**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 67/2023**
**[2024] NZSC 130**

| | | |
|---|---|---|
| BETWEEN | | PAKI NIKORA AND PAREARAU POLLY ALICE NIKORA ON BEHALF OF TE KAUNIHERA KAUMĀTUA O TŪHOE<br>Appellants |
| AND | | TĀMATI KRUGER ON BEHALF OF TŪHOE – TE URU TAUMATUA TRUST<br>Respondent |

| | |
|---|---|
| Hearing: | 27 February 2024 |
| Court: | Winkelmann CJ, Glazebrook, Williams, O'Regan and Collins JJ |
| Counsel: | M S Smith, P T Harman and L J L Hemi for Appellants<br>M G Colson KC, M R G van Alphen Fyfe and K O M Fitzgibbon for Respondent<br>B R Arapere, I T K T R F Hikaka and J T H Kohu-Morris for Te Hunga Rōia Māori o Aotearoa as Intervener |
| Judgment: | 3 October 2024 |

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## JUDGMENT OF THE COURT

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**A** **The application by the respondent to adduce the evidence of Te Whenua Te Kurapa is granted.**

**B** **The appeal is allowed.**

**C** **The orders made by the Māori Land Court in relation to trustee elections of the Tūhoe – Te Uru Taumatua Trust are reinstated (*Nikora on behalf of Te Kaunihera Kaumātua o Tūhoe v Trustees of Tūhoe – Te Uru Taumatua* (2021) 252 Waiariki MB 157 (252 WAR 157) at [85]).**

**D** **The trustees of the Tūhoe – Te Uru Taumatua Trust must pay the appellants their actual and reasonable legal costs and disbursements in connection with the appeal to this Court out of the assets of the Trust. If the parties are**

**unable to agree on the amount of costs and disbursements payable, that will be determined by the Registrar of this Court.**

**E Any outstanding issues relating to costs in the Courts below are to be determined by those Courts, in light of this judgment.**

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**REASONS**
(Given by Williams J)

**Table of Contents**


| | Para No |
|---|---|
| **The dispute** | [1] |
| **The parties** | [5] |
| **Background** | [10] |
| **The Māori Land Court and Māori Appellate Court** | [18] |
| **The Court of Appeal** | [24] |
| **Application to adduce evidence** | [28] |
| **The issues** | [32] |
| **"… constituted in respect of …"** | [34] |
| **"… owned for a beneficial estate in fee simple …"** | [38] |
| *Submissions in this Court* | [39] |
| *The origins of "General land owned by Māori"* | [44] |
| *The reforming and conserving objectives of the TWMA* | [51] |
| *Tikanga and the idea of tribally-owned land* | [60] |
| *Tribal ownership under the TWMA* | [63] |
| *Unintended collateral consequences?* | [80] |
| *Is the Māori Land Court an inappropriate forum?* | [83] |
| *Resulting untidiness* | [88] |
| **Costs** | [93] |
| **Disposition** | [94] |


## The dispute

[1] This dispute concerns the Tūhoe – Te Uru Taumatua Trust (TUT), Tūhoe's post-settlement governance entity (PSGE). Paki Nikora considered that two of TUT's seven trustees had not been selected in the manner required by TUT's trust deed. He thought their appointments were invalid. He took his complaint to the Māori Land Court. At the time, this course was open because in its 2019 decision in *Moke v Trustees of Ngāti Tarāwhai Iwi Trust*,[1] the Māori Appellate Court found that

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[1] *Moke v Trustees of Ngāti Tarāwhai Iwi Trust* [2019] Māori Appellate Court MB 265 (2019 APPEAL 265), [2019] NZAR 1465.

the Māori Land Court had supervisory jurisdiction over PSGEs that hold "General land owned by Māori" in trust on behalf of the beneficiaries of that entity.[2] General land owned by Māori is a category of land defined in Te Ture Whenua Māori Act 1993 (TWMA) and subject to certain of its provisions. TUT holds General land in trust for the 51,000-odd individuals who claim descent from the eponymous ancestors Tūhoe and Pōtiki.[3]

[2] The Māori Land Court heard Mr Nikora's application and directed that fresh elections be held for the two contested positions.[4] On appeal, the Māori Appellate Court upheld the decision of the Māori Land Court,[5] but following a further appeal, the Court of Appeal overturned the rule in *Moke* and set aside the decisions of the Courts below.[6]

[3] This appeal assesses whether the Court of Appeal erred in doing so. The decisive issue this Court must determine is whether the Māori Land Court has supervisory jurisdiction over TUT. Our answer to this question will have wider significance for the reasons explained by the Māori Appellate Court in this proceeding:[7]

> [2] The Crown has a well-settled policy of transferring Te Tiriti settlement redress to entities that are representative of, and accountable to, the affected iwi and hapū. These entities are referred to as "post-settlement governance entities". They are charged with receiving and managing Te Tiriti redress (including land) from the Crown for the benefit of the intended beneficiaries. By definition, all of those beneficiaries are Māori.

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2 See Te Ture Whenua Māori Act 1993 [TWMA], s 4 definition of "General land owned by Māori". Tohutō (macrons) are generally not used in the relevant legislation, including the TWMA, nor are they used in the relevant trust deeds. However, we use tohutō in this judgment where consistent with contemporary usage in relation to kupu Māori. We acknowledge that the double vowel variant is employed in contemporary usage by Tainui iwi, but it is not used by Tūhoe.

3 According to the 2023 Census results: Te Whata "Tūhoe" (2024) <https://tewhata.io/>. For an explanation of the distinction between Tūhoe and Pōtiki, see below at [74], n 93.

4 *Nikora on behalf of Te Kaunihera Kaumātua o Tūhoe v Trustees of Tūhoe – Te Uru Taumatua* (2021) 252 Waiariki MB 157 (252 WAR 157) (Judge Coxhead) [MLC judgment] at [85].

5 *Kruger on behalf of Tūhoe Te Uru Taumatua Trust v Nikora on behalf of Te Kaunihera Kaumātua o Tūhoe* [2021] Māori Appellate Court MB 444 (2021 APPEAL 444) (Judge Doogan, Judge Wainwright and Judge Stone) [MAC judgment].

6 *Kruger (obh of Tūhoe Te Uru Taumatua Trust) v Nikora (obh of Te Kaunihera Kaumātua o Tūhoe)* [2023] NZCA 179, [2023] 3 NZLR 160 (Miller, Gilbert and Goddard JJ) [CA judgment].

7 MAC judgment, above n 5. The Māori Appellate Court acknowledged that, in cases of whāngai or legal adoption, non-Māori may be beneficiaries of post-settlement governance entities. But even in these cases, the majority of beneficiaries will be Māori: at [6], n 6.

[4] The appellants submit that the Māori Land Court does have jurisdiction over TUT. The respondent, supporting the decision of the Court of Appeal, says it does not. The intervener, Te Hunga Rōia Māori o Aotearoa (Te Hunga Rōia), filed submissions in respect of tikanga considerations applicable to land ownership, for which we express our gratitude. Te Hunga Rōia did not take a position on the disposition of the appeal, acknowledging "the mana motuhake of the parties" in that regard.

**The parties**

[5] Mr Nikora was the original appellant in this appeal. He was a board member of Te Kaunihera Kaumātua o Tūhoe (TKKOT), a charitable trust incorporated in 2018 to "establish a Kaumātua Council for Tūhoe to provide kaumātua stewardship and leadership for Tūhoe".[8] Mr Nikora brought his appeal on behalf of TKKOT. He sadly passed away in September 2023, before his appeal could be heard. By consent, Parearau Polly Alice Nikora, a current trustee of TKKOT, was added as a second appellant.

[6] The objectives of TKKOT are set out in cl 4 of its trust deed as follows:

> 4.1 TO ensure the health and wellbeing (kaitiaki) of Tūhoe whānau/hapū[.]
>
> 4.2 TO uphold and give practical effect to maintaining Te Mana me te tino Rangatiratanga of whānau and hapū.
>
> 4.3 TO promote and foster the concept of matemateāone[.]
>
> 4.4 TO promote and advocate for Tūhoe beneficiaries.
>
> 4.5 TO promote the development of Tūhoe economic, social and cultural programmes for the betterment of Tūhoe.
>
> 4.6 TO create positive and productive working relationships with Government agencies, non-Government agencies, private enterprise, Māori organisations, Local Government and other Tribal organisations and the wider Community[.]
>
> 4.7 TO alleviate poverty, abuse and alienation of families by providing an advocacy role.
>
> 4.8 TO seek, accept and receive donations, subsidies, grants, endowments, gifts, legacies, loans and bequests either in money or

[8] Trust Deed of Te Kaunihera Kaumātua o Tūhoe (24 November 2018), cl 4.

in kind or partly in kind for all or any purposes and objects of the Trust[.]

4.9 TO carry on any other activities that directly or indirectly advance the objects of the Trust.

[7] The named respondent, Tāmati Kruger, is a trustee and the chair of TUT. TUT is a trust settled by deed in May 2009 as the (then-named) Tūhoe Establishment Trust. The latest iteration of its trust deed is dated 13 December 2013 (the TUT Deed). This is the relevant deed for the purposes of the appeal. TUT's purposes are relevantly:[9]

> … to receive, hold, manage and administer the Trust Fund in trust for the present and future Tūhoe Iwi Members in accordance with this Deed, and shall without limitation include:
>
> (a) Leading and serving the cultural permanency and prosperity of Tūhoetanga by way of re-enacting te mana motuhake of Tūhoe[;]
>
> (b) The promotion and advancement of the social and economic development of Tūhoe including, without limiting the generality of this purpose, by the promotion of business, commercial or vocational training or the enhancement of community facilities in a manner appropriate to the particular needs of Tūhoe;
>
> (c) The maintenance and establishment of places of cultural or spiritual significance to Tūhoe and marae of Tūhoe, including restoring the connection of Tūhoe with Te Urewera through the operation of the Te Urewera Board;
>
> (d) The promotion of tribal forums to hear and determine matters affecting Tūhoe and to advocate on their behalf;
>
> (e) Any other purpose that is considered by the Trustees from time to time to be beneficial to Tūhoe and Tūhoe Iwi Members;
>
> (f) To achieve requital for raupatu and other claims from the Crown and to establish a new generation relationship between other iwi, the Crown and Tūhoe;
>
> (g) To address the effect that Crown breaches have had on the economic, social, cultural, and political well-being of Tūhoe;
>
> (h) To make distributions to Tūhoe Iwi Members.

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9 Trust Deed Establishing the Tūhoe Trust (13 December 2013) [TUT Deed], cl 3.1.

[8] The TUT Deed provides for the appointment of up to seven trustees to represent hapū associated with one or other of four districts in the tribal rohe:[10]

> The Trustees shall be appointed in accordance with the Appointment Process on the following basis:
>
> | | |
> |---|---|
> | Te Waimana Kaaku | 2 Trustees |
> | Te Kōmiti ō Runga | 2 Trustees |
> | Tūhoe Manawarū | 2 Trustees |
> | Te Mana Motuhake o Tūhoe mai Waikaremoana | 1 Trustee |

[9] The trustees are appointed in accordance with the hapū-based election process set out in sch 3 of the TUT Deed.

**Background**

[10] As provided in the Tūhoe Claims Settlement Act 2014, TUT received on behalf of Tūhoe—and, in relation to certain Crown lands, will continue to acquire as they become available—the settlement assets there identified.[11] Those assets comprised primarily cash, but also included Māori freehold land (which it was to hold transitionally, pending transfer to trustees associated with the land) and a number of General land blocks—that is, blocks that are neither Māori land nor Crown land as defined in the TWMA.[12]

[11] These proceedings arose because of a dispute over alleged irregularities in the selection of Mr Kruger and a second trustee, Patrick McGarvey, as trustees of TUT. TKKOT considered these trustees had not been appointed in accordance with the appointment process prescribed by sch 3 of the TUT deed. This, TKKOT considered, rendered the selections invalid. The details of the alleged irregularities need not detain us, as our focus is on the prior jurisdictional question identified: that is, whether the Māori Land Court has jurisdiction at all.

[12] TKKOT triggered the dispute resolution procedure in cl 19 of the TUT Deed by giving written notice to TUT. According to cl 19.2, TUT had 10 business days to

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10 Schedule 3 cl 1. See also cl 4.1.

11 Tūhoe Claims Settlement Act 2014, Part 2 and sch 2; and for deferred selection properties and rights of first refusal see Part 3 and sch 3.

12 TWMA, ss 4 and 129.

acknowledge receipt of the notice. No reply was received within that time, nor indeed at any time before Mr Nikora filed his applications in the Māori Land Court nine months later.

[13] That said, at the hearing before this Court, counsel for Mr Kruger advised a formal mediation process had now been commenced in accordance with cl 19.7. It was accepted therefore that there may eventually be a settlement of the specific dispute that gave rise to the proceeding, although that had yet to occur. Due, however, to its significance for TUT and for Tūhoe, the parties advised that they nonetheless seek an answer to the question in the appeal. As the dispute is not yet settled, and may not be in the end, the appeal is not moot and it is appropriate for this Court to proceed. In any event, the issues raised in the appeal are significant and are likely to come before the Court again in some form.[13]

[14] To return to the narrative, on receiving no reply, Mr Nikora, on behalf of TKKOT, applied to the Māori Land Court seeking directions that fresh elections be held for the two disputed positions and that they be conducted in accordance with the requirements of sch 3. He invoked the Māori Land Court's supervisory jurisdiction over landholding trusts; relevantly, ss 236–238 of the TWMA provide:[14]

> **236 Application of sections 237 to 245**
>
> (1) … sections 237 to 245 shall apply to the following trusts:
>
> (a) every trust constituted under this Part:
>
> (b) every other trust constituted in respect of any Māori land:
>
> (c) *every other trust constituted in respect of any General land owned by Māori.*
>
> …
>
> **237 Jurisdiction of court generally**
>
> (1) Subject to the express provisions of this Part, in respect of any trust to which this Part applies, the Māori Land Court shall have and may exercise all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by virtue of its inherent jurisdiction) in respect of trusts generally.

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13 See *R v Gordon-Smith (on appeal from R v King)* [2008] NZSC 56, [2009] 1 NZLR 721 at [24].

14 Emphasis added.

(2) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court.

**238 Enforcement of obligations of trust**

…

(2) The court may at any time, in respect of any trustee of a trust to which this section applies, enforce the obligations of his or her trust (whether by way of injunction or otherwise).

[15] General land owned by Māori as referred to in s 236(1)(c) is defined in s 4 as follows:

> **General land owned by Māori** means General land that is owned for a beneficial estate in fee simple by a Māori or by a group of persons of whom a majority are Māori

[16] Mr Nikora also sought mandatory orders removing Messrs Kruger and McGarvey pending the outcome of those fresh elections. For this purpose he invoked the Court's power in s 240 to remove trustees for cause.[15] As this issue does not arise on appeal, it is unnecessary now to address the substance of that provision.[16]

[17] Though the Māori Land Court directed that TUT be notified of the applications, neither TUT nor the two named trustees participated in the hearings that followed in that Court. TUT's chief executive, Kirsti Luke, wrote to the Court advising that TUT did not consider the Court had jurisdiction over its affairs.

## The Māori Land Court and Māori Appellate Court

[18] The applications were heard before Judge Coxhead who issued two decisions. In the first decision he declined the application for immediate removal of Messrs Kruger and McGarvey.[17] That decision was appealed unsuccessfully by Mr Nikora to the Māori Appellate Court and it has not been further pursued.[18]

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15 Section 240 contains a lengthy list of bases upon which a trustee may be removed. In addition to bankruptcy and dishonesty offending, examples include repeated refusal or failure to act as trustee or unsuitability due to the trustee's conduct or circumstances.

16 See below at [18].

17 *Nikora v Trustees of Te Uru Taumatua* (2019) 221 Waiariki MB 200 (221 WAR 200).

18 *Nikora v Tūhoe – Te Uru Taumatua* [2020] Māori Appellate Court MB 248 (2020 APPEAL 248).

[19] In his second decision, the Judge directed TUT to hold fresh elections in respect of the two disputed positions.[19] That decision rested on three related propositions: first, that the Court had jurisdiction to make orders in respect of TUT by virtue of s 236 of the TWMA;[20] second, that the trustees breached several provisions in the trust deed by failing to follow the required processes for elections, internal disputes and annual general meetings;[21] and third, that while these breaches did not meet the high threshold for removal,[22] fresh elections were justified.[23] The Judge observed that voting in trustee elections is a fundamental right of Tūhoe members, and members are entitled to expect elections will be held in accordance with the requirements of the trust deed.[24]

[20] Mr Kruger appealed to the Māori Appellate Court on behalf of TUT, arguing the Māori Land Court lacked jurisdiction. The Māori Appellate Court upheld the Māori Land Court's decision.[25] The Māori Appellate Court affirmed and applied the rule in *Moke*.[26] As in *Moke*, the Court relied on the fact that TUT holds General land on behalf of the members of Tūhoe and so holds "General land owned by Māori" in accordance with the definition in s 4 of the TWMA.

[21] Before the Māori Appellate Court, TUT had argued it was not "constituted in respect of" land.[27] Its primary purpose did not relate to land. Rather, it was created as part of the Tūhoe Treaty settlement, for wide-ranging purposes relating to a broad range of assets. In that Court (in contrast to the position taken in the Court of Appeal for reasons we come to) TUT accepted it held General land owned by Māori. But TUT argued that was not enough; it lacked the primary focus on land required to bring it

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19 MLC judgment, above n 4, at [85].

20 At [47].

21 At [64]. At least, that was the finding on the evidence before the Court. Judge Coxhead noted that TUT did not participate in the hearing and so the Court received no evidence to the contrary: at [55] and [64].

22 At [70] (footnote omitted): "… while the conduct of the trustees and the extent to which they are failing to adhere to their trust deed is concerning, many of the breaches are technical in nature. The removal of trustees is a serious step not undertaken lightly and it is not every unsatisfactory act or omission which should lead to removal. No evidence has been provided to show that the conduct of the trustees have put the assets of the trust at risk or that there has been serious loss or malfeasance."

23 At [81].

24 At [80].

25 MAC judgment, above n 5, at [53]–[54].

26 At [32].

27 TWMA, s 236(1)(c).

within s 236(1)(c). In support of this argument, TUT pointed to instances where it said the TWMA displayed a consistent and exclusive focus on land. TUT argued it would be absurd if a trust whose primary purpose is not land holding could fall in and out of the Court's jurisdiction as and when it held land.

[22] The Māori Appellate Court rejected TUT's arguments. While the Court accepted that s 236(1)(c) required an assessment of a trust's purpose, it did not follow that a trust's *primary* purpose must relate to land for the trust to fall within s 236(1)(c).[28] The Court did not consider the fact that a trust could conceivably fall in and out of its jurisdiction to be arbitrary; it is by definition a court whose jurisdiction is based on land.[29] In any event, the Court considered, its jurisdiction is concurrent and co-extensive with that of the High Court.[30]

[23] For completeness, we note that the Court also considered the relevance of a 2020 amendment to the TWMA.[31] As the Court noted, there was, in the course of Select Committee deliberations on the measure, discussion of the Māori Land Court's jurisdiction, following *Moke*, over PSGEs.[32] As a result of that consideration, a proposal to enable the Court to grant injunctive relief over General land owned by Māori was dropped. The Court concluded, however, that as the amendment made no change to s 236 either to confirm or overturn the rule in *Moke*, the Select Committee discussion and the amendment itself should not influence the Court's interpretation of that provision one way or the other.[33]

**The Court of Appeal**

[24] On behalf of TUT, Mr Kruger appealed to the Court of Appeal. That Court invited the parties to consider the possibility that, contrary to TUT's concession in the Courts below, TUT did not in fact hold General land owned by Māori as required by

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28 MAC judgment, above n 5, at [19] and [24].
29 At [27].
30 At [28].
31 Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020.
32 MAC judgment, above n 5, at [33]–[39].
33 At [42]–[44].

the s 4 definition.[34] Having considered that invitation, Mr Kruger on behalf of TUT, understandably reversed that concession.

[25] In a closely reasoned decision, the Court of Appeal rejected the rule in *Moke* and overturned the Māori Appellate Court's decision in the current proceeding. The Court held that although TUT's land was General land, it was not "owned for a beneficial estate in fee simple by … a group of persons of whom a majority are Māori" in terms of the definition in s 4 of the TWMA. The Court considered that the framing of the definition in the technical language of property law was deliberate and intended to invoke traditional (English) concepts of law and equity.[35] This would, the Court considered, ensure that the TWMA regime was aligned with cognate real property legislation such as the Land Transfer Act 2017.[36] Thus the requirement that land be owned by individuals for a beneficial estate in fee simple would, in accordance with orthodox principles of property law, exclude purely discretionary trusts like TUT where the underlying beneficial title is not vested in any person, Māori or otherwise.[37]

[26] Though not strictly necessary to dispose of the appeal,[38] the Court held further that TUT cannot be a trust "constituted in respect of" General land owned by Māori as required by s 236(1)(c).[39] This is so because TUT was not established to hold one or more identified parcels of land on trust for the beneficial owners of that land. It was, of course, always contemplated TUT would eventually acquire Treaty settlement land, but its purposes were more broadly stated. It was not therefore created, or, in the language of s 236, "constituted" to be a trust for the beneficial owners of any specific land.

[27] As such, it cannot have been intended that trusts such as TUT be subject to the TWMA. If it were, the Court considered, then any private discretionary family trust (a majority of whose beneficiaries were Māori) would be caught, as long as it owned

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34 CA judgment, above n 6, at [78].
35 At [90]–[93].
36 At [91].
37 At [86]–[90] and [105].
38 See at [107].
39 At [108]–[124].

some land, and irrespective of whether the land was ancestral land.[40] The Māori Land Court therefore had no jurisdiction to intervene in TUT's appointment processes.

**Application to adduce evidence**

[28] It is convenient at this stage to record that the respondent sought leave to adduce in this Court the affidavit of Te Whenua Te Kurapa, a kaumātua and mātanga of Tūhoe tikanga. In his affidavit Mr Te Kurapa explained that vesting ownership of Tūhoe's land in individuals is "offensive" to Tūhoe tikanga. The essence of his perspective is captured in the following extract:[41]

> 15. For a Tūhoe person owning land causing a more entitled attitude to whenua is to live a life at odds with one's own tikana. Only when our care obligations are met do we become deserving thereby unlocking the benefits earnt through that care. In our tikana we are duty bound to protect, grow and preserve our homelands for next generations. So then in our tikana, to own land individually is to put at risk the continuity of our homelands for our next generation. It risks our continuity as an Iwi. And while titles may pass, the responsibilities of the whenua risk being distorted, further colonised and emptied of the needed learnings gained through aeons of time. All this in a time when we can least afford to guess our way through a disrupted climate in change.

[29] Leave was sought out of an abundance of caution. Mr Colson KC reiterated that the respondent's primary submission is that evidence of tikanga in relation to land is "likely to be of limited assistance" in construing the technical meaning and effect of General land owned by Māori. But if that submission did not find favour, then it was, he submitted, important that guidance from a Tūhoe perspective be available to the Court.

[30] The appellants did not oppose admission of this evidence, and we do not apprehend that the appellants took issue with its content. Rather, Mr Smith submitted, the appellants' view was that the respondent had misconstrued its stance as arguing for "Anglocentric individual property rights".

[31] Although the evidence has come in late—that is, on a third appeal—we are minded to accept it. As Mr Colson submitted, it is appropriate in a case of this nature,

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40 At [100]–[103].

41 The spelling of tikanga as "tikana" in Mr Te Kurapa's affidavit is a dialectal variation.

even at this late stage, that guidance about Tūhoe tikanga be available to the Court. The application is granted accordingly.

**The issues**

[32] As noted above, the question before this Court then is whether the Māori Land Court's supervisory jurisdiction over trusts under the TWMA is engaged in respect of the dispute between TKKOT and TUT. In particular:[42]

**(a)** in terms of s 236(1)(c) of the TWMA, whether TUT was "constituted in respect of" General land it would eventually acquire, but that was not identified or even known when TUT was established in 2009, five years before enactment of the Tūhoe Claims Settlement Act; and

**(b)** in terms of ss 4 and 129(2)(c) of the TWMA, whether the fact that TUT is a fully discretionary trust means that the beneficial estates in its landholdings can be said to be "owned" by any individuals, whether Māori or otherwise.

[33] We turn now to address those questions.

**"… constituted in respect of …"**

[34] TUT accepts that it was established in anticipation of receiving some land but, it says, predominantly cash. As it did in the Courts below, TUT argues "constituted in respect of" requires land to be the primary or dominant asset of the trust, and in this case it is not.

[35] In agreement with the Court of Appeal, we consider such requirement to be an unnecessary gloss on the words employed.[43] Applying a primary purpose test is apt to create problems and uncertainties. For example, we are aware that some Treaty

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42 A third issue was raised by the appellants, relating to the impact of freehold land on the nature of TUT, but we consider it is unnecessary to address this point for the disposition of the present appeal.

43 CA judgment, above n 6, at [119].

settlements are substantially in land,[44] but most are not, and it is unclear what proportion would need to be made up of non-land assets to render merely subsidiary the land component of a settlement. As cls 3.1 and 3.5 of the TUT Deed provide, land holding is a TUT purpose.[45]

[36] However, contrary to the view expressed by the Court of Appeal, we do not consider that s 236(1)(c) requires TUT to have been established from the outset to hold particularised parcels of land on trust for the benefit of the identified beneficial owners of each parcel.[46] Specifically we do not agree that "constituted in respect of" necessarily implies a timing requirement. There is no reason why those words should not mean the trust is constituted in respect of particular land as and when it is acquired and subjected to management by the trustees. After all, the trust does not exist in respect of that land until it is acquired. Further, and as we discuss in more detail below, this construction better advances the principles contained in the Preamble of the TWMA in accordance with the direction in s 2(1).[47]

[37] In the case of TUT, it not only holds General land in fact; this was a purpose of the trust from the outset. Section 236(1)(c) is therefore prima facie engaged, subject to meeting the s 4 definition of General land owned by Māori.[48]

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44 See for example Te Whakaaetanga Whakataunga mō Ō-Rākau, Te Pae o Maumahara | Deed of Agreement Relating to the Ō-Rākau Site (31 October 2023); Deed of Agreement between the Crown and the Proprietors of Rotomā No 1 Block Incorporated (6 October 1996); Waitangi Tribunal *Joint Memorandum from Crown and Claimant Counsel Advising the Waitangi Tribunal of the Settlement of the Waitomo Claim* (Wai 51, 11 March 1996); and Deed of Agreement between the Crown and the Representatives of the Te Maunga Railways Land Claim (Wai 315, 2 October 1996).

45 Clause 3.1 of the TUT Deed states: "The Purposes of the Trust shall be to receive, hold, manage and administer the Trust Fund in trust for the present and future Tūhoe Iwi Members in accordance with this Deed…". Clause 3.5 states: "All land that is part of the Trust Fund and that is situated within the Tūhoe ahikāroa shall not be sold or otherwise disposed of by the Trustees." See also below at [75].

46 See CA judgment, above n 6, at [8] and [116].

47 See below at [64].

48 Since both the fact and purpose of acquiring General land are aligned in this case, it is unnecessary to decide whether Māori-owned trusts that hold General land for purposes merely ancillary to their core purpose or business—for example, to house administrative offices—are constituted in respect of Māori land in terms of s 236. That issue is better resolved if and when it is material to a dispute.

**"… owned for a beneficial estate in fee simple …"**

[38] The more challenging question is whether TUT's General landholdings are "owned for a beneficial estate in fee simple by a Māori or by a group of persons of whom a majority are Māori".[49] This was the real focus of the decision of the Court of Appeal.

*Submissions in this Court*

[39] TUT argues, supporting the Court of Appeal decision, that it is a fully discretionary trust. The land is therefore, and by definition, not owned for a beneficial estate in fee simple by anybody. This is because the trust is perpetual, and its land assets do not vest in individual members of the iwi. In accordance with orthodox trust principles, iwi members can only have a hope of benefit at the discretion of the TUT trustees. Members are entitled to enforce compliance with the trust's purposes and procedures as set out in the TUT deed, but they have no proprietary interest in its assets. They cannot therefore be beneficial owners as required by s 4. TUT is effectively a purpose trust.

[40] TUT argues that a finding that the individual members of the tribe have a vested interest as mere discretionary beneficiaries would have problematic consequences. For example, they would therefore obtain a caveatable interest in the land. TUT submits that there may be other, as yet unforeseen consequences that only become apparent in the context of future disputes.

[41] TKKOT on the other hand argues that s 4 must be construed purposively and in accordance with the TWMA's Treaty-based objectives. It is, TKKOT argues, inappropriate to apply a determinedly English law frame to tribal trusts, still less to tribal trusts established to achieve "requital" for Treaty breaches.[50]

[42] TUT also opposes intervention by the Māori Land Court for policy reasons. First, it argues tino rangatiratanga requires that it should be subjected to the minimum oversight absolutely necessary by state—that is, kāwanatanga—authorities. TUT has

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49 TWMA, s 4 definition of "General land owned by Māori".

50 This is the term used at cl 3.1(f) of the TUT Deed, above n 9.

no choice about High Court supervision, but does have a choice about whether it should be exposed to an additional layer of oversight by the Māori Land Court. Second, and relatedly, TUT argues the supervisory jurisdiction of the Māori Land Court is more paternalistic and intrusive than that of the High Court and that its predecessor, the Native Land Court has a bad reputation in Tūhoe. The High Court is therefore the lesser of two evils.

[43] On this point TKKOT's response is that the Māori Land Court is the most suitable jurisdiction because it is more accessible, the judges are required to have expertise in te reo Māori, tikanga Māori and the Treaty of Waitangi,[51] and because Māori are familiar with the Court and see it as "their" Court.[52]

*The origins of "General land owned by Māori"*

[44] We have referred to the definition of General land owned by Māori in s 4. This definition is then substantially repeated in Part 6 of the TWMA which deals with the status of land. Section 129(1) provides that, for the purposes of the TWMA, all land must belong to one, and only one, of six possible statuses. The applicable status then determines which provisions of the Act apply, whether the Māori Land Court has jurisdiction and, if so, the nature and extent of that jurisdiction. The categories are:[53]

(a) Māori customary land:

(b) Māori freehold land:

(c) General land owned by Māori:

(d) General land:

(e) Crown land:

(f) Crown land reserved for Māori.

[45] Subsection (2) then describes the necessary elements of each particular status. Paragraph (c) relates to General land owned by Māori, providing that:

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51 TWMA, s 7(2A).

52 Law Commission | Te Aka Matua o Te Ture *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2006) at [9.52].

53 TWMA, s 129(1).

> [L]and (other than Māori freehold land) that has been alienated from the Crown for a subsisting estate in fee simple shall, while that estate is beneficially owned by a Māori or by a group of persons of whom a majority are Māori, have the status of General land owned by Māori:

It can be seen that the common elements of both s 4 (set out above at [15]) and s 129(2)(c) are that the land has the status of General land and that the beneficial estate in it is owned by a Māori or, if there is more than one owner, a majority of Māori.

[46] General land owned by Māori is a category of land unknown outside the operation of the TWMA. Something of an historical artefact, it was introduced in the Māori Affairs Act 1953 (1953 Act). The label then was "European land owned by Maoris [sic]" and it was defined as "European land which, or any undivided share in which, is owned by a Māori for a beneficial estate in fee simple, whether legal or equitable".[54] It recognised that there were sometimes circumstances in which Māori-owned land whose technical status was European land could be better managed or dealt with as if it were subject to the jurisdiction of the Māori Land Court. This was usually because, like Māori freehold land, that land was also held in undivided shares by multiple related owners.

[47] One example of this exceptions-based approach was contained in s 434 of the 1953 Act which empowered the Court, in exercise of its "special powers", to recommend to the Governor-General that land meeting the statutory definition be declared Māori land if "by reason of the number of owners or for any other reason the land cannot be conveniently dealt with as European land".

[48] But the primary use for this status was contained in Part 23 of the 1953 Act. Part 23 provided a special procedure for collective decision-making, called a meeting of assembled owners. The procedure could be utilised in relation to Māori freehold land or European land owned by Māori.[55] This was the Act's most commonly-used mechanism for securing the alienation of multiply-owned land, as, in the 1950s, most land owned as undivided interests by whānau and hapū had no formal governance

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54 Māori Affairs Act 1953, s 2(1) definition of "European land owned by Maoris".

55 Section 304(1). This procedure was first introduced in Part 18 of the Native Land Act 1909: see Māori Land Court | Te Kooti Whenua Māori and Ministry of Justice | Te Tāhū o te Ture *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero: 150 Years of the Māori Land Court* (30 October 2015) at 53–54.

structure.[56] On receipt of a request by an intending alienee, the Court would direct the registrar to summon a meeting of assembled owners.[57] The meeting would be attended by a member of the court staff described in the Act as the Recording Officer, whose task was to prepare a record of the meeting and provide a report to the Court.[58] A quorum of three owners was required for the duration of the meeting, but provided that requirement was satisfied, the owners of a bare majority of the shares represented at the meeting could carry the day, even if they were not a majority of all owners or all shares in the land.[59] Failure by the registrar to notify any particular owner of the proposed meeting did not invalidate either the meeting or any resolution ultimately adopted.[60]

[49] As can be seen, the Part 23 procedure eased the path for those wishing to acquire whānau or hapū land not otherwise held in a formal governance structure. Its effect was that a minority of owners could bind all owners to a sale or lease. Where,

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56 Trusts could be established by the Court under s 438 of the Māori Affairs Act in relation to any customary land, Māori freehold land or "land owned by Maoris": subs (1). However, the approval of the Minister of Māori Affairs was required before the Court could make the vesting order: subs (4). This requirement for ministerial oversight was repealed in 1965, by s 6 of the Māori Purposes Act 1965, but it was not until the 1970s that court-created trusts became common. Māori incorporations could also be established under Part 22 of the Māori Affairs Act. They provided for a corporate form of land ownership using a version of the traditional company structure: see Richard Boast "The Evolution of Māori Land Law 1862–1993" in Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 65 at [4.5.6]; and NF Smith "Incorporation of Māori Owners" in Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 207. However, the compliance requirements under Part 22 and constraints on allowable purposes meant incorporations tended to be established only for tribal farming and forestry operations large enough to carry the administrative and infrastructural cost. A similar observation is made in PG McHugh "The Economic Development of Native Land: New Zealand & Canadian Law Compared" (1982) 47 Sask L Rev 119 at 137. The comparative advantage of s 438 trusts was the ease with which they could be created by the Court and the ability of the Court to fashion trust orders (the equivalent of common law trust deeds) that best suited the financial and other capacities of the owners. See for example *Rātima Estate v Waitai – Tahoraiti 1B* (1981) 9 Tākitimu Appellate Court MB 190 (9 APT 190) at 218–240 per Chief Judge Durie; and *Clarke – Ahipara B2* (1983) 2 Taitokerau Appellate MB 263 (2 APWH 263).

57 Māori Affairs Act, s 307.

58 Sections 310 and 314. The report enabled the Court to decide whether alienation should be "confirmed". No alienation was effective unless confirmed by the Court: s 224(1). Unless there were owners who were opposed to sale and wished to partition their interests out, the confirmation inquiry generally involved examining compliance with quorum and vesting rules and the adequacy of consideration: s 227.

59 Sections 309 and 311. Significant changes to quorum and voting requirements were made to the meeting of assembled owners procedure in Part 7 of the Māori Affairs Amendment Act 1974 to ameliorate some of the problems associated with this mechanism: see for example s 36, amending s 309(6B) of the Māori Affairs Act. The procedure remains as Part 9 of the TWMA but the proliferation of trusts under that Act has greatly reduced its utilisation.

60 Māori Affairs Act, s 307(9).

for whatever reason, the status of whānau or hapū land had been "Europeanised", Part 23 provided a simple, officially-sanctioned alternative to the stricter general property law requirements applicable to the alienation of tenancies in common.[61]

[50] That said, "European land owned by Maoris" was still a category of land that was only exceptionally subjected to the 1953 Act's procedures. But it became a more significant source of work for the Court when the legislature enacted the Māori Affairs Amendment Act 1967. That Act enabled the registrar of the Māori Land Court to declare Māori freehold land owned by fewer than five people to be European land.[62] This was effected by administrative action following a search of the Court's title records, and without any requirement to notify the owners before the status change.[63] The objective of this power was, it was said, to free up closely-held Māori land titles from the burdens of Māori freehold land status.[64] It was a creature of its time.[65]

*The reforming and conserving objectives of the TWMA*

[51] It is necessary now to make a brief diversion into consideration of the context, structure and purpose of the TWMA to better understand how General land owned by Māori is relevant in contemporary terms. The Preamble of the TWMA is a lengthy narrative of key drivers of the Act's substantive provisions. It reflects an attempt to break from past assimilationist policies. It centres the Treaty exchange of kāwanatanga for the protection of rangatiratanga as the Act's constitutional foundation; affirms that land is a taonga tuku iho (treasured inheritance) of special significance to Māori; and declares that land subject to the Act should be retained,

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61 Assuming they knew about the sale, dissenters could apply to the Court to partition their shares out under Part 16, but partition was expensive as it required an application to Court, assessment of how the land should be divided and a survey. See also the discussion in JR Holmes "Fragmentation of Māori Land" [1967] Auckland U L Rev 1.

62 Māori Affairs Amendment Act 1967, ss 3, 6 and 7 [1967 Amendment Act].

63 Section 4. Section 11 required the Registrar to inform owners after the fact.

64 Michael Sharp "Māori land development" [2013] NZLJ 342 at 344.

65 See CA judgment, above n 6, at [95] citing *Nicholas v Commissioner of Police* [2017] NZCA 473, [2018] NZAR 172 at [14]. See also *Alexander v Māori Appellate Court* [1979] 2 NZLR 44 (SC) at 56. Seven years later, the Māori Affairs Amendment Act 1974 marked the beginning of a general shift away from cultural and legal assimilation as government policy. That Act reversed a number of the less attractive aspects of the 1967 Amendment Act: Boast, above n 56, at 119.

occupied, and utilised for the benefit of owners, their whānau and hapū. It is worth setting it out in full:

> **Preamble**
>
> Nā te mea i riro nā te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: ā, nā te mea e tika ana kia whakaūtia anō te wairua o te wā i riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: ā, nā te mea e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki ō rātou whānau, hapū hoki, a, a ki te whakangungu i ngā wāhi tapu hei whakamāmā i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mō te hunga nōna, mō ō rātou whānau, hapū hoki: ā, nā te mea e tika ana kia tū tonu he Kooti, ā, kia whakatakototia he tikanga hei āwhina i te iwi Māori kia taea ai ēnei kaupapa te whakatinana.
>
> Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kāwanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whānau, and their hapū, and to protect wāhi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau, and their hapū: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles.

[52] Section 2 grounds the working provisions of the TWMA in that narrative. It provides that the Act should be interpreted so as to further the principles in the Preamble and in particular that the powers, duties, and discretions under the Act must be exercised, as far as possible, to facilitate and promote the retention, use, development and control of Māori land as taonga tuku iho:

> **2 Interpretation of Act generally**
>
> (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.
>
> (2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whānau, their hapū, and their descendants, and that protects wāhi tapu.
>
> (3) In the event of any conflict in meaning between the Māori and the English versions of the Preamble, the Māori version shall prevail.

[53] Reflecting these purposes, the general objectives of the Māori Land Court and Māori Appellate Court are outcome-focused. They emphasise for the first time in Māori land legislation that those courts must support land retention and owner empowerment:

> **17 General objectives**
>
> (1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—
>
> (a) the retention of Māori land and General land owned by Māori in the hands of the owners; and
>
> (b) the effective use, management, and development, by or on behalf of the owners, of Māori land and General land owned by Māori.
>
> (2) In applying subsection (1), the court shall seek to achieve the following further objectives:
>
> (a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:
>
> (b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:
>
> (c) to determine or facilitate the settlement of disputes and other matters among the owners of any land:
>
> (d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:
>
> (e) to ensure fairness in dealings with the owners of any land in multiple ownership:
>
> (f) to promote practical solutions to problems arising in the use or management of any land.

[54] In a sense, the TWMA straddles two very different views of the kind of legal relationship individuals within a community should have with their land. On the one hand, the Act conserves, as it must, the colonially-inspired native land tenure system of individualised undivided interests under which most land still held by whānau and hapū is now owned. On the other hand, it is very much a reform measure.[66] Its intention is to preserve Māori ownership of their ancestral land and, to the greatest extent possible, to facilitate its management according tikanga Māori. Put another

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[66] See Boast, above n 56, at [4.5.14].

way, the Act seeks to enable re-collectivised and re-tribalised management of what remains of whānau and hapū land without turning on its head the legacy system of individual undivided interests. Unsurprisingly, the fit between these deeper purposes is not always comfortable or tidy.

[55] The primary mechanisms to promote communal management are the new trusts introduced in Part 12 of the TWMA. Part 12 trusts may be constituted in respect of Māori freehold land or General land owned by Māori. The options include ahu whenua trusts, whānau trusts, whenua tōpū trusts and pūtea trusts.[67] Ahu whenua trusts are designed to facilitate the use and administration of Māori-owned land titles (ahu means to tend or care for).[68] Whānau trusts may be established to hold individual undivided interests within larger land titles.[69] Vesting undivided interests in a whānau trust will end successions and the consequent fragmentation of those interests over time.[70] Whenua tōpū trusts are designed for the administration of multiple titles held by a hapū or iwi (tōpū means to bring together or consolidate).[71] Finally, pūtea trusts may be created for the administration of undivided interests that have already become too fragmented to be economic for their owners (a pūtea is a special kind of bag and its use in this context implies the creation of a special category of interests for separate treatment by the trustees of the supervening title).[72]

[56] We will return below to special court-created trusts, as they are particularly relevant to the appropriate approach to the position of TUT.[73]

[57] The Māori Land Court achieves its objectives under s 17, in part, by assisting owners to utilise the new trust structures wherever they express a desire to do so. These trusts may be established only by order of the Court.[74] But as s 236 provides, trusts created by means other than order of the Māori Land Court may also be subject

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67 Kai tiaki trusts are another option: TWMA, s 217.
68 Section 215. See also Te Aka Māori Dictionary "ahu" <https://maoridictionary.co.nz/>.
69 TWMA, s 214.
70 Section 214(6).
71 Section 216. See also Te Aka Māori Dictionary "tōpū" <https://maoridictionary.co.nz/>. In contrast to ahu whenua trusts, the whenua tōpū trust provisions make no reference to beneficial entitlements, even though General land owned by Māori can be vested in whenua tōpū trusts.
72 TWMA, ss 212–213. See also Te Aka Māori Dictionary "pūtea" <https://maoridictionary.co.nz/>.
73 See below at [66]–[68].
74 TWMA, s 211.

to that Court's purpose-driven jurisdiction. They include trusts over Māori land or General land owned by Māori, such as statutory trusts or trusts created by deed.[75]

[58] Both in its original form and as a result of amendments in the early 2000s, the TWMA gave the Māori Land Court additional functions to address the marked revival of tribal political, economic and legal activity during that period. These functions were designed to facilitate progress in Treaty settlements, the allocation of iwi fisheries assets following the Sealord settlement, allocation of commercial aquaculture space following settlement in 2004 of those claims, and to assist the expanding participation of iwi and hapū in matters of environmental regulation and social programmes.[76] The Act thus developed into a mosaic comprising the legacy land tenure system, collectivised land management reforms, settlement asset allocation, and systems to facilitate tribal engagement with public agencies, including with the mainstream courts where appropriate.

[59] With that brief background as to the origin of General land owned by Māori and the purpose and structure of the TWMA in mind, we return now to this case.

*Tikanga and the idea of tribally-owned land*

[60] TUT is a tribal trust with political as well as asset-holding functions. This is reflected in recitals A and G of the TUT Deed:

> A. Representation in a Tūhoe context is all about the creditable presentation of Tūhoetanga; the people, the land, the assets. These things give form, longevity and force – ihi, mauri and mana – to Tūhoe. …
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> …

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75 As to statutory trusts subject to the jurisdiction of the Māori Land Court, see for example the Wi Pere Trust currently governed under the Māori Purposes (Wi Pere Trust) Act 1991. A Māori incorporation established by order of the Court under ss 247–250 technically holds its land as trustee for the beneficial owners of the land who are also shareholders of the incorporation: s 250(2) and (4). However, these technical trusts are expressly excluded from the Māori Land Court's substantive Part 12 jurisdiction: s 236(2).

76 See TWMA, ss 26A–26N (fisheries), ss 26O–26ZB (aquaculture), 29 (general inquiries), 30 (representation of Māori groups) and 61 (Māori Appellate Court case stated from High Court, including on matters of tikanga). Note also the ex officio eligibility of all Māori Land Court Judges for Waitangi Tribunal membership: Treaty of Waitangi Act 1975, sch 2 cl 5(1)(a)(ii) and (3).

> G. Tūhoe wishes to create the Tūhoe Trust to act as their Iwi authority and post-settlement governance entity (that is transparent, accountable and representative of the iwi) and for the Trustees to hold Property upon the trusts and with the duties, powers and discretions set out in this Deed.

[61] TUT exists for the tribe and is its primary outward-facing voice, recognising at the same time that Tūhoe, like all iwi, is a confederation of independently-minded hapū clusters. TUT's mandate is both affirmed and disciplined by that fact.

[62] As Te Hunga Rōia submitted, the idea that authority over and ownership of land vests in the tribe is tikanga orthodoxy.[77] Also, as illustrated by Mr Te Kurapa's affidavit, collective ownership is fundamental to Tūhoe tikanga.[78] Traditionally, collective title was held at hapū rather than iwi level (hence the importance to TUT of its hapū-based mandate), but the essential element is that land was held by a community defined by common descent, and not by a group of individuals who just happened to be related. This means that a mode of land ownership in which beneficial interests vest in individuals would be inconsistent with fundamental tikanga principles.[79] In tikanga, land ownership would be in Tūhoe for as long as Tūhoe exists—subject, as always, to the continuing collective support of its hapū.[80] So, if tikanga was the controlling legal framework, it is no stretch to conceive of TUT's lands as beneficially—that is, substantively—owned by Tūhoe itself.

*Tribal ownership under the TWMA*

[63] The question then is whether it is appropriate to construe the definition of General land owned by Māori (and its expanded description in s 129(2)(c) of the TWMA) consistently with these tikanga notions, or whether, as the Court of Appeal found, the invocation in these provisions of English concepts of real property indicates this was not intended.

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77 See *da Silva v Aotea Māori Committee* (1998) 25 Taitokerau MB 212 (25 AT 212) at 237–238.

78 See above at [28].

79 Individualised Māori land ownership was introduced in the 19th century to displace the traditional communal system: see Boast, above n 56, at [4.2.1(b)] and [4.2.3].

80 See the termination provision, which requires a "Hapū Representatives Unanimous Resolution": TUT Deed, above n 9, cl 22.

[64] We have already mentioned relevant aspects of the Preamble and statutory purpose, and the Māori Land Court's role in promoting a tribal approach to land administration within the limits allowed by the quasi-individualised legacy tenure system. These suggest, as a general proposition, that the courts should approach the definition of General land owned by Māori with caution and with an eye to that wider statutory context. Part of that context is, undeniably, the ongoing effect of the transformation from tribally-held customary land into individual undivided interests in Māori freehold land, achieved by the Native Land Court under the TWMA's predecessors. But another part is the extensive provision in the TWMA for new legal forms of tribal ownership.

[65] It is now appropriate to return to address in more detail, the Part 12 trust models, briefly introduced above at [55].

[66] First among these new forms is, as noted, whenua tōpū trusts that may be established by the Court under s 216 to administer the lands of an iwi or hapū. They may be established in relation to Māori land or General land owned by Māori. To establish a whenua tōpū trust, the Court must be satisfied that the owners have had sufficient notice, a sufficient opportunity to consider the proposal and that there is "no meritorious objection".[81] While the trust exists, underlying beneficial interests (if there are any) are held in abeyance and successions are prohibited.[82] The assets of a whenua tōpū trust must be held for Māori community purposes under s 218(1), which provides:[83]

> Where any income of a trust constituted under this Part is to be applied for Māori community purposes, the trustees may provide money for the benefit or advancement of any specified beneficiary, any class or classes of beneficiaries, or the interests of any hapū associated with any land belonging to the trust, and its members, whether directly or indirectly.

This means any underlying beneficial interests remain in form only, and the tribe as a whole becomes the true purpose and beneficiary of the trust.[84]

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81 TWMA, s 216(4).

82 Subsection (6); but see subs (7).

83 See also subs (5); and s 218(2), which provides a long list of specific purposes including the promotion of health; social, cultural and economic welfare; and education and vocational training.

84 A practical example of the TWMA's built-in tension between individual interests and collective purposes may be found in s 216(7)–(8). In creating a whenua tōpū trust, the Court may expressly

[67] Whenua tōpū trusts have also been established to implement Treaty settlements or to hold land "on account" pending final settlement and the enactment of implementing legislation. For example, the Te Ngae Farm Trust was created by order of the Māori Land Court to give effect to an on account transfer of land pending full and final settlement of the Ngāti Rangiteaorere claim.[85] Section 13 of the Reserves and Other Lands Disposal Act 1993 authorised vesting of the subject land in Rangiteaorere the ancestor.[86] Similarly, the Pākaitore whenua tōpū trust was established by order of the Māori Land Court in 2007 to receive title to the land known as Moutoa Gardens, the Whanganui Courthouse lands and, in due course, the interests of the tribes of Whanganui in the Kaitoke Prison and the Lismore State Forest.[87] The trust remained in place until substituted in 2017 by the statutory scheme provided for in the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. Relevant also are the whenua tōpū settlement trusts referred to by Judge Harvey in *Matuku – Ngāti Maru Wharanui Pukehou Trust.*[88] In cases such as these, there are, by definition, no underlying interests vested in any living individual when the transfer is effected. Instead, as with TUT, access to trust benefits are derived by descent.

[68] There is a similar collectivised regime for pūtea trusts which, as noted, are trusts over undivided interests whose owners cannot be found, or where the minimal value of the interest means paying dividends to the owner is not sensible or feasible.[89] For example, in such circumstances, the trustees of an ahu whenua trust can obtain an order from the Court constituting a pūtea trust in respect of specific shares, or in

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preserve the right of a beneficial owner to derive trust income on a pro rata basis, but only if the owner holds a "large interest": subs (8). This exception is designed to mitigate two risks: the risk of conflict between large shareholders and the wider beneficial community as the interests of the former become subordinated to the collective, and the risk that large shareholders will exercise a de facto veto on the re-collectivisation proposal itself. This comparatively narrow exception serves to demonstrate the substantive point that in the ordinary course, the community will supplant individual owners as the true purpose and beneficiary of whenua tōpū trusts.

85 Relevant background is set out in *Pirika v Eru – Te Ngae Farm Trust* [2013] Māori Appellate Court MB 127 (2013 APPEAL 127).

86 When the Ngāti Rangiteaorere claim was fully settled, further arrangements were made for management of the Te Ngae Farm Trust as part of the wider hapū asset base: see Ngāti Rangiteaorere Claims Settlement Act 2014.

87 *Te Puni Kōkiri – Pākaitore Trust* (2007) 183 Aotea MB 17 (183 AOT 17); and see *Taueki v McMillan – Horowhenua 11 (Lake)* (2014) 324 Aotea MB 144 (324 AOT 144) at [122(a)]; Whanganui Iwi (Whanganui (Kaitoke) Prison and Northern Part of Whanganui Forest) On-account Settlement Act 2011; and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 92 definition of "Pākaitore Trust".

88 *Matuku – Ngāti Maru Wharanui Pukehou Trust* (2010) 245 Aotea MB 15 (245 AOT 15) at [61]–[63].

89 TWMA, s 212.

respect of any shares below a particular capital value. Usually shares held in pūtea trusts have both characteristics; that is, they are owned by deceased or unreachable owners and are of low value. Shares in Māori-owned land are often very fragmented due to a combination of land loss and intestate succession across multiple generations.[90] Ironically, extreme share fragmentation has made re-collectivisation easier than might otherwise have been the case.[91] As with whenua tōpū trusts, income derived from pūtea trusts may be utilised entirely for hapū or iwi purposes, and individual succession to interests in the trust property is suspended during the existence of the trust.[92]

[69] Finally, s 220A of the TWMA demonstrates how a descent-based collective approach to land ownership can be formally recognised in the adjacent Torrens system. Under that provision, trustees of any trust over land or an interest in land that is registered or registrable under the Land Transfer Act may direct the Registrar-General of Land to register the land in the name of the trust itself, or a tipuna (ancestor).

[70] These mechanisms demonstrate that the TWMA provides practical pathways, by way of court order, for re-tribalising landholdings and de-powering individualised interests. It might perhaps be argued that since there is no similar provision under the Act for common law trusts to have the same effect without a court order, a strictly English property law approach should be taken to General land held by such trusts on behalf of iwi or hapū. This is the view accepted by the Court of Appeal.

[71] We do not think that can be correct. It is true, of course, that General land owned by Māori is a pre-TWMA legacy land category, but it is also important to bear in mind that the context in which it now sits (both statutory and otherwise) is very different to that which prevailed in 1953 and 1967.

[72] The more correct approach to assessing whether the TWMA applies to TUT is to focus first on the purpose and provisions of the TUT Deed. If they are consistent

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90 See Thaddeus Pearcey McCarthy, W Te R Mete-Kingi and MJQ Poole "The Māori Land Courts: Report of the Royal Commission of Inquiry" [1980] IV AJHR H3 at 29–30.

91 George Asher and David Naulls *Māori Land* (New Zealand Planning Council, Planning Paper No 29, March 1987) at 76; and see ETJ Durie "Submission No 11 to the Royal Commission on the Māori Land Courts" at 24.

92 TWMA, ss 212(6)–(8) and 218.

with the purpose and text of the Act, then it must be taken that the legislature intended the Act to apply.

[73] As we have concluded above at [37], it is a purpose of TUT to acquire and hold land on behalf of Tūhoe. This is reflected in cl 3.1 of TUT's deed which, for convenience, we set out again:

> The Purposes of the Trust shall be to receive, hold, manage and administer the Trust Fund in trust for the present and future Tūhoe Iwi Members in accordance with this Deed, and shall without limitation include:
>
> (a) Leading and serving the cultural permanency and prosperity of Tūhoetanga by way of re-enacting te mana motuhake of Tūhoe.
>
> (b) The promotion and advancement of the social and economic development of Tūhoe including, without limiting the generality of this purpose, by the promotion of business, commercial or vocational training or the enhancement of community facilities in a manner appropriate to the particular needs of Tūhoe;
>
> (c) The maintenance and establishment of places of cultural or spiritual significance to Tūhoe and marae of Tūhoe, including restoring the connection of Tūhoe with Te Urewera through the operation of the Te Urewera Board;
>
> (d) The promotion of tribal forums to hear and determine matters affecting Tūhoe and to advocate on their behalf;
>
> (e) Any other purpose that is considered by the Trustees from time to time to be beneficial to Tūhoe and Tūhoe Iwi Members;
>
> (f) To achieve requital for raupatu and other claims from the Crown and to establish a new generation relationship between other iwi, the Crown and Tūhoe;
>
> (g) To address the effect that Crown breaches have had on the economic, social, cultural, and political well-being of Tūhoe;
>
> (h) To make distributions to Tūhoe Iwi Members.

[74] "Tūhoe Iwi Members" is defined in the following way:[93]

> **Tūhoe Iwi Members** means the individuals for the time being, who (a) by whakapapa (or by legal adoption) can claim descent from the eponymous ancestors Tūhoe or Pōtiki or who are Whāngai and (b) who are affiliated to any of the Hapū;

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93 TUT Deed, above n 9, cl 1.1 definition of "Tūhoe Iwi Members". It is to be noted that the definition differentiates between Tūhoe and Pōtiki, suggesting Pōtiki is not the second part of the composite name Tūhoe-pōtiki, generally taken to be the youngest son of Tamateakitehuatahi and Paewhiti. Rather, in the context of the TUT Deed, Tūhoe and Pōtiki are separate ancestors. As

[75] By the terms of sch 1, the trustees have the power to acquire, hold and dispose of land, although, importantly, cl 3.5 provides that any land acquired within the Tūhoe ahikāroa is thereafter inalienable.[94] This suggests that land retention is an important purpose of TUT.

[76] It may be seen that, insofar as land is concerned, TUT's form and purpose is a close analogue of the form and purpose of whenua tōpū trusts. The detailed social, economic and cultural purposes referred to in cl 3.1 are consistent with the list of Māori community purposes provided in s 218 of the TWMA. And the land retention directive in cl 3.5 is consistent with the Preamble and purpose of the TWMA, and with the Māori Land Court's general objectives. Further, like trusts created by Māori Land Court order,[95] TUT is not subject to the rule against perpetuities.[96] The intention is it will hold trust assets on behalf of the iwi for as long as the iwi exists. Finally, the focus in the definition of Tūhoe Iwi Members on descent from Tūhoe and Pōtiki reflects the ancestral title option available under s 220A.

[77] In light of the foregoing, it is consistent both with the TUT Deed and the TWMA to construe "Māori" in the definition of General land owned by Māori, as capable of referring to a Māori, whether still alive or not, where the context makes that appropriate. Since the introduction of pūtea, whānau and whenua tōpū trusts, in which successions are automatically brought to an end,[97] it is now relatively commonplace for beneficial interests in Māori freehold land and General land owned by Māori to be held by ancestors. Treaty settlement-based whenua tōpū trusts are similarly placed as we have identified.[98] The common element in all cases is that the living descendants of those ancestors are discretionary beneficiaries.

[78] In applying this approach to TUT, the TUT Deed makes it abundantly clear that Tūhoe and Pōtiki are the appropriate ancestors for vesting purposes. This involves no

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the full tribal name is Tūhoe Pōtiki, the distinction is not significant for our purposes.

94 "Ahi kā" in s 4 of TWMA means "fires of occupation". The addition of "roa", or "long" in "ahikāroa" means the undisturbed occupation by a group of an area over a long period of time: see Te Aka Māori Dictionary "ahikāroa" <https://maoridictionary.co.nz/>. For the purposes of cl 3.5 of the TUT Deed, above n 9, this may be taken as a reference to Tūhoe's traditional territory.

95 TWMA, s 235.

96 Tūhoe Claims Settlement Act, s 19.

97 TWMA, ss 212(8), 214(6) and 216(6) respectively.

98 Above at [67].

straining of the language in s 4 or s 129(2)(c); and they were Māori. Nor is this a novel or controversial approach under the Act generally. As we have outlined, beneficial interests in land subject to the TWMA are commonly vested in deceased individuals to facilitate collective management. The novelty arises under the general law and outside the operation of the TWMA.[99]

[79] Given the inclusion in s 236(1)(c) of General land, there is no good reason to include purely tribal trusts established by the Māori Land Court under Part 12 within that Court's supervisory jurisdiction, while excluding purely tribal trusts established by other means. We are unable to agree with the Court of Appeal that the technical language employed in the definition of General land owned by Māori provides a basis for such exclusion.

*Unintended collateral consequences?*

[80] The respondent submits that construing the definition in a way that included TUT land exposes Treaty settlement-based landholding trusts to unintended negative consequences. It was suggested, for example, that individual members of Tūhoe would obtain a caveatable interest in TUT's land and could therefore interfere in the administration of TUT's assets. We agree that would be a risk if we were to find that beneficial title vests in the individual members of Tūhoe from time to time rather than the collective, but it is no risk where the beneficial owner is an ancestor or ancestors from whom all members of the relevant collective can claim descent.[100] Ancestral beneficial ownership is therefore consistent with the wholly discretionary nature of the TUT, and it is also structurally consistent with tikanga.

[81] Finally, the respondent adopted the Court of Appeal's view that if TUT land is subject to Part 12 of the TWMA, any ordinary discretionary family trust whose

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99 For a similar approach to statutory interpretation (albeit in different circumstances), see the decisions of this Court in *Ryan v Health and Disability Commissioner* [2023] NZSC 42, [2023] 1 NZLR 77 in relation to the meaning of "agency"; and *Clayton v Clayton [Vaughn Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 in relation to the meaning of "property".

100 Nor, since it is a fully discretionary trust, would any descendant of Tūhoe be entitled to succeed to a 1/51,000 share of TUT's land assets: TWMA, s 111(1). Such an individual would be unable to demonstrate an entitlement to succeed on intestacy as required by this provision. In any event, the nature and purpose of TUT is, as we have said, analogous to the whenua tōpū trust model in which successions are prohibited during the life of the trust: s 216(6).

beneficiaries are Māori or comprise a Māori majority would also be caught.[101] This would include a standard form discretionary trust over a family home in which one parent is Māori, the other Pākehā, and their children are also of Māori descent. The home could be on land to which the Māori discretionary beneficiaries have no traditional connection at all. It cannot, it was suggested, have been intended that such trusts be subject to the supervision of the Māori Land Court.

[82] We generally agree that, if that were the case, it would be a problem. However, it is not the case because, as we have said, the beneficial estate does not vest in living discretionary beneficiaries. Moreover, in the more than 70 years since the Court has had jurisdiction over General land owned by Māori, this has not proved to be an issue of any significance, even in respect of non-discretionary family trusts which, on a plain reading of the definition, *are* covered. In any event, it is open to the Māori Land Court to remove any application to the High Court which enjoys concurrent supervisory jurisdiction, should that be considered appropriate.[102] The more important point is this: TUT's General land *is* tribal land to which members of the tribe have a tikanga connection. That is why alienating landholdings located within the tribal territory is prohibited by the TUT Deed. In other words, whatever General land owned by Māori was not designed to include, it obviously was intended to include land within a tribal territory held for the benefit of that tribe.

*Is the Māori Land Court an inappropriate forum?*

[83] Although we consider that the words of the definition of General land owned by Māori do not exclude TUT's General land, and need not do so to avoid unintended collateral consequences, it is still necessary to consider whether the definition should be intentionally read down. This might be necessary if allowing the Māori Land Court to interfere in TUT's affairs is an imposition that is inconsistent with the statutory framework and purpose.

[84] TUT's opposition to the Māori Land Court's supervisory jurisdiction is understandable, in theory at least. That Court's predecessor has a problematic history

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101 CA judgment, above n 6, at [100]–[103].
102 TWMA, s 18(2).

in Tūhoe, as it does in other tribal districts. Further, an iwi committed to protecting its own mana motuhake (sovereignty) will not cede jurisdiction to an external overseer if that can be avoided. But the practical context is more complex than that. The Māori Land Court is, by statutory direction and long experience, sensitive to the challenges of communal asset administration. Its jurisdiction is expressly informed by the preambular direction in the TWMA to affirm the Treaty guarantee of tino rangatiratanga and to "assist the Māori people to achieve [its] implementation". The High Court is neither institutionally focused on these matters, nor subject to Treaty-based directives in the exercise of its supervisory jurisdiction over trusts.

[85] In addition, Māori Land Court judges must have knowledge and experience of te reo Māori, tikanga Māori and the Treaty.[103] High Court judges are not so required, and are much less likely in fact to be experienced or expert in these matters.

[86] A consideration that might be said to cut both ways is that the Māori Land Court is an accessible forum. On the one hand, the cost of filing an application in that Court is very small compared to the cost of bringing proceedings in the High Court. It is also a forum with which Māori are familiar. On the other hand, TUT is understandably concerned that it could become bogged down in responding to repeated applications brought by dissentient members for collateral purposes.

[87] We agree that this must be avoided. But this problem was not apparent here. The trial Judge in this case proceeded with due care and, on the facts as found, he came to conclusions that were available—finding against Mr Nikora on one application and for him on the other.[104] It did not help that TUT failed to respond to Mr Nikora's notification of dispute under cl 19 of the TUT Deed, nor that TUT refused to participate in the proceeding before that Court, not even under protest to jurisdiction. Like any exercise of authority, tino rangatiratanga cannot be its own judge. Its parameters must be defined and maintained by reference to applicable principles of equity, legality and tikanga. The Māori Land Court is an appropriate forum to undertake that task.

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[103] Section 7(2A).
[104] MLC judgment, above n 4, at [84]–[85].

*Resulting untidiness*

[88] The more powerful argument against subjecting TUT to Part 12 is a practical one. If TUT is subject to the Māori Land Court's jurisdiction by reason only of its (proportionately minimal) landholdings, that is apt to create uncertainty for TUT and for other PSGEs. As land ownership is the trigger under Part 12, some PSGEs that do not hold land permanently could move in and out of the jurisdiction of the Court based on commercial investment decisions. We were also advised that the settlement legislation for some of the larger Treaty settlements that postdate *Moke* has specifically provided that the Māori Land Court does not have jurisdiction in relation to the relevant PSGE. Other smaller post-*Moke* PSGEs have not expressly excluded the Court. Further, some settlements specifically adopt the supervisory jurisdiction of the Māori Land Court.[105] Thus, the Māori Land Court could have jurisdiction over only some PSGEs, in respect of the administration of only one asset category, and, even then, only some of the time. This results in untidiness and uncertainty.

[89] In 2006, the Law Commission | Te Aka Matua o Te Ture proposed a new regime for Māori governance entities (Waka Umanga).[106] It would have provided for concurrent jurisdiction in the Māori Land Court and High Court in relation to disputes between the new entities and third parties.[107] Parliament did not proceed with the resulting Waka Umanga Bill due to opposition from iwi.[108] The result is that, without the enactment of a purpose-built regime for the administration of PSGEs, the controls that apply to them will be case-specific. Some PSGEs are purely statutory;[109] others, like TUT, are common law trusts. Some settlement legislation excludes the TWMA and other settlements do not.

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105 TUT referred to an example of the last category in its submissions—namely, the Maraeroa A and B Trust, which was created to manage the Treaty settlement effected by the Maraeroa A and B Blocks Claims Settlement Act 2012. This, it was suggested, supported the proposition that if the Court is not expressly invoked in the relevant settlement legislation, it was not intended to have a supervisory role. Given the alignment between the purposes of the TWMA and tribal land administration more generally, this is not a sound basis for reading down the key language in ss 4 definition of "General land owned by Māori", 129 and 236 of the TWMA.

106 Law Commission | Te Aka Matua o Te Ture, above n 52.

107 At [9.6]. The Māori Land Court would have had exclusive jurisdiction to consider internal disputes: at [9.5].

108 Waka Umanga (Māori Corporations) Bill 2007 (175-2); and see Sacha McMeeking "Enhancing the Māori Innovation System" in Robert Joseph and Richard Benton (eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2021) 921 at 931.

109 See for example Te Rūnanga o Ngāi Tahu Act 1996.

[90] Whatever the structure of the PSGE, the High Court will have supervisory jurisdiction of some kind over it, whether public or private law-based or both. But the applicable law will be case- and fact-specific, including as to the role tikanga should play. And, if appropriate, the High Court can refer tikanga issues to the Māori Appellate Court in any event.[110]

[91] This patchy regime is not optimal. A more thoroughgoing statutory reform would be preferable, but in its absence, a case-specific approach is required. In such an approach the TWMA must be applied according to its terms and in light of its very clear statement of purpose. It does not seem sensible to (effectively) require vesting in a living beneficial owner in the case of a trust created by private deed over General land owned by Māori, when that requirement is not explicit, and when it is not a requirement for trusts created by Māori Land Court order, whether over Māori freehold land or General land owned by Māori. It would certainly be inconsistent with the purpose and much of the detail of the TWMA. Further, to construe the definition of General land owned by Māori as time-bound to the circumstances that led to its creation in 1953, or to its increased importance following the problematic 1967 reforms, would be inconsistent with the requirement to apply ss 4 and 129(2)(c) to circumstances as they arise.[111]

[92] Finally, it must be accepted that there will be untidiness, but that is best remedied through statutory reform in which all relevant policy factors can be considered.

**Costs**

[93] We agree with the Court of Appeal that the trustees of TUT should pay the appellants their actual and reasonable legal costs and disbursements in connection with the appeal to this Court out of the assets of TUT.[112] We make that order below.

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110 TWMA, s 61.
111 Legislation Act 2019, s 11.
112 See CA judgment, above n 6, at [130]–[132].

**Disposition**

[94] The application by the respondent to adduce the evidence of Te Whenua Te Kurapa is granted.

[95] The appeal is allowed.

[96] The orders made by the Māori Land Court in relation to trustee elections of TUT are reinstated.[113]

[97] The trustees of TUT must pay the appellants their actual and reasonable legal costs and disbursements in connection with the appeal to this Court out of the assets of TUT. If the parties are unable to agree on the amount of costs and disbursements payable, that will be determined by the Registrar of this Court.

[98] Any outstanding issues relating to costs in the Courts below are to be determined by those Courts, in light of this judgment.

Solicitors:
G E Morrell, Pukekohe for Appellants
Tompkins Wake, Rotorua for Respondent
Dixon & Co Lawyers, Auckland for Intervener

[113] MLC judgment, above n 4, at [85].