngāti Whātua litigation is about tikanga, exercise of mana over large parts of Auckland, so is that a problematically porous kind of an approach to it?

MR SMITH:

No, in my submission. So as your Honours recognised in the *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 judgment and the discussion of the relationship between customary ownership, to use the high word, the customary ownership of mana whenua, the rights and responsibilities of ownership might, I think of it in Venn diagram terms, you can see it as the smaller circle is mana whenua rights/interests/responsibilities, but the bigger circle is the broader tapestry of customary rights/interests/responsibilities that might exist in relation to particular places of landscapes, and that might be held in accordance with tikanga by non-mana whenua and able to be exercised in respect of that landscape because of the nature of ultimately the whakapapa relationships in the application of tikanga principles, and perhaps one example of that is at, the concept, and it's talked about, and I won't take your Honours there, but there's a helpful, with respect, discussion of it in the "Custom Law" paper by Taihakurei Durie that's in one of the authorities bundles –

WINKELMANN CJ:

I'm not sure you've answered my question though. My question is that it's a very, tikanga based interests can be very broad, and so this could make this jurisdiction enormous. That's my question.

MR SMITH:
Yes, yes.

GLAZEBROOK J:
Are you saying that you're talking about where they intersect where you've got
5 actual mana whenua holdings as well as the interests, and they don't apply to the wider mana whenua responsibilities over land that's not "owned", in inverted commas, in European terms by either a trust or the collective?

MR SMITH:
Yes potentially.

10 **GLAZEBROOK J:**
So it's in that, just in the area where the two intersect.

MR SMITH:
Yes.

WILLIAMS J:
15 Well you have to have someone that owns it, that you claim to be a trustee on your behalf.

MR SMITH:
Yes.

WILLIAMS J:
20 So it wouldn't catch the general mana whenua arguments under the RMA, given it's necessarily the case that it's not owned by such people by and large.

MR SMITH:
Yes.

WILLIAMS J:
25 It's the case, isn't, that Te Ture Whenua Māori has constantly struggled with the fit between fee simple beneficial ownership and tribalism, you can see it in the

structure of the Act, and I wonder whether the way in which the Act deals with whenua tōpū trusts and in fact putea trusts don’t help you.

MR SMITH:

Yes, in the sense of one way of looking at that is, and it’s a point that my learned
5 friends fairly raise, if you look at the, and it’s reflected in the Court of Appeal judgment as well, there are different terms that are used to, as recognised, for want of a better term, of rights that are recognised by the Act, so there’s beneficial estate, our focus. There’s beneficial ownership, beneficial interests, and those terms are ultimately a reflection of the provisions in which they’re
10 used in the immediate context of that provisions. So for –

WILLIAMS J:

My point is, for example, a whenua tōpū trust suspends underlying beneficial ownership, and declares that the asset, whatever it is, will be administered for tribal purposes?

15 **MR SMITH:**

Yes.

WILLIAMS J:

Irrespective of the underlying ownership.

MR SMITH:

20 Yes.

WILLIAMS J:

So the model that appears to be Te Uru Taumatua, actually exists within the Act, albeit it one in which the Court declares that the underlying beneficial ownership becomes a shell, and it shall be a tribal asset hereafter.

25 **MR SMITH:**

Yes.

WILLIAMS J:
So that's the way in which this Act deals with the problem of an imposed English system that is inconsistent with customary notions of ownership and mutual obligations.

5 **MR SMITH:**
Yes.

WILLIAMS J:
My point to you is doesn't that suggest that the Act has thought this issue through and found a way of dealing with it?

10 **MR SMITH:**
I accept that that is one way of dealing with if your Honour is exploring the issue of does that by necessary implication mean that section 236(1)(c) cannot be interpreted and applied.

GLAZEBROOK J:
15 I think it's the other.

WILLIAMS J:
No, it's the flip side.

GLAZEBROOK J:
It's the other implication because it already is exactly in the Act.

20 **WILLIAMS J:**
They tried, Te Uru Taumatua is a straight and close analogue of a whenua tōpū trust.

MR SMITH:
Yes. So in that sense I embrace the point that's being made.

25 **WILLIAMS J:**
All right so how does, do you want to explore that idea with me?

MR SMITH:

This, the way I did want to explore that is through, there's two points I think. There's the point that your Honour's made that I'd only be repeating again, that the Act does recognise and provide for trusts that are uniquely tikanga infused.

5 **WILLIAMS J:**

Well no, what it does is confront the collision between beneficial ownership and customary right and obligation.

MR SMITH:

Yes.

10 **WILLIAMS J:**

And it does this through the creation of a mechanism which exists for what it calls Māori community purposes under, I can't remember the section, but basically says disregard the ownership, this is for everybody in the tribe. Until someone, until a Court says otherwise.

15 **MR SMITH:**

Yes.

WINKELMANN CJ:

So effectively suspending or removing the notion of beneficial ownership.

WILLIAMS J:

20 That's right.

WINKELMANN CJ:

From the ownership.

GLAZEBROOK J:

Or else just recognising that the beneficial ownership is in the iwi and in the 25 customary owners, so in fact –

WILLIAMS J:
In substance, that's right.

WINKELMANN CJ:
In the Māori dimension as opposed to the Pākehā dimension.

5 **WILLIAMS J:**
And notions of vesting just become irrelevant.

MR SMITH:
Yes.

GLAZEBROOK J:
10 Because it already is vested in the collective and owned by the collective but administered by a trust.

MR SMITH:
Yes.

WINKELMANN CJ:
15 What occurred to me when I looked at this Trust is that it seemed to me to be an attempt to almost create another legally – in a legal way, the concept of customary ownership, that land was inalienable and perpetually owned but perpetually held for the collective.
1110

20 **MR SMITH**
Yes.

WINKELMANN CJ:
And that's the sort of concept also as te whenua tōpū.

WILLIAMS J:
25 It's also true with putea trusts which are trusts in which the Trust subtrust interests, in which a specific value is set to deal with highly fragmented

interests, so that the technique used in the Act is to say when you get too fragmented you will hold it for tribal purposes only because there's no longer any value to the individual owner. You will suspend the individual ownership and use whatever income there is there for tribal purposes.

5 **MR SMITH:**
Yes, and connecting your Honour's points to "beneficial estate" as a gateway term in terms of the definition of that in section 4, that must take colour from those other types of trust that the Act recognises and the ownership interest.

WILLIAMS J:
10 Well, it's possible. The point is it's possible that the Court of Appeal may have overvalued the significance of the term "beneficial ownership" given the way in which the Act is in essence a negotiation between English concepts of ownership and customary concepts of right and obligation.

MR SMITH:
15 Yes.

WINKELMANN CJ:
Overvalued the traditional concept of "beneficial ownership".

WILLIAMS J:
The English concept, yes.

20 **MR SMITH:**
Yes.

GLAZEBROOK J:
And one might say if one was going to give an interpretation to an Act that takes into account customary ownership as against an English concept this would be
25 the Act to do it in, because that's it's very purpose effectively.

MR SMITH:

Yes, and the direct affirmation of the Article 2 rights of the Treaty through the preamble really underscore the importance of that, and the significance and appropriateness of that.

5 **WINKELMANN CJ:**

And it would be ironic if in attempting to achieve something very akin to customary ownership placed it outside this Act.

MR SMITH:

Yes, ironic in the sense that your Honour is alluding to but also perhaps ironic
10 in the sense that one of the reasons why this had to be done was the focus on individualised Western titles which was the part of the engine room of the native land legislation which led to ultimately the loss of the customary collective rights and responsibilities.

WILLIAMS J:

15 Yes, well, throughout the system the Trust was used as a means of overcoming that, from section 438 in the 1953 Act right up until now the Trust is the way of getting around individual ownerships and recollectivising administration.

MR SMITH:

Yes.

20 **WINKELMANN CJ:**

So you might say that this is using a conventional common law concept of beneficial ownership but it's being applied in a Māori context, and so it has to do its work in a Māori context.

MR SMITH:

25 Yes, and it's in terms of the Court of Appeal was concerned of the knock-on consequences across the statute book of a different approach to beneficial ownership as a concept beneficial estate but the decisions of this Court in *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 show that, it illustrates

that the decision of this Court in *Ryan v Health and Disability Commissioner* [2023] NZSC 42, [2023] 1 NZLR 77 in a different context, and the Health and Disability Commissioner's legislation, illustrates that a statute can ultimately have a unique meaning for an otherwise common term where that meaning
5 flows from the purpose and the text and scheme of the legislation, so that is an important part of the answer to the wider knock-on arguments to other statutes.

The other thing that, on that point, that I've looked at is, well, how does the law, how do other statutes define "beneficial estate", and I naturally looked at the
10 Land Transfer Act, the Property Law Act and the Trust Act of 2019 and there's no definition of that term in those Acts. It's a concept but it's not a defined term and it seems to me that that is a concept that we owe the Court of Chancery for ultimately and it is explained by the central, the very reason for being of equity as a body of law, but it's a common law concept that's been developed by the
15 Courts. It's reflected in legislation but because of the whakapapa of the concept there is malleability there and it's even more legitimate to interpret and apply it in a way which fits with the text, the scheme, the purpose of a unique and special statute such as Te Ture Whenua Māori is, and by interpreting it in the way that we've been exploring in the last 15-20 minutes, that is not going to
20 have, to use the F word, the floodgates word, it's not going to have floodgates implications in other areas of law that would raise public policy concerns because it just uniquely flows out of this statute, and the text and the purpose, the policies and objects of it.

O'REGAN J:
25 Some time ago you said there were five features that showed why this was different from a normal discretionary trust.

WILLIAMS J:
You're up to two.

O'REGAN J:

I got up to number 2, and I then I think you got diverted. So the first one was that the Court of Appeal approach assumed there wasn't any interest apart from the Trust, and there is because of tikanga, that was the first one.

5 **MR SMITH:**

Yes.

O'REGAN J:

The second one was that the law against perpetuities has been excluded, so that's one and two. Have I missed three, four and five, or are you coming to 10 them?

MR SMITH:

I think the –

WINKELMANN CJ:

We plead guilty.

15 **MR SMITH:**

The differences had matured into dimensions and the other dimensions –

GLAZEBROOK J:

Are they, although there are six here rather than five, are they set out at your paragraph 3? Or are we on something totally different?

20 **MR SMITH:**

They flow out of the combined effect of one through three so just in answer to your Honour Justice O'Regan's questions, and using the matured language of dimensions, so the influence of tikanga we've talked about, perpetuity period, or ultimately vesting of trust property we've talked about. The next one, and it 25 probably overlaps with the tikanga dimension that we've talked about, so perhaps my five is down to four, is that the law that the Court of Appeal applied really assumes that individual rights aren't anchored to a collective, whereas

the very essence of the rights here, the beneficial estate that we're contending for, is a collective, not an individual one, and there's just, there is the disconnect, the clash, that flows from looking at it through a collective-rights lens relative to the common law today, looking at it through an individualised lens, and then the
5 other one, which will be revised four on my shortening list, is a point that we really began by exploring at the outset, and it's that the beneficial estate, it's a long-winded way of saying context is everything, but the beneficial estate needs to be, as a term within this Act, needs to be interpreted as a term within the Act and having regard to the issue, which is what jurisdiction or jurisdictions are
10 appropriate to adjudicate matters relating to this Trust. Which is a long-winded way of saying context is everything.

COLLINS J:
When Justice O'Regan asked you in relation to your first point what the proprietary interests were, should your answer have been, it includes beneficial
15 ownership?

MR SMITH:
Yes.

COLLINS J:
Okay.

20 **MR SMITH:**
And this is tying it to the problems with ownership as a concept from a, which all of the submissions have acknowledged through a Te Ao Māori and tikanga lens, it's not just proprietary ownership, it's something much, much more and that's the responsibilities and the interests held collectively in respect of
25 ancestral –

COLLINS J:
That's why I used the word "includes".

MR SMITH:

Yes.

O'REGAN J:

I'm still hanging out for number 5.

5 **MR SMITH:**

I think I'd revised it down to four.

WINKELMANN CJ:

There was no number 5, that was the decision.

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10 **MR SMITH:**

I think three collapsed into two, which led to a list of ultimate four dimensions. Now in terms of the road map, we've covered things, I just pick it up very briefly at paragraph 7 to make, and I'm making the point there that it's a matter that the Court of Appeal didn't engage on, and in fairness to it, wasn't raised,
15 certainly by me, as a point of relevance, but it's section 243, and in particular subsection (7) of that provision, and in Te Ture Whenua Māori Act, and what the effect of it is, is to differentiate between corpus land and investment land. So, and the effect of that is that where a trust within the jurisdiction of the Māori Land Court acquires in the course of its operation later land, it's got to decide
20 whether that's corpus land or investment land, and if it's categorised as investment land then the restrictions on alienation in the Act don't apply to it, that's what subsection (7) says, and there's an equivalent provision for Māori incorporations in section 256, which is referred to there, and I wanted to draw this to the Court's attention because at least it addresses in part some of the
25 concerns that the Court of Appeal had because the limitations on alienation of general land don't apply to land of a trust that's categorised by it as investment land, and it seemed to me, and this is the reference to Article 2 and Article 3 in that paragraph 7 there, that one way of looking at that is that your corpus land is your Article 2, or tino rangatiratanga land, and your investment land is your
30 general land, your Article 3 land, which you're entitled to use in a manner in

terms of the Article 3 in the Treaty principles or options right to walk in, for Māori to walk in both worlds, so to speak. You're entitled to use that unfettered by some of the constraints that would otherwise apply to corpus land as a policy, and that does mean that in respect of at least landholdings, there will be an
5 appropriate commercial flexibility, if that's the lens through which you view the difference between investment and corpus land.

WILLIAMS J:

Aren't you creating a problem that doesn't exist? Why do you need to talk about corpus and non-corpus land at all?

10 **MR SMITH:**

Well one of the points I apprehend my learned friends to make is, well, if the Trust is subject to Te Ture Whenua then its investment activities are going to be materially constrained, and in respect of its investment activities for other general land –

15 **WILLIAMS J:**

Well it would be if it's Māori land, but not if it's general land owned by Māori. It's not subject to the alienation constraints.

MR SMITH:

And that's the point that I'm –

20 **WILLIAMS J:**

But that's got nothing to do with it being investment land. The only land subject to restrictions on alienation, and the requirement of confirmation, is Māori freehold land, or Māori customary land, which is completely inalienable. Those restrictions don't apply to general land owned by Māori.

25 **MR SMITH:**

Yes, and that's the purpose for citing these provisions as really reflecting that. That the restrictions on alienation don't apply to all general land

that's – because corpus land will be in terms of what subsection (7) of section 243 says.

WILLIAMS J:

But you can have general land owned by Māori that is corpus land.

5 **MR SMITH:**

In which case –

WILLIAMS J:

That doesn't make it subject to the Māori freehold land alienation constraints.

WINKELMANN CJ:

10 So Justice Williams is saying you're pursuing a complicated argument you don't need to.

MR SMITH:

Yes. In which case I can leave it.

WILLIAMS J:

15 And in any event even if it's not what you might call ahikāroa land, it's still subject to the kaitiakitanga responsibility of trustee towards beneficiary, and therefore subject to at least some constraints that ought to be enforceable somewhere. High Court or Māori Land Court.

MR SMITH:

20 Yes, I accept that.

WILLIAMS J:

Even if it's not corpus or not ahikāroa.

MR SMITH:

Yes.

WILLIAMS J:

Doesn't mean it can be squandered in breach of the Trust.

MR SMITH:

No, I accept that.

5 **WINKELMANN CJ:**

Isn't it another deficiency in the Court of Appeal's analysis of this problematic trust set up by someone for a mixture of owning land and investment purposes, that the same problem would apply if it just wasn't a discretionary trust but it would clearly be caught, so you could have a trust which is, you know, for your
10 own domestic purposes, is not discretionary, that section would apply, same problem the Court of Appeal addresses. So it's an analogical kind of analysis.

MR SMITH:

Yes.

GLAZEBROOK J:

15 I would have thought that you look at it in terms of not so much the owned but by the Māori aspect of that and that must be talking about more of a collective concept than an individual concept because that's the point of the Act, and so the examples given by the Court of Appeal fail at that level anyway, whether they are discretionary or fixed trusts.

20 **MR SMITH:**

Yes.

GLAZEBROOK J:

Well, fail, they don't come within that term.

MR SMITH:

25 Yes, they don't have the significance in support of the outcome that the Court of Appeal reached that they were given.

WINKELMANN CJ:

And you say the answer is a concurrent jurisdiction?

MR SMITH:

Yes.

5 **WINKELMANN CJ:**

And does sometimes Māori Land Court say: "No, this is not for us"? No one ever comes to them with things that are outside, that aren't really…

MR SMITH:

That's the *Grace v Grace* [1995] 1 NZLR 1 (CA) case. I might have a look at
10 that over the break but I've got a feeling that that was a situation where it came within the jurisdiction of family – no, I'm guessing. Possibly. I can't give you any examples off the top of my head though, but I'll have a look over the adjournment shortly.

WINKELMANN CJ:

15 Where are we at in your road map, Mr Smith?

MR SMITH:

10, that's just to – and in fairness this wasn't cited in our written submissions and it should have occurred to me earlier but didn't, so it's only in the road map, but your Honour, Justice Williams', dissenting judgment in *Stafford v ACC*
20 [2020] NZCA 164, [2020] 3 NZLR 731. One way, perhaps, of looking at that is that your Honour was comfortable in a very different approach being taken to the concept of property in the context of a caveatable interest where –

WILLIAMS J:

Yes, but I was in dissent.

25 **WINKELMANN CJ:**

Still has value in the law.

WILLIAMS J:

It's not your best argument.

MR SMITH:

But it's a bit like *Clayton* in the sense that where the – and this is as high as the
5 reliance upon it is and can be – that where in a particular legal context the statutory and policy and treaty and tikanga considerations point to a different outcome to what would follow from an application of orthodox or English or Anglocentric trust law there are examples where that's happened and *Clayton* is one and your Honour's reasoning in *Stafford* was another example of that.

10 **WINKELMANN CJ:**

So your point is that when you combine the conventional Anglo construct of a discretionary trust and you place it in the tikanga world, you actually get something where there is a beneficial interest and the beneficial interest resides in the commonality of the iwi.

15 **MR SMITH:**

Yes, or a different way of putting the same point, why should the beneficial estate and interest in Te Ture Whenua be determined by Anglocentric law that was developed outside of this context and considerations that are unique and important to it?

20 **WINKELMANN CJ:**

Well, because it's the statutory construct that you would – I suppose is the answer to your question, Mr Smith.

MR SMITH:

Well, that was the Court of Appeal's answer, that it was a statutory construct
25 that also was intended to use a well understood term, although I was pushing back earlier as to whether or not it is truly fair to say it's a well understood term.

WINKELMANN CJ:

Well, the difficulty with that analysis is that actually we're now applying it to something which is not really well understood in – certainly in this case, the notion of a discretionary trust which never vests, and need never vest, is
5 unknown to Anglo common law, so – but you're saying even if it didn't have that it would still be – even if it didn't have that extra thing where the rule against perpetuities doesn't apply, you would say it still is a situation where those discretionary interests are actually conferring a beneficial interest on the iwi and that's – must – the collective?

10 **MR SMITH:**

Yes. But it's that, as your Honour puts it, it's the lack of any perpetuities period when added to that that takes this well outside of the norm which was envisaged when the equitable Anglocentric principles were developed.

WILLIAMS J:

15 Well, they were developed specifically to stop perpetuity because it was a tax dodge.

WINKELMANN CJ:

And also to make sure that assets didn't remain out of the general flow of the economy in perpetuity.

20 **MR SMITH:**

And also perhaps to – I'm sure – going back into the deepest darkest reaches of legal history with Nigel Jamieson at Otago University, I do recall something to the effect that it was also one of the other drivers consistently with those two was to break up the aristocracy and effectively the land-holding gentry that had
25 secured property to that point. Now we're at –

O'REGAN J:

Seems to have been an abject failure if that's what it was trying to do.

WINKELMANN CJ:

No, I don't think that's correct. Right, we'll take the morning adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

5 **MR SMITH:**

I, near the outset, said that I would look over the morning tea adjournment for the evidential reference to, in terms of your Honour Justice Williams' very early questions around why the case was commenced in the Māori Land Court. There is some evidence that's relevant to that, and it's in Mr Paki Nikora's
10 affidavit, and it's at, it's 201.0003, and it's, I had a recollection which thankfully has proved accurate, that the *E Moke v Trustees of Ngāti Tarāwhai* [2019] Māori Appellate Court MB 265 decision had been one of the reasons for the commencement in the Māori Land Court, and that's noted there at paragraph 12 of that affidavit.

15 **WINKELMANN CJ:**

Yes, now just before you go on, I should, to give Ms Arapere fair warning, I should say we propose to call on Te Hunga Rōia Māori after your submissions have concluded if that suits?

MS ARAPERE:

20 That's fine Ma'am.

WINKELMANN CJ:

Thank you. Sorry to interrupt you Mr Smith.

MR SMITH:

In terms of the other potential homework task, I haven't managed to locate a
25 decision that has involved a transfer from the Māori Land Court to the High Court under section 18(2). I did have a look at that in the context of preparing the written submissions, and didn't find anything, but I might have

another look over the lunch-break, and if there is anything I will circulate it to my learned friends and hand it up in reply submissions.

Returning then to the road map and I think we're really at paragraph 15 on the
5 final page and we've really discussed the concept of ownership in quite a bit of detail in the earlier session, and all I just wanted to note there is that really the point has been made that it's owners, as a common shorthand within Te Ture Whenua itself including for, and I particularly highlighted for customary title holders is the purest in tikanga form of title that is recognised at, it talks to that
10 title, or the beneficially interested parties as the owners of that title, and it's just, I just make the point because it is a common shorthand which is not, which as such is able to be used as an interpretive or a vessel to be interpreted consistently with a case that we're advancing, and that's really paragraphs 15 and 16 of the road map.

15

That then takes us to the final issue of constitution in respect of, and I really apprehend there that there's probably not much I can add to what's in the written submissions that have been filed. The other point, and it did occur to me as I was preparing the road map is that one way one might if your Honours
20 were with us in respect of ownership of a beneficial estate the Trust might be conceptualised as having been resettled by the Settlement Act itself, given that that inserted section 19 and removed the perpetuities period that would have otherwise applied, and as from that date it was constituted in respect of the land, because the date that the Act became operative as the date that the
25 cultural redress properties were vested also in the Trust.

WILLIAMS J:

So Te Uru Taumatua is established or the, sorry the Trust deed is dated 2011 isn't it?

MR SMITH:

30 The current trust deed is dated 2013.

WILLIAMS J:
2013? Right.

MR SMITH:
But it goes back to the Tūhoe – we've set out the history in our written
5 submissions that it is, and we deal with it as the first chronological event, from memory, in the joint chronology, but it is ultimately traceable back to the Tūhoe Establishment Trust and that's why I only cautiously advance that point in paragraph 18. If – one possible way would be to approach the Trust as being, changing, materially changing in form through the removal of the perpetuities
10 period that would otherwise have applied by operation of the Tūhoe Claims Settlement Act, and if you view, conceptualise the Trust in that way, then as from the date that that happened, that was the same date that the cultural redress properties vested at that point –

WILLIAMS J:
15 What was in the Trust before that?

MR SMITH:
I was hoping no one was going to ask me that. The short answer is I don't know. I presume that I would've been –

WINKELMANN CJ:
20 $10 probably.

MR SMITH:
Some, yes, some notional trust property earlier, but certainly when you look at the Treaty settlement context which explains ultimately the assets that the Trust came to have vested through the settlement, the primary purpose of the Trust
25 was clearly to be created to receive the settlement redress, which could only, in terms of the Crown's policy settings, be vested once the settlement legislation came into effect.

WILLIAMS J:

Correct, so timing is irrelevant, isn't it, on that basis?

MR SMITH:

Yes.

5 **WILLIAMS J:**

It's more purpose?

MR SMITH:

Yes.

WINKELMANN CJ:

10 Can I just ask a point of detail. You said that the appellants are not aware of what land is now owned by the Trust. Is there no accounting of assets and, to the iwi?

MR SMITH:

Well there is and there are mechanisms within the Trust deed for getting that 15 information. There are annual reports that are prepared and are the subject of annual general meetings, so there are mechanisms to get it. At the time we prepared the written submissions we included in there quite clearly that we don't know exactly what the property is, the Trust property is, general land that's owned by the Trust as today, and I had thought perhaps the submissions in 20 response might identify that for the benefit of the Court so the Court knew that the general land that the Trust presently owns today, but that hasn't been done. But I'm not…

WINKELMANN CJ:

You're not making something of it?

25 **MR SMITH:**

No. Now unless there were any further questions, those were the oral submissions that I planned to make.

WINKELMANN CJ:
Thank you Mr Smith.

MS ARAPERE:
E te pai o ngā Kaiwhakawā o Te Kōti Mana Nui, tēnā koutou. E tika ana ki te
5 mihi, ki te haukāinga o tēnei pito o te whenua, Te Ātiawa, Taranaki whānui, tēnā koutou. E te Pāpā, te kaikarakia, nāu i whakairi Te Aho Tapu. I te Rangi ki te Papa, ki te Papa ki te Rangi. Nō reira, tēnā koe. Ngāi Tūhoe, koutou katoa e whakarauika mai nei i tēnei rangi, tēnā koutou. Ka mihi tēnei mokopuna o Raukawa, o Tūwharetoa, o Maniapoto, ki a koutou.
10
May it please the Court. As is tika I acknowledge the mana of this Court. I have acknowledged the mana whenua of the land on which I am standing, Te Ātiawa Taranaki Whanui. I have acknowledged koroua the kaikarakia who opened our proceedings this morning, and the iwi gathered here today. Having come up
15 the batting order a bit your Honours I'm not entirely sure which dimension I'm in, but hopefully we will –

WINKELMANN CJ:
The answer is the Supreme Court dimension.

MS ARAPERE:
20 Thank you Ma'am. Te Hunga Rōia was granted leave to intervene and file submissions addressing tikanga relating to ownership of land. Te Hunga Rōia acknowledges the mana motuhake of the parties involved in this matter. Accordingly, Te Hunga Rōia does not take a view on the disposition of the appeal, but rather seeks to assist the Court.
25
In summary Te Hunga Rōia submits that tikanga appropriately plays a role in interpreting the meaning of "owned by Māori" in section 236(1)(c) when tikanga is considered it may provide a perspective that means ownership could be broader than how that term is used under traditional common law and equity.
30 We recognise that this is not necessarily determinative of the appeal. The interpretation exercise here, of course, requires consideration of the text in

light of its purpose and its context, which will include, but is not limited to, tikanga considerations.

How we propose to use our time this morning, your Honours, is that I will speak
5 to some of the general principles of tikanga that we say are relevant to this case, in a summary way, as well as how tikanga should be interpreted in terms of Te Ture Whenua Māori. Mr Hikaka will address the common law approach to ownership in the context of trusts. Mā pango, mā whero, ka oti ai te mahi. So the combined strengths of Te Hunga Rōia are brought before you today.
10 We anticipate we would take about 20 to 30 minutes.

So turning to tikanga principles, we acknowledge of course that Ngāi Tūhoe have their own tikanga as concerns their whenua. However, in a general sense tikanga places importance on land and collective rights to share and care for it.
15 It possesses special significance. It is something to which Māori belong. This relationship is expressed through song, through story, through kōrero tuku iho, and the myriad of oral traditions of ngā iwi Māori.
1200

20 The word "whenua" carries a range of meanings. It can mean placenta, ground, country and state, and whenua as the placenta sustains the life of a baby in the kōpū, the womb, and at the end of a person's life they return to Papatūānuku, to the whenua, and hence the whakataukī: "Mai te kōpū o te whaea ki te kōpū o te whenua." "From the womb of the mother to the womb of Mother Earth,
25 Papatūānuku."

The relationship with whenua is about bonding to the land and having a place on which you can stand. Land was not regarded as a personal asset to be traded, and that does not mean that tikanga had no concept of property holding.
30 Concepts such as take tūpuna, take raupatu and take tuku existed but the rights were held collectively rather than individually.

This specific way of looking at and dealing with land ownership is a reflection of the broader tikanga values with which this Court is familiar, so whakapapa, whanaungatanga, mana, kaitiakitanga, tapu, and of course there are more.

5 In summary then we say that tikanga places a heavy importance on land and collective rights to share and belong to it as well as the obligation as kaitiaki to care for it.

Turning then to the Act and how tikanga may inform an interpretation of this 10 matter, we submit that the definition of "owned by Māori" for the purposes of section 236(1)(c) can properly recognise broader concepts of ownership at tikanga. In the context of a statute designed to address the relationship between Māori and their whenua a tikanga-consistent approach is appropriate in our submission.

15

Section 2 of the Act expressly provides that Parliament's intention is that the Act provisions be interpreted in a manner that best furthers the principles set out in the preamble. In our written submissions we have a more lengthy discussion of the preamble but my basic submission is that the preamble 20 contains clear principles regarding ownership of land, that land is a taonga tuku iho of special significance to Māori people. The preamble speaks of rangatiratanga, the protection of wāhi tapu.

Section 2 also provides that the powers, duties and discretions conferred by the 25 Act shall be exercised in a manner that facilitates and promotes the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners.

Also in the written submissions, your Honours, we refer to the *John da Silva v* 30 *Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212 case and following that case the preamble recognises the traditional relationship of Māori with their land and its tribal significance rather than ownership in an individualised sense.

So Te Hunga Rōia submits that the strong directives in the preamble are a further reason that a tikanga-consistent interpretation is available.

We also note the Act's broader textual context reflects the fact that tikanga is an integral part of its operation. My friend for the appellant has taken your Honour to some of those sections, such as the requirements for Judges of that Court to have knowledge and experience of tikanga Māori.

Our submission here is that as a statute about whenua Māori, tikanga ought to provide an important interpretive overlay to the whole Act and not just specific sections.

Te Hunga Rōia Māori submits that this Court should take account of tikanga as part of the interpretive exercise and this is appropriate for the following reasons. Tikanga is the first law of New Zealand, needs to be considered where, as here, it is relevant to the circumstances and context of the case. This appeal concerns an important question as to the status and governance of land which tikanga treats as fundamental to Te Ao Māori. Tikanga forms part of the values of the common law, and generally legislation should be permitted interpreted consistently with the common law where the words of a statute permit. Legislation should also be interpreted consistently with Te Tiriti o Waitangi and, it is argued, tikanga, as an implication of the tino rangatiratanga guarantee contained in Article 2.

As confirmed by this Court in *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 the development of the common law also includes tikanga, and Te Hunga Rōia acknowledges that tikanga has not previously been raised in this matter. However, we submit that does not mean that tikanga should not be considered by this Court. That tikanga has not previously been raised is no barrier to it being raised and considered by this Court, in our submission. Indeed, the Court in the past has been prepared to raise tikanga itself as something to be considered, and your Honours will recall the *Ellis* case which sent parties into something of a flurry and resulted in a wānanga.

WILLIAMS J:
It's not the norm.

MS ARAPERE:
Not the norm. We submit that this is appropriate and in accordance with tikanga
5 being part of the law of Aotearoa New Zealand and this Court's role in considering matters of public importance and defining the law in those matters of public importance.

As this Court recognised in *Ellis*, the common law is in a state of transition as
10 regards the place of tikanga in the common law. During this transitional phase, especially for matters commenced prior to the *Ellis* decision, it can be expected that there will be situations where tikanga was not raised before the lower Courts but it may have relevance to the issues this Court needs to consider.

15 To close, your Honours, it is respectfully submitted that the Court should consider tikanga in such circumstances. I think that's my 10 minutes.

WILLIAMS J:
Just one question, Ms Arapere. What are the risks?

WINKELMANN CJ:
20 Of what?

WILLIAMS J:
Of inserting tikanga concepts into English conceptions of the distinction between beneficial and legal ownership and tenurial estates and so forth. What are the risks in concluding that ownership can be backfilled with tikanga
25 concepts of connection?

MS ARAPERE:
I think…

WILLIAMS J:

Do you want to give that some thought and get Mr Hikaka for a minute?

MS ARAPERE:

Ka pai. Now I know which dimension I'm in, Sir.

5 **WINKELMANN CJ:**

Well, I mean one thought is that it's context so this is not changing the meaning of ownership for all purposes. It's a statutory interpretation.

WILLIAMS J:

Here's one possible set of risks that you might want to think about.

10 **MS ARAPERE:**

Yes.

WILLIAMS J:

What about former owners who are no longer on the ownership list?

MS ARAPERE:

15 And who missed out by virtue of the acts of the Crown who disenfranchised themselves and from their land.

WILLIAMS J:

Or whatever, yes, and might nonetheless in tikanga terms consider themselves to be owners. How does the law cope with that if we backfill tikanga into 20 beneficial ownership and interest? Might want to think about that and perhaps come back.

MS ARAPERE:

Yes, thank you, Sir. Thank you for that opportunity. I will now –

GLAZEBROOK J:

25 But again probably it's context because what we're doing is saying do these particular beneficiaries of this particular trust have beneficial ownership, not –

and so that's the context in which you're looking at what it means, and it's not a wider concept that you apply to add beneficiaries to other trusts where they may not be included.

MS ARAPERE:

5 Yes. Thank you, your Honours.

WILLIAMS J:

You've had a chance to think about it now.

WINKELMANN CJ:

Can I just add my comment which I made to Mr Smith which is that it seems to
10 me that he was following a different pathway than the dimensional pathway I suggested which was he was suggesting that in particular tikanga interests such as the interest to go on and use the land for particular purposes might give you an ownership interest for this purpose whereas I suggested that this is a structure which created ownership in a far – ownership interests of far broader
15 nature which is that the land and every kind of incidence of its benefit must be held for the collective of the iwi, which is much more akin to…

MS ARAPERE:

To tikanga?

WINKELMANN CJ:

20 Yes, and also collective –

GLAZEBROOK J:

Or more akin to European ownership actually.

WINKELMANN CJ:

And also capturing the concept of what really seems to be aimed at in the
25 section, but anyway…

MS ARAPERE:

I'm not sure that's a risk though. I think that's an opportunity.

WINKELMANN CJ:

No, I'm not saying it's a risk. I'm saying there's less risk in that approach. If you just say a right to go onto the land and collect some sort of, I don't know, food or something was sufficient to give you ownership, well, that's obviously and
5 incredibly broad – and opening that up. But if you just – but this is a very particular thing where assets are clearly own – they're actually clearly held for the benefit of –

MS ARAPERE:

The iwi?
10 1210

WINKELMANN CJ:

Iwi, and every concept, every way that we talk about it in the law of, you know, a beneficial interest, every interest but the right to control it, which is normally anyway the legal interest, so, yes, so that's much more consistent with
15 traditional legal concepts and it seems more consistent to me with what's in section 236.

WILLIAMS J:

Yes, it does seems to me that's straightforward. I'm just wanting to explore what hares might be let running by doing this and one potential hare is members
20 of a hapū who were originally owners but whose interests were taken, for example, as uneconomic in the pre-1974 period, can they go to the Court claiming beneficial ownership on the basis of a more tikanga-based assessment of what beneficial ownership is and, if not, because if the answer to that is "yes" then you're introducing a revolution, if not, why not, because you
25 need a nice sharp line.

MS ARAPERE:

Mmm.

WINKELMANN CJ:

And I think your threat, your risk that you characterise is the one that is attached to Mr Smith's conception whereas that doesn't –

WILLIAMS J:

5 No, no, it's a different point.

WINKELMANN CJ:

– because it's not tied to the fee simple whereas this is tied to the fee simple.

WILLIAMS J:

No, it's a different point.

10 **WINKELMANN CJ:**

Okay, all right. Okay, you see if you can work it out, Ms –

MS ARAPERE:

I think I do need to take a few minutes to think about the wānanga that's occurred just here and hopefully come back –

15 **WILLIAMS J:**

And which you were a bystander in.

MS ARAPERE:

Yes. Thank you, your Honours.

WINKELMANN CJ:

20 Mr Hikaka.

MR HIKAKA:

Tēnā koutou e ngā kaiwhakawā. I thought it might be of assistance to the Court if I conceptualised, or contextualised, rather, why the common law did have the law against perpetuity as a requirement for vesting because the reasons that
25 tikanga sees land as inalienable have already been contextualised by my learned senior and I thought to provide balance it might be of use to the Court

if I addressed the common law position, and there was some discussion about it between the Bench and my learned friend, Mr Smith. Also, this will now give time for my learned senior to come up with the answers.

WINKELMANN CJ:

5 If she can understand the questions that'd be good.

MR HIKAKA:

So as the Court of Appeal identified the requirement for vesting is based upon a requirement that land be alienable and be able to be sold and used unhindered, not only through sale but also through mortgage, for example, and 10 that is a very longstanding and important aspect of – I believe "the Anglo common law" was the phrase used earlier and I think I will use the same phrase because I think it's useful. Indeed, so important was the ability for land to be, that it must be able to be alienated at some point, is that it is one of the very few restrictions that the Anglo common law puts on land that is not directly 15 related to interference with someone else's rights, either rights of person or rights of property. So, for example, if I wished to dig an enormous hole in my land the Anglo common law would be fine with me digging that hole unless it encroached upon my neighbour's land and caused a slippage. However, the Anglo common law would not be happy for me to try and tie up my land so that 20 it never after my death came outside of my family, for example, and why is this?

This was, in our submission, not because of any individualistic tendencies but because it was believed the ability for land to be freely circulating and usable was for the common good and so that perpetual holding of lands was 25 destructive of the commonwealth, underpinned by two main aspects.

The first is a religious underpinning and I think it's important to acknowledge that the Anglo common law has such sacral undertones to it, just as tikanga does, and I can probably do no better than to quote Lord Nottingham who was 30 the Lord Chancellor who decided the Duke of Norfolk's case which is the case in which the rule of perpetuity was really first expounded cleanly with an exciting set of facts that effectively is Le Carré-esque, albeit written much more densely

than he does, and he said that a perpetuity is, and I quote, a "fight against God, for they pretend to such stability in human affairs, as the nature of them admits not of". So if we unwind the Churchillian grammar that the Lord Chancellor used we see him saying one of the reasons that perpetuities are odious to the
5 law is because they purport to give humanity the same stability as the divine.

The second key reason, and one that is, of course, much more focused by modern jurists, is that if one leaves land inalienable it would, and I'm quoting here from a US case, it would harm the natural development of a community by
10 removing property from the ordinary channels of trade and commerce. So the requirement that in a capitalist society that is based upon individual ownership there must be free movement of capital and access to land as part of that.

Why? Because it was determined that free use of capital was the best way to
15 advance society as a whole and thus we can compare that to tikanga where non-alienability of land was seen as necessary to advance society as a whole. Flip that to Anglo common law, alienability was necessary for the exact same thing. Both systems of law approaching the question of what is best for society, just taking very different paths in doing so and with different results, and we
20 submit that that might be of assistance to this Court, if the Court decides it needs to consider these two separate potential lines of analysis, to show that both of them are rooted in the societies from which they came and both are thought to have been the best way of achieving an outcome for those societies.

25 One last thing I'll touch upon to give my learned senior a little more time is we did rather look internationally to see whether similar questions had been determined by other courts, this question of vesting of the general interest in the land, and regrettably I was unable to find any assistance anywhere else. The Cook Islands has very similar provisions because the Cook Islands Act is
30 based upon the older versions –

WILLIAMS J:

Native Land Act.

MR HIKAKA:

Yes, the Native Land Act. But I could find nothing in the Cook Islands Courts. There, two reasons, I think. One is Cook Islands, Cook Islanders especially, do not use discretionary trusts and there is no statute that I am aware of that
5 would suspend the beneficial interest, so the point simply hasn't arisen in the only other jurisdiction I think that might really be able to provide any assistance, so I apologise there as my researchers have not been able to assist you on that other than to prove a negative.

WINKELMANN CJ:

10 That rule against perpetuity, that principle flows through the whole of our land-based common law. It's part of the law in relation to restrictive covenants, for instance, why the law is so, finds, won't allow restrictive covenants to hang around after they've ceased to be useful and relevant.

MR HIKAKA:

15 Yes, your Honour, and it is very old law. I mean it looks – I don't think it was there to break up estates as might have been suggested because, of course, the judges who were making the decisions about perpetuities tended to have quite large estates themselves.

WINKELMANN CJ:

20 Yes.

MR HIKAKA:

But it seems to have gone back at least earlier to 1285 because 1285 you have the Statute De Donis, I believe, which created the fee-tail which was jumped upon by everyone to try and lock land up effectively perpetually through their
25 heirs.
1220

WINKELMANN CJ:

It's around the same time as the Statute of Uses.

MR HIKAKA:

Yes, your Honour, and so then that began to be wound back over the course of literally centuries because it was 1683 I believe we have the *Duke of Norfolk's case* (1682) 3 Ch Cas 1, 22 ER 931, so that's several hundred years of back
5 and forth, and, of course, 1685 I think 200 years was found not to be perpetuity, so it wasn't until about 1791, I believe, we had the life in being and 21 years which has caused –

WINKELMANN CJ:

Magic gravel pits, precocious toddlers, and fertile octogenarians.

10 **MR HIKAKA:**

Yes, it is something that has confused and confounded law students for –

WINKELMANN CJ:

And entertained law students.

MR HIKAKA:

15 Yes. So unless I can be of any further assistance I will –

WILLIAMS J:

Just one point, you said that it's central to tikanga that land not be alienable. That's not quite right because there is tikanga about alienability and that does have to be acknowledged. There's just no sense of a market in land which, of
20 course, is central to the other system. But alienability is perfectly possible and done for good reason within the context of that culture.

MR HIKAKA:

Sorry, yes, your Honour, thank you for that. That's an important and useful clarification. I will hand back to my learned senior, if I may.

25 **MS ARAPERE:**

Thank you, your Honours. I've had a few minutes to gather my thoughts and hopefully can provide some assistance to the Court. Thinking about why, why

can't former owners have beneficial ownership, your Honour, Justice Glazebrook, talked about context and I think that is what we need to think about here. So how long ago might that hapū have been on the land? What was the strength of their interest when they were on the land? How long
5 since those rights were exercised. So in my submission tikanga would look at the context and take a flexible approach to reviewing those –

WILLIAMS J:

That's pretty elastic though and you're giving a judge a lot of discretion about whether someone is treated under the Act as some kind of owner.

10 **MS ARAPERE:**

Yes, so my next point was going to be that tikanga could resolve things before they even get to the Court and then the second point to that is it is the function of the courts to determine these things, so in advance one would hope that hapū and iwi would try to resolve this amongst themselves before even going
15 to the Māori Land Court or the High Court.

WINKELMANN CJ:

So…

GLAZEBROOK J:

But if there's a trust and it's not this Trust but a trust that has effectively named
20 beneficiaries, you're not suggesting that the Court could add beneficiaries to –

MS ARAPERE:

No Ma'am, no.

GLAZEBROOK J:

So we're in a totally different concept here because we have everybody who is
25 part of the iwi, this land is held for them.

MS ARAPERE:

For them.

WINKELMANN CJ:

Yes, I must say, I just think that this difficulty ignores the statute because the statute says, it limits it. So we're not just stepping outside a statute into just a world where tikanga regulates everything, we've got a statutory framework, and 5 the statute says every other trust constituted in respect of any general land owned by Māori, then we go over the definition of "general land owned by Māori" means: "General land that is owned for a beneficial estate in fee simple by a Māori or by a group of persons of whom a majority are Māori."

10 So that means it's fee simple owned by Māori. So that means it's not just a general opportunity to open up past things, it's in relation to this fee simple which is owned for this Māori person or this group of Māori. So that's, I think myself, is the answer to the fear. It's not just general tikanga.

MS ARAPERE:

15 Yes, and I suppose my submission Ma'am is really about tikanga being an interpretive overlay to the whole Act as part of the development of the common law. I accept that that may be problematic on the face of that particular section.

WINKELMANN CJ:

So are you suggesting that we step completely outside of that definition?

20 **MS ARAPERE:**

No I'm not suggesting that.

WINKELMANN CJ:

Because you don't need to suggest it, do you, I don't think. I mean you're not arguing one case or the other, but the appellant doesn't need to suggest it.

25 **MS ARAPERE:**

Yes, I'm walking a careful line here your Honours. The other risk I wanted o talk about are risks inherent in the Treaty settlement process. So the Crown is ordinarily negotiating with one iwi at a time, and the courts are dealing with the consequences of those types of issues now, and also settlement assets returns

may not actually reflect tikanga interests. Those are my five minutes of thoughts and I'm in your Honour's hands if you want me to –

WINKELMANN CJ:

Why I raised the point is because we have, this is land that's held with,
5 you know, fee simple certificates of title, Land Transfer Act 1998 indefeasibility principles apply et cetera, so this statutory framework is conceptualised in that context, so that's why it's important that it's tied to the fee simple estate I think.

MS ARAPERE:

Yes, I don't disagree with you Ma'am.

10 **WILLIAMS J:**

I'll discuss this with the Chief Justice offline. Explain to her why it's an issue.

MS ARAPERE:

Thank you your Honours. Unless you have any further questions that I will try to answer, those are my submissions.

15 **WINKELMANN CJ:**

Thanks Ms Arapere. Mr Colson.

MR COLSON KC:

Thank you your Honour. I will largely work off my outline of written submissions that was filed this morning. I would like to go back to look at the Trust deed,
20 and just before doing that, I obviously don't need to remind the Court that we're talking about statutory interpretation here, and we're talking about a quintessential common law phrase "estate in fee simple" and taking, in my submission I'll come onto that, taking a different approach to that phrase in this Act, when it is quintessentially a settled legal phrase, will have knock-on effects,
25 some of which we might not have anticipated today, and I'm not doing that in a floodgates type way, because I will identify some of those knock-on effects today.

WINKELMANN CJ:

Can I just ask you. No one has focused on estate in fee simple, and the Court of Appeal didn't focus on that, that's a recalibration on your part.

MR COLSON KC:

5 It is a slight recalibration, but I mean that is always, yes and no your Honour. I didn't pick up this argument before the Court of Appeal, it was raised by Justice Goddard, as you may have seen on the face of the judgment as to whether the beneficiaries –

WINKELMANN CJ:

10 Yes, so you went to the Court of Appeal – so the position of the respondents until this Court has been that this is a beneficial interest?

MR COLSON KC:

No, the position of the respondents in the Court of Appeal is that there was no beneficial interest.

15 **WINKELMANN CJ:**

Right. Was that picking up a point that Justice Goddard had raised?

MR COLSON KC:

Yes, he issued a minute before the hearing alerting the parties to that, and inviting submissions on that.

20 **WILLIAMS J:**

It had been conceded in the Māori Appellate Court, hadn't it, I think someone said?

MR COLSON KC:

I think I may have conceded it wrongly in the Māori Appellate Court, and I'll

25 come back to some of those consequences shortly. But if we, it might be helpful just to look back at the Trust deed, I'm sure your Honours have looked at it, but I want to focus initially on the recitals. Aspects of this are not just aimed at the

beneficial ownership aspect of the case, but also the constituted in respect of element of the case, and we can see at recital A that all of these recitals indicate the importance of the Trust deed and TUT to Tūhoe. Recital A talks about the credible presentation of Tūhoetanga. That things that give form, longevity, ihi, mauri, mana to Tūhoe et cetera. I want to particularly focus on part G, or recital G: "Tūhoe wishes to create the Tūhoe Trust to act as their iwi authority in post-settlement governance entity (that is transparent, accountable and representative of the iwi)." To state the obvious in effect the PSGE, or the Trust is Tūhoe's outward or Western manifestation of the body that not just holds property, but also governs that, and governs aspects of Tūhoe, only aspects of course.
1230

Importantly I would like to come on to 3.1, and this sets out the purposes of the Trust. Now the point I want to make before we look at the subparagraphs here is that there almost has been a hint of, well, the beneficial interest in the Trust must be owned by someone, which, in my submission, is not correct. This is, admittedly, and it's an unusual type of trust, certainly in Western law, it is almost a combination of a charitable trust and a more traditional, specific trust and –

WILLIAMS J:
This is the shoehorning problem.

MR COLSON KC:
It is the shoehorning problem, I accept that, Sir, entirely accept that. But the way – what I want to indicate is important about that is that although we have here at 3.1(h) there may be specific distributions to Tūhoe iwi members, many of the benefits that will be provided by the corpus of the Trust to Tūhoe members will be indirectly, and I think that must go without saying.

WINKELMANN CJ:
What clause are you at?

MR COLSON KC:

Well, I was looking at 3.1(h) which is the distribution provision, but if you look at the purposes of the Trust classically they are the type of purposes that would be consistent with a charitable trust: leading and serving cultural permanency
5 and prosperity, social development, promotion of tribal forums, et cetera, et cetera. So the Trust, of course, is for the iwi in the wider sense of the word but the benefits of that for specific individuals is likely to be an indirect benefit.

Now the reason that is partly important is when we come back to look at the
10 words of the statute in due course that is owned for a beneficial estate in fee simple.

The other aspects I just wanted to draw the Court's attention to, Schedule 1 on page 101.0025, powers of the trustees. As I have indicated at the start, 1(a):
15 "To represent the collective interest of the iwi and to be the legal representative of the iwi in relation to that collective interest." It goes on to more traditional powers such as to borrow, et cetera, but the Trust is, admittedly, of course, as I said, in many ways the legal or Western manifestation of the iwi to the extent it has to interact in a commercial or property-owning way with Western society.

20 **WILLIAMS J:**

That's another shoehorning point, isn't it –

MR COLSON KC:

It is.

WILLIAMS J:

25 – because this is both a government and a Trust of Tūhoe expressed as a common law trust.

MR COLSON KC:

It is and I would emphasise though it's not a government in the absolute sense of the word because, of course, that comes from the people and from the hapū
30 and the whānau, but it is a governing body to the extent one is necessary.

Of course, Tūhoe wouldn't want any of this. They wouldn't want to own anything. They don't believe in ownership. As the affidavit says, they wouldn't see any of this as necessary but unfortunately it is to interact in a Western way.

WILLIAMS J:

5 This is an internally ratified and mandated body to express the collective will of a tribe?

MR COLSON KC:

Yes, it is.

WILLIAMS J:

10 And in general indigenous rights law around the Anglo common law world that would be referred to as a government?

MR COLSON KC:

Yes, yes, I –

WILLIAMS J:

15 Not quite so here but it's doing many of the things that tribal governments elsewhere in the world would do?

MR COLSON KC:

I suppose, Sir, to be honest, I wouldn't feel sufficiently qualified even though I've acted for this client for a long time to entirely answer that question, given

20 the extent to which –

WILLIAMS J:

It's a political entity –

MR COLSON KC:

It is a political entity, yes.

25 **WILLIAMS J:**

– as well as a trust?

MR COLSON KC:
Yes, I accept that.

WILLIAMS J:
All shoehorned into a single bucket.

5 **MR COLSON KC:**
Yes, I accept that.

WILLIAMS J:
That's the problem.

MR COLSON KC:
10 It is the problem but the other problem, as I say – that's certainly context and we've looked at the other context as well but ultimately we are interpreting a very common phrase in a statute and that is also a problem.

WILLIAMS J:
Yes.

15 **MR COLSON KC:**
So the other –

WINKELMANN CJ:
I'm just – do we know why your client doesn't want, opposes – so we asked the appellants why they sought the jurisdiction. Can we ask why your client
20 opposes the jurisdiction?

MR COLSON KC:
Yes, because they see it as, first, historically, of course, like most iwi, they are no great fans of its predecessor, the Native Land Court, to put it mildly. Second, they see the added supervisory jurisdiction of the Māori Land Court as being
25 paternalistic. For example, the ability of a judge to call a trustee before the judge, and make enquiries of that person.

WILLIAMS J:
A High Court judge can do that.

WINKELMANN CJ:
Yes, that’s exactly the same jurisdiction.

5 **MR COLSON KC:**
Not in relation to a trustee.

WILLIAMS J:
Why not?

WINKELMANN CJ:
10 I think they can.

WILLIAMS J:
Yes they can.

WINKELMANN CJ:
They can so.

15 **MR COLSON KC:**
Not as of right. They can under the Trusts Act 2019 if there is a genuine dispute.

WILLIAMS J:
Of course.

MR COLSON KC:
20 And there is –

WILLIAMS J:
The Māori Land Court wouldn’t do it unless there was a general dispute either.

MR COLSON KC:
That threshold isn't in the Act.

WINKELMANN CJ:

But as a matter of principle it would be applied.

WILLIAMS J:

Why would a Māori Land Court judge do that without an excellent reason?

5 **MR COLSON KC:**

I don't know Sir, but it may occur. The test under the legislation –

WINKELMANN CJ:

No, what's being put to you is a court would not exercise a jurisdiction because it would be an arbitrary act of judicial power. They would have to have a reason
10 to do so.

MR COLSON KC:

Yes, it may be exercised, for example, if the Judge wrongly thought there was a, some kind of contest as to what was going on on the facts, for example.

WILLIAMS J:

15 Well a High Court judge might make that mistake.

MR COLSON KC:

Yes, but it's a much test. The threshold test under Te Ture Whenua Act is a lot lower than under the High Court in relation to that.

WILLIAMS J:

20 What's the test and what's the section?

MR COLSON KC:

The test is, yes, I'll give it to you. It's section 238, it's an extremely broad jurisdiction.

WINKELMANN CJ:

25 Fortunately just over the page from 236.

WILLIAMS J:

What do the authorities say about when it's triggered?

MR COLSON KC:

I haven't reviewed the authorities as to when it's triggered Sir, but it's so much
5 wider than the equivalent sections 126 and 127 of the Trusts Act.

WILLIAMS J:

That depends on what the authorities say, doesn't it?

GLAZEBROOK J:

Also it probably depends what sort of trust because some of those trusts are
10 under the direct supervision rather than…

MR COLSON KC:

The section is engaged as a consequence of the argument that's been put by the appellants.

WINKELMANN CJ:

15 So is that the essence of what you say is paternalistic, or is there other aspects and paternalistic –

MR COLSON KC:

The other aspect clearly is section –

GLAZEBROOK J:

20 And what do you see the Trustee Act 1956 power is?

MR COLSON KC:

That's in sections 126 and 127. On application by beneficiary the High Court may review an act, omission, or decision on the grounds it wasn't reasonably open to them, and that first requires a genuine dispute. It's quite a lot higher
25 threshold than this. To similar effect, for example, the Court, the Māori Land Court can direct the application of the Trust assets under section 242. That cannot occur in relation to the Trusts Act. So my clients say why as an iwi

which has settled with the Crown wishes to exercise its own mana motuhake and has its own asset base, are we still to be subject to these paternalistic powers that others aren't subject to. That's the starting point.

WILLIAMS J:

5 Well section 242 is used where you have a right to the money that hasn't been paid. That would be, the High Court would make the same direction.

MR COLSON KC:

It's still on a face a power, I'm not sure if the High Court can – sorry, obviously if you had a right –

10 **WILLIAMS J:**

If there's entitlement to it, of course.

MR COLSON KC:

If you had a right to, of course.

WILLIAMS J:

15 The Māori Land Court won't make that direction unless there's an entitlement and the money hasn't been paid.

MR COLSON KC:

Yes, but the High Court doesn't have that power. You'd have to have it absolutely vested and then go into the Trusts Act.

20 **WILLIAMS J:**

Well that's the point.

MR COLSON KC:

Yes.

WILLIAMS J:

25 It's relatively rare that the two courts would take a different view of these things.

MR COLSON KC:

Similarly section 242(2), there is an ability to order payments in relation to any person beneficially entitled to that money, and that would include, if the Court were to go the way of the appellants, that would include any of this iwi.
5 So those, that's the general, if I can put it this way, it's a general conceptual why ought we to be subject to more paternalistic powers in the Trusts Act. The second issue is, the first was generally it's the, obviously the successor to the Native Land Court. The third issue obviously is section 17 of Te Ture Whenua Māori Act which really has not had much of a focus in this hearing, but
10 is significant in relation to this Trust. You'll see in section 17(1): in exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—(a) the retention of Māori land and general land owned by Māori in the hands of the owners."

15 So if there happened to be a dispute, for example, about whether the Trust should continue to own an investment property in Auckland, that is the standard by which the Court has to answer that question. It's the primary objective.
1240

WILLIAMS J:

20 But you've got to ask yourself what the trigger is to be able to purport to take that control when there are no constraints in the Act over the alienation of general land owned by Māori.

MR COLSON KC:

Well, there is no specific restraint but this is the primary objective of the Act.

25 **WILLIAMS J:**

Yes, but with or without that objective what's your trigger? If you're not breaching your Trust then you're not breaching a provision in the Act.

MR COLSON KC:

So there was an argument about the wisdom of selling an investment property.
30 Someone challenged that decision. This Court's starting point has to be while

we want to promote and assist the retention of that policy that's my primary objective.

WILLIAMS J:

Okay, well, that's not how the Court interprets that jurisdiction.

5 **MR COLSON KC:**

But, Sir, with respect, that's entirely – what I just outlined is what section 17 says.

WILLIAMS J:

I know, but section 17 is applied, for example, primarily when a trust is being
10 set up and the objects are being set out, but I know of no example where a judge has said: "Sorry, you can't sell that land," if it's consistent with the trust order, or deed in the case of it not being an order, and isn't in breach otherwise of the Act.

MR COLSON KC:

15 If you put, say, Sir, for example, section 17 and section 237 together you could absolutely have a situation in contrast to normal trust law where someone complains about the sale of an investment property, asks the Court to look into that and then takes as the starting point it shouldn't be sold because of section 17.

20 **WINKELMANN CJ:**

But you do need to read those general objectives with the preamble and so – firstly.

MR COLSON KC:

Yes, but the preamble only refers to Māori land. This expands it to general land
25 owned by Māori.

WINKELMANN CJ:

And also there is a principle which has been recognised by courts that every purpose in an Act is not necessarily given perfect expression through every provision in the Act, so there are multiple principles, et cetera, so…

5 **MR COLSON KC:**

Understood, but when you do have that as a primary objective that is a very strong indication.

WINKELMANN CJ:

Okay, so – right.

10 **O'REGAN J:**

I mean to some extent it's the exposure to the possibility that someone will try this.

MR COLSON KC:

Yes, of course, it's the exposure to potential mischief and the cost that goes 15 with that.

O'REGAN J:

And the cost of then having to defend it and so on, yes.

MR COLSON KC:

Precisely. So that was to answer the question about what the concern was.

20

As the Court will have seen in my outline, the settlement trusts were predominantly cash, that is about $169 million, plus two CNI forests and three fee simple estates of approximately 14 hectares.

25 I also just touch in the factual background the underlying dispute relates actually to the election process and who can nominate candidates and is now subject to the slow but ongoing dispute resolution process in the Trust deed.

I'll come now to the heading: "Land held by TUT is not General Land 'owned' by Māori," and, of course, the starting point for that is section 129(2)(c). Section 129, of course, carves up all of the land in New Zealand into "one of the following statuses" and here we're dealing with status (c): "Land (other than
5 Māori freehold land) that has been alienated from the Crown for a subsisting estate in fee simple shall, while that estate is beneficially owned by a Māori or by a group of persons of whom a majority are Māori, have the status of General land owned by Māori." So that introduces a bit more of a temporal connection than the interpretation definitions, but if we go back to the definition which is on
10 page 19 of the statute, crucially: "General land owned by Māori means General land that is owned for a beneficial estate in fee simple by a Māori or by a group of persons of whom a majority are Māori."

A couple of points about that initially. First the words "beneficial estate" are only
15 used in connection in the Act to general land owned by Māori. The word "estate" otherwise appears repeatedly in the Act. It is repeatedly contrasted with the word "interest" as one would expect. But apart from the definition section further above, and this section, and section 129(2)(c) it's the only time beneficial estate is actually used. What that means, of course, in my
20 submission, is that the legislature intends it to have a different meaning from simply an interest that is a beneficial interest. It is a beneficial estate. It is, of course, also something that has to be owned and we're well familiar with the term fee simple, or the phrase estate in fee simple, and while obviously the intention of the legislature here is that it needs to be a predominantly Māori
25 affair, obviously there is a focus on individuals. For each of those individuals, are they Māori in order to work out whether they're a majority are Māori.

WILLIAMS J:
What do you make of the use of the word "group".

MR COLSON KC:
30 A group. I actually don't, I think – sorry my submission it is just signifying, it is the noun that is necessary to qualify persons in order to ascertain whether that group is a majority Māori. You have to look at each of them individuals. So it

may be a group of beneficiaries. So if you had another trust that owned general land, the beneficiaries, if it were vested, may or may not be more than 50% Māori.

WILLIAMS J:
5 They could have said by a Māori or a majority of Māori.

MR COLSON KC:
Yes, I accept –

WILLIAMS J:
It's possible to read that as reference to group think.

10 **MR COLSON KC:**
It is Sir, but in my submission it's far more possible to read "estate" as meaning the Western concept of estate, and "owned" as the Western concept of owned. They're the words that I particularly emphasise in relation to their – given the Act has overall a clear delineation between the words "estate" and "interest",
15 because the effect of finding what the appellants are putting to you is the words owned a beneficial estate mean a discretionary beneficiary who or may not ever benefit from this actually owns an estate, and that also has knock-on consequences for other areas of the law which I'll develop later.

WILLIAMS J:
20 Or that it's owned by the tribe.

GLAZEBROOK J:
So no one owns it, is that the –

MR COLSON KC:
Yes.

25 **GLAZEBROOK J:**
The submission is that nobody has the beneficial interest?

MR COLSON KC:

Yes, and no one has to have –

GLAZEBROOK J:

Well who, what is the Trust for?

5 **MR COLSON KC:**

What's the purpose, a charitable trust, no one owns the beneficial interest is the point of my submission earlier.

GLAZEBROOK J:

So you say –

10 **MR COLSON KC:**

The beneficial interest doesn't have to be owned.

WILLIAMS J:

Don't you think Tūhoe individuals might have a problem with the idea that they don't own that estate?

15 **MR COLSON KC:**

No, they would have no problem with that, they don't own anything Sir. They might have a relationship with the land, owning an estate is something entirely different, and the other –

WINKELMANN CJ:

20 You mean the, just to clarify which is a very broad statement you just made, you mean they would have no problem with the notion that they don't own the fee simple estate?

MR COLSON KC:

Yes, or the beneficial estate.

WILLIAMS J:

They wouldn't have any notion of what a fee simple was, but the, why is it not as simple as Ngāi Tūhoe own the beneficial interest. The descendants to Tūhoe-pōtiki, or any other tribe, Porourangi, Kahungunu, doesn't matter, 5 because that's both consistent with tikanga and unlikely to disrupt English law concepts.

MR COLSON KC:

I'll come back to the latter Sir. But if, I suppose the starting point is despite this phrase being a very common English phrase, does it have a different meaning, 10 a quite different meaning.

WILLIAMS J:

Yes, I understand that point.

MR COLSON KC:

So that is a threshold question.

15 **WILLIAMS J:**

It's not really a quite different meaning because it's just whether English law can cope with the concept of a tribal beneficial ownership, and why shouldn't it.

MR COLSON KC:

There are, or the first, we're trying to ascertain the intention of the legislature 20 obviously. We have clear words here. The question is does tikanga, particular Tūhoetanga –

WILLIAMS J:

Is Tūhoe a group of Māori?

MR COLSON KC:

25 Yes.

WILLIAMS J:

There you go.

MR COLSON KC:

But that's not the entire definition of course Sir. It is, do they own an estate in fee simple.

1250

5 **WILLIAMS J:**

For a beneficial estate. That's for a beneficial estate.

MR COLSON KC:

Do they – yes, do –

WILLIAMS J:

10 Not "they". "It."

MR COLSON KC:

It own. But –

WILLIAMS J:

Yes. So can you just help me here because I'm –

15 **MR COLSON KC:**

Yes.

WILLIAMS J:

I'm pressing you because it's right at the centre of this case.

MR COLSON KC:

20 Sure.

WILLIAMS J:

What do we break if we read that as referring to a tribal beneficial interest?

MR COLSON KC:

If it is a tribal – the issue is it says owned in fee simple by a Māori or a group of persons, which means each of those individuals would have an interest in that estate.

5 **WILLIAMS J:**

No, that's the point I'm making to you. It doesn't need to mean that. If it means the tribe is the owner of the beneficial estate in fee simple, what do we break?

MR COLSON KC:

If I can ask you a question, respectfully –

10 **WILLIAMS J:**

Always.

MR COLSON KC:

– what do you mean by "the tribe" in that context? Do you mean the current people? Do you mean the future people? Do you mean all of those?

15 **WILLIAMS J:**

Well, what do we mean by "New Zealanders"?

MR COLSON KC:

Part of my concern here is the knock-on effects potentially for other property right issues.

20 **WINKELMANN CJ:**

Well, that's what Justice Williams is asking you.

WILLIAMS J:

Right, so, yes, that's what I'm trying to get you to – what are we breaking here?

MR COLSON KC:

25 So, for example, caveat. If you say that an individual Tūhoe member has a beneficial estate in fee simple –

WILLIAMS J:

I’m not saying that. That’s the point I’m trying to get to you. If we treat this as a tribal beneficial interest, does the system get turned on its head?

MR COLSON KC:

5 It still potentially does, Sir, because you’re –

WILLIAMS J:

Okay, now I need you to tell me why.

MR COLSON KC:

You will face arguments, for example, that a Tūhoe member may be able to
10 caveat land. You would face an argument that –

GLAZEBROOK J:

They may be able to what, sorry?

MR COLSON KC:

Sorry, may be able to caveat the land.

15 **WILLIAMS J:**

Why?

WINKELMANN CJ:

Just let him tell us.

MR COLSON KC:

20 Because they have an interest in the land. To similar effect charging orders –

GLAZEBROOK J:

They may be able to – sorry, I didn’t catch what you said. Can you just repeat it?

MR COLSON KC:

25 It’s at the classic –

GLAZEBROOK J:

Face arguments that an individual Tūhoe member may be able to what?

O'REGAN J:

Lodge a caveat.

5 **MR COLSON KC:**

Sustain a caveatable interest in the land, and I'll develop this a bit more.

WINKELMANN CJ:

Because they have an interest?

MR COLSON KC:

10 Because they have an interest. Because if you're a discretionary beneficiary you can't caveat. If you have a vested or actual interest you can. The next follow-on from that logically gets into things such as charging orders.

WILLIAMS J:

So there's just a short leap there. If the beneficial interest is in the tribe, you 15 then have to establish that any individual member therefore has a caveatable interest. It doesn't necessarily follow, does it?

MR COLSON KC:

That is assuming – by – sorry, again, I just want to clarify the argument being put to me. Starting with, Sir, it says "a group of persons", so it is a group of 20 individuals in terms of the language from the legislature, one builds up that group by looking at the individuals within it.

WILLIAMS J:

That's one way of doing it, of course.

MR COLSON KC:

25 But the entire group, and I know we're getting into obviously the nub of it here, is Tūhoe the iwi, is that an entity which can actually own anything as opposed

to a group of individuals each of whom have an interest in the corpus of the trust.

WILLIAMS J:
Isn't that the very collision between one form of law and another?

5 **MR COLSON KC:**
It is, Sir, but a difficulty for knock-on consequences of that is if an individual has an interest in the estate then that does have much broader consequences. I realise it's where we might depart in our analysis.

WILLIAMS J:
10 Well, I don't know. I'm – it may not appear that way but my mind is completely open on this. I just need to work out what the risks are one way or another and we need to engage fully in this because it's a very important case.

MR COLSON KC:
It is in issues I genuinely see in that regard and I appreciate as always in part
15 of the dialogue it can easily be said by the Court at times, oh, a judge wouldn't do that or someone wouldn't do that, but, of course, in real life it does happen.

WINKELMANN CJ:
But for your point about a caveatable interest, it'd have to be proprietary interest.

20 **WILLIAMS J:**
It could be an equitable interest.

MR COLSON KC:
No, a – well, it's an – the word used is the "estate".

WINKELMANN CJ:
25 No, for a caveatable interest.

WILLIAMS J:

An equitable interest is clearly –

MR COLSON KC:

It's not just a proprietary interest, your Honour.

5 **WINKELMANN CJ:**

So would it be a – would a discretionary beneficiary be –

MR COLSON KC:

A discretionary beneficiary cannot but a vested beneficiary or a beneficiary has greater right than vested can.

10 **WILLIAMS J:**

So the structure of this is that if there is a tribal title held by Tūhoe-potiki any individual member of the tribe still has a hope because the, as you say, the charitable approach which was reflected in the Māori community purposes provisions in the Act and has been operating for years under whenua tōpū does
15 not create an enforceable right in anyone who has received – a caveatable right in anyone who is receiving those benefits.

MR COLSON KC:

That's because the purpose is a general purpose as I understand it, Sir.

WILLIAMS J:

20 Exactly, just as the recitals and purpose provisions in your deed do.

MR COLSON KC:

Yes, and because they're general purposes then I don't know if – sorry, I'd have to look back at the section. I know it does talk about beneficial interests in the section, doesn't it?

25 **WILLIAMS J:**

Which section is that?

MR COLSON KC:

Sorry, the whenua tōpū section.

WILLIAMS J:

Yes, but what it does is freeze the beneficial interests and render them 5 unenforceable and unusable while the Trust exists.

GLAZEBROOK J:

Which actually is probably the case with most of the trusts that are subject to perpetuities with final beneficiaries because they may well be final beneficiaries but they're not actually ascertainable for an awfully long time.

10 **MR COLSON KC:**

Yes, but charitable trusts being the typical one don't have –

GLAZEBROOK J:

No, no, I'm not talking about charitable trusts because one of the issues with what is said, I think, by the Court of Appeal is that it throws under the bus 15 anything that isn't a discretionary trust, and when I say "throws under the bus" puts subject to what you say are unreasonable powers of the Māori Land Court, and if there was a perpetuity period in this that said at whatever time in the future it's just distributed to every member of the iwi who's living at that time then there's a different basis even if the perpetuity period is unbelievably far 20 into the future.

MR COLSON KC:

Yes, I accept that. Of course I accept that.

WILLIAMS J:

So you see if the vesting is in the tribe of the beneficial interest, in fact there are 25 provisions in here in which the vesting can be in the name of a tupuna –

MR COLSON KC:

Yes, and we've done that before.

WILLIAMS J:

– and no successions beyond that. So this is a very close analogue.

MR COLSON KC:

It is a close –

5 **WILLIAMS J:**

It needn't follow that, at all, that the rule about discretionary interests and mere hopes would be broken.

MR COLSON KC:

Yes, I'm just thinking that through a bit, Sir. I suppose my starting point would
10 be that if the – and I'll think about it more over the lunch break – but if the legis –

WILLIAMS J:

You want to take an Arapere break, do you?

MR COLSON KC:

No. It might feel like I was conceding something, Sir.

15 **WILLIAMS J:**

No, no, I was just cracking a bad joke at the expense of Ms Arapere.

WINKELMANN CJ:

And that was unfair too. We're not going to have a new expression in the Supreme Court, an Arapere break.

20 **MR COLSON KC:**

But actually realistically that may be a good time to pause before –

WINKELMANN CJ:

Well, let's take the adjournment.

COURT ADJOURNS: 12.57 PM

COURT RESUMES: 2.18 PM

MR COLSON KC:
To come back to effectively the rhetorical question posed by your Honour Justice Williams prior to the break, if I can summarise it in this way. What is the
5 issue, or what is wrong with interpreting the words "a group of person of whom a majority are Māori" to be Tūhoe as an iwi, but I'm sorry Sir if I haven't quite phrased that right. The issues I see with that are the following. The starting point being, of course, we are seeking to ascertain Parliament's intention here.

WINKELMANN CJ:
10 Well, we're not. For the purpose of the legislation, we're actually seeking to ascertain the purpose of the legislation.

MR COLSON KC:
In light of the, yes. So if we look at the words "a group of persons of whom a majority are Māori" I suppose there are two potential competing interpretations
15 of that. One would be that you look at each of the individuals, you determine that they own, and then you determine whether or not they're Māori. The other is the more general there are, in effect, is owned by a group of persons of whom a majority are Māori because it is Tūhoe.
1420
20
An issue with that is the word "owned" of course because it's used throughout the Act in what seems to me to be a traditional form of the work ownership. Tūhoe isn't a legal entity. It can't own anything under traditional Western law, and so if there were a choice to be made as to which of those two interpretations
25 was correct, or more likely, in my submission it would be the former, that is you look at each of the persons as to whether they own and then aggregate them to look at the outcomes. So the focus is on each of the persons in terms of ownership otherwise you would be saying Parliament here, the purpose of this is that a group of, a group which actually can't own anything does own
30 something, and that's my first point in relation to that.

WILLIAMS J:
What about the ability to vest in an ancestor.

MR COLSON KC:
Yes, that's –

5 **WILLIAMS J:**
I mean effectively the same thing, or are you going to pick that up?

MR COLSON KC:
Well it is a specific section which specifically refers first to vesting in obviously in a tīpuna, but I suppose – so obviously within the confines of this Act there is
10 an example where Parliament provides that power to the Māori Land Court without doubt, but in my submission that doesn't detract from the first point I made as to the more likely intention of ownership, and obviously within that section, it might be a semantic point, or a small point, it talks about vesting not ownership, but I appreciate you can make the same point because ultimately
15 you end up with it, but the question is interpreting this provision which is the more likely outcome in my submission I appreciate that the tīpuna example is an example of where Parliament does conceive of something traditionally, or someone traditionally who would not be a legal entity able to own property owning property of course I accept that –

20 **WILLIAMS J:**
And the whenua tōpū approach, which is clearly the beneficial interest can be vested in a hapū or an iwi, it says so.

MR COLSON KC:
Yes, for specific purposes as it is here.

25 **WILLIAMS J:**
Well for Māori community purposes which is essentially what's in your deed really.

MR COLSON KC:
No I accept that those points are consistent with it, but in my submission –

WILLIAMS J:
Not enough?

5 **MR COLSON KC:**
Not enough, yes.

WILLIAMS J:
Okay.

MR COLSON KC:
10 I would seek to reinforce that by the general context and purpose of the Act, which I've addressed in my submissions, but obviously there's no need to go through section 2 et cetera again, but it has a very clear purpose, which is to ensure that those small amounts of traditional yet fragmented landholdings that have managed to remain in Māori hands continue to remain in Māori hands.
15 Now that purpose is shown not only by section 2, but by section 17 as well, and in the context and purpose of the Act taken together, in my submission, don't particularly favour an interpretation that would see general land owned by Māori extending to an entire iwi and bringing it's PSGE within the purview of the Act.

20 This is perhaps a point that also arises more in relation to constituted, and respect to, and in respect of, but if one assumes, say, a charitable trust that owned one piece of general land, but the purposes were to advance the education of, say, Māori teenagers, then that would also fall within the Act, and moreover you would have –

25 **GLAZEBROOK J:**
Why would that fall within the Act?

MR COLSON KC:

Because you would have general land owned by a group of persons of whom a majority are Māori, if the beneficial estate meant the class of individuals within the purposes of the Trust.

5 **GLAZEBROOK J:**

But you agree –

WINKELMANN CJ:

That's not a discretionary trust then. You're saying if it's not a discretionary trust –

10 **MR COLSON KC:**

No, if it is a discretionary trust, just as this is a discretionary trust. That would be the logical consequence of your finding. Sorry, I didn't explain that.

WINKELMANN CJ:

Okay, understand now.

15 **MR COLSON KC:**

I apologise for that. So again potentially expand the scope of the jurisdiction to areas where it might not seem, again, any reason to be engaged.

WILLIAMS J:

I mean I think that point's very well made. The problem is it's laundered out the 20 really key component here, which is kinship.

MR COLSON KC:

Yes.

WILLIAMS J:

That's the thing that is common between this and all kin-owned assets, if you 25 like, and that charity, I presume, is not intended to be a charity in respect of kin-owned assets.

MR COLSON KC:

Exactly that generally Māoridom I, on my example, that's correct Sir.

WILLIAMS J:

Yes.

5 **MR COLSON KC:**

But then of course that would potentially lead to a further interpretation as to group of persons, where that means connected by kin.

WILLIAMS J:

That's true, yes. It would have to mean that or it wouldn't really make any
10 sense.

MR COLSON KC:

No.

WILLIAMS J:

And you'd have to come to that by reference to section 2 and section 17 and so
15 on.

MR COLSON KC:

In some of the jurisdictional sections as well, the jurisdictional sections.

WILLIAMS J:

Yes.

20 **WINKELMANN CJ:**

Wouldn't the Act currently apply in any case if the interest was vested to that trust of land set up for Māori teenage boys?

WILLIAMS J:

I don't think it was sexist. I think it was Māori teenagers.

WINKELMANN CJ:

Was it? Okay. Māori teenagers?

MR COLSON KC:

The land isn't, it's, the issue I suppose with respect with the word "vested" it's
5 obviously held by the trustees for the purposes of the objects of the Trust, just as it is held here by the trustees for the purposes of the object of the Trust.

WINKELMANN CJ:

I don't know if you're answering my question, because the reasoning of the Court of Appeal turns on the fact that it's a discretionary trust.

10 **MR COLSON KC:**

Yes.

WINKELMANN CJ:

If it's not a discretionary trust then that hypothetical would fall within section 236.

WILLIAMS J:

15 You mean if it's for the following teenagers?

WINKELMANN CJ:

No.

WILLIAMS J:

Every Māori teenager in New Zealand?

20 **WINKELMANN CJ:**

It would be a group of Māori, wouldn't it, or a group.

MR COLSON KC:

On the Court of Appeal's reasoning neither would fall within the purview of the Act as neither would be vested, they're both discretionary trusts.
25 A charitable trust which had as its objects the advancement of Māori of school age, for example. It's not vested in –

WINKELMANN CJ:

I suppose, I'm talking about a certain, if all of them are ascertained and they have particular interests in this thing then it would fall within that.

GLAZEBROOK J:

5 What's the logic in that distinction though, especially with those trusts that have a perpetuity period and way in the future have some possible vesting?

MR COLSON KC:

I think from memory a charitable trust doesn't necessarily –

GLAZEBROOK J:

10 I'm not talking about a charitable trust.

MR COLSON KC:

Sorry, I was just trying to give an example of where the consequences of that –

GLAZEBROOK J:

No, I understand that, and I understand that you've got the charitable trust that's 15 discretionary there, I'm just asking a more general question. You make a distinction between, and that's the logic of the Court of Appeal judgment, there's a distinction between discretionary trusts without a perpetuity period, which are very much an odd category, and other trusts that might be discretionary but have final beneficiaries. What's the logic of the distinction between having 20 jurisdictions in the Māori Land Court for those but not for others?

MR COLSON KC:

I suppose the logicalness is in a reverse way, is that when you look at – I mean to be honest there is no clear logic in terms of the statute, because I don't think any of this was envisaged, but I suppose the logic I would say that results from 25 that is where you have an entity in perpetuity here, which effectively is the embodiment of Tūhoe, it's consistent with that, that no one should have an ownership interest in the beneficial estate. No individual.

O'REGAN J:
Is your client trust charitable?

MR COLSON KC:
No it's not. No, I'm just using it as – it's obviously –

5 **WINKELMANN CJ:**
But your examples all point to the fact that this interpretation would have a logical, would give section 236 a logical application but my point to you is that section 236 even on your interpretation has sometimes a logical application?

MR COLSON KC:
10 Yes, I accept that, yes I do.

WILLIAMS J:
It's the problem of the poor fit.

MR COLSON KC:
Yes, it is, but I suppose it comes as to how far you do shoehorn or seek to fit it
15 because…

WILLIAMS J:
Correct, how hard do you try.

MR COLSON KC:
How hard do you try and how – sorry I won't use a pejorative word, but if you're
20 working hard on words like "owner" "estate" and then "group" means kinship group, that's starting to do, read quite a lot into the wording, which might or may not be justified. It's for you to decide.

WINKELMANN CJ:
Well, I mean on your submission it's hard work and on Mr Smith's submission
25 it's not.

MR COLSON KC:
Yes.

WILLIAMS J:
It's worker day.

5 **GLAZEBROOK J:**
Yes, but it would include, if you're really looking at it, a trust, a young disabled but perfectly – well a young disabled Māori child, that would be under the Act?

WINKELMANN CJ:
Yes, if it was land.

10 **MR COLSON KC:**
Yes, if it was land.

WINKELMANN CJ:
Standard general land.
1430

15 **MR COLSON KC:**
If land alone, yes.

GLAZEBROOK J:
And I'm just asking why would that be under the Act and not something that it is quintessentially effectively a tikanga-based interest.

20 **MR COLSON KC:**
Yes, and I suppose, in my submission, neither should come within the Act. In fact the –

GLAZEBROOK J:
Well, that might be but how do we get it out if we're relying on ownership as
25 being the issue?

MR COLSON KC:

Yes, well, you would get that one out by looking at the purpose of the Act. As I would say, we're out here as well because the purpose of the Act you described is to care for the young Māori disabled child. It's not to hold the land, just as
5 the purpose of the Act, the statute here is, sorry, the Trust here is to care for Tūhoe, not to hold the land per se.

WILLIAMS J:

You could say that section 2(2) is so freighted full of kinship and taonga tuku iho that it's aimed at traditional, beneficial interests held by traditional Māori kin
10 groupings.

MR COLSON KC:

Yes, but section 2, from memory, only refers to Māori land, not general land owned by Māori. I appreciate it's another distinction.

WINKELMANN CJ:

15 Section – you're saying section 22?

MR COLSON KC:

Sorry, did you say section 2? I'm sorry, I missed –

WINKELMANN CJ:

Section 2(2) or section 22 or…

20 **WILLIAMS J:**

Yes, it does say "Māori land", you're right, "control of Māori land as taonga tuku iho", but there's a –

MR COLSON KC:

Yes, which is the real focus of the Act, obviously, in my submission.

WILLIAMS J:

Yes, and general land owned by Māori as originally, as you say in your submissions, as originally conceived was that hybrid category, to use a more modern term, that shouldn't have been not Māori land but…

5 **MR COLSON KC:**

Became Māori land under – as a result of the –

WILLIAMS J:

Yes, became general land, yes.

MR COLSON KC:

10 General land as a result of the 1967 Act and now – yes.

WILLIAMS J:

But we can agree there was no treaty settlement process.

MR COLSON KC:

We can agree that.

15 **WILLIAMS J:**

At the time. So we're going to have to see what the statute does on its wording with an animal that didn't exist.

MR COLSON KC:

That's true, which comes on to the next issue in many ways, if I can move on
20 to that, "constituted in respect of", and I'll perhaps spend a little more time on this than my learned friend, Mr Smith, but in some ways there's only so much one can say in respect of analysing these words. I appreciate the Courts below have not overly liked my summation in terms of "primary purpose" or "raison d'être" but…

25 **WINKELMANN CJ:**

Well, it's reading a lot in, isn't it?

MR COLSON KC:

It is, but – to start with the wording it doesn't –

WINKELMANN CJ:

And French words are not a good starting point.

5 **WILLIAMS J:**

Try some Latin, Mr Colson.

MR COLSON KC:

It's my whakapapa so… But as the Court of Appeal said, it doesn't say "held" the Trust which holds land, so it has to be "constituted in respect of". When one
10 comes back again to section 2, and even to some extent section 17, obviously the preamble, and reads the Act in its entirety it's clear that there is a huge focus on land, to make an understatement. It is all about land.

In contrast, obviously holding land is part of the purposes of the Trust and
15 almost part of the purposes of almost any settlement trust, but it also has a huge range of other purposes, effectively being the Western face of Tūhoe through ownership and governance as we've discussed and the purposes of the Trust are much, much wider than simply holding land, and compared to the context and purpose of this land-focused statute, in my submission those words
20 "constituted in respect of" ought not to apply to this Trust largely for the reasons set out in my submissions and through a close examination of the Trust deed.

GLAZEBROOK J:

We're slightly hampered by not knowing what actually this Trust does hold.

MR COLSON KC:

25 Yes.

GLAZEBROOK J:

So it's a fine submission except if we don't know what is actually in the Trust it becomes quite a difficult submission for you, doesn't it?

MR COLSON KC:

Yes, well, the onus isn't on me, obviously; it's on the applicant, to introduce evidence of that because the applicant is saying this is why we're within the jurisdiction of the Māori Land Court.

5 **WINKELMANN CJ:**

Well, don't you have the information though?

MR COLSON KC:

Yes, we do have the information. We'd happily provide the information. But part of the focus, and I think it's clear from the deed of settlement and – my
10 reading of it all being that you create, you focus on the creation of the Trust and the purpose at that time.

WINKELMANN CJ:

I was going to say so what's the timing and focus?

MR COLSON KC:

15 Well, we know when the Trust was created and I'm not taking a timing issue on that at all actually and nor was the Court of Appeal in my submission, I don't think it was properly read, it's, was taking a timing issue at all. We know it's against the backdrop of the Settlement Act and we've got the deed of settlement and we know the assets that were transferred at that time. Now if your Honours
20 would be assisted by a full account of the assets that are held at the Trust as of now then obviously we can put that in, but all the information, in my submission, that you require is already before the Court.

WILLIAMS J:

So certainly we're agreed, aren't we, that this Trust owns general land?

25 **MR COLSON KC:**

Yes, absolutely.

WILLIAMS J:

And that its intention on inception was to do that?

MR COLSON KC:

It was an intention.

5 **WILLIAMS J:**

Yes.

MR COLSON KC:

Yes, it was –

WILLIAMS J:

10 So that takes us back to the primary though, doesn't it?

MR COLSON KC:

Yes, it does, in my submission.

WILLIAMS J:

Because clearly one of its intentions was precisely to hold general land.

15 **MR COLSON KC:**

Yes, or coming – it comes back to the wording of the statute obviously but yes, exactly.

WILLIAMS J:

In "constituted in respect of".

20 **MR COLSON KC:**

Whether it was created for the purpose of, and in my submission it's not if it's created for a whole range of purposes and varying material purposes, only one of which is to hold land.

WINKELMANN CJ:

And on what basis can you justify selecting out of a realm of possible thresholds "primary" or "principal"? Why not "not insignificant" or "material" or…

MR COLSON KC:

5 Yes, I mean I suppose I'd put it this way. Every trust "constituted in respect of", in my submission, means more, means, well, I come back to "primary" or something. It doesn't say "held land" so we know it's got to be a lot more than just holding land, and why was this Trust constituted? It was to receive settlement assets which are mainly cash and to be the –

10 **WINKELMANN CJ:**

Yes, so that might suggest that it's not an ancillary function of the Trust, so it's not something, just a subsidiary thing to achieve the main purpose, but you couldn't say that here, could you? So if it has a main purpose which is running some enormous business and the ancillary thing is owning a small plot of land 15 somewhere, that might be your scenario but that's not a primary purpose threshold; that's just that it is a purpose of it.

MR COLSON KC:

It is undoubtedly a purpose to hold the land but it says "constituted in respect of" which, on my reading of it, seems to mean a dominant purpose or a primary 20 purpose, and I know we could go round and round in circles and I can, of course, see the arguments either way, but "constituted in respect of" indicates that is the reason it was constituted.

WILLIAMS J:

You're not going to say "raison d'être"?

25 **MR COLSON KC:**

No, I'm not. That's banned, I think.

WINKELMANN CJ:

Okay, I think we've probably exhausted that one.

MR COLSON KC:

I think we've probably exhausted that one. Now the next two topics my learned junior is going to deal with.

WINKELMANN CJ:

5 And those topics are?

MR COLSON KC:

Those topics are, he says, because I'm not dealing with them I've forgotten what they are. They are the effect of whether it be consistent or not against, across PSGEs, and then Treaty principles to the extent that the Act needs to 10 be given a Treaty-compliant interpretation. But unless you have any other questions, those are my…

WILLIAMS J:

Just one. You talked about a slow-moving disputes process?

MR COLSON KC:

15 Yes.

WILLIAMS J:

What was that about?

MR COLSON KC:

The very underlying dispute which gave rise to this litigation in the first place 20 relates to the meaning of "hapū trust" and the Trust deed and –

WILLIAMS J:

Whether it's a marae committee or…

MR COLSON KC:

Whether it's a marae committee or whether it's the trustee owners. We were 25 going to have another – we had another hearing or started a hearing on that early last year. Time flies.

WILLIAMS J:

Hearing? What do you mean?

MR COLSON KC:

Another hearing in the Māori Land Court on it for which we eventually were
5 stayed and the dispute resolution process and the Trust deed was engaged instead. We've had a long attempt to – we agreed a mediator. The mediator wasn't prepared to do it. We've agreed another one, but we are working through that process still. We have agreed someone but it's been slow.

WILLIAMS J:

10 So you may be able to tell us you don't need an answer?

MR COLSON KC:

I would never do that, Sir. No, the – that doesn't, regardless of the jurisdictional issue – sorry, there will always remain this point, I think, because, for example, if the dispute resolution process failed at mediation and went on to a decision
15 by, I think it's kaumātua, it's certainly three people appointed, that might have an outcome. There might be then a legal issue as to well, can you go further and if you go further which Court do you go further on? But this specific issue is the subject of a dispute resolution process, the committee versus trustee issue. Does that answer your question?

20 1440

WILLIAMS J:

Well, yes, it does, but we're not big fans of advisory opinions.

MR COLSON KC:

No, but I don't – even, as I say, your Honour even if that resulted in a positive
25 outcome for the actual application – sorry – if there was a resolution, obviously, would your opinion be advisory? Well, there's other reasons why the Court may want to give a judgment on this in any event, Sir.

WILLIAMS J:

Well, the trustees could apply for a declaration but it kind of changes the complexion if there's actually no longer a dispute.

MR COLSON KC:

5 Yes.

WILLIAMS J:

This is not a straightforward question, that's all.

MR COLSON KC:

No, it's not a straightforward –

10 **WILLIAMS J:**

And it's better to deal with it against facts.

MR COLSON KC:

Yes, I accept that.

WILLIAMS J:

15 Okay.

MR COLSON KC:

Thank you, your Honours.

WINKELMANN CJ:

Thank you.

20 **MS VAN ALPHEN FYFE:**

Tēnā koutou. As my learned senior has said, I am going to be dealing with the history of post-settlement entities and the fact that they don't support a uniform approach to trusts being subject to the Māori Land Court jurisdiction, and then the second point being the Tiriti principles and particularly tino rangatiratanga

25 and partnership and that they support –

GLAZEBROOK J:

Can you please just bring the microphone down slightly? It's not picking you up that well.

MS VAN ALPHEN FYFE:

5 The second point I'm going to talk about is the Tiriti principles and in particular tino rangatiratanga and partnership and how they support the respondent's position that Te Uru Taumatua is properly characterised as constituted in respect of a constitutional compact between te Karauna and Tūhoe for breaches of Te Tiriti.

10

So turning to that first point, in summary, the respondent says it's not the case that there is a uniformity across all settlements that would fall easily within the Māori Land Court jurisdiction. A more careful assessment of the scheme of Te Tiriti settlements is required and a more nuanced assessment of the specific 15 settlement in this case as well and even under modern settlement policy there are a range of circumstances that indicate that there's no general jurisdiction that is workable or even intended across all of the settlement entities. More recent settlements post-*Moke* in 2019 indicate that where settling groups are aware of the potential for Māori Land Court jurisdiction it's typically 20 expressly ousted.

So, as I say, there is a range of post-settlement entities and that the express clarifications that have been made in some of those entities in respect of the application of the Act don't support the appellant's contended jurisdiction and –

25 **WINKELMANN CJ:**

When it's expressly ousted that's by statute, is it?

MS VAN ALPHEN FYFE:

Yes, yes. So I'll come to a number of examples that later settlements have expressly ousted the Māori Land Court jurisdiction following that Māori 30 Appellate Court decision in *Moke*.

The first point I'd like to make is that – which I think has been suggested already – is that the modern settlement policy that we have has not always been the case. It wasn't the case in 1993 when Te Ture Whenua Māori was enacted. We have a number of settlements that were much smaller kind of parcels of
5 land. We had the Ōrākei Act in 1991 which was a small parcel at Takaparawhau which is the Bastion Point for Ngāti Whātua Ōrākei and that wasn't under a trust model. It was under the Māori Trust Board at the time and as such not necessarily subject to Māori Land Court oversight specifically under section 236. I mean obviously it was a couple of years before Te Ture Whenua
10 Māori but when that came into being it wasn't under that provision either, rather it was subject to the Māori Affairs Act which meant it was in the oversight of the Minister rather than the Māori Land Court, although the Māori Land Court obviously had jurisdiction over the Māori freehold land components of that particular settlement.
15
Now that settlement became part of the larger settlement in 2012 for Ngāti Whātua Ōrākei and then became subsumed into their trust model, so on the appellant's case would be subject to 236 but wasn't for a period of years and on the respondent's case would still not be subject to 236.
20
Then we have the example of the land returned at Waitomo in 1990 as well and that was under a trust set up by the Māori Land Court at the time under section, then section 438 of the Māori Affairs Act and because that was set up by the Māori Land Court it obviously had jurisdiction over it when Te Ture Whenua
25 Māori came into being. It is important, in my submission, that there is a specific carve-out for that particular Trust. So the Māori Land Court has the jurisdiction generally to terminate trusts but there's a specific carve-out for that particular Trust, the Ruapuha Uekaha Hapū Trust. In section 351(3) it says that the Māori Land Court can't terminate that particular Trust so –

30 **WINKELMANN CJ:**
So what is your submission based on all these individual cases?

MS VAN ALPHEN FYFE:
It's that there is a – there's no uniform approach. There is no particular desire, uniform desire, to be subject to Māori Land Court jurisdiction and even –

WINKELMANN CJ:
5 On the part of the parties?

WILLIAMS J:
That's clear.

MS VAN ALPHEN FYFE:
Indeed, and even if there is a Māori Land Court jurisdiction in these 10 circumstances it's not going to apply to every single settlement.

WILLIAMS J:
It will apply to most though.

MS VAN ALPHEN FYFE:
It will apply to most but there are going to be very significant exceptions and I'll 15 come to those now. Firstly, it's the Waikato Raupatu Claims Settlement Act, so that specifically carved out their landholding Act by saying that it would no longer be subject to Māori Land Court jurisdiction.

GLAZEBROOK J:
Is that rather against you to suggest that otherwise it would be?

20 **MS VAN ALPHEN FYFE:**
No. I did anticipate that might be a suggestion and the reason I say no is because it was – that particular parcel of land was originally in a temporary Māori Land Court Trust and was subject to the Māori Land Court jurisdiction but when it was moved into the Waikato Raupatu Claims Settlement Act, which 25 happened a couple of years later, it was expressly carved out to clarify the position that it was no longer going to be, so it's the particular complexity of that

case that required a clarification in the Act rather than a default jurisdiction in any event.

WILLIAMS J:

What land was that? Was that the Hopuhopu site?

5 **MS VAN ALPHEN FYFE:**

I actually can't remember off the top of my head, your Honour.

WILLIAMS J:

Because there was land transferred on account, as I recall it. It was that land, was it?

10 **MS VAN ALPHEN FYFE:**

Yes, and it was – it was that land and it was during a period when they were trying to sort out exactly what their settlement entity would like at the time. They didn't have it in place and the land was held by the Tainui Trust Board for a couple of years before the settlement entity was established.

15 **GLAZEBROOK J:**

I'm just not sure where you get by saying, well, some Acts for particular reasons – I mean this makes it worse – for particular reasons related to particular settlements have excluded the jurisdiction. To say that means that there shouldn't be the jurisdiction which only applies if you're going to look at trusts
20 without a perpetuity period and discretionary trusts and still – coming back to the point – still leaves every other single trust subject to the Māori Land Court jurisdiction in circumstances where there is absolutely no logical reason for that to be the case.

MS VAN ALPHEN FYFE:

25 The submission is not so much that this is the exact answer but it's just trying to illustrate that there is complexity here that we need to be quite careful about, and the next point that I was going to make, your Honour, is from that time of the Waikato Raupatu Claims Settlement Act, which I think was '95, until 2012

there was no mention of the Māori Land Court jurisdiction, so there was an assumption, in my submission, that it didn't apply. It just wasn't addressed by any further settlements until 2012 and that was – the 2012 Settlement Act was Maraeroa in respect of two specific blocks and that Act specifically gave the
5 Māori Land Court –

WINKELMANN CJ:

What's your evidence that there was an assumption it didn't apply as opposed to just didn't deal with the issue?

MS VAN ALPHEN FYFE:

10 It just didn't deal with the issue, but I'll come to later why I say it was – why this should be interpreted as an assumption that it didn't apply.

WILLIAMS J:

What year, sorry?

MS VAN ALPHEN FYFE:

15 Sorry, the 2012 Maraeroa Settlement legislation. It's the A and B Blocks Claims Settlement Act 2012, and that Act established a trust. It's sort of a very typical trust entity as we have become accustomed to and that Act specifically enabled the Māori Land Court jurisdiction, gave it the same jurisdiction as the High Court, effectively replicating what is section 237 in Te Ture Whenua Māori in
20 the Act, and it's section 79(1).

GLAZEBROOK J:

And was that a discretionary trust with no perpetuity period?

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MS VAN ALPHEN FYFE:

25 As I understand it, yes.

WINKELMANN CJ:

Well, it wasn't giving the Court jurisdiction, wasn't it? It can't create jurisdiction.

MS VAN ALPHEN FYFE:

It said it granted the Māori Land Court all the powers of the High Court in respect of the Trust that was established in respect of those blocks.

WINKELMANN CJ:

5 It's an interesting idea.

MS VAN ALPHEN FYFE:

And so in my submission the inference we can make there is that that wouldn't have been necessary.

WINKELMANN CJ:

10 So the Act did, not the Trust entity?

MS VAN ALPHEN FYFE:

Sorry, yes, yes. My point there is that the inference that can be drawn from that is that there wouldn't be a need to enable the jurisdiction of the Māori Land Court if it was simply there and expected by 236.

15 **WINKELMANN CJ:**

Although they were giving them an extended jurisdiction?

MS VAN ALPHEN FYFE:

No, it's replicating section 237 of Te Ture Whenua Māori.

WINKELMANN CJ:

20 I thought you said they gave them all the powers of the High Court.

WILLIAMS J:

This was what it does.

MS VAN ALPHEN FYFE:

Which is what they have under section 237 of Te Ture Whenua Māori.

WINKELMANN CJ:
So that was an irrelevant point, okay.

MS VAN ALPHEN FYFE:
And the next point that I'll make that follows on from that is that once *Moke* was
5 decided in 2019 we have a series of settlements that expressly exclude this jurisdiction and that, in my submission, shows a desire not to have this jurisdiction, that settlement entities, when considering their partnership and tino rangatira principles in this Treaty settlement space, are choosing not to have this jurisdiction and the examples that are in the submissions at paragraph 82
10 and onwards are the Maniapoto Claims Settlement Act in 2022. The Whakatōhea Claims Settlement Bill also is to the same effect. It says it must not be treated as constituted in respect of any general land owned by Māori for the purposes of section 236, and the final example that we have there is the Taranaki Maunga Collective Redress Deed of Settlement which also says
15 a similar thing, that the settlement entity is not a trust for the purpose of 236(1)(b) or (c).

WILLIAMS J:
The problem with these is they cut both ways, don't they?

MS VAN ALPHEN FYFE:
20 They do but in my submission it shows a desire not to be subject to the Māori Land Court jurisdiction and it feeds into my next point which is that –

WILLIAMS J:
Well, in those cases anyway.

MS VAN ALPHEN FYFE:
25 Indeed, but we actually do set out at footnote 77 some of the settling groups that are post-*Moke* that haven't excluded Māori Land Court jurisdiction but –

WINKELMANN CJ:

I mean it doesn't tell us much because we can't pay attention to what Parliament thinks about the Act because that's for us, so what does it tell us apart from the fact that some iwi do not want the Act to have jurisdiction, the Court to have
5 jurisdiction?

MS VAN ALPHEN FYFE:

It will feed into my next point, your Honour, which is that had Tūhoe been aware that this was going to be the case it would have chosen otherwise in its settlement, in its settlement processes.

10 **WINKELMANN CJ:**

Well, who says?

GLAZEBROOK J:

Well, I don't think we can infer that from anything, can we?

MS VAN ALPHEN FYFE:

15 The next point I'm going to make, your Honour, is that the primary purposes of that settlement were both tied to Te Urewera, the land that is Te Urewera which became part of a separate piece of legislation, and the second one is mana motuhake o Tūhoe and I'll take you to some documents that show why that was a principal part of the settlement and why I say in my submission that it's
20 incompatible with mana motuhake o Tūhoe and the principles of tino rangatiratanga and partnership to impose that jurisdiction through an interpretive lens when –

WINKELMANN CJ:

Well, I mean because the High Court has jurisdiction, so why is it inconsistent
25 with those principles for the Māori Land Court to have jurisdiction?

MS VAN ALPHEN FYFE:

Because, your Honour, sorry, Chief Justice, the High Court obviously has inherent jurisdiction. It is accepted it can't be ousted in that respect, but Tūhoe's

settlement says that it wants to enable mana motuhake as much as reasonably possible and in my submission obviously had this prospect been allied at the time it would have been dealt with in a different way.

WINKELMANN CJ:
5 Well, that's speculative really, isn't it? We don't have evidence, do we?

MS VAN ALPHEN FYFE:
We don't have evidence but we do have the Trust deed and we have the Crown apology and we have various aspects of the historical record that show the insistence of Tūhoe on mana motuhake o Tūhoe throughout the colonial period
10 and continuing into the deed of settlement and the legislation, and it ties into my response to my learned friend where he made the point about the Bill of Rights Act and the ability to express your culture and in my submission the response to that is that it requires a free prior and informed consent in terms of the partnership model between Crown and Tūhoe to have that jurisdiction
15 imposed without it being agreed to.

WINKELMANN CJ:
Well, it's not a consent jurisdiction. It's a statutory jurisdiction.

MS VAN ALPHEN FYFE:
In my submission it's an interpretation of whether this particular Trust
20 established and the deed and the settlement legislation intended for this jurisdiction to extend to it and that it was constituted in respect of general land owned by Māori rather than being "constituted in respect of".

WINKELMANN CJ:
Well, again, I think it's speculative. I don't know you can take this submission
25 too far.

WILLIAMS J:

Well, there is I think a certain irony in an active choice to reject a judge required by statute to be knowledgeable and experienced about tikanga in favour of a judge who has no such requirement. I mean is it…

5 **MS VAN ALPHEN FYFE:**

The point is not that Tūhoe would favour a judge that has no requirement of that kind of knowledge. The point is that Tūhoe wants to have autonomy and have fewer Crown incursions into its area of autonomy and part of that is ensuring that the deed is the way that the internal disputes will be resolved rather than
10 the Māori Land Court.

GLAZEBROOK J:

Well, we're making a whole lot of assumptions here about what the Māori Land Court will do compared to the High Court, because both the Māori Land Court and the High Court will be enforcing the trust deed. That's the whole point about
15 having a supervisory jurisdiction and certainly the High Court and I would have thought the Māori Land Court will only intervene if there are things that are happening that are not in accordance with the Trust deed, and they should be able to intervene in those circumstances because autonomy does not mean autonomy to break the law or to break the terms of the trust.

20 **MS VAN ALPHEN FYFE:**

No, and of course that's not the submission, your Honour.

GLAZEBROOK J:

No, I understand that's not the submission but there's an assumption –

MS VAN ALPHEN FYFE:

25 No.

WINKELMANN CJ:

I'm not sure we're just not wasting time because you can't really take it any further. In your submission it's more consistent with mana motuhake just to

have the jurisdiction of the High Court than to have the jurisdiction of the High Court and the Māori Land Court and that's really all your submission is, isn't it?

MS VAN ALPHEN FYFE:

5 Well, the submission is more that the process by which interpretation can take place is informed by Te Tiriti principles. It's informed by the way – the actual settlement itself and the legislation that enacted it.

WINKELMANN CJ:

No, legislation – interpretation of the legislation is not informed by a settlement.
10 It's not ambulatory to that extent.

MS VAN ALPHEN FYFE:

It is – sorry, not the interpretations of the Act but whether it is constituted in respect of general land owned by Māori.

WINKELMANN CJ:

15 Okay, right, I think we've got your submission.

MS VAN ALPHEN FYFE:

Thank you, your Honour. I'll move on now to the Treaty analysis and just make some very brief points about that.

20 Obviously, Te Tiriti and its principles are relevant. My friend has dwelt largely on active protection and also rangatiratanga, but, in my submission, there's an element of rangatiratanga that hasn't been addressed here and that active protection ought to be trained on or targeted on enabling tino rangatiratanga rather than active protection through a kāwanatanga, an institution which is the
25 Māori Land Court, and the first point I'd like to make in support of that is that the preamble principles that are often emphasised in the Māori Land Court space are the taonga tuku iho and retaining that land for iwi, hapū and whānau and facilitating the occupation and use of that taonga. However, the principles that we would wish to emphasise are the two that run before it and they're often

sort of assumed in the grand scheme of things, but they are that the special relationship created by Te Tiriti o Waitangi is relevant and that the reaffirmation of the wairua of Te Tiriti, the protection of tino rangatiratanga in exchange for kāwanatanga, is part of those principles. So it's those two particular aspects
5 that we think are important, we say are important, in assessing whether or not this is "constituted in respect of" general land owned by Māori. As I said, these are often taken as read but they're significant in this instance.

How far should the kāwanatanga jurisdiction extend? How best do we give
10 effect to the kāwana jurisdiction to protect rangatiratanga for post-settlement governance entities, particularly where that settlement entity is predicated on mana motuhake o Tūhoe?

WINKELMANN CJ:

And you could say that allowing, well, it would be said against you by Mr Smith,
15 that allowing the Māori Land Court to exercise jurisdiction with its wealth of knowledge of tikanga is more consistent with those principles you've just emphasised than allowing, than saying no, it's no business of Māori Land Court, it's just for the High Court which doesn't have that depth of experience and breadth of experience in tikanga.
20 1500

MS VAN ALPHEN FYFE:

The response to that is that it's not a competition between the High Court and the Māori Land Court. It's actually a competition between, or a tension between holding that mana within Tūhoe to make those decisions around the disputes
25 and retain that authority within its own sphere, and obviously it hasn't ousted and can't oust the High Court jurisdiction but it sees itself as constituted in respect of its own authority, its independent authority, and that the Māori Land Court authority is not consistent with that.

WINKELMANN CJ:

30 But, of course, it cannot have exclusive – it's not above the law, so your response to the point that the High Court will be still acting to hold it to the law,

you would say the High Court can do so but based on Mr Colson's analysis the Māori Land Court has more intrusive powers and therefore that's less consistent with tino rangatiratanga, is that –

MS VAN ALPHEN FYFE:

5 Right.

WINKELMANN CJ:

So it's all really based upon the submission that Mr Colson made that this is a more intrusive, less respectful jurisdiction created by this legislation?

MS VAN ALPHEN FYFE:

10 It is that but in addition it is also the choice about how active protection is going to apply for Tūhoe and also how Tūhoe chooses to engage with the Crown.

WINKELMANN CJ:

Yes, but if we take as a given that the High Court has jurisdiction then the only downside for the Māori Land Court having jurisdiction in your analysis of that

15 preamble is that Māori Land Court is more intrusive on the powers? I mean why is it worse to interpret it to give it jurisdiction in terms of the Treaty principles as you say?

MS VAN ALPHEN FYFE:

It isn't a matter of why it's worse; it's a matter of whether Te Uru Taumatua is

20 constituted in respect of general land owned by Māori and it has not wanted to have – sorry, it has not focused on this jurisdiction because it wasn't aware of it. It wasn't raised as part of the negotiations, and the settlement is a constitutional compact between the Crown and Tūhoe and any kāwanatanga jurisdiction over it is intended or a part of that sort of settlement process is to

25 ensure that it's a free prior and informed consent basis.

WINKELMANN CJ:

I'm not trying to cross-examine you. I'm just trying to understand what your submission is. So is your submission then that basically Tūhoe don't want the Māori Land Court to have jurisdiction?

5 **MS VAN ALPHEN FYFE:**

Tūhoe – well, those are our instructions, but also the point I'm trying to make, your Honour, is that ultimately that the Treaty principles, an analysis of the Treaty principles that best gives effect to mana motuhake o Tūhoe which was the driving principle of the settlement is the best analysis of whether it is 10 constituted in respect of general land owned by Māori, and the reason I say that is because active protection is important. It's important when the Crown, as the Tribunal has said and we go through this in our submissions in some detail, the Tribunal in its rangatiratanga report has done quite a careful analysis of how active protection ought to work. It's important when tino rangatiratanga hasn't 15 been supported in the past and hasn't been given the space to be given effect to but when tino rangatiratanga, or in this case mana motuhake o Tūhoe, is being asserted and being given effect to through the settlement and through that new relationship with the Crown that the settlement created, that active protection becomes active protection of that mana motuhake o Tūhoe.

20 **WILLIAMS J:**

The irony though is that the very things you're talking about are binding principles for the Māori Land Court but not for the High Court, because the Act says so. This – Te Ture Whenua Māori Act says respect te tino rangatiratanga o ngā iwi, specifically, and in its purposes it says you must give effect to that 25 preamble, whereas the Trustee Act says nothing.

MS VAN ALPHEN FYFE:

In submission the High Court would obviously have regard to the deed of settlement, the legislation and the Trust deed, and that would all support looking for mana motuhake o Tūhoe as the primary guiding principle for its application 30 of the law to any application to the High Court. I don't – sorry?

GLAZEBROOK J:

I'm not sure I'm going to get an answer to this because I don't really understand the point but exactly what do you look at in the settlement to say that it wasn't supposed to be land constituted, or constituted for that?

5 **MS VAN ALPHEN FYFE:**

So there are a number of – and I can take your Honours to those documents. There are –

GLAZEBROOK J:

Is it just the same point as Mr Colson's making?

10 **WINKELMANN CJ:**

Which I think Ms van Alphen Fyfe has said it's not.

GLAZEBROOK J:

No, no, I meant in the sense of there being other things in the settlement deed apart from land.

15 **WINKELMANN CJ:**

Okay, yes.

GLAZEBROOK J:

Is it that point or is it some other point?

MS VAN ALPHEN FYFE:

20 Well, it's not so much that there are other things as in assets but there are other drivers, yes.

GLAZEBROOK J:

No, no, other principles and purposes.

MS VAN ALPHEN FYFE:

25 Yes, well, the two primary ones were Te Urewera which became a separate Act and the second being mana motuhake o Tūhoe in a new relationship with the

Crown. But I don't know if it will be helpful to go through those documents to see that in the evidence but I'm happy to do so if that would assist.

WINKELMANN CJ:

So just to be clear, I had understood your submission to be, and then you said
5 it was but can I just be clear if it is, Mr Colson had said when I asked him right up front why the respondents did not want, sought to argue the Māori Land Court did not have jurisdiction, and he said it was because of the bad history of Native Land Court. He said it was because of the very intrusive jurisdiction and because of section 17(1) of TTWA which promotes Māori ownership and this is
10 a mixture of Trusts and when you were submitting that it's an exercise in mana motuhake and application of the principle of tino rangatiratanga argues in favour of the interpretation that you're contending for I asked you if those were the reasons why this favoured the interpretation because it was more intrusive on the mana of Tūhoe for the Māori Land Court to exercise its historically
15 problematic, more intrusive and really customary land-focused jurisdiction.

MS VAN ALPHEN FYFE:

I don't disagree with the points that my learned senior has made and there are – but there are layers obviously to – multifactorial reasons for that, and part of the reason why there is a reluctance for the more interventionist approach is
20 the emphasis on mana motuhake o Tūhoe.

WINKELMANN CJ:

So I'm struggling with your submission but perhaps it might be that we just need to take time to digest it, so if you could tell us where it's located in your written submissions because we can reflect more carefully upon it.

25 **WILLIAMS J:**

I think your proposition is a simple one. The whole point in the settlement is the protection of the mana motuhake o Tūhoe. Any intrusion that can be avoided by state agencies should be avoided in order to respect the mana motuhake o Tūhoe, and so you might be stuck with the High Court but you're not stuck with

the Māori Land Court, so the only way of reading that Act consistently with the mana motuhake o Tūhoe is to read that Court's jurisdiction out.

MS VAN ALPHEN FYFE:

Yes, yes, that is the submission, your Honour, and I'm happy –

5 **WINKELMANN CJ:**

But even – and I had asked you, well, why – so I had understood – that was my initial understanding of your submission and I said to you, well, how is Tūhoe any worse off having the Māori Land Court exercising jurisdiction because it's only one court at a time exercising jurisdiction?

10 **MS VAN ALPHEN FYFE:**

The point, well, as my learned senior has said, there are those difficulties.

WINKELMANN CJ:

Okay, and that's that reason, that unattractiveness of the Māori Land Court jurisdiction on your submission.

15 **MS VAN ALPHEN FYFE:**

But then in addition to that there is also the mana of Tūhoe and its decision for itself to have its own autonomy.

WINKELMANN CJ:

In your submission it's a decision that Māori Land Court not have…

20 **MS VAN ALPHEN FYFE:**

Its decision to emphasise mana motuhake o Tūhoe in its –

WINKELMANN CJ:

All right, I think we're going round in circles now.

MS VAN ALPHEN FYFE:

No, that's completely fine. I'm happy to end my submissions there, your Honour, because I've made the points that I wanted to make and unless there are any other questions –

5 **GLAZEBROOK J:**

And there wasn't an additional point about the settlement itself, because I'd understood you to say there was an additional point about the settlement itself?

MS VAN ALPHEN FYFE:

Those additional points are just emphasising that mana motuhake o Tūhoe was
10 the primary, after Te Urewera, was the primary aim and I was going to – I'm happy to take you through that but also happy to leave it.

1510

GLAZEBROOK J:

No, no, that's fine.

15 **WILLIAMS J:**

And "mana motuhake" means autonomy.

MS VAN ALPHEN FYFE:

Āe.

WILLIAMS J:

20 So that's the key point. Any intrusion on the autonomy of Tūhoe should be read out of any statute where that's possible.

MS VAN ALPHEN FYFE:

Yes.

WILLIAMS J:

25 It's a pretty straightforward argument.

MS VAN ALPHEN FYFE:

Unless there are any further questions those are –

WINKELMANN CJ:

No. Thank you for your very helpful submissions, Ms van Alphen Fyfe. So that
5 concludes you, does it, Mr Colson?

MR COLSON KC:

It does, your Honour, yes.

WINKELMANN CJ:

Thank you. Mr Smith?

10 **MR SMITH:**

Subject to any things that your Honours want to explore there were only two points that I wanted to make by way of reply and the first is just honing in on what Mr Colson referred to as the problematically paternalistic nature of the Māori Land Court's jurisdiction which your Honour, the Chief Justice, referred
15 to as the intrusive nature of it, and I just – there's two points that I want to make in response to that submission. The first is that those provisions that confer those powers that Mr Colson was emphasising as sitting within Part 12 of Te Ture Whenua Māori Act, they, of course, confer discretions and your Honours will find the ordinary denote of that, the "may" in there, and there
20 is a risk given that it's discretionary powers that are conferred of really risk to be avoided and that's the, in a conceptual sense, we don't want to assume or build into what we will assume that the Māori Land Court Judges will do in exercising those powers to assume that there will be arbitrary exercises of power or exercises of power that aren't justified on the particular evidence
25 before the Court, and that goes to the point that your Honours explored with Mr Colson as to, well, what is the approach of the Māori Land Court to the exercise of powers of this kind, and to those points I just wanted – there is – we have in the evidential record an example of how those powers have been exercised in this very proceeding which is the decision of his Honour,
30 Judge Coxhead, at the Māori Land Court phase, and I'd just like to –

WINKELMANN CJ:

Well, he was guided by the principles that are applied by the High Court in respect of removal, et cetera, of trustees, wasn't he, general approach to it?

MR SMITH:

5 Yes, in broad terms I accept that, but also it is helpful, and I'll just go there very briefly, because it underscores really the point that was made without development in the written submissions for us anticipating this point that we shouldn't assume that broad powers will be exercised broadly or without a proper foundation, and the illustration of that, if your Honours go to – it's the 10 Māori Land Court judgment which is 101.0175, and if we go, please, to paragraph 75 of that, and it illustrates the observation that your Honour, the Chief Justice, just made so that you'll see the Court says, his Honour, Judge Coxhead, sets out the power in section 237 equivalent to the High Court, and then, and I emphasise this, just in that first sentence there you'll see that 15 there is really a summary of the circumstances in which that power is exercised and that is broadly, in my submission, what you would expect to see of the High Court in respect of a similar power. It's got to be exercised reasonably in accordance with the evidence and, by way of example, defects that are merely technical or procedural will not necessarily justify a particular outcome that's 20 being sought, and you'll see there if you go – there's a reference to the case law at footnote 18 referred to there and cases of the Māori Land Court that are relied upon as standing for that broad proposition, and similarly there was – so that really supports – it gives an evidential basis on the record relating to this proceeding which supports the point that your Honour, the Chief Justice, was 25 exploring.

And the other point, and if we go over to paragraph 80 of it, is you'll see there, not surprisingly, in my submission, that there is an emphasis upon actually what the terms of the Trust deed say as being relevant to ultimately the exercise of 30 a discretion as to whether or not to exercise the Trust, or the powers that are conferred on the Māori Land Court, and again that's the kind of thing that you'd expect to see centrally in forming the exercise of supervisory powers and the outcome of those exercised in the High Court as well, so it's not, in that sense

when we look at what the Māori Land Court has done in respect of exercise of powers here they aren't, in my submission, it's not an illustration, there aren't reasonable bases for concerns that the discretionary jurisdiction will be a paternalistic of inappropriately intrusive one.

So that is the first point that I wanted to make. The second point, and it's just following through with one, another implication of, my learned friend Mr Colson said that, well, there is no beneficial estate, there's no beneficial ownership, and I just wanted to stress-test that through one provision of the Act which the Court of Appeal also gave prominence to in its judgment. That section 133 of Te Ture Whenua Māori Act, and this is the provision that enables, confers jurisdiction on the Court to change the status of relevantly general land owned by Māori to Māori freehold land, and your Honours will see in subsection (3) there are statutory pre-conditions, gateways, that need to be satisfied in order for that power to be available, and the first of those, paragraph (3)(a) is that the land is beneficially owned by one or more Māori.

Now on my learned friend's approach this power would never be available to the Trust or other trusts like it, because there is no beneficial ownership by one or more Māori, and one of the implications of that is that if your Honours were to approach it from well what would happen in respect of a title of general land that sits within the ahikāroa that the Trust says is inalienable. Now if a third party purchaser, a bone fide purchaser for value without notice was to purchase that, then without the notice there would be the potential for that parcel of land to be last to Ngāi Tūhoe. If, on the other hand, a decision was made at some point to convert a title of general land that came back, or has been acquired by the Trust, that is within the ahikāroa to Māori freehold land to get the benefit of the greater protections against alienation then that is a much less likely outcome that there would ultimately be the loss of that through a transaction with a bone fide purchase for value without notice.

WINKELMANN CJ:

What did the Court of Appeal make of this?

MR SMITH:

So they address it at paragraph 92 of their judgment in a, if we go there and there it was cited in support of the approach the reading of the Act that was ultimately taken, but it seems to me thinking about this that, actually there's a
5 greater danger, potentially, in the Court of Appeal's approach, that you don't, you remove, in terms of the collateral damage to rights that would otherwise, and powers that would otherwise be available, you remove that if you adopt the Court of Appeal's approach to beneficial ownership, because that subsection (3)(a) precondition would not be available for general land that is held by
10 the Trust in this context.

WILLIAMS J:

I do wonder whether we're making the words of the statute do too much work, generally because it would be easy enough to vest the land in an individual in order to trigger the jurisdiction of the Court, but I was thinking about the land in
15 which beneficial ownership is being vested in an ancestor, given the second requirement that the ancestor has to have had an adequate opportunity to consider the proposal. You can see that these provisions kind of have to be made to work in the cultural reality of the context or they'll just start looking silly, and that's true both of your example, and perhaps of the other examples, it
20 means it's crucial to understand cultural and other context when applying the words of the statute, because they're square pegs in round holes.

MR SMITH:

Yes, yes, I agree with your Honour's point and the only thing that comes to mind in response, it's not really a response at all, but this Court in the *Clayton v*
25 *Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 judgment talked about the importance of the interpretive question there being viewed, the context is obviously slightly different, through a lens of worldly realism, and that –

WILLIAMS J:

Judges know so much about that.

WINKELMANN CJ:

Of course we do, we're of the world.

MR SMITH:

Well it's ultimately a question of law, which is, in terms of the points that
5 your Honours were exploring with Ms van Alphen Fyfe a moment ago, which is ultimately for this Court to decide, and it's a hard one, which also explains why it's before this Court, and why we've had the day that we have had today exploring what are difficult issues. In a statute that not only was, is a product of its time in terms of the legal and social and cultural and political, in terms of
10 Treaty settlement policy, environment that existed in the early 1990s leading to its enactment in 1993, which is a bit different to now, and it's your Honour the Chief Justice's ambulatory interpretation point, but it also through, and it in a sense isn't unique relative to some other statutes, it's also a statute that's been added to over time, and the lawyers of accretion that have built up perhaps
15 explains some of the shoehorning issues that are in there in terms of some of the concepts and some of the language, which is a way of saying these things don't make it easier but explain why these issues are difficult and ultimately are before your Honours and will require resolution through your Honours' judgments. Probably subject to any final questions any of your Honours might
20 have, those were the only points that I wanted to make in reply.

COLLINS J:

If the dispute mechanism succeeds in achieving resolution, do we still need to give a judgment?

MR SMITH:

25 I agree with what I understood the position to have been advanced by Mr Colson is, which is that the jurisdictional question is there independent of that, and if you, one way of looking at the dispute resolution mechanism in clause 19 of the Trust deed is that is the, that's the basis for mana motuhake to be exercised in the purer sense internal to Tūhoe itself, and if it's resolved there,
30 then it doesn't go into any court, but the issue of what court is available for supervisory oversight remains, in my submission, a live issue, and the –

COLLINS J:

Well there has to be a dispute that's alive and if there is resolution…

WINKELMANN CJ:

Well, I think we've had enough discussion on that. We've heard their case now
5 and we've issued judgments before when matters have resolved so, over matters as exciting as restrictive covenants so…

MR SMITH:

Well one way of looking at the *Ellis* decision was that was one dimension that would be seen as unfair in one sense, but that was, raised similar issues in one
10 sense, and my memory might not serve me right, but the *Gordon-Smith v R* [2008] NZSC 56 decision I think a few years ago by this Court, might have been by the Court of Appeal, on to what extent is it appropriate in the public interest to hear a matter that might have aspects of academicness that have supervened –

15 **WINKELMANN CJ:**

This is not academic in any case because this is an entity that is going to last forever.

MR SMITH:

Yes, that's the simple answer with respect.

20 **WINKELMANN CJ:**

Thank you very much counsel. Before we close I think that Mr Pitau was going to offer a karakia? Please do so.

Karakia Whakamutunga – Reremoana Pitau

25 **WINKELMANN CJ:**

Before I get criticised by my colleagues I also should say that we're reserving judgment. So thank you all very much. We'll retire. Tēnā koutou.