IN THE MAORI LAND COURT
TAITOKERAU DISTRICT

IN THE MATTER OF An Application pursuant to s.2,s.17(2) & s.280 of Te Ture Whenua Maori Act 1993 by Marcellus Jenkins on behalf of the Hazel Jackson Whanau Trust
**Applicants**

AND IN THE MATTER OF The Matauri X Incorporation
**Respondents.**

INTERIM DECISION

**Introduction**

On 30 August 2002, Marcellus Jenkins filed an application (subsequently amended on 19 May 2003) on behalf of the Hazel Jackson Whanau Trust seeking an investigation of the affairs of the Matauri X Incorporation. The Whanau Trust ("the applicants") has 10.526 shares in the Incorporation. In addition, they have filed consents to their application from shareholders with, in total, approximately 610 shares. Their principal concern was the authority for an investment by the Incorporation in a water-bottling venture known as Eternal Waters Ltd and the security given over the Incorporation's land at Matauri Bay (and in particular an area in which they claim an especial interest) for an advance of $2.55 million from Bridgecorp Finance Ltd ("Bridgecorp"). This borrowing from Bridgecorp enabled the Incorporation to invest in the water – bottling business.

This issue had previously come to the Court's attention in a roundabout way in an application by the late Barry Blacklaw who sought an injunction to restrain the Incorporation from entering into a lease of the same area of land in which the present applicants claim a particular interest. Mr Blacklaw alleged that the proposed lease was intended by the Incorporation to repay an investment debt. He claimed on behalf of a group described as Te Whanau Nui O Waiaua that they had an interest in a papakainga site in that area. The Court, in a minute of 18 February 2002 (93 WH 170-171) did not find grounds to grant the relief sought but adjourned the application pending a report being prepared by the Registrar pursuant to s.40/93 and s.280 (3) (c)/93. (The latter provision has since been repealed). The Court was concerned that there were issues disclosed in the

Chairman's report to the Annual General Meeting held on 29 September 2001 as to investments in a water – bottling company and a mussel farming business which, on account of the Incorporation's objects defined on 03 May 1989, warranted further enquiry by the Court. Both Mr Blacklaw's application and the Court's directions to the Registrar have now merged with this present application.

The application was first heard on 25 September 2002. The Court found there were grounds for an enquiry into the Incorporation's affairs and appointed Kevin Gillespie of Merenti Ltd, chartered accountants, the examining officer pursuant to s.280 (1)/93. Mr Gillespie filed an interim report on 23 December 2002.

Following a Chambers meeting with the Deputy Registrar responsible for the application and Mr Gillespie on 9 January 2003, the Court issued a direction to the Registrar on 17 February 2003 that counsel, Brian Henry of Auckland, be appointed to assist the Court. By directions of 15 April 2003 (following receipt of an opinion from Mr Henry), the application was set down for a 2 - day fixture at Whangarei on 22 – 23 May 2003.

The issues raised by Messrs Gillespie and Henry respectively in their reports, were put to the parties at the May 2003 hearing. The Applicants were represented by counsel, Annette Sykes of Rotorua; John Stevens, solicitor of Wellington, represented the previous Chairman of the Incorporation, Hemiraua Rapata; Matiu Te Rei (elected to the Committee of Management on 29 September 2001 replacing Mr Rapata as its Chairman) attended for the Committee of Management; Vibeke Dale, solicitor, appeared for Bridgecorp; and Rex Birdsall, the business adviser employed by the previous Committee of Management when they entered into the water – bottling venture, attended to represent himself. John Walters, whose firm Walters Williams were the Incorporation's legal advisers, attended on 23 May 2003 and was represented by counsel, Wayne Peters of Whangarei.

At the conclusion of the hearing on 23 May 2003, upon the submission of counsel for the applicants and with the consent of all parties, Kevin Gillespie was appointed Interim Administrator of the Incorporation (the Committee of Management being suspended) pursuant to s.280 (7) (c) /93.

A hearing on 13 June 2003 received a report from Mr Gillespie on the Special General Meeting of the Incorporation held on 31 May 2003 and the options discussed to resolve the Incorporation's immediate business difficulties.

The hearing of the substantive issues resumed (following the 22 – 23 May 2003 hearing) on 07 July 2003. The Court was informed that Bridgecorp had filed an application for a Declaratory Judgement in the High Court, as to the validity of its mortgage security.

At a hearing on 3 December 2003, the Interim Administrator reported that Bridgecorp's High Court application had been heard on 13 – 15 October 2003. He had instructed Deirdre Watson, barrister of Auckland to represent the Incorporation. The Court had reserved its decision. Mr Gillespie also reported on development proposals and consultation undertaken with shareholders. Mr Henry presented an analysis of the evidence previously heard by the Court and made recommendations as to the Incorporation's future management. He concluded that winding-up the Incorporation was the only option if shareholders were unable to put aside their differences and "sit down and work out a business plan and agree."

Following these recommendations, the Court directed the Registrar to prepare a report to identify the Incorporation's shareholding to the composite blocks as at the date of the Order of Incorporation in 1967, in order that the effects of winding up and/or alienation of any parts of the Incorporation's lands could be determined in relation to the whenua tupuna of the respective shareholders.

The Court's final hearing was on 29 March 2004 when Mr Gillespie reported that a Special General Meeting of Shareholders had been held on 6 March 2004 to which the Registrar's report of 11 February 2004 had been presented, as directed by the Court on 3 December 2003. He also reported that the High Court had upheld the validity of Bridgecorp's mortgage. He had instructed counsel to appeal that decision in the Court of Appeal. Final submissions were received from the parties, shareholders and members of the Committee of Management. Mr Henry was directed to file his final report by the end of April 2004. This was received on 4 May 2004. Mr Stevens, counsel for Mr Rapata, filed his submissions in reply on 17 May 2004.

Mr Gillespie continues as Interim Administrator, assisted by an advisory committee representing shareholders. The appeal against the High Court's Bridgecorp decision was heard by the Court of Appeal in October. Their decision has not yet been handed down.

**Background**

1 The Incorporation

The Proprietors of Matauri X was established as an incorporation by order of the Court on 7 March 1967 to administer an area of 1381a.02 r.04 p. at Matauri Bay in Northland. The objects of the Incorporation were redefined by order of the Court on 3 May 1989 to include tourist ventures. By a Memorandum of Transfer dated 24 March 2000, the Incorporation, over the signature of its then Chairman, Hemi-RuaRapata transferred an area of 4.9547 ha (being a block included in the Incorporation's lands in 1967, known as Matauri 1C2), to its original owners. This transfer was completed by a partition of this block from the Matauri X lands by order of the Court on 25 June 2002. The total area of the Incorporation's lands is now 549.7960 ha (comprising 246.8960 ha in CT 100C/611 and 302.9000 ha in CT 100C/610).

As at 31 July 2001 there were 485 shareholders with a total of 5893.962 shares recorded on the Incorporation's share register.

The following interests are recorded on the Incorporation's titles:

(a) 24 licences to occupy in favour of shareholders (granted house sites by the Committee of Management).

(b) A lease of an area of 2.8964 ha to Matauri Bay Holiday Park Ltd, which expires 31/03/21.

(c) Forestry Rights in favour of Matauri Bay Forests Ltd expiring in 2032.

(d) Maori reservations known as Waiaua ki Mangawhai and Mangawhai ki Putataua.

Subsequent to the registration of these interests, Bridgecorp's mortgage securing a priority sum of $5.1m was registered on 6 August 2001. A further mortgage a year later to secure the sum of $6m in favour of Instant Funding Ltd and dated 8 August 2002 was forwarded to the Registrar for noting. This was rejected, however, because the area partitioned 25 June 2002 was included in the security (ie Matauri 1C2).

2 The Committee of Management and its borrowing

The Committee of Management at the time of the transactions under investigation were Hemi–Rua Rapata (Chairman), Ngaire Pera (Secretary), Geraldine Baker (Treasurer), Monty Puke, Nau Epiha, Moana Kadamia and Steven Samuels. At the Annual General Meeting on 29 September 2001, Moana Kadamia, Monty Puke and Steven Samuels were replaced by Mac Paki, Dover Samuels and Matiu Te Rei.

The investment in Eternal Waters and the borrowing from Bridgecorp arose over a period of approximately 6 weeks, from 18 May 2001 to 6 July 2001. The Chairman of the Incorporation at that time, Hemi-Rua Rapata, has 99.400 shares and is the Incorporation's eighth largest shareholder.

The loan from Instant Funding Ltd was to raise additional capital for the water-bottling business and was entered into by the new Committee of Management in July 2002. Although this mortgage secures $6m, the Court understands that only the sum of $715,000 has been drawn on the loan.

3 The Investment in Eternal Waters

The investment in the water-bottling business at Edgecombe was arranged through Waari Ward-Holmes and his company M-Tech Ltd (which has subsequently been put into liquidation) and an associate Janusz Kubs and his trust (J K Trust). Their contribution to the capital was their intellectual property, said to have a value of $2m. The investment was through an intermediary company, Eternal Investments Ltd., in which the Incorporation took $1m in (paid-up) shares and lent that company a further $1m. Eternal Investments Ltd. in turn lent Eternal Water Ltd. $1m but this loan was subject to a prior first debenture securing $4.308m in favour of the original vendor of the business, Greenfields VDB Ltd. Messrs Ward Holmes and Kubs were to guarantee the Incorporation mortgage advance with Bridgecorp. Their part in the transaction is outside the scope of this enquiry.

This summary of the structure of the "partnership" purchasing the water-bottling business is substantially simplified. There are other companies and, in some cases, 6 classes of shares to which different rights (e.g. voting power) attach to the respective shareholders. To understand the transaction simply, M-Tech Ltd. and JK Trust purchased the water-bottling business and brought the Incorporation into the purchase with them. It was only the Incorporation, however who committed cash to the purchase. Ignoring distinctions between classes of shares, the Incorporation became a 1/3 shareholder with paid – up shares and M-Tech Ltd. and JK Trust each had a 1/3 shareholding (with unpaid shares). To buy into the business, the Incorporation's loan

from Bridgecorp was $2.55m. Only $2m was applied as capital for the business venture and the balance of $550,000 comprised interest paid in advance and fees associated with the transaction.

The investment in Eternal Waters appears to have had its origins in a visit by Waari Ward-Holmes and his associate Nathan Yorke to Hemi-Rua Rapata's home in Whangarei on 18 May 2001. Their discussions were followed by offers of assistance by M-Tech Ltd. on 29 May 2001 who introduced Mr Rapata to Bridgecorp.

**The Negotiations and Purchase of the Interest in Eternal Waters**

It is not the purpose of this application to attribute blame on a misjudged investment decision, but rather to enquire into whether the Committee of Management acted appropriately in obtaining advice prior to committing to the investment. Nor is it the Court's function to critique the advice given. Did the Committee of Management involve itself enough, or familiarise itself enough, with what it was being asked to commit its shareholders to?

Ostensibly, the Incorporation had a local body rating problem. For the year ended 31 March 2001, the rates were $23017. The Incorporation had sufficient income from rental (the Motor Camp and Forestry) and dues payable by shareholders with licences to occupy. The Court agrees with Mr Henry's view that this was not a ground for the Incorporation to enter into this investment. Rather, there was a general view among Committee members that they should establish an economic base for their shareholders and community. 'We have a valuable asset, let's make it work for us.' The investment decision, however, was not a matter of urgency for the Incorporation.

(a) The negotiations/ business advice

The Chairman of the Incorporation, Hemi-Rua Rapata is a solicitor of some 20 years or so experience. For the period February 2000 until May 2002 he was not holding a practising certificate and it may have been for this reason he appears not to have told Rex Birdsall, whom he approached for advice, that he had qualifications in law.

The details of the proposal were put to Mr Rapata by Waari Ward-Holmes shortly after 29 May 2001. He in turn referred them on 7 June 2001 to Rex Birdsall who provided him with an analysis by letter dated 8 June 2001.

Mr Rapata instructed Mr Birdsall upon the recommendation of a business associate. Mr Birdsall had undoubted credentials as a chartered accountant, previously a partner in a major firm of accountants, who was familiar with Maori organisations. He was an appropriately qualified person from whom the Committee of Management may seek business advice.

Mr Rapata received further analysis of the proposal from Mr Birdsall by letters dated 15 June 2001 and 23 June 2001. A meeting of the Committee of Management was held on 30 June 2001 to discuss the proposal. Mr Birdsall attended and gave a presentation based upon the analysis in his letter of 23 June 2001, copies of which had been given to some Committee members by Mr Rapata prior to the meeting.

From what transpired at the meeting on 30 June 2001 and the negotiations which immediately followed between Mr Birdsall and Mr Ward-Holmes, the Court finds that the Committee of Management relied upon him, and made known their reliance, as both their business adviser and negotiator in the transaction.

In terms of instructions given by the Committee of Management to Mr Birdsall, the Court is completely satisfied that there were at least 7 conditions precedent (e.g. an equal cash contribution to the venture from the other 2 partners or a third party to be introduced by them), before they would agree to enter into the contract. The Court was particularly impressed by the evidence of Geraldine Baker in this regard, and indeed Mr Birdsall confirmed that this was his understanding also.

Miss Baker was clear in her understanding of the process they had agreed to before they would commit to the transaction. She said at the hearing on 7 July 2003.

> "It was agreed by all that Rex and Hemi-Rua would present 7 points of concern within the agreement to M-Tech, email the points of concern to the management members once completed and accepted and then circulate to members."
>
> Later she said:
>
> "Well I was under the understanding that Hemi and Rex Birdsall were meeting with our legal representatives to work through the heads of agreement and as well as address those 7 points that were outstanding."

Mr Birdsall left town for about 2 weeks (ie he was unable to be contacted) shortly after the 30 June 2001 meeting. He did not conclude the negotiations on the Incorporation's behalf. He did not inform them he would be unavailable at this critical period in the negotiations. He did not fully apprise the Incorporation's legal advisers as to the terms to be included in the Heads of Agreement being drafted at the time of his disengagement on 3 July 2001. There was no notice to the Committee of Management such that they, as a Committee with whom he had met and discussed the transaction a few days previously, would be aware he had not concluded the negotiations and that they should therefore have sought other advice before committing to the transaction. They were unaware that responsibility for completing negotiations and instructing solicitors was left solely to Mr Rapata.

Mr Birdsall's explanation was that he did not anticipate that the transaction would be completed before his return, first because there were issues still to be negotiated, and secondly, because he thought that the Committee of Management would be required to call a Special General Meeting of shareholders to ratify their decision which would be required for obtaining confirmation by the Maori Land Court.

When Mr Birdsall disengaged on 3 July 2001, draft Heads of Agreement were still being exchanged with M-Tech's solicitors. Mr Birdsall said at the hearing on 22 May 2003 that he received e-mails backwards and forwards from Walter Williams on clauses in the Heads of Agreement right up until the time of his departure. A memorandum very similar to the notes taken by Mr Birdsall in his discussions with Mr Ward-Holmes on 1 July 2001 (but differing in that it was in the form of questions and answers) was sent to Mr Walters on 4 July 2001 by M-Tech's solicitors with a draft copy of the Heads of Agreement. There appears not to have been any actual, specific instructions, however, by Mr Birdsall to the Incorporation's solicitors for their inclusion in the Heads of Agreement (being the conditions precedent agreed at the 30 June 2001 meeting) prior to his disengagement. Mr Rapata and Ngaire Pera signed the contract on 6 July 2001, which was settled when the vendors signed on 9 July 2001

(b) Legal Advice

The Incorporation had legal advisers Walters Williams in Auckland. They had been advising the Incorporation on investment proposals over a number of years. John Walters of that firm first became aware that there was a transaction imminent when he received a message from Mr Rapata on Monday 25 June 2001 that a mortgage of Matauri X's property was being arranged for $2.5m. Mr Rapata informed Mr Walters of the water-bottling transaction on 27 June 2001 and Mr Walters received the first draft Heads of Agreement from M-Tech's solicitors at 5.30pm Friday 29 June 2001. Thereafter Walters Williams received further drafts until the

transaction was signed by Mr Rapata and Miss Pera at their offices on 6 July 2001. Prior to Mr Birdsall's departure from the transaction on 3 July 2001, there was some communication with him. Mr Rapata, however, was constantly in their offices until signing on 6 July 2001 and it would appear that any instructions they received were from him.

Although they were being included in the loop by M-Tech's solicitors in the preparation of the Heads of Agreement, Mr Walters insists that their role was not in advising the Incorporation but rather to prepare documents as instructed. He says that, as at 27 June 2001 when he was first informed of the transaction, Mr Rapata had also informed him that the Incorporation was already committed to the deal. Their firm accordingly refused to complete a solicitor's certificate upon the completion of the mortgage documentation; they authorised the funds to be paid direct from Bridgecorp to M-Tech's solicitors without first requiring M-Tech to hand over to them the documents to complete the sale and purchase of the business. That of course is unusual, but Mr Walters said that occurred because his firm was not the legal adviser to the Incorporation in the transaction.

Despite their not having completed a solicitors certificate or having received the funds advanced by Bridgecorp, on 20 July 2001 Walters Williams sent the mortgage for noting in the Maori Land Court and on 25 July 2001 wrote to the Committee of Management advising as to the resolutions which should be passed ratifying the transaction. On 4 August 2001 the committee passed a resolution "That management endorse and support the proposal" ie the transactions signed on their behalf on 6 July 2001.

Were the Committee of Management's actions appropriate in this situation? Their Chairman was a solicitor. He was working, ostensibly with their legal advisers. Despite this, given the importance and complexity of the transaction, one would have expected the Committee, as a Committee, to have met with its legal advisers. When they were not at the meeting on 30 June 2001, they should have exercised caution. Rex Birdsall was a stranger. Why was their legal adviser of some time not present? Apart form Mr Rapata, none of the Committee of Management had any contact with their solicitors prior to signing on 6 July 2001. This was a must if they were to familiarise themselves with a transaction of this complexity.

(c) <u>The Role of the Incorporation's Chairman</u>

By his own admission, Mr Rapata took a leading role in promoting and concluding the purchase with M-Tech Ltd. and JK Trust, and the borrowing from Bridgecorp.

The extent of his involvement became clear at the hearing on 7 & 8 July 2003. In a message to Walters Williams on 27 June 2001, Mr Rapata informed them that the Incorporation had decided to invest in Eternal Waters and that their firm would be instructed to complete the documentation, including the borrowing. Mr Rapata's counsel put the following questions to his client:

> ***John Stevens:*** *Mr Rapata when you reached the point when you wanted to instruct Mr Walters, did you consider that you were bound by any contractual arrangement to enter into this venture?*
>
> ***Hemi Rua Rapata:*** *At that time of instruction John Walters – No, the answer is no because there were some – Geraldine referred earlier in her evidence to seven points and they were important.*
>
> ***John Stevens:*** *The seven points arose later. At the point when you went to Mr Walters you had a transaction that you wished to proceed with?*
>
> ***Hemi Rua Rapata:*** *Yes.*
>
> ***John Stevens:*** *Did you consider that you had any legal obligation to proceed with it?*
>
> ***Hemi Rua Rapata:*** *No*

Mr Rapata then went on to say that if the conditions precedent arising from the meeting on 30 June 2001 had not been included in the Heads of Agreement then "there was no deal."

Mr Rapata described his role "as the Project Manager, bringing together Rex [Birdsall], Connie [a solicitor with Walters Williams] and John [Walters] to provide expert advice while I was providing the management coordination."

His position, however, became clearer later in the hearing. At page 169 in his bundle of documents is an e-mail form Mr Rapata to Waari Ward-Holmes dated 2 July 2001 disclosing that he had already signed the acceptance of a loan offer from Bridgecorp which was held by Mr Ward-Holmes. The e-mail reads:

> *"Kia ora e Waari, Rex Birdsall has updated me on the position with regards to the amendments sought by PMX to the Heads of Agreement. He said that he has spoken with you and I am now left with some concerns. PMX is aware of the risks and quantum shifts for our people. Essentially, we're waiting to*

*jump into the river and we want to be confident that all parties are jumping into the river together at the same time. It is a very uncomfortable feeling having jumped into the river and your mates are still on the bank waving "We love you" as we are swept away. We love you too, so let's all jump in to the task that life is. In light of our concerns, I request that our Offer and Acceptance to Bridgecorp not be released until we have agreed upon the amendments sought to the Heads of Agreement. I am available for a conference call."*

Mr Rapata had signed the acceptance of Bridgecorp's loan offer on 27 June 2001. He did not inform his fellow committee of Management members at their meeting 3 days later. He sent a copy of this e-mail, however, to Mr Birdsall.

By signing the acceptance of the loan and leaving the documentation in the hands of Waari Ward-Holmes (the other contracting party), Mr Rapata had committed the Incorporation to the transaction, as he had informed Mr Walters on 27 June 2001. Although not at that stage contractually bound to M-Tech Ltd., Mr Rapata had entered into a contract with Bridgecorp and had put M-Tech in the position of being able to enforce it. If they had not proceeded with the Eternal Waters transaction, the Incorporation would have been liable for substantial penalties on their Bridgecorp contract - $200,000 arrangement fee, interest etc. If there had been delay in uplifting the advance, the contract provided for a penalty at 5% pa on the amount borrowed until uplifted (ie on this loan, $127,500 pa). The draw down date in the contract was 29 June 2001. There was little prospect of meaningful negotiations with M-Tech Ltd. after 29 June 2001.

Mr Stevens, in his submissions of 17 May 2004 attempted to minimize the impact on the contract negotiations of his client's undisclosed completion of the loan acceptance. The e-mail message of 2 July 2001, however shows that Mr Rapata fully understood the predicament in which he had placed the Incorporation. Mr Ward-Holmes appears not to have been sympathetic. The omission of the condition precedent from the final Heads of Agreement, without Mr Birdsall's input, was not due to a failure by the Incorporation's solicitors to follow instructions. When asked at the hearing on 8 July 2003 whether he had informed the Incorporation's solicitors of the "key points" to be included in the Heads of Agreement, Mr Rapata confirmed he had not. Mr Rapata, it should be noted, is not a layman. Any client instructing solicitors should read and check over a document before signing.

As to Mr Rapata's claim that he left it to Rex Birdsall to instruct Walter Williams on the terms to be included in the Heads of Agreement, he knew he could not be contacted after 3 July 2001 – when he tried to contact him,

he did not get a response. He knew it was his responsibility to ensure the terms were included. Had he insisted, however, the deal was unlikely to have proceeded. He chose to withhold the instructions.

It is clear that Mr Rapata went out of his way to minimize Walters Williams' involvement. Bridgecorp's solicitors, McVeagh Fleming, made enquiry with the Maori Land Court on 13 June 2001 about the Incorporation's lands to enable it to prepare its client's loan offer/mortgage documentation. Mr Rapata did not instruct Walter Williams until over a fortnight later, and then it was rush-rush.

Mr Rapata acknowledged during the hearing on 8 July 2003 that he did not report back to his Committee as to the inclusion of the conditions they had required prior to his executing the documents on their behalf. He also acknowledged, as Geraldine Baker had said in her evidence, that he did not have their authority to sign the contract without first confirming that the Committee's conditions laid down at the meeting on 30 June 2001 had been satisfied.

Given that these actions of their Chairman were not disclosed to them, did the Committee of Management act appropriately? Should they have left him in the position where he could make these decisions on his own? They believed Mr Birdsall was acting in the negotiations for them. Their Chairman was a solicitor. They placed reliance upon his expertise and goodfaith. They had solicitors acting for them. They seemingly had all the professional assistance one would reasonably expect. Geraldine Baker said in evidence that they stipulated that Mr Rapata and Mr Birdsall were to confirm to the Committee of Management that the concerns expressed at the meeting on 30 June 2001 were incorporated in the documentation before completing the transaction. After they knew that the transaction had been completed, however, they did not enquire 'but where is our confirmation that all matters were attended to, as we had agreed?'

There is another, Maori, answer to the question as to whether the Committee of Management should have left Mr Rapata to make these decisions alone.

**The Incorporation's Management since buying into Eternal Waters**

The purchase of the 1/3 share in the water-bottling business was completed on 9 July 2001. An Annual General Meeting was scheduled for 29 September 2001. Mr Rapata asked Mr Birdsall to prepare a report on the water-bottling business. In a letter to Mr Rapata dated 27 September 2001, Mr Birdsall paints a glowing picture of the investment. He set out his views in a question and answer format, and concluded:

"...having the benefit of hindsight as to subsequent events, I remain convinced that the business should, over the long term, be very, very successful."

He was praising of Mr Rapata's role as a director of the company. His only concern was whether the Incorporation's shareholders would allow the investment to last the distance:

"The relevance of that to Matauri X Inc is that every investment has its ups and downs. Eternal Waters will be no different. It will always be possible for a member of Matauri to question some element of Eternal Waters performance, or even the investment in the first place. In doing so, they might not realise that their hoha could be enough on the grapevine to destabilise a major Japanese contract negotiation.

If so Matauri may not last the distance within Eternal Waters, not because the business is not good enough, but because Matauri was not yet ready for such an investment. No doubt Eternal Waters will survive and prosper, but this could be without Matauri as a shareholder."

The tone of this letter contrasts markedly with Mr Birdsall's view at the hearing on 22 May 2003. He then was distancing himself from the transaction – he was surprised when he was ' back in the loop' after settlement on 9 July 2001, that the transaction had gone ahead. In cross-examination on 8 July 2001, he acknowledged that the only information he had about the water-bottling business subsequent to his involvement in the negotiations had been from Mr Rapata and M-Tech. He said of M-Tech's advice "obviously I was fed a line contrary to what was actually happening. "

The election held at the Annual General Meeting on 29 September 2001 resulted in 3 new Committee of Management members being elected. One of them, Matui Te Rei, was elected Chairman at the Committee of Management meeting on 17 November 2001, replacing Mr Rapata who was also replaced in early 2002 by Geraldine Baker as the Incorporation's director on the water-bottling company.

Relations with M-Tech soured with Mr Rapata's removal as director. Mr Rapata then offered to buy the Incorporation's share of the water-bottling business. The Committee of Management was required to first offer their interest to their partners (pursuant to a right of pre-emption). M-Tech were not cooperative. Despite being sceptical of Mr Rapata's offer, it was discussed by the Committee of Management on 16 February 2002 and they left it to Mr Rapata to forward details to their solicitors. The Court disagrees with Mr Stevens'

submission of 17 May 2004 that this was an offer by which the Incorporation could have mitigated its losses. Mr Rapata had the opportunity to make his case in this regard but did not do so.

The new Committee of Management decided that it should give the water-bottling business their best shot. It raised funds with Instant Funding Ltd. as the business required additional capital before it could begin to pay its way. A meeting was held at Tapui Marae, Matauri Bay, on 31 August 2002. A lawyer attended to explain the whole business to the Incorporation's shareholders. Mr Te Rei was uncertain whether the additional finance had been uplifted prior to that meeting. The mortgage securing $6m in favour of Instant Funding Ltd., which was sent to the Maori Land Court for noting, was dated 8 August 2002.

The conduct of the new Committee of Management is not an issue in this investigation. We cannot criticise the steps they took, faced with the financial dilemma they had inherited. It is the conundrum quite frequently confronting business people – the 'should we throw good money after bad?' scenario.

At the hearing on 25 September 2002, Mr Te Rei asked that the new Committee of Management be allowed to get on with its business. He said the new Committee were not responsible for the mess but had the understanding of the transactions and skills to work their way through them.

Although the Court understood Mr Te Rei's frustration, many of the shareholders did not agree. A resolution passed at a Special General Meeting on 31 August 2002 supported the application asking for an investigation. The appointment of Mr Gillespie as Interim Administrator on 23 May 2003, upon submissions by the Applicants' counsel Annette Sykes, was with the consent of all parties. There were strong feelings among shareholders to have someone independent, an outsider, to help them resolve the issues. This was apparent at the Special General Meeting on 31 May 2003 when the lease proposal to a neighbour met with such opposition that the proposed lessee's condition of quiet enjoyment of the property could not be assured.

During the course of the investigation, attitudes have been changing for the better. Mr Henry's reports to the Court show a progression in the improvement both of the prospects for the Incorporation's continued existence (ie avoiding its being wound-up) and in shareholder relationships.

**The Examining officer and Interim Administrator**

Mr Gillespie filed his interim report on 23 December 2002. At a Chambers meeting on 9 January 2003, attended also by a Deputy Registrar, the Court discussed the report with Mr Gillespie. Following a telephone

conference with Mr Stevens acting for Mr Rapata, the report was amended and the Court directed that it be made available to interested parties. It was formally produced at the hearing on 22 May 2003.

Mr Stevens in his submission of 17 May 2004 alleges, on Mr Rapata's behalf, that his client has been disadvantaged. The notice given to Mr Rapata and opportunity to respond were canvassed fully at the hearings. The Court does not accept that Mr Rapata has been disadvantaged by the process it has adopted.

Since the outset of the Court's investigation of the Incorporation's affairs, there has been a long shadow cast by the Bridgecorp mortgage. It was due for repayment on 10 July 2003 until which time the interest rate was 14% per annum. Thereafter, the penalty rate is 24%. As at the hearing in May 2003, the debt was approaching $3m.

At the time of the hearing in May 2003, the new Committee of Management had a Special General Meeting of shareholders scheduled for 31 May 2003 to consider the lease proposal mentioned previously. The applicants were vigorously opposed. It is against that backdrop that the Court appointed Mr Gillespie Interim Administrator pursuant to s.280(7)(c)/93.

A member of the suspended Committee of Management, Dover Samuels, sought clarification of Mr Gillespie's role as Interim Administrator, at the hearing on 13 June 2003.

> ***Dover Samuels:*** *Can I just make a point of clarification? I just want to ask the Court in terms of the order that was made suspending the committee members. My understanding is it was an interim order. Can you just advise when or whether you intend to lift that order or if you intend to and when?*
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> ***Court:*** *Thank you Mr Samuels. It's a perfectly valid question. The order that was made on the 23rd of May was an interim order in terms of Mr Gillespie's appointment. And I've made it quite clear that it is only to address the immediate problems of the financing and the arrangements with regard to Eternal Water so that Mr Gillespie can apply his expertise on that issue to a point where the Incorporation from its debt dilemma.*
>
> *Now I take entirely the point which Ms Sykes has made, Mr Samuels, that there should be some continuity hopefully in Mr Gillespie's administration to the point where the Incorporation is out of that difficulty where its no longer got than deadline of default. What I'm saying is that its not intended, Mr Samuels, that Mr Gillespie should take a long term role in this at all. He's got a specific assignment*

*and I'm sure he understands that and its in order to take all the negotiating out so that one person with expertise is in charge. And at the same time liasing with Committee of Management even though their powers have been suspended and also with the shareholders generally. It's in order to give the boat direction and to try and achieve, with expertise, a desirable result.*

***Dover Samuels:*** *I understand and support that Your Worship.*

Since appointment as Interim Administrator on 23 May 2003, Mr Gillespie (with counsel) has represented the Incorporation in defending the proceedings brought by Bridgecorp in the High Court, has explored development options and sought refinance, held meetings with shareholders and reported to the Court. Following the Special General Meeting on 6 March 2004 when the Registrar's report dated 11 February 2004 was presented identifying the effect winding-up and/or alienation of parts of Matauri X would have upon whenua tupuna relationships, the Court at the hearing on 29 March 2004 decided that it could now "bow out" and let the Incorporation get on with its own affairs. The Court's funding for Mr Gillespie's appointment would accordingly cease at the end of April 2004.

Mr Gillespie continues as Interim Administrator in the meantime, assisted by a committee nominated by shareholders and appointed by the Court.

**Appointment & Reports of Counsel to assist the Court**

At the Chambers meeting on 9 January 2003 with Mr Gilllespie and the Deputy Registrar, the Court raised the question of whether counsel should be appointed to assist the Court. The Court's file note records the Court's concern that third parties may be affected (e.g. house owners with licences to occupy, the motor camp's water supply etc) and that these people should be represented before the Court could exercise its jurisdiction, for example, to wind up the Incorporation. Its direction to the Registrar of 17 February 2003 recorded its concern that questions of reputation may arise during the investigation requiring representation by counsel. In inquiries/investigations, one can never anticipate what may emerge and who may be affected. Unlike applications generally, one can wander into uncharted waters. The Court accordingly appointed Mr Henry pursuant to s.70(3)/93.

Mr Henry attended all the hearings with the exception of 13 June 2003 on account of a family bereavement. He has presented his reports at the hearings and all parties have had an opportunity to respond to them.

In his first report of a 4 April 2003, Mr Henry was of the view that "Liquidation of the Incorporation is not in my opinion a remedy that is in the best interests of the shareholders." By the time of the hearing on 3 December

2003, his report referred to "a range of serious divisions between factions of the Incorporation" and that "the Incorporation cannot be left to operate with its current management structures." Liquidation of the Incorporation "on the basis that it is inextricably dead locked" was now an option.

At the hearing on 29 March 2004, Mr Henry commented on the Special General Meeting of 6 March 2004. There was an amazing change of tone:

> "That meeting was from my observation, a very positive one. And it was certainly on e that shows, that in the face of adversity, the Incorporation is quite capable of sitting down and working away, very pragmatically through what can only be described as one of the most difficult situations that could ever face an incorporation.'

**Final submissions of Counsel assisting the Court**

Mr Henry's final submission to the Court of 3 May 2004 canvasses the roles of the Incorporations Chairman and their advisers. To Mr Rapata he attaches commercial naivete. In his submission of 17 May 2004, Mr Stevens agrees.

That, however, is not the point. Rather, the Court is interested in what happened and how. Given their advisers and their advisers' expertise, did what the Committee of Management think was happening, happen? If the answer is "no", was there anything that the Committee did (or didn't) which contributed to it? If the answer to this second question is "yes", what should be done about it?

The Court found on 25 September 2002 that there were matters justifying an enquiry and pursuant to s.280(6)/93 has conducted its enquiry. On 23 May 2003 it made a first interim decision as to what to do about the deficiencies found by the Examining Officer - it suspended the Committee of Management and appointed an Interim Administrator. It must now complete the inquiry and make its final decision, with reference to the other measures provided in s.280(7)/93.

Returning to Mr Henry's submissions, does he raise any issues, which were not canvassed at the hearings? He makes valuable comment on the role of the Committee members. These will be incorporated in the Court's findings. The Court shares his view that it is easy to criticise advisers with the benefit of hindsight. It is not intended that this should happen beyond putting the evidence into context with the knowledge and responsibilities of the Committee of Management.

In answer to Mr Henry's invitation for the Court to comment further on Mr Birdsall's report to the Annual General Meeting held on 29 September 2001, the Court does not consider it necessary to do so.

There has been one piece of evidence, however, which has been overlooked. For completeness, it not having been raised at the hearings, it should now be entered into the record. On 22 June 2001 Mr Birdsall sent an e-mail to Mr Rapata:

> *"Kia ora Hemi*
> *I've lost your phone number – and can't find it in the white pages etc*
> *I've rechecked the numbers that M-Tech re-worked for me and they are better/ok except for some of the sensitivities, however they won't stop us now.*
>
> *There's still outstanding:*
>
> *1 A query on the Domes contract re adjustment of the first shipment doesn't arrive in Japan by 1 July.*
>
> *2 On cash support if the 1st year goes like a dog from day 1.*
>
> *3 On reducing the share options or at least spreading them over say a 3-4 year period.*
>
> *Otherwise everything is falling into place ... I've got an urgent 6.00pm Directors meeting for my Web/WAP company but I'll be back later to today this up and do a summary for you*
>
> *Cheers Rex B.*

This message to Mr Rapata bridges the perhaps pessimistic analysis in Mr Birdsall's letter of 15 June 2001 and the more optimistic analysis in his letter of 23 June 2001 which formed the basis of the presentation to the Committee of Management on 30 June 2001. It identifies 3 important issues remaining to be resolved (including the "double whammy" in the 15 June 2001 letter of the promoters retaining share options).

**Findings**

Incorporations have constitutions which define their objects. They hold the land upon trust for their shareholders:

s.250/93 (4) From and after its constitution, every Maori incorporation shall hold the land and other assets vested in it on trust for the incorporated owners in proportion to their several interests in the land.

(5) No Maori incorporation acting in accordance with its powers and in compliance with this Act or any other Act shall be in breach of trust.

In its decision of 17 December 2003 on Bridgecorp's Declaratory Judgement application, the High Court held that the investment in Eternal Waters and borrowing from Bridgecorp were not ultra vires (ie outside their powers). So the law remains, in the absence of a Court of Appeal decision to the contrary.

Accordingly, although the Court found that the investment and borrowing are not themselves ultra vires, the Committee of Management, while acting within the objects of their trust, nevertheless has a duty to act with the prudence of reasonable business people. They owe that duty to their shareholders as, in effect, they are trustees of the land.

**In relation to the Committee of Management of the period June-July 2001, in the negotiation and completion of the Eternal Waters transaction, the Court makes the following findings:**

1 The Committee of Management met on 30 June 2001 and approved the transaction subject to certain conditions precedent.

2 That the Committee of Management made known to both their Chairman, Hemi-Rua Rapata and their business adviser and negotiator Rex Birdsall, their reliance upon their ensuring that the conditions precedent were included in the contract before it was entered into on their behalf.

3 That both Hemi-Rua Rapata and Rex Birdsall knew of the reliance reposed in them by the Committee of Management and neither of them acted in accordance with the agreed instructions.

4 That Hemi-Rua Rapata, in breach of his duty of good faith to his fellow members of the Committee of Management, completed the contract knowing that it was not in accordance with the instructions and was therefore acting without the authority of the Committee of Management.

5 The Committee of Management failed to act prudently and was in breach of its duty to its shareholders in the following respects:

(a) Failed to keep an adequate record or minutes of its meeting on 30 June 2001 having regard to the importance of the issues being discussed.
(b) Failed to pass resolutions authorising actions to be taken on their behalf.
(c) Failed to obtain independent legal advice and ensure their solicitors approved the transaction.
(d) Failed to take any steps to ensure that their conditions/instructions had been complied with,
(e) Left their Chairperson to handle critically important business transactions alone without the tautoko of others on the Committee of Management.

**Conclusion**

At the first hearing, Mr Rapata acknowledged his responsibility as Chairman. It is clear that his co-signatory to the transactions at the centre of this enquiry, Ngaire Pera, was acting only on his instructions and for this reason has not been held individually accountable as otherwise she might.

On 25 September 2002, Mr Rapata told the Court:

> *"I acknowledge that I was chairperson of the Committee of Management and it was under my leadership that they entered into these investments. I accept that I am as chairperson accountable to them. I agree to act in good faith in accounting to them even should they resort to taking action in another jurisdiction..."*

The Court at the hearing on 3 December 2003, while agreeing remedies against individuals may be available in other jurisdictions, said that its role was to look at the affairs of the Incorporation. The Court also observed at the outset that the enquiry was not "a witch hunt." By s.280(7)(h)/93, the Court may, however, refer a matter to the Attorney General with a view to a prosecution. This course of action was raised by counsel for the Applicants in her submissions and at the hearing on 03 December 2003

The Court does not consider it appropriate to adopt this course of action. In an enquiry, full disclosure should be encouraged without fear of self-incrimination. Mr Rapata, and the Court acknowledges Mr Stevens' candour also, has provided very good disclosure of the documents in his possession. There is no evidence of

defalcations from Incorporation funds. The prosecution provision would be more appropriate in those circumstances.

Accordingly, as Mr Rapata acknowledged, should the Incorporation seek any remedy against Mr Rapata personally, that opportunity is available in another jurisdiction.

Concerning the other measures the Court may adopt under s.280(7)/93, the Court does not consider winding up the Incorporation to be either necessary or appropriate. In its present dilemma, the Incorporation structure and ownership of assets provide flexibility, which the alternative of multiple ownership (ie devolving the land's ownership to the shareholders individually on winding up) would not. Besides, the interests of those with licences to occupy and the mortgages preclude this as being a realistic option.

Most encouraging, however, is Mr Henry's recommendation that the shareholders, now having an understanding of the realities of their predicament, are desirous to cooperate. For that reason, the Court will exercise its powers under s.280(7)(d)/93, imposing restrictions on the powers of the Incorporation.

**Costs**

Mr Henry in his final submissions recommends that the Court, pursuant to s.79(1)/93 orders costs against Mr Rapata. Unsurprisingly, Mr Stevens opposes that recommendation.

There are very considerable costs in these proceedings, in particular those incurred by the Court in appointing an Examining Officer, counsel to assist the Court and the Interim Administrator (the latter 2 appointees until the end of April 2004).

> s.79(1)/93 provides:
> In any proceedings, the Court may make such order as it thinks just as to the payment of costs of those proceedings, or of any proceedings or matters incidental or preliminary to them by or to any person who is or was a party to those proceedings or to whom leave has been granted by the Court to be heard.

There is no doubt that the Applicant and the Incorporation come within that provision. With respect to the latter, the Court, both during the hearing and in minutes incidental to his appointment as Interim Administrator, drew Mr Gillespie's attention to the need to factor his costs into any refinancing or development proposals to address the Incorporation's financial predicament.

As to the position of others who appeared before the Court, submissions will be necessary. Mr Stevens has already made his representation on Mr Rapata's behalf. The Court is inclined to agree with him that, this is an Inquiry where those participating are witnesses assisting the Inquiry (albeit themselves assisted by counsel) rather than parties or persons granted leave to be heard as may be the case in other applications. By letter dated 24 February 2004, Mr Birdsall claimed his costs should be met by a grant of legal aid. Mr Rapata has referred his counsel's costs to the Interim Administrator. All the issues relating to costs will be considered when we know the costs incurred by the Court-appointed Examining Officer, counsel and Interim Administrator.

**Directions**

There are a number of matters requiring completion and for that reason this is an interim decision. The Court is conscious that the Interim Administrator, his committee and the shareholders, have other pressing issues to address. The Court and does not wish to distract them from their task. A hui will be required for the shareholders to decide the appropriate limitations upon the Incorporation's objects and the Committee of Management's powers to be included in the Constitution pursuant to s.280(7)(d)/93. Also, the Interim Administrator must provide a report and accounting, and must relinquish his functions at an appropriate time. Would Mr Gillespie kindly contact the Registrar and advise by no later than 31 March 2005 and a minute can then be prepared accordingly with directions.

Concerning the question of costs, the Registrar is to provide a memorandum to the Court as to the costs paid to Mr Gillespie as the examining officer and the fees and other expenses paid to or claimed by Mr Gillespie as Interim Administrator to 30 April 2004. The Registrar is also to provide a like memorandum for the fees paid to or claimed by Mr Henry as counsel appointed to assist the Court. These memoranda are to be provided by no later than Friday 11 February 2005. Once this information is to hand the Court will issue further directions concerning costs.

Finally, on 21 July 2004 the Court issued directions by way of a minute (99 WH 291) restraining any person from having access to the files in this application pending the completion of the Court's decision. The Chief Registrar had, on 16 July 2004, filed an application pursuant to s.45/93 with the Chief Judge, challenging ancilliary orders made in hearing this application, for the payment of Messrs Henry and Gillespie's costs. The Chief Registrar's application has been set down for hearing before the Chief Judge at the Quality Inn Manukau, 477 Great South Road, Papatoetoe at 10.00am Wednesday 19 January 2005. The Court now having delivered its findings on the application, the direction given on 21 July 2004 is withdrawn.

This Interim Decision will be pronounced in open Court at 9.30am Monday 17 January 2005 at Nga Whare Waatea, Mangere.

A D Spencer, Judge

Date: 17 January 2005.