I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI
In the Māori Appellate Court of New Zealand
Waiariki District

A20220001868

WĀHANGA *Under*	Sections 58 and 98 of Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	An appeal against the order of the Māori Land Court (Judge Wara), Waiariki District, dated 21 December 2021 at 267 Waiariki MB 184-196.
I WAENGA I A *Between*	Beryl Tawa Kaitono pīra *Appellant*
ME *And*	Tuaropaki E Trust Kaiurupare pīra *Respondent*

Nohoanga: *Hearing*	19 August 2022, 2022 Māori Appellate Court MB 255-300 (Heard at Rotorua)
Kooti: *Court*	Deputy Chief Judge CL Fox (Presiding) Judge MJ Doogan Judge Te K Te A R Williams
Kanohi kitea: *Appearances*	J Kahukiwa for Appellant M Mahuika for Respondent
Whakataunga: *Judgment date*	18 October 2022

TE WHAKATAUNGA Ā TE KOOTI PĪRA MĀORI
Reserved Judgment of the Māori Appellate Court

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Hei tīmatatanga kōrero
Introduction

[1] Beryl Tawa is a beneficiary of the Beryl Tawa Whanau Trust. That trust is in turn a beneficial owner of the Tuaropaki trust, a large and successful ahu whenua trust with over 2,500 beneficial owners and an asset base of over one billion dollars. For some time, Beryl has been of the view that the trustees of the Tuaropaki trust should change the trust deed to require trustees to retire after completion of a specified term. In March 2021, Beryl applied to the Court for an order varying the trust order accordingly. In May 2021, Beryl amended the application to apply for a review of the trust order.

[2] Beryl also challenged the lawfulness or reasonableness of certain decisions of the trustees pursuant to s 238 of Te Ture Whenua Māori Act ("the Act"), which deals with enforcement of obligations of trust. She sought an order directing the trustees to hold a general meeting of beneficial owners within three months to discuss and resolve the proposed rotation of trustees.

[3] By decision dated 21 December 2021, Her Honour Judge Wara dismissed Beryl's application as there had been a review in February 2020, and therefore the Court lacked jurisdiction to undertake a further review because of a statutory bar on more than one review within a 24-month period, as per s 231(2) of the Act.[1]

[4] Judge Wara also found that even if she was not jurisdictionally barred from undertaking another review, she would not have granted orders for enforcement of obligations of trust.[2]

[5] Beryl Tawa appeals that decision. Because the jurisdiction issue substantially determines the outcome of the appeal, we deal with it first.

[6] At the conclusion of the hearing, we reserved leave to counsel to file further submissions on certain matters. We thank counsel for their supplementary submissions, respectively dated 2 and 9 September 2022.

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1 267 Waiariki MB 184-196 (267 WAR 184-196) at [26]-[27].
2 At [28].

The Jurisdiction Issue

[7] The Tuaropaki Trust was established prior to the enactment of the 1993 Act. It was subject to a number of transitional provisions. Two of these provisions are of particular relevance.

[8] Section 351 of the Act provides for a periodic review of trusts:

> **351 Periodic Review of Trusts constituted under Section 438 of Māori Affairs Act 1958**
>
> (1) The trustees for the time being of any trust constituted under section 438 of the Maori Affairs Act 1953 shall apply to the court within 3 years after the commencement of this Act, and thereafter at intervals of 20 years or such shorter intervals as the court may specify on any review of the trust, for a review of the trust.
>
> (2) On any such review the court may, by order, confirm the trust order without variation, or vary the terms of the order in such manner as it thinks fit, or make an order terminating the trust.

[9] Section 354 of the Act provides that trusts established under s 438(1) of the Māori Affairs Act 1953 that are in existence at the commencement of Te Ture Whenua Māori Act 1993 are to continue as Ahu Whenua trusts and that the provisions of part 12 of the Act shall apply accordingly.

[10] Amongst the provisions of part 12 is s 231, which provides:

> **231 Review of Trusts**
>
> (1) The trustees or beneficiary of a trust (other than a Kaitiaki trust) constituted under this Part may apply to the court to review the terms, operation, or other aspect of the trust.
>
> (2) There can be no more than 1 review of a trust within a period of 24 consecutive months.
>
> (3) The court may, on any review,—
>
> (a) Confirm the trust order for the trust without variation; or
>
> (b) Exercise its powers under section 244; or
>
> (c) Terminate the trust if the court is satisfied that there is a sufficient degree of support for termination among the beneficiaries.

[11] Section 231(2) is clear. There can be no more than 1 review of trust within a period of 24 consecutive months. There had been a review of the Tuaropaki trust on the 28th

February 2020 and it was on this basis that Judge Wara concluded that the Court did not have jurisdiction to entertain another review.[3]

[12] Counsel for Beryl Tawa, Mr Kahukiwa, maintains that the Court was wrong to decline jurisdiction. Mr Kahukiwa argued that there was jurisdiction under s 231 of the Act to conduct a review, and the Court was wrong to conclude that s 351 must be read consistently with s 231. Mr Kahukiwa argues that this is because a review under one provision is not a review under the other. Sections 231 and 351 are instead dealing with mutually exclusive kinds of review.

[13] Mr Kahukiwa says there is no issue with a s 231 review applying to a s 438 trust, as this is what s 354 provides by deeming the provisions of part 12 to apply. He notes that, under s 231 either a trustee or beneficiary can apply for a review whereas under s 351 only a trustee can apply. Mr Kahukiwa argues that the consequential powers afforded to the Court in relation to a ss 231 and 351 review are "vastly different." Under s 231, if the Court considers the trust may need to be varied as a result of a review, the only route available is pursuant to s 244. Section 231, Mr Kahukiwa argues, does not of itself confer the power to vary the terms of trust and under s 244 the Court's power to do so is qualified by what Mr Kahukiwa describes as "certain evidential requirements". These requirements are that the beneficiaries have sufficient notice of the proposed variation and sufficient opportunity to discuss and consider it, and that there is a sufficient degree of support for the variation amongst the beneficiaries (as per s 244(3)(a)(b)). Mr Kahukiwa says there is no such limitation under s 351.

[14] Counsel for the Tuaropaki Trust support the decision of the lower Court. Mr Mahuika notes that s 351 falls under the transitional and consequential provisions of the Act and sits alongside s 354 which provides that existing s 438 trusts continue as ahu whenua trusts. Accordingly, s 438 trusts become and are administered as ahu whenua trusts following the commencement of the Act. The term "review" is not defined in any of the relevant provisions. This supports the decision of Judge Wara that "a review is simply a review, irrespective of what section it was ordered under."[4] Mr Mahuika argues that the express parliamentary intention is that s 438 trusts would be administered as ahu whenua

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3 230 Waiariki MB 208-210 (230 WAR 208-210).
4 267 WAR 184-196 at [26].

trusts established after the commencement of the 1993 Act. To follow the approach suggested by Mr Kahukiwa would result in a more burdensome regime applying to those trusts established under the previous legislation. This would mean that s 438 trusts would be subject to more than one review within a 24-month period whereas an Ahu Whenua trust created after the commencement of the Act could be subject to only one review within twenty-four months. This, Mr Mahuika argues, could not have been Parliament's intention.

[15] Mr Mahuika goes on to argue that the better interpretation, and one consistent with Parliament's intention regarding s 438 trusts, is that s 231(2) is applicable to a review brought before the Court regardless of the section it was ordered under. Once the trust has been reviewed, another review of the trust cannot take place within a 24 month period. Accordingly, s 351 of the Act must be read consistently with s 231(2) and therefore the Court did not err in finding that it was jurisdictionally barred from undertaking another review of the trust until the 24 month period had elapsed.

Kōrerorero
Discussion

[16] On the jurisdiction question, Her Honour Judge Wara found:[5]

> I agree with counsel for the respondents that s 351 must be read consistently with s 231. While the review of trust that was ordered under s 351 was a periodic review, a review is simply a review, irrespective of which section it was ordered under. Ultimately the court should move away from periodic reviews under s 351 as this is a transitional provision. In addition, I cannot accept the submission that s 231 allows for more than one review within a 24 month period depending on who makes the application, as this is not clearly expressed under s 231(2).

[17] We can see no error in this approach. We also make the following points.

[18] The word "review" is defined in the *Concise Oxford Dictionary* as "a formal assessment of something with the intention of instituting change if necessary."[6] *Black's Law Dictionary* defines a review as "consideration, inspection, or re-examination of a subject or thing."[7]

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5 267 WAR 184-196 at [26].
6 *Concise Oxford English Dictionary* (11th ed, Oxford University Press).
7 Bryan A Garner *Black's Law Dictionary* (11th ed, Thompson West, 2019).

[19] While the term "review" is not a defined term in the Act, its ordinary meaning, and the context in which the term is used in both ss 231 and 351, tell against Mr Kahukiwa's argument that there are substantially different kinds of review in operation under the two provisions. The policy objective was to bring existing s 438 trusts under the Court's supervisory jurisdiction as extended and modified by the passing of the 1993 Act. We agree with Judge Wara that a review is simply a review, irrespective of which section it was ordered under. We also agree with Judge Wara that the Court should move away from periodic reviews under s 351 as this is a transitional provision.

[20] We are not persuaded by Mr Kahukiwa's characterisation of the powers available to the Court under a s 351 review and a s 231 review as "vastly different." We see no material difference in the powers available to the court under either review. Section 351(2) provides that the Court may, by order, confirm the trust order without variation, or vary the terms of the order in such a matter that it deems fit, or make an order terminating the trust. Section 231(3) provides that the Court may confirm the trust order without variation, or exercise its powers under s 244, or terminate the trust if the Court is satisfied that there is a sufficient degree of support for termination amongst the beneficiaries.

[21] Section 244(2) provides that the Court may vary the trust by varying or replacing the order constituting the trust, or in any other manner the Court deems appropriate.

[22] Section 231(3) provides that the Court may not exercise its powers under s 244 unless satisfied that the beneficiaries have had sufficient notice of the application by trustees to vary the trust, sufficient opportunity to discuss and consider it, and that there is a sufficient degree of support for variation amongst the beneficiaries. The reference in s 231(3)(b) to the exercise of the Court's powers under s 244 is clearly a reference to the powers given to the Court in s 244(2) to vary the trust by varying or replacing the trust order, or in any other manner the Court deems appropriate. Had the draftsperson intended that the threshold requirements in s 244(3) operate as a condition or qualification on the exercise of these powers it would have said so, as is the case with s231(3)(c) where it is made clear that the Court must not terminate the trust unless satisfied there is sufficient support among the beneficiaries.

[23] We also note that s 234(2) concerning review of a Kaitiaki trust is identical to s 351(2) providing as it does that on a review the court may confirm or vary the trust order in such a manner as it thinks fit, or make an order terminating the trust. This also runs counter to Mr Kahukiwa's argument that there are distinct kinds of review in operation under various provisions.

[24] We also note that the High Court and Court of Appeal has considered and rejected a number of the arguments advanced by Mr Kahukiwa concerning the legislative scheme and the relationship between a review pursuant to s 351 and a review pursuant to s 231 of the Act.

[25] In the *Proprietors of Mangakino Township* the Court of Appeal upheld a High Court decision to decline relief in a judicial review application concerning the outcome of a section 351 review.[8] Both Courts considered the scope of the Māori Land Court's jurisdiction on such a review.

[26] The Court of Appeal rejected arguments made on behalf of the Incorporation that it was for trustees on a s 351 review to set the scope of the review. The Incorporation had argued that a "review of the trust" meant a review of the trust order and that the Court had no power under s 351 to review the trustees as well as reviewing the trust.[9]

[27] The Court of Appeal rejected this argument saying:[10]

> What the Māori Land Court is required to do under s 231 or s 351 is to conduct "a review of the trust", not merely of the trust order. When the draftsperson wanted to refer in the Section to the trust order, doing so several times, that was spelled out. In contrast, when the reference was to the trust, instead of to the constituting document, that was also done. The distinction could hardly have been more clearly made. If it had been intended that there be a review confined to trust order the section would have called for "a review of the trust order."

[28] The Court of Appeal went on to find: [11]

> What parliament has called for in Sections ss 231 and 351 is a general review of the trust's governance and management of its assets on behalf of the beneficial

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8 *Proprietors of Managkino Township v The Māori Land Court* CA65/99, 16 June 1999 and *The Proprietors of Managkino Township v The Māori Land Court* CP252/97, 5 May 1998.
9 At [13].
10 At [18].
11 At [19].

> owners. Are those assets being administered in the best interest of the beneficiaries? Is the trust fulfilling its purpose as an Ahu Whenua (care of the land) trust, as that purpose appears from the statute…

[29] The Court of Appeal also offered the following guidance which has been followed in a number of cases: [12]

> In carrying out a general review of this kind the Court ought to concentrate on the broader picture and not become drawn into matters of detail, but it is in our view impossible to see any bright line between matters of governance and policy, on the one hand, and questions of operational management, on the other. As McGechan J appreciated and as is reflected as well in comments of Judge Savage during one of the hearings, it comes down to a question of common-sense how far into the affairs of a trust the Māori Land Court should burrow. Certainly, its primary focus ought to be on the policies that the trust is pursuing and on how in a general way those policies are being implemented, but in order to see whether a policy is working at ground level in the best interest of the beneficiaries the Court can hardly avoid some consideration of particular operational matters.

[30] The Court of Appeal also observed: [13]

> There is an armoury of powers given to the Court in relation to trusts under Part XII so that it can carry out its guardianship role and there is good reason to read ss 231 and 351, which apply to the particular situation of a general review, in a manner consistent with those powers.

[31] The following analysis of the relationship between ss 231 and 351 from the decision of Justice McGechan in the High Court is also pertinent. Justice McGechan held: [14]

> The most significant point is that s 231, the counterpart of s 351, is complemented in respect of trusts constituted under Part XIII by the express powers in ss 239 and 240. If s 351 confers jurisdiction to do what the Court did in this case, s 231 must be superfluous in respect of Part XII trusts. It is a settled principle statutory interpretation that provisions should be so read that none of them is superfluous, if there is any other interpretation open on the wording which avoids that result…
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> I can accept s 231 and s 351 are to be considered in tandem. The only significant internal difference is that s 231, relevant to the new s 211 trusts created under Part XII, has no preliminary three year review requirement, whereas s 351 dealing with existing s 438 (now ahu whenua) trusts has that required early threshold. There is a comprehensible distinction between the new and the existing in that respect. I can accept also that provision in ss 239 and 240 as to reduction and replacement of trustees exists alongside both s 231 and s 351 trusts. Section 236(1)(b) provides

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12 At [21]. Cited *by Puha v Crawford - Mokoia 19A* (2021) 439 Aotea MB 68 (439 AOT 68), *Taueki v Taueki - Horowhenua No 11B Subdivision No 14 and Other Blocks* (2021) 437 Aotea MB 134 (437 AOT 134), *Deputy Registrar v Moeahu Lot 1 DP 17494 Part Section 2345 New Plymouth (Old Railway Station)* (2021) 437 Aotea MB 3 (437 AOT 3) and *Corrigan – Ngatihine H2B* (2014) 71 Taitokerau MB 72 (71 TTK 72).

13 At [24].

14 At [23]-[24].

> accordingly. However, I do not accept interpretation of s 351 and s 231 in a way which includes reference to management and performance renders either- particularly s 231, superfluous. Sections 351 and 231 are not solely directed at reduction or removal of trustees. They are review provisions, looking ultimately to whether terms of Trust Orders (or existence of a trust itself) remain appropriate. That requires consideration of management and performance, but for that different purpose. There is no superfluity of one or the other.

[32] In our view, the approach taken by Judge Wara was entirely consistent with these authorities. We see no error in her conclusion that s 351 ought to be read consistently with s 231, and that a review is simply a review, irrespective of which section it was ordered under.

Remaining Appeal Issues

[33] Further issues were raised in the notice of appeal. They include a complaint of jurisdictional error and procedural unfairness on the basis that if the Court lacked jurisdiction to undertake a review then it also lacked jurisdiction to consider the merits, something which the Court below nonetheless went on to do. It is also alleged that Judge Wara misapplied, or failed to apply, the principles arising from the Māori Appellate Court decision in *Pukeroa Oruawhata v Mitchell.*[15] In her decision, Judge Wara had framed the issues for decision as follows:

[a] Does the Court have jurisdiction to review the terms or operation of the Trust pursuant to s 231 of the Act?

[b] Have the trustees, in the exercise of their discretionary powers, acted in breach of trust or requirements under the Trusts Act 2019?

[c] Should the Court enforce the obligations of trust and direct the trustees to convene an SGM?[16]

[34] We can see no error in the way Judge Wara framed the issues. The Court's power pursuant to s 238 of the Act to enforce obligation of trust is one that may be exercised "at any time". This is a broad power, but it can only be used when there is a matter before the

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15 *Pukeroa Oruawhata v Mitchell – Pukeroa Oruawhata Trust* (2006) 11 Waiariki Appeal MB 66 (11 AP 66).

16 267 WAR 184-196 at [19].

Court. The applications before Her Honour Judge Wara were for a review of trust and enforcement of obligations of trust, there was no jurisdictional or procedural error in the way she dealt with the applications before her.

[35] As to the merits, we see no error either in the statement of relevant legal principles or in their application to the evidence before the Court. The inferences Judge Wara drew as to the approach of the trustees to the question of rotation since 2008 were reasonably open to her on the evidence. Similarly, we see no error in Judge Wara's decision in relation to Beryl's more recent dealings with trustees, including issues raised concerning failure to convene a special general meeting.

[36] Importantly, Her Honour went on to find:[17]

> Ultimately, I consider that the applicant's concern is misguided. There is ample evidence that the Trust is actively addressing the issue of trustee rotation. This evidence includes the draft minutes from the 2021 AGM; the PowerPoint presentation that was presented at the 2021 AGM for a governance review that was then circulated to the beneficial owners following the AGM; and correspondence to the beneficial owners providing a timeframe for the review, and an information booklet. I find that the process for review is reasonable and robust, particularly given the Trust's commercial portfolio and the need for advice and information to be collated so that the beneficial owners can make an informed decision.

[37] While there has been some delay caused by Covid restrictions, there is clearly a process underway which will see the question of amendments to the trust order to allow for a rotation of trustees to be considered by beneficiaries at the next AGM. We questioned Mr Kahukiwa about this at the hearing as it appeared, at face value, that if his client was successful on appeal there may considerable delay to the process underway which would see the trustees address a rotation policy with beneficiaries. In response, Mr Kahukiwa said that what his client essentially sought was that this particular issue be given priority and prominence, separate from other possible amendments to the trust order that were also to be considered by beneficiaries at the forthcoming AGM. In oral submissions, he modified

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[17] 267 WAR 184-196 at [194]-[195].

his position with respect to relief and asked that this Court issue orders requiring the Trust to expedite consideration of a rotation policy, ahead of any other proposed amendments.

[38] We see no error in the approach taken by Judge Wara which would warrant intervention of this kind. In fact, we consider that it is in the interest of the beneficiaries that the current process be allowed to continue unhindered so that beneficiaries have the opportunity to consider this important question at the earliest opportunity.

[39] We see some parallels in this case with the way in which the question of rotation of trustees emerged as an issue with respect to the Pukeroa Oruawhata Trust. In a 2006 decision, the Māori Appellate Court said this in response to a review of the arguments for and against the introduction of a rotation policy:[18]

> [33] All of these arguments raise issues of substance and must be respected in considering this appeal. It is true that only a minority of shares and shareholders supported the variation. It is true also that there is a risk in introducing an element of democracy into trustees' accountability - it might indeed prove something of a distraction to trustees who must be focused on protecting the trust asset come what may. There is also a risk that unfit trustees will be elected. This may indeed introduce instability to the trust and reduce the overall credibility of the organisation as a large player in the Rotorua retail property market. And we agree that there is an element of unfairness in introducing the ballot box to trustees who have worked solidly for 25 years to bring the trust to the success story that it so clearly is today - particularly given that for most of those years, the work was done for no or mere token remuneration.
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> [34] But there is a principle which must in the end transcend these concerns. The Ngati Whakaue people who are beneficiaries of this trust, are the substantive owners of this land. In our view, we are well past the time when the role of Maori landowners is merely to receive dividends and be occasionally consulted by otherwise unaccountable trustees. Owners must now be seen as having a right to participate directly and regularly in the choice of their representatives at trustee level, and by that means, to contribute to the strategic direction of the business. Far from militating

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[18] *Pukeroa Oruawhata v Mitchell – Pukeroa Oruawhata Trust* (2006) 11 Waiariki Appeal MB 66 (11 AP 66) at [33] and [34].

> against direct involvement by beneficial owners, the size and substance of the Pukeroa Oruawhata Trust makes the necessity for elections even greater in our view.

[40] We endorse this statement of principle. Mr Kahukiwa had argued that Judge Wara had misapplied or failed to apply this authority. We do not agree. Judge Wara found:[19]

> There is no authority requiring a trustee to consider the implementation of a rotation process, nor is there authority that the failure to consider a rotation process constitutes a breach of trust. However, there is authority for the implementation of a rotation process where this is supported by a sufficient number of beneficial owners.

[41] We can see no error in the way Judge Wara characterised and applied this authority.

[42] That said, we note the acknowledgment by Mr Mahuika that it is "no longer the practice for trustees and trusts of this nature to be appointed for indefinite terms and that the trustees are alive to that issue."[20] Further that "this is a matter that does need to be thought about and it would be for the reason that Mr Kahukiwa has given but also in my submission just because it is good practice."[21] We consider that providing beneficiaries with the ability to vote on the appointment of trustees recognises the ability of the beneficiaries to exercise their rangatiratanga. To make opportunity for that to occur in the Trust Deed either by way of rotation of trustees or by some other means would be consistent with principles of tikanga under which custodians of hapū assets are accountable to the people.

[43] There is another aspect of the case that requires some comment. When the Trust applied in February 2020 for a periodic review under s 351, it instructed its counsel to apply for the review to be dealt with in chambers. For reasons that are not apparent on the documents before us, that application was granted, and the review took place in chambers. It is not clear to us why the trustees felt it was necessary to apply to have the review carried out in chambers and nor is it clear to us why the judge agreed to deal with it in this manner. There is nothing on the face of the application nor on the record that suggests chambers was either necessary or appropriate. The application was for periodic review and to replace

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19 267 WAR 184-196 at [31].
20 2022 Maori Appellate Court MB 255-300 (2022 APPEAL 255-300) at 290.
21 2022 APPEAL 255-300 at 290.

a trustee who had died. The minute concluding the review is perfunctory and discloses no reasoning or consideration of the operations of the Trust, presumably because on a chambers review of the papers the Judge concluded all was in order.[22] The fact that the Tuaropaki Trust administers substantial assets and conducts substantial business operations is not of itself a reason to conduct a review in chambers. To the contrary, such factors suggest that it is all the more important that a review is independent, transparent, and is seen to be so. The exercise of the Court's extensive supervisory jurisdiction over trusts should take place in open court on notice to beneficiaries and interested parties in all but the most exceptional cases where significant countervailing factors are present.

Whakataunga
Decision

[44] For the reasons outlined above, the appeal is dismissed pursuant to s 51(1)(g) of the Act.

[45] We note that the appellant has received special aid, while the respondent has not. The respondent is, on ordinary principles, entitled to costs. While we are not encouraging an application, if the respondent wishes to make application they should do so by way of memorandum to be filed within 14 days of the date of this decision. The appellant will then have a further 10 working days to file any submissions in reply.

I whakapuaki i te 2:30pm i Te Whanganui-a-Tara, i te rā tekau mā waru o Hiringa-ā-nuku i te tau 2022.

C L Fox (Presiding)	M J Doogan	Te K Te A R Williams
DEPUTY CHIEF JUDGE	**JUDGE**	**JUDGE**

[22] 230 Waiariki MB 208-210 at [208]-[210].