IN THE MĀORI LAND COURT OF NEW ZEALAND
AOTEA DISTRICT

A20100012008

UNDER	Section 67, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Mataimoana
	HARVEY GIFFORD BELL Applicant
	DAVID CHURTON Respondent

Hearings: 374 Aotea MB 298 – 307 dated 12 September 2017
376 Aotea MB 272 – 302 dated 11 October 2017
391 Aotea MB 206 – 246 dated 11 September 2018
(Heard at Whanganui)

Appearances: B Gilling for the Applicant
D Churton in person

Judgment: 24 December 2019

INTERIM JUDGMENT OF JUDGE L R HARVEY

Copies to:
H Bell PO Box 4035 Whanganui 4541
R Boast, Faculty of Law, Victoria University, PO Box 600, Wellington 6140 richard.boast@vuw.ac.nz
B Gilling, Morrison Kent, 105 The Terrace, Wellington 6011 bryan.gilling@morrisonkent.com
D Churton, Watershed Road, RD 8, Whanganui 4578 farmcorpfarming@hotmail.com
Mangaporou Trust, c/-Chris Shenton, Wikitoria Road, Putiki, Whanganui 4578 matapihi@ihug.co.nz

CONTENTS

Introduction

[1] Harvey Bell seeks an investigation into Mataimoana, a block of Māori customary land. He does so on behalf of the Whanganui Trust and requests that the Court should determine the customary interests, then identify the groups associated with the land in accordance with tikanga and leave the status of the land as Māori customary land. He asks that the Court confirm appropriate processes for the creation of a suitable governance structure.

[2] David Churton, commonly known as Tuffy Churton, opposes Mr Bell's application. He asserts that, in accordance with the concept of ahi kā, he and his immediately family are entitled in the first instance to the land. During the last two hearings he acknowledged that the summit of Mataimoana, of up to 10 acres, could be set aside as a reserve of some description for the benefit of those claiming an interest. Nonetheless, Mr Churton seeks confirmation that the land is to be vested in himself and his family as owners.

[3] The issues for determination are:

(a) Who has customary rights and interests in Mataimoana in accordance with tikanga?

(b) What governance arrangements are appropriate?

[4] Before then, I consider the nature of the evidence presented, including from Court commissioned experts, Professor Richard Boast QC, and Turama Hawira, a renowned expert

on customary lore from within the mana whenua tribes of the region.[1] Professor Boast relies heavily on Native Land Court narratives for each of the blocks surrounding Mataimoana to provide both historical context and evidence of customary overlays and who these were treated by the Native Land Court in arriving at its decisions.

[5] Following the close of hearings in 2018, Mr Churton then began corresponding with the registrar and the Chief Judge's office over claims that he had been somehow disadvantaged by the process. He appeared to object to the calling of expert evidence by the Court and the payment of those witnesses, including Professor Boast and Mr Hawira, as well as the costs of the applicant's counsel being met from the Special Aid fund. Those allegations are also considered in this judgment.

Background

[6] According to the Court's records, Mataimoana is a block of Māori customary land 50.1607 hectares in area.[2] It was created by way of a vesting order dated 24 June 1971.[3] The land is currently vested in the Whanganui Trust as responsible trustee. An open spaces covenant of kawenata was entered into between the Whanganui Trust and the Queen Elizabeth II National Trust on 6 April 1987.

[7] A brief history of these lengthy proceedings is set out in my earlier interim judgment of 12 September 2017 and the salient points are reproduced here for convenience:[4]

> **Introduction**
>
> [1] Harvey Bell seeks an investigation into ownership of the Māori customary land known as Mataimoana, located inland of Whanganui. Mataimoana block was vested in the Whanganui Trust, as trustee, on 24 June 1971.[5]
>
> [2] The application has been before the Court since 2010. Professor Richard Boast QC has been commissioned to provide expert evidence and Dr Gilling was appointed counsel. It was intended that a hearing would be held in April 2016 however that did not occur.
>
> [3] On 18 July 2017, a hearing was convened at the request of David (Tuffy) Churton, an interested party.[6] He expressed concern about the progress of the application. Mr Churton also raised issues surrounding what he termed was the improper alienation of the subject land by the Whanganui Trust, by, I infer, licence or lease.

---

1 Both experts were commissioned per s69(2) of Te Ture Whenua Māori Act 1993.
2 167 Aotea MB 143-144 (167 AOT 143-144).
3 135 Whanganui MB 119-127 (135 WG 119-127).
4 *Bell v McDonnell - Mataimoana* (2017) 374 Aotea MB 298 (374 AOT 298).
5 135 Wanganui MB 119-127 (135 WG 119-127).
6 373 Aotea MB 44-47 (373 AOT 44-47).

[4] I then directed that hearings would occur:

(a) in October 2017 for a substantive hearing for Mr Churton to give evidence on his claims of ownership;
(b) in November 2017 for Professor Boast QC to present his report and reflect on any evidence filed by interested parties; and
(c) in December 2017 for closing submissions.

[5] Dr Gilling filed a memorandum on 25 August 2017 responding to concerns raised by Mr Churton. In addition, counsel invited me to consider those elements of "tikanga Māori" under which the Court will be proceeding with this investigation to determine the ownership of Mataimoana to achieve an expeditious resolution of these proceedings.

[8] As set out above, there have been many long delays in bringing this proceeding to a conclusion. Any delays caused by the Court are also regretted.

The Law

[9] Section 129(2)(a) of Te Ture Whenua Māori Act 1993 states:

> land that is held by Māori in accordance with tikanga Māori shall have the status of Māori customary land

[10] Section 132 provides:

> **132 Change from Māori customary land to Māori freehold land by vesting order**
>
> (1) The Māori Land Court shall continue to have exclusive jurisdiction to investigate the title to Māori customary land, and to determine the relative interests of the owners of the land.
>
> (2) Every title to and interest in Māori customary land shall be determined according to tikanga Māori.
>
> (3) In any application for the exercise of the court's jurisdiction under this section, the applicant may specify—
>
> (a) the person or persons in whom it is proposed the land shall be vested; and
>
> (b) any trusts, restrictions, or conditions to which it is proposed the land shall be subject.
>
> (4) On any investigation of title and determination of relative interests under this section, the court may make an order defining the area dealt with and vesting the land in—
>
> (a) such person or persons as the court may find to be entitled to the land in such relative shares as the court thinks fit, or otherwise in accordance with the terms of the application; or
>
> (b) a Māori incorporation or a Māori Trust Board or trustees for or on behalf of such persons, and on such terms of trust, and in such relative shares, as the court thinks fit.

What are the relevant legal principles?

[11] As foreshadowed in my earlier judgment, establishing a claim to Māori customary land invariably requires claimants to provide evidence of a "right" to the land in the context of orthodox legal principles and rules that have developed over time. These rights are commonly referred to as "take" namely, discovery, ancestry (take tupuna), conquest (take raupatu) and gift (take tuku).[7] To some extent, these labels are seen in certain quarters as archaic, one dimensional and too prescriptive relying, as they do, on what can be described as a 'western lens' and approach to customary tenure.

[12] In any event, as I set out in a previous decision, the authorities confirm that, while evidence of occupation is invariably a precondition, it is not necessary to demonstrate uninterrupted physical possession. Ahi kā - periodical or regular use consistent with ownership could also be sufficient to maintain the connection.[8]

[13] In *Da Silva* Judge Spencer addressed the issue of customary title in this way:[9]

> In the first instance, the Preamble recognises the traditional relationship of Māori with their land in its tribal significance rather than ownership in an individualised sense.
>
> This is consistent with the definition of Māori customary land as being "land held in accordance with tikanga Māori" (s.129(2)(a)/93), It is not therefore a question of its being "owned" but rather of its being "held", By s.132(2)/93, "Every title to and interest in Māori customary land shall be determined according to tikanga Māori." The use of the word "owners" in s.132(1)/93 must be interpreted accordingly. The term "determine" has been discussed earlier. Simply, it means that the Court must decide the land's ownership. As previously observed, implicit in a determination is establishing a point in time at which rights and interests are identified. The Court is now required, however, to make its decision in accordance with tikanga Māori, whereas under previous legislation it was in accordance with "the ancient customs and usages of the Māori people." To meet that previous standard, the Court and its predecessor the Native Land Court, established "the 1840 Rule". Whilst doubtless that was a useful cut-off point for determining "ancient customs and usages" before Pakeha influences had a major impact upon Māori traditions, there is no evidence that Māori themselves have adopted 1840 as the golden year of their tikanga. Under the 1993 Act tikanga is now contemporary rather than ancient. That the Act should remove this previous qualification to "tikanga" is consistent with the evolution of te reo Māori to meet modern circumstances and the acknowledgement of changes in social environment in, for example, the broadcasting cases in the Court of Appeal and Waitangi Tribunal.

[14] He also found that:[10]

---

7 See Smith, *Native Custom and Law affecting Native Land* (Maori Purposes Fund Board, Wellington 1945) and *Minhinnick – Maioro Lands* (1994) Waikato Maniapoto Appellate Court MB 220 (18 APWM 220).

8 Ibid.

9 (1998) 25 Auckland MB 212 (25 AT 212) at MB 237-238.

> Returning then to s,132 (1) & (2)/93, the Court is required "to determine the relative interests of the owners of the land" according to tikanga Māori. The central issue is the identity of the people with the place (its traditions etc.) The relationship with the place is based upon whakapapa (and between each other, whanaungatanga), ahi ka, tikanga (knowledge and practice of traditions) and in all things, aroha. The evidence is conclusive that both Ngati Rehua (and others of Ngati Wai and hapu of Marutuahu, share common bonds of whakapapa in relation to Aotea, It is also conclusively established that the ahi ka and tikanga (together being the kaitiakitanga) is with Ngati Rehua only, They have the knowledge of customary practices on Aotea and are the human kaitiaki of the taonga.

[15] In more recent times, in a provisional determination, Judge Doogan in *Te Ohu Kaimoana Trustee Ltd v Te Runanga Nui o Te Aupouri* provided guidance on the relevant factors and principles that would apply in that case which concerned customary interests relevant to the coastline:[11]

> [8] This provisional determination is issued in response to the request of the parties. I would not have done so but for the fact that there was unanimous support.
>
> [9] The guidance here recorded is provisional in nature. It does not determine matters of relevance or weight. It remains for the parties and their advisors to decide how they wish to present their evidence and argument. If any party disagrees with any aspect of this decision they are free to argue for a different approach at the substantive hearing.

[16] Judge Doogan referred to criteria developed for the identification of mana whenua in the Te Hiku forum draft mana whenua process:[12]

(a) Take taunaha;

(b) Take raupatu/ringa kaha;

(c) Ahi karoa;

(d) Take tuku;

(e) Take tipuna.

[17] He acknowledged that:[13]

> [122] In acknowledging these (and other criteria) as of relevance I do not intend to suggest that the named criteria are exhaustive nor that any particular criteria is in itself decisive. It will be for the parties to marshal and present their evidence. Questions of relevance and weight can then be the subject of argument and submission. What does bear emphasis is the fact that the legislative scheme requires the Court to hear and determine coastline claims on the basis of the relative strength of iwi customary rights.

---

10 Ibid at 241.
11 (2017) 102 Taitokerau MB 1 (102 TTK 1) at [8]- [9].
12 Ibid at [121].
13 Ibid at [122].

What is an appropriate approach to Native Land Court evidence?

[18] As mentioned, Professor Boast, one of the two principal witnesses in this case, draws extensively from the records of the Native Land Court, the predecessor to this Court. Accordingly, it is appropriate that some comment in made on a proposed approach to considering the evidence of the Native Land Court and its decisions. From the outset it is important to emphasise that Māori are understandably ambivalent about both the institution of the Native Land Court and its processes given its pivotal role in the extinguishment of Māori customary land on a vast scale and its alienation from collective title through the device of individualisation.[14] The consequent impoverishment of hapū and iwi as a direct result of the Native Land Court processes has long been decried by claimant communities.[15]

[19] Despite the assurances acknowledged in the Treaty of Waitangi, history attests to the destruction of customary land tenure, the loss of the majority of the Māori land base and the resulting erosion of tribal autonomy and cohesiveness.[16] By the beginning of the early 20th century well over 12 million acres of Māori customary land had passed through the Court by 1909.[17] Undoubtedly, the disposition and resulting disempowerment of hapū through the loss of lands has had a profound and ongoing impact. Invariably, the outcome was the impoverishment of the tribes and their economic, social and political marginalisation.

[20] As foreshadowed, it is hardly surprising that Māori have maintained a suspicion of the Court and its motives while at the same time acknowledging, albeit reluctantly on occasion, the value of some of its record of proceedings. Along with Williams, Boast has written extensively on the difficulties created by the Court and its records.[18] These realities have not endeared the Court and its conduct to Māori over the generations and in many rohe that ambivalence, if not outright opposition, remains to this day. The short point is that the

---

14 See for example Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 813, 2004) and Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987).

15 See Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997); *Orakei Report*, above n 14; and *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wai 1200, 2008).

16 Richard Boast *The Native Land Court 1862-1887: A Historical Study, Cases and Commentary* (Brookers, Wellington, 2013) *Volume 1*; Richard Boast *The Native Land Court 1888-1909: A Historical Study, Cases and Commentary, Volume 2* (Brookers, Wellington, 2015); Tom Bennion *The Māori Land Court and Land Boards, 1909 to 1952* (Rangahaua Whanui Series, Waitangi Tribunal, 1997); Richard Boast *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865-1921* (Victoria University Press, Wellington, 2008).

17 David Williams *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999) at 58-60.

18 Boast *The Native Land Court 1862-1887, Volume 1*, above n 1616; Bennion, above n 16; Boast *Buying the Land, Selling the Land*, above n 16.

Native Land Court is often viewed with unease, uncertainty and suspicion. However, that is not to say that all its decisions were incorrect every time.[19]

[21] The reality is that, as claimant communities can attest, the records that have survived provide a rich source of material on the historical overlays of Māori custom and tradition relating to land. As Ballara and other experts point out, not all the evidence before the Court was correct and not all of it was wrong either.[20] Context was everything. For example, it is unsurprising that unsuccessful claimants in a Native Land Court hearing would bitterly protest the fact that those iwi and hapū who did succeed had entered into sale or long term leasing agreements with the Crown in the months and years preceding the hearing.[21] In other words, it is not unusual for unsuccessful claimants to land in the Native Land Court to maintain their opposition to a decision where it subsequently emerged that the claimants who did succeed had agreed to sell the land prior to the Court hearing.

[22] Another flaw in the process was notice and the location of hearings. There are many examples of Native Land Court proceedings being held outside of the rohe in question. An added complication was the hearing of two different blocks at the same time.[22] Fraud was not uncommon and in one hearing the Court described the evidence presented as nothing but the "grossest perjury."[23] Multiple overlapping agendas were commonplace and witnesses were not beyond tailoring their evidence to suit particular circumstances and objectives that might have been contrary to their earlier evidence in another case.[24]

[23] In summary therefore, while the records of the Court do provide an important and often unique source of history, whakapapa, tikanga and customary land tenure, its evidence is not always entirely reliable. Moreover, history has shown that if a particular whakapapa line or right of a specific iwi or hapū has been emphasised at an early stage, it was not uncommon for that perspective, once legitimised by a Native Land Court judgment, to be simply repeated both in subsequent hearings or appeals and in other fora. Generations later, individuals would copy whakapapa out of early Native Land Court decisions and pass that

---

19 See Boast *The Native Land Court 1862-1887, Volume 1*, above n 16.16.

20 Angela Ballara *Iwi: The Dynamics of Māori Tribal Organisation from c.1769 to c.1945* (Victoria University Press, Wellington, 1998).

21 Boast *The Native Land Court 1862-1887, Volume 1*, above n 16.

22 See for example *Matahina* (1881) 1 Whakatāne MB 267 (1 WHK 267); *Putāuaki* (1881) 1 Whakatāne MB 270 (1 WHK 270) and *Pokohū* (1881) 1 Whakatāne MB 274 (1 WHK 274) in Boast *The Native Land Court 1862-1887, Volume 1*, above n 16, at 905, 911 and 916.

23 *Matahina* (1881) 1 Whakatāne MB 267 (1 WHK 267) in Boast *The Native Land Court 1862-1887, Volume 1*, above n 16 at 905.

24 Tom Bennion and Anita Myles *Ngati Awa and Other Claims (Wai 46 & Others)* Wai 1200 # A58, September 1995.

information onto succeeding generations which might result in a separate manuscript or set of private papers decades after the original hearings.

[24] If, for example an "error" had been made in the original Native Land Court hearing, affirmed in a rehearing or appeal, and then copied down from the Native Land Court source and entered into a private journal or manuscript decades later, the original error would have been repeated several times over several decades. The key point is that the repetition of an earlier error, no matter how many times repeated, can never make that first inaccuracy correct. So, while it is important to cross reference for the purposes of corroborating Native Land Court materials with external sources, care also has to be taken that the external source relied on is not simply a variation of the original Native Land Court record.

The evidence in this case

[25] The Native Land Court and its records have been referred to extensively during these hearings. They have also been referred to and relied on by some claimants during the Waitangi Tribunal hearings in the *Whanganui* and *Te Kāhui Maunga* Inquiries. My conclusion is that the records of the Native Land Court provide an important, if sometimes tainted, source of information on Māori history and custom. A cautious approach is therefore necessary when dealing with some of the historical records of the Court, its decisions and orders, especially where the case was highly contested or where, due to absences, the decision was not subject to serious and expected challenge.

Who has customary interests in Mataimoana in accordance with tikanga?

Applicant's case

[26] Dr Gilling submitted that *take taunaha*, according to Mr Hawira's definition of it, is equivalent of the original Court's right of discovery - naming and claiming and initial settling. In addition, Mr Hawira's evidence suggests that tikanga may vary from place to place but not on the essentials.

[27] In addition, counsel referred to the *'Mataimoana History'*, being the history of this Court's investigation of the block, the initial 1971 hearing, recognition of Mataimoana as a tribal asset. The original hearing in 1971, considered that the Ātihau Tribe, being Ngāti Hau were pre-eminent but from 2012, after the start of this case, there is the view that Ngā Rauru

also asserted customary rights. Mr Churton also claimed customary rights and therefore ownership through occupation and utilisation.

[28] A meeting of interested parties was the only time on the record that this appears to have been discussed by a wider group, apart from Mr Hawira's hui at which he presented the draft of his report and concluded that Ngāti Hau based roughly in the area of Hiruharama has a strong customary affiliation while noting that the Ngā Rauru had utilised the land in various ways.

[29] Counsel submitted that Mataimoana should remain in customary title. The land administrators or trustees should be drawn from local hapū or iwi and the administration should depend on what best accommodated land of Māori customary status.

[30] Mr Hawira's evidence was that three *take* were particularly applicable to Mataimoana: *take taunaha*, right by discovery confirmed by the speaking, as he called it, the land, naming, claiming and occupying; t*ake tūpuna*, right by continuous ancestral occupation. Being ancestral connection to one or more ancestors who held tangata whenua status within that particular takiwā whilst also showing a continued occupation of the takiwā by the descendants; and *ahi kaa*, continuous fires of occupation. Being continuous ongoing occupation, maintenance of land, referring to the fires, occupiers use for warmth and cooking.

[31] Dr Gilling submitted that Mr Hawira described some of the elements of customary usage of the whenua, for all aspects of daily livelihood of both physical and spiritual nature. All of which gave an intimacy of knowledge that is associated with the relationship. He noted under *take taunaha*, the prior arrival of the iwi of Whanganui, then Paerangi I, who was there ahead of Turi of the Aotea waka. But the tensions and the eventual peace makings that had gone on subsequently over the centuries led to both of those hapū, Ngāti Pourua and Ngāti Hau, having pre-eminence in and use of that area. Mr Hawira's view, as a recognised expert in tikanga Māori and whakapapa, is that those who held Mataimoana under tikanga Māori were the Ngā Rauru hapū of Ngāti Pourua and the Whanganui hapū of Ngāti Hau.

[32] Counsel noted Mr Hawira's insistence that Mataimoana was left as a special place and therefore deliberately excluded from surveys because it was an ancient whare wānanga and a sanctuary for the placement of displaced kaitiaki. The area, according to Mr Hawira, had extensive connections of tōhunga with the area over a long time. Dr Gilling then

emphasised that Mr Hawira had stressed in his oral evidence the implications of the tapu on that area and on those who attempted to use it or interfere with it.

[33] Counsel then submitted that Professor Boast's report focussed, as was proper, on what the Native Land Court investigations into neighbouring blocks determined as to who were the hapū or other groups who laid claim to those lands. Because Mataimoana self-evidently had no Native Land Court investigation, Professor Boast focussed especially, but far from exclusively, on Mangaporau where the contention was between Ngā Rauru and Ngāti Hau. Essentially his evidence, counsel submitted, supports that of Mr Hawira, that the key hapū involved were Ngāti Hau of Whanganui and Ngāti Pourua of Ngā Rauru. He does though also raise the possibility that Tamahaki might extend down from the Taumatamahoe block and raises the possibility of Ngāti Kura too.

[34] Dr Gilling then turned to the claims of Mr Churton. His tribal affiliations appear to be principally with Ngāti Tama of North Taranaki. But he also claims within his whānau to connect via Pūtiki. Counsel then invited the Court to reflect on the nature of customary tenure under tikanga Māori as being collective, not individualised, belonging to hapū or possibility whānau and not to individuals regardless of how the Native Land Court might have behaved in subsequent decades.

[35] Counsel noted that Mr Hawira refuted Mr Churton's evidence, particularly his claims to historical connections. That said, counsel acknowledged that there is the connection through Taringakuri of Ngāti Tama and Maraea Te Peo who connected through Pūtiki. Even so, regarding Ngāti Tama's own self-description in their 2001 deed of settlement located them firmly in Taranaki.

[36] Dr Gilling contended that the independent evidence of Ngāti Tama themselves in their settlement documents and legislation confirms that Ngāti Tama have no customary interest at Mataimoana nor anywhere close. In the Waitangi Tribunal's Whanganui enquiry, Ngāti Tama were not within the Whanganui enquiry district. In Professor Boast's report they make no appearance in any of the blocks he studied, even as far north and distant from Mataimoana is Taumatamahoe. Counsel underscored that Mr Hawira provided evidence that Ngāti Maru seem to repose themselves between Ngāti Tama and the middle Whanganui.

[37] In the context of whakapapa, counsel submitted that Mr Churton claimed a genealogy to Pūtiki while noting that Mr Hawira and he clashed somewhat over this and that Mr Hawira was of the view that the WAI 999 claimants provided an entirely different

Tūpoho whakapapa. He also stated to Mr Churton that he would have to convince that hapū that their whakapapa was wrong. Dr Gilling argued that the Court is justified in accepting the published representative whakapapa of a hapū over what are unsubstantiated assertions.

[38] Counsel submitted that Mr Churton defined ahi kā as personal ties to the land and discussed his family's connection while noting that it was actually a company, the Tanaka Land Company, that owns and operates this property. While the area no doubt does have a great personal significance to Mr Churton's family, that does not amount to any customary attributes such as ahi kā in any sense relating to tikanga as the Act requires.

[39] Dr Gilling further submitted that Tanaka Farm is not Mataimoana, it is close by with the 888 block intervening or another block Mr Churton bought in 1996 as well. In short, according to counsel, it is a different block that is at best contiguous and only after purchase in 1996. Counsel contended that it was unclear what customary rights can accrue to shareholders in a limited liability company, while acknowledging that there was no evidence that Mr Churton is even a shareholder in Tanaka.

[40] Dr Gilling argued that another element Mr Churton attempted to establish was having wāhi tapu on Mataimoana including an urupā, which he has placed on Mataimoana. However, apart from the issue of the illegality of using land that is not his, this urupā has no-one buried in it to make it consecrated ground or imbued with being a wāhi tapu. Counsel submitted that Mr Churton's justification for using a portion of Mataimoana for his personal potential urupā, appeared to be that it would take some process to have an urupā or a Māori reservation created on one's own land.

[41] According to Dr Gilling, this area with its fence, gateways and monuments with brick bases is all illegally placed with no permission from the land's owners. It was put there by Mr Churton who believes that customary land is anyone's. It has been there for less than four years and carries no significance or status other than that to Mr Churton who erected it there instead of on his own land. The core basis of Mr Churton's attitude and misapprehension is that the customary status means something equivalent to a 'free for all' without the ordinary restrictions that would apply to the use of public reserves or land.

[42] Dr Gilling then submitted that another attribute of customary interest that Mr Churton tried to create is use. He has used heavy equipment to build a road across Mataimoana, or expand it, with a gate and admits to having used Mataimoana since about

1978 or 79. He has also in his words defended Mataimoana with violence from others. He continued to stress his family's usage agreeing with the Court in the following exchange:

> **The Court:** Well I mean if I can be blunt, your evidence is that for about half a century your family has been connected to neighbouring lands.
>
> **D Churton:** Yes.
>
> **The Court:** And have used it and farmed it in various ways, not Mataimoana in its totality, but your own family land.
>
> **D Churton:** Yes, and the Mataimoana block has become part of that farm more so in the last 30 years.
>
> **The Court:** So what you're saying are you not, is that over the last 30 years you have decided to use that land.
>
> **D Churton:** We have been using it, yes.

[43] Counsel contended that this may have been used as the basis for a claim in adverse possession had the applicants, trust and other neighbours not tried to deal with Mr Churton over the years. However, a commercial operation for 30 years regardless of a family enjoying and connecting with the land does not amount to anything that can be equated to the use by Māori of land under tikanga.

[44] Dr Gilling underscored that the focus of the ownership, occupation and usage was the neighbouring farm, which until 1996 seems not even to have adjoined Mataimoana, and since then the road has been carved across the block, the potential urupā has been erected, and a hut seems to have been erected and then burned down in a violent criminal activity. There has been other activity too, such as the attempt to extract tolls from a Mr Roadie and the felling of some bush in disregard of the fact that none of this is Mr Churton's property to use, fell or otherwise seek to make money from.

[45] In any event, counsel underscored that the weight of evidence supports a sharing of interests between Ngāti Hau and Ngāti Pourua. The Court may also consider that Ngāti Kura and Tamahaki could have some interest but the evidence for these two hapū was not strong and they did not seem to appear even in the original Court hearing to closely neighbouring blocks, only in lands at some distance. By contrast the evidence is very strong and clear that Ngāti Tama have no customary interests in Mataimoana and nor do down river hapū at Pūtiki. Simply being of Whanganui descent does not in any of the evidence before the Court substantiate rights in Mataimoana.

[46] Therefore, counsel submitted, the applicant on behalf of the Whanganui Trust seeks:

(a) A declaration and resulting status order that the status of Mataimoana is and should continue to be Māori customary land.

(b) A determination of the groups who have customary interests in Mataimoana.

(c) A deferral of an order defining interests in vesting the land until those found to have customary interests have conferred together the trust and decided amongst themselves on any division of relative interests, if such is desired. The way Mataimoana should be held into the future, whether by Māori incorporation, Māori trust board or by trustees, and the terms under such a body should hold Mataimoana.

(d) The dismissal of Mr Churton's claims to any customary rights in Mataimoana.

(e) An order that Mr Churton's activities on the block to date have been unlawful and that he must remove from the land any of his property and to cease and desist from any further activity on the block.

[47] Finally, the applicant is of the considered view that the imposition of a QEII Covenant over Mataimoana several decades ago was ultra vires in respect of Māori customary land and should be removed. This matter will be considered further by the groups determined to have customary ownership, and if necessary after that referred back to the Court at a later date.

Respondent's case

[48] Mr Churton provided a brief written submission noting at the start of his address that he did not think there was a lot of value in going over what was brought before the Court and that it was for the Court to make its decision on that evidence.[25] One of the fundamental issues was the status of the Mataimoana block, which Mr Churton contended was clearly customary land.

[49] Mr Churton also submitted that a second a key issue for the Court was whether the 1840 rule should apply. He argued that this device had been imposed in earlier dealings with customary land in New Zealand in relation to the Treaty and in relation to the exercising of

---

[25] 393 Aotea MB 187 (393 AOT 187)

Māori customary right including ahi kā. Mr Churton submitted that the 1840 rule did not apply. Should the rule of 1840 not apply then, he submitted, his claims should stand as rights under ahi kā, rights of occupation and use.

[50] Mr Churton asserted that he had supplied significant evidence to support his family claims under ahi kaa. He also stated that his address in the local telephone directory is 1 Mataimoana and this too supported his claims.

[51] Turing to the applicant's evidence Mr Churton referred to the evidence of Mr Hawira about the Aotea whare wānanga. In response Mr Churton stated that the ancestor Taringakuri attended wānanga. Whether he ever attended a wānanga in the Whanganui river region is unclear. In saying that, Mr Churton submitted that the main part of the significance of the Mataimoana block is the summit. Regarding the evidence of Mr Hawira, Mr Churton argued that the main significance of Mataimoana is the peak.

[52] According to Mr Churton, the evidence of Professor Boast, did not prejudice his claim for ahi kā. Indeed, he considered it supported his claims. He referred to the Mangaporou block of 16,000 acres where he claimed the Court saw fit to award the land to 13 people which equated of 1,200 acres per person. In dealing with the Mataimoana this is only 120 acres.

[53] Mr Churton then sought to provide evidence from Neville Baker who he said was unavailable for the hearing. He did however present a report that Mr Baker had provided which concerned a dispute in Taranaki with Ngāti Tama and Poutama which mentions Tahora. According to Mr Churton Tahora is on the main road between Whangatemomona [sic], Tahora. Mr Churton claimed that the report included evidence of Ngāti Tama occupation around Ohura, the Ohura River, Tokorima and Tahora. But the significance of Tahora he claimed was due to an old track through the bush that connects from Tahora back to Mount Humphreys, which he stated was originally called Whakaihuwaka and then back to Mataimoana. Therefore, according to Mr Churton, to say that Ngāti Tama had no connections in that area is incorrect. To what extent and to be able to quantify that today is a difficult task.

[54] Mr Churton submitted that Mr Baker was to have given evidence about the connections that have been formed over time between iwi, hapū and whanau. Ngāti Tama had a very close connection in to the Whanganui area and today that has been something that has been lost.

[55] In addition, Mr Churton submitted that a report by Tony Walzl on Ngāti Tama in Wellington was also relevant, citing page 161 which deals with Te Mamaku, the Ngāti Hawira chief who lived up the Whanganui River and on the Tawhata flats, where he also died, according to Mr Churton. Te Mamaku said that he agreed with his people Ngāti Tama about their claims to Ohura and other blocks there. He has connections to Ngāti Tama and when he is down in Wellington he saw himself as Ngāti Tama. He also took a force of roughly a hundred warriors when Taringakuri was faced with Governor Grey in the Hutt Valley in 1846. It was from that event in the Hutt Valley that Te Mamaku came back to Whanganui here and attached the settlement of Whanganui, according to Mr Churton

[56] Further, Mr Churton submitted that the Tawhata Flats is where the Ohura River meets the Whanganui River and the area around the Ohura River was an occupation of Ngāti Tama and was where Ngāti Tama and the Whanganui people mixed. There is another part in the Walzl report which mentions names of people in Whanganui that are Ngāti Tama. Two of the names that are well-known in this area are the Henare family, from Pipiriki across the river on our side and the Metekingi family, which is prominent over in Pūtiki.

[57] In summary, Mr Churton contended that there was a connection in earlier times with Ngāti Tama that has been clouded over in the more modern history and in the dealings of the Land Court in the last hundred years. So Mataimoana is not exclusively Ngāti Tama but through the big bush area and the walkway the Taranaki people and the Whanganui people jointly used that bush. It was never an exclusive area.

[58] In conclusion, Mr Churton submitted that his rights to ahi kā to Mataimoana are through both his Ngāti Tama and Whanganui connections. While there may be some dispute as to whether his family are descendants from the chief Te Tua, there has been no evidence put before this Court to say that they were not. Finally, Mr Churton submitted that the summit of Mataimoana remain in customary title and that the balance of the Mataimoana block be awarded to his family.

Discussion

What are the applicable legal principles in this case?

[59] Claims to customary land are rare because the great bulk of Māori customary land has already been determined either by Crown purchasing or through the Native Land Court. In any case, the weight to be afforded to the evidence is a matter for the Court to consider in

determining the substantive application. As outlined above, the parties should endeavour to provide credible and reliable evidence to support their claims. To avoid doubt, on the issue of oral evidence and traditions, I also refer the parties to s 69 of the Act.

[60] The following general principles can be discerned from the available authorities:

(a) The extent of customary interests can vary over time and overlap as between hapū and iwi depending on a range of circumstances;

(b) Interests and rights in the context of title determinations to Māori customary land are not necessarily synonymous. A right may have primacy over an interest and interests may be shared more widely;

(c) Even so, a right need not be enforced to the exclusion of interests;

(d) The historic criteria for assessing interests in Māori customary land adopted by the Native Land Court in the nineteenth century are not an exhaustive set of considerations. They provide a useful guide but each of those criteria are not necessarily determinative;

(e) Rights and interests in Māori customary land can wax and wane over time as they continuously evolve over generations connected by whakapapa, individuals and events;

(f) A determination of rights and interests need not result in a conversion of Māori customary land to Māori freehold land.

[61] The short point is that there is no one set of determinative and exhaustive rules for assessing the rights and interests of competing or overlapping claimants in the context of Māori customary land.

Who has customary interests in Mataimoana according to tikanga?

[62] Turning then to the present case, the available evidence supports a conclusion that Ngāti Hau, a hapū of Te Atihaunui-a-Pāpārangi, and Ngā Rauru, through its hapū Ngāti Pourua, are the principal right and interest holders as custodians of Mataimoana according to tikanga Māori. Professor Boast and Mr Hawira are both preeminent in their respective fields of expertise and knowledge. During questioning, their evidence remained internally consistent.

[63] The interests of David Churton and his family, on the other hand, are more akin to use rights. On the available evidence, they do not appear to amount to a right to a legal an enforceable legal interest in the land to the exclusion of the principal claims of Ngāti Hau and Ngāti Pourua.

What is the status of Mr Churton's claims?

[64] Even so, I acknowledge Mr Churton's earlier request, belated as it was, that Neville Baker, a kaumatua of Ngāti Mutunga iwi of Taranaki and a former public senior public servant with considerable experience in Māori claims, be provided with the opportunity to contribute evidence to the proceedings. I give leave for Mr Baker to file a brief and to present this evidence within three months from the date of this interim decision. If Mr Baker requires support for his costs, then an application can be made to the registrar. If he needs additional time, then he can seek leave.

[65] Mr Churton had also requested that Kevin Amohia, a well known elder of Ngāti Haua also be provided with the opportunity to comment on the evidence and to contribute to these proceedings. Despite that request however, I have not seen anything filed for either Mr Baker or Mr Amohia, even though the last hearing was held some time ago.

[66] To avoid doubt, given my preliminary findings, the onus is now on Mr Churton and to some extent Mr Baker to provide compelling evidence of a legitimate Ngāti Tama related interest of sufficient authenticity and credibility to dislodge the primacy of the customary interests of Te Atihaunui-a-Pāpārangi, and Ngā Rauru through Ngāti Pourua.

[67] One final point. I note from the s 45 application Mr Churton has filed, made available to me by the deputy registrar, (out of concern that the present application of Mr Bell and Mr Churton's application will overlap), that he claims the current proceedings are "a sham". In the absence of further elucidation, it is unclear what exactly is meant by that assertion. In any event, that claim is rejected.

[68] Moreover, Mr Churton is an experienced litigant before both this Court and the Waitangi Tribunal. It would not be unreasonable to expect him to make applications for support for witness and legal costs if he considered that necessary. Indeed, in the s45 application I note he requests legal assistance.

What governance arrangements are appropriate?

[69] In context of governance over Mataimoana, it would appear that a whenua tōpu trust with a Māori reservation overlay, in the absence of statutory alternatives, is likely to be the most practical form of management structure for this land. A whenua tōpu trust is intended as a governance entity for hapū and iwi land interests and are provided for under s 216 of the Act:

> **216 Whenua topu trusts**
> (1) The court may, in accordance with this section, constitute a whenua topu trust in respect of any Maori land or General land owned by Maori.
> (2)A whenua topu trust may be constituted where the court is satisfied that the constitution of the trust would promote and facilitate the use and administration of the land in the interests of the iwi or hapu.
> (3) An application for the constitution of a whenua topu trust under this section—
> (a)shall be made in respect of all the beneficial interests in 1 block or in 2 or more blocks of land; and
> (b)may be made by or on behalf of any of the owners or the Registrar of the court.
> (4) The court shall not grant an application made under this section unless it is satisfied—
> (a)that the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and
> (b)that there is no meritorious objection to the application among the owners, having regard to the nature and importance of the matter.
> (5)The land, money, and other assets of a whenua topu trust shall be held for Maori community purposes, or for such Maori community purposes as the court may specify either on the constitution of the trust or on application at any time thereafter, and shall be applied by the trustees in accordance with section 218 or as otherwise ordered by the court for the general benefit of the members of the iwi or hapu named in the order.
> (6) Except as provided in subsection (7), while a whenua topu trust constituted under this section remains in existence, no person shall be entitled to succeed to any interests vested in the trustees for the purposes of the trust.
> (7)Notwithstanding anything in subsection (5), but subject to subsection (8), the court may, either on the constitution of a whenua topu trust or on application at any time thereafter, order in respect of any specified interests vested in the trustees for the purposes of the trust that the interests shall be deemed to be held for the persons named or described in the order, and the income arising from those interests shall thereafter be paid to those persons and their successors accordingly.
> (8) The court shall not make an order under subsection (7) unless it is satisfied that the order is necessary to protect the interests of any owner of a large interest in the land vested or to be vested in the trustees for the purposes of the trust.

Next steps

[70] Leave is reserved for the parties to file further submissions within three months from the date of this decision as to:

(a) Whether they agree the concept of a whenua tōpu trust with a Māori reservation overlay with the beneficiaries of that reservation to be determined by agreement and failing that by further determination of the Court;

(b) Whether a practical alternative to a whenua tōpu trust with a Māori reservation overlay is available;

(c) The process for the convening of meetings of beneficiaries if and when the recommendation for a Māori reservation is supported by the beneficiaries, as to how a whenua tōpu trust and an election of trustees might be arranged;

(d) What further orders if any are required to implement the Court's decision.

Decision

[71] The Court determines, on a preliminary basis, that the primary customary interests over Mataimoana in accordance with tikanga Māori are Ngāti Hau, a hapū of Te Atihaunui-a-Pāpārangi, and Ngā Rauru, through its hapū Ngāti Pourua.

[72] The parties are invited to file submissions, within three months, on whether a whenua tōpu trust with a Māori reservation overlay is the most appropriate governance structure for Mataimoana with equal representation from Ngāti Hau and Ngāti Pourua. The parties are also invited to provide submissions on an alternative governance model.

[73] David Churton is invited to file evidence from Neville Baker and Kevin Amohia in support of his claims within three months from the date of this decision. If that occurs, then Ngāti Hau and Ngāti Pourua are entitled to file evidence in rebuttal within a further month or to request Messrs Baker and Amohia attend a hearing for cross examination purposes.

[74] Leave is reserved for any party to apply for further directions at any time.

Pronounced at 3.15pm in Rotorua on Tuesday this 24th day of December 2019

L R Harvey
JUDGE