

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Pūnaha whakawā – Criminal justice

The emergence of whakamā in the sentencing process

Oliver Fredrickson and Stephen Woodward

Oliver Fredrickson* and Stephen Woodward# discuss how whakamā is incorporated into the criminal justice system's sentencing process.

Hei tīmatanga – Introduction

Waiho mā te whakamā e patu!

Leave him alone he is punished by whakamā^[1]

Almost a decade ago, then-Chief Justice Elias stated, for the first time, that tikanga Māori principles form part of the values that underpin the New Zealand common law.^[2] In the years since, tikanga principles have slowly begun to enter the fray, with legislators, judges, and practitioners all showing an increased willingness to engage with tikanga Māori principles. One such principle is whakamā, which can be broadly defined as a feeling akin to “shame” or “embarrassment”, although a more comprehensive and nuanced exploration of its definition is provided below.

The purpose of this article is to inform practitioners, judges, and the wider public about how whakamā may be relevant in the criminal justice system's sentencing process.

(Continued at p 3)

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Contents

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Pūnaha whakawā – Criminal justice

- The emergence of whakamā in the sentencing process 1
– Oliver Fredrickson and Stephen Woodward

Te Kōti Matua – High Court

- Ngā whakataunga tiriti – implementation – deferred
selection properties – *Poutu, Wano, Skelton, Kopu,*
Panoho, Ritai and Tamati v Attorney-General [2021]
NZHC 723 – Zoe Rose-Curnow 10

- Judicial review – non-notified grant of consent – 13
Lysaght v Whakatane District Council [2021] NZHC 68
– Elizabeth Derby

Te Kōti Whenua Māori– Māori Land Court

- Trusts – removal of trustees refused – new elections – 16
Tūhoe – *Nikora v Trustees of Tūhoe – Te Uru*
Taumatua Trust (2021) 252 Waiariki MB 158 (252 WAR
158) – Zoe Rose-Curnow

Arotakenga pukapuka – Book review

- A long time coming: The story of Ngāi Tahu's treaty
settlement negotiations with the Crown – Dr Carwyn
Jones 18

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(Continued from p 1)

Kōrerorero – Discussion

Sentencing

In *Moses v R*, the Court of Appeal clarified the correct approach to sentencing. The Court outlined the following two-step methodology:^[3]

Step one: Calculate the adjusted starting point, incorporating aggravating and mitigating features of the offence;

Step two: Incorporate all aggravating and mitigating factors personal to the offender, together with any guilty plea discount. This is to be calculated as a percentage of the adjusted starting point.

In *Henare v R*, the Court of Appeal first discussed the role of whakamā in the sentencing process. Importantly, the Court noted that a future court may wish to explore the possibility of treating whakamā as a unique mitigating factor.^[4]

Two recent cases demonstrate how this may be done. In *Grace v R*, the presence of whakamā contributed to the Judge's assessment of Ms Grace's remorse.^[5] This necessitated a compassionate and rehabilitative approach to sentencing and justified a 20 per cent discount. In *Police v Wikaira*, the Judge had the benefit of comprehensive evidence about relevance of whakamā and how it affected the defendant.^[6] This powerful evidence fundamentally altered the lens through which his Honour then determined the most appropriate sentencing outcome.

Whakamā

Whakamā is a notoriously difficult concept to define, and it is neither our place nor within our expertise to attempt to reach a definition ourselves. Instead, we will recite a number of definitions provided from a range of sources, remaining cognisant that there is not one universally accepted definition nor an exact equivalent in Western societies.^[7]

At a high-level, most sources describe whakamā^[8] as a feeling akin to "shame", "embarrassment", "shyness", or "bashfulness".^[9] Taking this further, Kiri Dell notes that whakamā represents the feeling state in a person when "he or she has felt dishonoured in the eyes of others", which leads to the sense of feeling "inferior, inadequate, diffident, and with self-doubt".^[10] This aligns with the comments of Joan Metge, who explains that whakamā is closely linked to the concept of mana.^[11] A sense of whakamā will emerge where an individual has lost mana in the eyes of their peers. Similarly, just as mana can be accrued by a group, it can also be lost by a group, leading to a collective sense of whakamā.

More recently, Tainui Stephens (Te Rarawa, Ngāti Moetonga) powerfully described whakamā in the following way:^[12]

Whakamā is not guilt for something you *did*, but humiliation for who you *are*. It's a deep hit to the core of your being. You are inferior, disgraced, disadvantaged: and you know it. It has an acute memory.

Dr Tākirangi Smith comments that whakamā is associated with an unsettling of mauri (life force) within a person, dissipating internal mā or energy and vitality, leading to outward expressions of withdrawal and feelings of pouritanga.^[13] For an individual who has been charged with criminal offending, the impact of whakamā may result in withdrawal of communication with others or a resistance to engage in rehabilitative programmes. Without a proper understanding of whakamā, this frozen and unresponsive appearance can be interpreted as active disengagement and have significant adverse consequences for that individual.^[14] For example, they will likely: forgo the opportunity to receive rehabilitative treatment at the first instance; fail to receive a sentencing discount for “rehabilitative steps taken”, good character, or remorse; and have their feelings of whakamā exacerbated by going through the entire court process as a passive spectator.

Like most aspects of tikanga Māori, whakamā played essentially no role in the criminal law until very recently. However, in the past year, all courts within the criminal jurisdiction have now recognised the relevance of whakamā in the sentencing process.

Judicial treatment of whakamā

Henare v R

Mr Henare was found guilty of theft by a person in a special relationship, having stolen \$1,083,893.30 from the Pārengarenga 3G Trust, of which he was a trustee. In the High Court, Muir J sentenced him to five years and two months' imprisonment.^[15]

Mr Henare appealed the sentence, arguing that Muir J did not sufficiently recognise the impact of whakamā on Mr Henare and his wider whānau. In support of this argument, Mr Henare pointed to the comments made by his daughter to the writer of the report prepared under s 27 of the Sentencing Act 2002:^[16]

This is the thing that is hurting me. If my father passed I wouldn't know where to take him. I wouldn't know who to call. He has been outcast and it has been put publicly. It is not just about him, it is about us. How do we even go there? Our mana has been stripped, our tikanga value is gone ... We as a whānau, we are broken.

The Court acknowledged that while whakamā may involve elements of shame, it may also engage “broader concepts that reflect upon the mana, not just of Mr Henare, but his whānau.”^[17] However, neither the author of the s 27 report nor anyone else provided any guidance on what whakamā actually entailed in the context of this case or what, if any, recognition could be properly given to this factor in Mr Henare's circumstances.^[18] As such, the Court dismissed the appeal. Importantly, however, it noted that in an appropriate future case, the courts may be able to explore the possibility of treating whakamā as a unique mitigating factor when sentencing a Māori defendant.^[19]

Mr Henare appealed to the Supreme Court. Although the Court accepted that the relevance and potential effect of whakamā in sentencing is a matter of general or public importance,^[20] it denied leave as Mr Henare was “unable to demonstrate any evidential basis” that he was impacted by whakamā.^[21]

Although Mr Henare did not receive a discount to recognise whakamā, the comments made by the Court of Appeal certainly pave the way for future cases. Most notably, the Court did not simply see whakamā as an alternative manifestation of remorse, but rather as a “unique mitigating factor” in its own right.^[22] Two recent decisions, each with similarly tragic facts, provide an example of how the court may use whakamā to reach a more appropriate sentence.

R v Grace

Ms Grace fell asleep while driving from Ruatoria to Gisborne, causing her car to veer off the road and crash into a grass culvert.^[23] The vehicle landed on top of her son, who sadly died at the scene. Ms Grace was disqualified from driving at the time and her blood alcohol level exceeded the legal driving limit.

A number of reports were prepared on behalf of Ms Grace, including: a s 27 cultural report, a report by Ms Grace’s social worker, and a report prepared by a member of Ms Grace’s iwi who was acting as a mentor. The s 27 report outlined a long history of abuse and trauma, both physical and mental.^[24] Ms Grace felt “deep shame” because she was driving to Gisborne at the time of the crash for the purpose of seeing her abusive ex-partner who had caused much of the physical and mental trauma.^[25]

At sentencing, Dobson J began by noting that “uppermost in my mind in assessing the matter is that whatever sentence I impose will be less weighty than knowing you caused the death of Tipene”.^[26] To this end, his Honour acknowledged that the cultural report referred to whakamā, “being something more than a deep sense of shame and extending to embarrassment for your whānau and uncertainty about your place within your whānau”.^[27]

Through this lens, Ms Grace’s circumstances warranted a compassionate and rehabilitative rather than a punitive sentencing approach. Thus, a 20 per cent discount was considered appropriate to reflect the remorse and ongoing grief associated with whakamā, which was described as “difficult a punishment as any the Court could impose”. Having concluded that a short-term sentence of imprisonment was available, his Honour went on to consider that home detention would be sufficient to satisfy sentencing principles and would make the most of rehabilitative prospects.^[28]

Though Dobson J did not treat whakamā as a unique mitigating factor, it certainly contributed to the significant discount for remorse and the lens through which his Honour reached the final sentence. This latter point is important as, unlike other mitigating factors, recognition of whakamā need not always result in a discrete sentencing discount. Rather, a proper understanding of whakamā and its impact can colour the sentencing judge’s perception of the defendant and, as a result, more accurately

impose a sentence that is a just one in all the circumstances.^[29] This can be seen in the approach taken by Judge Davis in *Police v Wikaira*.^[30]

Police v Wikaira

Ms Wikaira was driving in the Northland region when she momentarily took her focus from driving and looked into the back of the vehicle. She lost control of the vehicle, which crashed into a bank head-on. Her daughter passed away as a result of the accident. As alcohol and cannabis were detected in Ms Wikaira's blood content, she was charged with carelessly driving a vehicle causing death while under the influence of drink or drugs.^[31]

Ms Wikaira pleaded guilty and was granted entry into the Matariki Court in Kaikohe.^[32] As Ms Wikaira progressed through the Court, concerns arose about her willingness to engage in the programmes that had been prepared for her. However, once Ms Wikaira returned in the new year, it was clear that she had fully engaged with the programmes. She explained that her lack (or perhaps perceived lack) of prior engagement was because she was still mourning the recent death of her daughter. Given her positive steps towards rehabilitation, Ms Wikaira then made an application to be discharged without conviction under s 106 of the Sentencing Act.

Judge Davis considered the offending to be in the moderate range of offending under s 61 of the Land Transport Act 1998. His Honour then turned to the impact that a conviction would have on Ms Wikaira's prospects of becoming a teacher and the effect of whakamā. For the purposes of this article, it is necessary to focus only on the latter.

Judge Davis had the benefit of receiving comprehensive evidence from Ms Sarich, the tūmuaki (principal) of the Kohanga Reo employing Ms Wikaira, about the impact of whakamā and how it applied to Ms Wikaira.^[33] She powerfully described the impact of whakamā in the following way:

It is difficult to peel away the many layers of what whakamā is, ... the regret, the shame, the embarrassment, the depression, the feeling of dishonouring others, the judgement, the absolute feeling of self doubt, and worthlessness, those are all naked to the human eye. Just because we can't see them, does not mean they aren't a struggle that greets Marino on a daily basis.

Applied to Ms Wikaira, she went on to say:

[Ms Wikaira] lives with one regret, the choice she made to drive her car after partying the night before, this choice took [her daughter]'s life. No matter how many times [she] lives that moment, it can never change the tragedy of what happened. [Ms Wikaira]'s reality is that she will live with this regret for the rest of her life.

This one regret she has is being laid open for all to see. It has exposed the truth. It has led her to this Court of law, it also led her to the Court of public opinion. Regardless of the outcome today, regardless of the sentence, [Ms Wikaira] will receive the jury of public opinion, will continue to scrutinise [her] every move forevermore. That is whakamā.

This one regret and this life long imposed scrutiny from the Court of public opinion is what we call whakamā.

She also described how whakamā manifests in a variety of ways. The loneliness on daily basis, “searching for her baby, in a sea of faces”, was whakamā. The search for accountability and the constant burden of judgement by others was whakamā. The shame knowing that her daughter’s life was taken was whakamā.^[34] In this case, as in many cases, the whakamā felt by Ms Wikaira resulted in her being reluctant to engage with the court process or rehabilitative programmes. Without recognising the effect of whakamā, it would be easy for any lawyer or judge to confuse this with apathy.

However, Ms Sarich informed Judge Davis that whakamā was a veil that Ms Wikaira must wear every day, and a conviction would tether her to that whakamā.^[35] This extraordinary burden of losing a child and carrying the weight of whakamā was such that adding a conviction and its associated consequences was out of all proportion with the gravity of the offending.^[36] In reaching this conclusion, Judge Davis expressly noted that it would be rare for the same circumstances and degree of information to be available to the court.^[37]

Ngā tākupu – Comment

This trio of cases has now laid the foundation for whakamā to be a recognised feature of the sentencing process. However, the specific details of how that will look remain to be seen. On the one hand, whakamā could act as a traditional mitigating factor, such as addiction or systemic deprivation, which would lead to a mathematical discount to the starting point. However, given the breadth of ways that whakamā can manifest and affect a defendant, it could also be used as a lens through which the sentencing judge determines the most appropriate outcome in all the circumstances. How whakamā is best recognised in the sentencing process is a difficult decision that will certainly come squarely before the courts in due course.

The courts must also decide how evidence of whakamā will be brought before the court and when it will affect the appropriate sentence. *Wikaira* sheds some light on the former question. In that case, Judge Davis had the enormous benefit of hearing from Ms Sarich, who gave evidence under s 27 of the Sentencing Act and informed the court about the relevance of whakamā and how it was affecting the defendant. In similar cases, this information could be included in a Provision of Advice to the Court (PAC) Report. To ensure that such evidence is routinely before the court, it is incumbent upon counsel, probation officers, and judges to be aware of the impact of whakamā and how it may influence the appropriate outcome. This is firmly in line with the Te Ao Mārama kaupapa of the District Court, which seeks to provide judges with the “best available information to assist them to make well-informed decisions about the people who appear before them.”^[38]

As to the latter question, it remains unclear exactly when the presence and impact of whakamā will justify a sentencing discount or an otherwise more lenient sentence. In *Henare*, both appellate courts rejected Mr Henare’s

appeal as he was “unable to demonstrate any evidential basis” that he was in “a state of whakamā”. As Mr Henare failed this initial hurdle, it remains unclear what follows if a defendant can provide evidence of whakamā. Will evidence of whakamā alone justify a more lenient sentence? Or will the defendant also have to show that, as a result of the whakamā, the sentence proposed will be disproportionately severe?^[39] Either way, sentencing judges will be required to make these important but difficult assessments.

However the courts wish to proceed, the calls for individualised sentences should be front of mind. Above all else, sentencing remains an evaluative exercise and the “ultimate question” is whether the sentence is a just one in all the circumstances.^[40] In cases where the defendant is in a state of whakamā, a just sentence will occur if the court understands the concept of whakamā, how it is affecting the defendant, and how it will inform the appropriate sentencing outcome.

Ngā kupu āpiti – Notes

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[1] Hirini Moko Mead and Neil Grove *Ngā Pēpeha a ngā Tipuna* (Victoria University Press, Wellington, 2004) at 25. A use of this whakatauki attributed to Te Tahi was recorded in Elsdon Best's *Maori Religion and Mythology (Part 2)* <<http://nzetc.victoria.ac.nz/tm/scholarly/tei-Bes02Reli-t1-body-d4-d6-d2.html>> accessed April 2021.

[2] *Takamore v Clarke* [2012] NZSC 116 at [94].

[3] *Moses v R* [2020] NZCA 296 at [46].

[4] *Henare v R* [2020] NZCA 188 at [25].

[5] *R v Grace* [2020] NZHC 3145

[6] *Police v Wikaia* [2019] NZDC 17641.

[7] Perminder Sachdev “Whakamā: Culturally determined behaviour in New Zealand Māori” (1990) 20(2) 433 at 434.

[8] The word whakamā is derived from the te reo Māori root word of “mā” meaning “white or pale”, and the causative prefix “whaka” which when attached to an adjective signifies a beginning of, or approach to, the condition indicated. See Perminder Sachdev, above n 70, at 434.

[9] P M Ryan *The Raupo Pocket Dictionary of Modern Māori* (2nd ed, Penguin Group, 2009) at 159; David (Rāwiri) Junior Waretini-Karena “Transforming Māori Experience Experiences of Historical Intergenerational Trauma” (PhD Thesis, Te Whare Wānanga o Awanuiārangī, April 2014) at 187.

[10] Kiri Dell “The Great Māori Shame Legacy” (17 July 2016) Kupumamae <<https://kupumamae.com/2016/07/17/the-great-maori-shame-legacy/>> Accessed: 7 January 2021.

[11] Joan Metge *In and Out of Touch: Whakamaa in Cross Cultural Context* (Victoria University Press, Wellington, 1986) at 25.

[12] Tainui Stephens “Whakamā: Fighting the taniwha of shame” (13 July 2020) The Spinoff <thespinoff.co.nz>.

[13] Karis Knight “From Whakamā to Whakamā: He aha tēnei?” (2019) 11 Psychology Today 134 at 136.

[14] Joan Metge, above n 11, at 25.

[15] *R v Henare* [2020] NZHC 2126.

[16] *Henare v R*, above n 4, at [24]. That being a report prepared pursuant to s 27 of the Sentencing Act 2002.

[17] At [25].

[18] At [26].

[19] At [26].

[20] *Henare v R* [2020] NZSC 96 at [13], citing Senior Courts Act 2016, s 74(2)(a).

[21] At [15].

[22] *Henare*, above n 4, at [26].

[23] *R v Grace* [2020] NZHC 3145 at [2].

[24] At [16].

[25] At [17].

[26] At [1].

[27] At [18].

[28] At [24].

[29] Described by the Court of Appeal as the “ultimate question” at sentencing. See *Moses v R* [2020] NZCA 296 at [49].

[30] *Police v Wikaira* [2019] NZDC 17641.

[31] Land Transport Act 1998, s 62(1). Although alcohol use was a necessary element of the charge, his Honour concluded at [45] that it could not be taken as causative of the offending on the evidence available.

[32] The Matariki Court is a specialist court operating in Kaikohe District Court. The Matariki Court brings the offender’s iwi, hapū and whānau to the forefront of the process. Through the s 27 provisions, a chosen cultural speaker may inform the court about the offender’s community and cultural background, as it relates to the offending and available rehabilitation support. In this way, cultural reports offer sentencing judges a fuller picture of all the circumstances affecting an offender. In order to enter the Matariki Court, an offender must plead guilty and demonstrate a commitment to addressing the drivers of their offending.

[33] *Police*, above n 30, at [58].

[34] At [61].

[35] At [62].

[36] At [77].

[37] At [78].

[38] Heemi Taumaunu, Chief District Court Judge, “Mai te po ki te ao mārama: the transition from night to the enlightened world” (Norris Ward McKinnon Lecture, Waikato University, 11 November 2020) at 2. Available: <https://www.districtcourts.govt.nz/assets/Uploads/Publications/2020/Norris-Ward-McKinnon-Annual-Lecture-2020-Mai-te-Po-ki-te-Ao-Marama.pdf>.

[39] As with defendants who are foreign nationals or suffer from addiction issues. See: *R v Zhang* [2019] NZCA 507 and *R v Fangupo* [2019] NZHC 2896 respectively.

[40] *Moses v R* [2020] NZCA 296 at [49]. See also *Zhang v R* [2019] NZCA 507 at [48]; *Orchard v R* [2019] NZCA 529 at [28]; *Crumph v R* [2020] NZCA 287 at [101].

Te Kōti Matua – High Court

Ngā whakataunga tiriti – implementation – deferred selection properties

Poutu, Wano, Skelton, Kopu, Panoho, Ritai and Tamati v Attorney-General

[2021] NZHC 723

1 April 2021

Report by Zoe Rose-Curnow

Whakataunga – Overview and result

Unsuccessful litigation arising from an implementation issue in the Deed of Settlement between the Crown and Te Atiawa. The Deed mistakenly recorded Te Atiawa as being able to purchase 51 Crown properties at a 20 per cent reduction in value. In negotiating the settlement, the parties only intended one property to be purchased at a reduced price. The Court accordingly ordered rectification to reflect this.

Ngā whakataunga tiriti – Treaty of Waitangi settlement process – implementation – deferred selection properties – ratification	
Date	1 April 2021
Case	Poutu, Wano, Skelton, Kopu, Panoho, Ritai and Tamati v Attorney-General (412 KB PDF)
Citation	[2021] NZHC 723
Court	Te Kōti Matua – High Court
Judge(s)	Clark J
Earlier/later decisions	
Legislation cited	Te Atiawa Claims Settlement Act 2016, ss 3, 13, 15; Public Finance Act 1989.
Cases cited	<i>Vector Gas Ltd v Bay of Plenty Energy Ltd</i> [2010] NZSC 5, [2010] 2 NZLR 444; <i>Chartbrook Ltd v Persimmon Homes Ltd</i> [2009] UKHL 38, [2009] 1 AC 1101; <i>Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd</i> [1997] AC 749; <i>Investors Compensation Scheme Ltd v West Bromwich Building Society</i> [1998] 1 WLR 896 (HL); <i>Starlight Shipping Co v Allianz Marine and Aviation</i> [2014] EWHC 3068; <i>Bathurst Resources Ltd v L&M Coal Holdings Ltd</i> [2020] NZCA 113; <i>Hanover Group Holdings Ltd v AIG Insurance New Zealand</i> [2013] NZCA 442, (2013) 13 TCLR 702; <i>Swainland Builders Ltd v Freehold Properties Ltd</i> [2002] EWCA Civ 560; <i>Kaimai Properties Ltd v Queen Elizabeth the Second National Trust</i> [2021] NZCA 10; <i>Davey v Baker</i> [2016] NZCA 313, [2016] 3 NZLR 776; <i>Hanover Group Holdings Ltd v AIG Insurance New Zealand</i> [2013] NZCA 442, (2013) 13 TCLR 702.
Overview and result	In 2014, Te Atiawa and the Crown signed a Deed of Settlement of Te Atiawa historical claims. In 2016, settlement legislation was enacted. As part of the negotiations, it was agreed that Te Atiawa would have the option to purchase the land on which the New Plymouth Courthouse sits at a 20 per cent reduced rate, and lease the land back to the Crown. A drafting error meant that the reduced price was recorded as applying to all 52 Ministry of Justice properties (including the Courthouse land) that Te Atiawa had the option of purchasing. This was not noticed by either party at the time of signing. In 2018, the Crown noticed the error and informed Te Atiawa. Te Atiawa subsequently attempted to claim the 20 per cent discount on the other 51 properties. The Crown did not agree with this interpretation of the Deed of Settlement. The parties agreed that the reduced rate was only intended to apply to the Courthouse land. However, while agreeing with this, the plaintiffs sought to implement the Deed of Settlement as written. The Crown position was that the plaintiffs cannot rely on an interpretation contrary to the parties' intentions (an estoppel argument), or alternatively, the Crown should be granted relief by way of rectification.

	Held, the Court granted the Crown's counterclaim to rectify the Deed of Settlement by clarifying that the reduction only applies to the Courthouse land. The Court did not deal definitively with the deed interpretation issues including the Crown's estoppel claim. The position in New Zealand as to the admissibility of pre-contract conduct is not definitively settled and the case could be decided on the rectification point in light of the parties' common position that during the negotiations the 20 per cent deduction applied only to the Courthouse land. (See [61]-[75].) For rectification to be ordered it must be shown that "the parties have agreed a contractual arrangement but the arrangement is not recorded accurately to reflect the parties' agreed terms" (at [80]). The plaintiffs submitted that while there was a common understanding before the Deed was signed, the "entire agreement" clause in the settlement deed and the privative clause, preventing courts and tribunals from questioning the redress (s 15 of the Act), are barriers to rectification. The "entire agreement" clause says that the deed "constitutes the entire agreement". The Court stated that this is by itself not a bar to rectification, and "does not preclude the Court from ensuring the settlement deed reflects the parties' common intention and agreement." (At [88].) Section 15 of the Act states that the "settlement of the historical claims is final". The claimants argued that rectification involves an inquiry into the deed of settlement. The Court found that s 15 only protects the finality of the settlement, which the case would not disturb.
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Judicial review – non-notified grant of consent

Lysaght v Whakatane District Council

[2021] NZHC 68
10 February 2021

Report by Elizabeth Derby

Whakataunga – Overview and result

Judicial review applications in respect of a non-notified grant of consent by Whakatāne District Council for a service station located on a Māori roadway.

Judicial review – non-notified grant of consent – Māori roadway	
Date	10 February 2021
Case	Lysaght v Whakatane District Council (693 KB PDF)
Citation	[2021] NZHC 68
Court	Te Kōti Matua – High Court
Judge(s)	Whata J
Earlier/later decisions	<i>Wharewera v Lysaght – Rangitaiki 28B 3C211 – Roadway</i> [2006] Māori Appellate Court MB 11 (2006 APPEAL 113).
Legislation cited	Resource Management Act 1991, ss 2, 3, 6(e), 7(a), 8, 35A, 36(1)(c), 36A, 36B, 61, 62(1)(b), 65(6), 66, 74, 95, 95B(8), 95E, 104, 108(1), 168, 168A, 189, and 189A; Interpretation Act 1999, s 5.
Cases cited	<i>Gabler v Queenstown Lakes District Council</i> (2017) 20 ELRNZ 76 (HC); <i>McMillan v Queenstown Lakes District Council</i> (2017) 20 ELRNZ 606 [2019] NZRMA 256 (HC); <i>Ennor v Auckland Council</i> [2019] NZRMA 150 (HC); <i>Discount Brands v Westfield (New Zealand) Ltd</i> [2005] NZSC 17, [2005] 2 NZLR 597; <i>Pring v Wanganui District Council</i> (1999) 5 ELRNZ 464 (CA); <i>Auckland Council v Wendco (New Zealand)</i> [2017] 1 NZLR 1008; <i>Seafield Farm (HB) Ltd v Hastings District Council</i> (2018) 20 ELRNZ 746 (HC); <i>Auckland Council v Wendco (New Zealand) Ltd</i> [2017] NZSC 113; <i>Ennor v Auckland Council</i> [2019] NZRMA 150 (HC); <i>McGrath v Accident Compensation Corporation</i> [2011] 3 NZLR 733 (SC); <i>Arrigato Investments Ltd v Auckland Regional Council</i> (2001) 7 ELRNZ 193 (CA); <i>Bayley v Manukau City Council</i> (1998) 4 ELRNZ 461 (CA); <i>Aley v North Shore City Council</i> (1998) 4 ELRNZ 227 (HC); <i>Smith Chilcott Ltd v Auckland City Council</i> (2001) 17 ELRNZ 126 (CA); <i>Queenstown-Lakes District Council v Hawthorn Estate</i> (2006) 12 ELRNZ 299 (CA); <i>Far North District Council v Te Runanga-a-Iwi o Ngāti Kahu</i> [2013] NZCA 221; <i>Nash v Queenstown Lakes District Council</i> [2015] NZHC 1041; <i>Northcote Mainstreet Inc v North Shore City Council</i> [2006] NZRMA 137; <i>MacLaurin v Hexton Holdings Ltd</i> [2008] NZCA 570; <i>Entick v Carrington</i> (1765) 19 St Tr 1029; <i>Bryson v Three Foot Six Ltd</i>

	[2005] 3 NZLR 721 (SC); <i>Edwards v Bairstow</i> [1956] AC 14, 36; <i>Campbell v Southland District Council</i> PT Wellington W114/94, 14 December 1994; <i>Dart River Safaris Limited v Kemp</i> [2000] NZRMA 440 (HC); <i>Westfield (New Zealand) Ltd v Hamilton City Council</i> [2004] NZRMA 556; <i>Bletchley Developments Ltd v Palmerston North City Council (No 1)</i> [1995] NZRMA 337; <i>Robert Holt & Sons Ltd v Napier City Council</i> (1977) NZTPA 132; <i>Medical Officer of Health v Canterbury Regional Council</i> [1995] NZRMA 49; <i>Westfield (New Zealand) Ltd v Hamilton City Council</i> (2004) 10 ELRNZ 254 (HC); <i>Residential Management Ltd v Papatoetoe City Council</i> (Planning Tribunal A62/86, 29 July 1986); <i>Ravensdown Growing Media Ltd v Southland Regional Council</i> (Environment Court C194/2000, 5 December 2000); <i>Grampian Regional Council v City of Aberdeen</i> [1983] P&CR633, 636 (HL); <i>Envirofume Ltd v Bay of Plenty Regional Council</i> [2017] NZEnvC 12; <i>Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council</i> HC Wellington CIV-2007-485-635; <i>Attorney General of Hong Kong v Ng Yuen Shiu</i> [1983] 2 All ER 346; <i>Comptroller of Customs v Terminals (NZ) Ltd</i> [2014] 2 NZLR 137 (CA); <i>Queenstown Airport Corporation v Queenstown Lakes District Council</i> [2013] NZHC 2347; <i>The Power Co Ltd v Gore District Council</i> [1997] 1 NZLR 537 (CA); <i>Commerce Commission v Fonterra Co-Operative Group Limited</i> [2007] 3 NZLR 767.
Overview and result	Judicial review applications in respect of a non-notified grant of consent by Whakatāne District Council for a service station located on a Māori roadway. The applicant for resource consent was one of the owners of the Māori roadway. Other occupiers of land adjacent to the roadway, the Lysaghts and two whānau of Ngāti Awa, complained that they were directly affected by the proposed activity and that the modifications and the proposed service station would adversely affect their use and enjoyment of the Māori roadway. Te Rūnanga o Ngāti Awa (TRONA) claimed that it was also an affected person because it is the mandated iwi authority and kaitiaki in respect of taonga tuku iho, including whenua Māori. TRONA was told its written approval would be sought and that the Council would seek its input before making any notification or consent decisions. TRONA claimed that, in breach of that expectation, the Council granted the consent without engaging them as promised. The issue before the Court was whether the Council erred in law or procedurally when granting the consent for the service station without notifying the Lysaghts or otherwise engaging with TRONA.

	Held, the Court dismissed the Lysaght's claim. TRONA's legitimate expectation and unreasonableness claims were successful in part. The Court set aside the decision to grant the consent on a non-notified basis. The Court found that the consenting officers gave careful consideration to the fact that the roadway modifications would affect the Lysaghts as landowners. The Court also believed that the consenting officers had adequate information upon which to base their findings that the pleaded effects of the proposed activity on the Lysaghts, in terms of the safe and efficient use of the roadway, were less than minor. The Court found no basis on grounds of unreasonableness to disturb the Council's findings in terms of the effects pleaded by the Lysaghts. The Court found that the commitment made by the Council to engage with TRONA on a matter relating to the management of Māori land was understandable and TRONA's corresponding expectation of ongoing meaningful engagement was legitimate. The Court did not, however, find that TRONA was an affected person in this case. The Court found that it was unreasonable for the Council to conclude that the effects of the proposal on pedestrians was less than minor. Thus, the Court found that the decision to proceed without affected party approvals from residential neighbours was unreasonable. The Court was "satisfied that the breach of the commitment to engage with TRONA prior to the final decision and the failure to reasonably assess the potential for conflict between the increased vehicular usage and the local resident pedestrians, including young children who reside at or travel to the whānau blocks, means that the decision to grant consent without notification must be set aside." However, the Court was not satisfied that the application had to be notified or that there were affected persons, and thus the matter was to be properly reconsidered in light of the Court's judgment.
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Te Kōti Whenua Māori – Māori Land Court

Trusts – removal of trustees refused – new elections – Tūhoe

Nikora v Trustees of Tūhoe – Te Uru Taumatua Trust

(2021) 252 Waiariki MB 158 (252 WAR 157)
21 April 2021

Report by Zoe Rose-Curnow

Whakataunga – Overview and result

Application seeking the removal of trustees from the Tūhoe – Te Uru Taumatua Trust (TUT), on the basis that the trustees breached the trust deed in relation to trustee elections and convening annual general meetings. The Court declined to remove the trustees but did order new elections be held for two trustee positions.

Trusts – removal of trustees refused – new elections ordered	
Date	21 April 2021
Case	Nikora v Trustees of Tūhoe – Te Uru Taumatua Trust (352 KB PDF)
Citation	(2021) 252 Waiariki MB 157 (252 WAR 157)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge Coxhead
Earlier/later decisions	Nikora v Trustees of Te Uru Taumatua and Te Komiti o Runga – Te Uru Taumatua Trust (2019) 221 Waiariki MB 200 (221 WAR 200); Nikora v Tūhoe-Te Uru Taumatua [2020] Māori Appellate Court MB 248 (2020 APPEAL 248).
Legislation cited	Te Ture Whenua Māori Act 1993, ss 19, 67, 236, 237, 238, 239, 240; Tūhoe Claims Settlement Act 2014; Te Urewera Act 2014.
Cases cited	Moke v Trustees of Ngāti Tarāwhai Trust [2019] Māori Appellate Court MB 265 (2019 APPEAL 265); Solomon-Rehe v Hokotehi Moriori Trust [2015] NZHC 46 (judgment No. 2); <i>Mikaere v Smallman – Mangatawa No 8A</i> (2021) 213 Waikato Maniapoto MB 277 (213 WMN 277); <i>Bramely v Hiruharama Ponui Incorporation – Hiruharama Ponui Incorporation</i> (2006) 11 Waiariki Appellate MB 144 (11 AP 144); <i>Rihari v Auckland – Takou Trust Ahu Whenua Trust</i> (2020) 220 Taitokerau MB 136 (220 TTK 136); McLelland – Ngāti Hine H2B (2011) 21 Taitokerau MB 57 (21 TTK 57); <i>Clarke v Karaitiana</i> [2011] NZCA 154; Te Korowai Tiaki o Te Hauāuru Incorporated Society v Te Rūnanga o Ngāti Tama Trust (2019) 407 Aotea MB 47 (407 AOT 47).
Overview and result	Paki Nikora filed applications on behalf of Te Kaunihera Kaumātua o Tūhoe challenging the 2018

and 2019 election processes and the appointment of two trustees for the Tūhoe – Te Uru Taumatua Trust (TUT). Mr Nikora alleges that relevant hapū were not properly notified of the elections, and the proper nomination process was not followed. Mr Nikora argued that the two trustees should be removed and fresh elections held.

Buddy Nikora also brought allegations relating to the notification of the elections and the nomination of the trustee candidates. In addition, Mr Nikora alleged that information is not made properly available before or after AGMs, and the trustees placed constraints on iwi members' ability to raise issues at the meetings.

TUT did not engage with the proceedings as they claimed that as a "private common law trust" they are not within the jurisdiction of the Māori Land Court.

As jurisdiction was raised, the Court dealt with this first. Section 236 of Te Ture Whenua Māori Act 1993 notes the court has jurisdiction over "every other trust constituted in respect of any General land owned by Maori." *In Moke v Trustees of Ngāti Tarāwhai Iwi Trust*, the Māori Appellate Court considered whether, under s 236, the Court had jurisdiction over a common law trust established to receive Treaty settlement assets. The Court found that it did have jurisdiction, and if it did not, it would have expected a clearer legislative indication to this effect.

On the election process issue, the Court found that there were a number of breaches of the trust deed. Among other things, TUT failed to provide private notice to all Tūhoe registered iwi members, and nominations did not come from a "hapū trust" as required by the deed.

Paki Nikora also submitted that attempts to resolve these concerns directly with TUT were made but no internal resolution process (as required by the deed) was begun.

In relation to complaints about AGMs, as TUT declined to give the Court any conflicting evidence, the Court determined on the evidence available to it that the trust deed was also breached in this matter.

Although the Court found that the 'TUT trustees have breached the trust deed in terms of the election process (sch 3), the internal process for resolving disputes (cl 19), and the AGM process (sch 4)" the Court did not order the removal of any of the trustees (at [70]). This is because removing trustees is a serious step that is not taken lightly, and the breaches were largely technical in nature. According to the authorities on removal of trustees (cited at [68]), technical breaches should be accompanied by the assets of the trust being put at risk of serious loss

	or malfeasance before there is a removal of trustees ordered. Held, the Court declined to remove any trustees. However, the Court did order further elections be held for the two trustee positions at issue. The Court noted that iwi "[m]embers should expect that elections are run in accordance with the detailed processes contained in the trust deed", and this had not happened (see [80]).
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Arotakenga pukapuka – Book review

A Long Time Coming: The story of Ngāi Tahu's treaty settlement negotiations with the Crown

Martin Fisher

Canterbury University Press, 2020 (ISBN 978-1-98-850311-0)

Reviewed by Dr Carwyn Jones

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Kōrerorero – Discussion

In *A Long Time Coming*, historian Martin Fisher provides an accessible and engaging account of Ngāi Tahu's journey towards the settlement of their historical claims. This is an important story to be told, and not just for those who whakapapa to Ngāi Tahu.

This book covers a lot of ground in a relatively short space. It begins with a history of the Ngāi Tahu claim itself. This provides important context for understanding the settlement negotiations that followed, but does so concisely – sensibly, there is no attempt to reproduce the full detail of the Waitangi Tribunal's three volume report. From there, the book charts the course of the negotiations toward a settlement. This includes initially setting a negotiating framework with the Crown, at a time in which the Crown was developing its general principles and policies for the settlement of historical claims. Whereas more recent settlement negotiations have taken place within a well-established framework, Ngāi Tahu (along with Waikato-Tainui, as the other early movers in this space) were working within a relatively uncertain policy context, with all parties aware that these first settlements would set a precedent for what was to follow. The journey of the settlement negotiations reminds us how dramatically the political environment has shifted in the intervening years. Today, the need to provide some redress for historical breaches of Te Tiriti o Waitangi is

generally recognised across the political spectrum, but this could certainly not be taken for granted throughout the 1990s, when Ngāi Tahu were engaged in their negotiations. However, it is striking to note that the Crown's settlement policy today continues to produce many of the same barriers and frustrations encountered by Ngāi Tahu in this process three decades earlier.

In some ways, this book might be seen as the official history of the negotiations. Fisher is a researcher at the Ngāi Tahu Research Centre at the University of Canterbury and the book has been researched and published with the support of the Centre. It includes a foreword from Tā Tipene O'Regan, former chairperson of the Ngāi Tahu Negotiating Group and of Ngāi Tahu Māori Trust Board. Fisher is interestingly positioned to write this account. He does not whakapapa to Ngāi Tahu, nor was he directly involved in Ngāi Tahu's settlement negotiations. But he has clearly been supported by Ngāi Tahu in this work, drawing on the iwi archives as one key aspect of the historical record, and supplementing documentary sources with interviews with key protagonists. This is, therefore, an account presented at arms-length, by an historian making sense of the narrative that emerges from the sources available. It is not a personal reflection from someone who was in the room as the decisions were being made and agreements struck. This has both advantages and disadvantages. The official record may not always reveal the nuance of discussions and motivations that direct participants might have observed or experienced. On the other hand, standing back from a distance to reflect on the full journey to settlement provides a perspective not available to those directly involved in the day-to-day progress of the negotiations. In any case, as Tā Tipene notes in the foreword, "[w]hilst some may quibble with the odd conclusion and the acuity of the occasional observation, this work will stand as the definitive account of a significant phase in this nation's historical journey".

I agree that this book is likely to be the definitive account of Ngāi Tahu's settlement negotiations, and that this does indeed represent a significant phase in the nation's historical journey, as the period when the framework for the programmatic, negotiated settlement of historical claims evolved. However, one criticism I have of the book is that, given the significance of the Ngāi Tahu negotiations in the development of the modern settlement process, it is surprising, and a little frustrating, that the book does not engage more in the broader settlement context. The book is squarely focused on telling the story of the Ngāi Tahu negotiations and the broader legal and political context is addressed only so far as it has an impact on the Ngāi Tahu story. Yet, there is much to be drawn from Ngāi Tahu's experience that could speak to the development of the settlement process and perhaps explain decisions of the Crown and other iwi in later settlements. Fisher is certainly well-placed to provide such analysis. Aside from his research on the Ngāi Tahu negotiations, Fisher has also worked at the Waitangi Tribunal and what was then known as the Office of Treaty Settlements (now, Te Arawhiti). Perhaps that might be the basis of a future project.

Although I would have liked to have seen the reach and ambition of the book extended, the focused account of the Ngāi Tahu settlement that

Fisher has produced is, in itself, extremely valuable. As someone who has been involved in settlement negotiations as a negotiator for my own iwi, the overriding feeling I had while reading this book was that every settlement deserved this kind of treatment. That is, a readable and authoritative account from the settling group's perspective; an account that makes visible the work that a settling community needs to undertake; the challenges the community encounters; the principles which guide iwi negotiators; and the context for decisions that are made along the way. I would encourage anyone who is interested in the settlement process and the Māori–Crown relationship to read this book. And I would encourage other iwi to think about how to tell the important stories of their own settlements.

Haratua 2021 – additional content online

Te Kōti Whenua Māori – Māori Land Court

[Succession](#) – giving effect to settlement of litigation – adjournment dismissed – *Bisson v Otarua Hapū Management Committee – Estate of Alayna Waimana Clark* (2021) 431 Aotea MB 108 (431 AOT 108) – Zoe Rose-Curnow

[Trusts](#) – trustee conflict of interest alleged – appointment adjourned – *Knuckey v Telford – Wahapakapaka 7A Block* (2021) 431 Aotea MB 119 (431 AOT 119) – Hinemoana Markham Nicklin