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**Wai 894: Urewera Inquiry – Third Hearing
22-26 March 2004
Waiohau Marae, Waiohau**

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Ann Parsonson
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Barry Rigby, Research Facilitator
Tom White, Report Writer
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David Amber/Curtis Bidois, Tuho
Campbell Duncan, Ngai Tamaterangi
Gina Rangi, Te Aitanga a Mahaki
Annette Sykes/Carl Mika/Jason Pou, Nga Rauru o Nga Potiki
Spencer Webster, Ngati Awa
Paul Harman, Kahungunu ki Wairoa
Charl Hirschfeld/Moana Tuwhare, Kahungunu-Rongamaiwahine
Jamie Ferguson, Ngati Whare
Baden Vertongan/Bonnie McKinney, Rangitihi
- Crown Counsel:** Annsley Kerr, Peter Andrew, Kirsten Harper
Tikirau Stevens (Kaumatua), John Battersby (Historian)
- Witnesses:**
- Historical:*
Kathryn Rose (Ngati Haka Patuheuheu)
Jock Brookfield (Te Houhi)
David Williams (Native Land Court)
Bernadette Arapere (Waiohau)
Phillip Cleaver (Matahina)
Nicola Bright (Kuhawaea)
Peter Clayworth (Tuararangaia)
- Tangata Whenua:*
Robert Powhare
Alec Mahanga Ranui
Hohepa Joseph Kereopa

Kerr Thank you Sir, can I perhaps make a general indication that the time estimates the Crown has given are far too long, having considered the answers to the questions of clarification which have been very helpful. So, if I can just indicate that the questions will be much reduced. Peter Andrew will ask Ms Rose the questions on her paper.

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Peter Andrew cross-examines Kathryn Rose

Andrew Kia ora Ms Rose. Can you turn please to page 5 of your summary? And I want to ask you some questions about your paragraph 14 there on page 5 of the summary. You're talking about the subject matter of leases in the Native Land Court and you say in the final sentence of para 14 of the summary, "This pressure escalated through Crown purchasing from late 1873".

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Rose Yes.

Andrew In your main report, at page 58, you quote Professor Richard Boast, who says this, and this is reading from your report: "Richard Boast states that in the years immediately following the war, the Crown lacked the resources to force the remaining centres of Maori autonomy to Urewera and the King Country into subjugation. The perceived need to do so was also less pressing as most of the fertile land in Te Urewera had been secured through confiscation. Thus the Crown was content was rely on more indirect means of gradually encroaching on autonomy, the process of the Native Land Court and land purchasing, while in the main allowing Tuhoe and Ngati Whare to retain control over their own affairs." It seems that despite your quoting with approval from Professor Boast, that you part company with him and give much greater emphasis to what you see as pressure, and the particular pressure from the Crown as from 1873. Is that a correct impression?

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Rose I think the difference is, perhaps, in terms of looking at what was happening for Tuhoe as an iwi in general and the general impact of the Crown purchasing and those sorts of pressures and the particular pressures that Ngati Haka Patuheuheu were experiencing as a border people. They were more, the Crown's leasing was, the Crown's actions were more focused on those areas around the border and the Rangataiki district. So I don't think it's a difference, it's a departure so much as a difference of degree of emphasis for Ngati Haka Patuheuheu as a hapu specifically, as opposed to Tuhoe as the iwi as a whole.

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Andrew When you look at the actions of the Crown, the Crown made some advances on Kuhawaea, but beyond those advances, no negotiations actually proceeded, did they?

40 Rose I think the Crown eventually decided to withdraw from negotiations in Kuhawaea, yeah. They proclaimed their interest in it as a Crown block. So there were some efforts in the early '70s to secure a Crown lease over that block.

- Andrew But you say, and it's correct isn't it, that negotiations did not advance beyond Wilson's initial advance payments? That's what you say on page 71.
- Rose Yeah, that's right, yes.
- 5 Andrew And there were a number of applications to the Crown on the Kuhawaea block for a survey weren't there? Later in the 1870s.
- Rose Yes, from – yes, that's right.
- Andrew And the Crown turned those initial applications down, didn't it?
- 10 Rose I'll just turn to my section of the report that discusses that. Just bear with me. Yes, the person who was negotiating for purchase, Troutbeck, applied for a lease in '78, and that was followed by, there were several other applications from owners in the block from the late '70s.
- Andrew But I'm talking about applications for survey to the Crown. They were turned down, weren't they? In respect of the Kuhawaea block.
- 15 Rose Yeah, that one was the Troutbeck one, yes. And that was turned down.
- Andrew And you say, on page 6 of your summary, paragraph 18, that in 1874 Ngati Haka Patuheuheu withdrew their offer to lease Waiohau. Correct?
- Rose Yes, yes.
- Andrew And the Crown respected that decision, didn't it?
- 20 Rose Yes.
- Andrew And then there was a hui at Te Umuheka in 1876 in which the Crown encouraged a jury and assessor process with respect to the Matahina block.
- 25 Rose Yes, that's correct. They were having some trouble in trying to decide who they were going to be dealing with, so they – because of the disputes over that, that it was necessary to have a hui. They felt it was necessary to have a hui.
- Andrew And in fact, the Matahina and the Kuhawaea blocks didn't come before the Native Land Court until the next decade, did they, the 1880s?
- 30 Rose Well, that's right, yes. The Crown was negotiating with people before the blocks had been passed through the Court.
- Andrew Except, you just told us before you agreed with me that beyond the advances in 1874, there were no negotiations by the Crown for the Kuhawaea block.
- 35 Rose That was just Kuhawaea. I'm talking about Matahina which is what the Umuheka hui was about, yeah, and other.

- Andrew But don't you see from all this, the decisions being taken by the Crown, that the Crown is really proceeding rather cautiously in this area, isn't it?
- Rose The Crown was facing a whole lot of opposition, especially from Tuhoe, and from a whole lot of groups. They were having some difficulty in getting the negotiations through, yes. So they had to, yep.
- 5
- Andrew Could you turn please to page 61 of your main report? And you say there, in the second paragraph, oh sorry the first paragraph, you're talking about the period of the 1870s. You say, "The paths that Tuhoe and Ngati Manawa chose to follow to secure their position were very different, generally speaking, whereas Tuhoe believed their future depended on retention of their land and authority, Ngati Manawa hoped that co-operation with the Crown by active military support then by supporting the Crown's purchasing policies would ensure their future prosperity." It would be fair to say, wouldn't it, that for all of these communities at that time, they were living in what they would have seen as challenging times, times of great change.
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- Rose Yes.
- Andrew And the communities, and focusing particularly on Ngati Haka Patuheuheu and Ngati Manawa, are closely inter-related, aren't they?
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- Rose Yes.
- Andrew You can see that in the figure of Wi Patene, particularly, correct?
- [Noisy background]
- Andrew Isn't it likely in those circumstances that within all of these communities at that time there would have been a diverse range of views on some of the issues you traverse here on page 61?
- 25
- Rose Of course, yes, I mean people met, worked out decisions through consensus and yes, there would have been the divergence of opinions.
- Andrew Well, my point is that when you say Tuhoe chose one path and Ngati Manawa chose another path, that's rather too absolute to talk in those sort of terms, isn't it?
- 30
- Rose Well, I'm trying to – as I say, generally speaking. I mean, I'm talking in terms of a general broad sort of, broad sweep approach, yes. I'm trying to give an indication of general positions, you know, it's a ...
- Andrew But you acknowledge that the reality is a little more complex than that.
- 35
- Rose Of course, yes.
- Andrew If you come through, please, to page 68 of your main report, and you're talking here about Wi Patene and the lease of Waiohau in the 1870s. You say there, in the penultimate paragraph on page 68 that Wi Patene's strident defence of an evolving negotiations is belied by his decision to

5 withdraw from discussions with Wilson regarding the lease of Waiohau. And you were asked a question in the, by the Crown in the question and answer series that you've answered and you provide an answer on page 4, paragraph 4, of your answers to the Crown's questions of clarification. And we refer there at page 4 to that paragraph I've just read out from page 68 and you, in your answer, talk about the position of Wi Patene in 1874 and then 1878. And ultimately, Wi Patene claims to have done a deal, doesn't he, with Ngati Manawa, not to claim separately on the Kuhawaea block.

10 Rose I don't know if it's specifically Wi Patene. Ngati Haka Patuheuheu and Ngati Manawa had reached agreement, but I don't know whether, you know, I don't imagine it would just have been Wi Patene.

Andrew But he was clearly involved though, wasn't he?

Rose I imagine he would have been. I'm not sure.

15 Andrew Well, isn't that what he says in his petition?

Rose In 1897?

Andrew Yeah, but it's actually with respect to the Kuhawaea block.

Rose That's Wi Patene and others that were doing, that wrote the petition. Yeah, I assume that he was involved, yes, as a leader.

20 Andrew Well, it's most likely he was, isn't it?

Rose Yes, yes. But my point was, it wouldn't be just him.

Andrew No. When you see, observe the way he behaved, contrasts his position in '74 with that in '78, he seems to be acting with increased independence from Te Whitu Tekau doesn't he?

25 Rose You mean when he was in, are you talking in terms of my, of question 4?

Andrew Well, focusing on your answer, yes.

Rose Right, okay. When he was acting on behalf of the Ngati Manawa hapu for the Kuhawaea, to apply for the Kuhawaea surveys? Is that what you're asking about? And you're suggesting that that means that he was acting –
30 sorry, just to clarify.

Andrew Yeah, is he acting with increased independence from Te Whitu Tekau? As appears to be the case, doesn't it?

Rose It's a complex, sort of, it's when Wi Patene was acting this way, he was working on behalf of his Ngati Kura(?) people, which is different from when he was acting for Ngati Haka Patuheuheu. Makes it a little bit difficult to answer, in a way. Certainly there was increased pressure to be involved in negotiations through the '70s and Ngati Haka Patuheuheu, you know, they became involved in some negotiations.
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- Andrew But isn't there also evidence of the waning influence and activity of Te Whitu Tekau? So, for example, you say in your answer on page 5, paragraph 5.1 that subsequent Te Whitu Tekau activities – this is post-1874 – appear to have been less thoroughly documented.
- 5 Rose Yes.
- Andrew Well, that's because their influence and activities were waning, isn't it?
- Rose Or because the Crown was paying less attention to what they were doing.
- Andrew And you say that, do you, because the only documentation you've seen of the activities, and this is in fact Crown documentation, is that correct?
- 10 Rose Yes, I mean, I haven't specifically investigated Te Whitu Tekau in any detail as Judith Binney's covered that, so.
- Andrew So you haven't seen any Maori-generated evidence, for example, of the activities of Te Whitu Tekau after 1874?
- 15 Rose I think all I just used Judith Binney's report for information on Te Whitu Tekau.
- Andrew Could you turn please to page 69? You say there, at the bottom of the page, talking about Ngati Haka Patuheuheu in the aftermath of war and surrender. You say, "They sought to recover their position. On the one hand they were supportive of Te Whitu Tekau and its ambitions for unity of the Tuhoe iwi and the Matatua waka. On the other they sought to co-operate with the Crown." But haven't you left out the most significant factor that they were also, they as in Ngati Haka Patuheuheu, would obviously have been concerned about their relationship with Ngati Manawa, wouldn't they?
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- 25 Rose Yes, I have discussed that in my report.
- Andrew If you turn please to your question and answer document and you'll see at the bottom of page 5 the Crown asked you a question about the making of advances prior to the land going to the Native Land Court and a specific question on that issue at the top of page 6 about whether any advances offered to Ngati Haka Patuheuheu after 1879. And you say not as far as you're aware. And then you go on to refer to what happened in Matahina. You gave evidence in the Gisborne, the Turanga inquiry, didn't you?
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- Rose Yes.
- Andrew And you've also done research on Central North Island, am I correct? Taupo, Kaingaroa?
- 35
- Rose Yes, yep.
- Andrew Do you recall from the Gisborne inquiry McLean's instructions to Burton, Crown Purchase Officer in 1873 about exercising care and caution in approaching the task of purchasing Maori land?

- Rose No. No I didn't prepare that material for this Tribunal inquiry.
- Sykes Sir, can I ask this as someone who's not in the Gisborne inquiry. If my friend's going to rely on that, he needs to be aware that there are many of us who haven't had the benefit of what he's just referred to.
- 5 Andrew I'm quite happy to share with Ms Sykes that those instructions are specifically referred to in the evidence of Mr Bob Hayes for the Crown in response to the evidence of Ms Rose, amongst other claimant witnesses. We asked you in the questions of clarification a number of related questions about the role of Wi Patene. In your answer at paragraph 7.2, you talk about the application by Wi Patene for the survey of the Kuhawaea block and you claim that he was acting in that capacity on behalf of Ngati Koru.
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- Rose Yes, I believe that's the, the application was in that name.
- Andrew Are we to interpret from your answer there and other answers you've given, that Wi Patene is a leader of Ngati Manawa?
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- Rose I don't have enough information on what his position was. Clearly he was acting on behalf of Ngati Koru but, you know, I haven't investigated that at all, so you'd probably have to ask the Ngati Manawa people.
- Andrew Could you remain, please, on page 7 of the question and answer document? And, we asked you a question there about the Crown's views of any Tuhoe or Ngati Haka Patuheuheu interests in the Kuhawaea block and in response to a question at para 9.2, you agree that the Crown did doubt the existence of that claim and you refer to Wilson stating outright that Tuhoe know they have no right to the land.
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- Rose Yes. I also mention that the Court didn't agree to a rehearing.
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- Andrew Yeah. Wasn't Wilson's position quite clear that he understood that Te Whitu Tekau were not asserting ownership, as such, of the block, but rather seeking to extend their policies, their banning policies, to the wider region?
- Rose I think it was probably in Wilson's interests to think that, because he was negotiating with, he wasn't negotiating with Tuhoe for a lease at that time. So, yes, that was his position, but it wouldn't have, yeah, I qualify it by ...
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- Andrew But it could easily have genuinely been his position, even if it was in his interests to think that, couldn't it?
- Rose Yeah.
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- Andrew I mean, you've got no real cogent evidence to suggest it was in his interests to think that and that is the reason he adopted that view, have you?
- Rose I haven't investigated that in any detail, so I don't know if that sort of evidence would be available.
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- Andrew If you turn, please, to pages 14 and 15 of the question and answer document, you were asked, on page 15, whether you'd read Ms Kathy Marr's report on the Urewera District Native Reserve Act.
- Rose Yes.
- 5 Andrew And you say, your answer is you haven't read Kathy Marr's report. You devote a whole chapter of your main report to the Urewera Commission and you make some significant conclusions about its operations. In those circumstances it's a little bit surprising, isn't it, that you haven't read Kathy Marr's report?
- 10 Rose I think those, Judith Binney, Anita Myles, have both covered that very, I mean, they've considered that was adequate for the purposes of writing this, my report.
- Andrew But if you're to go ahead and make some significant judgments about that subject, surely it's incumbent upon you to read important background sources such as the Marr report, isn't it?
- 15 Rose Oh, I'm sure it would have been preferable to have done so, but I don't think that me not having read it, affects the – I feel confident in what Anita Myles, Judith Binney, have written on that.
- Andrew Presumably you were aware of the existence of the Marr report, were you?
- 20 Rose Yes.
- Andrew We asked you at question at page 16 on the question and answer document about the number of requests the Government received from Te Urewera to reconvene the General Committee after 1914. And your answer, top of page 17, is you note on page 163, Campbell details several such requests. In terms of numbers, though, it's only a small number of requests isn't it? As few as three or four? Is that the case?
- 25 Rose I can't recall off-hand. Yeah, Lee(?) details several requests in 1917 and 1918, they're examples.
- 30 Andrew But are you in a position to answer my question that it's as few as about 3 or 4?
- Rose No, I'm not.
- Andrew Can you come, please, to page 80 of your main report? You're dealing here with the issue of Ngati Manawa/Ngati Haka Patuheuheu with respect to the Kuhawaea block. And you say there in the third paragraph down, "an earlier section shows that Ngati Haka Patuheuheu and Ngati Manawa had reached an agreement over their respective claims in Kaingaroa seems likely they had held similar discussions with respect to Kuhawaea. However, it appears," you say, "that Ngati Manawa did not honour the agreement they had with respect to Kuhawaea which can perhaps be attributed to the influence of negotiations." And you refer to Troutbeck
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- 5 and then you say "it was in his interests. Troutbeck with the Native Land Court awarded title to those who he had dealt with and this might have been a factor in Ngati Manawa's compilation of the list of owners." The language you've employed there, focusing on the words "perhaps be attributed to" and "this might have been a factor", that's really speculation on your behalf, isn't it? I mean, there's no persuasive evidence to support your views there, is there?
- 10 Rose I think it's supported by the 1897 petition. I think that helps, that provides some more support to that proposition, that argument. The argument about the agreement that they'd reached.
- Andrew But it doesn't support any conclusion about Troutbeck's role, does it?
- Rose What, the 1897 petition you mean?
- Andrew No.
- 15 Rose I'd have to, is that in the material you've given me. Maybe I should refer to the 1897 petition.
- Andrew It is, yes. Tab 1.
- 20 Rose Yeah. Yes, this petition doesn't give explicit evidence about Troutbeck's involvement in Ngati Manawa's decision. I guess it's probably just a reasonable, if you think about what Ngati Manawa were doing at the time, why they were bringing the land before the Court, because they had an agreement with Troutbeck, and how that would have coloured, or influenced, their decisions. So, yes. I mean, there's often not a lot of ...
- Savage (Inaudible).
- Andrew Yes. Which one, Sir, the petition?
- 25 Savage Yes. The head of the Native Department subject petition 207, the very first document in that bundle. The first page of the first document. There are many parts throughout what you've given to us that I find difficult to decipher. I mean, what does that say? Does it say "stand over should any steps be taken" and then I'm lost.
- 30 Andrew This is this handwritten note, 30, yeah.
- Savage Is there to be a translation or a transcript or something of that nature to be given to us at some stage?
- Andrew I'm sure we could do that, Sir, yes.
- 35 Savage Because if you're going to cross-examine a witness on this, it would be difficult for that witness to answer helpfully when the document's indecipherable. And the next one appears to be in shorthand.
- Andrew She has, of course, examined this document, Sir, at leisure. She's had that advantage.

- Rose Not recently though.
- Savage Anyway, can I suggest that in subsequent hearings there is also a transcript of the document and available for the witness during cross-examination.
- 5 Andrew I take your point, Sir.
- Savage Thank you.
- Male(?) Sir, might I add that we would appreciate it if it came a bit earlier too, of course we only got it today.
- 10 Andrew Can we just move to the next page of your main report, page 81 please? And you're talking here about leasing and it's under the heading of "Matahina in the Native Land Court". You say "of the numerous", this is the very bottom of the page, "leasing negotiations entered into by the Crown when it opened its operations in the Central North Island in 1873, only one, the Taupo block, actually resulted in payment of rents." And you go on to refer to the Crown justifying its failure to pay rent on the basis of the land and not yet been adjudicated on by the Native Land Court. But wasn't the position with respect to most of these leasing negotiations that there wasn't actually a lease in existence until the land had been through the Native Land Court and title determined?
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- 20 Rose Yes, that's right, but the Land Court was suspended from operation in the area that these negotiations were entered into. So, there was agreement to lease but it couldn't go through until the Land Court had sat, and it was some years before the Land Court would sit in this area, which meant that a lot of people were not getting any lease from their, yes.
- 25 Andrew But the Crown, at that time, wasn't actually in possession of any land, it wasn't actually using the land as the lessee, was it?
- Rose You mean, was it farming it or anything like that?
- Andrew No.
- Rose No, no.
- 30 Andrew And it was still in Maori possession and, presumably, still being used by the Maori owners in the customary way, wouldn't it have been?
- Rose Yes.
- Andrew Could you turn please to page 7 of your summary? And you're talking, in paragraph 20, about the issue of costs associated with attending Native Land Court hearings in the 1880s. And you refer to the issue of Ngati Haka Patuheuheu travelling to the hearings at places away from here. This was not only costly, you say, in itself but also probably meant that cultivations were neglected during hearings. If you, and Mr Williams may have a copy handy, if not, you can look at mine. I'm referring here to Clementine Fraser's main report, #A103. I've got a spare one here if
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- 5 you Do you see there on page 162 of the main Clementine Fraser report, "Tuhoe and the Native Land Court", #A103, she's produced a table there, that's Table 7.2A headed up "Estimated Native Land Court Hearing Costs for Tuhoe Hapu or Individuals". It traces the various blocks in the left-hand column, year of hearing. It covers the period 1878 to 1894. You've given evidence on the issue of costs associated with the Court process before, haven't you?
- Rose Yes.
- 10 Andrew When you look at that table there, it seems there were relatively few Native Land Court hearing days in total over that 16 year period documented in the table. Are you in a position to comment on that?
- Rose I would add that she perhaps, to this table, in terms Ngati Haka Patuheuheu, you'd want to include the Urewera Commission hearings as well, which would be more reflective of, which would add to it.
- 15 Andrew Yeah, but that's all after 1894 though, isn't it? That's in a different time period, isn't it?
- Rose Well, I would, if I was going to use this table for Ngati Haka Patuheuheu, I'd look at what happened between 1878 and 1884. I mean, I would look at them in separate, sort of, periods. I'm trying to get the point across that this is a general table and if I was to do a Ngati Haka Patuheuheu picture, it would perhaps be slightly, it wouldn't be. Yeah, so I take what you mean, yes.
- 20 Andrew Well, the point is, if there's relatively few hearing days, then the issue of ignoring cultivations because of a requirement to attend the Court is really rather a non-issue, isn't it?
- 25 Rose Well, they were still, the hearings were still be held for this amount of time. People were still having to be at the Court. And I think that's the point, actually, with this length of hearing compared, I mean, people weren't given notification of when their blocks were going to be heard, a lot of the time, so people would have to be staying wherever the Court hearing was for lengthy periods of time. I mean, I'd have to get when the Court sittings were at, but you'd need to, the length of hearing is actually more indicative than the actual time spent in Court because people were stuck for months, sometimes, in the locations of the hearings.
- 30 Andrew So are you saying they didn't return home to their ...
- Rose Not if they weren't sure ...
- Andrew ... place, their homes at all?
- Rose Not if they weren't sure when their blocks were going to be heard. I guess (inaudible).
- 40 Andrew Is this something that you've studied, with respect to these blocks?

- Rose No it's not. That's why I said probably.
- Andrew In many instances, it was the case, wasn't it, that individual owners could, and in fact, did rely upon their representatives to attend the Native Land Court hearings and advance their interests?
- 5 Rose Oh, my understanding is that Ngati Haka Patuheuheu went en masse to a lot of the hearings, in the Urewera Commission at any rate.
- Andrew And is that also the case for the Native Land Court hearings?
- Rose I think so, yes. I'll just check to see what, I mean, obviously they weren't at the Waiohau subdivision in '86, but ...
- 10 Andrew There doesn't seem to have been many of them at the Kuhawaea hearing, does there, in the 1880s?
- Rose Yeah, that would probably be another one that there wouldn't have been so many. There's a, if you just bear with me, I'm sure there's information here on that. Yeah, I think there's a bit of a problem with evidence, in a way. Like, I was thinking I know that they went en masse to several hearings of the Urewera Commission, but I know that because there was a school teacher at Te Hauhi(?), at the area at the time, and so they are reporting that everybody had left to go to hearings, but there's no school at that place so that sort of evidence is more difficult to come by for the late '70s and '80s in the case of Ngati Haka Patuheuheu. There's evidence of joint petitions with Ngati Manawa and Ngati Whare, asking for hearings to be held closer to their settlement. And there's several of those, which is suggestive of the desires for it to be closer to home and, you know, which is further suggestive that their people were moving to these places, but.
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- Andrew Well, it might mean that unless the hearing was close, they couldn't attend, mightn't it?
- Rose Yes, possibly.
- Andrew Yes, thank you Ms Rose, I've no further questions.
- 30 **Ann Parsonson questions Kathryn Rose**
- Parsonson Kia ora Ms Rose.
- Rose Kia ora.
- Parsonson I might just start by following up on what Professor Boast was asking, because that fascinated me too. It takes, I would think, a particular sort of person to take, as Professor Boast said, an entire township and suggest that they remove themselves from their own land. Have you found any letters of Mrs Beale that indicates anything that we know about her thinking on this, or diaries?
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- Rose Well, again this is more, you know, what Judith Binney has really investigated this in more detail and so I haven't looked at any of those sorts of sources. I mean, it's extremely personal, I think, yeah, I think Judith describes it as a vendetta of these people, James Grant, Margaret Beale, these people. It's a personal vendetta which she traces to their connection with, Ngati Haka's connection with Te Kooti.
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- Parsonson Yes, yes.
- Rose But I haven't examined this myself. You know, enough to really, yeah.
- Parsonson Thank you. I have a few questions, I think I'm losing the paper war here so I might start just with a couple on your summary. Page 9, paragraph 28, you talk about the large sum involved in Burt's sale to Piper and the Land Registrar deciding not to place a caveat on Piper's title. And you then talk about the Government would be liable to pay a large sum as compensation to those who had purchased Burt's interests. Do you have any idea what sort of sum we're actually talking about?
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- Rose Thousands of pounds.
- Parsonson Thank you. I find that quite interesting as to what the cost of it would actually have been.
- Rose Well, I know when, yeah, I'm not entirely sure on that but I know when they were looking to purchase the land back for Ngati Haka Patuheuheu, the block was valued at £2000 so, yeah, but again that's not really ...
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- Parsonson Thank you.
- Rose Brookfield might, again, be a better person to answer that for you.
- Parsonson Well, perhaps if I go to your main report, please Ms Rose, on page 96 you talk about Burt's application for subdivision on the 16th of February and I think Dr Battersby refers, on page 9 of the Crown evidence, to a subsequent application on July 1886. On page 9 he refers to an application by 65 owners to the Court by Rewiri Te Mumuhu who signs himself on behalf of Patuheuheu. And I just wanted to ask if you accept that the February application was in fact superseded, was that the correct word to use, by the one in July?
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- Rose I'm not sure about that actually, I don't have ... Page 9 was it?
- Parsonson Yes. It's under the heading "Application for Subdivision" (inaudible).
- Rose Right, I see, yep. I'm not sure whether it was superseded.
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- Parsonson I'd like just to ask if you could tell us anything about the survey that was done before the Court hearing, because on page 98 you refer to Meihaka saying that he had not expected that Burt's claim would extend over the Ngati Haka Patuheuheu settlement at Te Houhi. And I just wondered if you have any knowledge of the survey being done or where the line, in fact, was cut.
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- Rose I haven't looked, I'm not sure whether this, it might probably, Bernadette Arapere's the better person to ask. I have a vague, oh no, it's probably wrong, a memory of there being a sketch, sort of, survey plan and it got brought to Ngati Haka Patuheuheu after the hearing and, yeah, that was the first that they became aware that that was the, so it was just a, it wasn't, so I'm assuming by that, that it wasn't surveyed on the ground and it was just a sketch survey that was going to the ...
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- Parsonson A sketch survey?
- Rose But yeah, yeah, I couldn't be 100% on that.
- 10 Parsonson I mean, there should have been a survey plan, of course. That's interesting. Thank you.
- Rose Yes, I don't know whether Wilson's inquiry discusses that, the '89 inquiry.
- 15 Parsonson On page 101 you're referring to the Native Minister, Mitchelson, and his involvement at this point, and then all of a sudden, in 1890, the Minister of Lands, Richardson, gets involved and writes to Mitchelson recommending that the Native Department take this case to the Supreme Court. How did he get involved? How did the Minister of Lands suddenly have a role?
- 20 Rose I don't recollect, sorry.
- Parsonson I thought that was most interesting.
- Rose Yeah, it is.
- 25 Parsonson It pops out of left field, and that relates to my next question which really is at the bottom of page 102, where the Native Department seems to be having quite a role here in what's happening. Deciding to withdraw the offer of government assistance to Ngati Haka Patuheuheu because they hadn't immediately taken advantage of it. Who was making the decisions in the Native Department at this time?
- 30 Rose Well, the letter's from the Under-Secretary of the Native Department, but ...
- Parsonson (Inaudible).
- Rose Oh, who was the, Lewis.
- 35 Parsonson T W Lewis was it, still? Yes, subsequently, again, they are advising Cadman in a particular way. But they seem to be playing an important role at this time and my next question is, looking at your paragraph there, the Native Department withdrawing the Government's offer of assistance and Ngati Haka Patuheuheu are told of this on the 27th of October. The Native Affairs Committee questions that decision, the 4th of November. And we're then told they were too late and the Native Department also
- 40 requests the removal of the caveat on Margaret Burt's title on that same

day, the 4th of November. Now, you have set that out in a very narrative sort of style. You haven't passed any kind of judgment on what's going on there. And I would like to ask you what your interpretation of that set of facts is.

5 Rose It would seem to suggest that the Native Department had fairly, was, had decided that the caveat should be removed and that that was their primary concern.

10 Parsonson Thank you. I think that's a very powerful set of facts as they are (inaudible) together there at that point. Now, I just had another question which was actually, I'm sorry and apologise for this, it's going back in time, to page 41 and the surrender of Ngati Haka Patuheuheu. And you say that a condition of the surrender was that they would, in fact, go down to Te Putere. Now, I was just looking at page 41 on your documents and you say there that Ngati Haka Patuheuheu say they were anxious for peace, that if the Government would consent they would come out to Hataurua(?) and live peaceably on their land. And Mair replies he could give no such undertaking. I'm just not quite clear and perhaps I've misread it wrong, but I'm not quite clear at what point the fact that they should remove to Te Putere becomes a condition of the surrender.

15
20 Rose I think this goes back to McLean's policy, I think, is it on the 4th of May 1870, he – I'd better find the page reference. It's actually the 26th of May. I'm not sure whether this was a policy that had been formulated for maybe when Ngati Whare's surrender. Yeah, but I don't know. But it's clearly, at least that's what Mair and Preece, both the Government officers at that time, that was the message they gave Ngati Haka Patuheuheu. But, yeah, 25
the one I was thinking of was McLean's comment which is on page 45 where he says "it is highly important that the Urewera should be got out of their mountain fastness" and, yeah.

Parsonson Yes.

30 Rose But that's actually later than ...

Parsonson So, are you actually satisfied in your own mind that Ngati Haka Patuheuheu knew, when they surrendered, that they would, in fact, be sent to Te Putere?

35 Rose Well, not that necessarily Te Putere, but that they'd be sent to the coast, yes.

Parsonson They'd be sent somewhere to the coast?

40 Rose Yes, that was a part of why, you know, they obviously were not happy about that and they went away and there's gap of two and a half weeks where they're consulting amongst themselves and with other Tuhoe before they agree to that and Tuhoe gives its, you know, overall iwi approval as well. In that period.

Parsonson But they were clearly hoping, initially, that they would in fact be able to stay here.

Rose Yes, that's right, yeah.

Parsonson Thank you. Now my last question, I think is, again, skipping right to the, more to the end of the period on page 209 in your report, where you're talking about the development schemes. And the establishment of individual farms and you say "the farmer of the new farm who was not necessarily the owner, was responsible for paying out the costs of the farm's assets". Can you tell us how the farmers of the farms were actually chosen? And were they Ngati Haka Patuheuheu ...

Rose Yeah, I think that they were generally. I think it was arranged that it was usually Ngati Haka Patuheuheu people and quite informal arrangement about, like, they weren't like formalised leases until later on. So I think it was generally the case that yes, it was Ngati Haka Patuheuheu.

Parsonson Thank you very much.

Afternoon adjournment

15 Annsley Kerr cross-examines Jock Brookfield

Kerr Thank you Professor Brookfield. Annsley Kerr from the Crown. I'll be asking you just a short set of questions about your evidence. For Counsel's assistance I'm just going to refer to the attachments to the evidence and to the Crown's Document Bank Tab 11. I wonder, has the Document Bank got a number so that we can keep our Court papers in order? C28. Thank you. Professor, I'd like to start first at paragraph 21 of your evidence, out of your main evidence, clearly Mr Justice Edwards was sympathetic to the plight of the Waiohou community and you have explained in the last sentence that, under the deeds system, their possession of the land would have legally secure against Mrs Beale even if she knew nothing of the fraud that preceded her acquiring title and even if she did not know of the defendants' occupation of the land. The principle being there that Beale would only take title as good as her predecessor in title. Is that the summary of ...?

Brookfield Yes, that is the principle. The mere fact that they were in possession of the land was constructive notice to her that they were there even if she didn't bother to enquire and didn't know they were there. So, that yes it's the notion of constructive notice that would bind her and which means, which would mean that under the old system, it wasn't possible to go ahead and buy land without actually looking at it, seeing who was there, and then if there was anybody there, getting an explanation from them about their rights were. And, of course, it's that doctrine of constructive notice, of course, that goes with the Torrens system but in this transitional provision is, would be, is preserved in effect.

Kerr Yes. And, so, effectively if Mrs Beale had gone ahead and purchased, she would be required to prove in Court her title and would fail if she went back in time to the original void transaction.

Brookfield That would have been the result, yes.

- Kerr Now you've referred in the next paragraph to Chief Justice Way's (?) principle lying beneath that provision. And you've pointed to the problem in interpretation of 67, s 67 identified by Justice Edwards. If we, perhaps, took a purposive approach to interpretation, if that principle was clear – is it possible that perhaps even Justice Edwards got that interpretation wrong? You've said it's a clear case that if you were looking at the purpose of the provision perhaps he should have applied a wider application rather than just excluding the, because of that mention of the applicant proprietor?
- 5
- 10 Brookfield Yes. Um, I'm not sure in what respect we're suggesting that the Judge, er Justice Edwards may have got it wrong?
- Kerr I'm just suggesting that he was very much reliant on that part of the provision that talks about the applicant proprietor, but as applying, as excluding everyone else who came under either by operation of statute or some other form.
- 15
- Brookfield Yes.
- Kerr I wonder whether there's potentially an argument that he should have taken a purposive interpretation and looked at the purpose of the section to say that in this case s 67 should have been read widely.
- 20 Brookfield Yes I see. Well, and of course, Counsel for Maori rarely urged him to do that.
- Kerr Hmm.
- Brookfield I, I'm kind of think myself that, no, it was only intended to be deal with to applying when they brought land under the Act. It, after all, that was how it was drawn at the time when Maori land didn't come automatically under the Act on the making of the freehold order and so that it suited the circumstances of the time and well you may be right but I'm inclined to think that Justice Edwards did get it right.
- 25
- Kerr Thank you sir.
- 30 Savage Is the proposition that you're attempting to establish [inaudible] that it is the High Court's fault rather than the Crown's fault?
- Kerr No, it isn't. It's not sir, I'm just clarifying whether there could have been other interpretations.
- Savage Okay.
- 35 Kerr Professor Brookfield, if I turn next to paragraph 25 of your evidence. Now, you've look at, you've identified a possible argument that the order of the Land Court of 11 September was ineffective to bring the land under the Land Transfer Act. I just want to clarify the argument there. I understand you mention earlier s 4 of the Native Land Division Act 1882 and I understand that is the provision that Earle submitted to the Court but
- 40

is it clear from the certificate of title attached to your evidence (Appendix 4)?

- 5 Brookfield Yes. Well, the first certificate of title took the form, took the form, of course, that they registered the Crown grant as if it were a certificate of title and it's not so very legible, of course, but the grant is made, you'll see up by the top left-hand corner there, the grant under the Native Lands Act, the Native Land Court Act and the Native Land Division Act 1882. I think that s 4 of the third named of those is the operative one but I think they've just covered them all.
- 10 Kerr Yes. Yes. Right, right. But you're not making, the point you're making her is actually a point about the underlying freehold order being void. Is that the point as you carry on to discuss?
- Brookfield Yes, that's right. Yes.
- 15 Kerr Now, you go on to discuss in that paragraph in that paragraph, Edwards' view that the appropriate proceeding, if it had been taken in time, the Land Court orders would have been quashed. Now, he found that the orders were procured by the fraud of Burt. He also ...
- Brookfield Sorry?
- 20 Kerr He found in his judgment that the Native Land Court orders were procured by the fraud of Burt.
- Brookfield Yes.
- 25 Kerr And he also found that the Chief Judge's actions in respect of the applications for rehearing meant that the orders made by the Native Land Court were made without jurisdiction and might have been quashed by certiorari (?).
- Brookfield Yes.
- 30 Kerr So, if the matter had been brought before the Supreme Court by a writ of certiorari within six months of the decision, that that decision of the Chief Judge may have been quashed? The subdivision orders of the Chief Judge may have been quashed if action was taken quickly?
- 35 Brookfield I'd say rather that, well, Counsel Fred McGill (?) was able to raise the validity of the, of the division order of 11 September 1886 because, of course, an order in council had been made under the Land Title Protection Act allowing it to be attacked in these proceedings and, well, that was all Justice Edward needed to, that was essential, of course, but for him to, to make the judgment that it could, that it would have been, it was made without jurisdiction and void and only the, and so as I think he says on page 888 of his judgment that the, that the defendants would have to rely on the exception to the Land Transfer Act.
- 40 Kerr Yes. Yes.

- Brookfield If they could prove it.
- Kerr Okay. I suppose what I'm getting at was he also saying that if action had been taken early enough in 1886 or thereabouts, that the Chief Judge's order could have been quashed at that point requiring a rehearing.
- 5 Brookfield Yes, I think so. Yes, I think so.
- Kerr Now, I'd like to turn to the Crown Solicitor, as he then was, Bell's opinion, which you refer to in paragraph 26, or you are actually discussing his role at a later stage.
- Brookfield Yes.
- 10 Kerr If I could refer you to Tab 11 of the Crown's Document Bank, this is a copy of the opinion from 28 December 1889.
- Brookfield Yes, I have it.
- Kerr Thank you. I'd like to refer you to the last page of that or the third page. Perhaps, if I read it out?
- 15 Brookfield Yes.
- Kerr "I think the natives who have been defrauded should be advised to apply to the Registrar under section 69 of the Land Transfer Act 1885 for rectification of the register failing which an action should be commenced in the Supreme Court by the natives (a) for cancellation of the partition order and the Crown grant (b) if there has been no fraud under the peculiar circumstances of the case that the registered proprietor be declared trustees for the injured persons. Section 56 of the Land Transfer Act does not provide for cancellation of the certificate of title except in cases of fraud but justice will be done as claimed in (b) above if there be no fraud but the title obtained was void. I further think that a caveat should be lodged in the meantime by the Registrar under section 175 subsection 4 of the Land Transfer Act."
- 20
- 25
- Savage That's absolute incredible. That's [inaudible] operation of law.
- Kerr Yes. Yes. He'd been successful in Parounia Matthews (?) obtaining his trust of that nature. Now, given Bell's advice that that Waiohou community initially proceed by an application to the Registrar to cancel the certificate of title on the basis that it had been fraudulently or wrongly obtained, in your view do you think Howarth should have proceeded in that matter, attempted that first step?
- 30
- 35 Brookfield I don't, well, I think Howarth shouldn't have been so confident. If, I think it's put somewhat differently – where have I have sent it in – Professor Boast's evidence, essay I think. I may be misplacing this, that Howarth's advice, no I don't it's Professor Boast, it's somewhere else, that Howarth was concerned, thought well they may as well stay there and simply be compensated if they lost the case but I suspect though that he must have been relying on the exception that Fred McGill argued for them. And, it
- 40

5 was, well it was, it was an unwise thing to do. In all the circumstances, anyone looking at s 67 and thinking that the community could rely on this would have, well they would have realised the difficulty straightaway. They would have realised the difficulty straightaway and, and proceeded in the Court right away. So that I don't think they got, I don't think they [got] good advice. It's only that if you start to explain why he advised that he did it looks as though he must have thought that relying on s 67 was possible.

10 Kerr Do you think it would have prudent for him to have put a caveat on the title?

Brookfield Oh yes, it would have been prudent to do that. Yes.

Kerr Do you also think that, given the DLR had Wilson's report and Bell's opinion, do you think that he may have considered cancellation of the title on the basis of those reports?

15 Brookfield Who might consider this?

Kerr The District Land Registrar.

Brookfield I don't think, I know the District Land Registrar under some circumstances acts judicially.

Kerr Yes.

20 Brookfield I, that I think would be, would be carrying, would be something that I wouldn't expect of him. In fact, I'm a little surprised that the District Land Registrar proceeded by, in any way by instructions.

Kerr Hmmmm.

25 Brookfield As I recall the section in the Land Transfer Act it's always been that the caveat by, the Registrar's caveat was to protect or was to prevent improper dealings and that it would have been in order for him to act on his own discretion and leave the caveat on. I think so.

Kerr Yes. Yes. Yes. And do you think, but you think it's unlikely that he would have taken the initiative to cancel the title himself?

30 Brookfield I don't think he would do that. No. I doubt if he would have the power to do that.

35 Kerr Now, in your conclusions on paragraph 28 you refer to Professor Binney's report and Richard Boast's paper and I'll direct questions to Professor Binney herself about the underlying documents, but I wonder if you have any observations to make on a number of the facts in this case? You've indicated that the system could be manipulated by persons acquiring land from Maori by illegal or fraudulent means. Now, in terms of Professor Binney's analysis, at some point she suggests that Soutar and Margaret Burt may have held title good against Maori because of the various transactions they entered into when the land was transferred following

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partition. Now, Burt was acting as their agent, Soutar and Mrs Burt's agent, so do you think it likely that his fraudulent actions would taint their own title under the Land Transfer Act.

5 Brookfield It will only taint the title of the registered proprietor who is personally fraudulent. I haven't tried to consider those circumstances, those circumstances particularly. Simply because as my evidence shows, I've been concerned with the situation where even if there was no fraud involved and I, well, where Justice Edwards saw the witnesses and reached a judgment that was not a person to be relied on to put it mildly. 10 Whereas, he also presumably saw Mrs Beale and was not convinced of her personal fraud. And, I know much has been said, probably quite plausibly, that after all Mrs Beale might be fraudulent after all. Nevertheless, the Judge saw them all and at this distance of time it's a little difficult to accept his judgment as to the witnesses in once case and 15 not to accept his judgment as to the witness in the other. But from my point of view, of course, it doesn't matter in regard to Mrs Beale or even it wouldn't matter in regard to the Harry Burt, even if he was quite honest. Or Mrs Burt.

20 Kerr You may also be aware that Professor Binney takes the view that the Crown either obstructed or purposely did not assist Ngati Patuheuheu so as not to have to make a payout from the assurance fund. Given, that it is a statutory fund and there are prescribed criteria for payments with the right of action against the Registrar-General, do you think it likely that the Crown would obstruct in this way?

25 Brookfield I haven't considered it and I didn't, I noticed that but I didn't really pay any attention to it. So, I wouldn't want to, I wouldn't express any opinion there.

Kerr Thank you very much for your evidence Professor.

Brookfield Thank you.

30 Kerr Thank you.

David Ambler cross-examines Professor Brookfield

Ambler Thank you. Professor Brookfield, we've heard from your evidence and from earlier evidence that the Land Transfer Act as it stood, could not assist or did not assist the Waiohou people.

35 Brookfield Yes.

Ambler And, they lost the case in the Supreme Court. We also know that the Crown looked at some other legislation to possibly compulsorily acquire the land and that was not followed through. My question is, in your experience, are you aware of the Crown ever passing special legislation to 40 acquire land from Europeans to remedy an injustice to Maori?

Brookfield No, I can't say I am aware. I'm not aware of any. There may have been but I just don't know. No.

Ambler Thank you.

Richard Boast cross-examines Professor Brookfield

Boast Kia ora Professor Brookfield.

Brookfield Kia ora.

5 Boast I'd pretty much like to buy you a beer afterwards and we can discuss the intricacies of this without boring everyone else. The question I would like to ask you though is about, about fraud under the Land Transfer system. Of course, it's clear law now following the assets and Mehirori case that fraud means as you said, actual dishonesty by the registered proprietor but at the time of the Beale case, isn't it right though that this was much more up in the air?

Brookfield Yes.

Boast Yes. I think the assets case may have just been decided but Edwards doesn't refer to it.

15 Brookfield No. He, well, he doesn't refer, I was going to say he anticipates it but that's not the right word. No. It's in line with the assets case but yes, it was more up in the air on the fraud question.

Boast Yes. Thank you. That's all. Thank you.

Ann Parsonson questions Professor Brookfield

20 Parsonson I have a question simply as a layperson and I'm just taking my courage in my hands being surrounded by lawyers on all sides but in a case like this where the law you have outlined is clear but yet an injustice of this magnitude stood to be done as a result. Did the Crown have any obligation, any Treaty obligation at that point to have acted so that that outcome might have been averted?

25

Brookfield Any obligation at this stage in relation to what happened then?

Parsonson Yes, in relation to the fact.

Brookfield Well, I think so in the light of things as they appear now. I could perhaps explain that by saying that in the case that when counsel were arguing before Mr Justice Edwards at the, at page 888 of the – sorry I'm finding it

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Parsonson That's all right.

Brookfield Yes. In the appendix to my evidence, page 880, sorry it's not 88 it's a bit before that. It's 886, and this is a place where the, where Counsel for Beale are explaining why it's not appropriate for, or why they think it's not appropriate for the section to have protected the defendants in this sort of case. They say, correctly – this is about 20 lines down on page 886 of the Court report, law report – the reason is, under the old law, possession was constructive notice. It was quite different with land subject to the Act

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5 by law, as the parties are not vendors and purchasers, you know, so that if
 someone bringing their land under the Land Transfer Act could be
 required, quite reasonably, to say "there was no one there in adverse
 occupation" and if they made a, if they made a stake in that there would
 10 be s 67 to protect the person who was in possession, rightfully entitled.
 That, in other words, it was right, as between vendor and purchaser, but,
 and this is, I think, the questionable place, the questionable part of what
 they argue "it is quite different with land subject to the Act by law that is
 by statute or court order", of course, and not subject to the Act by an
 application "as the parties are not vendors and purchasers". And here is
 the phrase that one would not accept nowadays and I don't think should
 have been accepted then "but the Crown is dealing with its own lands. If
 15 this were not the position we should be put on upon enquiry as to who was
 in possession of the Crown's lands, how long they'd been there and all the
 rest". Well, the point is that the Crown is not merely dealing with its own
 lands. It's dealing with lands subject to the customary title and it's the
 transition from the customary title to the freehold title of the Maori Land
 Court and then the title under the Land Transfer Act. It's there that the
 protection becomes as appropriate. Now, in view of, the view now
 20 substantially upheld by authority but both in the country and all the other
 jurisdictions, Canada, Australia, the United States, in view of the view
 that initially the Crown acquires its title subject to the Maori customary
 title, then it is quite clear that it would have been appropriate for the
 protection to be extended. And, that leads on, I think, to really it's a long
 25 lead up to answering your question, but the answer is, yes, if my opinion
 is asked, I think it is right the Crown should consider restoring to the
 claimants or compensating the claimants so far as possible for a failure in
 the system at the time, which if we are to have regard to this passage in
 Counsel's argument, had something to do at the time with the idea that
 30 after all it was the Crown's own lands and no question of their being
 incumbent by Maori customary title came into it. Does that, I hope that
 answers it.

Parsonson Thank you very much.

Judge Savage questions Professor Brookfield

35 Savage I have a couple of questions. The people of Tuhoe (?) would have been
 protected in the s 67 sense had the land been under the old system?

Brookfield Yes. Yes.

Savage They were not protected because their title emanated from a court order.

Brookfield Yes, because the s 67 would extend to it.

40 Savage And, people in adverse possession, in contrary to a court order in favour
 of another party, would inevitably be Maori people, wouldn't they?

Brookfield Um.

Savage Almost inevitably.

- Brookfield Yes. I don't think not "almost inevitably" because, see the cases that arose in Australian jurisdictions, the South Australian, for example the case I referred to where Chief Justice Wade –
- Savage Yes. No, I'm talking about cases where title emanated from a Court.
- 5 Brookfield Yes. Oh, yes, I see what you mean. Yes.
- Savage That was the problem here, is that the title emanated from the Court.
- Brookfield It is the problem and the Australian amendments because of their different history – yes, I see what you mean – the Australian provisions don't, they have actually been changed so that they operate more generally and just on, so that it doesn't matter how the land comes under the Act, but they don't in Australia in all the sections I've seen, go into the particularity about Court orders and statute. And, that, no doubt, is due to the different historical relationship.
- 10
- Savage So, those who would be most likely to be hit by this omission in the legislation would be Maori people, because the orders were emanating from Maori Land Courts.
- 15
- Brookfield Yes. I think that's so. It was obviously drawn wide enough to cover other sorts of cases too and perhaps – this is just simple guesswork – but perhaps if it was Dillon Bell's work, he simply thought that the easiest way to ...
- 20
- Savage 1913 amendment you're talking about?
- Brookfield 1913 amendment. Or whoever is responsible thought the best way to do it was simply to make a general and refer, but yes.
- Savage In your knowledge of New Zealand legal history, is this a one-off? Is this the only time that this particular pitfall was fallen into?
- 25
- Brookfield Ah, well, yes. It's been very, very little used and I noticed from the landlord textbooks, High, McBaldin & Syme, Hope, the one-time Registrar-General of Land, EC Adams who would know, if anybody did, that that he knew of only one application, I think, and that wasn't successful. It is quite true, this is something I should have mentioned, but that I didn't, there was a doomed attempt at the Moutua Gardens case to raise it and it was doomed because, of course, they couldn't show, they couldn't show the continuous occupation.
- 30
- Savage Yes
- 35 Brookfield So, so to that extent, well it is, we still can't, we still don't know of any Maori attempt to use this section successfully and, in fact, the numbers of attempts to use the section or its corresponding Australian instances, is very few, anyhow.
- Savage Okay. Just one last matter. Is it clear that Howarth's clients had a caveatable interest?
- 40

Brookfield I'm not sure. The ...

Savage They'd have been well advised to put one on and see what happens next, would they?

5 Brookfield Yes, it would. I think, I think it would have been. It would have been and they, the Registrar's caveat would have been the better hope to prevent an improper dealing with the land.

Savage Yes.

Brookfield But I'm not sure of, I'm not sure about the defendants here.

Peter Andrew cross-examines Dr David Williams

10 Andrew Kia ora Dr Williams.

Dr Williams Morning.

Andrew At page 6 of your brief, you refer to your expertise as a lego-historian. You say in that same paragraph, it's page 3 of your brief.

Dr Williams Page 3?

15 Andrew Yeah, para 6. That your evidence discusses legislation, policy and practices of the Crown, not only as viewed from the context of the times, but also as understood from a Treaty jurisprudential perspective. I'd just like to read you a passage, also, from your book, page 8. You say there in the second paragraph, "I do not attempt in this work to understand and contextualise the Native Land Court in the light of contemporary thinking in the period 1864 to 1909. Such a task would be for an historian to undertake." And then you go on to refer to your approach of, your method of approaching the matter from a Treaty jurisprudential perspective. Now, your evidence here is wholly based on your book, isn't it, as you say in para 8?

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Dr Williams Yes. My interpolations have been, as I've gone along, have related to some of the evidence that I've read since, but the brief of evidence was prepared based on this book.

30 Andrew Given your acknowledgement in your book, at page 8, wouldn't any objective reader of your evidence have cause to question your authority to speak on historical matters such as the comments you quote yesterday from Stafford and say the proceedings of the Kohimarama Conference?

35 Dr Williams Well, I do have a PhD which is in legal history. From the University of Dar es Salaam. And which was written prior to any Treaty principles were invented by Judges or Tribunal members, so it was judged as a piece of history in, I think I finished it in 1982, my PhD thesis. And, indeed, part of this book was based on that PhD thesis that I wrote from 1978 to 1982.

- Andrew But, would you accept that contemporary thinking about the Native Land Court is important in attempting to understand how it operated?
- Dr Williams Yes, I think that you need not just my perspective, but the perspective of others and, as you are aware, there's a considerable debate amongst historians and others, Bill Oliver and Andrew Sharp and others have criticised the way in which the law looks to the past and interprets the past in the light of the present. On the other hand, in the Tribunal where we are, the job of the Tribunal is to interpret the past from the point of view of the present. So, in my view, my evidence is highly relevant to this particular hearing.
- Andrew I want to put some extra material in front of you, and I have copies for the Tribunal too. It would be appropriate to hand those up at this stage.
- Pohatu This shall become document #C29.
- Andrew The ...
- Dr Williams Just before you ask me the next question, in answering that last question of mine, I would point out that Dr Paul McHugh, who has been a Crown witness recently, expresses very similar views as to mine about the role of lego-historians in an article in the University of Toronto Law Journal, published in the year 2000.
- Andrew One of those documents in the pile I've got, it's the second one, it's actually page 255 of Michael King's Penguin of New Zealand History. It's a document I want to focus on at the moment. I want to read what Michael King says there about the Native Land Court. He says, "although one of the main reasons for establishing the Court's procedures was to facilitate the transfer of Maori land to Pakeha ownership, Maori themselves often displayed a considerable willingness to bring land to the Court and to offer it for sale. The reasons were complex. In some cases would-be sellers simply wanted money with which to purchase commodities or expand their capacity to offer hospitality, for the land concerned was unwanted. But in many other cases, Court sittings and sales were initiated by Maori to prove the validity of their claims over those of rivals". And he goes on to make comments about inter-hapu and tribal rivalries. It's fair to say, isn't it, that in your viewing matters through the prism of Treaty jurisprudence as you see it, you ascribe a much more of a passive victim role to the historical Maori actors, or players, than Michael King does, don't you?
- Dr Williams Well, I don't believe in the fatal impact theory and in various other writings which are not before you, I have emphasised the significant role played by Maori in interacting with missionaries and then early Pakeha settlers and then early settler arrivals after the Colonial Government came here. In situations where clearly they were, or they thought that they were in charge of proceedings, and I certainly don't adhere to any views that Maori were victims who were purely passive. The lens for this particular inquiry though is the Treaty of Waitangi Act 1975 and the jurisdiction of the Tribunal is to look at actions of the Crown, and so I focus on the

- 5 Crown purposes of the Land Court to acquire land for settlers. There may have been all sorts of reasons and one member of the Tribunal has written an article too on the matter of mana and the First Edition of Oxford History of New Zealand, wasn't it? Where some of those matters being talked about by Michael King there, indeed he may have sourced it Ann Parsonson, I suspect. The evidence that I'm looking for is how did the Crown measure up to its obligations under the Treaty of Waitangi? And whether, and how Maori responded to that is part of another story, but that's not the part that I'm focused on.
- 10 Andrew But it's an important part of the story though, isn't it? Because the Crown clearly is not operating alone and in a vacuum. It's interacting with the Maori.
- Dr Williams Sure, and I'm not the only witness, either for the claimants or for the Crown.
- 15 Andrew But you accept, therefore, that the role of Maori and the interaction of Crown/Maori is an important part of the equation in making an ultimate judgment?
- Dr Williams Absolutely. My assessment of it, from the, my reading of the history of that period, through the Maori repudiation movement, the Te Kotahitanga, Te Kingitanga, the Orakei Parliaments and so on, is that Maori were consistently criticising the Native Land Court and asking the Government to not pursue that particular method and so there's a very consistent active response by Maori against the Maori Land Court. What you're pointing out is there's also a very active engagement in the Land Court proceedings, once they are going, once they get going. And then, of course, you do get into re-litigating old scores, once you get into the Land Court. So, my focus is on how did this whole Land Court process start? And why did it start? How it started was because the Crown wanted to get land for settlers.
- 20
- 25
- 30 Andrew Could you turn please to page 6, your paragraph 15? You say there, "Treaty jurisprudence today must emphasise two facts, firstly the extinction of Maori customary tenure" that you say was the intention of the 1865 Act. I'd like to take you to your book again, at page 90, please. You say there at the top of page 90, "It must be made clear that many Maori leaders were not ill-disposed to land tenure reform which would provide certainty and security in the control by rangatira of tribal lands". Do I take it from that that you accept that some modification, some movement away from orthodox customary title was inevitable as part of the new world, the new order post-Treaty?
- 35
- 40 Dr Williams Every, the laws and customs of all peoples change and evolve as conditions change. And undoubtedly tikanga Maori has, and is, changing and evolving and was changing at that time. The question is who is in charge of the change? Is it change that's been imposed upon people or change in which they are in control of their own destiny, so that what people like Wiremu Tamihana Teneke, Tamihana Te Rauparaha, Paora Te Haere and those people whom I quote on that page that you would refer to
- 45

me to, what they were looking for was some certainty of manawhenua at a time when the old sanctions were no longer available. The sanction of war, or conquest of, in satisfaction of previous disputes, was no longer available. How do we protect the manawhenua in the present day? It maybe that we need to have some rules around that. That's what those people were saying. But, I would draw your attention to what I said after that statement that you've quoted, the full quotation's there from those various Maori in 1860 at the Kohimarama Conference and I say, at the end of the quotation there, halfway down page 91, "It's one thing to claim Maori support for a better defined tenure", that's what I've been talking about, a better-defined tenure, "but Buller and many other Government officers persistently linked tenure reform with the intention that those reforms would "pave the way to a more general alienation by the Natives of their wastelands"". So that's the point. The Crown was trying to get hold of what they called "waste lands". Maori may have been willing to adjust their tikanga in various ways, but it was in a context when they would be in charge of it, rather than in order to facilitate Crown purchasing.

Andrew On this issue of, as you see it, Maori taking charge, being in control, you're critical, obviously, in paragraph 15, about the lack of consultation with Maori with respect to the enactment of various Native Land laws.

Dr Williams Yes.

Andrew The, as you rightly say, in this area seems to be the 1873 Act which had the greatest impact, in a practical sense.

25 Dr Williams Yes.

Andrew It is fair to say, however, that there was some consultation with Maori in advance of that Act, wasn't there?

Dr Williams The Haultain Commission.

Andrew The Haultain Commission.

30 Dr Williams 1871. Yes.

Andrew And you gave evidence in the Hauraki inquiry, didn't you?

Dr Williams And you questioned me in that inquiry.

Andrew And you will be aware that Dr Michael Belgrave and Dr Grant Young gave evidence, after you gave your evidence, and in fact after the Crown gave its evidence, in that Hauraki inquiry, correct?

Dr Williams I am aware of that because I'm editing a book with Michael at the moment, but I never actually, I've never actually seen his evidence.

Andrew Oh, you've never seen it. One of the documents I've put before you is extracts of the Young and Belgrave evidence from the Hauraki inquiry. And it's document #B2 on the Wai 686, the Hauraki record of inquiry.

They say, for example, at page 4, can you see that, paragraph 6? This is the Young and Belgrave extract.

Dr Williams Yes.

5 Andrew They say there, "The Court, the Native Land Court, was regularly
reinvented throughout the 19th and 20th centuries in response to the
changing policy, priorities of different governments." And they say over
the page, on page 5, "All these considerations challenged the suggestion
10 that the Court set up in 1862, which as Loveridge research shows, only
operated in the districts specifically chosen because the tribes there lived
in relative harmony with each other. The Crown and settlers can bear any
relationship but the kind of court established in '65, '73, 1880 etc". It's
also fair to say in respect of those changes and consolidations that Young
and Belgrave refer to there that there was ongoing dialogue and
15 consultation post-1871 with Maori, wasn't there, about the legislative
changes?

Dr Williams Yes, I mean the reason that some people find my book useful is not
because of the text of the book, but because of its appendices and the
point that's been made by Belgrave and Young here is that there were
those substantial changes in 1873, then 1880, another one 1884 actually,
20 then 1888 and so on, and so that the appendices track through on, in a
thematic way, the ways in which partition orders could be obtained and
the numbers required to apply for investigation of title and so on, all of
those ways in which there was, there were some very significant changes
as time went by. The interaction with Maori through that period, though,
25 was primarily by constant applications for rehearing, of which we've
heard of seven in this particular area, numerous petitions to the Native
Affairs Committee of Parliament, sometimes representations from the four
Maori members of Parliament from 1868 and one or two members of the
Legislative Council from, I think, 1872. So, my take on that, which I've
30 read quite a substantial amount of, is that it was by and large Maori pleas
and laments about the way in which the Court was operating and seeking
for greater control over the process. So that what's not in that list there is
all of the attempts to get the Native committees which started in 1883, I
think, and then the committees established in 1900 where there were some
35 attempts to try and get self-determination so that you keep the Court out
of ascertainment of title issues. And that was a consistent thread of Maori
protest in the repudiation movement, the Kotahitanga, Kingitanga and so
on. Those requests, though, were not acknowledged. There was a brief
period of a reassertion of Crown pre-emption and then that was changed
40 again very shortly afterwards. By and large the Crown wished to keep
control of the process right through that period. So, although the
particular actions(?) as to how land was ascertained and how it was
partitioned and how it was alienated, changed quite substantially through
the century. One year, I think, 18 Acts of Parliament were passed dealing
45 with native land affairs. An enormous amount of legislation. So, yes, that
was happening but my take on it is that throughout that period the Crown
always kept control of the proceedings. Always maintained its power to
order the Court to desist from hearings and so on. Had Native Land
Purchase Officers operating and many of the changes were not in response

- 5 to Maori requests for change, but in response to Land Purchase Officer requests for change. All these (inaudible) shares, it's really, really difficult to get a majority these days can we surely move away from this requirement for a majority and so the Government moves away from the requirement for a majority.
- Williams Just before Mr Andrew continues, could I perhaps just at this stage highlight my growing concern that documents are being put to witnesses that aren't part of this inquiry, they haven't read and are being put to the witnesses at a very late stage. I'm confident that Dr Williams has the ability to answer the questions, but it is, however, a growing concern that I am having.
- 10 Andrew Well, I would say in light of the expertise that he says he has, that, and his experience with Hauraki etc, that he would be hardly surprised or ...
- Savage (Inaudible).
- 15 Andrew Well, just, you were speaking in your answer before about a lack of Maori control. There was, albeit short-lived and rejected ultimately, as you say, an attempt in the 1880s, wasn't there, with the Ballance block committees to give some form of, or greater form of autonomy or power to Maori owners with respect to land, wasn't there?
- 20 Dr Williams Yes, there's, I'd only be relying on the work of somebody whose name I've forgotten at the moment. I've read a thesis on the Native Committees Act of 1883 and the Papatuku committees under the 1900 Councils legislation as well. And by and large they, the Ballance block committees failed because they define areas which were just covered too many tribal groups and were not very effective. But I don't claim to have any particular expertise to take that matter any further, except to say that they didn't, they weren't given very many powers and what few powers that they had were not very effectively implemented.
- 25
- Andrew Can you just look further down the page from that Belgrave and Young report, page 5 there, this is paragraph, sorry it looks like that number's been deleted, still paragraph 6 actually, but it's the last paragraph on that page.
- 30
- Dr Williams On page 5?
- Andrew Page 5. It says there, "In its initial stages the main focus of his report was the relationship between the Court's investigation of title to a block of land and the alienation of that block of land. We are very sceptical", they say, "of a close relationship between the Court and rapid alienation, especially in terms of cause and effect. It is too simplistic and the patterns of alienation over 10 or so decades are much more complex." That's a fairly accurate assessment of the operations of the Court generally, isn't it?
- 35
- 40
- Dr Williams Yes, I agree with that statement entirely. Indeed, in my book I rather defended the 10 owner system which has been strongly criticised by many, because on the statistics that I found, some of the, many of the

- 5 blocks awarded to only 10 owners in the early Court from 1865 or 1873 actually remained in Maori ownership for quite a long period of time. So that it wasn't an automatic movement from investigation of title to sale. Although, I think the process sped up very substantially under the 1873 Act. So that's why my focus of attention has been on the 1873 Act. And the tables of lands sold returned to Parliament each year in the 1870s and 1880s would bear that out.
- 10 Andrew Isn't it the case that under the '73 Act sales actually slowed down and there were attempts later in that decade to actually bring about reform to try and speed it up?
- Dr Williams Completed sales slowed down. But, piecemeal sales were going on all the time. Completed sales slowed down for a period and then were sped up because the Crown gave itself the right to apply for a partition without the owners consent in 1877, which is only four years later.
- 15 Andrew When you say piecemeal sales, though, they didn't actually result in alienation of the land though, did they, because the various provisions of the Act weren't triggered?
- Dr Williams No, but that's why the Crown then gave itself the power in 1877, as I say, only four years after 1873, to partition the land and partition out whatever interests they thought they should have, either by survey liens or by minority interest required.
- 20 Andrew Turn please to page 11 of your brief. It's under the heading "undermining te tiro rangatiratanga", paragraph 27. And you refer there at the bottom of that page, page 11, to the New Zealand Settlements Act 1863 and the Native Lands Act 1865. You say it's two elements of the same policy. But surely it's the case, isn't it, that the New Zealand Settlements Act was fundamentally different in the sense that it unashamedly sought to confiscate rebels, confiscate land to punish rebels. That was its explicit aim, was it not?
- 25 Andrew
- 30 Dr Williams Yes. And at the end of the day, not a huge amount of land was acquired for settlers as a result, because much of the land that had been confiscated was in fact returned under the Compensation Court, or other mechanisms, as individualised interests of the same sort as the Native Land Court interests and those lands were then later dealt with by the Native Land Court. So that the actual acreage taken by proclamation and made available for settlers was a very, very small proportion of the North Island.
- 35 Dr Williams
- Andrew But ...
- 40 Dr Williams But what the Acts have got in common is that they were aiming to provide land for settlers, but why the Native Land Court was much more successful is because they delivered it in a much bigger area.
- Andrew But that overtly punitive element of the New Zealand Settlements Act wasn't a feature of the Native Land legislation, was it?

- Dr Williams 5 No, well, that's what Donald McLean kept on saying. McLean said it's much easier for us to wheedle land out of Maori than it is to punish them and take it away from them, they get very upset when we take it away from them, but if we go along and do a few sales transactions here and there and get a bit of a dispute going between one person and another and they all come to Court and then there's a few survey charges and there's a 90 day hearing and they've got to pay £1 a day for each person, well, then you're tending to get the land. And so McLean was very clear that the Land Court was much more effective than raupatu. So they didn't use the raupatu legislation in the East Coast, because he successfully persuaded Government ministers that that was not a good idea, we'll try and get voluntary cessions, they were called, and I think that affects this inquiry as well.
- Andrew 15 Yeah, but he was very much in favour, also, of ensuring that Maori had sufficient reserves of land, wasn't he?
- Dr Williams 20 Ah, well, that's one of the examples of protective mechanisms which was in the early legislation and his legislation in particular of 1873, that I discuss at length in my book, and as you know, the Native Land Court Judges were very happy to implement most of the 1873 Act but thought that all of the provisions about native reserves that McLean had put in were not possible to be implemented and they didn't like them anyway because they didn't like the idea of land coming the Court and finishing up in customary title afterwards. So, they didn't implement the native reserves provisions that McLean had put in. But, McLean's provisions, I think, are a clear example of what I said in my evidence today, which is 25 that at the early point in time when there was a very large amount of Maori customary land still available, the Crown appeared, in the legislation, to be quite generous in 1873 it was 50 acres per man, woman and child. I don't know why it says per man, woman and child. It should say 50 acres per person, I would have thought, but anyway. They said 50 acres per man, woman and child and the District Officers were supposed to organise that. They didn't.
- Andrew 35 But in terms of the legislative intent and design, the maintaining, setting aside of sufficient reserves, was a key platform of the Act, wasn't it, because specifically referred to in the long title, isn't it?
- Dr Williams Yes. It was part of the politics of getting the Act passed. My greater concern is the law in action rather than the law in the books. The law in the books had the references to the reserves, the law in action had none.
- Andrew 40 Turn please to page 14, para 31 of your evidence. You say there that "the Ministers of the Crown were aware that any one individual could and did embroil the whole hapu in Land Court title investigation litigation from which there was no escape." Looking generally at the practice of the Court, isn't that criticism there very much overstated because it was frequently the case, wasn't it, that applications made to the Court were 45 made by individuals who were acting in a representative capacity, on behalf of their hapu or kinship group?

Dr Williams 5 Yes, and generally because they'd already signed up some alienation arrangement beforehand. Which is one of the major criticisms that I make of the Land Court procedures. And which, indeed, Dr Martin, the former Chief Justice made as well. Which was that, I spend quite a bit of time on the fact that pre-investigation dealings were always permitted under the Native Land legislation. People took a risk as to whether their speculative deals prior to title investigation would come to fruition or not. And, so, that, the protection that Dr Martin, the former Chief Justice would have had, would be that all pre-investigation dealings would be illegal and punishable and that no land could be awarded as a result of them. That was never accepted and so there certainly were many cases in which there was only one or two applicants indeed in a representative capacity, but almost always because they'd already entered into sale or lease negotiations or even concluded those negotiations and at that point then of course other people who've got interests in the block then have to come along to protect those interests.

Andrew 20 But often the transactions that were entered into prior to the title determination were also entered into on the Maori side by representative individuals, weren't they, the would-be purchaser would often deal with kinship groups, albeit in advance of the Court process?

Dr Williams 25 Well, the Crown practice was, as I indicated in using Wilson's remarks in relation to this area in 1874, Crown practice was to use whatever technique would achieve the best results in the long term. If you could go along to a single individual in a non-representative capacity because you knew he had some debts, then you would. If you thought that there were people in this area that were wanting to bring Pakeha into the area, and this was one of those chiefs that was, one of those rangatira that were keen to bring settlers in, then you'd go along and you'd have an open hui and you'd have it all discussed and so on. The Native Land Purchase Officers used whatever technique was likely to be successful to achieve the Crown's objectives. Naturally enough, that was their job. But it included taking advantage of people who were known to like a bit of drink and had got into a bit of debt, as well as taking advantage of the, perhaps, better intentions of some other rangatira. So, I don't think you can give, in fact 30 as you've already said to me, I don't think you can give a blanket sweeping answer to that question. You have to look in more detail on a block by block basis, in this area, Tahora is a block where two people claimed, who were found to have no interest whatsoever, in a huge area of land that then involved other hapu having to defend their interests.

Andrew 40 The Legislature was alive though to this issue, wasn't it? They did, in the 1873 Act, introduce this preliminary, sort of, vetting procedure to insist upon the bona fides of the application being tested, didn't they?

Dr Williams 45 Well, again, that's in the legislation. That's in the law on the books. But the law in practice is that the Judges didn't like it. That the District Officers were supposed to do it. The District Officers were given no particular resources to do it. And the view of the Judges was, look, it's best if people come to Court and we sort it out in Court on the basis of evidence in the Court. And so that although there was an apparent

- 5 protection in the legislation, it was one of those occasions in which the Judges show a sort of independence, in a sense, from following the law and didn't effectively operate the provisions. And, indeed, shortly afterwards, the power was, I haven't got every Act in front of me, but I think the District Officer requirement to investigate was then transferred to the Judges at some point quite soon after. Is that correct?
- 10 Andrew (Inaudible) the Act I was talking about, section 38 was the basis of my question to you. You referred in your answer just a minute ago to the Tahora block and the size of that block. The various blocks that we've been focusing on, or are to focus on this week, tend to be larger blocks. I'll give you some of the acreages. Matahina, 85,000 acres; Waiohau, 15,000 acres; Kuhawaea, 22,000 acres approximately. Does that tend to reflect the nature of the terrain? Relatively traditionally sparsely populated areas. This is the area where you will see larger blocks being processed through the Court.
- 15 Dr Williams Well, survey costs and accessibility are all issues when it comes to sizes of blocks and numbers of possible claimants and so on. I mean, ...
- 20 Andrew It just seems like with the more intense areas of agriculture and habitation, like in Turanga, Poverty Bay Flats, you get smaller blocks there, for example, in contrast to the hill country behind.
- Dr Williams No doubt because in customary terms you're also looking at areas where whanau interests were much more significant in quite specific areas, whereas you're tending to deal with hapu interests in larger areas in this sort of terrain.
- 25 Andrew So there is some correlation between the customary, or the existing conditions of the people living there, and the size of the blocks?
- 30 Dr Williams Well, I would have thought, from reading the Wilson materials you put in front of me, that the idea was to nibble at the rohe potae and because in his view the Urewera 70, as he called them, and as the Judge corrected me, were making claims over other tribes' lands and they were wanting to, the Crown was wanting to come in here and undermine any rohe potae claims in this area. So, obviously they'd want to do it in large blocks, wouldn't they? But in terms of farming potential for people like Troutbeck and all the rest, I mean, this was not good farming territory so I guess they needed large blocks too. The private purchasers would want large blocks.
- 35 Andrew If you turn, please, to page 18, paragraph 36 of your report. And you refer there to the, what you see as the main protective mechanisms. You list them there. Under the 1873 Act the Court had to satisfy itself that all owners under a memorial of ownership consented to the sale and the Court also had to be satisfied as to the fairness of the sale, didn't it? That's in section 59.
- 40 Dr Williams Yeah, that's what the legislation said, yes.

- Andrew The Court also had to satisfy itself, under section 80, that the owners fully understood the effect of commuting from native title to freehold tenure, correct?
- Dr Williams Yes. There was a standard set of questions.
- 5 Andrew And under section 85, all instruments of disposition had to be witnessed by a Judge or a Resident Magistrate, correct?
- Dr Williams Yes.
- Andrew Isn't there reflected in those provisions, a clear vetting role for the Court? The Native Land Court itself in relation to transactions in native land and that can be seen as protective in intent?
- 10
- Dr Williams No, no, not if you look at the Act as a whole, because you then have to look at the partition provisions and the opportunities that were used by Native Land Purchase Officers to get around this unanimity requirement. The unanimity requirement, if it had been strictly enforced, would have been a very good protective mechanism. But, Native Land Purchase Officers continued to seek to buy – the advantage of the 173 Act was that all persons entitled were now named, at least in theory, so you knew exactly who you had to target and person by person, their interests could be acquired and then when a suitable number had been acquired, a partition order could be applied for. So that the 1873 Act had a number of, we've already looked at two of them, the reserves, three of them now – the reserves provision, the investigation to make sure it's not a fraudulent claim, the requirement of unanimity for sale and those other questions about understanding what's going on. Those all look as though they are good protective mechanisms, except that most of them were evaded by the Crown's determination to achieve individual interests. Purchase individual interests. So that those were not really land interests. That's the point that Professor Ward makes. They were negotiable paper. They were marketable paper. You couldn't go and look at the block of land and say "my piece of land is over there and I'm going to plant a kumara crop over there and it'll only be for me". You couldn't be an individual who owned the block, a bit of that block of land. And if you wanted to own a bit of that block of land, you couldn't do it under those provisions. And so that was one of the inducements that Land Purchase Officers worked on in order to acquire the negotiable paper, as I call it, interests under that 1873 Act. And then, from 1877 onwards, the Crown gets the right to partition.
- 15
- 20
- 25
- 30
- 35
- Andrew But the Legislature saw there, in 1873, saw the Court having an important vetting role, didn't it, and that's why it essentially put those provisions in?
- 40 Dr Williams Well, ...
- Andrew It expected the Court to carry out the legislation.
- Dr Williams Yes, there was a, it's always important to look at the personalities where New Zealand Colonial society was a very small society. There was a great deal of rivalry between McLean and Fenton and my understanding

5 of the 1873 Act is that McLean and his 12 apostles, as they were called,
 the purchase rings that operated in Hawke's Bay had been the subject of
 investigations that very year and they were wanting to tidy their act up a
 bit and look a bit better and they were wanting to force Fenton to come
 10 closer to the system that McLean thought appropriate. Now, if you're
 asking me whether I know what was in McLean's head in 1873, as to
 whether he thought those protective mechanisms were supposed to last
 forever, I don't know. I just suspect from looking at all of the
 surrounding circumstances, looking at everything that I've seen about
 McLean and his way of engaging in transactions in the top of the South
 15 Island and in Wairarapa and various other parts where I've done some
 research, some historical research, the, my suspicion is that the overall
 purpose that McLean had in mind was to put protections in at this stage, in
 1873, with a view to removing them later as Richmond explicitly said.
 So, whether Richmond and McLean disagreed, I'm not sure, all I know is
 that clearly these protections were removed relatively soon afterwards,
 later that century.

Andrew The 1973 Act was tested, wasn't it, in the Supreme Court and Court of
 Appeal in various litigations?

20 Dr Williams Yes.

Andrew And the Court in *Pouaka* and *Ward* very much upheld or emphasised the
 protective vetting function of the Native Land Court under the '73 Act,
 didn't it?

Dr Williams Yes.

25 Andrew Turn please to your, have you got your question and answer document
 before you?

Dr Williams You mean questions of clarification?

Andrew Yes, yes, and your answers to them, I'm more particularly interested.

Dr Williams Yes, well, I've got ...

30 Andrew You should have a document with the questions and the answers.

Dr Williams Well, I haven't got that document. I've got my original that was faxed to
 the firm of Wackrow Williams and Davies. Yes.

35 Andrew At question 1.1 you were asked by counsel for the Wai 36 claimants what
 provision was there in the Native Land legislation for recognition of
 collective ownership and management of land by Maori. Perhaps ...

Dr Williams Sorry, what page are we at on the document.

Andrew Well, it's page 4 on my.

Dr Williams Page 4, righto.

Andrew Question 1.1, (inaudible).

- Dr Williams Yes.
- Andrew The answer you give there doesn't seem to make any reference to the 1886 Ballance legislation, which is perhaps the best example, is it not, of at least some attempt at recognition of collective ownership mechanisms?
- 5 Dr Williams Which was, which lasted until 1888 and was hardly effective, was that right? I think that's right.
- Andrew It lasted until 1888, yes.
- 10 Dr Williams Yes, well, at least, I mentioned the ones where there were some significant implementation of them. As I say, I'm more interested in what actually happens, rather what the law in Parliament looks like. And that particular 1886 Act was very ineffective. And was repealed two years later.
- 15 Andrew Turn please to page 22, para 43 of your brief of evidence. You're dealing with a number of issues, trust commissioners and then you go on to talk about the 10-owner rule. You say the 10-owner rule was in force at that time and Native Land Court practice even after the abolition of that rule in 1873 was to name few owners for most blocks. But that, surely, is not the case, is it? I mean, you look, just for example, at the blocks we're dealing with this week, there are multiple owners on the title and the charge is frequently levelled at the Crown that the titles are cluttered with owners. It's not correct to say that the practice was to name few owners for most blocks is it?
- 20
- 25 Dr Williams That was discussed in that Te Umukorehe(?) and Duff litigation that I refer to my in book in some detail in 1903 and thereabouts. And the Judges who had been involved, Munro and others, were still alive and came along and gave evidence in 1903 and what they said was, what invariably they did under this, it was only under the 1873 Act that they were talking about, what they invariably did was ask the people to go outside and decide what names were going to go in. And then the people would come back and inside and he said have you got the names that are going to go in? And they would say yes we have and they'd hand in a list and then he would say are there any objections? And if there were none, then it would be signed off that these were the owners according to native custom. We may well have known that there may have been more owners who were truly involved with this land, said the Judges, but there were no objections and so therefore we put down the names that were on the list. So, that's the sort of flavour of the Court, as reported by the Judges themselves. So that's what I relied on for that comment.
- 30
- 35
- 40 Andrew Yeah, but frequently the names put forward would include large numbers of individuals, wouldn't they? And the Court would endorse them as the owners of the block.
- 45 Dr Williams It depends, block by block, and there are some good reasons for having David Alexander to go through block by block histories and find out some of that information. My evidence is more thematic and is drawn on the general lines of Government policy and Native Land Court practice. And,

5 in that case, is relying on the Judges who administered this particular Act
 you're asking me the questions about, who were questioned about it
 because the way that that litigation came to Court in 1903, after the
 Mereara(?) Tamaki case succeeded in the Privy Council, was that
 10 numerous people then realised, oh, our ancestors were cut out back in
 1877 or whenever it was, and we want to get them back in because they
 never recognised all of the relevant interests. And the Judges were
 supposed to, according to the legislation, have put down everyone and so
 they had to explain why it is that not everyone was there and that's how
 they explained it.

Andrew You were asked a question, this is page 6 of your questions of
 clarification and answers, about the issue of bias of Native Land Court
 Judges and you have, of course, written about that topic in your book.

15 Dr Williams I do have a preface, I'm saying that in terms of the technical term "bias"
 in administrative law terms, I don't know that that is particular relevant,
 but it's the general pre-determination to implement Crown policy to
 advance settlement or progress or civilisation, whatever word was ...

20 Andrew There were, whereas you said before, numerous petitions and complaints
 from Maori about the workings of the Court. Is it fair to say that it
 doesn't seem to have been a feature of those complaints and petitions to
 challenge or question the integrity of the Judges?

25 Dr Williams I think most of the Judges were people who knew how to behave
 themselves at a hui. Who knew how to get on in the Maori world. Were
 people were some integrity in that sense. I think Maori were rightly
 questioning the whole system, rather than personalising the issue. There
 were some Judges that got flak, but as a generalisation, I don't know, the
 applications for rehearing often made accusations against particular
 Judges. The petitions that were going to the Native Affairs Committee
 tended to be on the general administration of the land laws.

30 Andrew Thank you Dr Williams. Those are my questions.

Dr Williams Thank you.

Ann Parsonson questions Dr David Williams

35 Parsonson Professor Williams, following on some of the lines of question this
 morning, this Tribunal, I think, in the past, has found that the Treaty
 provided for British settlement. It was one of the elements in the Treaty,
 it contemplated that there would be some settlement and my question,
 therefore, is, if that was the case what, in your view, would have been a
 suitable system by which some land might have been made available by
 40 Maori for Pakeha settlement had Maori wished to do so? Given that we
 have had, from 1840, we have had a system of Crown purchase which the
 way in which purchases were conducted in that period is one of the
 reasons why this Tribunal exists, because so many grievances have arisen
 from those purchases. How might such a system better have been set up?

Dr Williams Well, the first point to make is that, of course, that the preamble to the Treaty makes it very clear that emigration to New Zealand was contemplated and indeed inevitable. And Professor Ranginui Walker has, indeed, described the Treaty of Waitangi as an immigration treaty in some of his writings. The types of practical suggestions that you're looking for, I think are along the lines of Dr Martin, the former Chief Justice, in 1860. He took the view that there were superfluous lands and that settlers would like to settle them, but that that should be done in a way which did not leave Maori aggrieved. And so he was particularly concerned that there should be no pre-Court dealings. That's the sort of issues I dealt with in answer to questions from the Crown. There should have been no pre-Court dealings. And that when it came to sales, there should be a genuine market, not one where the Crown has already acquired some interests and so on. He, in fact, proposed auction sales to the highest bidder, so that Maori would have achieved that and that, of course, there would be no survey costs, because that should be something borne by the purchasers who got the benefit of clear title if that sort of procedure was agreed to. So there were a range of practical suggestions that were put to governments in that time and were not picked up and they certainly have meant that, for those Maori that wished to engage with the new economy and learn to discuss about Professor (inaudible) or whatever, that they would be able to do so on their own terms, having decided which pieces of land, in advance, they wanted to deal with, following consultations within tikanga in an appropriate way and that all of that had to be settled before you ever gave the chance to the Crown or private purchasers to dangle their carrots.

Parsonson Did there need to be a Native Land Court?

Dr Williams Did there need to be?

Parsonson A Native Land Court.

Dr Williams Well, Mr Lewis didn't think so. You're asking what some people in this, some Crown people who have cross-examined me in the past have got into discussions about counter-factual history. You'll be aware of the debates on that, Dr Parsonson, so I mean think that the point is that the Native Land Court was neither fish nor fowl. It was neither English property rights which gave people actual, real, individual rights and the possibility to actually develop land for themselves, to actually acquire the modern technology and equipment needed to be farmers, or whatever it was. Some of them owned sailing ships of course and things like that, in the early period. Engaged in that type of activity. It was neither that, nor was it customary. So, it was the worst of both worlds, really. So, I think my answer to your question is there must have been a better way.

Parsonson So, at what point in the process would it have been proper, in your view, for the Crown to become involved in issuing title?

Dr Williams Well, if the Treaty was to be honoured in terms of the statement there that it's only when Maori wished to engage in selling that there would be any selling, then every statement by tribes by Ngai Tuhoe setting up the rohe

5 potae, would have been respected and there wouldn't be any attempts to
change their minds, I would have thought. That that's a matter of tribal
autonomy that they should have been able to do. If, however, they wished
to engage in the modern commodity exchange type of economy where
security of title was important and requiring a mortgage was important,
then, of course, you would need to have that clarification of title and the
security. Because, of course, you would not be able to obtain security on
customary title from the modern type of capitalist institutions that
Mr Hamer was asking about. It's the voluntary-ness that I think is the key
10 question.

Parsonson Yes.

Dr Williams Or key issue.

15 Parsonson I have just a couple of other questions. You've talked about whether
alienations were a foreseen consequence of the tenure reforms. And I'd
just like to think in terms of another of the key aspects of the Land Court's
work which, of course, was succession. And the way in which the
principles of succession were applied by the Court, which, of course, had
major ramifications for generations to come. Do you think that the
application of those principles of equal succession were also, that the
consequences of those were also foreseen?
20

Dr Williams I'm not entirely sure that they were foreseen, because I think that the hope
of most of the officials is that once land had been through the Land Court,
most of it would come into Crown and settler ownership. So that I
haven't seen anywhere that they address their minds to the difficulties of
25 the Papakura Succession Rule, which is what you're talking about. What
I have seen is significant criticisms of Maori custom law and customary
law by officials who get fed up with all these Maori customs which lead
you to have so many people owning blocks of land, you know, three or
four thousand people after a few generations. And my comment on that,
of course, is that is not Maori custom law. That is the so-called custom
law invented by Chief Judge Fenton in the Papakura case in 1867 or
whenever it was, '68. So, that's where the difficulty arose and ever
thereafter they were trying to find ways and means of dealing with that
and in this area the consolidation schemes were thought to be a way of
remedying that and the incorporation possibility from 1894 was also
35 another way of trying to deal with that issue. And Sir Apirana Ngata and
the Tairawhiti people, in particular, tried to follow that incorporation
model.

40 Parsonson Just perhaps my final question because one of your appendices deals with
the way in which survey costs were allocated. And I'd just like to ask you
again, what in your view would have been a system whereby survey costs
were fairly allocated?

45 Dr Williams Well, I think I've already said that as part of one of my answers to your
first question. I think that survey costs were for the benefit of those who
were to be able to use the land, use it both in terms of productivity and in
terms of as a security for finance, financial transactions. The people that

5 got that benefit should have paid for the survey costs. So, if it was a block of land that was intended to be for Maori to develop for their own purposes, then in those circumstances, it would be reasonable for them to pay the survey fees, but in no other case. So, all the cases we're talking about here, it would have been unreasonable to impose survey charges on anyone that was involved in the Land Court process because the land was not intended to be used by them for productive purposes. It was for Mr Troutbeck and those people.

Parsonson Yes. Thank you.

10 **Annley Kerry cross-examines Bernadette Arapere**

Kerr You'll just need your report summary and the questions and answers to clarification from the Crown.

Arapere Can you hear me?

15 Kerr Yes. Ms Arapere, thank you for your answers to our questions of clarification. I only have a few follow-up questions to ask arising from that. First of all on page 22 of your report, referring to the last paragraph. This is also in paragraph 7 of your summary. You note that in August 1873 the Government suspended the Native Land Acts of 1865 and 1867 in the Rangitaiki District. Can I just clarify that is that all Native Land
20 Acts were suspended at that point of time? All Acts in respect of that District rather than just the 1865 and '67?

Arapere I don't believe I can answer that question except by referring you to Nicola Bright's report on the Kuhawaea block which is where I got that information. She may be able to answer that question in more detail for
25 you.

Kerr The effect was that the Native Land Court couldn't operate?

Arapere I believe so.

Kerr Okay. Your next sentence, you note that the Government was thereby
30 free to negotiate for leases or purchases of Maori lands. That doesn't consequently follow from the previous sentence. Does it? The Government was always free to lease and negotiate for purchases.

Arapere I think the point of that sentence was that the Government was free to negotiate for leases before the owners had been determined on a certificate of title.

35 Kerr Yes. That's correct, but it, you seem to link it by using the words "that the Government was thereby free to negotiate" as if it relates to the suspension of the Native Land Court.

Arapere As – the Native Land Acts were not actually a matter in my commission.

Kerr Sure.

- Arapere Again, I'll just refer you to the footnote which is referring to the Kuhawaea block report.
- Kerr Thank you. Now, turning to paragraph 11 of your summary report which I think is also a summary of page 35 of your main report.
- 5 Arapere Paragraph 11?
- Kerr That's right.
- Arapere Yes?
- Kerr The second sentence, you note the Court found that £10 paid to Ngati Pukeko by the surveyor as well as deposit money they received for the lease of the land was recognition of Ngati Pukeko mana over the northern part of Waiohou. Now referring back to the judgment of the Native Land Court, wasn't it the fact that – and you'll see that on page 33 of your main report?
- 10
- Arapere Yes.
- Kerr Wasn't the key point or the significance of those payments, to the Court, the absence of objection from Ngati Haka Patuheuheu?
- 15
- Arapere You mean the words "not having been rejected"?
- Kerr That's right.
- Arapere Yes, that's in the judgment, but I have the minutes before me and I think there was a bit of dissension between the Tuhoe people and the Ngati Pukeko over whether that, over whose authority had been given for that survey.
- 20
- Kerr Yes. That's correct. I'm just checking the rationale of the Court decision though.
- Kerr Yes.
- 25
- Arapere Yes. In respect of page 40 of your report where you discuss the receipts Burt produced in Court, ah no, when the purchase of the block was subject to enquiry in 1889 and then you note none of the Deeds had signatures on them but Burt's.
- Kerr
- 30
- Arapere Hmm.
- Kerr I understand from the questions of clarification, you haven't seen the Deed. Have you actually seen the receipts or is ... ?
- Arapere No. I have not. As I stated on page 39 my coverage of that issue was based primarily on Professor Binney's report and other secondary sources.
- 35
- Kerr Yes. So, for those important issues I should direct all questions to Professor Binney?

- Arapere Yes.
- Kerr Thank you. Now, page 52 of your report but I think you also put it in paragraph 16 of your summary ...
- Arapere Yes.
- 5 Kerr You're discussing the lists of owners settled for the ownership of the Te Teko lands ...
- Arapere Yes.
- 10 Kerr And you say the ownership was based on the original ownership and interests in Waiohou 1B as established in the Native Land Court in 1878. I wonder if I can just draw this out a little further? Waiohou 1 had the original ownership interests fixed in 1878 and then Waiohou 1A had two types of shares; full and partial shares applied. Can you comment on whether any consideration of the Waiohou 1A apportionment of shares was taken in the apportionment of shares to the Te Teko lands?
- 15 Arapere As I recall from the minute book evidence, there were a number of issues that the owners considered in coming up with their list of owners. It included the 1878 investigation of title, 1886 investigation and the allocation in Waiohou 1A. But I can direct you to specific pages.
- Kerr Will they just be footnoted in your report?
- 20 Arapere [I] say on page 52 that the allocation in Waiohou 1A was used as a measure and the footnote is to the Whakatane minute books from 1920.
- Kerr Right. So that would be the correct reference.
- Arapere Yes.
- 25 Kerr Thank you for that. Just further up the page on paragraph 15, the first line, you note Mr McGarvey was paid £1230. It's my understanding that the purchase price fixed on was £1300 and that Mr McGarvey still had a little money to pay to the Land Board and therefore that was the reason for the deduction.
- 30 Arapere Yes. Yes. I understand he had an occupation of right to purchase, I think that's what they're called, over part of the block.
- Kerr Yes.
- Arapere And so, it went down from £1300 to £1230.
- Kerr Right. Thank you very much Ms Arapere.

Annsey Kerr cross-examines Phillip Cleaver

- 35 Kerr Thank you. Mr Cleaver, I'll refer to your main report and your summary report. I'll also make a brief reference to the Crown document bank, document number #C28. We're also circulating some more documents

5 which are actually transcripts of the Crown document bank. They're in
 draft still and we haven't got to the bottom of the shorthand pages yet.
 But I'd like to refer to the last two pages of that document that we're
 circulating. Thank you Mr Cleaver for your answers to the questions of
 clarification. I've just, again, I've got a rather shortened estimate of my
 10 time to question you, following on from that. Now, at page 11 of your
 main report, which is also referred to in your summary, you discuss the
 withdrawal of the Te Urewera claim by Te Makarini Te Waru and you
 don't strongly make the suggestion, but you suggest that possibly this is
 15 because of Te Whitu Tekau. I wonder, given that the, he did give
 evidence for Ngati Rakei and his statement was that he'd ascertained there
 was no claim, those are the more likely suggestions in this instance.
 Would you agree with that?

Cleaver Sorry, could you repeat the question? I'm not ...

15 Kerr You've raised the possibility that Te Whitu Tekau may have had some
 involvement in the non-pursuit of the Te Urewera claim. I'm suggesting
 to you that the more likely reason is the reason he gave, which was that
 he'd ascertained there were no claims on behalf of Te Urewera in that area
 and that might be supported by the fact that he also gave evidence during
 20 that hearing concerning Ngati Rakei, so he wasn't absenting himself from
 the Land Court inquiry.

Cleaver Yeah, it's, it does, in that instance he, with the Tuhoe hapu, he did
 withdraw his claim after establishing that the hapu had no interest within
 the block. And the issue of Te Whitu Tekau's position on the Native
 25 Land Court obviously wasn't why he withdrew that claim.

Kerr Thank you. Now, turning to page 45 of your main report. Just under the
 heading '3.7' there, you note that Judge Brookfield suspended the
 delivery of his judgment until title investigation of the claims to the
 adjacent Pokohu and Patuaki blocks had been heard. Do you understand
 30 that to be because Native Land Court Judges were directed to make wide
 inquiry, perhaps wider than the claims before them, and to take account of
 relevant evidence that might inform them on the title investigation? And
 for that reason the blocks running alongside Matahina might be relevant to
 his decision.

35 Cleaver Yeah. I would assume that that's why the delivery of the judgment was
 delayed, because he must have assumed that evidence, relevant evidence
 to the Matahina block, would come out during the course of the Pukehu
 block and Putoaki block investigations. And during the Matahina block
 title investigations, there was a certain amount of evidence that was
 40 relevant to those other blocks. So, I suppose he wanted to take all of that
 evidence into consideration. And thought that that was reasonable to
 operate in that manner.

Kerr Now, I understand in respect of the Pokohu block, a Ngati Rangitihia had
 awards made to them. Have you studied the awards made in those
 45 surrounding blocks and considered them in the context of the Matahina?

- Cleaver No I haven't.
- 5 Kerr Thank you. Turning to page 47 of your evidence. This is discussing the Crown's attempts to define its interests in the Matahina block and here in the first paragraph, you refer to a number of amounts of money that were advances and survey costs. I'd just like to clarify some of these by reference to the document I've just handed out, that's got Tab 1 on the front. It's the last two pages of that. This document, and I'll get a proper reference to it, but I think you've actually seen it in the context of your evidence here. It lists the payments made in respect of the Pokohu block and, towards the end of the second page, in respect of the Matahina block. And if you look at the columns on the right-hand side, the first of the three columns indicates purchase money or rent and then the second column is incidentals and then the third column is totals. If you go over to the second page, I understand that the total, about a third of the way down the page, is the source for your figure of £782, which isn't actually mentioned on this page, but is mentioned earlier in respect of the advances made on rents and purchase monies. Is that correct?
- 10
- 15
- Cleaver I'll just spend some time looking at my report.
- 20 Kerr Sure. I think it's page 21 you say that £782 had been paid out on the lease.
- Cleaver Yes.
- Kerr Yes. I'd just like to break this down a little further. It's the left-hand column of £442 that would be taken into account if you were finalising a lease or a purchase agreement. Is that correct?
- 25 Cleaver It looks to be the case.
- Kerr Because the second column "incidentals" is, seems to be just costs associated with the purchase or lease arrangements.
- Cleaver Yeah.
- Kerr Okay.
- 30 Cleaver So it looks like £442 was what Maori would have received.
- Kerr Right.
- Cleaver That seems to be the case. Yep.
- Kerr Now, did that relate to the Pokohu block or the overall Matahina and Pokohu block that was originally being negotiated for?
- 35 Cleaver My understanding is that money related to the Matahina block, which was, prior to 1881, when this document was prepared, was known as the Pukehu block and referred to as the Pukehu block.
- Kerr Well, there's a distinction here, isn't there, because further down they talk about the Matahina block, and set out the amounts, the purchase money or

rent payments made and that's where you get the total of £274. And, actually, it seems to be £294 because of a £20 payment to Rangi Te Kehu. I'm just trying to clarify whether the £728 amount applied to both the Pokohu and the Matahina block or do you think it's not particularly clear?

- 5 Cleaver Well, yeah, my understanding is that £782 applied to the Matahina land, the land that later became known as the Matahina block.
- Kerr Okay. But, as you say at page 47, it's this £274 amount that Gill discusses in terms of the recovery of money on the Matahina block. Okay. And Gill, you've noted here that Gill considered that a fair charge for the survey was £675. On Tab 4 of our document bank, if you could turn to that.
- 10 Cleaver Oh, okay, yeah. Can I just respond to something (inaudible).
- Kerr Yeah, sure, sure.
- Cleaver It's just about the £274.
- 15 Kerr Yes.
- Cleaver That figure was what the owners were admitting had been paid. So, I believe that the total sum of £442 may have been paid, but the owners were only prepared to admit payments of £274. That may be the portion that was paid in advances, or may be the portion that was paid in leases. The owners may have felt that they did not have to return lands for advances that had been made on a lease, given that that lease would have provided the Crown with some entitlement over the land at the time that it possessed the lease.
- 20 Kerr Well, perhaps we can go back to that, just to clarify the Crown's thinking on that. At Tab 5 of the document bank, there is a receipt or a Treasury voucher outlining one of the payments made. And I think this just illustrates some of your analysis, it's about a third of way down the page, the statement is made "note the rents of this block are not payable until lands pass the Court's surveys passes. The Court's surveys have just been completed and several claims covering this country will come on for hearing by the Native Land Court at its next sitting at Matata. These payments are only preliminary and will probably become part of the consideration of purchase instead of for rents." And that's the support for your conclusions in respect of the payments, being for rent or purchase. Is that correct?
- 30 Cleaver Yes, yeah.
- Kerr But the second page that I've referred you to, you're saying that the payments totalling to £274 are the ones that were accepted by the owners as payable.
- 40 Cleaver That's how I interpreted it, yeah.
- Kerr Yeah.

- Cleaver That's what they were prepared to pay.
- 5 Kerr Thank you. I'm just going to check a particular document. Could you go to Tab 10 of the Crown document bank, #C28 and the second page, Surveyor-General to Mair on 10 January 1884. There, the Surveyor-General's reporting to Captain Mair that the following liens have been brought against the under-mentioned blocks of land and he identifies amounts against Pokohu No 1, Matahina No 1 and Matahina No 2. And there the liens state, £330 and £297 for the two Matahina blocks and the acreages, and that comes to the total, the survey costs you've identified. Or close to the total. So that shows the survey liens outstanding on those particular surveys and you've recorded that Mair's recollection, a couple of years later, and concluded on the basis of that that there might have been some additional costs put onto the survey.
- 10
- Cleaver That's right.
- 15 Kerr Is that likely, given the fact that the lien is recorded here as a precise amount, next to the acreage?
- Cleaver It depends when the adjustment was made to the cost of survey. They may have decided to record it at an inflated cost on the 10th of January 1884 when the survey lien was lodged against the blocks. And, ...
- 20 Kerr Well, if you compare it with the later surveys within the Matahina block itself, the subdivision surveys, it doesn't appear very excessive as a survey charge, given the amounts, for example, for A1C, I think it is, or AC, which was over £200.
- Cleaver You're talking about the 1885 survey of the subdivisions?
- 25 Kerr Yes, which is a year later.
- Cleaver Yeah. No, I tend to disagree actually. I think it looks like quite a large amount compared to the 1885 survey, the details of which are on page 68 of my report?
- Kerr Yes.
- 30 Cleaver £628 the total cost of surveying Matahina 1 and 2. At some stage, I think after the first title investigation, and that's significantly greater than all the charges that were made against the Matahina subdivisions in 1891. Admittedly that excluded Matahina A1 and A6.
- 35 Kerr If you look at A3, which is actually quite a small proportion of the entire block.
- Cleaver Yeah.
- Kerr And doesn't have the same length, that's £252, which is not much less than the amount for Matahina No 2, which is £297.

- Cleaver Yeah. It's unclear why that was so large. It seems, yeah, I can't explain that, because Matahina A2, to the north of Matahina A3, was only £63 and it also had quite long boundaries.
- 5 Kerr Possibly some of the boundaries had been already surveyed for A3 at that point.
- Cleaver Perhaps, yeah.
- 10 Kerr Okay. I'll leave that point. On page 52 of your report, you note that the Ngati Manawa, Ngati Rakei and Wi Hape claims were all new. Just clarifying there, the first two claims were raised during the first hearing though, weren't they, with Ngati Manawa withdrawn and Ngati Rakei just mentioned during the course of that hearing?
- Cleaver Ngati Rakei mentioned during the course of the evidence, when the evidence was presented, yeah.
- 15 Kerr Yes, yes, that's right. Can I just check with you, on page 71, this is, actually this is part of the Ngati Awa area, isn't it, so?
- Cleaver It is, yes.
- 20 Kerr Yes, okay, I won't pursue that one. Sorry, I'm having difficulty finding your summary amongst my papers here. Here we go. Going to paragraph 22 of your summary report, and returning to the rehearing of the title investigation, 1884, you've noted that Ngati Haka Patuheuheu didn't want to pursue the rehearing and however the, it was reheard because of what the Crown viewed as a deficiency in the earlier hearing. And the rehearing seems to have been another extensive hearing of the title application. Is it your understanding that if the parties had come to a voluntary arrangement, they could have put that to the Court, rather than having a full rehearing at that point in time?
- 25 Cleaver I just suggest the possibility that they had reached some sort of agreement that Ngati Haka may have reached an agreement with Ngati Awa when they requested the rehearing to be cancelled.
- 30 Kerr Yes.
- Cleaver And, yeah, I suppose, if they had reached such an agreement, they may have been able to just put that before the Court and save the long title investigation.
- 35 Kerr Right. Okay. And in respect of your discussion of the 1907 deductions for survey costs, you've indicated that the composite document provides no evidence that the survey was requested by any of the owners of Matahina B, C, C1 and D. Can you explain the reason for the surveying of the boundary between Matahina C and C1, in that context?
- Cleaver No.
- 40 Kerr Okay. So, it could well have been requested by Ngati Haka Patuheuheu?

Cleaver That would suggest, perhaps, that they had requested it, but there is no evidence that they did in fact request it.

Kerr Thank you Mr Cleaver. No further questions.

Judge Savage questions Phillip Cleaver

5 Savage I have two questions. Henry Mitchell was the father of Tai, Taiporutu Mitchell, is that right?

Cleaver I'm not sure of that relationship actually.

Savage Henry Walker Mitchell is the father of Taiporutu Mitchell.

Cleaver Right.

10 Savage Second matter is how was Matahina affected by the Tarawera eruption?

Cleaver Quite seriously from the valuation reports that were made in the 20th century.

Savage Yes.

15 Cleaver At that stage it was still, most of the flat and undulating land was covered in a substantial layer of ash from the eruption.

Savage So, that reflects, impacts very heavily on the valuations that are given post-1886?

Cleaver Yeah, it's a factor that's mentioned in the valuations, certainly.

Savage Thank you. Thank you very much for your evidence.

20 **Peter Andrew cross-examines Nicola Bright**

Andrew Kia ora Ms Bright.

Bright Kia ora.

25 Andrew I want to ask you some questions about the hearing before the Native Land Court itself in 1882. It seems apparent from your main report at pages 51 and 52 that Makarini Te Waru was present in the Court at Whakatane and you go on to suggest on the first paragraph on page 52 that Tuhoe not acknowledging the mana of the Court, especially within Te Urewera, may have been a reason why Te Makarini Te Waru did not address the Court in Whakatane at that time. You say in your report, 30 don't you, that Tuhoe maintained an attitude of overlordship. Those are your words.

Bright As described by Best.

35 Andrew But you appear to adopt that at page 70 of your report, don't you? You say "Tuhoe maintained an attitude of overlordship over Ngati Manawa and over the lands at Whirinaki and Kuhawaea"?

- Bright What paragraph?
- Andrew 120. The penultimate sentence in that paragraph. Can you see it there, Tuhoe maintained, from the early 1880s, 1800s, sorry, "Tuhoe maintained an attitude of overlordship over Ngati Manawa and over the lands at Whirinaki and Kuhawaea"?
- 5 Bright Yep. I'm using the evidence from Best for that. That's what that statement is based on.
- Andrew But you're accepting or adopting that as your own conclusion as well, aren't you?
- 10 Bright Oh, you could interpret it that way.
- Andrew Well, it's very, it seems apparent from its face, doesn't it, that that's your view as well?
- Bright From a surface view, yes.
- Andrew Well, is it your view?
- 15 Bright It is without having consulted Tuhoe and Ngati Manawa, in particular, on that issue.
- Andrew If that is the case, that is the Tuhoe attitude, it would seem unlikely, would it not, that Makarini Te Waru would appear, or be present, at least, in the Native Land Court and watch Ngati Manawa advocate their interests without taking any action or doing anything about it unless there was some arrangement or deal having been concluded with Ngati Manawa?
- 20 Bright So what's your question, sorry?
- Andrew Perhaps I'll rephrase it. You say you offer as a reason for Te Makarini Te Waru not addressing the Court.
- 25 Bright A possible reason.
- Andrew Possible reason, yes, is him not, or Tuhoe not acknowledging the mana of the Court. I'm suggesting to you that's unlikely, given the overlord attitude of Tuhoe. Unlikely that that would be the reason for him not addressing the Court. If he's present there and seeing Ngati Manawa advocating its interests and seeking to become the owners of the block.
- 30 Bright I don't know how deep it went, but I assume there was some tensions between loyalties to Tuhoe and the way they perceived the Court process. I'm sorry, I can't go any further into that.
- Andrew Doesn't all the evidence, including the petition from Wi Patene in 1897 that a deal was done with Ngati Manawa, suggest that that in fact was the case, there was some arrangement between the groups?
- 35 Bright That's what Wi Patene certainly stated.

- Andrew That seems to be the better view on the available evidence, doesn't it, that there was in fact an arrangement entered into between the two parties?
- Bright It does appear there was some arrangement, yes.
- 5 Andrew The time this block went before the Court a number of the adjacent blocks, Waiohau and Kaingaroa had already been before the Native Land Court, hadn't they?
- Bright I'm not sure.
- 10 Andrew It's fair to say that generally speaking, looking at the practice of the Native Land Court generally, that Native Land Court hearings were a big event for the relevant Maori communities, weren't they?
- Bright Yes.
- Andrew This block was, of course, the Kuhawaea block, was surveyed, of course, wasn't it before it went before the Court?
- Bright Yes.
- 15 Andrew And given the size of the block, 22,000 acres, it's likely the survey took some time, isn't it?
- Bright I don't know. I don't know how long a survey takes.
- Andrew There's quite a lengthy history of dealings with respect to Kuhawaea before it goes before the Court, aren't there?
- 20 Bright Yes.
- Andrew There's leases, there's applications for survey which are refused.
- Bright Yes.
- Andrew And then Ngati Manawa ultimately come to some arrangement with the Crown for the repayment of advances made, correct?
- 25 Bright I can't actually remember without you referring me to that particular paragraph in my report.
- Andrew Isn't it the case that Wilson initially made some advances in 1874 for the acquisition of the land?
- Bright I believe so, I'm not certain of the year without checking my report again.
- 30 Andrew If you look at page 43, you say there, third paragraph, "on 26 April 1881, A W Broomfield wrote to the Native Minister on behalf of the owners of Kuhawaea asking that the Government withdraw from the purchase of the land. The owners offered to return the money already received, along with 8% interest".
- 35 Bright Yes.

- Andrew And then that leads to the Government abandons the negotiation, withdraws, an application for survey comes in, it's approved and the survey is done on the land and goes before the Court. Correct?
- Bright Yes.
- 5 Andrew When you look at all these goings on, the history, the fact of the survey, the significance of Native Land Court hearings generally, doesn't it seem unlikely that Ngati Haka Patuheuheu didn't have notice of the hearing in Whakatane?
- 10 Bright It's hard to talk about everybody in Ngati Haka Patuheuheu having notice of the hearing. Some certainly, I guess, would have, but I don't know whether the entire party who would have been interested would have been notified in time.
- Andrew But the significant players would have had notice, wouldn't they?
- Bright I don't know.
- 15 Andrew Well, on the evidence available, the better view is that they likely did have notice, isn't it?
- Bright Like I said, I don't know.
- Andrew Anita Miles suggested in her report, this is at page 226, that it might be worth researching.
- 20 Bright Which report, sorry?
- Andrew The Anita Miles report, #A11. Are you familiar with that?
- Bright No, I don't think so.
- Andrew Well, that - I'll ask you the question anyway. It's not necessary that you've actually, specifically, read the report to answer the question. She suggests that it might be worth researching the possibility of whether Ngati Haka Patuheuheu, whether their interests in Kuhawaea were somehow accommodated by receiving a share of the sale proceeds when the land was eventually sold to Troutbeck. Is that something that you have investigated or considered?
- 25
- 30 Bright I think Wi Patene and others received some money from the sale.
- Andrew You believe that to be the case?
- Bright I think so, from memory.
- Andrew Are you able to identify in your report where you say that?
- Bright I think that may have been in the 1899 Urewera Commission minutes, but without having them in front of me and reading through again, I couldn't say definitely.
- 35

Andrew Yes, thank you. I have no further questions.

Judge Savage questions Nicola Bright

Savage (Inaudible) referred to in paragraph 16 of your evidence, in other words Judge Paki's rejection of the rehearing application.

5 Bright Yes.

Savage He tells us that Makarini Te Waru was present in Court on that occasion, but did not speak. Now, I would have thought that as a matter of logic, almost anything could be taken from that, and that it was evidence of nothing. If a man says nothing, there's no evidence, and you can't simply infer from his silence as to the reason for his silence. Was there any other – this is my question – was there any other material available to Judge Paki or referred to by Judge Paki that would have justified the inference that he took?

10

Bright Not that I'm aware of.

15 Savage Okay. Where was Makarini Te Waru's sphere of influence? Where was he from? How did he affiliate?

Bright I think that's better asked of his descendants.

Savage Do you know whether he was, we've heard about his wife's position, whether he himself was Ngati Haka Patuheuheu or whether his affiliations were, as I seem to remember, were much further east? You don't know?

20

Bright Again, his descendants would (inaudible).

Savage All right. Thank you very much. Thank you for your evidence.

Kirsten Harper cross-examines Dr Peter Clayworth

25 Kerr Thank you. Kirsten Harper will ask questions of Dr Clayworth for the Crown.

Harper Good morning Dr Clayworth.

Dr Clayworth Morning.

Harper Thank you for your evidence and thank you for the answers you provided to our questions of clarification. I'll just be asking approximately three questions that relate to your summary report. If you could turn to paragraph 16 please, in that paragraph you note that Reha Perehama was the assessor who assisted with the title determination hearing.

30

Dr Clayworth Yes.

Harper Are you able to provide us with further details about what role he played in regard to that hearing?

35

Dr Clayworth No, I have no added information beyond his name.

- Harper Okay. Thank you. Could you please turn to paragraph 34? I just have a couple of general questions around the charging of the delay costs to individuals. Are you able to clarify for me what the statutory provisions were that enabled the Court to charge for these delay costs?
- 5 Dr Clayworth I would have to look in my report for that. The only information I was able to glean from the records I looked at was that these claims were made under s 65 of the Native Land Court Act 1894.
- Harper Thank you. Professor Boast, in his opening submissions that he delivered on Monday for the Te Whanau A Kai claimants, suggested, as well, that that provision may have provided the authorisation for the charging of these additional costs for delay. In terms of your discussion around the appropriateness of individuals being charged, as opposed to the collective of owners, how would that have worked in practical terms, do you think?
- 10
- Dr Clayworth I'm not any sort of legal expert, so any speculation I make may kind of, would probably have no great authority, but as the Native Land Court record from 1890/1891 specifically named six of the people who were claimed to be responsible, I would imagine that would be possible to take specific criminal charges against those people for delays. However, I don't, I'm honestly not qualified to make any great statement on that, not being any sort of legal historian.
- 15
- 20
- Harper Certainly. Thank you Dr Clayworth. Those were the only questions I have.

Ann Parsonson questions Dr Peter Clayworth

- Parsonson Kia ora (inaudible) to your summary in paragraph 23, again where you're talking about Judge Gudgeon's findings in that particular case on Hurenu Te Apanui's claim and he finds that Rangitukehu had completely transferred the authority when he made the gift. I just wondered, have you any knowledge from other hearings of this period whether in fact that would have been a normal sort of finding of the effect of the gift?
- 25
- Dr Clayworth I don't have enough knowledge of other hearings at this time to really comment, I'm afraid.
- 30
- Parsonson And I just had a question about your main report on page 81.
- Dr Clayworth Is that 81?
- Parsonson 81, sorry, where you're talking about the Land Court partitioning Tuararangaia 3 and you say that you couldn't find any record of the removal of the restrictions.
- 35
- Dr Clayworth That's right, yes.
- Parsonson On the block. Again, from your knowledge of records of this period, would you have expected to find a record, if the restriction had been removed?
- 40

- 5 Dr Clayworth Quite possibly not. A lot of the records at this time are very patchy and I also noted, where is it, sorry I can't remember the exact point, place in this account where I noted it, but I did note that as over two-thirds, the very large body of people who sold perhaps could be interpreted that they, I think there was a law at one point where you could remove a restriction of two-thirds of the owners agreed to it.
- Parsonson Yes, you've got that further down the page there.
- Dr Clayworth Yes.
- 10 Parsonson So, you simply inferred from that, the restriction must have been removed, but I was interested in the point whether in fact there was any system about recording the removal of restrictions at this time.
- Dr Clayworth There may have been, but the work I've done, both on this report and on various others, I've found very little documentation of removal of restrictions. But this, I think, is in particular areas and at particular times.
- 15 Parsonson Thank you. Yes, because you say the restrictions must have been removed and, as you say, there seems to be evidence that that might have happened, or ignored, you say, which is a rather different point altogether. So you think there were, in fact, cases where restrictions simply were ignored?
- 20 Dr Clayworth I really don't know enough about the broader land sales during this period to make any definitive comment.
- Parsonson Right. Thank you very much.
- Judge Savage questions Dr Peter Clayworth**
- Savage Dr Clayworth, the summary, para 50 please. The £8,410.
- 25 Dr Clayworth Yes.
- Savage Was paid into the General Fund of the Education Department. When was it received by the Education Department?
- 30 Dr Clayworth I'll just have to look in my main report. The only records I found referring to this payment refer to it being paid into the account in 1954, but I have no documentation of exactly when they received that money. It was some time within two or three years of that, given the period when the logging in that area actually occurred.
- Savage Now, do we know from whom it was received?
- 35 Dr Clayworth Oh, there was a complicated process involved in this. I might, can I read very briefly from my original report, might be an easier way of – there was, in an investigation in 1972 into what had happened.
- Savage Yes.

- 5 Dr Clayworth The Education Department inquired of the Commissioner of Crown Lands as to what had occurred and the head office of the Forest Service acquired the relevant information on this transaction from the Lands and Survey Department, which was where I got that information from the Archives. The proceeds from the logging, minus appraisal costs and 10% commission for the Forest Service were passed over, from the Forest Service to the Education Department, but it was a complicated exercise, because there had to be an agreement between Forest Service, Education Department, and Maori Affairs over how this was all administered and it seems like it was a one-off process where they, it doesn't, from the records I saw, it doesn't seem like there was a set procedure. They were, it was a rather unusual bureaucratic situation.
- 10 Savage Did it seem to have much regard to the fact that the Crown, through its various agencies, was in fact explicitly a trustee?
- 15 Dr Clayworth I honestly can't comment on that.
- Savage Alright.
- 20 Dr Clayworth I don't have enough legal knowledge on that. But, the impression I got from looking at these records is that it was an area of land that had basically been forgotten, almost, and when the logging began of the other State-owned blocks in the Turarangaia, then, which was in the, about 1948, then the Education Department and Maori Affairs had to start thinking what to specifically do with that area. Because, I imagine, because of what was written into the certificate of title.
- 25 Savage The impression that I got from your report is that the various arms of the Crown had made charges for the labour and effort that had been expended on the block. Is that right?
- 30 Dr Clayworth There was definitely a commission to the Forest Service and there was an arrangement to pass some of the wood over to the Maori Affairs, I think 12%. But how much of that was specifically labour costs, again, I'm not too sure. It was very minimal ...
- Savage In your researches was there any, did you see any thought given to the proposition that a trustee is not allowed to charge for its services?
- Dr Clayworth I found no record that, from memory, that mentioned that.
- Savage Alright. Thank you very much.
- 35 Dr Clayworth As I say, that particular thing is not well-documented.

Annley Kerr cross-examines Robert Pouwhare

- 40 Kerr Mr Pouwhare, I would like to ask you some questions about your evidence. First, on paragraph 58. You discuss, you say that Ngati Haka Patuheuheu were in discussions with Ngati Awa over Matahina and came to some agreements. Can you tell us more about the agreements that were arranged between the parties at that time?

- Pouwhare [Translated: These information was passed down by, to us, to Ngati Haka Patuheuheu. Our elders said that Ngati Haka Patuheuheu and Ngati Awa, they had held hui and some of the outcomes of those hui. There was a long period of time that Tuhoe and Ngati Awa were battling over these lands of Matahina because those lands were treasured by our ancestors. Now we of Ngai Tuhoe, we assert that the mana on Matahina and the mana of Ngai Tuhoe is over Matahina. We do not believe the Court's assertion that the mana of Matahina belongs to Ngati Awa. No. We were there and battling for Matahina for over 200 years. And so, when Ngai Tuhoe and Ngati Awa met to discuss this matter according to the words that came to us that there was a settlement reached that the two sides would both occupy that land, according to the words left to us. Now, because we aren't able to say they are not have interests in that land and vice versa. Mahana Ranui will be making a submission. He can clarify for you our settlements, our pa, our battle sites, our settlements and our cultivations and food places. Ngati Awa is aware of these korero, this information. The brief korero here, there was a settlement between the two sides that both sides would occupy Matahina.]
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- 10
- 15
- Kerr Thank you. Now turning to the section you've provided on the Waiohau fraud, paragraph 66. You note that Harry Burt was known as Hare Rauparaha. You go on to say "his main interest and activity here was going in amongst our people to buy shares in land." Well, that's the English translation I have. Do you see any link between the name Rauparaha and that activity?
- 20
- 25 Pouwhare [Translated: I'm not quite sure what the aim of your question is. Can you clarify?]
- Kerr I'm wondering what the name Rauparaha means. It was attributed to the Ngati Toa. It was the Ngati Toa rangatira's name, but what about the meaning of the name Rauparaha? To gather up – here he's gathering up signatures. He's going out buying shares. I wonder if it had another meaning.
- 30
- Pouwhare [Translated: No, to us, as far as we're concerned, the name Te Rauparaha, Rauparaha, that Hare part he used as a pseudonym. That was the name that he gave to the Court at the time that he applied for these lands and that is the only clarification for that name that we have. We do not have other explanations.]
- 35
- Kerr You go on, in paragraph 68, to say many mistook him to be a Maori and we heard he was a Maori from Ngati Raukawa. Can you tell us more about that? Was it simply his expertise in the language?
- 40 Pouwhare [Translated: I said to you earlier that he was a fraudster. He had many faces. He was a smooth talker. And that was the translation of Tauwhau Te Oki(?). From Mahinihini – smooth and deceitful. When Harry Burt came amongst us, in the beginning and this occurs to all Maori. When a Pakeha comes amongst us, we think he's a true friend because he is bringing the resources that we desire. That the Maori desires. The ploughs, the knives, the pots for cooking food and other such utensils and
- 45

- when this Pakeha came and we were appeased, we were happy because he was fluent in English, because he was fluent in English. He was knowledgeable of our customs and he was a friend of Te Kooti a Hikirangi and so the doors of the homes were open to him and other things were also open to him. Ngati Haka Patuheuheu helped him. Ngati Haka Patuheuheu assisted him. It was not long that this man took on the semblance of a Maori amongst us. But the words of caution were this man is doing calculating things. He has married his wife, Margaret Burt. He did not reveal that to the woman of high rank that he had married, that he was already married to his Pakeha wife. He spoke Maori. He said to us he was from Ngati Raukawa. And we were an iwi that believes in the word. If someone says to us something, we believe it straight away. That's why we believed, when he said he was from Ngati Raukawa, we believed him. It was later on he stated he was from Ngati Toa.]
- 5
- 10
- 15 Kerr So, he actually stated he was from Ngati Raukawa and you believed him. He didn't appear to be a Pakeha?
- Pouwhare [Translated: In this century, you see some Maori fair, have bright eyes, but they're still Maori within their hearts. So despite the fairness of Hare Burt's appearance and he had a wife, their daughter of Miha Te Hatokopounamu(??) and he was going around, taking lands but in a very surreptitious manner. This was his, his home was at Te Houhi. He lived amongst the Maori people at that time and he was a close friend of Te Kooti a Rikirangi. And we were staunch supporters of Te Kooti.]
- 20
- Kerr I'm not sure that I've picked up from the evidence so far the closeness of his friendship with Te Kooti. Can you perhaps add to your evidence here in telling us some more about that?
- 25
- Pouwhare [Translated: Yes, I can talk about that. But I'm concerned that some of the words may be taken, they're all in the writings of Judith Binney "Redemption Songs" of the complete information between Hare Burt and Te Kooti. Perhaps I should say Harry Burt had already worked out who were the people, the strategic people that he could inveigle himself with in order that he could get the lands and he saw that Ngati Haka Patuheuheu were staunch followers of Te Kooti and Te Kooti had great mana. Harry Burt saw that Te Kooti was being chased, pursued by the government troops, so Harry Burt made friends, this is his brief summary, but it's Judith Binney's book, which gives us a complete, a wider perspective on this matter pertaining to Harry Burt and Te Kooti's relationship.]
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- 35
- Kerr Thank you. Now, turning to paragraph 78, you describe the transfer of land to Harry Burt's banker, Soutar, and to his wife, Margaret Burt, and you describe all this activity as selling and transfer taking place in the one day at the Court sitting. Is that based on Judith Binney's work as well?
- 40
- Pouwhare [Translated: No. These words, this information came from out of the wananga held here at Ngati Haka Patuheuheu. When we were evicted from Te Houhi and arrived here, the work here was to carry out wananga to find out how Ngati Haka Patuheuheu would occupy these lands, what would be the nature of occupying these lands and the lands at Te Houhi
- 45

- and out of these wananga, we saw there was a long period where we held discussions because we did not know. It wasn't till much later, years later, within the wananga here that we put all the korero together so that we could be, we could understand how the purchase and how Harry Burt carried out his process through the Native Land Court under his name Te Rauparaha so that Te Mumu and Pereniko would obtain title and they sold that Pearce transferred title to Harry Burt and from Harry Burt to his wife, Margaret and from there to Soutar.]
- 5
- Kerr Now moving on to the eviction you describe at paragraph 90.
- 10 Pouwhare [Translated: Which erection?
- Kerr The eviction from full disposition, dispossession.
- Pouwhare [Translated: I'm sorry, I'm sorry. I apologise. I'm a bit, my ear's a bit clogged up at the moment. I thought you were saying that the erection of our ancestral house, Tamaki Hikurangi. So I apologise. I thought you were referring to the erection of the house.]
- 15
- Kerr On paragraph 90, you talk about the experience of your people in their eviction from Te Houhi.
- Pouwhare Aye.
- Kerr I understand that the government refused to take part in that eviction, so this evidence, it's very important to hear what happened. Is this your recollection from the old people of what happened?
- 20
- Pouwhare [Translated: Yes.]
- Kerr And you know who called for the Police and the soldiers from Auckland?
- Pouwhare [Translated: According to the elders work, korero, it was the Pakeha people who wanted to evict them from the land. It was they who called the Police, because the ancestors of these people would not move from the land. And they stayed on the land and the new owners of the land, shall we say, came and stated that it was their land. The Maoris were saying no, this is our land and they stayed on that land. And the word is that the Police came from Rotorua and the soldiers came and that's what we heard in our wananga, that's not my words, but that's what the words that were left to us in the wananga.]
- 25
- 30
- Kerr And then, in paragraph 92, you talk about the chiefs and the people being imprisoned in Auckland. Again, from the research I've seen, I don't understand that they were imprisoned in Auckland. But perhaps you can tell us some more about the wananga.
- 35
- Pouwhare [Translated: Sorry, I did not quite catch the question. Could you repeat it please?]
- Kerr Some of the chiefs and people were imprisoned in Auckland, you say, as part of the eviction. I understand, I have no evidence to show the
- 40

imprisonment of these people from the written records, so I wonder if you could clarify that part for me, please.

- 5 Pouwhare [Translated: Thank you. These are not my words. I am just conveying these words that were passed down to us, pertaining to this matter. They said yes, some of them were imprisoned.]
- 10 Kerr At paragraph 105 you've recorded the Crown's position being that it was not fraud, what Harry Burt did. Can I just say that the Crown's approach in this inquiry is to test what actions and omissions the Crown took in this dispossession of Ngati Haka Patuheuheu and it will be my submissions later that outline the Crown's position on those events. I don't say to trust me, but that will be the Crown's position on those events.
- 15 Pouwhare [Translated: Can I just make a comment here? At this point what you've just said, the spirit of the words of our ancestors to the actions of the Pakeha, of the Crown and of the government to us, there were many evil deeds perpetrated by them on us and so I want to convey the spirit behind those korero. I still assert Ngati Haka Patuheuheu that the Crown was involved in these actions. However, you have your words, your position, and I have my position for Ngati Haka Patuheuheu.]
- 20 Kerr Thank you. Can I just last say that I understand you have brought your Ngati Haka Patuheuheu story to Wellington, to Te Papa Tongarewa, and there is an installation there of your work. So, we in Wellington, have had the benefit of that. I wonder if you want to say anything about that journey?
- 25 Pouwhare [Translated: Thank you, Ms Kerr. Thank you for that noble work, but that work at Te Papa was to show, to display to exhibit the pain and the anger and the sadness that is still within us. The thoughts go back to them who fought for our lands. So, let's leave that there for now, but I thank you for those noble thoughts.]
- Kerr Tena koe mo korero. No further questions, Sir.
- 30 **Tuahine Northover questions Robert Powhare**
- 35 Northover [Translated: I acknowledge Ropata, one question. The reason I ask this question because my memory goes back to the claim of Taranaki for oil and gas. Now, we come back to the paragraph 79 of your summary. And return to Te Umutauroa. Now, we come to the dream of Te Kooti and he said there were eight mauri. We come to the sixth mauri which is te mauri hohunu and the clarifications therein.]
- 40 Pouwhare [Translated: Your question is quite correct because the Government at this moment is, by their law, by their lawyers, by people throughout the country, the Maori states that all the possessions from the sky to the land and beneath the land belong to the Maori. Pakeha laws have a different state. If there is a lake, the bed of the lake belongs to someone else. The water of the lake belongs to someone else. Above the water, someone else has the right. To the Maori, you're talking about the gas in Taranaki. I believe in this old person's word, that the Maori is also within these

5 areas. Maori are not a stingy people. They see someone who is hungry, they feed him. The Maori sees someone who is thirsty and they give him drink, but not whiskey, water. And the Maori sees that he has more than enough for himself, he shares out his wealth. So your discussion on Taranaki, I sympathise with them. Taranaki people say that the gas belongs to them and I sympathise because I'm aware, because Taranaki will share their resources if they should get any. But we come back to this mauri hohunu, number six, in Te Kooti's a Rikirangi's words, sayings, he had much to say about this te mauri hohunu. The hidden treasures. I am not an expert within the Ringatu Church. I cannot really expand on what this te mauri hohunu is, but for me, I am here to lay out Te He Iki's words before the Tribunal.]

Northover [Translated: Thank you Ropata, I finish my questions.]

Annley Kerr cross-examines Alec Mahanga Ranui

15 Kerr Thank you for your evidence, Mr Ranui. I wondered if, actually we put down the overhead projector, but I wondered if you could show us some of the places you describe in your evidence on the maps. I'll take you to it, and we may well see it on the site visit on Friday, but it would be useful for me. On paragraph 15 you describe some of the cultivations, food gathering places, pas, perhaps you could indicate on the map where those places are for me, please.

20 Ranui [Spoken in Maori, but translator says: Wishes to know where Otipa is, where Hauraki is, Opiti is on the extreme north. Ohui is to the south of that. Tokotokorau is to the east, Kaitangata, below that Waiohau. Tauheke is just to the back of the marae. Pukehau is to the south of Waiohau. Okahu further south. Ngati Kare is those forests just above, south. And we go up to Te Raipohatu. Te Upukutu – Raipohatu, that's where Te Raipohatu is. And Hohe, Te Ruakokopu is just next to Raipohatu and further is Te Hohe and that is the southern extreme of the block. That's Orere and Tapiri and Pokairua and this is the Pokairua Stream that runs east to west, ah west to east. Tahekehehe is on the other side of the Rangitaiki River on Pokairua and you get to Motokura. Do you want to know the other areas?]

Kerr I would like to know Te Karangī.

35 Ranui [Translated: As far as I'm aware, it's not on here. Te Karangī is over here somewhere as far as I'm aware. Within, Waiohau is Karangī, it's just near Waiohau.]

Kerr Perhaps it might, if I leave the request on the record, it might be, hopefully it's possible to locate some of those places on a map with some time.

40 White Yes, that's fine.

Kerr Thank you. Perhaps also in paragraph 41.

- Ranui [Translated: Just a clarification, can you speak up a bit louder, because I'm deaf.]
- 5 Kerr I'm sorry. Mr Ranui, you've also spoken about Ohui and it is described as a place of sanctuary for women and children. Can you speak a little bit more about Ohui and this concept of this area being a sanctuary and for there to be no settlements on either side. Can you tell us any more about those concepts?
- 10 Ranui [Translated: You want me to talk to you about Ohui? Is that what you want? Ohui was the greenstone door, the peace between Ngati Awa and Ngai Tuhoe. The greenstone door between Hamua and Koura. That's where the greenstone door was embedded, at the peace-making negotiations, to end the wars between the two tribes. One of the requests of my friend here is to whether Ohui was a shelter, a place of refuge for women and children. I didn't quite hear. I said you need to shout, actually, because I can't hear properly. My friend would like to know whether Ohui was arranged as a sheltering place for women and children in that your reference is there to Ohau for the, that it is a place of peace. In our ancestor's words, these are their words, but what I am saying at here is relaying what their information is. I don't really know, but I'd say that that is the words of our ancestors, given to us.]
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20
- Kerr No further questions. Thank you for your evidence, Mr Ranui.
- Annsey Kerr cross-examines Tama Nikora**
- 25 Kerr Mr Nikora, thank you for answering my questions about Ohue(?) earlier. I've just got a few more questions I'd like to raise with you now. In respect of the Waiohau No 2 block, you mentioned a customary boundary.
- Nikora Yes.
- Kerr And I didn't catch it. I wondered, it was Tokotokorau(?) or Tukutoropiko or miro.
- 30 Nikora You say it, Tuketoromiro Stream. There's a bridge at the end of this boundary.
- Kerr Yes.
- 35 Nikora Well, it was right at the end of this boundary. You follow the old road before you go over the bridge and you just go along until you hit the first stream. That's the Tuketoromiro Stream. I can pull out the evidence for you where it was mentioned. I think it's mentioned in the Turongai(?) Block Lists.
- Kerr Oh, okay.
- Male(?) I took the reference to be to Tokotokorau, which is shown on Map 6 in your map book.

- Nikora Crown Counsel was referring to the boundary of the Waiohau No 2 block. That's what ...
- Kerr That was the customary boundary you mentioned at paragraph 11.
- Male(?) Okay.
- 5 Kerr And, can you tell me who the customary boundary was between? What was the boundary marking?
- Nikora I think it's better if we pull out the actual evidence. It was really saying that was the extent of Patuheuheu tribal claim.
- Kerr Right.
- 10 Nikora Of Te Hera(?).
- Kerr Yes.
- Nikora To see it that way there, that it didn't say anything about what was happening on the other side.
- 15 Kerr Right. Thank you. I wondered if you could, you haven't mentioned this here, but in the course of the Matahina evidence, in the title hearing, Rangitukehu gave evidence about inviting the refugees of Ngati Hamua Warehoi(?) back to live on this area and he, we only have the English, he talked about coming and living on the palm of his hand. Can you tell me the customary significance of that type of statement? Rangitukehu stated that he'd invited these people back to live on the palm.
- 20 Nikora It appears, I'd have to check up on this, but it appears at the time that you are speaking of.
- Kerr Yes.
- 25 Nikora Rangitukehu was changing his mind about what he had earlier decided. To give it back. And hence the decision by Gudgeon saying no, no, if you've given it away, that's it.
- Kerr What's the significance of living upon the palm of my hand? What does that mean? I don't know the te reo.
- 30 Nikora I think it's an assumption of chiefly jurisdiction. Which you can only speak of (inaudible) and nobody else.
- Kerr Yes. And at paragraph 50, you say that, in your view, the usufructory rights of Ngati Pukeko did not entitle them to an award of 1000 acres at Tuararangaia(?).
- Nikora Paragraph 60?
- 35 Kerr Paragraph 50.
- Nikora Usufructory rights is what you are talking to.

Kerr Yes, that's right.

Nikora Yes.

5 Kerr Just a general question about that. It does appear from the evidence that you and others have reviewed that in cases where those types of rights arose, that the Native Land Court would recognise them by an award of a smaller area of land and you think, is that what you have seen?

10 Nikora What comes to my mind, more to the point, is the observation by Judge Gudgeon that, if I recall correctly, he said Ngati Pukeko were really a people of no abode, all their chiefs were scattered. Some were at Rotoiti, all over the place. They certainly weren't (inaudible) and were evicted from Te Whaiti, but I'm not actually confident they occupied around Waiohau or Turangaihia at all, myself. But never mind, it was said that they take trees for canoes. That was the same point as raised by Ngati Awa on the Ratingi(?) case. But it was never accepted by Tuhoe that was a, some sort of right, to claim a proprietary right. They said, well, that's okay you can take the trees, but that was it.

15
20 Kerr Well, that's very helpful. Thank you. Now, counsel have indicated that we have an opportunity to put questions in writing, especially on your bigger report here. I would like to take that opportunity so thank you for your evidence. Thank you.

Transcript ends