IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CIV-2022-470-44
[2023] NZHC 363

I WAENGA IA -BETWEEN	WILLIAM HENRY DONEY, ALLAN RICHARD NIAO, MARTIN LESILY NIAO, CARRIAGE SAVAGE, KERERUA RAY SAVAGE, ANTHONY TANGIHIA SAVAGE and PHYLLIS MONIQUE SAVAGE being the Trustees of Lot 39A Section 2A Parish of Matata Block Ahu Whenua Trust (known as the Savage Papakāinga Land Trust) Te Kaitono -Plaintiff/Judgment Creditor
ME -AND	RAE BEVERLEY ADLAM Te Kaiurupare -Defendant/Judgment Debtor

Nohoanga -Hearing:	14, 25 November 2022
Kanohi kitea -Appearances:	J W McDougall and M Hunia for Plaintiff/Judgment Creditor L M Van and N J Jirkowsky for Defendant/Judgment Debtor
Whakataunga -Judgment:	1 March 2023

TE WHAKATAUNGA Ā KAIWHAKAWĀ MĀTĀMUA HARVEY
Judgment (No. 2) of Harvey J

This judgment was delivered by me on 1 March 2023 at 2.30 pm pursuant to r 11.5 of the High Court Rules.

Date: ……..
(Deputy) Registrar

Solicitors:
Holland Beckett, Tauranga
Anthony Harper, Auckland

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Hei tīmatanga kōrero

Introduction

[1] The trustees of the Savage Papakāinga Land Trust apply for substitution of judgment creditor and leave to issue enforcement proceedings against Rae Beverley Adlam. The application concerns the enforcement of a judgment issued by the Māori Land Court in 2014 where Mrs Adlam was ordered to repay various amounts totalling approximately $15 million.[1] To date, the trust has received $4.7 million, although Mrs Adlam asserts that they have in fact received more. The trustees now seek to enforce the outstanding judgment debt including by way of sale of two properties owned by Mrs Adlam in Tauranga and at Pukehina in the Bay of Plenty.

[2] Mrs Adlam opposes the orders sought by the trustees. While she does not oppose the substitution of trustees, she does oppose the ongoing enforcement of the judgment against her on two principal grounds. First, that the trustees are estopped from enforcing the judgment based on representations made to her by former and current trustees during the course of the proceedings. In good faith, Mrs Adlam claims, she relied on those representations to her detriment.

[3] Secondly, Mrs Adlam argues it would not be in the interests of justice for the judgment to be enforced against her on the basis of delay. She claims that the trustees have refused to meaningfully engage in settlement negotiations or alternative dispute resolution processes. Mrs Adlam also submits that the trustees have delayed taking steps to such a degree that it would be now unjust to have her effectively rendered homeless as a seventy-six-year-old superannuant with limited assets and income. She asks that the application for enforcement be refused or alternatively be stayed or set aside. Counsel also raised the issue of tikanga.

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1 *Savage v Adlam* (2014) 95 Waiariki MB 176. The Māori Appellate Court remitted quantum back to the Māori Land Court: *Adlam v Savage* (2015) Māori Appellate Court MB 29 (2015 APPEAL 59), [2015] NZAR 746. However, the orders were reinstated by the Court of Appeal in 2016: *Adlam v Savage* [2016] NZCA 454.

[4] The issues for determination are, first, should the application to substitute trustees be granted? Secondly, should the trustee's application for leave to enforce the judgment be granted? Tikanga Māori is also considered in this judgment.

Kōrero whānui

Background

[5] Mr McDougall set out the background to the proceedings in the trust's chronology attached to his submissions, none of which was contested by Mrs Adlam's counsel, apart from the issues of whether the parties had engaged in out of Court settlement discussions, alternative dispute resolution and whether representations were made in the context of estoppel.

[6] In summary, the litigation began in December 2008 when by consent Mrs Adlam was suspended as a trustee. The formal hearings before the Māori Land Court commenced in October 2012 and a judgment was issued in April 2014 ordering Mrs Adlam's removal as a trustee and that she repays $2.4 million plus interest of $823,550.29 along with another $11.2 million to the trust.[2] That was followed by proceedings before the Māori Appellate Court in August 2014. That Court issued a decision on 26 March 2015 ordering that the case be remitted back to the Māori Land Court over quantum issues.[3] On 22 September 2016, the Court of Appeal issued its decision on a further appeal, setting aside the orders of the Māori Appellate Court and reinstating, effectively, the judgment of the Māori Land Court.[4] The Supreme Court dismissed Mrs Adlam's leave to appeal application on 17 April 2017.[5]

[7] Before then, on 10 March 2017, the trustees made demand for payment and proposed the sale of Mrs Adlam's properties to meet part of the repayment due to the trust. New trustees were then appointed by the Māori Land Court on 21 December 2017: Graeme Niao, Kererua Savage, Carrie Savage, William Doney, Alan Niao, Martin Niao and Jason Dowie.[6] Meetings were held with Mrs Adlam on 27 April and 13 June 2018. Following that, the trustees wrote to Mrs Adlam on

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2 *Savage v Adlam*, above n 1.
3 *Adlam v Savage* (MAC), above n 1.
4 *Adlam v Savage* (CA), above n 1.
5 *Adlam v Savage* [2017] NZSC 11.
6 *Pacey v Adlam - Matata Parish 39A 2B 2B 2A* (2017) 178 Waiariki MB 32 (178 WAR 32).

16 July 2018 to propose how to proceed with settlement discussions regarding the debt due.

[8] On 30 August 2018, the District Court issued a final charging order over Mrs Adlam's properties. Correspondence was sent to Mrs Adlam by the trustees on 9 November 2018 asking for release of escrow funds being held by solicitors and a statement of means. The trustees confirmed enforcement would proceed in the absence of repayment. Mrs Adlam then swore an affidavit as to her means on 28 June 2019. On 27 August, Judge Mabey ordered a variation to the charging order over Mrs Adlam's properties and for the escrow funds to be paid into court. By 2 October 2019, the trustees agreed that Mr Niao was to become to sole point of contact with Mrs Adlam. A further affidavit of means was provided by Mrs Adlam on 8 October 2019. On 22 October, Mrs Adlam made a final settlement proposal. The next day the District Court released the escrow funds to the trustees.

[9] Between 6 November 2019 and 15 March 2020, the trustees say they considered new counsel and further enforcement proceedings against Mrs Adlam. On 2 June 2020, the trustees' solicitors wrote to Mrs Adlam's solicitors advising that unless a repayment proposal was made then enforcement proceedings would commence. On 14 November 2020, a meeting of trust beneficiaries was held where a presentation on trust business including enforcement against Mrs Adlam was made by Mr Niao. Mrs Adlam was also given the opportunity to address the meeting, referring in her view to the findings of the courts below on "technical" breaches of trust, as the draft minutes record.[7]

Ko te hātepe e pā ana ki te tono nei

Procedural history

[10] The present application was filed on 22 July 2022. Mrs Adlam's notice of opposition was filed on 26 August 2022. The final judgment for $10,453,491 was sealed by the High Court on 30 May 2022. On 23 June 2022, Moore J issued a minute setting the application down for a half day fixture at the earliest available date after

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7 Affidavit of Martin Niao, dated 15 July 2022.

23 September 2022.[8] He also issued timetabling directions.[9] Then on 26 July 2022, Associate Judge Sussock issued a minute setting out timetabling directions and scheduling a hearing for 5 October 2022.[10]

[11] The 5 October 2022 fixture could not proceed and so a new date was allocated being 14 November 2022. On 7 November 2022 Mrs Adlam's counsel sought an adjournment on two grounds. First, that in light of the Supreme Court decision *Ellis v R*, counsel needed time to secure the expertise of a tikanga Māori expert to determine how that decision in tikanga might influence the submissions of Mrs Adlam.[11] Secondly, counsel confirmed that Mrs Adlam was scheduled for surgery on 11 November 2022 and may not be sufficiently recovered to attend the hearing on 14 November 2022.

[12] A telephone conference was arranged on 10 November 2022 where submissions were made by counsel. On 11 November 2022, I issued the decision confirming my earlier intimation that the hearing on 14 November 2022 would proceed as scheduled and that it would then be adjourned to 25 November 2022 to enable Mrs Adlam to recover sufficiently and to also to give opportunity for Ms Van, Mrs Adlam's counsel, to secure the input of a tikanga Māori expert as foreshadowed.[12]

[13] The hearings took place on 14 and 25 November 2022. I confirmed that a written judgment would issue in due course. I also raised with counsel the fact that, in my previous role as a Judge of the Māori Land Court, in the absence of Judge Coxhead who issued the principal judgment against Mrs Adlam in 2014 that the trustees are now seeking to enforce, the Registry asked me to sign the order transferring enforcement from that Court to the High Court at Rotorua. Ms Van confirmed that she had discussed the matter with Mrs Adlam who had taken advice and agreed that no issue arose and that I could continue to hear the case.

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8 *Savage v Adlam* HC Auckland CIV-2022-470-44, 23 June 2022.
9 At [8].
10 *Savage v Adlam* HC Auckland CIV-2022-470-44, 26 July 2022.
11 *Ellis v R* [2022] NZSC 114.
12 *Doney v Adlam* [2022] NZHC 2963.

Me whakaae ki te tono kia tīni ngā taratī - Should the application to substitute trustees be granted?

Ngā kōrero a te Kaitono – Applicants' submissions

[14] Mr McDougall submitted that, due to a change of trustees as a result of retirements, resignations and the like, Judge Wainwright in the Māori Land Court on 29 March 2022 issued orders vesting the land of the trust in replacement trustees.[13] As a result, it was appropriate that those persons now be recorded by way of substitution as the trustees for the purposes of the application to enforce the outstanding judgment of the Māori Land Court.

Ngā kōrero a te Kaiurupare – Respondent's submissions

[15] Ms Van submitted that Mrs Adlam abides the decision of the Court.

Kōrerorero

Discussion

[16] This aspect of the application is purely administrative. As set out above, the replacement trustees were appointed by the Māori Land Court earlier this year. That Court was satisfied of the reasons for doing so and I understand there has been no appeal filed against that decision within the relevant statutory timeframe.[14] It follows that where necessary the individual trustees must now take the place and stand in the shoes of their predecessors in all aspects of the trust's obligations and responsibilities. I see nothing controversial in this aspect of the application, which is granted.

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13 *Savage – Lot 39A Sec 2A Parish of Matata* (2022) 272 Waiariki MB 298 (272 WAR 298).

14 Section 58(3) of Te Ture Whenua Māori Act 1993: an appeal against any decision of the Māori Land Court to be filed within two months from the date of the minute or order appealed from, absent the leave of the Māori Appellate Court outside of that timeframe.

Me whakaae ki te tono kia whai hua ai te whakataunga - Should the application for leave to enforce the judgment be granted?

Ngā kōrero a te Kaitono – Applicants' submissions

[17] Mr McDougall contended that the trustees have a judgment debt of $10,453,491 in their favour and charging orders over properties owned by Mrs Adlam which they seek to sell in partial repayment of that debt. Counsel argued that, but for the change in trustees, this application for leave under r 17.9(2)(c) would be unnecessary. While Mrs Adlam agrees to the substitution of trustees, Mr McDougall submitted that she opposed the trustees' proposal to issue a sale order and instead, effectively, sought a stay, based on a range of arguments including estoppel. On that issue counsel contended that, having accepted the substitution of trustees, leave is now not required for the sale orders and in any event, a request for what is effectively a stay is not made out. Mr McDougall argued that the trustees, having secured a sealed judgment, after years of contested litigation, are now entitled to pursue settlement by way of enforcing the sale of Mrs Adlam's properties.

[18] Counsel submitted that there were no representations which would estop the trustees from enforcing the sale. The trustees had a clear position throughout their communications with Mrs Adlam that sale of the properties was their intent. Mr McDougall referred to the charging orders over the properties which have been in place since the Māori Land Court judgment in 2014. Additionally, a letter was sent to Mrs Adlam's lawyer by Dowthwaite Law as early as March 2017 signalling intent to have the properties sold.

[19] Mr McDougall contended that Mrs Adlam has provided no detail regarding the alleged representations not to sell the properties or bankrupt Ms Adlam, apart from the text from Anthony Savage to Mrs Adlam's daughter. According to counsel, at some point Mrs Adlam proposed what amounted to, in effect, a 33c to the dollar settlement in that what had been paid to date was largely sufficient. Mr McDougall argued that because Mrs Adlam was seeking confirmation of this proposal, which the trust did not give, she cannot rely on this as a representation of the trust.

[20] In addition, counsel submitted that although there was some delay in progressing the sale, this is because the trustees were taking a staged approach to recovery by first focussing on escrow funds. Once those were received, focus turned to sale of the properties. However, throughout that period, counsel argued, enforcement of the judgment debt has been a priority, reflected as a standing agenda item at trustee meetings and regular updates being given to owners.

[21] Mr McDougall submitted it is relevant context that the trustees had sought to try and resolve matters with Mrs Adlam without recourse to enforcement proceedings. That included a proposed settlement engagement process. During this period Mr McDougall contended, pressure was brought to bear on the trustees by Mrs Adlam's whānau and her supporters which resulted in Mr Niao being confirmed as the sole point of contact with Mrs Adlam.

[22] On the issue of out of court discussions, counsel submitted that the trustees had proposed a resolution process by letter to Mrs Adlam in 2018 which referred to the two meetings that had already taken place by then. The letter also set out the proposed resolution process. Mr McDougall underscored therefore that the opportunities have been given to Mrs Adlam to engage with the trustees but she has not done so. Her claims to the contrary and allegations of delay by the trustees should therefore be considered in light of these facts.

[23] Counsel also referred to a letter from the trustees sent in November 2018 which outlined their view on Mrs Adlam's failure to engage in that resolution process, to provide the financial information and to hold hui. Accordingly, Mr McDougall contended that the trustees' final request for relevant accounting and related information from Mrs Adlam that was required to properly inform any settlement discussions was never provided. The result was that the trustees' offers to engage with Mrs Adlam to try and reach an out of court resolution were never taken up.

[24] Overall Mr McDougall submitted no substantial miscarriage of justice will arise from enforcing the judgment debt and selling the properties; they are the ordinary consequences of enforcement of a judgment.

Ngā kōrero a te Kaiurupare – Respondent's submissions

[25] Regarding estoppel, Ms Van submitted that representations were made to Mrs Adlam by trustees that she was not going to be left homeless. As a result, Mrs Adlam then arranged her personal affairs and maintained the properties to the best of her abilities on the basis that the trust beneficiaries were willing to allow her to continue to reside there. Given the familial connections, counsel contended that Mrs Adlam believed that she could rely on those representations and that settlement could eventually be achieved. To corroborate this narrative, Ms Van pointed to the fact that while the trust did lodge charging orders over the two properties, it has not acted on those until recently. This supports, counsel argued, the proposition that the trust never intended to sell the properties as a means of enforcing the judgment.

[26] Counsel confirmed that Mrs Adlam currently resides at 82 Westridge Drive, Tauranga. Her son and his family live at 2425F State Highway, Pukehina. Ms Van submitted that if the trustees are able to sell these properties, contrary to their previous representations, Mrs Adlam and her family will be left homeless. Counsel also repeated her earlier submission that Mrs Adlam simply does not have the money to meet the outstanding judgment. Added to that, Ms Van argued that Mrs Adlam would not be able to afford to rent a home and so it would be unconscionable for the trustees to resile from its representation not to enforce the judgment.

[27] Alternatively, counsel submitted that the enforcement proceeding should be either set aside or subject to a stay. Ms Van contended that the granting of a sale order against the two properties, being contrary to the agreement reached between the parties, would be accordingly contrary to good faith. Consequently, she argued that the enforcement process should be set aside in accordance with r 17.30 of the High Court Rules. Where the Court considers that the threshold to set aside is not made out, the Court should stay the enforcement process and give relief on more suitable terms.

[28] In this context, Ms Van argued that a substantial miscarriage of justice would result in the granting of the sale orders because of the representations and conduct relied on by Mrs Adlam and due to the failure of the trustees to act on the judgment promptly. Ms Van submitted that the trustees' failure to enforce the judgment within

a reasonable timeframe without any legitimate explanation is contrary to the objectives of r 1.2 of the High Court Rules.

[29] Ms Van also made a number of submissions relating to the judgment sum. She noted that Mrs Adlam did not dispute that there were findings against her of breach of trust. Even so, while Mrs Adlam accepted that the Māori Land Court found she profited from her role as a trustee, she pointed out that the trust continues to derive significant revenue from the development of the land which lay at the heart of the breach of trust proceedings. Mrs Adlam contended that due to her efforts, the trust now receives considerable annual income and made a significant profit of approximately $885,000 for the five-year period to March 2018. But for Mrs Adlam's deployment of her skill and expertise, that development would not have occurred, according to counsel.

[30] Regarding the $11.2 million profit, Mrs Adlam asserted that she did not receive all of that money personally. Moreover, counsel submitted that the trust has received $4.7 million which was part of the $11.2 million award against her.

[31] In any event, due to the passage of time, Mrs Adlam has not been able to provide documentary confirmation as to the disbursement of the balance of those funds. Counsel contended that, at best, Mrs Adlam asserted that she may have received personally approximately $5 million of which some $2 million was spent on legal costs. In the context of these proceedings, Mrs Adlam filed a statement of financial position which confirmed that she does not have significant cash assets. Consequently, she is unable to meet the balance of the judgment that is outstanding.

[32] In terms of settling the claim against her, Ms Van submitted that Mrs Adlam has attempted to resolve matters but due to the lack of meaningful engagement by the trustees past and present, no settlement has been possible to date. Counsel pointed out that the Court should also be cognisant of the fact the parties are all closely related whānau. This reality must inevitably impact on the dynamics surrounding this dispute.

[33] As part of its enforcement against her, the trust has charges against Mrs Adlam's Māori freehold land interests that includes her shares in a number of

trusts. As a beneficiary of several trusts, including this one, counsel argued that Mrs Adlam was entitled to receive a distribution from those trusts which could then be applied toward reducing the judgment debt.

[34] In terms of securing the judgment, counsel highlighted that on 15 August 2015, the trustees obtained charging orders in the District Court at Rotorua.[15] That charging order applied to the Tauranga and Pukehina properties as well as interim charging orders over Mrs Adlam's interests regarding $4 million held by Chapman Tripp and $1 million held by Simpson Grierson. Following that, on 28 July 2017 charging orders over all funds derived from revenue payable to Mrs Adlam, in total $12,780,111.75, were granted by Judge Coxhead on 30 November 2017.[16]

[35] Ms Van claimed that since these decisions the trust should have received:

(a) $4.7 million being Mrs Adlam's "interest" in the funds held in various solicitors' trust accounts on escrow representing a portion of the $11.2 million profit;

(b) Royalties previously held by David Dowthwaite, solicitor. As of 20 October 2014, $658,335.47 was held. Counsel suggested as the injunction was initially ordered on 20 October 2008, the Savage Papakāinga Land Trust has received approximately $276,000 in royalties on an annual basis;

(c) Annual revenue pursuant to leases and royalty payments for the power stations that were the subject of the substantive litigation.

[36] Ms Van pointed out that no financial information as to receipt of these monies by the trust had been forthcoming and this was hampering meaningful attempts to engage constructively in resolving the impasse between Mrs Adlam and the trustees.

[37] Further, counsel reiterated that Mrs Adlam's assets that are subject to charging orders by the Māori Land Court also have a value that should be included and any proper calculation of what is due and owing to a trust. Ms Van underscored her earlier

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15 *Barnes v Adlam* DC Rotorua CIV-2015-063-257, 10 August 2015.

16 *Barnes v Savage* (2017) 176 Waiariki MB 226. Those orders were affirmed by the Māori Appellate Court on 22 August 2018: *Adlam v Niao* (2018) Māori Appellate Court MB 478.

submission that the lack of information and transparency by the trust continues to hamper sensible attempts at dialogue between Mrs Adlam and the trustees as to solutions regarding the outstanding judgment.

Te Ture

The Law

[38] As indicated above, due to the change in trustees leave to issue an enforcement process is required under r 17.9(2) of the High Court Rules:

> (2) The court's leave is required to issue an enforcement process—
>
> > (a) if judgment has not been sealed; or
> >
> > (b) if 6 years have elapsed since the date of the judgment (which for a judgment that is an arbitral award entered as a judgment has the meaning given to it by subclause (2A)); or
> >
> > (c) if any change has taken place (whether by death or otherwise) in the parties entitled or liable to enforcement under the judgment; or
> >
> > (d) if the judgment is against the assets of a deceased person, enforcement is sought against those assets, and that person's executor or administrator has taken possession of those assets after the date of the judgment; or
> >
> > (e) if a person is entitled to relief under the judgment only if that person has fulfilled a condition, and that person alleges that condition has been fulfilled; or
> >
> > (f) if goods sought to be seized under an enforcement process are in the possession of—
> >
> > > (i) a receiver appointed by the court; or
> > >
> > > (ii) a sequestrator.

[39] The granting of leave to issue an enforcement process is a matter of discretion.[17] When exercising the discretion, focus should be on the merits.[18] In *Re Giddings, ex parte Simpson* the Court stated that "unusual circumstances" would be required for it to decline leave in the circumstances of a devolution of interest.[19]

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17 *R Chesney v New Zealand Drycleaners and Dyers Ltd* [1958] NZLR 599 (HC) at 601.
18 *Wati v Sharma* [2020] NZHC 2010 at [11].
19 *Re Giddings, ex parte Simpson* [2017] NZHC 2560 at [11].

[40] In relation to stay of an enforcement order, r 17.29 provides:

> **17.29 Stay of enforcement**
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> A liable party may apply to the court for a stay of enforcement or other relief against judgment upon the ground that a substantial miscarriage of justice would be likely to result if the judgment were enforced, and the court may give relief on just terms.

[41] Rule 17.30 provides:

> **17.30 Enforcement process may be set aside**
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> The court may set aside an enforcement process if it is issued contrary to—
>
> (a) any order of the court; or
>
> (b) the agreement of the entitled party; or
>
> (c) good faith.

[42] The relevant principles are set out in *Bay Citys Real Estate Ltd v Re/Max New Zealand Ltd*:[20]

(a) The applicant has the onus in persuading the exercise of the Court's jurisdiction.

(b) Any miscarriage of justice likely must be more than minor or insubstantial.

(c) The Court must reconcile the parties' respective positions to secure the overall interests of justice.

(d) A miscarriage of justice is unlikely to result where one is required to pay another an amount owing and the debtor is free to pursue its claim against the creditor in the normal way.

[43] Potentially relevant factors might include the strength or weakness of the claim, explanation as to why any counterclaim was not raised, the ability of the applicant for stay to meet the judgment and the potential bankruptcy of a party seeking to pursue a strong claim.[21]

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[20] *Bay Citys Real Estate Ltd v Re/Max New Zealand Ltd* HC Napier CIV-2010-441-134, 8 June 2011 at [19].

[21] At [19(f)].

[44] In *Lawton v Redemptech Holdings Pty Ltd* the meaning of good faith under r 17.30 was defined as "acting honestly, without impropriety and attempting to misuse the powers conferred by the rules". [22]

[45] In order to establish an estoppel, there must be a clear and unambiguous representation or promise creating a belief or expectation.[23] The representee must have reasonably relied on this expectation to their detriment.[24] The Court must then question whether it is conscionable in all the circumstances that the representor is permitted to resile from that representation.[25]

Kōrerorero

Discussion

[46] I do not accept that the delay in enforcing the judgment debt has been unreasonable, nor the fault entirely of one or other party, such that a stay would be justified. The parties have, directly and indirectly, contributed to the delays that have been experienced. The court processes have inevitably contributed to the passage of time and its effect on the proceedings. Covid-19 in recent years has also had an impact. Yet as Mr Niao pointed out in his 16 September 2022 affidavit, much of the delay had been as a result of Mrs Adlam's own actions, in either pursuing appeals or by simply not engaging with the trust. Often, Mr Niao claimed, her engagement would be precipitated by an impending court hearing date. He highlighted that for a seven month period the trust sought to engage and that it was not until 8 October 2019 that Mrs Adlam provided an updated affidavit of her financial position. Her subsequent email proposal of 22 October 2019 was to the effect that the $4.7 million received by the trust would amount to a full and final settlement.

[47] In addition, while there have been changes to the trust personnel from time to time, that has not been of such significance to justify a finding of a lack of promptness or efficiency by the trust in pursuing its rights. Moreover, part of the reason for that change in membership has been due to, it was claimed, the ability of the trustees to act

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22 *Lawton v Redemptech Holdings Pty Ltd* [2017] NZHC 3104 at [39].
23 *Wilson Parking New Zealand v Fanshawe 136 Ltd* [2014] 3 NZLR 657 at [44].
24 At [44].
25 At [44].

impartiality and not be subjected to improper influence in the discharge of their duties. Those obligations include the enforcement of the judgment against Mrs Adlam, which has been highlighted to the trustees by the Māori Land Court and in one example at least, by the Court of Appeal.[26]

[48] Equally importantly, the trust position for recovery has been consistently expressed in its solicitors' correspondence with Mrs Adlam's representatives throughout the life of the litigation. This of course was contrary to Mrs Adlam's assertions that representations had been made to her by individual trustees as well as their counsel that the sale of the properties would not be pursued, as set out in counsel's memorandum of 22 June 2022 and Mrs Adlam's affidavit of 10 September 2022. Ms Van argued that according to Mrs Adlam's information, the trustees were themselves divided on pursuit of the debt and the sale.

[49] In contrast there is the direction from Judge Wainwright in March 2022 that the trustees needed to pursue the debt. All trustees who were present at that hearing confirmed that the decision had been taken and that the trustees did not oppose that course. Even Anthony Savage and Phyllis Savage, trustees who it was said were not unsympathetic to Mrs Adlam's position, both agreed that recovering the debt due remained critical for the trust and that like their fellow trustees, they supported that decision to do so:[27]

> **The Court**: Ms Phyllis Savage, have you thought about how you would deal with that conflict of interest?
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> **P Savage**: I have had lots of thoughts about it your Honour. But at this point in time, I am not clear on what position the trust has taken. *I do understand that the trust is continuing to carry out that debt and to recover that debt and I am supportive of them doing that.* Like Kererua indicated, there are lots of other streams.
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> …
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> **The Court:** Well, there is no doubt that recovering in excess of $12 million for the beneficiaries is a key focus for these trustees and recovering the money for the beneficiaries is not something that they can walk away from. They have a Court decision, and the money is owed –
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> **A Savage**: Yes

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26 See *Savage v Adlam*, above n 1, at [59]–[61], set out herein at [93]..

27 *Savage – Lot 39A Sec 2A Parish of Matata*, above n 13, at 308–310 (emphasis added).

> **The Court**: - and the trustees in order to fulfil their role of trustees must pursue that money.
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> **A Savage**: Yes, I understand that your Honour. I am just saying that maybe we could look to recover from Bev in a different way as well. *We are still going to go after that the legal recovery. Everyone expects that it has got to go through Court it has got to do this, it has got to do that to recover all the money and I agree with that*.

[50] The Judge made it perfectly plain to the trustees, as well as the new trustees as she was appointing them, that the decision to pursue recovery of the debt had already been made and so it was now for all the trustees to work toward that goal. Moreover, the short point is that the trustees in any case have a legal obligation to pursue the debt. Any failure on their part to do so may even result in their exposure to personal liability, both jointly and severally.[28]

[51] I also do not accept that estoppel arises in this case. There was no formal authorisation by a majority of trustees, let alone by unanimity, to make any alleged promise not to enforce the judgments. Moreover, that would have been contrary to the trustees' duties to protect the assets of the trust. It was also contrary to their correspondence sent to Mrs Adlam's solicitors on a number of occasions. At best, Mr Savage sent text messages to Mrs Adlam's daughter, Loren Riddall, expressing his personal opinion that he did not wish to see Mrs Adlam homeless. According to Mrs Adlam's evidence, he also appears to have expressed that same sentiment in person on possibly more than one occasion.

[52] That is quite different, however, from dissenting formally with the trust's decision and actively opposing enforcement of the judgment and the sale of both properties. In any case, none of those brief and limited communications can amount to the trust's representation not to pursue the debt. There is no evidence for example that Mr Savage even discussed the idea with the other trustees.

[53] Indeed, Mr Niao understandably denied that the trust ever made such a statement or authorised anyone to do so. As mentioned above, that would be contrary to the trust's own position as set out in its correspondence. As Mr Niao pointed out, the "promise" not to enforce appears to have only arisen when the formal steps to

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[28] See Trusts Act 2019, s 26; *Bahin v Hughes* (1886) 31 Ch D 390, 54 LT 188; and *Foley v Burnell* (1783) 1 Bro CC 274.

enforce the judgment, secure charging orders and to then proceed with the sale of the properties started to progress. Nor did he accept Mrs Adlam's assertion that the discussions with her focussed on what she could offer, other than the properties. He correctly pointed out how, again, this was contrary to the trust's correspondence with her solicitors since 2017, when the Supreme Court declined her application for leave to appeal. Mr Niao highlighted that even the suggestion from the trust's then solicitor that Mrs Adlam voluntarily market her properties was made on a without prejudice basis to the trust's rights to continue to enforce the balance of the judgment.

[54] Having found that a stay of enforcement is not appropriate and that estoppel does not apply, I accept the trustees' submissions that they are entitled to enforce the judgment they secured against Mrs Adlam. As mentioned, she does not oppose substitution of the trustees which is the main reason leave is required. It is arguable that 17.9(2)(b) applies but taking into account the judgment sum was only enforceable following the Court of Appeal's decision reinstating the orders, I accept that leave should be granted.

[55] The issue of quantum as raised by Ms Van is discussed below.

[56] In any case, having arrived at the conclusion leave should be granted, I now consider the applicability of tikanga, as this was raised by counsel for Mrs Adlam.

He tikanga Māori e pā ana ki tēnei tono - Is tikanga Māori relevant to this application?

Ngā kōrero a te Kaiurupare – Respondent's submissions

[57] Ms Van submitted that the principles of tikanga are relevant to the exercise of the Court's powers under rr 17.29 and 17.30 of the High Court Rules. Before any further consideration of the claims, counsel contended the appropriate next step would be for the Court to direct mediation under r 7.79. This would provide an opportunity by the parties to resolve the claim kanohi ki te kanohi, consistent with tikanga.

[58] In addition, Ms Van argued that the ability of tikanga to adapt confirms its flexibility to suit new situations in changing community needs. Citing the Law

Commission's paper *Māori Custom and Values in New Zealand* counsel contended that tikanga can change provided it remains faithful to fundamental core principles.[29]

[59] Further, Ms Van argued that the courts are not the correct forum to determine tikanga since it is inherently open ended and pragmatic. Citing the Supreme Court's decision in *Ellis v R*, Ms Van argued that the Court needs to consider whether tikanga might be relevant, what aspects of tikanga are relevant and how it should be taken into account.[30] Counsel underscored that a fundamental element of tikanga is ensuring balance and "making things correct". She submitted that key principles of tikanga included whakapapa, turangawaewae, whanaungatanga and tino rangatiratanga.

[60] In any case, Ms Van contended that the key question is how Mrs Adlam's acknowledged wrongdoing can now be made right. Added to that, counsel argued that the trustees' failure to take account of tikanga in pursuing the sale order would result in a substantial miscarriage of justice. In support of this argument, Ms Van submitted that the trust has charging orders over Mrs Adlam's Māori land interests yet there is a lack of evidence as to the value of those interests and their income as means of setoff against her judgment liability.

[61] Regarding the proposed sale orders over the properties the subject of these proceedings, counsel contended that whakapapa is a relevant and material consideration. This is because it provides the context against which the representations were made by the previous trustees that they would not leave Mrs Adlam homeless. Ms Van argued that this "promise" likely arose from the parties considering whakapapa and whanaungatanga. Mrs Adlam is also a person of mana. The Court should therefore consider this context against the promise to Mrs Adlam "by the previous trustees". Counsel also cited evidence from Mrs Adlam's daughter that some of the current trustees do not wish to leave Mrs Adlam homeless. Moreover, counsel argued that Mrs Adlam's position was that there was an agreement that the trustees would not force the selling of family homes.

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29 Law Commission *Māori Custom and Values in New Zealand* (NZLC SP9, 2001) at 3–4.
30 *Ellis v R*, above n 11.

[62] Further, Ms Van submitted that whether the trustees' actions were consistent with their duties under "western law", such a promise is consistent with whakapapa and whanaungatanga which recognises the connection of the parties and their mutual responsibilities, notwithstanding any wrongdoing. Counsel also contended that as a counterpoint the Court needed to take into account the fact that, despite the transgressions, Mrs Adlam had worked to provide the trust with a valuable asset and revenue stream as a result of her skills, expertise and effort which should also be taken into account.

[63] Mrs Adlam's evidence is that she resides at one property with an adult grandson and that the second property is significant to her because of memories of where her grandchildren were raised. A sale order of the properties notwithstanding its General land status, according to counsel, would deprive Mrs Adlam and her descendants of their connection "to their mana whenua". It would also "interfere" with her turangawaewae.

[64] Then in the context of good faith, whakapapa and whanaungatanga, Ms Van argued that any sale would not be done in good faith where there are other available assets which the trust could enforce. That included the income from the trust and the Farm Trust.

[65] In terms of tikanga based resolution, Ms Van submitted that her client maintained her desire to meet with the trustees and the trust beneficiaries to attempt a resolution in circumstances where she has made prior attempts to do so but those efforts have not advanced, partly due to trust dysfunction. It was also important, counsel contended, that in accordance with tikanga the parties attempt to resolve the dispute themselves in an effort to mitigate future harm and for the overall wellbeing of the whānau. Of particular relevance in this context is the fact that, according to Mrs Adlam's evidence, the whānau are divided as to how they wished to have the matter resolved, given that there are trustees and beneficiaries who do not wish for enforcement action.

[66] In any case, Ms Van argued that the trustees have had the ability to enforce the sale order since 2017. With the passage of time there would be no prejudice to them

attending mediation. Counsel contended that there is no evidence to explain the urgency. Added to that, the property market is in decline and so it is not, by implication, a sensible time to seek sales. Finally, counsel submitted that the principles of tikanga are relevant to the granting of a stay or a direction that the parties attend mediation.

Ngā kōrero a te Kaitono – Applicant's submissions

[67] Regarding mediation Mr McDougall reiterated that the request for mediation relied on the same arguments made for estoppel and stay of enforcement. He referred to *Wright v Pitfield* which confirmed that the jurisdiction to direct mediation is wide.[31] According to Mr McDougall, the factors that are outlined in that decision all favour the trustees being allowed to proceed ultimately with a sale order and not delaying this matter any further. In this case confidentiality in terms of mediation is not relevant, as the history is already well known in public, compared with say an internal family trust dispute. The Court is also entitled to take into account the wishes of the parties. Mr McDougall submitted that this latest suggestion of mediation has only been proposed at the last minute. The trustees' view is that it has been offered previously in one form or another and so they do not wish to engage in mediation now.

[68] Mr McDougall also highlighted the decision *S v N* against considering s 145 of the Trusts Act 2019.[32] In summary, counsel contended that where a party has acted improperly in the proceedings then that weighs against mediation being ordered. In *S v N* the party seeking mediation had breached previous timetabling orders and had a protection order against the other spouse. That is similar to the present case where there were strong factors weighing against mediation.

[69] Mr McDougall argued that Mrs Adlam has failed to comply with timetable orders, has regularly delayed and opposed unnecessarily the proceedings, both in the present case and in hearings before other courts. According to counsel, despite resisting the claims at every stage, almost at the door of the court, she accepted liability. Another example counsel cited was at the Court of Appeal where Mrs Adlam

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31 *Wright v Pitfield* [2022] NZHC 385.
32 *S v N* [2021] NZHC 2860, [2021] NZLFR 756.

abandoned her appeal after filing. That conduct also needs to be taken into account, according to counsel, which in any event tends to militate against mediation being ordered.

[70] Moreover, the trustees argued that the entire process has become an unnecessary distraction. Requiring the parties to engage in mediation at this very late stage, when there had been opportunities to do so long before now, only serves to delay resolution further. This cannot be a just outcome for the trust.

[71] Ms Hunia, who made submissions on tikanga, outlined what she contended were key concepts of whakapapa and turangawaewae, whanaungatanga, and tino rangatiratanga. According to counsel, the key word was "responsibility" in that the trustees, even under tikanga, have effectively an obligation to make decisions in order to protect their assets.

[72] In terms of turangawaewae, Ms Hunia contended that the deeper connection to the whenua is also represented by kaitiakitanga, a central role that the trustees must uphold. The trustees are the stewards of the land responsible for protecting the trust and its assets. Counsel also argued that "assets" were not simply the lands and resources of the trust, but the land is regarded as a tipuna. In addition, Ms Hunia underscored that the notion of turangawaewae was not so much where you might live, but where you came from, which emphasised the deeper connection to the whenua.

[73] Regarding whakapapa, counsel submitted that this is the "glue" that binds the Māori world together through the interconnectedness between each other, the whānau, to the whenua and the atua. Part of that centrality of whakapapa, according to counsel, is maintaining relationships and part of that process was traditional decision making by hapū, collectively. At a practical level, Ms Hunia contended that the trustees, in seeking the views of the trust beneficiaries through letter or pānui, minutes and hui included an opportunity for the owners to express their views. For example, counsel highlighted how Mr Niao made a presentation to the owners confirming that they were consulted as well as being informed. This was all part of whanaungatanga.

[74] In addition, Ms Hunia submitted that muru, hara and utu were also important principles of tikanga that had application in the present case. According to counsel, where a wrong or hara was committed, muru was seen as a way of compensating an aggrieved party. Further, while Ms Van mentioned balance, Ms Hunia argued that *maintaining* the balance is where the notion of utu has application to achieve a remedy for the hara that was committed. Ultimately, according to counsel, the central aim must be the restoration of mana.

Te Ture

The Law

[75] The experience for Māori is that tikanga has been applied in the attempted resolution of disputes both before and after 1840.[33] In more recent times, the senior courts have also acknowledged the increasing relevance of tikanga. In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*,[34] drawing on the approach to tikanga in earlier cases like *Takamore v Clarke*,[35] the Supreme Court confirmed that tikanga as law had to be taken into account as "other applicable law" in terms of a specific statutory provision empowering a decision maker in a resource consent context.[36]

[76] In *Ellis v R*, the Supreme Court acknowledged that the applicability of tikanga will be determined by the nature of the case and its subject matter, and that tikanga will not always have controlling relevance. It may also be part of an array of considerations because the circumstances will be highly relevant:[37]

> [117] *As an overall comment, tikanga will need to be considered where it is relevant to the circumstances of the case. It will not have to be considered in cases where it is*

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33 A judgment of this kind is not the place to explore the examples that exist in this context. However, several that are relevant to tikanga and custom include *Hunia v Keepa* [1895] 14 NZLR 71; *Hunia – Horowhenua 11* (1898) Otaki Appellate MB377 (OTI 377); *Nireaha Tamaki v Baker* [1901] AC 561 (PC); *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Baldick v Jackson* (1911) 13 GLR 398; *Hineiti Rirerire Arani v Public Trustee* (1919) NZPCC1; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680; *In re a claim to the Waitangi Tribunal by Henare Rakiihia Tau and the Ngai Tahu Maori Trust Board* (1990) 4 South Island Appellate Court 672; and *Kameta v Nicholas* [2012] NZCA 350.

34 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.

35 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

36 In this case, the legislation was the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and the decision maker was a committee of the Environmental Protection Authority.

37 *Ellis v R*, above n 11 (emphasis added).

> *not relevant or where consideration of tikanga will not or cannot assist, such as when it would be contrary to statute or contrary to binding precedent.* In terms of the usual common law method, prior authorities on tikanga will be useful in ascertaining when tikanga may be relevant in future cases.
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> [118] In some cases, tikanga and its principles may be controlling: for example, where Treaty principles and/or tikanga have been incorporated into statute in a manner that makes them so, or where the factual context justifies it. *In other cases, tikanga principles or values may be relevant considerations alongside other relevant factors. Tikanga may be relevant to explain the social and cultural framework for the actions of Māori parties.* In still other cases tikanga principles and values may have an influence on the development of the common law. They can also provide a new vocabulary or new way of thinking about new concepts of law or a new intellectual framework for those concepts.
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> [119] Challenging issues may arise where there may be a difference between the process or result indicated by tikanga principles and that under the current common law. Such issues may arise due to the traditionally more individualistic nature of the common law and the more relational and communitarian perspective of tikanga. That does not necessarily mean the two are irreconcilable or necessarily by default sit in opposition. *The methodology of resolving any differences will need to be worked through on a case by case basis.*

[77] More recently, in *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Ltd*, the Supreme Court underscored the importance of context when parties raise the relevance of tikanga to the specific facts of each individual case.[38] The Court emphasised that, even within a tikanga framework, strict adherence to a rigid hierarchy of principles cannot always have application. There will inevitably be exceptions, particularly in the context of a fundamental consideration like, to use a label, "mana whenua". The Court concluded that, depending on the context, a range of tikanga principles may have application in seeking long term solutions to disputes, particularly one involving Māori parties:

> [74] All that said, we take the view that in tikanga, as in law, context is everything. *It is dangerous to apply tikanga principles, even important ones, as if they are rules that exclude regard to context.* The following four factors suggest to us that in this case, a rigid approach to the priority of mana whenua (if that is what the Judge intended in the second conclusion cited above at [60]) cannot be justified.
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> …
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> [76] Second, even within its own tikanga framework, mana whenua is neither immutable nor incapable of adaptation to new circumstances. Every system of law recognises that core principles, applied to real life, will have exceptions and adaptations. *Indeed, as the mātanga (experts) noted in the course of the tikanga wānanga held by the Tribunal prior to completion of its preliminary report, tikanga*

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[38] *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Ltd* [2022] NZSC 142 (footnotes omitted, emphasis added).

> *is a principles-based system of law that is highly sensitive to context and sceptical of unbending rules***.** This is not a matter of compromising tikanga, but of applying it to context.
>
> [77] Relatedly, the Tribunal did not refuse to apply tikanga in its assessment. *Rather, it concluded that mana whenua need not be the controlling tikanga because other tikanga principles were also in play. These included principles such as hara, utu, ea and mana. Taken together, they reflect the importance of acknowledging wrongdoing and restoring balance in a way that affirms mana.* We come back to this last aspect below when we discuss tikanga-based processes.

[78] There have also been attempts to legislate tikanga based dispute resolution.[39] For example, the procedure established under the Second Schedule of the Central North Island Forests Land Collective Settlement Act 2008 included a tikanga based resolution process. Section 7 of that legislation provided for the removal of the jurisdiction of courts and tribunals in an effort to compel the claimant iwi to engage in tikanga based resolution or failing that, mediation then adjudication by an expert panel.[40] Unfortunately, despite these well intentioned aims, for some claimant iwi, even those tikanga based processes became mired in protracted litigation, some of which continues to this day.[41] In short, any dispute resolution process that seeks to invoke tikanga will depend on a range of variables that are context specific.

[79] Tikanga has also been referred to in decisions of this Court concerning claims under the Marine and Coastal Area (Takutai Moana) Act 2011, where it is mentioned in 12 sections of that legislation.[42] Then there are the recent decisions concerning tribal claims of mana whenua where again tikanga has gained increased recognition.[43]

[80] Unsurprisingly, tikanga has also been subject to scholarly research and academic writing including the well-known text *Tikanga – Living by Māori Values* by Distinguished Professor Sir Hirini Mead.[44] In extra-judicial writing, Williams J has

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39 See Central North Island Forests Land Collective Settlement Act 2008.

40 See Schedule 2, Central North Island Forests Land Collective Settlement Act 2008. That too can go awry: *Ngāti Wahiao v Ngāti Hurungaterangi and Ors* [2017] NZSC 200.

41 See *Te Rūnanga o Ngāti Manawa v CNI Holdings Ltd* [2016] NZHC 1183; *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] 3 NZLR 770; *Bidois v Leef* [2015] 3 NZLR 474; and *Rapata (Robert) Leef as representative of Ngāti Taka v Colin Bidois as representative of Pirirākau* [2017] NZSC 202.

42 *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772; *Re Reeder & Ors (Ngā Pōtiki Stage 1 – Te Tāhuna o Rangataua)* [2021] NZHC 2726; and *Re Ngati Pahauwera (Stage Two)* [2023] NZHC 15.

43 See *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84, [2019] 1 NZLR 116; *Ngāti Whātua Ōrākei v Attorney-General* [2022] 3 NZLR 601; and *Ngāti Whātua Orākei Trust v Attorney-General* [2023] NZHC 74.

44 Hirini Moko Mead *Tikanga Māori: Living by Māori Values*. (Wellington, Huia Publishers, 2003).

also canvassed salient tikanga principles and their application in a legal context in "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law".[45] In short, since colonisation, the courts have continued to give recognition to tikanga, in its various forms and definitions, commencing with the decisions of the Native Land Court up to the present day.[46]

He whaitake te tikanga i tēnei kēhi?

How is tikanga relevant in this case?

[81] At the risk of belabouring the point, I note again that Mrs Adlam raised the issue of tikanga, in the context of the *Ellis* decision of the Supreme Court. The proceedings were adjourned so that counsel could secure the services of a tikanga expert to assist in the preparation of Mrs Adlam's submissions. Despite Ms Van's best efforts, she was not able to do so in the time available. That said, she did not seek a further extension of time. The trust, in response, provided its own submissions on tikanga issues. In addition, in the absence of expert evidence, I have referred in this judgment to several authoritative texts, books, articles and caselaw, both historic and contemporary, on tikanga. Moreover, despite the absence of a specific provision under the High Court Rules, I accept counsels' overarching submissions as to the relevance of tikanga. That relevance applies in this case in three specific contexts: ownership and whakapapa; the management of the whenua; and dispute resolution.

[82] First, the familial relationships between the parties through their whakapapa bind them together. They are all owners of the whenua, Matatā 39A 2A, or representatives of owners, like their parents and mātua before them. This is because

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45 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1.

46 See F D Fenton *Native Land Court Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879* (H Brett, Auckland, 1878); Alexander Mackay *Opinions of Various Authorities on Native Tenure* (Government Printer, Wellington, 1890); Richard Boast *The Native Land Court A Historical Study. Cases and Commentary 1862-1887* Vol 1 (Thomson Reuters, Wellington, 2013); *Tau – Ngai Tahu Trust Board* (1990) 4 South Island Appellate Court MB 673 (4 APTW 673); *Hohua – Estate of Tangi Biddle or Hohua* (2001) 10 Waiāriki Appellate MB 43 (10 APRO 43); *Mihinui – Maketu A 100* (2007) 11 Waiāriki Appellate MB 230 (11 AP 230); *Nicholas v Kameta – Estate of Whakaahua Walker Kameta – Te Puke 2A2A3B1* [2011] Māori Appellate Court MB 500 (2011 APPEAL 500); *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Baldick v Jackson* (1910) 30 NZLR 343 (SC); *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116; *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Ltd*, above n 38; and *Ellis v R*, above n 11.

the land was awarded either through a Crown grant or a Native Land Court process of title determination, or a combination of both to ascertain the relative interests of the owners.[47] Those processes including succession have continued over the generations, despite the often palpable antipathy of Māori to engage with the Māori Land Court or more particularly, its nineteenth century predecessors, the Native Land Court and the Compensation Court. So tikanga is relevant because of the legal ownership of the land since all of the owners are kin or whānau to each other.[48]

[83] Secondly, tikanga applies in this case as a consequence of that ownership. Kin connected resources held by individuals who are related by blood can include tikanga based understandings of how the whenua is protected and managed for the benefit of the three generations relevant to whenua Māori: the tīpuna or ancestral forebears who held the whenua; the present generation of stewards who under tikanga are required to fulfil a custodianship role during their lifetimes; and then the generations yet to come. Those understandings can be both formal and informal, oral and written. For example, some groups of owners can infuse their trust orders with elements of their own tikanga including an absolute prohibition against permanent alienation of the freehold.[49] Others may wish to restrict eligibility for governance roles to uri only. In short, owners of Māori land will often apply principles of tikanga in the use, development and retention of their lands, depending on the circumstances.

[84] Thirdly, tikanga is relevant in terms of how the owners might seek to resolve differences that can arise from time to time. As a general observation, it is trite that conflicts can occur between owners of Māori freehold land, between trustees and between subsets of each, as the records of the Māori Land and Appellate Courts and their predecessors confirm.[50] Over time, Māori landowners, their whānau and hapū,

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47 This block was created by partition order of the Native Land Court on 29 June 1927: 23 Whakatāne MB 5 (23 WHK 5). It is 12.53 ha in area. Currently there are 149 beneficial owners on the title.

48 To use the more cumbersome language of Te Ture Whenua Māori Act 1993, they are members of the "preferred class of alienees".

49 Rotoehu Forest Trust is an example: 119 Whakatane MB 131-148 at cl 4 (a). Conversely, the Court will be wary of recently asserted tikanga, especially where it is internally inconsistent: *Phillips v Ashby – Oromahoe 17B2* (2006) 6 Taitokerau Appellate MB 271 (6 APWH 271) at [16]; and *Wihongi v Samson – Otarihau 2B1C* [2018] Māori Appellate Court MB 469 (2018 APPEAL 469) at [16]–[23].

50 For examples, see *Fenwick v Naera* [2016] 1 NZLR 354 (SC); *Clarke v Karaitiana* [2011] NZCA 154, [2011] NZAR 370; *Proprietors of Mangakino Township v Māori Land Court* CA65/99, 16 June 1999; *Rameka v Hall* [2013] NZCA 203; and *Tito v Tito* [2012] NZCA 493.

where appropriate, have engaged in attempts at the resolution of those conflicts in accordance with their tikanga. Some of those dispute resolution processes have become formally incorporated into the trust order, as mentioned previously. Others will be accessed more informally and can form part of the oral traditions of the group.

[85] In either case, this will involve taking the issue back to marae (or some neutral venue if the dispute concerns the marae) through a process of hui, wānanga and noho (either individual or combined) in an effort to undercover pathways to resolution, wholly or in part. Inevitably, this takes time. The results are not always conclusive, and several attempts can be made. Where success remains elusive then invariably one or more parties will, often reluctantly, seek the assistance of the courts. Yet before that occurs, or even part way through a legal process, owners and their trustees will often convene hui to seek a resolution without the need to continue with litigation.

He aha ngā tikanga e pā ana ki tēnei kēehi?
What principles of tikanga apply?

[86] The evidence confirms that there have been meetings held between the trustees and Mrs Adlam to find solutions and that those attempts have proved unsuccessful. While the parties may differ over the extent of those efforts, meetings did take place, including a hui where Mrs Adlam was able to address the trust beneficiaries. However, despite those efforts, the debt remains unpaid. Ms Van submitted that, for the reasons argued, Mrs Adlam should not have to repay the trust. As foreshadowed, even so, counsel contended that, if the claims of delay and unconscionability fail, a further process of hui and mediation should be attempted.

[87] Conversely, the trustees argued that the real purpose of such meetings would simply be to provide Mrs Adlam and her supporters with another opportunity to try and influence the trust beneficiaries and therefore the trustees to forego pursuit of the debt. In any case, this is arguably an aspect of whanaungatanga as cited by counsel in that Mrs Adlam and the trustees, in attempting to preserve their relationships as whānau, have tried to resolve matters outside of court.

[88] In a tikanga context, it was also argued by Ms Hunia that the principles surrounding concepts like hara, muru and utu have not yet been addressed

satisfactorily in order to achieve a state of ea between the parties. "Hara" has been defined as a transgression—the accidental or deliberate violation of a tapu, rules, regulations and the law.[51] "Muru" can be defined as the taking of ritual compensation as a form of social control and restorative justice among whānau connected through whakapapa or marriage.[52] The nature and extent of it would often depend on variables including the mana of the parties, the extent of the hara and whether it was deliberate or unintentional. Usually, the extent of the muru would focus on restoration on the wronged party to their pre-offence status or as near to it as was possible in the circumstances. These two terms are sometimes combined, particularly in religious contexts, as "muru hara".[53]

[89] "Utu" has been defined, in summary, as return, satisfaction, ransom, reward or response—the payment to a wronged party for a breach of tikanga.[54] Distinguished Professor Sir Hirini Mead referred to utu as the central element of a three part procedure involving take, utu and ea, to restore the parties' relationships. Mead states that a breach of tikanga gives rise to a take, an issue or cause. This take requires an appropriate cultural response to compensate the wronged party and to achieve a state of ea, or harmony.

[90] Then there is the equally relevant concept of mana in its various forms including for example mana atua, mana tīpuna, mana tangata and te mana o te whenua. "Mana" has been defined as authority, control, influence, prestige and power.[55] It has also been referred to as spiritual force and vitality, and the ability to control people and events.[56] Its singular importance as a concept to tribal communities was referred to by the prophetic leader Te Kooti Rikirangi in the late nineteenth century in his

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51 Mead, above n 44, at 392; and Richard Benton, Alex Frame, and Paul Meredith *Te Mātāpunenga – A Compendium of references to the concepts and institutions of Maori Customary Law* (Victoria University Press, Wellington, 2013) at 74–75.

52 Mead, above n 44, at 161–176; and Benton, Frame and Meredith, above n 51, at 254–265.

53 A variation of the phrase is mentioned in the Lord's Prayer: "Murua o mātou hara.." In the Ringatū faith, the night of the eleventh includes a series of prayers, hymns and psalms for the muru hara – the cleansing of sin: Judith Binney *Redemption Songs – A life of Te Kooti Arikirangi Te Turuki* (Auckland University Press, Auckland, 1995).

54 Mead, above n 44, at 35, 197, and 213–215; Benton, Frame and Meredith, above n 51, at 467–476.

55 Mead, above n 44, at 33–34, 43, and 303–304.

56 Benton, Frame and Meredith, above n 51,at 154–204.

waiata *Kaore te po nei morikarika noa.*[57] Accordingly, mana as a concept sits near the centre of te ao Māori and is also relevant here.

[91] Turning to the present case, the trustees have a large money judgment in their favour, which despite two appeals, remains intact. To get to that point, the trustees have had to engage in costly litigation before four different courts. They are now before a fifth seeking repayment of that judgment debt. The principal finding of the Māori Land Court was that Mrs Adlam had breached her duties as a trustee and had to repay over $15 million. She has repaid approximately one third of this amount and so some $10 million remains outstanding, even though she claimed that the trust has in fact received more than $4.7 million. She owns two properties valued it is said at between $4–5 million which the trustees now wish to secure in part payment of the debt, in the absence of any realistic payment plan, they say, from Mrs Adlam. While the parties' views on resolution proposals may differ, none of these facts are in serious contention.

[92] Then there are the principles of whanaungatanga and manaakitanga as argued by Ms Van. Mrs Adlam and the trustees, as foreshadowed, are all close whānau. They affiliate to the same hapū and marae and are all known to each other as whanaunga. Mrs Adlam says she has acknowledged her error and has attempted within her present means to repay as much of the debt as possible. As a pensioner with limited other assets or income, she implored the Court to bring a halt to the pursuit by the trustees of the remaining debt so that she might live with her whānau on their lands for the remainder of her life. She has also offered to provide her expertise to the trust to further its business activities to benefit the owners as a whole.

[93] By contrast, the evidence appears to suggest that Mrs Adlam has sought to minimise her culpability with repeated references to "technical" breaches of trust in records of meetings with trust beneficiaries and representatives. That interpretation of the judgments mischaracterises the findings made against her in the courts below. In any event, and more importantly for the purposes of this proceeding, Judge Coxhead

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[57] Binney, above n 53, at 321–324: "Ko te mana tuatahi, ko Te Tiriti o Waitangi; Ko te mana tuarua, ko Te Kooti Whenua; Ko te mana tuatoru, ko te Mana Motuhake" (The first authority is the Treaty of Waitangi; The second authority is the Land Court; The third authority is the Separate Māori Authority).

highlighted the importance of the trustees pursuing the judgment debt against Mrs Adlam, citing the Court of Appeal's observations on the point:[58]

> [59] One of the major matters that the trustees of the Bath Trust will need to deal with is the enforcement of the judgment against Mrs Adlam who as Mr Dowthwaite has submitted refuses to make payment or propose any realistic arrangement in respect of the debt and who continues to resist honouring the judgment.
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> [60] In terms of unrealistic arrangements to satisfy the debt it is noted in the Court of Appeal decision *Adlam v Savage* stated:
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> > [50] Secondly, this matter has been on foot for a number of years now. Just prior to the hearing in this Court, Mrs Adlam made an offer to pay $2.44 million plus interest (from $5 million of the $11.2 million) to the Bath Trust. Although the Bath Trust has continued to receive rental, it has received nothing in the way of a return of profit since the breach.
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> [61] The significant issue of enforcement of the judgment against Mrs Adlam and seeking to recover in excess of $12 million is in my view an important consideration in the appointment of trustees. It is important that the trustees appointed are able to freely manage the recovery of the debt. The judgement needs to be enforced and the debt owed needs to be recovered.

[94] In any event, it is not difficult to understand the position of the trustees, bound as they are by orthodox trust principles, as set out in the Court of Appeal judgment *Rameka v Hall*.[59] This includes the duty to get in and protect the trust assets. Any argument that the judgment debt is not a trust asset is not sustainable, as is the contention that tikanga in the present case can displace a judgment that was hard fought at every step in the proceedings by Mrs Adlam. By her own evidence she spent approximately $2 million on legal fees defending the claims.

[95] By her own admission, Mrs Adlam conceded that approximately $3 million of trust funds was received and used for her personal benefit. Equally important in this context, her counsel confirmed that, due to some issues over record keeping, she cannot account for what happened to the rest of the money. That is hardly a satisfactory situation. Indeed, in the circumstances, given what was at stake, it seems surprising that more care was not taken to secure and preserve such important records. While I appreciate that over time records can become mixed up or otherwise unavailable, given the circumstances, that Mrs Adlam, a high profile Māori

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58 *Savage v Adlam*, above n 1. The trust is also known as the Bath Trust.
59 *Rameka v Hall* [2013] NZCA 203 at [78].

businesswoman was facing serious litigation involving allegations of improper conduct as a trustee involving millions of dollars of trust funds, it is understandable that the trustees take a different view over the debt they say is owed to the trust.

[96] Put another way, if Mrs Adlam could demonstrate that much of the remaining balance or part thereof had been, for example, lost in poor investments, then that could have an impact on the trustees' approach to enforcement. Yet inexplicably, there does not appear to have been, by Mrs Adlam's own admission, any comprehensive attempt to provide an accounting with corroborating evidence of what has happened to all of the trust money that she received. That said, as mentioned, Mrs Adlam did confirm she had spent approximately $2 million on legal and related fees in defending the litigation but even then that was at best an estimate.

[97] Occasionally, where landowner representatives become involved in serious defalcation, other principles and concepts can sometimes come into play. For example, whakamā, or shame and humiliation which can act as a fetter on landowners and their whānau seeking redress against one of their whanaunga because of those whakapapa links.[60] It is a not uncommon refrain before specialist courts from time to time that a malefactor is not pursued for fear of tarnishing the reputation of the trust and its kin group associated to the whenua in accordance with tikanga. There is a belief that the mana of the trust and its community will be diminished, sometimes irretrievably, if the wrongdoing gains a wide audience. In this case, it would appear that the trustees have not been affected by that approach and instead continue to seek to pursue repayment of the debt due and owing to the trust.

[98] On the issue of further mediation, or attempts at alternative dispute resolution, in my assessment, the time has long passed for such an approach. The trustees had meetings with Mrs Adlam in 2018. There was also a meeting of trust beneficiaries, as foreshadowed, where Mr Niao made a presentation and Mrs Adlam was given the chance to respond. That there may be trust beneficiaries who do not wish the trustees to pursue the debt is understandable, given the whakapapa relationships.

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[60] See Hirini Moko Mead and others "Te Tahi o Te Rangi" in *Mataatua Te Whare i Hoki Mai* (Huia Publishers, Wellington, 2017) at 192 on the whakataukī, "Waiho, ma te whakamua e patu – Let shame be their punishment."

[99] Yet for the trustees to even contemplate taking that path, they would need the endorsement of all of the trust beneficiaries, not only those who may attend a meeting. Such an outcome seem highly unlikely given the polarised positions that the individual groups of trust beneficiaries appear to have taken to date, when the litigation in its entirety is considered. Moreover, it is not difficult to understand the trustees' view that further mediation appears premised on Mrs Adlam's position that she can pay nothing further. It is unsurprising therefore that they remain reluctant to engage in any such process.

[100] As to the arguments raised by Ms Van that the trust has charged Mrs Adlam's Māori land interests and can secure any dividends from those lands to help repay what is owed, there are two difficulties with that submission. First, the various trusts Mrs Adlam connects with are not obliged to pay a dividend as that decision rests entirely with the respective trustees. So, there is no guarantee of any income going to individual trust beneficiaries from those sources. Secondly, even if they did provide a dividend, the debt due is far in excess of what those entities' distributions would amount to over a lifetime. Indeed, it would take several lifetimes, arguably, to even begin to make a reduction of any moment in a debt of that size. In short, the proposed remedy here as part payment would in practice be illusory.

[101] Similarly, the arguments raised by counsel that the landowners have benefited significantly from Mrs Adlam's efforts in having a geothermal power generation established and the income that is now derived from that enterprise. Two points are relevant. First, but for Mrs Adlam's misconduct, the trust might have enjoyed an even *greater* profit from its lands. If the money taken by Mrs Adlam had been passed on to the trust as it should have been, and either reinvested or partially distributed if the trustees had agreed, then the financial position and therefore profitability of the trust would have likely been far in excess of the $855,00 recorded over the five years ending in 2018. Secondly, Judge Coxhead already dismissed Mrs Adlam's claims for a commission for her efforts in unequivocal terms, highlighting the importance of the scale of the wrongdoing and its undoubted effect on the trust's beneficiaries over a long period of time:[61]

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[61] *Savage v Adlam*, above n 1.

> [81] I agree that from 1993 until 2008, Mrs Adlam converted to her own use the proceeds due to the Bath Trust, and in so doing deprived beneficiaries of the Trust, significant entitlements. Since 1993, as a trustee, she has taken funds due to the Bath trust for her own personal use. The breach is that simple and that serious.
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> …
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> [83] In these types of circumstances, even where the granting of an allowance is legally justified, this Court must exercise its discretion sparingly. In the Māori land context where lands are held by a collective and entrusted to whānau members as trustees, there would, in my view, need to be special circumstances to allow an individual to profit from a clear breach of trust. I do not find any special circumstances to assist Mrs Adlam.
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> …
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> [85] In my view the seriousness of the blatant breach, the amount of money involved and the length of time the beneficiaries have been deprived of the funds, outweighs all those factors in favour of granting an allowance or developer's fee for Mrs Adlam. Therefore, on balance I find that a developer's fee or allowance should not be granted in these circumstances. Mrs Adlam must fully compensate the Bath Trust for the agreed loss of $2,440,149.00.

[102] Whakapapa and whanaungatanga are also relevant to the reputations of both parties, the trust and its beneficiaries and Mrs Adlam and her whānau. The process of reconciliation, involving hara, muru, utu and ea must include a pathway to restoring the mana of all parties over time. Without question, these events have led to a diminishment of mana, certainly for Mrs Adlam as well as the owners as a whole—she said so herself to the hui of owners in 2020. Moreover, her whakapapa, like a number of those owners, deriving from important lines of descent within her hapū and iwi, requires that Mrs Adlam in a sense is obliged to find solutions over time that include the restoration of her own mana and, through her ancestry, that of her illustrious forebears.

[103] In this context, I adopt the comments of the Supreme Court in *Pouākani* that tikanga and its application will depend entirely on the specific facts of the case.[62] As that Court confirmed, tikanga will always be suspicious of unbending rules. Congruent with that point is the principle that tikanga should not apply in circumstances where it is not appropriate or irrelevant. Put another way, there are no principles of tikanga that I am aware of, or that were cited by counsel with examples, that would support the approach proposed by Mrs Adlam, especially where there are

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62 *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Ltd*, above n 38.

assets available to contribute to the remedy the trust is entitled to pursue. In doing so, the trustees are seeking to apply the principles of tikanga to achieve ea for the trust beneficiaries, including themselves and Mrs Adlam, in accordance with their duties.

[104] In addition, those tikanga principles also go to the discretion and merits under r 17.9(2) as set out at [39]. In the factual context they are also relevant to whether there would be "a substantial miscarriage of justice if the judgment were enforced" (for a stay); the principle set out at [42(c)] that the Court must reconcile the parties' respective positions to secure the overall interests of justice (in relation to setting aside); and whether it would be unconscionable in the estoppel context had there been a factual finding that there was a reasonable representation. In this way, the applicable legislative regime and the relevant tikanga are not incongruent but are in fact aligned.

[105] In any case, to put matters into perspective, it should be remembered that, at a minimum, Mrs Adlam has acknowledged that she has profited by $3 million from her breaches of the most fundamental of trust obligations—the duty of non-conflict and the duty not to profit. That must be a record in the Māori Land Court jurisdiction, in modern times at least, for any fiduciary to have profited from improper activities to such a degree. Added to that has been the approach of Mrs Adlam to the proceedings, encapsulated, it could be argued, in the response she provided to the meeting of owners in November 2020, in reply to Mr Niao's presentation on the history of the litigation, as set out in the draft minutes of that hui:

> Mrs Adlam was then able to respond. She began by saying that the information provided [by Mr Niao] is just one perspective. She shared that in one meeting Elaine August attended as her support person, but she was not allowed to speak. The second meeting she asked to have Barry Savage attend but had to wait for Trustees to agree. She had conceded to & has taken responsibility for a technical breach of trust, so there was no need to go through the rigmarole. The issue had destroyed her reputation but has strengthened her resolve. The work she did was at her risk, she spent a considerable amount of time to create the asset the beneficiaries have now, without payment & asked where the natural justice was in this. She claimed to have no say in matters as the process was being run by lawyers.

[106] Ultimately, in the context of this long running proceeding dating back almost 15 years, tikanga cannot provide a haven for such misconduct without the appropriate degree of muru and utu for the hara that has been caused to the satisfaction of the aggrieved party. In short, in terms of tikanga, it is evident that traditional concepts

including hara, muru, utu are as relevant as whakapapa, whanaungatanga, tino rangatiratanga and manaakitanga in this proceeding. To even contemplate the restoration of a state of ea between the trustees, the trust beneficiaries on the one hand, and Mrs Adlam and her whānau on the other, it is essential that there continues to be recompense to the trust and its beneficiaries to the fullest extent practicable. The alternative would be to allow Mrs Adlam to effectively avoid responsibility to the trust for in excess of $10 million in circumstances where she continues to fail to provide a proper accounting for the loss or use of those funds. That can hardly be a just outcome, either in ture Pākehā or tikanga terms.

[107] In summary, given the size of the debt outstanding, it is difficult to see how it can be justified that the trust, being deprived of so much of its money for so long, should countenance the prospect of Mrs Adlam's family continuing to benefit from her misconduct in circumstances where, even if the properties are eventually sold, the trust will still be receiving less than the full amount of the judgment debt. Moreover, when correctly applied, the relevant principles of tikanga, as set out above, reinforce Mrs Adlam's responsibility to repay the trust the judgment debt that remains outstanding.

Ka whakakorengia te mana whenua te tūrangawaewae o Mrs Adlam mēnā ka hokona te whenua?

Will the properties' sale sever Mrs Adlam's mana whenua and turangawaewae?

[108] One final point. During the hearing I raised with counsel the idea of Mrs Adlam being provided with a life interest in one of the properties so that she would not be rendered homeless as part of a possible solution to the present proceedings. Her evidence was that both of the properties, the house in Tauranga and the home in Pukehina, are used by her immediate family. As foreshadowed, Ms Van submitted that any sale would sever what she described as the mana whenua and turangawaewae links of Mrs Adlam and her whānau to that land. There was no detailed evidence, however, filed in support of this assertion. As a result, I have considered the publicly available records of the Native Land Court on title determinations for the lands nearest Mrs Adlam's Pukehina property. I did not consider the land at 82 Westridge Drive on the

basis that there is no evidence that Mrs Adlam is a member of the Ngāti Ranginui, Ngāti Pūkenga or Ngāi Te Rangi iwi of Tauranga.

[109] I further note that the area of Mrs Adlam's Pukehina property falls between two marae, Pukehina and Ōtamarākau, which affiliate with the iwi of Ngāti Whakahemo and Ngāti Makino respectively. Title to those lands were determined by the Native Land Court in the 1870s and 1880s recognising the interests of Ngāti Whakahemo in the Pukehina block and Ngāti Makino in what became the Ōtamarākau block or more correctly parts of the Waitahanui and Tahunaroa blocks.[63]

[110] It is not in contention that Mrs Adlam is a well-known former representative of the group previously known as Tūwharetoa ki Kawerau and referred to in settlement legislation as Ngāti Tūwharetoa (Bay of Plenty), as records in the public domain confirm.[64] Unless Ms Van can point to evidence of Mrs Adlam's membership of Ngāti Whakahemo and Ngāti Makino, for example, confirmation of longstanding registration as a member of their tribal authorities, any argument for severing turangawaewae may prove challenging. In any case, even if she was a member of those tribes, in a tikanga context that alone cannot act as a shield to the unresolved claims of the trust.[65] The short point is that where counsel intend to pursue arguments of this kind, then an evidential basis to support that assertion will be required.

Whakataunga

Decision

[111] The Savage Papakāinga Land Trust trustees' application for substitution of judgment creditor is granted.

[112] The Savage Papakāinga Land Trust trustees' application for leave to issue enforcement proceedings, including a sale order, against Rae Beverley Adlam is granted.

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63 *Otamarakau block* (1878) 2 Maketu MB 324-325; *Pukehina rehearing* (1888) 7 Maketu MB 186.
64 Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005.
65 *Bamber v The Official Assignee* [2023] NZHC 260 at [45]–[47].

[113] Counsel may exchange memoranda as to costs one month after the date of this judgment of no more than five pages.

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Harvey J