OFFICIAL

Wai 2180, #3.3.76(c)

BEFORE THE WAITANGI TRIBUNAL **WAI 2180**
WAI 662
WAI 1835
WAI 1868

IN THE MATTER OF	the Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	the Taihape Rangitīkei ki Rangipō District Inquiry
AND	
IN THE MATTER OF	a claim by **Peter Steedman, Herbert Steedman** and **Jordan Winiata-Haines** on behalf of themselves and the descendants of Winiata Te Whaaro and hapū of Ngāti Paki **(WAI 662)**
AND	
IN THE MATTER OF	a claim by **Lewis Winiata**, **Ngahapeaparatuae Roy Lomax**, **Herbert Steedman**, **Patricia Anne Te Kiriwai Cross** and **Christine Teariki** on behalf of themselves and the descendants of Ngāti Paki me Ngāti Hinemanu **(WAI 1835)**
AND	
IN THE MATTER OF	a claim brought by **Waina Raumaewa Hoet**, **Grace Hoet, Elizabeth Cox, Piaterihi Beatrice Munroe, Terira Vini, Rangimarie Harris** and **Frederick Hoet** on behalf of themselves, their whānau and all descendants of Raumaewa Te Rango, Whatu and Pango Raumaewa **(WAI 1868)**

PART FOUR(B) GENERIC CLOSING SUBMISSIONS – NATIVE LAND COURT ISSUE 3(25) – (29)

Dated this 22nd day of December 2020

RECEIVED
Waitangi Tribunal
22 Dec 2020
Ministry of Justice
WELLINGTON

Annette Sykes & Co
Barristers & Solicitors
8 – Unit 1 Marguerita Street
Rotorua, 3010
Phone: 07-460-0433
Fax: 07-460-0434
Counsel Acting: Annette Sykes / Kalei Delamere-Ririnui
Email: asykes@annettesykes.com /kalei@annettesykes.com

MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. The Native Land Court introduced fundamental changes to the traditional Taihape Māori land tenure system and to their basic social control structures. The first element was perhaps the most fundamental. It was the necessary pre-condition to the other elements introduced in the transformation. The Native Land Court removed from Taihape Māori (where that power had resided) the power to control the nature and distribution of land rights both within and between those communities.[1]

Tribunal Statement of Issues ("TSOI")

2. This section of the Native Land Court generic closing submission addresses Issue 3(25) – (29) of the TSOI, which concentrates on the Mangaohāne Block. We set out the TSOI questions here for ease of reference:[2]

   The Mangaohāne block

   25. *Were there errors or incomplete sections in the Mangaohāne boundaries as presented in the sketch map used in the first hearing court?*

   26. *Did the Judge make it clear what parts of the block his judgement referred to?*

   27. *Was the rehearing process an adequate and fair response to Taihape Maori protest?*

   28. *Why were the decisions of the Chief Judge and the Native Affairs Committee ignored by the government of the day?*

   29. *Did any of the various Native Land Court Judges involved with the case collude with the Native Minister to favour the cause of the runholder or his agents?*

3. The generic closing submission is filed for the benefit of all claimants in the Taihape Inquiry District. Counsel notes that this is not to prevent claimants from taking their own positions and presenting their own submissions on this issue.

---

[1] Wai 814, 2004 at 407.
[2] Wai 2180, #1.4.003 Issue 3(25)-(29).

4. This submission provides a generic overview and position only. Counsel understand that claimant specific closing submissions will address issues raised by individual claims.

5. The analysis that follows will divulge the history of the Crown's facilitation to alienate Māori land, the individualisation of Māori customary title and rights, and the promotion for Māori to assimilate to Pākeha ways. Counsel submit that the evidence is clear that upon a dispassionate analysis of the evidence, it will confirm that the Crown failed to uphold its duties and obligations under Te Tiriti o Waitangi, to the detriment and prejudice of Taihape Māori.

Technical and Tangata Whenua Evidence

6. The Tribunal have heard extensive evidence from Taihape Māori concerning the Native Land Court, particularly in relation to the block at Mangaohāne. We attach herewith a list of all relevant technical and tangata whenua briefs that have been provided throughout the course of the Inquiry to assist the Tribunal in its assessment of issues. While some of the evidence is referred to in the following submissions, we commend the evidence as a whole for the full totality of concerns to be taken account of by the Tribunal.

ROI	Technical Evidence
Wai 2180, #A39	Grant Young, 'Mangaohāne legal history and the destruction of Pokopoko', November 2015.
Wai 2180, #A6	Martin Fisher and Bruce Stirling, 'Northern block history'.
Wai 2180, #A15	Craig Innes, 'Māori land retention and alienation'.
Wai 2180, #A52	Peter McBurney, Ngāti Hinemanu and Ngāti Paki Oral and Traditional Report, 10 December 2014
Wai 2180, #A56.	Jane Luiten, The Arrest of Winiata Te Wham'o and the Eviction of the Pokopoko Community Report, August 2017.

Wai 2180, #A37	Suzanne Woodley, 'Māori land rating and landlocked blocks, 1870-2015'.

ROI	Tangata Evidence
Wai 2180, #H19	Joint Brief of Evidence of Grace Hoet and Jordan Winiata-Haines dated 30 November 2017.
Wai 2180, #E5	Affidavit of Peter Steedman dated 24 February 2017.
Wai 2180, #H8	Affidavit of Peter Steedman dated 28 November 2017.
Wai 2180, #H3	Affidavit of Hineaka Winiata dated 29 November 2017.
Wai 21780, #H13	Joint Statement of Evidence of Maraea Elizabeth Oriwia Bellamy and Te Urumanao Kereti dated 29 November 2017.
Wai 2180, #H17	Statement of Evidence of Wharerimu Ngapera Parekura Steedman dated 29 November 2017.

TREATY OF WAITANGI JURISPRUDENCE

7. In order to assist the Waitangi Tribunal, the findings of various Tribunals considered relevant to these submissions and to the issues at hand are discussed below.

8. At the outset, counsel reiterate that at the heart of the Claimants' case in relation to the Native Land Court, is that in breach of the principles of the Treaty of Waitangi, the Crown established the Native Land Court with the purpose of:

   8.1 facilitating the alienation of Māori land in order to expand European settlement;

8.2 commuting Māori customary title and rights into an individualised Pākehā fee simple title;

8.3 promoting and facilitating the de-tribalisation of Māori; and

8.4 promoting and facilitating the assimilation of Māori into Pākehā customs and practices.

9. These basic propositions are not new. They have been considered in a number of other inquiries.

10. The Turanga Tribunal considered whether the structures and processes for the administration and alienation of Māori land under the Native Lands Acts were consistent with Treaty principle. It found that the Native Lands Acts, in providing for the operation of the Native Land Court, expropriated from Māori, the power of deciding questions of title. It was furthered concluded that Māori land was the subject of a complex web of kin-based rights. While some rights were held at whānau and even individual level, all rights existed on a substratum of tribal (that is hapū) title. Crucially, the decision to alienate belonged, in accordance with customary tenure, to the hapū. Despite this, the 1873 Native Lands Act allowed Māori customary land to be alienated, and secondly, it individualised that alienation process. The effect of these changes was to expropriate from communities both the community title itself and the community's right to control land sale and retention strategies. Māori on the whole, did not support the individualisation of titles. The efficacy of the system of title allocation and land transfer under the Native Lands Acts was then considered and was found that the system was complex, inefficient, and contradictory.[3]

> *"In our view, this meant that such safeguards as were contained within the system to protect Maori against unfair and unwise land alienations were ineffective.*

11. The Turanga Tribunal found that "it is clear that the purpose of the system was to ensure that the bulk of the Māori land base passed out of Māori ownership".[4] That Tribunal also found that an "objectionable effect of the Act [(the Native Land Act 1873)] was […] that Māori could participate in the new British prosperity only

[3] Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, (Wai 814,2004), p533.
[4] Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, (Wai 814,2004), p526.

by selling or leasing their land".[5] In this regard, the system provided that Māori would be separated from their lands if they wished to participate in the new economic order.[6] This is a further reason why the legislation was in fact designed to separate Māori from their lands.

12. The findings of the Pouakani Tribunal are a useful starting point as to how the Native Land Court impacted upon Taihape Māori:[7]

> *All these factors contributed to mounting debts. There is plenty of evidence that the tribal leaders wanted to avoid the worst problems created by land dealing by keeping the Native Land Court out of the Rohe Potae and administering their own lands. There is also plenty of evidence that the government intentions were that Crown sovereignty would be imposed, government institutions extended into region and the lands of the Rohe Potae "opened up" for Pākehā settlement. Parliament also sought to protect its investment in the construction of the main trunk line by imposing a Crown right of pre-emption in the hope of paying off its substantial debts by profits from the sale of land.*
>
> *We conclude that Māori paid a disproportionate cost for Pakeha settlement, but little provision was made for Māori participation in the suggested benefits of the introduction of capital and settlers.*

13. The Turanga, Hauraki, Central North Island, and Wairarapa ki Tararua Tribunals found that the Crown through the Native Land Court 'expropriated' or 'usurped' from Māori their right to make decisions about the allocation and ownership of their land and resources in accordance with their own traditions and tikanga. This was despite the fact that tribal leaders wished to inquire into the own titles, as was noted by the CNI Tribunal:[8]

> *Tribal leaderships of the Central North Island had made it clear to the Crown that they wished to inquire into their own titles, rather than that the Native Land Court adjudicate on them.*

14. In the Hauraki Report, the Tribunal, when considering whether the Crown employed 'divide and rule' tactics to open a block to mining, accepted the claimants' basic proposition that, in by-passing one Māori leader and making an agreement with another leader and her group:

> > *"…the Crown had breached the standards of informed tribal consent that observance of Treaty principles would normally require."*

[5] Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, (Wai 814,2004), p 444.
[6] Waitangi Tribunal, *Turanga Tangata Turanga Whenua,* (Wai 814,2004), p 444.
[7] Waitangi Tribunal, *The Pouakani Inquiry Report 1993*, (Wai 33, 1993), at section 18.5.
[8] Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims,* (Wai 1200, 2008), at 480.

15. As that Tribunal stated, the Treaty clearly recognises the rangatiratanga of chiefs and tribes in respect of their lands and other valued possessions. In our submission, by engaging with individuals who had made offers of land and ignoring those who opposed such offers undermined their rangatiratanga.

16. Various Tribunal Inquiries have also noted the considerable burden that engagement with the Court processes placed upon Māori communities. The Pouakani Tribunal noted that all these factors contributed to mounting debts:[9]

> *The 1891 Commission on Native Land Laws identified the problems of confusion in law and practice in the Native Land Court, the high costs in fees and other expenses to attend court sittings in distant towns, the excessive costs of surveys and costs of litigation in the Supreme Court or rehearing in the Native Land Court.*

17. The Wairarapa ki Tararua Tribunal reported that "the combination of fees, surveys, costs of attendance, and the toll that absence took on normal activities is likely to have contributed significantly to the hardships faced by Wairarapa ki Tamaki-nui-a-Rua Māori in the late nineteenth century.[10]

TREATY OF WAITANGI PRINCIPLES

18. Taihape Māori assert that the Crown must deal with them in an honourable and good faith way and should ensure their protection and prosperity including their economic, physical, spiritual and cultural wellbeing. We now set out the general framework against which all Treaty claims stand to be measured. They understand the Crown's fiduciary obligations extend to:

    18.1 active protection to the fullest extent practicable in possession and control of their;

    18.2 property and taonga and their rights to develop and expand such property and taonga using modern technologies;

    18.3 ongoing distinctive existence as a people albeit adapting as time passes and the combined society they develop; and

[9] Waitangi Tribunal, *The Pouakani Inquiry Report* 1993, (Wai 33, 1993), at section 18.5.
[10] Waitangi Tribunal, *Wairarapa ki Tararua Report,* (Wai 863, 2010), at 537.

18.4 economic position and their ability to sustain their existence and their ways of life ensuring the benefit from good government exhibited by the Crown ensuring the protection and promotion of:

18.4.1 entitlements to peace, law and order;

18.4.2 the absence of discrimination in the eyes of the law and law makers;

18.4.3 the determination of matters effecting Māori land by Māori in accordance with their own methods of reaching agreements;

18.4.4 conditions that both assured Māori and their advance;

18.4.5 an inability to avoid the Crown's obligation by any delegation of the Crown's duties under the Treaty.

Active Protection

19. Under Article II of Te Tiriti o Waitangi, the Crown guaranteed to Taihape Māori the ability to exercise their tino rangatiratanga over their taonga katoa. This Tiriti principle acknowledges and protects "unqualified exercise of chieftainship and confirms and guarantees to Māori their property and other rights".[11]

20. This principle was of fundamental importance to Māori, and Taihape Māori assert that Māori would not have entered into the Treaty if their tino rangatiratanga was not guaranteed:[12] "The principle that the cession by Māori of sovereignty to the Crown was in exchange for the protection by the Crown of Māori rangatiratanga is fundamental to the compact or accord embodied in the Treaty and is of paramount importance." The principle that the Crown should actively protect Māori tino rangatiratanga is paramount to the claimants.

21. This protection is not merely a simple acknowledgement of tribal autonomy and self-management, it also includes a requirement that the Crown actively protect and support the claimants in the exercise of their rangatiratanga.

[11] I. H. Kawharu, "Treaty of Waitangi - Kawharu Translation" (2011) Waitangi Tribunal – Te Rōpū Whakamana i te Tiriti o Waitangi. Retrieved from: http://www.waitangitribunal.govt.nz/treaty/kawharutranslation.asp%3E

[12] Waitangi Tribunal, Turangi Township Report (Wai 84, 1995) at 284.

22. Both the Waitangi Tribunal and the general Courts have recognised the Crown's duty of active protection, Justice Cooke stating that:[13]

> *"... the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable."*

23. Similarly, in the Mohaka River Report, the Tribunal found that the very important principle of active protection meant that:[14]

> *"... the Crown is obliged to protect Maori property interests to the fullest extent reasonably practicable."*

Partnership

24. The Principle of Partnership was first addressed in the Manukau report which stated that:[15]

> *"It is in the nature of an interest in partnership, the precise terms of which have yet to be worked out"*

25. There has been a retrenchment from this position in recent times with significant findings by the Te Paparahi o Te Raki Tribunal that Northern Māori neither ceded their sovereignty nor was such cession in the contemplation of an ordinary reading of He Whakaputanga o Nga Hapū o Niu Tireni and Te Tiriti o Waitangi which are documents that must be read together for a proper understanding of the preamble to Te Tiriti.

26. The Tribunal considered the 1987 Lands case in the Orakei report. It stated that there are two essential elements, the first was that the Treaty signified a partnership between the races, and:[16] "The second is the obligation which arises from, indeed is inherent in, this relationship for each partner to act towards the other as Cooke P puts it at page 370, "with the utmost good faith which is the characteristic obligation of partnership."

27. The obligations arising from tino rangatiratanga, partnership, and active protection required the Crown to act fairly to both settlers and Māori – the

---

[13] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, p 667.
[14] Waitangi Tribunal, *Mohaka River Report*, p 77.
[15] Waitangi Tribunal, Manukau Report (Wai 8, 1985) at 70.
[16] Waitangi Tribunal, Orakei Report (Wai 9, 1987) at 207.

interests of settlers could not be prioritised to the disadvantage of Māori.[17] Where Māori have been disadvantaged, the principle of equity – in conjunction with the principles of active protection and redress – requires that active measures be taken to restore the balance.

Equity

28. It is through Article III that Māori, along with all other citizens, are placed under the protection of the Crown and are therefore assured equitable treatment from the Crown to ensure fairness and justice with other citizens.

29. This principle was articulated by the Tribunal in its pre-publication report, Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims, 'the Crown could not favour settlers over Māori at an individual level, and nor could it favour settler interests over the interests of Māori communities'.

30. Further, the Tribunal has found that the Treaty principle of equity obliges the Crown to 'meet a basic standard of good government', by acting in accordance with its own laws and ensuring that Māori rights and privileges as citizens have the protection of the law in practice.[18]

31. To this end, in its inquiry into Te Rohe Pōtae claims, the Tribunal said that the Crown 'should be accountable for its actions in relation to Māori and subject to independent scrutiny'.[19]

32. The Tribunal, in the Wairarapa ki Tararua Report, noted that Secretary of State for the Colonies Lord Normanby ("Normanby") directed that Crown purchase agents should act with 'sincerity, justice and good faith,' and were not to allow Māori to enter bargains that would be injurious to their well-being, and that experience of dealing with Māori about their lands soon taught agents that they could not follow these guidelines unless:[20]

- *"the blocks to be purchased were clearly delineated; • title was investigated before purchase;*
- *all right holders were identified; and*

[17] Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2008) at 61-64.
[18] Waitangi Tribunal, *He Maunga Rongo*, vol 2 (Wai 1200, 2008) at 428–429.
[19] Waitangi Tribunal, *Te Mana Whatu Ahuru – Pre-publication Version*, Parts I and II (Wai 898, 2018) at 189.
[20] Waitangi Tribunal, *Wairarapa ki Tararua Report,* p 104.

- *there was agreement between right holders as to their relative interests or, where there was no agreement, some sort of umpire (commission, registrar, or court) could be called upon."*

Redress

33. The principle of redress is another fundamental principle of the Treaty. We assert that the Crown has a duty to provide the claimants with appropriate cultural redress which correctly recognises the losses suffered by Taihape Māori as a consequence of the Crown's breaches of the Treaty. The Crown has a duty to expeditiously remedy past Treaty breaches.

CROWN POSITION

34. We set out below the Crown response to the Tribunals Statement of Issues on Native Land Court: [21]

> The Crown concedes that the individualisation of Māori land tenure provided for by the native land laws made the lands of iwi and hapū in the Taihape: Rangitīkei ki Rangipō inquiry district more susceptible to fragmentation, alienation and partition, and this contributed to the undermining of tribal structures in the district.

35. The Crown accepts it did not take adequate or timely steps to protect traditional tribal structures, for example through legal provision for communal governance mechanisms.[22] In relation to the lack of provision for collective administration of land under Native Land Laws Until 1894:

> The Crown concedes that it failed to include in the native land laws prior to 1894 an effective form of title that enabled Taihape Māori to control or administer their land and resources collectively. This has been acknowledged previously as a breach of the Treaty of Waitangi and is again acknowledged as such for the Taihape inquiry district.

36. The Crown's concessions are framed with reference to the very laws and concepts which are inconsistent with the tino rangatiratanga of the claimants that Te Tiriti sought to protect. They are also silent as to the impact of these laws and concepts on essential components of rangatiratanga, such as kawa and tikanga. They promote a mirage of Te Tiriti-compliant conduct, when such structures and descriptors are framed within Western law, and not by reference to kawa and

[21] Wai 2180, #1.3.1, Crown Memorandum on early concessions – Native Land Court, at [2].
[22] Wai 2180, #3.3.1, Opening Comments and Submissions of the Crown, 2 March 2017, at [27].

tikanga. Even if the Crown had provided for the matters described in its concessions, such structures would still have been wanting with respect to tino rangatiratanga.

37. The Crown concessions do not adequately concede on the primary points of concern. This is disturbing because as the analysis of jurisprudence in the many Tribunal reports that have now issued on these matters all have been very clear on the many breaches of the guarantees of Te Tiriti that have been occasioned by Crown introduction of the Native Land Court and its various amendments.[23]

Crown Duties

38. Counsel adopt the Crown duties outlined in the Part one generic submissions for Native Land Court filed by Mahony Horner Lawyers, which are listed below for ease of reference:

39. Counsel submit that at all times, the Crown had duties, under te Tiriti o Waitangi to:

 39.1 actively protect Taihape Māori rangatiratanga and their lands to the fullest extent practicable;

 39.2 act reasonably and with the utmost good faith towards Taihape Māori;

 39.3 adopt a fair process in any dealings with Taihape Māori and their lands;

 39.4 recognise and uphold Māori customs and practices;

 39.5 foster and protect the autonomy of Taihape Māori;

 39.6 ensure that they retained lands that they did not wish to sell and their tino rangatiratanga over those lands;

 39.7 ensure Taihape Māori were left with a sufficient land base for their present and future needs; and

 39.8 remedy wrongful acts and omissions of the Crown and its agents.

[23] Wai 2180 # 1.4.3: Statement of Issues p. 18.

40. Counsel further submit that in addition to the duties outlined by Mahony Horner Lawyers, the Crown owe the following duties to Taihape Māori:

    40.1 ensure the retention of rangatiratanga over tūrangawaewae, taonga, social structures, property and resources in accordance with their own laws, cultural preferences and customs;

    40.2 actively protect the spiritual and physical resources as they were traditionally managed;

    40.3 ensure that any change to traditional social structures are instigated and promoted from within rather than imposed from without;

    40.4 recognise and protect the laws, customs, cultural and spiritual heritage of Taihape Māori;

    40.5 avoid policies and practices which would impact detrimentally on the spiritual expressions which have been traditionally enjoyed; and

    40.6 ensure that the impact of government and regulation upon Taihape Māori is consistent with the Treaty and its principles to actively protect Māori rangatiratanga, customs, laws and properties.

41. In counsels' submission, it is the desire of Taihape Māori to have the ability to exercise their tikanga in their own way. Counsel accordingly submits that, pursuant to the terms and principles of the Treaty of Waitangi, the Crown was, and is, under a continual obligation to protect the rangatirangatanga and the mana whakahaere of Taihape Māori over their whenua.

BREACHES

42. Other counsel has set out in general terms, the allegations of breach that the Claimants rely upon to establish their claims with respect to the establishment and operation of the Native Land Court. We augment those observations with these further allegations of breach which we say are highlighted in the issues now considered with respect to the Mangaohāne Block.

43. The Crown has failed to recognise the Claimants mana and rangatiratanga with respect of Taihape Māori and their authority and tino rangatiratanga over their whenua as guaranteed in Article 2 of Te Tiriti o Waitangi.

44. In breach of the principles of Te Tiriti, the Crown established the Native Land Court which undermined Tikanga Māori and Customary practices of Taihape Māori.

45. In breach of the actively protection obligations in Article II of Te Tiriti, the operation of the Native Land Court enabled individuals to deal with the land without reference to iwi or hapū, which as a result, made those lands more susceptible to partition, fragmentation and alienation.

46. In breach of its duties, the Crown failed to ensure that sufficient lands and reserves, were set aside for Taihape Māori.

47. It is submitted that the evidence on the record, clearly demonstrates that the Crown's principal purposes in establishing the Native Land Court were twofold:

    47.1 The Court was to facilitate the alienation of Māori land for the purpose of settlement; and,

    47.2 The Court was to bring about the assimilation of Māori into British-based property tenure.

48. Counsel now turn the submissions to answer issue (3)25 of the TSOI.

Issue 3(25) Were there errors or incomplete sections in the Mangaohāne boundaries as presented in the sketch map used in the first hearing court?

49. Counsel that yes, there were errors in the Mangaohāne boundaries as presented in the sketch map used in the first hearing court.

50. The court hearing proceeded on the basis of a sketch map which did not include a survey of the southern boundary of the block where Pokopoko was located. The problem was not so much an error in the location of the boundary, which was not known with any precision, as a lack of any clear information about the southern boundary.[24]

[24] Wai 2180, #A39(g) at [1].

51. Evidence was presented to Tribunal which highlighted the fact that Kawepo misidentified places with the incorrect names.[25]

> *"Te Whaaro pointed out that the hill on the map was actually located somewhere else. A similar thing happened with evidence Kawepo gave about the existence of a pā that belonged to his people. When the court wanted to know where the pa was, he couldn't identify the area it was in. From this we conclude that it was nonexistent."*

52. A key factor in the lack of a completed and approved survey plan at the 1884-85 title investigation was the very strong opposition of most claimants to what had been a long-contested survey. The opponents to the survey included the people who lived on parts of Mangaohāne (such as Winiata Te Whaaro and his people), who opposed the unlawful occupation of Mangaohāne by the runholder George Donnelly.[26]

53. Acting on the advice District Officer James Booth, the Wellington Chief Surveyor in September 1880 denied authorisation to the private surveyor to survey Mangaohāne, due to the contested and controversial nature of the claims there. Booth advised: "It will not be safe to make the survey until all parties are agreed."[27]

54. Despite this, during an absence of the Chief Surveyor, the surveyor renewed his application to survey in January 1881, which was this time approved by other officials without reference to Booth, who renewed and expanded on his objections to the survey.[28] He told the Chief Surveyor the "majority of claimants" to Mangaohāne opposed survey and title investigation until "the whole of the owners have had a conference" on the issue, and were "most excited about this affair." Paramena Te Naonao (of Ngai Te Upokoiri) asked the Chief Surveyor for the rangatira involved to resolve the matter before survey began.[29]

55. On hearing of the authorisation, the Chief Surveyor wanted to suspend it but the Surveyor-General declined to act as Kennedy and his employer Hiraka, rather than the Crown, were liable for any losses resulting from opposition to the

[25] Wai 2180, H8 at [10].
[26] Wai 2180, #A39 at [27]-[29], [35] and [37]-[38], and Wai 2180, #A6 at 177-178.
[27] Wai 2180, #A39 at [27].
[28] Wai 2180, #A6 at 177 and Wai 2180, #A39 at [28].
[29] Wai 2180, #A39 at [28]-[29].

survey.[30] The surveyor encountered opposition from a group sent by Renata Kawepo. The survey was also opposed by a group led by Winiata Te Whaaro and Ihakara Te Raro, who wanted the survey confined to the north side of the Mangaohane Stream.[31]

56. Kennedy did not complete the survey of Mangaohāne, later referring to encountering "very violent opposition" with the result he had sufficient survey data for only a "rough sketch plan"[32] He asked the Chief Surveyor if a sketch plan could be approved for the title investigation, but the Chief Surveyor's staff declined.[33] It was later acknowledged that "nearly all the boundaries" of Mangaohāne were well-known topographical features so a sketch plan would suffice for title investigation. But, critically for Winiata Te Whaaro and Ngāti Hinemanu me Ngāti Paki at Pokopoko, the "southern side of the block" was the exception and this area still required "actual surveying" in order to "describe the claim beyond the possibility of any doubt."[34]

57. This left the location of the southern boundary of the area claimed unclear to the Court.[35] In August 1882, Renata Kawepo's solicitor submitted a compiled sketch plan of Mangaohāne for the Chief Surveyor's "provisional certification," but acknowledged that the southern boundary was not well-defined, being "where a grey line has been put on the bearing of the line given." In August 1883, the sketch plan was approved for title investigation purposes.[36]

58. Counsel now turn to consider Issue 3(26) of the TSOI.

Issues 3(26) Did the Judge make it clear what parts of the block his judgement referred to?

59. The decision of the Court makes it clear that Mangaohāne 2 was awarded to the descendants of Te Honomokai but that part of the area claimed south of Te Papa a Tarinuku was not included in the decision. However, while the Court was clear on this point, the reliance on a sketch plan and the lack of information about the

[30] Wai 2180, #A39 at [29].
[31] Wai 2180, #A6 at 177.
[32] Wai 2180, #A39 at [35].
[33] Wai 2180, #A39 at [30].
[34] Wai 2180, #A39 at [32]-[33].
[35] Wai 2180, #A39 at [32]-[33] and [36].
[36] Wai 2180, #A39 at [36].

southern boundary meant there was considerable ambiguity about the significance of this aspect of the decision.[37]

60. The Court later made it clear that its intention in defining the southern boundary of Mangaohāne 2 in its 1885 decision was to exclude Pokopoko and land to the south, east, and west of it. Neither Pokopoko nor Te Papa a Tarinuku were marked on the sketch plan.[38] This land was excluded from the award because the Court considered that it belonged to a different tribal group from the rest of Mangaohāne 2. As Judge O'Brien explained in 1885: [39]

> We declined to adjudicate on the part lying south of [Te] Papa o Tarinuku going through or by Pokopoko forest, leaving it or a part of it out of judgment, for reasons which satisfied us that it should be the subject of a future investigation. The evidence seemed to point that that part and the land adjacent to the south and east belonged to these people, Ngati Pake[sic; Paki] and Ngati Hinemanu.

61. The Judge confirmed his understanding of the location of Pokopoko elsewhere in his report; when discussing the evidence of Irimana Ngahou (a whanaunga of Winiata Te Whaaro) who lived at Pokopoko with Ngāti Hinemanu and Ngāti Paki, the Judge observed that Pokopoko "is where the judgment draws the line."[40] When writing of the earlier dispute between Renata and Winiata over sheep farming on Mangaohāne, the Judge referred to Winiata leaving Waiohaka to live at Pokopoko, being "that place where our judgment draws the boundary."[41] The Court had intended to exclude Pokopoko and land to the south, east, and west of this important papakainga from Mangaohāne 2 because it was land in which Ngāti Hinemanu and Ngāti Paki held customary interests.

62. Judge O'Brien later told the Court that neither of the early Mangaohāne sketch plans held by the Chief Surveyor (WD 633 and 633A) were the plans actually used at the title investigation. He recalled the sketch plan then in use as bearing a different number and including marks and references made on it by the Court during the hearing.[42] The Court clerk affirmed the Judge's recollections.[43]

[37] Wai 2180, #A39(g) at [2].
[38] Wai 2180, #A39 at [74]-[76].
[39] Wai 2180, #A39 at [77].
[40] Wai 2180, #A39 cited at [82].
[41] Wai 2180, #A39 cited at [85] and [86].
[42] Wai 2180, #A39 at [263].
[43] Wai 2180, #A39 at [264].

63. The Court of Appeal later noted that the sketch plan before the Court included a division line “in red and blue pencil” between Mangaohāne 1 and Mangaohāne 2 which had been marked on the sketch plan at the direction of the Court.[44] The surviving sketch plans do not show such a line.[45]

64. It is evident that the diagram of Mangaohāne supplied by Judge O’Brien with his report on the 1885 rehearing applications was drawn from the sketch plan before the Court; a plan that differed materially from the surviving sketch plans on record. The surviving copy of ML 633 appears to be an official copy rather than the Court copy of the plan actually used at the hearing, to which marks and words were added during the hearing (as was typically done at hearings).[46] It is rare to locate the Court copy of the plan in the official set of plans retained by Land Information New Zealand.

65. Judge O’Brien was called as a witness in the partial rehearing of Mangaohāne 2 in 1892-93. His memory of the details of the 1884-85 proceedings was “vague on several points,” particularly relating to the addition of the southern boundary line to the sketch plan in the vicinity of Pokopoko. The location of the southern boundary on the “rough sketch” included with his 1885 report to the Chief Judge on the applications for rehearing differed considerably from that later defined by survey.[47]

66. When questioned about the “discrepancy” in the southern boundary, he recalled that it was drawn to exclude a part claimed by Ngāti Hinemanu and “that it either belonged to them or was so doubtful that we cut the piece out. … I cannot say now how much we left out.” He recalled the “uncertainty about the position of Pokopoko” in relation to the southern boundary as “localities were not properly fixed” on the sketch plan. He emphasised that it was only a sketch plan so it was “immaterial” where the line was drawn on it, but was material was the location of Pokopoko and the other places referred to in the 1885 judgment.[48] He was also clear that Ngāti Hinemanu’s land was to be excluded from Mangaohāne as defined

[44] Wai 2180, #A39 at [270].
[45] Wai 2180, #A39(e) at 2, and; ML 633 with Wai 2180, #A15(g).
[46] Wai 2180, #A15(g).
[47] Wai 2180#A39 at [357].
[48] Wai 2180, #A39 at [357]-[358].

by the 1885 judgment.[49] That was never done, despite so many acknowledgements that it should have been done.

67. The Court's 1893 judgment on the partial rehearing of Mangaohāne 2 referred to the southern boundary in relation to Pokopoko, which it agreed the Court in its 1885 judgment "intended excluding… yet the line actually laid down took in a part where those now claiming had some occupationary rights." In 1893, it confirmed that this land was supposed to have been excluded from the Mangaohāne title "but that owing to the want of accurate information" it had instead been included.[50] No action was recommended to remedy this profound error.

68. The final survey of Mangaohāne 2 was completed in April 1886. The surveyor, whose work had been opposed in 1881, proceeded with the work in November 1885 despite once again failing to obtain the necessary authorisation through the Native Land Court, the Chief Surveyor, the District Officer, and the Surveyor-General.[51] The unauthorised survey was again obstructed by the land's occupants. Retimana Te Rango of Pokopoko vowed to Native Minister John Ballance that he and his people would obstruct the survey until a rehearing of Mangaohāne was granted as "the land of our ancestors… is to become the property of strangers who have no claim to the land." Some of those obstructing the survey were charged and served with summons to appear in the Napier Supreme Court, to which Retimana responded: "we will not stop though we die, it only be, 'We die for our land'…. This affair will never cease until perhaps blood has been spilt on the soil, and then the end may come, for then the people living on it will be exterminated."[52]

69. Those of Ngāti Whiti and Ngāti Hinemanu charged with obstructing the survey were arrested and imprisoned.[53] In December 1885, the charges laid against them were dropped when the Chief Justice discovered the surveyor lacked the consent of the Surveyor-General to his survey.[54] The Chief Justice also found that the

[49] Wai 2180, #A39 at [359].
[50] Wai 2180, #A39 at [375]-[376].
[51] Wai 2180, #A39 at [117]-[118].
[52] Wai 2180, #A39 at [120].
[53] Wai 2180, #A39 at [138].
[54] Wai 2180, #A6 at 196 and #A39 at [163].

surveyor had to be employed by the Surveyor General rather than one acting "for the benefit of private individuals."[55]

70. On 30 January 1886, the Surveyor-General issued a new authority to Kennedy to survey Mangaohāne, but the Chief Surveyor was unwilling to issue the authority until funds to cover the survey costs were lodged with his office. Kennedy estimated his costs at £462 and this sum was deposited by Studholme a few days later. The authority was sent to Kennedy on 12 February 1886.[56] After the survey was completed the Surveyor-General imposed a lien of £1,108 on the two Mangaohāne titles, basing this on a standard rate of five pence per acre, even though the actual cost of the survey was only £462 and this sum had already been paid by Studholme.[57]

71. The survey was completed in April 1886, promptly examined by the Chief Surveyor and, on 30 April 1886, approved for use in the Native Land Court.[58] It did not reflect the Court's understanding of its exclusion of Pokopoko from its 1885 award. The final survey followed the boundary defined in the Court's award, but that definition reflects the Court's ignorance of where key locations such as Pokopoko actually were, as they were not marked on the sketch plan. As a result, Pokopoko and land to the south, east, and west of it as wrongly included in Mangaohāne 2 when it should have been excluded.

72. The erroneous final survey was not made available by the Court in Hawke's Bay for inspection (by, for instance, owners and other claimants) as required by the Native Land Court Act 1880 (s.28). When C. B. Morision, a solicitor acting for Winiata Te Whaaro, later pointed out this failing, the Registrar asserted that this had not been necessary as Judge O'Brien had considered the sketch plan at the title investigation sufficient "as required by s26."[59]

73. The Registrar was legally and factually incorrect; s26 provides for a certificate of title to be "issued forthwith" when a survey had been made before the title investigation. This was not the case with Mangaohāne, as only an incomplete sketch plan was available to the Court in 1885. It could not issue certificates of

55 Wai 2180, #A39 at [127].
56 Wai 2180, #A39 at [134]-[135].
57 Wai 2180, #A39 at [140]-[141] and [195].
58 Wai 2180, #A39 at [137].
59 Wai 2180, #A39 at [252].

title on the basis of the sketch plan, as is evident from the need to complete the survey in 1886 and for that survey plan to be made available to the Court in 1890. The Court of Appeal found in 1891 that title had been completed without the Court meeting the survey requirements of the Native Land Court Act 1880 (ss28 and 31), and that this was "a clear excess in jurisdiction" sufficient to justify a writ of certiorari.[60]

74. Several years later, in February 1893, the Court belatedly publicly notified the plan and made it available at the Hastings Native Land Court for inspection, as required by the Native Land Court Act 1880 (s.29). This occurred during a hearing that involved Mangaohāne. Even so, no objections to the plan were lodged.[61]

75. The lack of objections was not because Ngāti Hinemanu and Ngāti Paki did not object to the southern boundary of Mangaohāne 2 as surveyed, but because their legal advice was that the objection process provided in the Native Land Court Act 1880 was inadequate for resolving the error regarding the inclusion of Pokopoko and other land in Mangaohāne 2.[62] As Winiata's counsel, Morrision explained in 1894, the 1880 Act (ss.26-32) could not deal with the nature of the error in the southern boundary, as the provisions related only to adjusting the boundary but the nature of the error in the 1885 award was such that an entirely new boundary was required to reflect the Court's intention to exclude Pokopoko and the land to the south and east from Mangaohāne 2.[63]

76. The Chief Judge was of a similar view in relation to the area in the south of the original Mangaohāne claim that was excluded from the 1885 award. In an 1892 decision he accepted that the location of the area excluded "could only be estimated" by the Court in 1885 and that it was an area where "there was not sufficient evidence on either side to justify a decision as to the debateable portion." It noted that Judge O'Brien's report on the 1885 applications for rehearing had said "they drew the line at Pokopoko, the place about which there seems to have been a strong conflict of evidence." Yet, the Court's intention in 1885 "has not been carried out, either because Pokopoko likes further north, or the line laid down

[60] Wai 2180, #A39 at [282] and [284].
[61] Wai 2180, #A39 at [574] and Wai 2180, #A39(d) at Question 11 and 11.1 and [28].
[62] Wai 2180, #A39(d) at [30]).
[63] Wai 2180, #A39 at [447]-[449] and [452]-[453].

runs further south, than was anticipated, and this land, which the Court intended to exclude, has in fact been included in the judgment."[64]

77. The Chief Judge concluded in 1892 that: "If this inference is correct, it shows that a decision partially erroneous has been arrived at which it seems cannot be satisfactorily rectified under the powers of amendment or upon the inquiry which is required to be held under sections 28-31 of the Native Land Court Act, 1880."[65] It is clear from the evidence, particularly the work of Judge O'Brien in 1885 (cited earlier), that the "inference" the Court referred to 1892 was correct - that is, the southern boundary of Mangaohāne 2 had been incorrectly surveyed in 1886 so as to include, rather than exclude, Pokopoko and other lands occupied by Winiata Te Whaaro and others of Ngāti Hinemanu me Ngāti Paki. Yet the Native Land laws provided no avenue to correct this profound error.

78. In 1894, the Chief Judge expanded on the inapplicability of the survey provisions in the 1880 Act, agreeing with Morrison on this point. He noted that had evidence about the error in the boundary been given as a result of objections raised under the Native Land Court Act 1880 (s29) when the plan was notified in 1893, the Court "might have recognised the error [but] would have been powerless to rectify it. … It is quite clear that the boundary line as laid down cannot be altered. But this fact does not alter the equity, which is that the intention of the Court shall be given effect to as nearly as possible, and this undoubtedly was to draw a line at Pokopoko."[66] The only remedy for the error in the boundary at Pokopoko would have been a rehearing in 1885, but this was wrongly refused by the Chief Judge at the time.

Issue 3(27) Was the rehearing process an adequate and fair response to Taihape Māori protest?

79. Counsel say that the rehearing process was inadequate and was not a fair response to Taihape Māori protest. The rehearing process was prolonged, complex, and never gave Winiata Te Whaaro or several other applicants a substantive opportunity to explain their complaints. The initial rehearing applications, including that submitted by Winiata and others, were dismissed as premature and

[64] Wai 2180, #A39 at [305].
[65] Wai 2180, #A39 at [305].
[66] Wai 2180, #A39 at [459].

their later efforts to appeal were focused on the scope of the rehearing inquiry and whether the claims could be heard. This situation arose out of the difficulties associated with surveying Mangaohāne 2 and finalising the titles to the block.[67] In some cases, the provisions for considering rehearing were not properly adhered to.

80. Mangaohāne is a stark example of the Crown's failure to provide an Appellate Court before 1894. This left applications to the Native Land Court as the only avenue open to Māori, but as Mangaohāne shows this was an inadequate provision.

81. Several applications for rehearing of Mangaohāne (1 and 2) were promptly filed. The first application was prepared on 28 February 1885, the day after judgment was given, and came from Winiata Te Whaaro, Utiku Potaka, Ihakara Te Raro, Retimana Te Rango.[68] One of the grounds for rehearing advanced by Winiata Te Whaaro (for Ngāti Hinemanu and Ngāti Paki) was that the Court had failed to deal with the entire block as claimed.[69] This refers to the exclusion from the Court's judgment of the area south of Mangaohāne 2, which the Court set aside for a future title investigation. This excluded area was of particular concern to Winiata as it took in the papakainga and sheep farm of he and his people at Pokopoko.

82. Even though Judge O'Brien advised the Chief Judge in his response to the applications for rehearing that it was the Court's intention to exclude Pokopoko and other land from Mangaohāne 2, this was not accepted as grounds for a rehearing as the southern boundary of Mangaohāne 2 as defined by the 1885 award had yet to be surveyed so it remained unclear if Pokopoko had been included or not in the title.

83. Following receipt of the reports of his Judges on these three applications for rehearing (including Winiata's application), Chief Judge Macdonald rejected them in a decision of 1 May 1885. He signed a Court order dismissing the three applications for hearing on 28 May 1885.[70] He had not heard from the applicants.[71]

---

[67] Wai 2180, #A39(g) at [3].
[68] Wai 2180, #A39 at [59].
[69] Wai 2180, #A39 at [92].
[70] Wai 2180, #A39 at [104].
[71] Wai 2180, #A6 at 192.

84. On 8 June 1885, the Chief Judge was advised that two other applications for rehearing had not yet been dealt with (being those of Te Rina Mete Kingi and Rena Maikuku. Despite this, on 11 June 1885 the Chief Judge issued a notice to the effect that all applications for rehearing had been dealt with and the title to Mangaohāne, as defined by the decision of 10 March 1885, was ascertained within the meaning of the Native Land Laws Amendment Act 1883 (s7).[72] This notice was gazetted on 18 June 1885, making it lawful to engage in dealings for the Mangaohāne blocks from 21 July 1885.[73]

85. The Chief Judge was reminded by the Registrar on 19 June 1885 of the two applications for rehearing that had yet to be dealt with. The Chief Judge asked for these to be sent to him but took no further action. (#A39 at [107]-[108]) The Court of Appeal found in 1891 that the two applications for rehearing - those of Te Rina Mete and Rena Maikuku - had not been dealt with.[74]

86. In August 1891, Winiata Te Whaaro, Retimana Te Rango, and Hare Tanoa applied to the Native Land Court for what is referred to as an investigation of title of Mangaohāne 1 and Mangaohāne 2.[75] In light of the Court of Appeal decision, this appears to have been intended as an application for rehearing. No response to it has been located.

87. Beyond this failure to grant a rehearing in the first instance, when a rehearing was belatedly allowed in 1893 following proceedings in the Court of Appeal, it was unduly constrained and amounted to only a partial rehearing. As a result the interests of Winiata Te Whaaro and others of Ngāti Hinemanu and Ngāti Paki were again wrongly excluded from consideration.

88. When the Court sat under the Chief Judge at Hastings in February 1892 it was to consider the two applications for rehearing allowed by the Court of Appeal (those of Te Rina Mete and Rena Maikuku), which were both presented by Morison.[76]

89. In relation to Te Rina's application, Morison said this was brought on behalf of Ngāti Paki, Ngāti Tamakorako, Ngāti Hau, and Ngāti Haukaha, not Te Rina

---

72 Wai 2180, #A39 at [105] and [272].
73 Wai 2180, #A39 at [106].
74 Wai 2180, #A39 at [285].
75 Wai 2180, #A39 at [290].
76 Wai 2180, #A39 at [291]-[292].

alone.[77] Morison sought to raise the issue of the location of Pokopoko and the Court's intention in 1885 to exclude this area from the Mangaohāne block as awarded. He sought to call Judge O'Brien to given evidence on his point, but the Chief Judge insisted the boundary was specified in the 1885 award and that the correctness of the survey was not relevant to the rehearing.[78]

90. In April 1892, the Court gave its decision on the applications for rehearing. It rejected both applications in relation to Mangaohāne 1 and also rejected the application of Te Rina Mete as it related to Mangaohāne 2. In relation to the application of Rena Maikuku it accepted that others besides those awarded title in 1885 had exercised "acts of ownership" in parts of Mangaohāne block, "in certain localities, especially in the neighbourhood of Pokopoko, which upon survey appear to be to the north of the line laid down on the southern boundary of the land adjudicated."[79]

91. On this basis, a "partial rehearing" of Mangaohāne 2 in relation to the interests of Rena Maikuku and those claiming through the same rights of ancestry (from Ohuake "and other lines of descent") and occupation.[80]

92. As already noted, in his 1892 decision, the Chief Judge also remarked on the error in the surveying of the southern boundary of Mangaohāne 2, leading to the inclusion of Pokopoko and other land in the title when the Court in 1885 believed it was excluding this land from the title. Based on this decision, Morison (counsel for several groups involved in the partial rehearing) believed the interests of Winiata Te Whaaro and his people would be included in the pending partial rehearing, but they were not.[81]

93. The Chief Judge was also of the view that his 1892 decision would mean the partial rehearing he had ordered would include an inquiry into the error in defining the southern boundary. He wrote in August 1892 that "it is possible that upon rehearing the line laid down as dividing the southern part from that part in respect of which no order was made may have to be shifted," but it was also possible that

[77] Wai 2180, #A39 at [292].
[78] Wai 2180, #A39 at [294] and [296].
[79] Wai 2180, #A39 at [304]-[305].
[80] Wai 2180, #A39 at [304] and [306].
[81] Wai 2180, #A39 at [315].

the Court "may affirm the line so laid down."[82] This indicates he expected the rehearing to inquire into the location of the southern boundary of Mangaohāne, but it did not do so. The Court instead concluded it could not rectify the error.[83]

94. The partial rehearing ordered by the Chief Judge in 1892 proceeded at Hastings in December 1892, and concluded in February 1893. Judge O'Brien (who presided at the 1884-85 title investigation) was called to give evidence. He told the Court "I have reason now to think I was mistaken" in dismissing Winiata's claims to Mangaohāne in 1885. When Winiata was called to give evidence for Ngāti Whiti during the 1890 partition hearing, O'Brien said "he showed a much clearer claim than at the first hearing and I came to the opinion that his claim was clear[er] than I thought."[84]

95. Despite this clear evidence in favour of the claim of Winiata Te Whaaro and his people to Mangaohāne 2 (in addition to the evidence about the error in the inclusion of Pokopoko when surveying the southern boundary), the Court's 1893 decision on the rehearing was constrained by the narrow terms authorised by the Chief Judge in 1892, which excluded many claimants. The rehearing was confined to the interests of Rena Maikuku and those claiming under the same rights of ancestry and occupation as her.[85]

96. At earlier investigations the Court was told that Rena Maikuku traced her rights from Te Rangiwhakamatuku and Hinemanu (descendants of Te Ohuake) but at the rehearing she claimed through Tamakorako (son of Tutemohuta and grandson of Te Ohuake). This excluded many people she had only recently included on her own list of co-claimants, as only 11 of them were descendants of Tamakorako.[86]

97. As a result of the narrow parameters set for the partial rehearing, Winiata Te Whaaro and his people were excluded by the Court.[87]

98. In November 1893, he appealed this decision to the Supreme Court where he sought writs of mandamu, certiorari and prohibition.[88] Among the grounds raised

[82] Wai 2180, #A39 at [308].
[83] Wai 2180, #A39 at [309].
[84] Wai 2180, #A39 at [360].
[85] Wai 2180, #A39 at [363]-[364] and [377].
[86] Wai 2180, #A39 at [369]-[371].
[87] Wai 2180, #A52 at 346.
[88] Wai 2180, #A39 at [396].

was the interpretation by Judges Mackay and Scannell of the Chief Judge's 1892 order for a partial rehearing; an interpretation that resulted in the exclusion of Winiata and several dozen other claimants.[89]

99. The Supreme Court (comprising the Chief Justice and Justice Connolly) gave its decision on 12 December 1893.[90] It did not uphold the complaint about the exclusion of Winiata and others from the partial rehearing, finding the Native Land Court to have rightly refused to entertain claims broader than descent from Tamakorako, who was named in Rena Maikuku's original application for rehearing.[91]

100. Winiata appealed the decision to the Court of Appeal.[92] The appeal was heard in May 1894 and concentrated on the narrow interpretation given by the Native Land Court and Supreme Court to the Chief Judge's 1892 order for a partial rehearing.[93] The Court of Appeal, comprising the Chief Justice and Justice Donnolly (who heard the case in the Supreme Court) with Justices Denniston and Williams, dismissed the appeal.[94]

101. The Supreme Court had, however, noted that the mistake over the surveying of the southern boundary in relation to Pokopoko "might equally have been a ground for granting a rehearing to Winiata Te Whaaro and those whom he represented." It added that it was "unfortunate that Winiata and his party should suffer through this mistake, and through the circumstance that it was not effectually brought to the notice of Chief Judge Macdonald when dealing with Winiata's [1885] application for a rehearing." More unfortunate still, "no appeal lies from the decision of the Chief Judge on an application for a rehearing under the Act of 1880, and the error, if such it were, cannot be corrected either by this Court or by the Chief Judge."[95]

102. The inadequate provisions for rehearing in the Native Land laws also proved of very limited utility when Ngāti Whiti sought a rehearing of the 1890 partition of

[89] Wai 2180, #A39 at [398].
[90] Wai 2180, #A39 at [396].
[91] Wai 2180, #A39 at [399]-[40].
[92] Wai 2180, #A39 at [402] and [406].
[93] Wai 2180, #A39 at [417].
[94] Wai 2180, #A39 at [416] and [419]-[423] citing *Winiata Te Wharo and others v. Davy and others*, (1893) 12 NZLR 502.
[95] Wai 2180, #A39 at [401] citing Winiata Te Wharo and others v. Davy and others, (1893) 12 NZLR 502.

Mangaohāne 1 and Mangaohāne 2. When the blocks were partitioned into 23 subdivisions, the bulk of the land was awarded to the Ngāti Honomokai owners (48,540 acres) with Ngāti Whiti owners being awarded the balance (6,800 acres).[96]

103. In applying for a rehearing, they disputed the Court's view that their occupation was limited and dated from after 1840. They pointed to the judgment in the Owhaoko reinvestigation, which found that Ngāti Honomokai had no interests west of the Taruarau River, which also formed part of the eastern boundary of Mangaohāne. That is, the Owhaoko reinvestigation found that Ngāti Honomokai did not have interests in Mangaohāne (although this finding had no effect on the title to Mangaohāne). Ngāti Whiti noted they were also disadvantaged by the absence through illness of Retimana Te Rango.[97]

104. The Ngāti Whiti applicants were also acting on behalf of Ngāti Paki, as their application referred to Ani Paki and Wera Utiku (a signatory to the application) being dispossessed as a result of the Court awarding the land containing their residence, farm, fenced paddocks, and crops to others. The application was not dismissed by the Chief Judge until May 1894, on the grounds it was "informal" and "premature" as the partition orders had yet to be completed due to the Supreme Court referral.[98]

105. The 1890 application for a rehearing of the partition of Mangaohāne was finally advertised for hearing at Hastings on 11 December 1893, when it was adjourned to a future sitting.[99] The application was that of Retimana Te Rango for Ngāti Whiti and was heard at Hastings on 22 May 1894. Doubts as to the Court's jurisdiction were raised and it was agreed that the application be dismissed and the applicant or others in the title could seek remedy under the Native Land Court Certificates Confirmation Act 1893(s4).[100]

106. As a result, in late 1893 or early 1894, Studholme considered negotiating a compromise with Winiata and his people, in which they would be offered 1,000 acres of Mangaohāne land and £800, but Studholme's manager Warren did not

---

[96] Wai 2180, #A6 at 199-200 and #A39 at [230].
[97] Wai 2180, #A39 at [231]-[233] and [250].
[98] Wai 2180, #A39 at [231]-[233] and [250].
[99] Wai 2180, #A39 at [409].
[100] Wai 2180, #A39 at [424]-[425].

think this would suffice and the offer does not appear to have been made to Winiata.[101]

Issue 3(28) Why were the decisions of the Chief Judge and the Native Affairs Committee ignored by the government of the day?

107. There were numerous inquiries by the Chief Judge and a number of petitions were considered by the Native Affairs Committee. The evidence discloses no particular reason for the failure by the Crown to address Winiata's grievances even though the substance of them was eventually acknowledged. It was probably just easier to ignore them in the expectation that Winiata would eventually be unable to pursue them further.[102]

108. Chief Judge Davy attempted to remedy the situation by including Wainiata and those who claimed with him in the title to Mangaohāne No. 2 following his inquiry in 1894 but the Court of Appeal subsequently concluded he exceeded his jurisdiction in doing so.[103]

109. In 1886 some of those excluded from the title to Mangaohāne petitioned Parliament for relief. Noa Te Hianga had been absent from the title investigation, being "dangerously ill, blind, and wholly unable to attend," and his interests had been overlooked.[104] His lawyer, former Native Minister John Sheehan, was instructed in 1885 to lodge an application for rehearing but Noa discovered after Sheehan's death in June 1885 that the application had never been lodged despite him advancing £750 for the action. The Native Affairs Committee reported that any grievance could only be remedied though legislation and referred the petition to the Government for inquiry.[105]

110. In his report on the applications for rehearing Judge O'Brien referred to Noa Te Hianga, noting that Noa was an important figure "allied with Winiata [Te Whaaro] and Ngati Pake[sic]," adding, "I wish he had been brought forward" as Winiata had referred to Noa's knowledge of the Mangaohāne land north of Mangaohāne

[101] Wai 2180, #A39 at [410].
[102] Wai 2180, #A39(g) at [4].
[103] Wai 2180, #A39(g) at [5].
[104] Wai 2180, #A6 at 192 and Wai 2180, #A39 at [138]-[139] and [145]-[146].
[105] Wai 2180, #A39 at [146]-[148] and AJHR, 1886, I-2, p.14.

Stream.[106] Noa Te Hianga described himself as Ngāti Hinemanu and was said by Utiku Potaka to be of Ngāti Hinemanu.[107]

111. In June 1886, a lawyer acting for Noa Te Hianga wrote to Native Minister Ballance to ask that Mangaohāne be included in the terms of reference for a forthcoming Parliamentary inquiry into the Owhaoko and Orumatua-Kaimanawa blocks. It was noted that the circumstances around the title investigation and the customary interests involved in Mangaohāne were very similar to those in Owhaoko and Oruamatua-Kaimanawa.[108]

112. The Native Minister referred the Mangaohāne petition of Noa Te Hianga to the chair of the Owhaoko Kaimanawa Native Land Bill Committee for inclusion in the pending Bill arising from its inquiry, but the chair responded in July 1886 that it could only deal with matters referred to it by the House of Representatives. [109]Other members of the Committee were of a different view and later agreed to inquire into the petition. In August 1886, the Committee reported the matter was not one in which Parliament should interfere, but it added that the provisions in the Supreme Court code (rule 558) providing additional time to lodge applications should be applicable to Native Land Court proceedings. This report was referred to the Government for inquiry.[110]

113. Noa Te Hianga's lawyer advised the Native Minister that many others suffered with him from their exclusion from the title to Mangaohāne 2. This would appear to include Winiata Te Whaaro and others of Ngāti Hinemanu and Ngāti Paki, as the lawyer referred to them being in danger of losing their homes on Mangaohāne "and property to the value of £20,000." They had already spent £1,000 in bringing their grievances and coming to Wellington to be heard by the Committee, and he pleaded that they be heard.[111]

114. If the petition could not be heard before the end of the Parliamentary session, the lawyer suggested the Native Minister halt the pending proceedings for the subdivision and alienation of Mangaohāne. The Native Minister referred the

[106] Cited in Wai 2180, #A39 at [79].
[107] Cited in Wai 2180, #A39 at [86] and [146].
[108] Wai 2180, #A52 at 333-334 and Wai 2180, #A39 at [143].
[109] Wai 2180, #A39 at [144] and [149].
[110] Wai 2180, #A39 at [156] and [164].
[111] Wai 2180, #A39 at [156].

matter to Attorney-General Sir Robert Stout, who advised in August 1886 that the subdivision be "stopped meantime." The Native Department forwarded the file to the Chief Judge, asking him to give effect to the Attorney-General's opinion.[112]

115. In September 1886, the Chief Judge replied that Judge Brookfield was then sitting in Hastings for a hearing that included the Mangaohāne applications. As such, it was now the sitting Judge rather than the Chief Judge who had the power to adjourn or dismiss the case. The Chief Judge advised that another avenue open to the Crown was for the Governor (acting on the advice of the Native Minister) to use his "ample authority" under the provisions of the Native Land Court Act 1880 (s38) to stop the case.[113]

116. The Native Minister declined to stop the Mangaohāne case. It instead failed to proceed for other reasons.[114] In the meantime, the petition of Noa Te Hianga and the report of the Owhaoko Kaimanawa Committee was referred by the Government to the Chief Judge in August 1886 for inquiry.[115] In September 1886, the Chief Judge rejected the petition, asserting that Ngāti Hinemanu's claims had not been neglected in Noa's absence and that witnesses did not refer to the significance of Noa's evidence or to his absence from Court.[116]

117. The Chief Judge did not appear to be aware that Judge O'Brien's report on the applications for rehearing (which he reviewed) does in fact refer to the significance of Noa's evidence (as noted above). The Chief Judge attached a copy of Judge O'Brien's sketch map of Mangaohāne showing Pokopoko along the southern boundary of Mangaohāne 2, placing it largely outside the title ordered by the Court in 1885. The sketch map was, in turn, based on the sketch plan before the Court in 1885, which did not show critical locations such as Pokopoko and Te Papa-a-Tarinuku. The Chief Judge was labouring under the misapprehension that Ngāti Hinemanu would have an opportunity to prove their customary interests to this land when title to it was investigated in a separate hearing.[117] That was the intention of the Court in its 1885 judgement, but it was not what happened;

112 Wai 2180, #A39 at [158]-[160].
113 Wai 2180, #A39 at [160]-[161].
114 Wai 2180. #A39 at [162].
115 Wai 2180, #A39 at [165].
116 Wai 2180, #A39 at [168].
117 Wai 2180, #A39 at [174] and Figure 9 at 71.

Pokopoko was instead wrongly included in the survey of Mangaohāne 2 without considering the interests of Ngāti Hinemanu and Ngāti Paki.

118. In August 1886, Te Rina Mete Kingi petitioned Parliament for a rehearing of her claim to Mangaohāne 2.[118] Her ancestral claim had been accepted by the Court and by other parties at the title investigation, but the Court held that she could not show occupation and as a result was excluded from the list of owners.[119] When she applied for a rehearing in 1885, Judge Williams did not recommend a rehearing but considered that if a rehearing was ordered on one of the other applications before the Chief Judge, she should be allowed to participate in such a rehearing.[120] As noted, none of the other applications were upheld by the Chief Judge, so Te Rina was denied the hearing to which Judge Williams advised she was entitled.

119. In August 1886, the Native Affairs Committee recommended that her petition be inquired into "at an early date." It was instead merely referred to the Chief Judge in April 1887.[121] In May 1887 he observed that Te Rina Mete Kingi's claims of occupation related to Pokopoko and other lands that lay south of Mangaohāne 2, in the area excluded from the Court's 1885 judgment which were intended to be left for a future title investigation.[122] This confirms the finding of Judge O'Brien that Pokopoko and other lands claimed by Winiata Te Whaaro and his people were not intended to be included in Mangaohāne 2 as defined by the 1885 judgment. Despite this, they had been included in Mangaohāne 2 as surveyed in 1886, but no action was taken to remedy this profound error.

120. When C. B. Morison, a lawyer acting for Winiata Te Whaaro, sought to participate in a Mangaohāne case referred to the Supreme Court by Judge O'Brien in 1890, he approached Native Minister Mitchelson seeking access to the Native Department file on Mangaohāne. The Native Department considered it "undesirable" to make files such as available to a solicitor or to the public. The Solicitor-General agreed with this as a policy, while leaving it to the Minister's discretion to make available parts of files that were "of a public nature" as he saw

[118] Wai 2180, #A6 at 192 and AJHR, 1886, I-2, p.40.
[119] Wai 2180, #A39 at [182]-[183].
[120] Wai 2180, #A39 at [88].
[121] Wai 2180, #A39 at [184]-[186].
[122] Wai 2180, #A39 at [189].

fit. In his view the only solicitors to whom such files should be given were those acting for the Crown.[123] Yet when Winiata Te Whaaro and another petitioned Parliament in 1890 for legislation to enable their claims to Mangaohāne to be reheard, the Native Minister readily agreed in August 1890 to produce the Native Department file on Mangaohāne to the Native Affairs Committee.[124]

121. The Crown repeatedly proved willing to assist Studholme rather than assist Winiata Te Whaaro and many other Māori wrongly excluded from Mangaohāne 2. In 1892, Studholme petitioned Parliament about his purchasing in Mangaohāne 1 and Mangaohāne 2 from 1885 to 1891. He was concerned that the Court of Appeal's recent decision cast doubt on the validity of his purchases, not through any invalid dealings on his part but due to Native Land Court errors affecting the title.[125]

122. The Native Affairs Committee agreed with the petition and its report of 5 October 1892 it recommended legislative provision be made to ensure Studholme's interests were not affected by the partial rehearing ordered by the Court of Appeal. It further recommended that the rehearing "be limited to those who made the applications upon which it was granted."[126]

123. On 5 October 1892, the same day the Committee's report was made, the House of Representatives debated amendments to the Native Land (Validation of Titles) Bill that were proposed to protect Studholme's interests in the Mangaohāne blocks. The amendments provided that where an application for rehearing had been dealt with and rejected (as was the case with Winiata's 1885 application in Mangaohāne 2) the unsuccessful applicant could not later join a rehearing that might be granted to another applicant. This would have the effect of excluding Winiata from the rehearing of Mangaohāne 2 ordered by the Court of Appeal.[127]

124. In response, James Carroll ('the Native Member of the Executive'), first suggested the addition to the amendments of the words "unless good cause be shown to the contrary," so as to provide for exceptional circumstances.[128] He went on to say

[123] Wai 2180, #A39 at [239]-[242].
[124] Wai 2180, #A39 at [245].
[125] Wai 2180, #A39 at [319]-[320].
[126] Wai 2180, #A39 at [321].
[127] Wai 2180, #A39 at [329] and [348].
[128] Wai 2180, #A39 at [329].

that while the Government agreed with the Committee that Studholme was not at fault and it wished to protect his interests, it had not yet decided to support the amendments.[129] The Government's view was that Winiata's application for rehearing had been dealt with and dismissed in 1885, and that he was now seeking to "take advantage" of the rehearing ordered by the Court of Appeal on the application of another claimant.[130] Rather than reject the amendments proposed to the 1892 Bill, the Government undertook to hold the matter over until the next Session of Parliament, "so that no injustice may be done during the recess." If Native Minister Cadman (then absent) endorsed the amendments, they could be made when the Bill came before the Legislative Council. If Cadman did not endorse the amendments, another provision could be made to protect Studholme's interests.[131]

125. The final effort of Winiata Te Whaaro to reverse the Court's error over the inclusion of Pokopoko and other lands in Mangaohāne 2, and its exclusion of he and his people from the title to their lands, was a s.13 application under the Native Land Court Ac Amendment Act 1889. In June 1894, Winiata made an application under the Native Land Court Act Amendment Act 1889 (s13) for an inquiry by the Chief Judge into his interests in Mangaohāne. He did so as Ngāti Hinemanu and Ngāti Paki, setting out the history of their claims to Mangaohāne 2 from 1884 onwards. He set out how their interests to the south and east of Pokopoko were excluded from the title in 1885 but later incorrectly included in the survey of Mangaohāne 2.[132]

126. The Chief Judge notified a hearing on the application to be held at Hastings on 23 July 1894.[133] The s.13 inquiry was presided over by Judge Butler and Assessor Horomona, and featured submissions by counsel for various parties on legal issues and the facts of the case. No new evidence was presented in the inquiry, which ended on 4 August 1894.[134]

127. Judge Butler did not support Winiata's application and deemed the survey of the southern boundary to be accurate. He advised the Chief Judge that the Court in

[129] Wai 2180, #A39 at [330].
[130] Wai 2180, #A39 at [334].
[131] Wai 2180, #A39 at [336].
[132] Wai 2180, #A39 at [435].
[133] Wai 2180, #A39 at [439].
[134] Wai 2180, #A39 at [444].

1885 must have been aware from the evidence that Pokopoko papakainga was inside the southern boundary it defined for Mangaohāne, and that it intended only to exclude part of Pokopoko forest from its judgment.[135] This conclusion is not supported by Judge O'Brien, who heard the evidence in 1885 and acknowledged in 1892 not only the Court's ignorance of key locations such as Pokopoko at the time but also acknowledged the profound error in the survey of the southern boundary.[136]

128. Even so, Judge Butler did find (as Judge O'Brien had acknowledged in 1892)[137] that Ngāti Hinemanu and Ngāti Paki did have valid customary interests in Mangaohāne 2. Referring to the evidence given at the 1890 partition, he reported it was "stronger in support of Ngāti Hinemanu and Ngāti Paki claims" than the evidence given at the title investigation in 1884-85. Had the 1890 evidence been given at the title investigation it "might have affected the judgment" in 1885 "but it was the fault of the parties themselves that the whole of the evidence was not available to the Court."[138]

129. After receiving Judge Butler's report, the Chief Judge considered it at a hearing in Hastings on 18 August 1894. After hearing submissions from counsel he gave his decision on 31 August 1894, which was that Winiata and his fellow applicants at the original title investigation should be included in the title to Mangaohāne 2.[139] The Chief Judge explained his reasoning at length, including the following key passage:[140]

    a) Upon consideration of the whole matter, and of the evidence given by Judge O'Brien before the rehearing Court on Rena Maikuku's application in 1893, it appears to me, that the Court in its decision included a portion of what is now known as Mangaohāne No. 2 which portion the Court intended to exclude or believed that it had excluded from its adjudication. It further appears to me, that such inclusion was the result of a misapprehension in the mind of the Court as to the position of a place called 'Poko Poko' a kainga or place of residence on the block, stated in the evidence to have been the

[135] Wai 2180, #A39 at [454].
[136] As noted earlier, citing Wai 2180, #A39 at [357]-[359].
[137] Wai 2180, #A39 at [360].
[138] Wai 2180, #A39 at [454].
[139] Wai 2180, #A39 at [457].
[140] Wai 2180, #A39 at [459].

place of residence of the applicant. The position in point of equity appears to be, that as to some undefined portion of the block lying generally southward of and contiguous to, and probably inclusive of Poko Poko the title remains unascertained, and the land is in equity still to be regarded as 'native land'. To this land, the applicant notwithstanding the judgment of the Court, has continued to maintain his claim, and has as I understand from a date prior to the decision up to the present time remained in possession. His position in this respect, may be regarded as analogous to that of a claimant in possession under section 67 of the Land Transfer Act, and assuming his claim to be well founded, I see no reason why an order of the Native Land Court should be deemed more sacred than a Land Transfer Certificate of Title would be under similar circumstances. In such a case even a purchaser for value would have to succumb.

130. On the survey issue, the Chief Judge agreed with Morison's submission that had evidence about the error in the boundary been given in 1893 under the Native Land Court Act 1880 (s29), the Court "might have recognised the error [but] would have been powerless to rectify it. … It is quite clear that the boundary line as laid down cannot be altered. But this fact does not alter the equity, which is that the intention of the Court shall be given effect to as nearly as possible, and this undoubtedly was to draw a line at Pokopoko."[141]

131. The only remedy for the error in the boundary at Pokopoko would have been a rehearing in 1885, but this was not granted and could not now be granted by the Court. The Chief Judge considered s.13 provided the only avenue to remedy the defect in the title, finding: "this is a case in which I should assume the fullest power the language of the statue will admit of," and the statute conferred "an equitable jurisdiction for the purpose of remedying the omissions and errors which are only too apt to find their way into the proceedings of the Native Land Court."[142]

132. Studholme's solicitors sought a stay on the Court proceeding to inquire into the list of names to be added to the title to Mangaohāne 2 with Winiata, while Airini

[141] Wai 2180, #A39 at [459].
[142] Wai 2180, #A39 at [459].

Donnelly's solicitors sought to challenge the Chief Judge's decision in the higher courts.[143]

133. Studholme at first opposed proceeding to the higher courts and suggested a compromise settlement with Winiata under which they would be allotted 5,300 acres in the south of Mangaohāne 2. This would entail sacrificing some of the interests of not only Studholme but also those of Airini Donnelly, who rejected the proposal.[144] Studholme then applied to have the Chief Judge rescind his s.13 decision, providing a statement from Judge O'Brien regarding the southern boundary. The Chief Judge considered this application at Otaki on 6 February 1895, when he found O'Brien's statement to be inadmissible without re-opening the s.13 proceedings. In any event, the statement was not sufficiently cogent to lead the Chief Judge to alter his decision.[145]

134. One of Studholme's solicitors (W. L. Rees) then travelled with Judge Butler to Otaki and there spent the evening with the Chief Judge when "I entered into fully into the circumstances with him." As a result, the Chief Judge agreed with the solicitor's wish to bring Mangaohāne 2 into the Validation Court "at once" but he needed to obtain consent of Judge Barton (the Validation Court Judge) to hear the case.[146]

135. The Validation Court claim was not pursued immediately as Airini Donnelly's solicitors wanted to first seek a writ of prohibition in the Supreme Court to prevent the Chief Judge making any order under s.13 that admitted Winiata and others to the title to Mangaohāne 2. Justice Richmond heard the matter in April 1895.[147]

136. The Supreme Court issued the writ of prohibition to the Chief Judge. Justice Richmond accepted that an error had been made when Pokopoko and other land was included in the survey of Mangaohāne 2, but it was an error beyond the scope of the Chief Judge's powers to amend under the s.13 application. His powers were instead "limited to the rectification of errors, whether of omission or commission." Such an error had to be "a definite mistake capable of a definite and definitive

[143] Wai 2180, #A39 at [458] and [460]-[464].
[144] Wai 2180, #A39 at [463]-[467].
[145] Wai 2180, #A39 at [489].
[146] Wai 2180, #A39 at [490] and see correction regarding Barton in Wai 2180, #A39(g) at [20] Proceedings in the Validation Court would have created a stay of proceedings in any other Court. Wai 2180, #A39 at [492].
[147] Wai 2180, #A39 at [494] and [498]-[499], and see also *Winiata Te Wharo v Airini Tonore and another* (1895) 14 NZLR 209 (SC and CA) 214.

correction by the amending order itself." In Justice Richmond's view, the error over the inclusion of Pokopoko in Mangaohāne 2 was not such an error; as it was not possible to correct what the Judges had done in 1885 as they did not then know what part of the block was affected.[148]

137. Winiata appealed the writ to the Court of Appeal (comprising the Chief Justice, Justice Williams, and Justice Denniston) which decided the matter in July 1895.[149] His appeal was not upheld. The Court of Appeal did not agree with the Chief Judge that his jurisdiction under s.13 was an equitable one. It agreed with the Supreme Court that the error or omission to be corrected under s.13 should be one that could be identified with some accuracy and corrected but that "if the only remedy is a rehearing the case is not within the section." Moreover, the Chief Judge's approach of including Winiata and others in the title was "unjustifiable" as the Court in 1885 had left the interests at Pokopoko to be determined by a future Court. The Chief Judge could instead have amended the southern boundary or held an inquiry to determine the interests of Winiata and others within the existing boundary.[150]

138. Even so, the Court did conclude that the Court had in 1885 intended to exclude Pokopoko from Mangaohāne 2.[151] Yet neither the Native Land Court nor the Court of Appeal had proved able to remedy the profound error in the title to Mangaohāne 2. All they could do was identify the error; it was for the Crown to provide a legislative remedy. While it proved more than ready to provide legislative remedies for Studholme, nothing was done for Winiata Te Whaaro and people. As a result, Studholme got the Mangaohāne land and the land's customary owners got nothing.

Issue 3(29) Did any of the various Native Land Court Judges involved with the case collude with the Native Minister to favour the cause of the runholder or his agents?

139. Edwin Mitchelson when he was Native Minister, did intervene with the Chief Judge to advance Studholme's claims in the Court. Generally, the purpose of these

[148] Wai 2180, #A39 at [500]-[503], and see also *Winiata Te Wharo v Airini Tonore and another* (1895) 14 NZLR 209 (SC and CA) 214).
[149] Wai 2180, #A39 at [504].
[150] Wai 2180, #A39 at [508]-[509].
[151] Wai 2180, #A39 at [507].

interventions was to schedule a hearing to progress Studholme's efforts to gain title to the land.[152]

140. There is no question that John Studholme Jr was well connected politically and the correspondence among officials and between those officials and Studholme shows that he exercised those connections in his efforts to obtain title to Mangaohāne.[153]

141. While Studholme eventually received title to the block, his efforts and those of the politicians and officials who assisted him were not infrequently counter-productive. This gave Winiata space to pursue his claims but at considerable cost and with little chance of success. Like many nineteenth century grievances involving Māori land, inaction which extended over many years made it difficult to pursue claims especially as ambiguity and confusion in the legal process were dulled with the passage of time and always to the benefit of the Pakeha purchaser. It was precisely this situation that Winiata found himself in as he pursued his claims to Pokopoko though, as time passed, officials and possibly even Studholme realised the legitimacy of those claims. However, the law proved unable to remedy the injustice (even as it could 'validate' deeds which were otherwise unlawful).[154]

142. In 1889 Studholme sought a partition of Mangaohāne 1 and Mangaohāne 2 to enable the interests he had purchased to be defined. When the partition hearing did not proceed, he complained to the Native Minister that every time the case was Gazetted for hearing the Court adjourned before hearing it.[155] In July 1889, the Native Minister sought a report from the Chief Judge on Mangaohāne "as to whether or not in his opinion justice has been done," but no report was received.[156]

143. In fact, the partition could not proceed until the titles to Mangaohāne 1 and Mangaohāne were completed and as of 1889 they remained incomplete due to survey issues relating to the need to define the boundary between the Wellington and Hawke's Bay provinces as it related to Mangaohāne 1 and 2 until the end of 1889.[157]

---

[152] Wai 2180, #A39(g) at [6].
[153] Wai 2180, #A39(g) at [7].
[154] Wai 2180, #A39(g) at [9].
[155] Wai 2180, #A39 at [200].
[156] Wai 2180, #A39 at [202]-[203] and [206].
[157] Wai 2180, #A39 at [205].

144. When the survey was complete, the Native Minister urged the Chief Judge to proceed with the partition hearing sought by Studholme.[158] This was despite Te Rina Mete Kingi having already applied for an inquiry under the Native Land Court Acts Amendment Act 1889 (s13).[159] This provided for errors or omissions in titles to be amended on inquiry by the Chief Judge.

145. The Court instead obliged the Native Minister and Studholem, assuring the Minister that Studholme's partition applicatiosn would be heard at the Hastings sitting in April 1890. Before the case could be called the Court realised it could not proceed to partition until the original certificate of title had been issued, which had yet to be done due to the delays with the survey plan.[160]

146. On 10 May 1890, Studholme belatedly consented to the survey plan for which he had paid being used on the certificates of title. The plan was then still being completed, with the provincial boundary yet to be defined on it. Under pressure from the Native Department and the Surveyor-General, the certificates of title were hastily sent to the Court on 12 May before the provincial boundary had been defined on the title plans. The Court immediately completed the title orders at Hastings. As Judge O'Brien was not there, the orders had to be signed by Judge Williams, who had retired since the 1885 title investigation. On 27 May, the Chief Judge signed the certificates, which were then sent to the Native Department.[161]

147. While the certificates of title were being completed, the partition hearing proceeded during April and May 1890.[162] When Mangaohāne 1 and Mangaohāne 2 were partitioned into 23 subdivisions, the bulk of the land was awarded to the Ngāti Honomokai owners (48,540 acres) with Ngāti Whiti owners being awarded the balance (6,800 acres).[163]

148. These proceedings revealed that Studholme (through his agent Warren) had acquired interests in Mangaohāne equal to about 32,000 acres in 1885 and 1886.[164]

[158] Wai 2180, #A39 at [208].
[159] Wai 2180, #A39 at [206].
[160] Wai 2180, #A39 at [213]-[215].
[161] Wai 2180, #A39 at [227]-[228].
[162] Wai 2180, #A39 at [229].
[163] Wai 2180, #A6 at 199-200 and #A39 at [230].
[164] Wai 2180, #A39 at [236].

149. The awarding of titles to the partitions Studholme had purchased in their entirety was delayed by Supreme Court action.[165] In response, he applied to have his purchases in Mangaohāne 1 and Mangaohāne 2 investigated by commissioners and validated under the Native Land Court Acts Amendment Act 1889 (s20). This provided for his invalid purchasing of undivided individual interests in these blocks to be retrospectively validated.[166]

150. Following the 1893 rehearing, the Court moved promptly in May 1893 to issue certificates of title for Mangaohāne 1 and Mangaohāne. It wanted this done before 6 June 1893, when the application of R. T. Warren (Studholme's farm manager) under the Native Land (Validation of Titles) Act 1892 to validate his purchasing of interests in Mangaohāne 1 and Mangaohāne 2. The Mangaohāne 1 title was completed on 2 June 1893.[167]

151. The application under the 1892 Act was inquired into by the Court at Hastings on July 1893, which duly validated purchases that were invalid under the Native Land Act 1873 and Native Land Court Act 1880.[168] Nor were the provisions of the Native Land Laws Amendment Act 1883 (s7) complied with.[169]

Conclusion

152. The Tribunal must find that these claims are well founded.

153. Counsel submit that the Crown acted in a number of ways that failed to actively protect Taihape Māori property interests to the fullest extent reasonably practicable.

154. In terms of its duty to act in good faith, we submit that, in breach of this duty, the Crown failed to act in good faith towards Taihape Māori.

155. Counsel submit that the Crown's submissions do not go far enough to acknowledge the role of the Native Land Court as a tool of the Crown. The Court operated to promote its own Crown's policies to help realise specific Crown

[165] Wai 2180, #A39 at [234].
[166] Wai 2180, #A39 at [254].
[167] Wai 2180, #A39 at [382]-[383], [392] and [395].
[168] Wai 2180, #A39 at [392].
[169] Wai 2180, #A39 at [395].

objectives and to displace existing customary tenure operating under Tikanga Māori.

156. The purpose of the Court was to alienate land to facilitate European settlement and to pay for the costs of developing the costs of the colonies infrastructure and Government at the expense of Taihape Māori.

157. Taihape Māori did not need the Court to determine their ownership or competing claims to land; Māori were more than capable of doing that themselves. In fact, the case relating to Mangaohāne, highlights it was the processes of the Court itself that created animosity and conflict in relation to title issues being argued by virtue of the very adversarial nature of the Court itself.

158. Taihape Māori already had the ability to alienate land according to their own processes and tikanga. However, the individualisation of title under British law was not beneficial to Taihape Māori and directly contributed to the loss of significant areas of land.

PREJUDICE

159. The claims, in relation to the Crown entering into transactions with Taihape Māori prior to the establishment of the Native Land Court up to the period 1910, all primarily concern the Crown's acquisition and alienation of the whenua of Taihape Māori.

160. The prejudice that arises through direct land loss is generally self-evident, with the same most evident in the economic and cultural losses that were suffered by Taihape Māori. There is a prejudice and trauma at a spiritual level which is also clearly evidenced by the testimony of all of the claimants in the Taihape Inquiry. On this basis, it is submitted that prejudice clearly arises from the Crown's breaches of Te Tīriti that have been articulated in this submission.

161. Counsel seeks appropriated findings that the following prejudice were suffered by Taihape Māori due to the establishment of the Native Land Court and the related tools implemented by virtue of the framework of legislation that was developed to achieve the purposes of assimilation and colonising objectives of the Crown without the full, free and informed consent of Taihape Māori:

162.1 There was no proper consultation in the development and imposition of the form of tenure promoted by the Native Land Court and its operations which, in turn lead to the replacement of customary rights and the denial of Tikanga Māori;

162.2 The ability for Taihape Māori to make communal decisions regarding their land was destroyed as the Native Land Court and its regime permitted individuals to make decisions without the support or even knowledge in some instances of the wider whānau, hapū or iwi;

162.3 There was no alternative to the Native Land Court and its associated processes. To give Māori land legal protection, or to enable it to be used in anyway in the Pakeha cash economy, Taihape Māori were forced into the processes of the Native Land Court. It cannot be said they chose to do this, rather there was no other option. The evidence also establishes considerable protest and direct action against this inevitability because of the impacts on the ways of life of Taihape Māori that were then occasioned by virtue of the processes and decisions made;

162.4 Tikanga and customary-based interests over land were diminished as the Crown failed to take into account Taihape Māori expertise, mātauranga Māori, tikanga, and customary interests and practices when determining interests and titles; and

162.5 Taihape Māori whānau, hapū and iwi struggled to retain authority and control over lands which were put through the Native Land Court process. After being investigated and issued with Crown-derived titles, the land became vulnerable to partition and alienation (which almost always eventuated). This undermined tino rangatiratanga over their lands.

BREACHES

162. It is, therefore, Counsels' submission that the Crown, in breach of te Tiriti, failed to:

163.1 Recognise or preserve the exercise tino rangatiratanga by Taihape Māori over their lands and resources to the fullest extent possible;

163.2 Recognise, respect or uphold Taihape Māori customs, practices or tikanga in determining customary interests;

163.3 Actively protect the lands of the Taihape Māori from alienation or sale where that was the wishes of the Taihape Māori owners;

163.4 Ensure that Taihape Māori were able to retain their lands for as long as they wished;

163.5 Ensure that Taihape Māori were able to appropriately utilise and develop the lands which they retained;

163.6 Ensure it properly obtained the consent of, or even consult Taihape Māori in establishing the Native Land Court and the entirely new tenurial system it embodied and, therefore, failed to act reasonably and with the utmost good faith towards Taihape Māori as Tiriti partners;

163.7 Ensure Taihape Māori were protected from actual or apparent bias in the Native Land process;

163.8 Ensure appropriate safeguards to stop the appointment of judges with obvious conflicts of interest and where there was also such a clear appearance of bias (whether or not such bias would be manifested in the Court's decision);

163.9 Ensure that the Native Land Court legislation in place at relevant periods of the process were able to be properly applied and had appropriate provisions for appeal that were both practical and effective to ensure the natural justice rights of Taihape Māori could be invoked. The application under the 1892 Act was inquired into by the Court at Hastings on July 1893, which duly validated purchases that were invalid under the Native Land Act 1873 and Native Land Court Act 1880. Nor were the provisions of the Native Land Laws Amendment Act 1883 (s7) complied with;

163.10 Ensure appropriate protections and appeal and rehearing processes were instituted. The inadequate provisions for rehearing in the Native Land laws approved of very limited utility when rehearing of the 1890 partition

of Mangaohāne 1 and Mangaohāne 2 were made and the significant delays caused extreme hardship to Taihape Māori;

RELIEF

164 Taihape Māori seek the following relief in relation to the prejudice caused by the Crown's breaches of Te Tiriti o Waitangi:

165 Findings that the Crown breached the principles of Te Tiriti as alleged in this Generic Closing submission. In particular we seek findings that the Crown in breach of its Te Tiriti obligations:

165.1 Engaged only with Taihape Māori who wished to sell land and ignoring protests from those who did not;

165.2 Failed to properly identify the lands being transacted which created uncertainty amongst Māori as to the exact land allegedly alienated from customary tenure;

165.3 Failed to appropriately identify land boundaries in accordance with the requirements of effective legislation in place;

165.4 Failed to act in good faith towards Taihape Māori;

165.5 Used the Native Land Court to effect the Crown's wider purposes of assimilation and to dismantle Tikanga Māori of Taihape Māori;

165.6 Recommendations that the Crown makes a full, public and unreserved apology for those actions and omissions that are found to be in breach of Te Tiriti;

165.7 Recommendations that the Crown pays full and comprehensive compensation to those Taihape Māori for the above-particularised breaches of Te Tiriti.

DATED at Rotorua this 22nd day of December 2020

Annette Sykes Kalei Delamere-Ririnui

Counsel for Claimants