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OFFICIAL

**SECOND UREWERA INQUIRY HEARING**  
**7-11 December 2003**  
**Tataiahape Marae**

**Tribunal:**

Judge Savage  
Joe Northover  
Joanne Morris  
Ann Parsonson

**Staff:**

Heidi Hohua  
Ralph Johnson  
Tom White  
Barry Rigby

**Crown:**

Annsley Kerr  
Kirsten Harper  
Peter Andrew  
Tikirau Stephens  
John Battersby  
Cecilia Edwards

**Counsel:**

Annette Sykes  
Carl Mika  
Jason Pou  
Dominic Wilson  
Racheal Paul  
Paul Harman

Te Kani Williams  
David Ambler/Curtis Bidois  
Darrell Naden  
Meg Poutasi  
Spencer Webster  
Stephen Clark

**Witnesses:**

Bryan Gilling  
Ewan Johnston  
Craig Tamihana Coxhead  
Rev Eru Potaka-Dewes  
Tuirangi Mokomoko  
Keri Huia Ratima  
Jeffery Sissons  
Kuini Beattie

Matt Te Pou  
Sonny Biddle  
Mahui Te Waarua  
Ani Hare  
Kirituia Tumarae  
Maraea Tumarae  
Hiraina Hona

**Monday, 8 December 2003**

Kerr Sir, perhaps since we have a few moments before 11, picking up the point that you raised with me earlier, during submissions being presented, I'm in a real dilemma as to whether to address the evidence at the trial. I would seek the Tribunal's direction as to whether they intend to take the approach that the Ngati Awa Tribunal take and that was not to investigate the murder trials of the 19<sup>th</sup> century on public policy grounds. I ask this in the context of the free pardon and s 407 of the Crimes Act, which makes it clear that Mokomoko was deemed never to have committed that offence. It would be my submission at a later point that the practical effect of that free pardon is to restore the tipuna's mana and that of the whanau. However, there's a lot of evidence raised and claims made as to wrongful conviction and I had intended to test that to some degree. It's a very uncomfortable position, however, given the free pardon and maybe it's better to leave that sort of issue to submissions if it is a particular matter that the tribunal does want to review.

Savage We have not made a decision, so I can't relieve your dilemma. You'll have to handle it as you see fit. We'll adjourn for morning tea. Thank you.

**Morning tea adjournment**

**Annley Kerr cross-examines Dr Bryan Gilling**

Kerr Dr Gilling, I'd first like to acknowledge the fact that you prepared this report for the Crown and Whakatohea for the purposes of entering settlement negotiations on that claim and we recognise your role in that regard. In large part I think my questions are questions of clarification or seeking further particulars from you. I'll start on page 13.

Dr Gilling Of?

Kerr Of your main report. I'm sorry, for the Tribunal and for everyone, I do intend to cross-examine Dr Gilling on his main report, #A53. There'll be some references to #B7, his summary. I've also put forward a document bank which is not all for Dr Gilling. It's some documents we might refer to during cross-examination this week. And that takes the document #B21. Has Dr Gilling been passed his copy of that document bank? Thank you. So, first to your main report Dr Gilling. Some contextual material I think you provide at the beginning, page 13. I'm just interested in whether you have any further observations on Resident Magistrate Hanson Turton's visits to the Bay of Plenty in 1861. He's visiting the runanga, I think, at the behest of the Government, travelling round at this point in time. Do you understand that these travels by Hanson Turton were part and parcel of the Government or Governor Grey's development of his native government policy?

Dr Gilling Given the timing, I would expect that they were, yes.

- Kerr And, it seems in this instance that the Resident Magistrate is putting forward suggestions to the runanga as to how they might be run and looking at the possible appointment of an assessor at this period.
- Dr Gilling You're meaning Turton?
- Kerr Yes, yes.
- Dr Gilling Is he a resident magistrate at this time? I'm not sure. I'm not sure in what capacity he's doing that. But he is, that's what he's doing, yes.
- Kerr Yes, thank you. Now, pages 15 and 16 of your main report, you provide some descriptions of the tradable wealth acquired by the ECEF during 1865 and the Hunter Brown report, which I think also indicates the property held by Whakatohea at this stage. Can you indicate to me whether, from the period towards the end of 1863, perhaps 1864, whether Whakatohea were continuing their trade with Auckland at this point?
- Dr Gilling I have no information on that. I would assume that if it was continuing, it would have been curtailed by, you know, the war situation.
- Kerr Yes.
- Dr Gilling But I have no more information than that.
- Kerr Thank you. At page 32, and I think this is really a question of clarification, you've indicated that Levy said that Volkner's teacher and housekeeper were among the first Hauhau converts, and that Levy's report heightened their treachery by saying they'd worked for him for 10-12 years, which you note as impossible. This is in the first five lines.
- Dr Gilling Yes.
- Kerr Now, for clarification purposes, given that earlier in your report you note that he worked for the Church Mission Society from 1852, I think, and then prior to that for three years in Taranaki with the North German Missionary Society. Is it possible that these people were working with him during that period, before he came to Opotiki? I don't know who they were, but I ...
- Dr Gilling I was looking at that again this morning and yes, it is possible, however, there is another reference and I can't point to it directly, there is another reference a little further on where one of those people is mentioned and they appear to be a Whakatohea person at that time. But, it is certainly possible that he could have had someone, people that went around with him.
- Kerr Thank you. Now, at page 38 you refer to the charge of spying. But prior to that, against Volkner, but prior to that you refer to Lyle at page 158, saying that Patara had sent a warning letter to Volkner, telling him not to return to Opotiki. And then you raise some questions about that and then I think in your questions of clarification, or summary, you point out that some of the evidence for this comes from the post humus trial that Grace

reports. I'm just wondering whether the reference to the Patara letter could refer to the letter you, I think, refer to on page 28 where he writes to Whakatohea and tells them to get rid of their ministers in the course of, and there is further material, I think, there that he was seeking a quota of men to fight in Taranaki. Do you think that that might be the letter they're referring to when they talk about Patara's letter?

- Dr Gilling            If so, then Lyle's got it wrong as to what the intention of the letter was, because it's not a warning letter to Volkner, is it? It's a letter to Whakatohea. That letter that you refer to is the only one of Patara's that I know of and I think my question was more whether Lyle took from Patara's comment at the post humus trial that Volkner had been warned to mean that Patara himself had warned him.
- Kerr                    But he wasn't there when he came back.
- Dr Gilling            But he wasn't there. Yes.
- Kerr                    You've identified, at the bottom of the page, that the charge of spying was perhaps the real reason behind the whole sorry event. And I think we've clarified the communications we have, or the written communications we have with Governor Grey were from a year earlier, from the 1864 set of letters. Is that correct?
- Dr Gilling            Yes, which related to the Tairawhiti Expedition and such, yes.
- Kerr                    Yes, and he commented during the course of some of those letters that the only reason he was writing was because there was no Government agent to report to the Government in the locality. Is that correct?
- Dr Gilling            Yes, and as I've either said or indicated, I think, don't think he considered himself to be a spy. He considered himself to be a responsible citizen.
- Kerr                    And he in fact returned to minister to his flock even though many of the missionaries had been removed by their societies by that time.
- Dr Gilling            By the communities that they were serving, yes, and in fact he's coming back expecting, perhaps not to be welcomed with open arms, but he is thinking that it's still probably safe enough that when his wife's better she'll be able to come back with him next time.
- Kerr                    I wonder whether, you've referred, I think, to William Martin's general assessment of Pai Marire and the situation at this time, and he, Sir William Martin indicated that over a period of time the missionaries' association with the Government or association in Maori mind with the Government seems to have made them, perhaps, a target, and ...
- Dr Gilling            Yes, that the event that really crystallises that is with the army marching into the Waikato and you end up with Bishop Selwyn and several of his senior missionaries acting as chaplains to these thousands troops who had no chaplains and that was seen as identifying with the, sort of the, Government forces.

- Kerr And, I can't remember where this came from. I'm not sure if you refer to it in your report, but Volkner himself was critical of that association by the missionaries, was he not?
- Dr Gilling Pretty much everyone was. I don't think anyone (inaudible) saw these thousands of men without spiritual help heading off into battle and, you know, Ashwell, Selwyn and I think another one, you know, they did it reluctantly, but they did it out of a feeling of duty.
- Kerr Right.
- Dr Gilling So, yes, even the participants were not enthusiastic participants.
- Kerr Turning to page 43, actually I think it's pages 42 to 43, actually I can't find the letter I'm referring to, but there is a, after Volkner's death, about the 5<sup>th</sup> of March I think there is a letter written by Ngati Awa to the Resident Magistrate Clarke.
- Dr Gilling That is on 42 isn't it?
- Kerr That's 42, yes. It seems there that they, even though some Ngati Awa were there at the time and involved, there is a quick distancing of themselves from that event. And perhaps that letter indicates that they read the murder of Volkner as a cause of war or a cause for the Government to come and capture the participants and seek to say that they will assist.
- Dr Gilling And your question is?
- Kerr Would you read that letter that way?
- Dr Gilling On the part of some Ngati Awa, yes. The difficulty appears to be with each of these tribal groups being fractured in different ways, according to their different religious allegiances or whatever. You know, there's a number of reasons. So, I don't know how extensive that, you know, how representative that sentiment is but, yes, they're clearly concerned that this is going to visit all sorts of trouble on them.
- Kerr At pages 47-48 I think you review the proclamation that Sir George Grey issues in April and you see that as a public declaration of his determination to excavate every manifestation of the movement and you see that as meaning the Pai Marire movement. Do you really read that proclamation as an indication that Pai Marire are unassociated with the rights they describe there is to be suppressed?
- Dr Gilling I don't think that they, particularly once the first soldiers were killed in Taranaki, I don't think that there's any real discrimination in the minds of the Pakeha observers. And this is a, I think, a fairly well-travelled argument, well-traversed argument, that however pacifist the Pai Marire may have been, it becomes a militant Hauhauism with the murders of the soldiers. Captain Lloyd, whose head was probably the one involved in this and so on, and from that time on I don't think that they make a distinction between Pai Marire and Hauhauism and in fact of course all

rebels very quickly get called Hauhau as a matter of course also, regardless of their religious affiliation.

- Kerr I have in mind one of the references that you refer to and I've got it in that document bank, #B21. It's at Tab 17. Here we have the instruction from the Native Minister to the Resident Magistrate, Mannering.
- Dr Gilling Yes.
- Kerr And then Mannering's report to the Native Minister at a later point. If I can take you to the second page, the second, or first full paragraph, there the Native Minister said "on the subject of the Hauhau religion I write in doubt and shall not be surprised to hear that you have great difficulty. The line which the Government will take is this, they will not interfere with the Hauhau so long as they confine their operations to the harmless expression of opinion or the practices of ceremonies within the law. But they are resolved as soon as in any case that opinion shall appear in the form of open crime or even of a conspiracy to commit crime to arrest the criminals at once at any cost and at any risk." Does that, to you, show a distinction between Pai Marire and what they see as the more fanatical aspects?
- Dr Gilling In principle, yes. The trouble is that this is right at the cross-over period where you're just starting to get this series of events.
- Kerr Yes.
- Dr Gilling That I think shift the attitude right across to one that, as I say, wouldn't really discriminate. At that point, I mean, that instruction is a matter of principle is fair enough.
- Kerr Yes, yes. Now if I perhaps next take you to your summary, at page 5 of #B7. I just want to take up the point in lines 2 and 3 where you refer to Dr Battersby's description of the courts martial board and you say he then proceeds to imply that this court martial was a model of fairness and due process. On reading that paragraph myself, I would suggest to you that Dr Battersby was simply trying to set out what the requirements of the court martial were at the time and what occurred in respect of those courts martial. When we talk about fairness and due process, I think we think more about the civil institutions rather than a court martial process.
- Dr Gilling Well, that's the implication I took from it. I think the next sentence has some bearing on it in that he gives no indication that what he's describing is a court martial from the 1860s, but, as I say, his authority appears to be a book about World War 1, British practice in World War 1 and I don't know whether one is directly applicable to the other.
- Kerr Are you aware of the practice changing between say 1863 ...
- Dr Gilling I'm not aware of the practice at all.
- Kerr Right. Okay. Thank you. Turning over the page, well, paragraph 12 which goes over the page, you refer to the newspaper report in February

1866 that Dr Battersby refers to, indicating that those implicated in Volkner's death were still awaiting court martial and then you query whether that can have been the case, as I understand it. And you point out the, sort of, length of time between the Attorney-General's opinion and this November period. Now, as I understand it, the two courts martial Dr Battersby refers to is the first one dealing with the alleged murderers of Fulloon and the second one dealing with the alleged inciters of that murder and the point he makes is that he hasn't found evidence of a third board being constituted to deal with that, the Volkner courts martial and the newspaper report tends to indicate that it didn't occur. Do you think that that is quite possible, that sequence of events?

Dr Gilling Well, Dr Battersby knows better than I what he was referring to. I'm just saying, I just saw the reference to the two courts martial there and the only definite statement we appear to have is that newspaper report.

Kerr Yes.

Dr Gilling It's just that, there is no indication as to why Stapp would have stopped, having, you know, got the ball rolling. Why would he not then continue to try the Volkner case?

Kerr Maybe he was awaiting instructions from Grey, at this point Grey directs that these things aren't to be proceeded with. Isn't that correct?

Dr Gilling Well, not at the beginning of November. I mean, this, doesn't that follow Prendergast's opinion? My, I mean, I think it's a secondary point, of course.

Kerr Yes.

Dr Gilling Given that the courts martial were declared to have had no validity.

Kerr But you haven't seen any evidence that these things happened?

Dr Gilling I have seen no further direct evidence that a court martial of Mokomoko and the others was proceeded with.

Kerr Okay.

Dr Gilling Yep.

Kerr Now, paragraph 13, I think you take issue with, again with Dr Battersby's evidence in respect of prosecutions being axiomatic in the context of martial law. Looking at that paragraph 228, wouldn't the discussion in that paragraph tend to indicate that despite the proclamation of martial law in the Opotiki and Whakatane districts, that martial law was not, in fact, in full effect, as can be seen by the fact that there weren't ongoing courts martial for a whole lot of minor offences?

Dr Gilling If that's the indicator, then yes. Yes.

- Kerr Turning back to your main report, Dr Gilling, I'm now into the testimony at the trial of the people claimed to have murdered Volkner. I think you put, I understand you raised this issue in the context of your summary too, you've raised the issue of whether Wipiha's testimony was part of a longstanding dispute between Ngati Awa and Whakatohea. And you note, I think, that Wiremu Te Paki was directly questioned at the depositions – sorry, have I not given a page number? Oh, sorry, pages 55-56 of the main report. Now you note, I think it's page 56, that Te Paki, yes, in the first full paragraph, was questioned as to whether he would acquire a block of land called Ohiwa if the prisoners died. And he said he didn't know. Is that a clear indication to you that the defence were cross-examination Te Paki to test Wipiha's credibility?
- Dr Gilling Possibly. As I recall ...
- Kerr Yes.
- Dr Gilling ... from however long ago. It does, the record doesn't actually show who was asking what, I think. So, we assume that a question like that would come from the defence.
- Kerr Yes. We don't have any questions at all, do we? We don't have a full record and that's part of the difficulty with all this.
- Dr Gilling Yeah. It's not, they're not formal minutes as we'd expect now perhaps.
- Kerr Yes. And at page 59 you discuss the Jahus testimony and note that this was opposed by the defendants on the basis that he wasn't present and say it was contradicted by prosecution witnesses as well as his prior statements. Now, as I understand it, all of the witnesses assert that he went to his own house and was hidden by his wife. Couldn't we query whether any of them could positively state that if they were in fact at the execution, and giving evidence on that? They couldn't state that he was remaining in his house for the entire period. The evidence we have is he couldn't be found.
- Dr Gilling I'd accept that. I assume that since this is happening a year later, that they'd realised where he popped up from afterwards. I mean he, clearly reappears shortly after those events and I assume that they then find out that they think that was in fact where he was when they were looking for him.
- Kerr But they couldn't say where he was.
- Dr Gilling But at the time the murder was taking place, clearly, unless they were actually in the house with him, they wouldn't have known where he was.
- Kerr Yes. That's right. Thank you. Now, continuing over pages 59-60, you mention that in April 1866 George Grace argued for Mokomoko's innocence after the trial. And you query why Grace didn't challenge Wipiha's standing at the trial. And I think you raise it again at pages 16, or paras 16 and 17 of your summary. Now, my understanding was that Grace was a witness for those events which he directly saw and he was

- kept in confined, under guard, during these events and was not actually a witness to the execution at all. Is that your recollection?
- Dr Gilling He didn't see the execution itself, no. He first the first part where the party came to take Volkner away.
- Kerr Yes, yes.
- Dr Gilling But he didn't see the actual killing.
- Kerr So, he couldn't directly give evidence relating to Wipiha, or anyone else's, participation, could he? He wasn't called to do so.
- Dr Gilling Not on the basis of what he saw, himself.
- Kerr No.
- Dr Gilling But clearly through all of these, well, at least some of these witnesses, they're talking about what they've picked up, you know, over the subsequent hours or days later.
- Kerr Right.
- Dr Gilling By talking to other people. Yeah. And, in fact, Grace does seem to have somehow raised a query.
- Kerr Yes. Yes, we'll come to that. Now, in this document bank we have Chief Judge Arney's letter to the Colonial Secretary. It's at Tab 15. I think we've got a transcript of page 1 only, it carries on over the page, but it appears from this letter that the Reverend Grace brought to Chief Judge Arney's notice a copy of the statement made by Jahus to Commissioner Smith and this is the prior inconsistent statement everyone refers to. I'm sorry it's not a very good copy, but, in that letter the Chief Judge sets out to the Colonial Secretary and I understand it's then forwarded to the Governor, the discrepancy between what Jahus said in an earlier statement that he saw Volkner's murder from his own house and in court where he describes moving around and seeing the murder from near David's house. So, clearly the Chief Judge is raising this issue, this particular issue, with the Colonial Secretary, because it's been brought to his attention. And in that evidence, he also indicates he's made inquiries of Smith as to the nature of that statement. Do you recollect all of this material, or have you seen this particular document before?
- Dr Gilling No, if I'd seen it before, I would have referred to it.
- Kerr Yes. I think it's a day before the letter you do refer to. So, it's clear from this document that the Chief Judge has made inquiries on the basis of concerns the Reverend Grace brought to him and feels it's his responsibility to refer it because of the significance of the matter to the Colonial Secretary. He also goes on to indicate that he has no ground to be dissatisfied with the verdict of the jury and states his belief that the prisoners were convicted in due course of law. This sort of material associated with the evidence we've seen that he actually drew the

attention of the jury to the conflicts in the evidence as to whether the rangatira Mokomoko was actually there, indicate that those issues were before the jury when they made their decision. What I'm putting to you is this, even though it's limited evidence, it gives an indication that perhaps wrongful conviction can't necessarily be made out in that context.

- Dr Gilling            This, these inquiries by the Chief Justice were made after the trial, I think.
- Kerr                    That's right.
- Dr Gilling            But he doesn't consider that they are sufficiently serious to warrant some sort of revisiting, overturning of the verdicts and revisiting them.
- Kerr                    That's right. But he sees them as sufficiently serious to raise with the Colonial Secretary.
- Dr Gilling            Yes.
- Kerr                    And that's forwarded on to the Governor.
- Dr Gilling            Yes he does. I'm not, of course, in a position to make any comment as to whether or not they were sufficiently serious, that's a matter for other people to comment on, rather than me.
- Kerr                    Okay. But, the evidence at the trial itself was that the Judge drew specific attention to Mokomoko's case and the fact of the conflicting evidence and read that evidence out to the jury again. So, you know, he is, in his summing up, he's directing the jury as to the issues.
- Dr Gilling            Yes. I mean, clearly he's aware of the inconsistencies. He comes to, as it says here, to the final conclusion that they're not sufficiently great, sufficiently grave, to warrant interfering with the jury's verdict.
- Kerr                    And it seems that's the conclusion the Colonial Secretary and Grey came to as well.
- Dr Gilling            Well, I assume they'd be guided by the Chief Justice.
- Kerr                    Now, an issue that's raised in quite a lot of the evidence on this matter is the question of why the people, why the defendants were not speaking in their own defence. Are you aware that no defendants could speak in their own defence at trial through till 1889, which is when an Evidence Act was put in place allowing defendants to speak in their own defence?
- Dr Gilling            I'm not aware of any such restriction.
- Kerr                    Turning to section 3 of your main report on war.
- Savage                Do you want to deal with the position of the prisoner subsequent to that finding of guilty by the jury, then speak of it?
- Kerr                    No, Sir, I hadn't intended to raise issues about that. Would you like to intervene at this point? Actually, I'd like to not leave this point just now. Perhaps if we can go to paragraph 26 of your summary. You refer to the

evidence of Penitito, or I think it's a comment to Preece initially, and then he gives different evidence at the trial of Kereopa, but his comment was that he was carrying Mokomoko's rope and Mokomoko had really less to do with the murder than Wipiha. Now, that in itself is not necessarily a clear statement that Mokomoko was not involved or, say a party, which if you're a party to an offence you can be convicted of the same offence. Nor is it a clear statement that Mokomoko did not have the rope at some point, is it?

Dr Gilling Your first couple of points I'm happy to concede those. As to your last point, that Mokomoko never had the rope, well, I suppose I would have to agree with you, but a statement such as that, just sort of implicitly excludes Mokomoko, I would have thought. It is not final, I agree with you, but as it's phrased, I would have thought that that implicitly excludes Mokomoko.

Kerr Well, going on to the evidence he called, he gave at Kereopa's trial, he identified that Mokomoko was the chief at Opotiki and that he agreed to give Volkner up to Kereopa. And I think you identify earlier in your report that Mokomoko sent for Kereopa on the arrival of the ship with the missionary involved on board. Those statements in themselves indicate that Mokomoko may have been a party to the offence.

Dr Gilling They do, but what they don't tell us is anything about why or, you know, what, for example, whether he was under duress or, and whether he was merely supplying information or what have you. But, they do indicate that he had some other role as well, quite apart from whether he was carrying ropes.

Kerr Yes.

Dr Gilling They also, it also indicates the position of Mokomoko within Whakatohea too, sort of highlights just how senior the man was.

Kerr Yes it does.

Dr Gilling In fact, my understanding, I'm not quite sure where I got it from now, but my understanding was that by this stage he was probably Whakatohea's senior chief, particularly after the death of Aporatanga.

Kerr Yes. Now turning to page 62 of your report in section 3. You're referring, I think, to Wiremu Kingi indicating, this is mid-1865, it's after the Volkner murder, you're indicating that Kingi does not object to soldiers coming to Opotiki as they will not take land the same as at Waikato but merely intend to arrest the murderers who have brought evil to this district. You go on to say that if the Government had an understanding of this attitude, it would have made political and military sense to assume control under the guise of catching the killers and then only to make clear its intentions to acquire more land. When you read that Kingi statement, doesn't it suggest more that the position that the Government had been explaining prior to the proclamations are not some sort of Machiavellian design to get land at even that point in time?

- Dr Gilling Well, this is, the statement is made by Dr Agassis, or whatever his name is.
- Kerr Yes.
- Dr Gilling A day before those instructions are given to Mannerling.
- Kerr Yes.
- Dr Gilling So, it's not the implementing of that sort of policy. Wiremu Kingi is Ngai Tai as I understand. And he might well not object to people coming to Opotiki for that reason alone. He remained a fairly staunch supporter of the Crown, but also keen on law and order, I think.
- Kerr You say it's a day before the instructions came to ...
- Dr Gilling No, no, it's, you see the statement is made on the 21<sup>st</sup> of August.
- Kerr Yes.
- Dr Gilling Yet, those instructions were given by the Native Minister to be sent to Fitzgerald, weren't they, dated the 22<sup>nd</sup> of August, so they're being issued in Wellington a day after Dr Agassis is reporting Wiremu Kingi's pre-existing attitude.
- Kerr They're remarkably similar to the Government's instructions, aren't they?
- Dr Gilling Well, it's something that would, I think, have been acceptable to, you know, quite a number of Maori, particularly ones that weren't "in rebellion". They would have seen it as probably being fair to arrest the murderers.
- Kerr Is this the period, it's August also that the military people come up and do a bit of reconnaissance in this area. Do you think maybe they too are passing, giving out those indications?
- Dr Gilling That quote that, the Mair quote commenting about, well, I don't know. Mair's sort of opinion seems to be that they're threatening to bring hellfire and brimstone to the region. He doesn't think it's a good idea. I think Brassey appears to be a hard drinking, hard fighting professional soldier and, you know, he may not have been the best person to put in charge of an expedition like this.
- Kerr Well, perhaps we can look at the instructions to Brassey, which I think start on about page 68, you review them. The instructions from Atkinson, they have the elements you've drawn attention to. The first is that they should try to seize the murderers, but the second seems to be that if they're attacked, they can act according to their best judgment, and then the third is, if you succeed in landing and establish yourself without opposition, you'll at once summon the tribe to surrender the murderers within a given time. If they do so, you will abstain from all active operations and await further orders from me. Now, though he may contemplate that he is going to meet opposition, these at least are the

instructions that he and his officers are operating under at that time. Do you agree, there's, it's very clear elements?

Dr Gilling Those are their instructions, yes.

Kerr Just in the prior pages, there's a point I'd like to pick up. It's, again, more of a question of clarification. I think at the bottom of page 66 you make the observation is that these troops were not regulars, they were volunteer units comprising of military settlers and you suggest that may have affected the manner of their fighting. The question I'd like to ask is whether there is any particular relationship between these groups going in to fight in an area, or being available to do that, and the expectation that they will be given land in that particular area as a result.

Dr Gilling Some of them were. One of Stapp's letters, I think it is, comments on the officers that are being drawn with him from Taranaki and he says that a number of them have relinquished their Taranaki lands and the expectation of their being given, presumably, lands on the East Coast in lieu.

Kerr Would it necessarily be on the East Coast? Some of these people, I think, got lands in the South Island, didn't they?

Dr Gilling If you say so. I have no idea if that occurred.

Kerr Yeah, I'm just trying to test whether there was any, sort of, clear instruction or expectation prior to the expedition that this would occur, that they would get land in the Opotiki area. This is an area of, you know, there's not very much evidence.

Dr Gilling My understanding also was that the Waikato Militia were pulled out of there under St John because there wasn't enough land available for them in Waikato and that they were definitely going to get lands in the new area.

Kerr Is that Turanga?

Dr Gilling In the eastern Bay of Plenty generally.

Kerr Turanga, I mean Tauranga, or?

Dr Gilling Whakatane, Opotiki.

Kerr That observation of mine is conjecture. I mean, I'm happy to admit that that's conjecture. It's also, of course, happening at a time when the Government has become very disenchanted with the Imperial Forces, General Cameron has, sort of, basically withdrawn himself from active service, maybe even left the country by this stage, because he'd fallen out with the Government.

Kerr And his successor wasn't releasing the, was it General Shute, not releasing the troops.

- Dr Gilling            General Shute, I don't think, would have arrived quite by then. I think there was a gap between the two of them.
- Kerr                    Right. At this part of your report, you're indicating that there is a sense that the whole Whakatohea iwi are generally assumed to bear some responsibility. I'd just like to query with you whether that can be the case at this stage, or whether this is an overall conclusion you draw because of subsequent events.
- Dr Gilling            Sorry, I'm not quite sure, conclusion about what exactly?
- Kerr                    About Whakatohea being considered to assume responsibility for the events, the Volkner murder I presume you mean at this stage.
- Dr Gilling            Yes. Well, the reports have come out right from the, sort of, earliest days about how, I mean, it wasn't just the hanging and it wasn't just Kereopa eating the eyes, but then there was the various other, you know, the bodily mutilation, blood drinking, the two or three different accounts of what happened with the blood and so on, which clearly involved a, you know, some number of the tribe as well.
- Kerr                    But I wonder whether you can extrapolate from the Government's actions at this point, they seem to be taking steps, or they've taken several steps through March, May, June, July with Fulloon to attempt to apprehend people and not to inflame the situation, in the hope that they can avoid ...
- Dr Gilling            There is the one that, the raid by the *Eclipse*.
- Kerr                    Yes.
- Dr Gilling            To try and catch somebody, I forget who. Whether they were actually after Kereopa or what, I'm not sure, I don't remember.
- Kerr                    Yes. That was in March, and ...
- Dr Gilling            Well, the *Eclipse* comes twice.
- Kerr                    Yes.
- Dr Gilling            They come first and manage to rescue Grace.
- Kerr                    Yes.
- Dr Gilling            And then they come back about May, I think, on a more, of what you'd call a raid, I guess.
- Kerr                    But their instructions weren't to initiate hostilities or to avoid them.
- Dr Gilling            No, they weren't to sort of sit off in the bay and shell Opotiki or something. Yes. That's right, they were actually trying to capture somebody.
- Kerr                    So, they'd had some quite considerable lack of success at that and that is the point when an expedition is raised to take a stronger line.

- Dr Gilling Well, there are two issues there, I think. One is they presumably had concluded that some little, small-scale raid like that was not going to, you know, was not going to be working very well. The other one is, of course, they don't have that many men available. Brassey doesn't get back until September, because he's besieged at Pikiriki with a large portion of his force. They, once the Imperial soldiers, the thousands of Imperial soldiers are taken out of the equation, the Colonial Government is then reduced to operating with hundreds instead. And, you know, their resources to conduct any sort of operation are severely limited. So, I'm not sure that it's a policy decision so much as something that's forced upon them by necessity, you know, this sort of six or eight month hiatus. And just on the previous point, down on page 67 there.
- Kerr Yes.
- Dr Gilling The second to last paragraph, in addition to Stapp, several more junior officers, and they're listed there, were taken from the Taranaki Militia. Theirs were permanent postings. They lost their land entitlements on the West Coast. Now, re-reading that, that's one of the passages I had in mind when making the comment you referred to.
- Kerr Yes, yes.
- Dr Gilling What I'm now not sure about is whether that means that they were actually given permanent posting as in like, instead of being military settlers they were proper soldiers of some description.
- Kerr Right, right.
- Dr Gilling But that's what I, that's the sort of thing I had in mind when I was writing it.
- Kerr Okay. Moving onto this period after the land, I'm referring to the reports on pages 73, I think, and 74. You refer to the Stokes(?) report.
- Dr Gilling It's a letter.
- Kerr Oh, letter, about Maori in the surrounding country being sent to him to ask for terms, and then you also, I think, refer a little later on to the report to Brassey which you think probably relates to the, to similar events, I think, on page 74.
- Dr Gilling Yes.
- Kerr Now, that's 14 September. It's after the Opotiki landing and the *Huntress* landing. It's three days after and you have here a request from Apanui and Kapa Toihou asking if Kereopa and the murderers of Mr Volkner had given up. The tribe forsake the Hauhau faith and return to their allegiance what treatment would they receive? Now you've, I think, read these as Maori taking the initiative without any context. I wonder whether it's also possible to regard these terms as ones that perhaps have been conveyed to them in some form and they're coming back to clarify what's expected of

- them. This is the situation where I think Fulloon's (inaudible) is used as the messenger.
- Dr Gilling She's not only, well I assume that she is also the Arawa woman referred to over on page 75, who is also a cousin of Hera Te Poho, who is again one of the Whakatohea chiefs.
- Kerr Yes.
- Dr Gilling So she's well connected and well placed to ...
- Kerr To be a messenger.
- Dr Gilling ... a messenger, a conduit, yes.
- Kerr Yes. I'm just wondering whether this is the period when the terms are conveyed formally and there's a period of negotiation going on.
- Dr Gilling Well, clearly the terms are conveyed in, subsequent to this contact being, the letter being brought by the woman.
- Kerr On the 17<sup>th</sup>?
- Dr Gilling Well, maybe a day or two, well, yes. Your question though is whether her letter is in fact a response to something prior.
- Kerr That's right.
- Dr Gilling I've seen no indication of that. I would have thought that Brassey, in his report, would have said something about it, if there had been. It's an example of the sort of thing that I was suggesting perhaps could have been happening in the intervening six months, where, and the nearest they get to it is the abortive message to Mannering, where they could have used some of the contacts, the Civil Commissioners, for example, could have used some of the contacts prior to this landing taking place. Of, you know, making use, you know, a proactive Government position, as opposed to an abortive raid or two earlier on, military raid and then jumping straight to the full-fledged military assault.
- Kerr Well, that certainly seems to occur in these few days, but I wonder whether, given the experience of Fulloon and others, whether the Government or the Civil Commissioners would have felt able to send people in on that basis without some sort of support.
- Dr Gilling Well, Fulloon's situation, I think, is quite unique. What happens to him? He's definitely breaking a particular aukati and the events, even the events that took place on his boat, are very confused. So, I mean, it's perhaps possible that the Government saw what happens to him in early June.
- Kerr July.
- Dr Gilling July, and decided to take no further steps in this, you know, not to pursue that sort of approach. But, they had, I would have thought, plenty of other ways of doing it, rather than sending him in, as a commissioned officer, as

well as his other, his Maori connections, and avoiding also the problems that he had with regard to the unique circumstances at Whakatane at that time.

- Kerr                    I think you suggest Ngati Awa may have been used in this way. But Ngati Awa seemed to, or some groups within Ngati Awa, seemed to be prepared to join with a military force but don't seem to wish to be utilised in this way.
- Dr Gilling            Well, after Fulloon's death all bets are off with regard to Ngati Awa as well. Because you then have the Arawa contingent led by Mair assaulting them and so how Ngati Awa are going to respond in any situation is problematic. You know, getting Government access to them is very difficult if, I mean, they're being chased through the swamps by a military force.
- Kerr                    Right.
- Dr Gilling            A lot of them.
- Kerr                    Okay.
- Dr Gilling            There are plenty of other connections. You know, there's connections from the East Coast side. There's connections from Ngai Tai, Whanau Apanui. There must have been ways of accessing Whakatohea, other than Ngati Awa.
- Kerr                    Okay. I'd like to take you to a little bit later in this sequence of events. I'd like to clarify, I think at pages 85-86, I think on these pages you've identified a report from McDonnell to Stapp of the 12<sup>th</sup> of October 1865 where he reported a conversation with Wipiha at Whakatane, saying that no more land would be confiscated. And then you've pointed to the Holt direction, I think, to the Officer Commanding at Opotiki that reprimands him for this statement and I think on a couple of occasions McDonnell provides these terms and, as you've identified, Whakatohea come in on the basis of the terms. What I'm interested in is that the term seem very, very similar to the proclamation terms in September and August – the Government's terms in August – and McDonnell seems to be almost repeating these to the letter. I'm wondering if you've identified what was the intervening event that meant that Holt, in November, should say that wasn't the appropriate course of action to take in this case.
- Dr Gilling            I think one of the key things was that McDonnell had no authority to make any substantial offers. He's not the commanding officer, Stapp is by now because Stapp has arrested Brassey for drunkenness.
- Kerr                    Well, Stapp seems to just be reporting what McDonnell has done. Does he seem to challenge what he's done?
- Dr Gilling            Stapp?
- Kerr                    Stapp, yeah, when he reports it.

- Dr Gilling I don't have any record of him doing so.
- Kerr No, no, they just seem to get forwarded on to the Government, don't they?
- Dr Gilling That's right.
- Kerr There seems to be an indication that these officers are acting pursuant to instructions that are perhaps changed.
- Dr Gilling I have no indication as to whether or not they had changed at all. The issue of authority is clearly important. My reading of that would have been that that line about, if they became Queen's men that no more land would be taken from them, that the Government by this stage had in mind a definite confiscation in the Eastern Bay of Plenty and that they were reading that as McDonnell saying that there wouldn't, in fact, be any lands taken, which is something he couldn't speak for the Government.
- Kerr What I'm wondering is whether the no more land line comes from the earlier statement from the proclamation and is referring more generically to land confiscated from Maori and that there would be no more confiscations but, you know, I just wonder whether you've identified anything to indicate that a decision was already taken at this point to take land at Opotiki.
- Dr Gilling Nothing further to what's already here, and, but I was trying to explain why they reacted like that if, in fact, he was just, as you say, rehearsing what had already been written down. And that seemed to me, that sort of thing, decision seemed to me to be the most likely explanation.
- Kerr Right.
- Dr Gilling But I have no further specific information.
- Kerr Thank you. I'd like to turn now, and it's slightly out of time sequence, I'm afraid, but to paragraph 46 of your summary and you've taken us through the sequence of events, I think, with the *Huntress*, and that occurred over a three-day time period. I'd just like to look at the report of Stalker, I think it is, or Stafford, the master of the *Huntress*, describing those events. It's at Tab 12 of the document bank. This is one of the primary pieces of evidence as to the events through the 9<sup>th</sup> to the 11<sup>th</sup>, particularly in respect of the *Huntress* and what happened there. Now, he describes, I think on the second page, the, sorry Tab 12, sort of grounding, I think, the *Huntress* after the initial landing. He gets free and then the *Fresh* carries him back down. But he describes, I think, at the top part of that second page, about 10 lines down, "Where we found our ..." once they'd driven onto the bar "We found ourselves exposed for four and a half hours to an incessant fire from the rebel rifle pits on the opposite bank. All the ship's company were unhurt and only four of the troops wounded." So, that's one of the bits of evidence that indicate that there was some attack on the *Huntress*. Do you recall that?
- Dr Gilling No, I haven't seen this report before.

- Kerr Okay.
- Dr Gilling But, yes, that indicates that they were shot at, yes. It is on the second day, isn't it?
- Kerr Yes, I think it's the second, the first day, as you say, there as no activity.
- Dr Gilling What he doesn't mention is any of the other activity that Stokes, for example, has in his letter, the shooting of the single man on the riverbank and the use of the cannon against the church. He says in that first paragraph, doesn't he, he received the gun from the *Brisk* and embarked the troops, but he doesn't actually talk about them doing anything back, in this report. He's simply referring to this, you know, what happens as far as the sailors were concerned, it seems.
- Kerr Yes, so there's quite a variation in the primary sources as to what was happening.
- Dr Gilling Different people reporting different things.
- Kerr Yes.
- Dr Gilling He's concerned about the safety of the ship, I imagine.
- Kerr Yes, yes.
- Dr Gilling Yes.
- Kerr Yes. Turning to a question of clarification, this is right over in the material you've provided us on the confiscation, page 143. I think you're referring to Wilson pointing out to Fenton in October 1866.
- Dr Gilling This is half way down the page?
- Kerr Yes, that there's a large reserve already. I'm just wondering if this necessarily refers to Opape or whether it could refer to the reserves to the western side of the Whakatane River which were, I think, eventually made to Ngati Pukeko and Ngati Awa.
- Dr Gilling I've said "presumably Opape", so I have no direct indication of it.
- Kerr Okay.
- Dr Gilling And I have no further information about that.
- Kerr Thank you. I also wonder, a few pages over, on page 149, looking at the various reserves made. I think on this page, or maybe following after, you suggest that possibly that every member of Whakatohea was considered to be in rebellion because of the description of the Opape reserve. Sorry, it's 148 to 149. Is that necessarily the case? It's talking about rebels who surrendered, that the reserve was set aside for. It doesn't necessarily assume all were in rebellion.

- Dr Gilling            They're all expected to go there though, aren't they? All, was it six, hapu are supposed to go onto that reserve, and given that it's for the rebels only, the Whakatohea rebels, I would have taken from that an indication that the tribe as a whole was considered to be rebellious. I mean, it's not just for Ngati Rua, for example, it was Ngati Rua's land, originally, I think, but the other five hapu are intended to go there, apart from that handful of individual little awards. But even some of those individual awards, ultimately, are given to "known rebels", like Hera Te Kopo.
- Kerr                    I just wanted to clarify that. I had thought that certain of the hapu were clearly stated not to be in rebellion at some point, but maybe that's not ...
- Dr Gilling            I don't think so. My understanding is that all of the six were expected to go across to Opape.
- Kerr                    Okay. Thank you. Just the last area of questioning, page 153, you're talking about the confiscated lands in the Bay of Plenty district and how they're being disposed of by about mid-1873. There seems to be a large area of the 440,000 acres was either compensation or lands for surrendered rebels or given back to Arawa. I'm just wondering, the next largest quantity was the lands surrendered, and I wondered if you thought that was the area to the east of Opape, or whether that was a separate, something separate from this particular.
- Dr Gilling            It's a huge area and the only chunk that big I can think of is the wedge where they'd taken Ngai Tai's lands by mistake.
- Kerr                    Yes, right.
- Dr Gilling            Yes.
- Kerr                    And was there further land at the east that was, that's what we're talking about when ...
- Dr Gilling            My understanding, from memory, is that you have the wedge of Ngai Tai lands that was surrendered, and then there's the Opape reserve.
- Kerr                    And what about the area north, was that relinquished at some point, north of the Ngai Tai, or it's just the Ngai Tai wedge?
- Dr Gilling            Well, the confiscation was coming up on an angle. The bay comes across like that and the confiscation was coming up and, so you end up with a wedge being given, being returned.
- Kerr                    Okay.
- Dr Gilling            Which is, you know, Ngai Tai's land.
- Kerr                    And at this point in time there's very little of the land is sold, about 98 acres. Only 500 to surrendered Urewera and this balance of 56,000 acres, do you know what happened to that land in the end or whether these category status ...

Dr Gilling        If it's not in this report, I don't know what happened to it. No, sorry.

Kerr                Thank you Dr Gilling. No further questions.

**Peter Andrew cross-examines Dr Ewan Johnston**

Andrew            Kia ora Dr Johnston. My first question relates to paragraph 15 of your summary, page 6. You're dealing here with the Mokomoko trial. You say there, at the top of page 6, third line, that the jury gave its verdict the following day. Did the jury retire overnight? In other words, did the Judge sum up on the previous day and the jury retire and return the next day with its verdict? Is that what you're saying?

r Johnston        That's what I understand from what I've written here. I could look into my report to see if I have any more information on that, if you'd like.

Andrew            Well, my next question to you was going to be, is it possible to deduce from the newspaper coverage of the trial how long in fact it took, or it occurred?

Dr Johnston      How long the trial took?

Andrew            Yes.

Dr Johnston      Not in terms of hours. The only indication I have is that the trial was concluded in one day. Although it looks as if, from what I've stated here, that the jury gave its verdict the following day. I'm not sure where that break was before the jury left to reach its decision.

Andrew            Have you tried to estimate the duration of the trial, the length of the trial, on the basis of the newspaper reports?

Dr Johnston      No I haven't.

Andrew            It seems like there was a grand jury empanelled. Do you know when, at what stage of the process the jury was empanelled?

Dr Johnston      I can't recall from the top of my head.

Andrew            Is that a matter you have particularly looked at?

Dr Johnston      I don't think it's mentioned in my report.

Andrew            Can we go now please to your main report, it's document #A14, and I'm turning now to the events of more recent history, the Hiwarau, or Hokianga blocks. Could you turn please to page 56 of your main report, #A14? And you say there at paragraph 4.3 that in November 1874 the grants of Hiwarau and Hokianga Island were *Gazetted*, and your footnote 185 says it's unclear whether or not an actual grant was issued. You see that at the bottom of the page?

Dr Johnston      Yes.

- Andrew            If that is so, what is the document you are quoting from on page 60 of your report? It's the quote essentially in the middle or towards the bottom of the page.
- Dr Johnston      That does appear to be the grant.
- Andrew            Well that was the purpose of my question. I wondered if, in light of the fact that appears to come from the grant, whether there could be any doubt about whether one was issued.
- Dr Johnston      Yes, I apologise for that lack of clarity. Although I should note that, no it does look as if a grant was issued.
- Andrew            Just focusing on the grant, those words on page 60, they don't seem to include reference to Te Upokorehe. Is there any reference to that hapu anywhere in the grant, that you recall?
- Dr Johnston      The grant was made to those people, I'm quoting here from the report, listed in the schedule of owners *Gazetted* in 1872 which I'm presuming would be those listed when the block was *Gazetted*. And those people are described as members of the Upokorehe tribe.
- Andrew            But did the grant itself use those words? Do you know, Te Upokorehe tribe or hapu.
- Dr Johnston      It didn't use those words as far as I remember.
- Andrew            Coming back to page 57 and in the top paragraph there you refer to the Hiwarau block being described as comprising 1,073 acres. You say significantly less than the about 1,500 acres described by Wilson in 1867. Just so I understand your figures, if you look at the figure 7 over on page 61, the block as surveyed was 1,321 acres and 61 acres was taken off for the road reserve and those two small allotments, is that right, leaving 1,260?
- Dr Johnston      That's right. There's a certain amount of slippage in the figures used at that earlier stage.
- Andrew            Can you turn please now to page 69? And you're dealing here with the issue of succession and partition applications for the Hiwarau block and you address the issue of whether those who were not descended from Te Upokorehe were in fact included in the grant. And you quote on page 69 from Judge Scannell, in the Native Land Court in 1879. Are you saying, with respect to that ruling from the Native Land Court, that Judge Scannell should have dismissed that succession application at that time?
- Dr Johnston      Sorry, could you repeat that question?
- Andrew            I'm focusing on the quote at the top of page 69 from Judge Scannell in 1879. Have you got that?
- Dr Johnston      Yes.

- Andrew And that he was dealing there with a succession application, as I understand it, and the application was granted. Correct?
- Dr Johnston Yes.
- Andrew My question is, are you critical of that decision of Judge Scannell, granting the application?
- Dr Johnston From what I've written here, I don't appear to be making a comment either way.
- Andrew It appears from your narrative that over the years from 1895 there have been a number of occasions when this issue of the inclusion of non-Upokorehe has been addressed. Is that correct?
- Dr Johnston Yes.
- Andrew Is this, and on each occasion the courts or the Native Affairs Committee as the case may be have essentially rejected the petitions and applications, haven't they?
- Dr Johnston Yes they have rejected them.
- Andrew Is this not some recognition that the term Te Upokorehe was a loose or a term for a loose grouping of Maori with some connection with the area in question?
- Dr Johnston That was the conclusion made at various times.
- Andrew Is that a conclusion that you challenge?
- Dr Johnston I'm not sure if I challenge it in my report. I think I just record that it was challenged.
- Andrew Could you turn now please to page 75, this is at paragraph 5.4 of your report, #A14, where you deal with the issue of partition and fragmentation of Hiwarau and you refer, in the second paragraph under that heading, 5.4, to the Tribunal claim or a letter to the Tribunal in December 1992, with the contention there that the acreage in the block has been drastically reduced to 800 acres. If you look at your, just hold that page open, but look at your conclusion, or it's the, sorry the paragraph just before your conclusion on page 130, and I'm referring in particular to table 5, which is a status of the Hiwarau blocks in 2001. And you give a total area there in hectares, at the bottom of the second column, of 496.4701 hectares. That seems to be a bit more than the 800 acres referred to on page 75. Do you agree with that?
- Dr Johnston Yes I do.
- Andrew Can you account for the difference?
- Dr Johnston I haven't worked out in acres or in hectares what the difference is, I don't think.

- Andrew I take it from your evidence that the table would be the more reliable figure, would it not?
- Dr Johnston That's likely to be the case, yes.
- Andrew If you turn now please to page 77 and we're still dealing with the issue of partitioning and amalgamation of the blocks. You say in the second paragraph on page 77 that over the next 60 years or so, Hiwarau A and B were subsequently partitioned into some 30 individual blocks. It appears that it wasn't sales that were driving those partitions, is that correct?
- Dr Johnston Generally yes, that's correct.
- Andrew Were the partitions along whanau lines?
- Dr Johnston I don't recall at this stage, but that might well be the case.
- Andrew Is that a matter that you have asked yourself, or particularly addressed, whether the partitions are being made along whanau lines?
- Dr Johnston I don't think it's something that is looked at in this report.
- Andrew Have you addressed the issue of whether or not the partitions are being driven by those owners who are not regarded as Upokorehe?
- Dr Johnston Not that I remember, no.
- Andrew Can you turn please to page 80? You refer there, in the middle of the page, to the Maori Affairs Amendment Act 1967 and the Maori Trustee's powers of compulsory acquisition or conversion of uneconomic interests. Did those powers apply to the Hiwarau or Hokianga blocks?
- Dr Johnston I'm not sure if those powers were directly used in the decision to amalgamate the Hiwarau block, but the Hiwarau block was amalgamated in 1969, two years after this, the Maori Trustee was given these powers, so it's, in many ways showing the kind of thinking that was happening at that time, with regard to this sort of land.
- Andrew So you're using it more as context, rather than saying that the particular powers applied here. Is that correct?
- Dr Johnston Yes, that's right.
- Andrew Can you come, please, to page 91 now? And you're dealing with the Hiwarau amalgamation hearings in 1969 and you say there, second sentence under paragraph 5.5.5 that with the exception of those owners who objected to the amalgamation of their partition blocks, there appears to be little evidence to show either the attendance or participation of Hiwarau owners in any significant numbers in the amalgamation hearings. Has there been, or is there any evidence of protest about a lack of notice or awareness of the amalgamation hearing taking place?
- Dr Johnston I can't find the exact reference, but I think it's noted somewhere in the report that at a later stage a comment was made that if people had known

- more about, or had known that some blocks weren't going to be included in the amalgamation, then they might have thought differently about it.
- Savage            There's a litigation that arose from other amalgamation orders at this time, would not one be looking for evidence that there was notice, rather than that there wasn't?
- Dr Johnston      Well, possibly.
- Andrew            I want to come now please to the issue of the Maori Trustee and the leases of the Hiwarau blocks. The Maori Trustee originally executed two leases, is that right, with Renee DeLorre?
- Dr Johnston      Yes, there were two leases.
- Andrew            And Mr DeLorre had a separate lease directly with the owners of Hiwarau A11 didn't he? It seems to be apparent from table 4 on page 93.
- Dr Johnston      That's correct.
- Andrew            And then in 1981 the owners of Hiwarau C agreed to form a trust, didn't they? The Hiwarau Lands Trust.
- Dr Johnston      Yes, that's right.
- Andrew            And the Maori Trustee was retained at that time as the responsible Trustee, wasn't he?
- Dr Johnston      Yes.
- Andrew            Isn't it the case that between then and Mr DeLorre's death in 1985 that the Maori Trustee attempted to settle this dispute about the rent arrears out of court?
- Dr Johnston      Yes, that's right.
- Andrew            And then in 1985 the rent was reviewed and substantially increased, wasn't it?
- Dr Johnston      Yes.
- Andrew            Wasn't that, or the intention at that time, that it was hoped that this would force the lessees to vacate the lease?
- Dr Johnston      I think that was the intention. But it was also, I think, when the leases were scheduled to be re-evaluated.
- Andrew            In 1992 the Maori Trustee obtained a judgment for the rent arrears in the Opotiki District Court, didn't he?
- Dr Johnston      Could you please refer me to a page?
- Andrew            Page 111. It's just the paragraph before 6.7.

- Dr Johnston Yes, that's right.
- Andrew And then you say there the Maori Trustee requested that a bankruptcy notice be issued against Peter DeLorre. Was it shortly after this that the Maori Trustee was replaced?
- Dr Johnston Sorry, I just can't find the precise date when the Maori Trustee was replaced.
- Andrew It was that year though, was it not, 1992?
- Dr Johnston As far as I remember, yes.
- Male(?) Inaudible.
- Andrew Right, thank you. You then refer, on pages 114 and 115, to the litigation in the Rotorua High Court and the subsequent settlement. I presume that the plaintiffs to the High Court action were legally represented? Is that correct?
- Dr Johnston I presume so, yes.
- Andrew Do you know if they had legal aid for that High Court proceeding?
- Dr Johnston I'm not sure.
- Andrew Have you looked at the Deed of Settlement itself for the settlement of that litigation?
- Dr Johnston No I haven't.
- Andrew Okay. Thank you Dr Johnston, those are my questions.

#### **Annsey Kerr cross-examines Craig Coxhead**

- Kerr Thank you Mr Coxhead. I've just got a few questions, mainly on your article. If you could turn to page 48 of the article, attachment A. There you identify some of the reasons in summary to support Mokomoko's innocence. And would you agree that they range between procedural, issues of procedural fairness, and actual content of evidence?
- Coxhead Yes.
- Kerr Going to the second head, one solicitor acted for all four accused. Is it correct that even today, one solicitor could act for all four accused, in a situation where there were was not conflict between their cases?
- Coxhead If there was no conflict, yes that could happen.
- Kerr And you've noted that there was only a one-day hearing. Now, there's been some discussion about that today and perhaps I can raise with you, you may recollect from Professor Boast's work, but my understanding was that the people accused were committed to trial in Auckland on the 27<sup>th</sup> of March, 1866, that the evidence was called mainly during the 28<sup>th</sup>

of March and that closing submissions and the Judge's summing up occurred in the morning of the 29<sup>th</sup> of March with the jury retiring at approximately 1.15 to 4 o'clock on that day. Wasn't the point Professor Boast was making was that the majority of evidence occurred on only one day in the trial?

- Coxhead From his letter, which is taken in Earl Howe's book, he says the actual length of the hearing was brief, in effect, one day.
- Kerr In effect, one day. If I can refer everyone to page 39 of Johnston, here, it's there that he identifies that the prisoners were committed to trial on the 27<sup>th</sup> of March - 39 of his main report - and then the, sorry, it's the second paragraph, following the *prima facie* case being established on the 12<sup>th</sup> of March. The accused were committed to stand trial on the 27<sup>th</sup> of March. Then, the date for the summing up and the retiring of the jury appears from Dr Battersby's evidence, from pages 92 to 93, he refers to the newspaper reports of the 30<sup>th</sup> of March 1866, which presumably refer to the previous day. In any event ...
- Coxhead Sorry, what's the question?
- Kerr I'm just going through what I understand and clarifying with you, have you looked to see how long the trial actually took? Looked closely at the evidence?
- Coxhead No I hadn't, I'd based my conclusions on that of Professor Boast who, I understand, read them off the trial record, but those notes from the Judge.
- Kerr Thank you. And I referred this morning to the Criminal Evidence Act 1889. We'll make submissions on that, as invited by the Judge, but that is the piece of legislation for counsel that I understand introduces the right to call an accused to provide, or his wife, to provide evidence on their own behalf. In your final paragraph of your evidence, you refer to the waiata sung in prison by Mokomoko. Is that the same waiata that was brought back to the people by Tiwai?
- Coxhead I do not know. Mani Mokomoko and others of his family would be able to explain that.
- Kerr Okay. Thank you. I just wonder about the translation of the point about the Governor in that. Can you comment, I've seen another translation which indicates that he is saying with the passing of time and the Governor in Europe, they decided that I must hang. I'm not an expert, I wonder if you have any comment on that waiata.
- Coxhead I'd rather leave that to the family to comment on.
- Kerr Sure, sure. Back to your article, you've discussed the effect of s 407 of the Crimes Act being that where a convicted person has been granted a free pardon in New Zealand effectively he's considered innocent. He's deemed to be innocent and you've raised some issues about the Court of Appeal discussion in the *Thomas* case. The second quote on that page ...

Male Which page is it?

Kerr Oh, page 50 of the article. They state that "Where a convicted person has been granted a free pardon in New Zealand it can no longer be said that the pardon may imply the executive accepts that he committed the offence but is forgiving him." Isn't the issue here the point that deemed innocence is exactly that, under s 407? That pardon, even though it's termed a free pardon, isn't simply saying "oh, you committed it but we pardon you", it's deeming you to be innocent.

Coxhead Yes, that's the legal effect.

Kerr And, in your opinion, is the legal effect of that the closest approximation we would have to the statutory statement which the whanau is so keen to have of the innocence of Mokomoko because it's deemed that an offence has never occurred at all?

Coxhead It's deemed that he did not commit the offence. Sorry, ...

Kerr I'm just saying, is it the closest, in terms of pardons and, you know, there's various mechanisms, is it the closest you could have to that statutory wording?

Coxhead The pardon itself, yes, but like I say, the phraseology of what was actually presented to the Mokomoko whanau, as was presented by Mr Clarke, is a little inconsistent with Te Runanganui O Ngati Awa Act 1998, where it was specifically said that it restored their character, mana and reputation, whereas in the Mokomoko case, either the Governor-General therefore, upon reading the advice, and whereas it appears to me just as expedient that a pardon should also be granted to Mokomoko, I suppose that phraseology needs, doesn't quite match what's been put in statute.

Kerr But the effect of the s 407 deems him innocent?

Coxhead Yes, yes.

Kerr Thank you. I have no further questions.

**Annette Sykes cross-examines Craig Coxhead**

Sykes Sir, can I just ask one question? If I can take you to page 67 of the article, sorry, there's a Cabinet paper that you talk there, refers to. It seems to suggest that it was in the context of Treaty claims, there's to be a different approach to the question of acquittal, pardon and innocence. It's an implied inference I've taken from that paragraph. Was that in fact what the paper said?

Coxhead The paper specifically was about compensating those who had been wrongly convicted and, in particular, it set out the criteria that was finally adopted by Cabinet and when, it was one paragraph that a point of clarification that this, as it says there, this does not apply in cases where there are claims before the Waitangi Tribunal for people who've been pardoned.

- Sykes Did you explore that further because on the face of it, it would, and this is the concern to my clients seem that there's one standard of acquittal for people who have been wrongful hung and murdered as a consequence of Crown action and another standard of acquittal for those people who were brought to justice before the normal criminal justice system. And it is of concern to us that there does seem to be that distinction.
- Coxhead There certainly appears to be an inconsistency in the application of the policy.
- Sykes Just so that we can clarify it, the policy was a policy paper developed by Cabinet, for Cabinet?
- Coxhead For Cabinet.
- Sykes From which Department?
- Coxhead I'm not sure because it was undated. It was a paper that I obtained under the Official Information Act from the Ministry of Justice.
- Sykes I see it's in respect of the high profile David Dougherty case, which was a quite different case, but involved quite serious allegations of sexual violation. Are you able to tell us what he got in compensation as a consequence of his pursuit for justice?
- Coxhead Yes I am, it's at footnote 6 of the article. Granted \$868,728 in compensation in July 2001.
- Sykes How many days in jail did David Dougherty stay, do you know?
- Coxhead I don't off the top of my head, but I think I do refer to it in the article somewhere. It think it's in a footnote somewhere in the article.
- Sykes Do you believe that the distinction on – I'd like to explore why this distinction in this Cabinet paper arises. Is it because there is a fiscal envelope policy in place with respect to Treaty settlements and compensation on Treaty claims?
- Coxhead I can't say, from the document itself, like I say, it was one paragraph. It seemed to be like, just in isolation saying remember there's somebody whose granted a pardon also has a statutory, who also has a claim before the Waitangi Tribunal, they do not come under this criteria. So, I don't know.
- Sykes In your paper, you explore very much the context of relief or remedy or ke whakatikatika te hara, from a very western legal framework. Did you explore at all the concept of justice, ke whakawatea te hara, if I could use that phrase, as a construct that may need to be developed in the context of Treaty claims, given the kinds of atrocities that occurred?
- Coxhead No I didn't, no I didn't.

- Sykes Do you believe that that kind of approach is consistent with Treaty principle?
- Coxhead I think it's consistent with Maori principles. I mean, I haven't addressed that in my article or anything, but at present I don't think it's consistent with the Treaty principles that have been put forward.
- Sykes I'd like to explore with you distinguished Maori principle from Treaty principle. If we assume, because I don't want to explore that the Treaty affirmed Maori principle, what would be the Maori principle which would be the basis for justice for the wrongful execution of an individual?
- Coxhead I think that's a tikanga question which I'm probably a bit out of my depth to answer, but just to clarify, what I was saying, I think what you said is consistent in terms of Maori tikanga, but the Crown principles of the Treaty, they don't, I suppose they're not consistent with those.
- Sykes What particular Treaty principle are you saying they're inconsistent with?
- Coxhead I think the remedy that you were talking about how could there be a Maori remedy for this situation? And is there a – I'm not talking about, you know, is there Crown policy, Treaty policy which will allow that Maori remedy – I don't think there is.
- Sykes Do you think that a recommendation in this hearing may be the kind of remedy that would be appropriate, given the enormity of this particular atrocity?
- Coxhead I think that's a question for the whanau, whether they are willing to accept that it is some way towards, or I don't know if it could ever be considered to be a final remedy or a final satisfactory conclusion to the execution of their tupuna, but maybe there's something for Mani, Mr Mokomoko and others to answer whether they consider it to be some way along, a recommendation from this Tribunal to be some way along towards getting a final closure to this issue.
- Sykes I don't want to labour the point because my friend, Ms Kerr, seemed to suggest that because you have a pardon, you've achieved justice and it's really in the context of the Treaty, is that necessarily so?
- Coxhead No.
- Sykes Thank you. I've no further questions.

**Ann Parsonson questions Craig Coxhead**

- Parsonson Just referring very briefly to your article, where you give some of the reasons to support Mokomoko's innocence, and one of them you mention is that no evidence was called on behalf of the defence. I'm just wondering whether, in your view, are you familiar with other murder trials around this period where no evidence was called for the defence? Is this usual or unusual?

- Coxhead I think it's an issue that the Crown is going to clarify, in terms of the Act that they referred to. But I'm not aware of any other instances like that. Would I be right in saying that, sorry?
- Kerr It's a question I would have to ask too. I don't know what the practice was at the time, and I'm not sure if this witness has undertaken a comparative study of other criminal trials.
- Coxhead I haven't.
- Parsonson Thank you.

**Joanne Morris questions Craig Coxhead**

- Morris Just one question Mr Coxhead, I noticed that at different times in your article, and I think in the Crown's questions, you refer to a full pardon versus a free pardon, and the way it's used I've understood that a full pardon is one that's achieved by statute and a free pardon, perhaps, by exercise of the Royal Prerogative. Is that correct? And if not, what else is the difference between those two things?
- Coxhead That's my understanding of it, that a full pardon there is statutory recognition.
- Morris And a free pardon is from the Governor-General by exercise of Royal Prerogative? Perhaps Crown Counsel could confirm that.
- Kerr The free pardon is that, I'm not sure about the full pardon.
- Morris You talked about a full pardon in conjunction with the Ngati Awa settlement pardon. That's how it's described, perhaps, by Mr Coxhead.
- Kerr Yes, that's right.
- Morris Is there any other difference between the two things?
- Kerr Well, a full pardon, I think, assumes guilt, but people are being pardoned for it. There's a distinction between various types of pardon and there's pardons with certain requirements on the person who's pardoned. There's a variety and then in the Ngati Awa case, there is a statutory statement.
- Coxhead Yes, I did look at it in Adams and, but it slips my memory now. I just looked at this as being a full pardon and therefore redeeming.
- Kerr No, it's a free pardon.
- Coxhead Not to have committed the ...
- Kerr Yes.
- Morris So, Mokomoko's pardon is different in quality from the Ngati Awa settlement pardon?

- Kerr                   What I'm saying is that in terms of getting the Governor-General to pardon, the effect of it is to deem innocence. The free pardon is to deem innocence, or to deem that this offence never occurred. But in the Ngati Awa case there is a statement of restoration of mana and those sorts of things.
- Morris                 Yes, I know that.
- Kerr                   And that's the sort of thing you can put in a statutory instrument. But, in this case, you're using free pardon process.
- Coxhead               It's not as if the effects never occurred, it's a deeming that the accused ...
- Kerr                   Did not commit ...
- Coxhead               ... prisoner did not commit the offence.
- Kerr                   That's right, yes, yes. That's correct.
- Morris                 Well, I'm still not sure about the full pardon, I'd have to say. You said a full pardon assumes guilt and yet it's said that the Ngati Awa pardon was a full pardon.
- Kerr                   I'm not – I've only focused really on the free pardon, but I know that there's several, and I'm not sure about the Ngati Awa one. We can address submissions to you on that.
- Morris                 And you can't shed any further light on that, Mr Coxhead?
- Coxhead               No.
- Morris                 Thank you.

#### **Joe Northover questions Craig Coxhead**

- Northover             Is it correct to say that having been granted the pardon, the pardon was not granted because of his innocence?
- Coxhead               Legally the effect of the pardon was to say that it was deemed that he did not commit that offence. But, if you read the pardon itself, it does infer that he was given a pardon because three others were.
- Morris                 (Inaudible) we've just said about a full pardon is true, those people were assumed to be guilty.
- Coxhead               Yes. Two of them actually admitted that they were guilty.
- Morris                 That's right, which would suggest that is a material difference between the two. Thank you.

#### **Judge Savage questions Craig Coxhead**

- Savage                 Mokomoko was deemed never to have committed that offence, therefore as a matter of logic, he was wrongly executed. Do you follow that?

- Coxhead Yes.
- Savage Now, we've heard evidence in this Tribunal of a number of people who were summarily executed without trial, which *prima facie* must be a breach of the law, wrongful execution. Why should the Mokomoko whanau be treated differently to the whanau of the other people who Ropata shot in the back of the head?
- Coxhead In my view, they should be getting just compensation and justice, just like the Mokomoko whanau as well.
- Savage So, there's no difference in principle between the Mokomoko whanau and the whanau of the other people?
- Coxhead I suppose if you get into detail, there may be some differences in terms that he was taken to trial and they weren't, and so along the spectrum, it's all bad.
- Savage There are differences of shading but there's no great difference of principle that jumps out at you?
- Coxhead No.
- Savage Thank you.

**Tuesday, 9 December 2003**

**Peter Andrew cross-examines Jeffery Sissons**

- Andrew I've indicated, Sir, in advance to my learned friend, Ms Sykes, that the witness will need access to certain other documents for the purpose of the cross-examination and it may be of some use if the Tribunal has those in front of it as well. The documents are the two Professor Binney reports, which are #A12 and #A15. That's the most important one, #A15 is of less importance. The next document which you should have readily assessable is #B21, this is the Crown document bank for this week. And the next document she may or may not have is #A24, and that's Professor Sissons' supporting document, #A24A I think.
- Female Sir, if we have access to a photocopy during an adjournment we could arrange for – provided there are not too many appendices we could arrange for that to be photocopied.
- Andrew Professor Sissons I'm going to start my questions and most of my questions are in fact based on your main report #A24. Would you turn please to page 31 of that document and in the last paragraph, second paragraph from the bottom of that page you say that Swindley by August 1873 was living in Te Waimana. I just want to clarify what you mean by Te Waimana. Was he living on land that later became part of the Waimana Block, or was it land within the confiscation blocks?
- Sissons I assumed that from my sources that it says that he was living in Waimana now so what you're wanting clarification of is where is

Waimana in this instance? Is it in the block or is it part of the confiscation land? That isn't clear from the report. Let me see – I'll just see where my source is. My assumption, and it's only an assumption from reading the report, is that it was within the Waimana Block 1A. And that's the assumption on which I've based all of my readings and that is what I would assume was meant when they said Waimana.

- Andrew           Waimana, I see. In your response to Crown questions of clarification 3.1, which was a question dealing with Tamaikoha's longer term development plans, you refer there in your answer to Mr Binney noting that in 1874 a consignment of Swindley's cattle driven from Galatea with the help of the Whakatane Police and you in your report, I think, footnote or refer to Professor Binney.
- Sissons           Yeah.
- Andrew           She footnotes a Whakatane Police Station daily diary. This is at page 290 of Binney. Binney #A12. And if you look in the Crown document bank, which is B21, have you got that?
- Sissons           I just want to find Binney's footnote first.
- Andrew           Certainly. It's Binney #A12, page 290.
- Sissons           Footnote number?
- Andrew           73.
- Sissons           73.
- Andrew           The reference is from the first paragraph on 290.
- Sissons           Yes.
- Andrew           And you've got the footnote 73?
- Sissons           Yes I have, yes.
- Andrew           If you turn then to tab 7 of the Crown document bank is that Whakatane Police Station daily diary. Have you got that?
- Sissons           Yep.
- Andrew           And you'll see there's the reference there in the right-hand column they drove about 171 head of cattle arrived here for Major Swindley.
- Sissons           Tab 7 you say?
- Andrew           Yes. #B21.
- Sissons           This reference doesn't have columns.
- Andrew           You've got rank and name on the left. #B21 is the number it's got hasn't it?

- Sissons            Okay. I see that reference there, yes.
- Andrew            Do you know why Professor Binney says that the consignment of cattle was driven with the help of the Whakatane Police?
- Sissons            I was, as you know, citing Binney's reports so I haven't actually seen this document.
- Andrew            I appreciate that.
- Sissons            So you are wanting me to comment on this document?
- Andrew            Well I'm asking you ...
- Sissons            Binney's interpretation of this document?
- Andrew            Do you know how she got to that interpretation? She said that ...
- Sissons            I'd have to sit down and study this document, but if you want me to do that I will. The point is it just looks like there's a listing of rank and name on the left. I don't know how that rank and name is linked to occurrences. She may have assumed that it was, I'm not sure.
- Andrew            It just looks like in the face of the document they are simply just noting, aren't they, that the cattle arrived?
- Sissons            Yes, well that's right. It does from this document. Yes she may have had information from other documents, I don't know, I haven't seen the whole of this diary so I just don't know enough about that source I'm sorry.
- Andrew            Thank you. Would you come now please to page 34 of your main report? You say there, the second paragraph, there were two main sources of pressure upon Tamaikoha, pushing him towards a collectively recognised lease with Swindley, and you refer firstly to the Land Purchase Commissioner at Opotiki, Wilson. You say that "Wilson had made special arrangements with Kelly to allow him to lease any Maori-owned land for cattle runs". And you go on to say that "when Kelly and Swindley formed a partnership to lease land in 1874 it was formally agreed that the Government would step in at a proper time and take such portions as may be required for its own settlers".
- Sissons            That's quoting Binney there.
- Andrew            Quoting Binney, yes. I'd like to take you please to Binney at page 298, which is what your footnote 114 refers to. You've got that at the top of page 298, Binney #A12?
- Sissons            Yes. Hang on. That's referencing a letter from Wilson to McLean.
- Andrew            Binney says, "They formally agree that while they could lease land there for cattle runs the Government will step in at the proper time". That's what you have quoted.
- Sissons            Yeah.

- Andrew Then Binney goes on to say, "This stipulation arose from the premise that the land there was held under the New Zealand Settlements Act and that the Government is the principle party to the business." Isn't Professor Binney there suggesting that the Government's stepping in applied to the confiscated blocks, not to the Waimana block?
- Sissons Yes, that's true. That's right. I thought she was referring to the land in the upper Whakatane River Valley.
- Andrew She says further down, "this particular arrangement must therefore have been intended to be imposed by the confiscated land that had been granted to Ngati Awa and Ngati Pukeko and others". It's pretty clear from that isn't it that that's her view in any event?
- Sissons A similar arrangement opted for Swindley and Kelly's partnership. Kelly's partnership formed in 1874 to lease land. She's referring here to land in the Upper Whakatane River Valley. Is that right? They formally agreed that while they could lease land there for cattle runs then the Government will step in and take land that is required". This is land in the Upper Whakatane River, that's Ruatoki as I understand it.
- Andrew But isn't the point that the ability to step in and take land applied to the confiscated lands, because the Government's got the legislative backing to do that?
- Sissons The confiscated lands, that's right, that's right. The lands in the (?) area, that's right.
- Andrew And that's not the Waimana block or the lands that become the Waimana block pursuant to the Native Land Court order, correct?
- Sissons I'm not sure. I'm not sure. I think that refers to – I would need to look at that a bit more closely but I have a feeling it refers to the Opouriao estate lands which Kelly was interested in. Now I'm not sure that they were within the confiscated land or whether they were part of the Ruatoki non-confiscated land. I would have to check that. I'm not familiar enough with that block but I thought that this was a relationship to the Opouriao lands.
- Andrew The which lands, sorry?
- Sissons Lands that were at the entrance to the Ruatoki Valley. I'm not sure if they were confiscated lands or lands that are part of the Ruatoki block.
- Andrew Okay. Just coming back to page 34 of your main report, the second paragraph there. You say that Wilson, this is the last sentence, was determined to break Tuhoe's tribal boundaries, wrote that he was watching and advising Swindley and Kelly on their operation at Te Waimana. Is it ...
- Sissons Again quoting Binney?

- Andrew Yes, again, sure. Is it Wilson saying that he was watching these two to make sure they didn't undermine his own land purchase activities or plans for the confiscated blocks?
- Sissons I'll have to look at the full context of the reference. Where is it in Binney's? You must understand I'm quoting Binney here so what we're debating is 332 of Binney, paragraph – oh here we are.
- Andrew Bottom of the page.
- Sissons Yes, okay. See I was taking it in the context of that paragraph which is with regards to Kelly and Swindley in the Eastern Bay of Plenty, Wilson claimed that he was watching and advising them on their operations at Te Waimana and Upper Whakatane. And Upper Whakatane which is why I was equating Upper Whakatane with Waimana in the earlier quote. Clearly he saw these private leases as part of an overall Government strategy to undermine the unity of Urewera leadership.
- Andrew Is it fair to say that Wilson's instructions from McLean related principally to land in the confiscated blocks?
- Sissons I don't know. I wouldn't – that's a generalisation I wouldn't want to make.
- Andrew Turn over the page please to page 35 of your report, and you refer there in the second paragraph to the Waimana hui at which Tamaikoha's lease to Swindley was denied for a second time. Now that was April '74 I think, wasn't it?
- Sissons The second hui?
- Andrew Yes. There was one at Ruatahuna in March was there not?
- Sissons Right, yes.
- Andrew And a month later at Waimana.
- Sissons Yes I know what you're meaning here is ambiguous as to whether or not there were in fact three hui or two. In my view I looked at it very closely and in my view there were two. Because I think, and the reason I'm trying to reconstruct why I came to that conclusion, and I think it's because two sets of names were referred to. One set of names was referred to in a Court case, the 1880 Court case, and another set of names was referred to in some correspondence and in fact they are one group. I have concluded they were in fact one group and that it was one lease ... a meeting, sorry one hui.
- Andrew As I understand it you and Professor Binney have a slightly different interpretation of the sequence here, don't you? She says that the payments were made after the October '74 hui at which time the Swindley lease was approved but with conditions.
- Sissons Yes. Did she say that did she?

- Andrew Yes. I can actually refer you to that if it's ...
- Sissons No, no, no, I believe you.
- Andrew Well she – it's Binney page 344, footnote 286, she expressly states that she differs
- Sissons Does she?
- Andrew from you in the interpretation of sequence.
- Sissons Right, right.
- Andrew I'm going to put to you that your interpretation is the better one.
- Sissons Thank you.
- Andrew Which is what you don't normally do in cross-examination.
- Sissons A fairly ancient form of cross-examination.
- Andrew That's what happens when you represent the Crown in the Waitangi Tribunal. You refer at footnote 118 on page 35 to a letter from Brabrant to McLean. And that letter refers to the money being paid. Now I've dated that letter. From the date of that letter you can logically deduce that the payments had already been made. Correct?
- Sissons Mmm.
- Andrew And if that letter is correct that would suggest that they were paid well before October '74. Correct?
- Sissons Let me just think. Yeah, hang on. I'll just read my paragraph to be clear. "The lease referred to by Numia and the above statement was entered into soon after the Waimana hui at which Tamaikoha ... Swindley with the knife for the second time. No doubt disappointed by the results of the hui." Yes, that's right, it was paid, I think, soon after that hui, yes, 4 August.
- Andrew Thank you. Come over the page please on the next page, at page 36. You say there in the first paragraph, "Tamaikoha was caught in the complex and rapidly shifting situation in which the need for clarity of ownership had become a matter of urgency." Wasn't one of the principle functions of the Native Land Court to provide clarity of ownership?
- Sissons Oh, that's a very debatable point. The functions of the Land Court depended on who was commenting on it. Those who designed the Land Court had probably different intentions in mind from those who were operating it. I don't know. I mean, I think ostensibly a clear title derived from the Crown was certainly an aim of the Land Court. Yes.
- Andrew See, just on this issue you're say in your summary, and this is #A24 at page 14 and you're here expressing sort of some conclusions about the Swindley lease and the Native Land Court.

- Sissons Sorry, what are we referring to now?
- Andrew Your summary, #A24 at page 14.
- Sissons At page 14 you mean the last page.
- Andrew The last page, yes. At the top there, second sentence, you say, "However the confidence of both parties in the lease would have been reduced by the presence of the Native Land Court and the ability of others not part of the agreement to bring the land in question before the Court." But surely from Swindley's perspective as least there was benefit clarity going to the Native Land Court. I mean, after all the lease was void, was it not, under the Native land laws at the time?
- Sissons I think it would be complicated for Swindley. To some extent, yes that's right, he would have clarity, but he would probably not have security of the partnership that he had been developing with Tamaikoha. He may not have had as much land available to him as a result of having to buy the land rather than to lease it. There may have well been advantages and disadvantages for Swindley in the arrangement. I think that the arrangement with Tamaikoha from Swindley's point of view would have been a secure one. My contention from my reading of the evidence.
- Andrew But the lease did survive in practise at least the Native Land Court determination didn't it? I say "in practice" at least because it's a matter of law, it was illegal prior to the Native Land Court determination.
- Sissons Sorry, it was therefore clearer, you were saying there.
- Andrew Well it survived, didn't it? It was a lease prior to this time. You say there was a lease as from about October '74, correct?
- Sissons Yes.
- Andrew And that lease survival continued beyond the date on which the Native Land Court determined ownership, correct?
- Sissons Yes, that's right, that's correct, yes, until it was partitioned.
- Andrew Or subsequently sold, yeah.
- Sissons Which was part of that process.
- Andrew You say in page 36 "Tamaikoha accepted on behalf of Te Whitu Tekau the sum of £100 from Swindley in October 1874. Was that a relatively large sum of money in those days?
- Sissons Which page are we talking about, page 36.
- Male Page 24, I take it, bottom paragraph.
- Andrew Bottom paragraph, yeah.
- Sissons I think it probably was, yes.

- Andrew Binney says on page 344 that the lease was, she says, these are her words, "finally effected in 1876". I understand you to be saying that in effect in practise there was a lease as from at least October '74, but is there any major difference between you and Professor Binney on that do you know?
- Sissons I'm not sure what she means by "effective" there.
- Andrew Okay. On the basis of your view that the lease is in effect from October '74, would you agree that it is not at all evident that Swindley was unhappy or rejected the two conditions imposed at the hui in October '74? The conditions were no Native Land Court and no survey, correct?
- Sissons That's right. Yes I don't think there's any evidence that he was unhappy with those conditions. For all we know he may have been but there's no evidence of that.
- Andrew Turn over the page please of your main report, #A24, to page 37.
- Sissons So what page now, page 37?
- Andrew 37. You'll see there after the quote in the second paragraph "Tamaikoha and other Tuhoe leaders made it clear to the Government the following year that they were not opposed to leasing some land to the Government". Does that represent a change in policy, formal change by defeated Te Whitu Tekau in favour of leasing?
- Sissons That's interesting. I don't think it does in the sense that they've already agreed to a – I think what they want is informal leases. They don't want the involvement of the Land Court, so they're not opposed to leases of the type that Tamaikoha arranged with Swindley. But they do not want ones that are done so artitiously(?), that are done not in the open, that are not done by dealing with rangatira and people who have the right to make those leases. I think that's the point that they are making.
- Andrew Was it possible that it's a recognition that the individual chiefs should have autonomy or control in their own area? In other words, it would be up to the particular relevant local chief to decide whether or not to lease his land or not.
- Sissons I don't read that from the statement, no.
- Andrew Come please to page 40 of your main report, and you're speaking here or giving here some general comments about the Native Land Court processes. And you say at the top of page 40, "The Court would not actively pursue additional information and Judges could not take their personal knowledge into account in making judgments". Wasn't it frequently the case that consensual arrangements were entered into outside the Court and the Court itself, the Judge would simply approve of those?
- Sissons Yes.

- Andrew Isn't that to a large extent what happened with respect to Waimana in 1878? That Tamaikoha was left to compile the list of owners?
- Sissons Yes, that's right, but the Court has to approve that list.
- Andrew Sure.
- Sissons And they didn't always approve lists.
- Andrew Your next comment on page 40 is in relation to the Ten Owner Rule. That didn't apply though to Waimana did it? And when the 1865 Act is well gone by the time you get to the 1878 hearing isn't it?
- Sissons Yes that's true but I think there – was it gone? When was that rule?
- Andrew '73.
- Sissons '73. That's right. I say that myself. Yes that's true so the Ten Owner did not legally apply to Waimana, that's true.
- Andrew And isn't it also correct that the Native Equitable Owners Act 1886 didn't have application?
- Sissons That's right.
- Andrew You had a rehearing in 1880 didn't you when 66 owners went on the title at that time? Correct?
- Sissons I read that to me that the – what page are we on now?
- Andrew We are still on page 40. It's just second paragraph, last two sentences.
- Sissons Second paragraph
- Andrew Sorry, it's the second paragraph. "The Government was repeatedly made aware
- Sissons of the Ten Owner Rule [voices speaking over each other]
- Andrew ... and in 1886 it was passed, yeah.
- Sissons That's right, for the readmission of excluded owners, so long as the land had not been partitioned or alienated. That's right. That's precisely what I say, that rule would not have applied because it had been partitioned in 1886.
- Andrew But there was in fact no problem here was there with exclusion of people from the title? [voices over each other]
- Sissons As I say in my answers I just don't know whether. Had there been people excluded from the title then they would not have been able to use that Act, the equitable (inaudible).

- Andrew No, but they had the opportunity with the rehearing in 1880, didn't they to remedy any injustice if they had been left off in 1878?
- Sissons Certainly in 1878, that's right. But it seems to me that there were those, because of the partitions following the 1880 hearing there were people who were unhappy, it seems to me three, and I listed three people, three leaders with the 1880 Court hearing. And I just wonder whether or not they were unable to have their names included in the title after 1880, because of the fact that it had been partitioned.
- Andrew Are you saying these petitioners were not on the title?
- Sissons The petitioners were, as far as I know, on the title, but I don't know whether they were petitioning on behalf of others. I haven't seen their petitions.
- Andrew Come now please over the page to page 41 in the issue of the survey for the Waimana block.
- Sissons Page 41?
- Andrew Yes. You say at the bottom of page 41 that Joseph Kennedy in 1877 applied for a survey and investigation of title to the land. Then you say on page 42, third paragraph down, that this application forced Tamaikoha to make a further separate application to the Court. Have you yourself seen copies of the respective applications?
- Sissons I've seen the applications which list the survey boundaries, yes, they are *Gazetted*.
- Andrew We don't dispute the *Gazette* is correct, but have you seen applications bearing a date of the application?
- Sissons I've only seen the *Gazetted* dates. The two applications which are both *Gazetted*, yes.
- Andrew The *Gazette* is actually in the Crown document bank here which I refresh your memory on this. It's tab 2. *New Zealand Gazette* of March 28 1878. The Joseph Kennedy application in the left hand column on the first page.
- Sissons Oh yes, I've seen this.
- Andrew Te Waimana. And the Eruti Tamaikoha application is over the page. 390 of the original document. Waimana Nerohiwa Opotiki in the ... (?)
- Sissons Which page is it on?
- Andrew It's the next page over, 390 of the *Gazette*.
- Sissons Okay.
- Andrew See that there?
- Sissons Yes.

- Andrew           It might be useful just to hold that document open. I'd like now to refer you to your document bank. This is Wai 894 #A24. #A24a thank you.
- Sissons           I don't have a copy of my document bank. I never received it.
- Andrew           It's going to be page 15, 13 and 15C. It should be handwritten in black, filed in the right hand column. 78 at the top.
- Sissons           What page are we dealing with?
- Andrew           It's page 13. Your page 13.
- Sissons           13 and 15.
- Andrew           Yes.
- Sissons           Okay.
- Andrew           These are the minutes aren't they from the 1880 rehearings?
- Sissons           Yes, as recorded by the Judge.
- Andrew           By the Judge, correct. And we start on page 13, it's 76 on the original, "Herewith Tamaikoha I belong to the Tuhoe tribe, I have a claim on the land before the Court".
- Sissons           I reside in the block and I have ...
- Andrew           Yes. Then, the particular piece of evidence from Tamaikoha I wish to focus on is on page 15. It's page 78 of the Judge's note. And he says there talking about the lease was Swindley. "I did not consent" – this is about five or six lines down – "consent to the lease. When I heard of it I went running, collected all the money for them and gave it back to the Pakehas". Is that correct?
- Sissons           Yep.
- Andrew           "Afterwards I agreed to lease it to Major Swindley. He gave me £100 on account". He goes on to say, "Swindley's cattle had been about one and a half years on the land". Correct?
- Sissons           Mmm.
- Andrew           "When he gave me the money". And it's the next line I'd like to focus on. He says, and correct me if I'm wrong, "It was then that I consented to the lease, the survey and the investigation". Is that what that says?
- Sissons           "It was then that I consented to the lease", yes, "the survey and the investigation". Someone came to demand the – and I don't know what that word is in the ...
- Andrew           Money is it?

- Sissons Money, yes. Rakuraku and I procured the surveyors. No-one came to interfere." That's right.
- Andrew My point is, doesn't that seem to undercut your contention that Tamaikoha was somehow forced into the Native Land Court? It looks like he's consenting to this.
- Sissons No, because I'm citing, my contention is not from here, it comes from Joseph Kennedy's own evidence when he says "I brought the land before the Native Land Court".
- Andrew Why do you prefer his evidence to what Tamaikoha also says in evidence?
- Sissons Well, because Tamaikoha's evidence, it's not clear that he was not forced. He's not saying, it was just he says, "It was then". What he's meaning is that "afterwards I consented to a survey and investigation". I didn't interpret that to mean that somehow or other after he - it didn't seem to make sense to me that after he's received the money from Swindley he is then able to put the land before the Land Court. That to me seemed to be a non-secrator(?). So I was reading that then. We're talking about a fairly lengthy period of time here and what he's saying is that it was afterwards. I read that as "afterwards I consented". So I didn't read them as in ...
- Andrew After the payment or ...
- Sissons Afterwards, yes, some time after that event I then consented to the investigation. And he may well have been persuaded. My reading of it was that he was persuaded to do so because of the reasons that I've said.
- Andrew Is it clear from the Judge's notes, and any other documentary material that's available, as to who made the first application? Kennedy or Tamaikoha?
- Sissons It's very clear from, if we take Joseph Kennedy's evidence, that it was he who was struggling to get the land, put the land before the Land Court and he made the application. That's clear from his evidence, given to the Land Court in 1880.
- Andrew It just might assist you with that, we've got an extract from that, under Tab 4 it is, sorry, Tab 3, the last page of that, yeah it's the Crown's document bank sorry, #B21. This is Kennedy's evidence at the rehearing in 1880.
- Sissons Yes, I mean, I've quoted. "I live at Gisborne. I belong to the Upokorehe tribe. I remember the year 1887, before this case was investigated at the last court. I gave notice to a Pakeha not to expend money on the block Waimana, not to deal with it until it was surveyed and title investigated. Not to continue for the purchase of it. I sent a written notice that his lawyers' letter, one to W Kelly, one to Captain Swindley. William Kelly acknowledged the receipt of the letter I sent to him. Captain Swindley did not. My lawyer sent a letter to Swindley on behalf of my tribe and I, on behalf of my tribe, applied to have title investigated." Now, I assumed

that that was Joseph Kennedy writing to Swindley saying that "I want title investigated to this land". And that it was on his insistence that that happened.

- Andrew            On ...
- Sissons            Joseph Kennedy's insistence. Through his lawyers.
- Andrew            See, Kennedy says there, further down, that his application was in the year of 1877 or the beginning of 1878. But then you'll see in the left hand margin it's got dated December 1875. Do you have a view on what those different dates might mean?
- Sissons            I'll have to look at the document. Where is the document you're referring to?
- Andrew            It's Tab 3 of #B21 and it's the last page.
- Sissons            Okay, Tab 3, #B21, the last page is it?
- Andrew            Yep, #B21, Tab 3.
- Sissons            Okay.
- Andrew            This is the 1880 evidence of Joseph Kennedy again. You had it before. You see December '75. It's quite easy to see in the left hand corner.
- Sissons            Yes, I do see that, yeah.
- Andrew            It's around there you see Kennedy says "I think it was at the end of 1877 or the beginning of 1878".
- Sissons            Right. Okay. So, what he's suggesting here is that in fact this is what he's given as evidence.
- Andrew            Correct.
- Sissons            But someone has written, ie the Judge, perhaps, in the margin that his application for survey is dated 1875.
- Andrew            Was that how you would interpret it?
- Sissons            Yes. I think so, yes. Whether that was the, I mean, we're guessing here, but I think it was, I mean, if it's dated, the reason I'm hesitating is that it just seems such a long gap between 1875 and 1877 for his memory to have slipped that much. You know, normally my memory's not that great but normally I can differentiate between events two years apart so that's really my hesitation.
- Andrew            See, if you interpret Tamaikoha's evidence as saying that he consented to the lease about the time, sorry he consented to the survey and the investigation at the time he paid Swindley the £100, then that pre-dates.
- Sissons            But I don't accept that.

- Andrew            You don't accept that?
- Sissons            No, no.
- Andrew            It pre-dates December '75.
- Sissons            I don't accept that he, I don't think that makes sense, that he would have received the £100 from Swindley and then consented to the investigation of title. There doesn't seem to be any logic in that to me.
- Andrew            Would you accept that Swindley might have sought an application to the Court at that time and that this was all part of the agreed arrangements between Swindley and Tamaikoha?
- Sissons            I just don't know what was in Swindley's mind, but I don't see any reason to think that Swindley was somehow being deceitful in this instance.
- Andrew            Well, it wouldn't necessarily be deceitful would it, it would simply be an upfront, out in the open agreement as to ...
- Sissons            Yes, but it's deceitful in the sense that the Whitu Tekau have agreed to this lease on the basis that there would be no Land Court hearing and as soon as the lease is concluded, they go ahead with a Land Court hearing. That doesn't seem to me to make a lot of sense.
- Andrew            The matter goes before the Native Land Court in 1878, correct?
- Sissons            Yep.
- Andrew            Is it your evidence that there were two surveys of block? Well, I shouldn't say the block ...
- Sissons            Yes, there were two surveys.
- Andrew            (Inaudible) adjacent areas.
- Sissons            Exactly. One which seems to include Waioeka and much more land to the east.
- Andrew            Can you just stick with this Tab 3, Crown document bank, #B21? Just go back, I'm afraid it's not – better to start from the beginning of Tab 3, page 59 of the minutes, page 63 – these are the Native Land Court minutes or the Judge's notes of 1878. You follow me? 59, 63 and then over the page to 64.
- Sissons            Yeah.
- Andrew            There's an entry there, half way down, "Te Waimana no survey dismissed".
- Sissons            Yep.
- Andrew            Now, when you read that with the *Gazette*, which is at Tab 2, which I took you to before, where you've got Joseph Kennedy's application.

- Sissons Yeah.
- Andrew Or Te Waimana near Opotiki.
- Sissons Yes.
- Andrew Doesn't that entry there suggest there wasn't a survey? A Kennedy-commissioned survey.
- Sissons Well, no, it just – I don't know what that suggests. That comment "no survey". I mean, there clearly were surveys in the sense that they'd both given evidence in Court that they have surveys.
- Andrew Well, is that clear, because it's a strange entry from a Judge if there was in fact a survey before him, isn't it?
- Sissons But this entry is, this entry follows, I mean it's, it seems to me it's, I don't on the face of it know what it means, but it's halfway through the Court hearing. This is on the, I'm not sure what day it is, but then we have the Thursday the Court opens.
- Andrew Well, there's clearly a survey from Tuhoe, from Tamaikoha isn't there? Because in fact the Court makes the award in his favour. Correct?
- Sissons Well then, well, no. It says "no survey", I mean, does that mean Tamaikoha's survey is not available yet?
- Andrew I suggest to you that "Te Waimana survey, no survey" relates to the Kennedy application.
- Sissons Why do you say that?
- Andrew Well, if you look at the top of 64, Tamaikoha appeared and stated that he and his land must be whanau or tribe and not being able to agree on the list of names in the Waimana claims and the Court adjourns. And ultimately, of course, it makes the award to the Tamaikoha party, does it not? I mean, Kennedy fails with his application, correct?
- Sissons Yes, but they're not going to hear a case twice.
- Andrew Correct. But why does he say "no survey"? That's my point, rather than application dismissed. Because on the merits, the Judge found that Tamaikoha, they were the, or the Tuhoe party were the correct owners.
- Sissons He may mean that the survey was not, the block as surveyed by Kennedy was not accepted. And that survey, therefore, was not, therefore no survey. I mean, we're guessing here, but.
- Andrew Yeah, I appreciate the documentation is sparse.
- Savage(?) Tell me there was an order drawn consequent to this minute?

- Sissons Hang on a minute, it says here, Kennedy himself says, on page – it's not numbered unfortunately – how can I point you to it? Oh, 353 in the top corner, it's a few pages further on from your "no survey". The last page.
- Male(?) (Inaudible).
- Sissons Yes, it has "Waimana rehearing, 13/3/80" in the corner.
- Andrew What's the particular passage you're referring to? Last page, Tab 3. Which, of course, is the rehearing, right. It is after.
- Sissons Oh, is it? Yes, that's true.
- Andrew 10/3/80.
- Sissons Yeah, okay. No, no, it's right, that's right, it's the rehearing. Okay, well, I don't know what "no survey" means. I assumed it meant that the survey was not relevant for the Waimana block and that therefore the hearing was not to be held. But, I agree, it is ambiguous.
- Andrew The Judge just asked the question, was ...
- Sissons It's just that the boundaries here, I mean, I think probably what leads me to think there was a survey is that the boundaries are quite clearly listed in the *Gazette*.
- Andrew Well, the application itself might, without a survey, identify those broad boundaries, might it not?
- Sissons Yes, it might. It might, indeed, yes.
- Andrew Judge Savage has just asked the question, can you help us, was an order drawn up as a result of the 1878 hearing?
- Sissons An order for award of title?
- Savage Any order drawn in the consequence of that hearing.
- Sissons I think, I've only seen the decision that the Judge gave to the Court case. I haven't seen an order, a document.
- Andrew That might be an appropriate place to take the break, Sir.

#### **Afternoon tea adjournment**

- Savage ... before we commence, a number of the questions you have asked are the very questions that we had hoped that we would receive as written questions prior to the hearing. You know, I think you accept that.
- Andrew I'm a little bit reluctant to answer, but I'm not trying to cover my back, Sir, but I don't have the background to commit to a position without talking about it with ...

- Savage           The other matter is that a number of questions you have put to the witness seek to compare his view with that of Professor Binney's and the situation is that those questions weren't put to Professor Binney, which makes it a little difficult. So, just please bear that in mind.
- Andrew           Certainly Sir. Can you turn, Professor Sissons, please to page 42, you're probably already there.
- Sissons           I am.
- Andrew           Of your main report. You refer at the bottom paragraph there to considerable survey and court costs that had to be paid by the owners. What were the survey costs for the Waimana block, do you know?
- Sissons           £17, I think, from memory.
- Andrew           Survey costs?
- Sissons           Survey costs, I don't know what they were. Court costs ...
- Andrew           I'm asking about the survey costs, not the ...
- Sissons           It's at the end of the document. I can provide that for you. They're listed at the end of the 1880 Court case and I think they come to a total of, for that case, and I don't know if that, I'm not sure if that includes survey costs. It's, I think, Court costs only the £17.
- Andrew           But this is the reason I ask, is we haven't been able to find in your material, any reference to the actual survey costs, as opposed to the Court costs.
- Sissons           No, I don't know that. Sorry.
- Andrew           So, have you not seen any documentary materials ...
- Sissons           No.
- Andrew           Giving information about survey costs?
- Sissons           From memory, no, I don't think so. I just know that the survey costs for, in general, you know, reading around the topic, survey costs can be, you know, a major burden on people and especially for land such as this which is quite difficult to survey. They can be quite high and it's just widely known that, but in terms of the exact figure for Waimana, I don't know.
- Savage           This is a classic Mr Andrew. If this question had been asked in writing, he would have had the opportunity to research it and we could see a precise answer.
- Andrew           I accept that Sir. Come to page 45 please. And you deal here on the first paragraph with the issue of the absence of Rakuraku's name from the original award in 1878 and your comment is that it's in that paragraph, almost inconceivable that Judge Halse(?) would accord and approve any list that did not include Rakuraku's name. Your conclusion in the next

paragraph, it's the final sentence, is it seems that the Court had allowed itself to become a weapon in a local dispute and you're referring there to a dispute between Tamaikoha and Rakuraku, correct? Could you look please at the Crown document bank, #B21? And it's Tab 3, it's the first page, which is the evidence of Rakuraku Reihua.

Sissons Yes.

Andrew It says "I live on the Waimanawa" (?), etc etc, "I know this land they show on the plan", but he says "I don't claim this land but Ngati Turanga do". You see that?

Sissons Yes I do.

Andrew And then further down, sort of, three lines from the bottom of that extract of evidence, he says "I spring from all the ancestors of Urewera yet do not claim this land". In light of that evidence, it's not surprising that Judge Halse reached the conclusion he did, is it?

Sissons Let me just read this first. Because – it's a very interesting statement that Rakuraku's making here. What he's saying is, and I'd need time to think about this, but he concludes by saying "I lived on this land through the mana over the tribes that were living on it. And what he's meaning is that "I spring from all the ancestors of the Urewera yet do not claim this land. I lived on this land through the mana over the tribes that were living on it". And it seems to me that what he's claiming is rights to this land but is unhappy about it being before the Court. He seems to me, I mean this is interesting, I haven't read this last, this sentence ...

Andrew Is this something you've thought about previously, or ...

Sissons It's something that's troubled me and I say it in the report, it is troubling that, why Rakuraku's name was excluded. I say, you know, inexplicable, I think, I can't remember the exact words I used, but, and I'm not clear as to why his name was not included in the list and I say that as well. And it's a puzzle for me, as good historians, they want to get to the bottom of it and I want to get to the truth of it and it seems to me that in this instance there was, there was clearly a dispute between Tamaikoha and Rakuraku as to who held the mana of the land. And Rakuraku would not be saying that he does not belong to this land because he clearly did. His ancestor, Maungaharuru(?) was an extremely sacred leader. He's a direct descendant of him. There's no way that he would be saying he did not belong to the land. So, what is he saying? He's perhaps saying he doesn't want to be associated as a, in the Land Court process, with ownership of the land. It's ...

Andrew Well, it's troubling because in 1880 he is put on the title.

Sissons He is, indeed. That's right.

Andrew And Tamaikoha, in fact, appeals for that reason, doesn't he?

Sissons That's right.

- Andrew Because of his exclusion.
- Sissons Yes, exactly, so there's clearly some disagreements going on between these two leaders as to how to hold the land, how to deal with the land in relationship to the Land Court. There's a lot of complex negotiations going on here that we don't know about and what we're seeing is just the results of that in the Land Court minutes.
- Savage Well, if we're only seeing the tip of the iceberg.
- Sissons Yep.
- Savage and there are transactions going on between Tamaikoha and Rakuraku, is it not possible that this minute evidence is an agreement that's been made between them? Because they're both here on that day.
- Sissons Indeed, it is possible, that's right.
- Savage And you've got Rakuraku saying, you know, I'll step away from this land and Tamaikoha saying I'll submit a list of names tomorrow.
- Sissons That's possible.
- Savage That's the inference that I first took.
- Sissons And that the, that's right, that's possible. That is possible.
- Andrew You have to be pretty cautious about drawing conclusions on sparse information, don't you?
- Sissons Yes you do and that's, and especially in a dispute like this. To assume that Rakuraku, after, that he would just walk away from the land would be a huge assumption to make. And so that's what worries me really, is that what exactly was the arrangement then between Tamaikoha and Rakuraku? And I don't, you know, as I say, I don't know what that was. I'm just, my point really was that this is a very delicate, difficult, dispute and the Court had become involved in it. And allowed itself to be caught up in that dispute and it had made things more difficult.
- Andrew You refer, on page 52, the bottom, the last paragraph, to a partition application in 1882. An application by Rakuraku. Was that a representative Ngati Raka claim, do you know?
- Sissons See, I'd have to look at the document, sorry, which page are we dealing with? Page 52.
- Andrew 52, yes.
- Sissons Which paragraph?
- Andrew The last two, or the two paragraphs at the bottom of the page.
- Sissons The two paragraphs.

- Andrew Well, you start off in the middle paragraph: "The application of Rakuraku ..."
- Sissons "The application was *Gazetted* for a second time".
- Andrew Yep.
- Sissons I'd have to look at the *Gazette* to see if there was, I can't remember, from memory I can't remember if it was ... It's normally in the names. They don't normally apply on behalf of hapu.
- Andrew No, but in practice, aren't they representative claims?
- Sissons Well, Rakuraku would be, yes, making that claim on behalf of others. Yes, that's correct.
- Andrew And that's fair to say, isn't it, generally, if they're partition applications that are being made here, they're representative group claims, are they not?
- Sissons Yes that's true, but we just don't know what, you know, why I'm hesitating is that I don't know what the group he's representing, who that group are, necessarily. That can change. There can be differences of opinions and people linking different allegiances to different leaders.
- Andrew Come to page 58 please. You say there, just before the heading 'Conclusion', that paragraph there, "Tuhoe had offered land to Swindley in payment for the survey and court costs because that was all they had to offer him". If you don't know what the figures for the survey costs are, it's difficult to jump to that conclusion, isn't it?
- Sissons Well, no. Swindley himself had said that he paid the considerable costs associated with the court case. And I imagine those costs ...
- Andrew But they had sold some land, hadn't they? Not all of it, they'd sold some.
- Sissons To Swindley?
- Andrew Yes. And received monies for the proceeds of sale.
- Sissons That's right.
- Andrew That doesn't mean it's necessary to sell further land, does it? They could pay him the costs if they owe him money from the proceeds of sale of Waimana A.
- Sissons Yes, you'd have to, what that would require though would be the individuals would receive their payments for their piece of land to agree to pool their money into a fund which would pay for the costs and the survey. Perhaps that was a reason that they didn't do that. But I'm guessing.
- Andrew Come through, please, to page 69, and you're talking here, dealing with the issue of partition still. It appears, am I right, that a lot of the partitions

between 1905 and 1950 aren't being driven by sale or land sales, is that correct?

Sissons That seems to be the case to me, yes.

Andrew When you talk about, on page 69, in the penultimate paragraph there about in some cases the partition, people wishing to separate off dairy farming units, correct?

Sissons That's correct, yes.

Andrew Is it part of your thesis or argument that the law should have prevented subdivisions of this kind?

Sissons No, I think my argument really is that this kind of decision prior to the Land Court would have been a collective decision of the owners of the land. Done on the basis of consensus under the guidance and leadership of people like Tamaikoha and Rakuraku. But with the Land Court this became an individual decision which undermined the direction and management of the Tuhoe leadership and of the community itself. So it's not whether farming or any other particular use of the land was, I'm not arguing it should or should not have occurred, what I'm arguing is that it made it easier, the Land Court made it easier for individuals to do, make, take decisions in reference to land which affected others within the community without reference to those others in the community. Which is the, really, one of the main points of the, that I make really. It's what I call the undermining of rangatiratanga.

Andrew Just, it appears on the information you've provided that there's a large degree of consensus with many of these partition applications.

Sissons Well, once someone has applied for partition, consensus is really irrelevant. If somebody wants their shares cut out of the block and they're designated as owners, they don't, they have the right to apply for that to happen.

Andrew They've got to meet certain requirements though, don't they, before the Court can grant the application?

Sissons Yes, but it doesn't require the consensus of the community to do that.

Andrew Well, at various times it would require the majority of the community couldn't it? A majority of the owners to agree to the partition. It changed over time, I grant you that.

Sissons Yep. You see, it's interesting because in some cases, you know, I think it was the 1905 B block hearing, Tamaikoha begins his evidence by saying "I don't agree to this partition, however, those others of the owners want it and therefore I'm acting on their behalf." What he's really saying, it seems to me, is that he can't really stop it and therefore he will do his best to make sure that it happens in a fair way.

Andrew Yes.

- Sissons The way I understood his comments in relation to the block 1B. And I could see through that that this was a man whose leadership had really been undermined through that process.
- Andrew Can we come now please to your Appendix 1 on page 100 and this is a different issue now, dealing with the Urewera Native District Reserve legislation 1896. And you say there in your introduction on page 100, in the first paragraph, that the reason for the inclusion of these appendices is the information contained in them is not available elsewhere.
- Sissons A further reason, yes, yeah.
- Andrew You say, on page 100, in that second paragraph there, dealing with the 1896 legislation, "that only the general committee would have the power to settle leased land and through a clause inserted by the Government against Tuhoe wishes this committee would be only able to negotiate sales and leases with the Crown. Private leases and sales become illegal." Have you read the Kathy Marr report, document #A21 entitled *The Urewera District Native Reserve Act 1896 and Amendments*?
- Sissons No, I haven't.
- Andrew Turn over please to page 102. You say there in the final paragraph on that page that the Commissioners, the Urewera Commissioners, under the legislation appear to have decided the next step would be to define the membership of these hapu and then locate the land upon a map that had been prepared for them. And you go on to say there were at least two inherent difficulties in this approach. The first point is few places of permanent residence in the inland forests. Do you say that the difficulties were encountered or experienced by all of the Commissioners? Because, after all, they did include significant Tuhoe representation, did it not?
- Sissons It did include Tuhoe representation and they were difficulties experienced by any Commissioner and would still be difficulties experienced by any Commissioner.
- Andrew Come over the page please, to 103. You say there in the second paragraph "Tamaikoha and Rakuraku, who by this time were working closely together, were concerned about the Commission's procedure at the outset, especially the determination of hapu lists". What was their specific complaint or grievance? Do you know?
- Sissons They disagreed, when the Commission met for the – I'll just carry on the next sentence: "When the Commission met for the first time at Ruatoki on February the 8<sup>th</sup> they immediately requested an adjournment to decide on their own methods for drawing up the lists." So, they were concerned at the way in which the lists were drawn up and I don't know exactly what the concerns were, that's not written in the evidence, not in the documents. They presented an alternative, but it didn't find favour with the Commission. But I don't know what that alternative, that isn't recorded.
- Andrew Okay. You say ...

- Sissons As I say, these methods were not recorded.
- Andrew You say at the top of page 108, after that quote there, "Concerns about the Commission's work amongst Tuhoe were very deep and went right to the heart of the Commission itself". Have you seen the letters from Tuhoe people themselves to the Government expressing support for the process of the Commission?
- Sissons I'm just trying to recall. There are certainly a lot of letters complaining about it. I'm just trying to think if there were any in support. Not from memory.
- Andrew Can we come now please to your table 6 on page 116? Table 6 is 'Inland block owners, whanau with 25 or more shares'. The first part of the table, table 1 – 'whanau who were the original owners of the Waimana block'. Over the page 177, it's 'other whanau'. Is it correct that the legislation required the family, the whanau groupings, to be determined first and then individuals listed? Is that the legislative process?
- Sissons This is a question I just simply don't know. My assumption was that they would, that these whanau represented the elders of that whanau, so that someone like Te Hiko, who was a rangatira who lived up at Tawhara, he was the elder of that family, so Te Hiko would be listed and then his children and grandchildren. So that, yes, I imagine, yes that's probably right, that they would list the whanau first, ie the whanau of Te Hiko, and then they would list, yes, members of that whanau.
- Andrew Just in terms of your methodology, the whanau names you've got here, in your table, do they correspond to surnames listed in the *AJHR* list of 1907? Is that your source?
- Sissons They should do.
- Andrew Yeah, that's your source.
- Sissons Yes, that's right. It's the *AJHR*, yep.
- Andrew The table is not representative of all family groups, is it? It's dealing with those with 25 or more shares, right?
- Sissons That's right. There may be some minor shareholders that are, that's right. It's just, have you seen these listings?
- Andrew Yes. Can you comment ...
- Sissons I tried to give some, all I was doing here really is just to try to give some clarity to the issue.
- Andrew I'm simply trying to understand your methodology.
- Sissons Yeah.

- Andrew            So it's not all of the whanau. Is it your understanding that this is actually only a small proportion of the total number of whanau who in fact had shares in these blocks?
- Sissons            No, that isn't my understanding. I think that's most of the whanau.
- Andrew            Sorry, you say most of the whanau had 25 or more shares?
- Sissons            Yes.
- Andrew            Did some of the whanau listed here, for example, the Tamaikoha one, have shares throughout the Urewera? I mean, not just in the Waimana blocks, which is the focus, of course, of ...
- Sissons            Yeah, I'd have to look at those appendices to check that. You could check that. I mean, they're quite simple to check. If you've got the documents there, you could find that.
- Andrew            But did you get the impression from the figures that you were working with, and I appreciate it's a representative example only, that you're talking about a relatively large number of individuals?
- Sissons            Not, it depends what you mean by relatively large. Do you mean thousands, hundreds?
- Andrew            Thousands. More than you would expect there to be resident in the Urewera at that time.
- Sissons            No, I was thinking more in, I think, why one would think thousands. No, I was thinking more that these, that there would be – how many whanau are there there? Count them up, multiply it by something like seven and you'd get a rough, I mean, several hundred people, perhaps. I didn't actually apply my mind to that question, but.
- Andrew            Thank you Professor Sissons. I have no further questions.

**TRANSCRIPT ENDS**