IN THE MAORI LAND COURT
OF NEW ZEALAND
AOTEA DISTRICT

A20070001902

UNDER	Section 269(6), Te Ture Whenua Maori Act 1993
	HOANI HIPANGO Applicant
AND	
	WHATARANGI MURPHY PEEHI, ABE HEPI, DANA BLACKBURN, DON ROBINSON, MANSON BELL, ROBERT GREY, TONI WAHO Respondents

Hearings:	185 Aotea MB 195, 17 April 2007 194 Aotea MB 233, 16 October 2007 197 Aotea MB 1, 21 November 2007 199 Aotea MB 110, 30 January 2008
	(Heard at Whanganui)
Appearances:	Ms C Batt, for the applicant Mr J Unsworth, for the respondents
Judgment:	30 December 2008

RESERVED JUDGMENT OF JUDGE L R HARVEY

Solicitors: Tripe Matthews Feist for the Applicant

Horsley Christie for the Respondents

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Introduction

[1] Hoani Hipango seeks an investigation into the election of two members to the committee of management of Atihau-Whanganui Incorporation held on 2 December 2006. He claims that the result is suspect on two principal grounds. Firstly, it is alleged that various invitation only pre-election meetings organised by the committee with incorporation resources were nothing more than an effort to present shareholders with a fait accompli concerning a proposed restructuring and to procure proxies for use at the incorporation's annual general meeting to support that change. This he argues was both unfair to all candidates and an improper use of incorporation funds.

[2] Second, Mr Hipango says that serious procedural irregularities, including a failure to date and witness proxies accurately and a lack of adherence to the constitution when replacing proxy forms, must cast doubt over the election sufficient to warrant either an investigation or a declaration of invalidity.

[3] Mr Hipango claims that the background to these events was a plan by the committee to make changes to the incorporation's structure including the appointment of a full time chief executive. He further says that since opponents of the chief executive proposal were not invited to the shareholder meetings, - despite their best efforts to obtain details of such hui – no alternative perspective was put to the meetings. More importantly, Mr Hipango alleges that if the two unsuccessful candidates not supported by the committee had been elected, then there was a real probability that the chief executive proposal would have failed. He seeks an order that the Court hold an investigation into the 2006 election.

[4] The committee of management denies the applicant's claims. They say that while there were minor problems with aspects of the election, those procedural deficiencies did not affect the ultimate outcome. They contend that the election result was correct and should not be displaced. They also reject the allegation that improper use was made of incorporation funds to support any candidates and contend that the pre-election meetings were ad hoc and informal with the purpose of providing information to shareholders, nothing more. The committee denies the claim that they have acted improperly, that they took advantage of the meetings to gather proxies and that they have used incorporation funds inappropriately.

[5] The principal issue for determination is whether or not the election has been rendered unsafe by the claimed procedural irregularities, which are sufficiently serious to justify an order for an investigation into the election. A further matter for consideration is

whether the committee acted improperly in arranging meetings and using incorporation resources for those shareholder hui during October and November 2006, prior to the annual general meeting of that year.

Background

[6] Atihau Whanganui Incorporation is the owner of 41,41.018 hectares of Māori freehold land, in accordance with the title order issued on 11 November 1969, 134 Whanganui MB 93. There are currently 8,032 shareholders holding 1,256,529 shares. Of that number 277 shareholders or 3.85% of the total hold almost 50% of the shares. The principal business activity of the incorporation is farming. According to the 2008 annual report, the incorporation received gross income in excess of $9 million but made a loss of some $2 million. It has net assets of approximately $111 million.

[7] The current members of the committee of management are Dana Blackburn, who is the chairperson, Abraham Hepi, Don Robinson, Whatarangi Murphy-Peehi, Mavis Mullens and Che Wilson. Mr Wilson was elected at the 2008 annual general meeting. The chief executive officer is Chris Scanlon.

Procedural history

[8] The original application was filed on 31 January 2007, per section 269(6) of Te Ture Whenua Māori Act 1993 and a copy was provided to the incorporation's solicitors on 7 February 2007. Following that the solicitors filed a notice of intention to appear on the application on 17 February 2007. By that notice the incorporation contended that there was insufficient evidence to justify an order for investigation into the election and upon further grounds yet to be submitted.

[9] On 28 February 2007 Ms Batt contacted the case manager and advised that she was acting for the applicant and sought assistance for his legal costs from the Special Aid Fund. Then on 7 March 2007 an application for discovery of documents was filed on behalf of the applicant. A proposed judicial conference set down for 15 March 2007 was rescheduled to 17 April 2007, 185 Aotea MB 195. After that conference orders were made granting assistance for legal costs to the applicant. On that same day the respondents filed an application for security for costs.

[10] A further judicial conference was then held on 13 June 2007, 188 Aotea MB 229. At the conference Ms Batt confirmed that progress had been made and that an amended application was likely following the administering of interrogatories, which occurred on 26 June 2007. Prior to that an application to amend the Special Aid estimate was received to enable Brian Herlihy, a former deputy registrar, to be engaged for the purpose of reviewing the proxy forms used at the 2006 annual general meeting. The respondents filed a statement in answer to interrogatories on 24 July 2007.

[11] The application was subsequently amended on 5 September 2007 and set out five principal complaints:

(a) five of the seven members of the committee voted themselves onto a subcommittee and improperly spent incorporation funds to inappropriately hold meetings around New Zealand that were used to seek proxy votes for selected committee of management candidates;

(b) the availability and use of proxy forms in different formats, some of which were pre-printed ,was the source of actual or likely confusion in respect of the conduct of the election;

(c) the replacement of proxy forms without compliance with the constitution was the source of actual or likely confusion in respect of he conduct of the election; and

(d) Turoa Ranginui and Tui Teka witnessed 56 proxies over two days and the circumstances in which those forms were witnessed requires investigation.

[12] A further statement of answer to interrogatories was filed on 9 October 2007. Then on 10 October 2007 the respondents' solicitors asked the Court to direct that the applicant file evidence in support of his application within 14 days. In the absence of such evidence it was submitted the Court might consider dismissing the application.

[13] A judicial conference was held on 16 October 2007, 194 Aotea MB 233 where the applicant's counsel expressed concerns over the use of proxies and their validity at the 2006 AGM. After hearing from the respondents' counsel I directed that the application be set down for hearing on 20 November 2007, with a day and a half set aside for that purpose. The applicant was given until the end of the first week of November to file and serve any

further evidence in support and the respondents had until 16 November to file any evidence in response. Another statement of answer to interrogatories was filed on 16 November 2007.

[14] Two substantive hearings were held on 21 November 2007 and 30 January 2008 which were both well attended by the parties and their respective supporters from amongst the incorporation shareholders and their whānau. Hoani Hipango, Hari Benevides, Anne Waitai, Hone Tamehana and Robert Gray filed evidence in support of the application. In reply for the respondents Whatarangi Murphy-Peehi, Dennis Brown, Charles Moodie, Don Robinson, Abe Hepi, Dana Blackburn, Frances Te Porana, Keri Browning, Turoa Ranginui and Toni Waho gave evidence. Mr Pat Brown was also called as an expert witness.

The Chief Executive Officer proposal

[15] In August 2006, after considering the idea in June 2005, the committee of management decided to terminate the services of its then part-time secretary Harvey Bell, and instead resolved to pursue the appointment of a chief executive officer. In his chairman's review set out in the incorporation's 2006 annual report Mr Murphy-Peehi emphasises the need for a chief executive given the unprecedented growth in the size of the incorporation's business to the point where it was now necessary to employee a full time professional, at page 20:

> *"...The increase in scale and size has occurred in relatively recent years. In the year ended June 2000 the total income before expenses was $3.8 million. In the year ended June 2006 the total income before expenses was $9.2 million. In the year ended June 2000 the current value of assets was approximately $40 million. In the year ended June 2006 the current calculation of assets was approximately $143 million...*
>
> *The incorporation runs a **big** business. The Committee of Management's review of the Strategic Plan discussed at the mid year hui considered the need for the appointment of a Chief Executive to efficiently manage this large business, and the time for that appointment is now...*
>
> *...The appointment of a Chief Executive Officer will mean that we will have a highly skilled professional business manager in charge, ensuring that what the Committee of Management determines through policy and strategic planning is converted into action. This will give the Committee greater confidence to govern, without interfering in the daily running of the organisation. The Committee's role in strategic direction and policy setting will be paramount, with the CEO running the business on a daily basis, and reporting on those activities to the Committee. This is standard business practice."*

[16] Mr Waho provides the most comprehensive background to the idea of employing a chief executive to take over the management functions of the incorporation at paragraphs 10-45 of his brief of evidence. He sets out in detail how the committee had previously worked

closely with a related incorporation, Morikaunui, in 2003-2004 over a plan to amalgamate the two incorporations given their common shareholding and how he and the applicant were part of a group opposed to that proposal. Mr Waho then relates how the close working relationship between the two incorporations began to become unravelled with changes in both committees of management, accountants and secretaries following the 2004 election. These changes he says would have an impact on how each incorporation managed its own affairs since there was considerable overlap between the two in terms of personnel at both governance and management levels.

[17] Despite this he says, relations between himself, the applicant and Ms Benevides amongst others, remained positive until 2005 when Mr Waho was nominated to the committee of management for Atihau Whanganui Incorporation, at paragraph 28:

> *"In the lead up to the 2005 election I was acutely aware that the politics within the Incorporation were notoriously fraught with backbiting, gossip and rumour. Knowing that the applicant had opposed my appointment by proffering alternative candidates I decided it was impossible to fully trust the network of once "anti-amalgamation" friends. That network included the applicant, Waitai, Benevides, H Bell and M* [Manson] *Bell. I decided to stand as an independent candidate and visited key players within the incorporation to explain my position. From then on I extracted myself from the old network."*

[18] Once elected Mr Waho says he became concerned with the lack of systems, policies and more importantly, the absence of any overall strategic direction. To remedy this he says various planning meetings were held to discuss strategy in June 2005, where he first formally raised the suggestion of appointing a chief executive, a suggestion unsupported by the committee. They were used to a more interventionist style of committee where members involved themselves in the day to day operations of the incorporation, a practice he believed was inappropriate.

[19] In addition, Mr Waho states that as an interim measure a part time secretary had been engaged at a cost of $75,000. This was then followed by the creation of an executive or "E-Team" comprising the secretary, accountant and newly established farm operations manager to deal with day to day management in the absence of a chief executive. Mr Waho then says that at his suggestion a number of subcommittees of the committee of management were created to formulate policy for implementation by the E-Team including farm operations and administration and policy subcommittees. Despite this he goes on to say that it soon became apparent to him that the lack of delineation between roles made the structure increasingly unworkable, at paragraph 34:

"The subcommittees began to take on their roles however the tensions within the Farm Operations Subcommittee never really dissipated. One of the problems I observed was that it never met. There were phone calls and emails and a confusion of roles between the authority of the sub-committee and the Chairman in relation to the FOM grew. The Chairman was the daily boss of the FOM. Sub-committee members often wanted to interfere with the FOM's activities."

[20] Then he says there were increasingly obvious problems emerging over the conflict between divisions of committee members and shareholders as to the fundamental issue of how the incorporation was to function as a business in terms of governance and management. According to Mr Waho this tension manifested itself at the 2006 mid-year meeting which he describes as "*unpleasant*". Following that he says at the August 2006 meeting of the committee the decision was finally taken to terminate the secretary's contract. At paragraph 46 he says:

"After the decision was made to terminate the secretary's contract I moved that we adopt a CEO-Board of Governors structure. I reminded the COM that they had rejected the idea at the June strategic planning meetings. The committee debated the issue and decided that it had been on the cards in the previous strategic plan. The COM agreed that we could either bring on a new secretary to work in the existing E Team environment that would over time change to adopt a CEO-Board structure or we could accelerate the development of the structure and adopt the CEO early. I argued strongly in favour of the CEO position being created because I believed it would remove a lot of the confusion of roles and responsibilities that pervaded the way the COM and management functioned."

[21] From that point forward he says, tensions between the five members of the committee who supported the chief executive proposal, and the two who did not became palpable. Mr Waho then states how it was only after this key decision had been made that the idea of holding hui around the country to better inform shareholders of the proposal occurred to him. He was concerned he says at the possible suggestion that the committee were presenting the shareholders with a fait accompli, at paragraphs 50-51:

"During the amalgamation debate I had thought the COMs would have done a better job if they had travelled the country to explain what it was they were trying to achieve. This idea came back to me in relation to the CEO for AWHI because I believed shareholders should hear first hand about a major change in the organisations way of working.

I was worried that shareholders would first learn about the CEO structure through the mail-out. My experience with Māori is we prefer consultation in person with face to face contact in Māori ways. We do not like presentation of a fait-a-complit [sic] *as if it was consultation, especially not through documents. I discussed this with those of the COM who supported the CEO concept and we planned how we could engage with shareholders effectively to show that our intentions to inform were genuine. They were supportive. Most of the planning took place prior to the October meeting where the idea was adopted. In October I moved that a CEO subcommittee be formed to establish the position and hold pre-AGM consultation meetings that in my mind would run as hui. They were intended to be for information dissemination and the promotion of the CEO concept, not the gathering of proxies as the applicant alleges."*

Shareholder meetings prior to the 2006 AGM

[22] A subcommittee comprising five of the committee of management was then created to co-ordinate the process for appointing a chief executive officer. That sub committee then decided to hold a series of shareholder meetings at various locations throughout the North Island along with Christchurch. A decision was made to spend up to $5,000 on the costs of these hui. According to the respondents the purpose of the meetings was to inform shareholders of the chief executive proposal. Mr Murphy Peehi stressed that the rationale for these meetings was to "*...bring shareholders up to date with the new corporate structure with a CEO in place, and any other questions the shareholders wanted to ask*". The committee he said went to the shareholders "*...because a major change was underway with the CEO proposal. If the CEO proposal wasn't going to be adopted that would be a backward step for the future of the incorporation.*" Meetings were arranged at the following venues and dates:

LOCATION	VENUE	DATE	ATTENDEES
Christchurch	Commodore Hotel	24 October 2006	15
Ratana	Ratana Pa	31 October 2006	30
Hamilton	Private residence	9 November 2006	10
Auckland	Sky City Hotel	11 November 2006	30-35
Wellington	Quest Hotel	14 November 2006	20-25
Palmerston North	Mana Tamariki School	25 November 2006	12
Whanganui	Te Puni Kokiri	25 November 2006	30
TOTAL ATTENDEES			147-157

[23] In their answers to interrogatories dated 16 November 2007 the respondents through Mr Murphy-Peehi confirmed that the costs for these meetings amounted to $4,478.50, subject to adjustment for costs that were not in fact claimed by Messrs Blackburn and Robinson, at paragraph 5 of the Answer to Interrogatories. The respondents claim that this

series of information hui were necessary to give shareholders some insight into the chief executive proposal prior to the 2006 AGM.

Election result 2006

[24] Using the table provided by the applicant's counsel at paragraph 44 of closing submissions as a basis, the four highest polling candidates from the election for the two committee of management positions were:

VOTES	ROBINSON	HEPI	WAITAI	BENEVIDES
Votes from AGM	130,323.11	129,821.11	144,498.83	134,787.99
"Undated" proxies	74, 936.66	77,702.76	3,225.14	5,645.37
M Gray proxies	13,279.29	13,297.29		
Teka/Ranginui proxies	36,475.62	33,207.51		
30 November votes	3,822.66	3,822.66	23.03	511.64
Secretary	1,790.88	1,790.88		
TOTAL	**260,537**	**245,728**	**147,747**	**140,945**

Independent audit of proxies

[25] Following the first hearing, on 30 November 2007 for the sake of clarity I directed that an independent expert be engaged to audit the proxy forms and identify those which may have been questionable or that did not comply with proper process, 195 Aotea MB 187. Mr Pat Brown of Strettons, accountants of Taupō, an experienced professional well known for his work with Māori land trusts and incorporations, was then engaged by the registrar per section 40 of Te Ture Whenua Māori Act 1993 to undertake a review of the proxies.

[26] In that same direction I also noted that:

(a) there were aspects of Mrs Tui Teka's evidence that gave rise to concerns over what appeared to be inappropriate or naïve behaviour regarding the collection and witnessing of proxy forms;

(b) proxy forms apparently stamped received by the incorporation secretaries on 29 November but dated 30 November by the shareholder seemed an unorthodox and even unusual practice;

(c) given the relatively small shares exercised by the secretary did the claim that he acted inappropriately by failing to abstain or vote in support of the status quo warrant any further consideration;

(d) if the proxy forms called into question had no real impact on the election outcome, apart from effecting remedial corrective action for future meetings, was there any further reason for the proceedings to continue; and

(e) the issue of whether a proxy form needed to be dated by the shareholder for validity required further submissions from counsel.

[27] On 30 January 2008, Mr Pat Brown provided his report to the Court and made himself available to answer questions from counsel at the hearing held that same day. He stated that his review involved an assessment of the 2006 proxy forms held by the registrar and consideration of the systems and procedures for the distribution, collection and recording of proxies. In summary, he found no evidence of inappropriate practice in the use of proxies at the 2006 annual general meeting. His principal findings were:

(a) the incorporation's process for distribution, receipt, review and recording of proxies was sound and proxy voting had been correctly recorded;

(b) of the 370 proxies recorded as valid, 3 were identified as invalid, involving 1,665 shares;

(c) 367 proxies were thus valid. Two were not correctly signed and were disallowed. These involved 1,527.87 shares. Another proxy was invalid because the widow of a deceased shareholder had signed the form without any authority to do so and this affected a further 137.55 shares; and

(d) of the 367 valid proxies, 27 had a date recorded by the shareholder of 30 November when the incorporation recorded its receipt on 29 November 2006 and these proxies related to less than 20,000 shares. While they may be questionable there was no basis to doubt the incorporation's date stamp of 29 November.

[28] Mr Pat Brown also recorded that he found no reason to question the integrity of the incorporation secretary or registration officers in the context of proxy recording. He did note that on the issue of recording the proxies of shareholders in attendance at the meeting, "*enhancements*" could be made. Mr Brown then observed that while a number of proxy forms were not dated by the shareholder "*this exclusion does not invalidate the appointment*" since "*the intent is clear and definitive date is the date received at the Incorporations office*". In any event he noted that the Court was considering the issue of dating by shareholders.

Applicant's submissions

[29] Counsel for the applicant submitted that there were four principal issues for consideration. First, the extent of disclosure provided by the Incorporation. Second, the legality of the meetings funded by the committee with shareholders around the country. Third, whether the proxies that were counted toward the election should have been allowed and whether there were any proxies that were disallowed that should have been allowed. Fourth, the impact of any of the meetings and proxy votes on the result of the 2006 election result. Ms Batt further submitted:

(a) disclosure had been sought prior to 22 May 2007 where the applicant requested copies of the spreadsheet analysis undertaken of the proxies and voting verified by the secretary, chairman and scrutiniser along with copies of:

  (i) minutes relating to the associated documentation and the conduct of the election;

  (ii) any advice given by the incorporation secretary to the committee concerning the election; and

  (iii) email exchanges between the committee and the secretary concerning the election.

(b) in response, counsel for the respondents said that the votes were recorded electronically on a spreadsheet and all voting forms and the spreadsheet would be lodged with the Court and made available if an investigation was ordered. The voting forms were not available for public scrutiny without the authority of the

Court as voting is by secret ballot. Finally, there were no minutes, advice or email exchanges referred to previously;

(c) further interrogatories were administered to obtain information concerning votes from the floor of the election and the answer to the interrogatories dated 16 November 2007 from the respondents was that an analysis had not been undertaken;

(d) despite the denial from counsel for the respondents, the existence of certain classes of information could not now be denied. For example, email communications relating to the conduct of the election were annexed to the brief of Denis Brown, the incorporation secretary. Then there was an email from one of the committee members Mr Toni Waho dated 1 November 2006 but only produced when annexed to the evidence of Mr Gray;

(e) counsel for the respondents reply at the 30 January 2008 hearing is less than satisfactory. In response to the application for discovery the respondents deny the existence of information. When it became clear that there was information in the categories sought counsel for the respondents said that he was not aware of Mr Gray's brief and didn't know what he was going to produce and further that the incorporation was not deliberating holding back information but was merely responding to allegations;

(f) these are inadequate responses to the application for discovery this lack of transparency with disclosure is of concern and invites investigation;

(g) five of seven committee members voted themselves onto a subcommittee authorising expenditure to hold meetings around New Zealand used to promote the view point of the majority of the committee in respect of an issue that was pivotal to the upcoming election;

(h) the applicant believes that the meetings were for the purpose of electioneering and this was an improper use of incorporation funds and were an inappropriate activity for the subcommittee to be conducting in any event;

(i) two committee members, Colin Manson Bell and Robert Gray, who opposed the funding of the meetings and the appointment of a CEO, were not told of the times or venues for the meetings. Two of the election candidates were also not informed

about these meetings. The family and friends of the candidates described by the secretary as a "dissident shareholder group" were not invited to any of the meetings. When these shareholders asked for details of the meetings it was not provided although it was in fact available;

(j) Ms Benevides sought a schedule of meetings from Mr Brown on 6 November 2006 and was advised that there was no schedule since what was intended was the arranging of informal meetings with various shareholders around the country. Mr Brown confirmed he had no details of those meetings;

(k) planning for the meetings was well underway by 6 November 2006 and this is confirmed by the email from Mr Waho dated 1 November 2006 where he said that plans for meetings throughout the rest of the motu were going well. A schedule of meeting dates dated 5 November 2006 was produced by Mr Gray from notes of a meeting held at Dana Blackburn's home;

(l) the request from Ms Benevides for information about the meetings was copied to the chairman of the incorporation, Mr Murphy-Peehi who was involved in the subcommittee arranging the meetings. But he did not respond during cross-examination. Mr Waho said that the request for a schedule was not relayed to him although he could reasonably have been expected to have access to that information. Mr Bell says he received no response from Mr Brown for a copy of the schedule that he sent by email on 9 November 2006;

(m) the arrival of "dissident shareholders" unexpectedly at the Ratana Pa meeting provoked comment that they were "gatecrashers." Mr Waho's evidence that this term related to behaviour rather than attendance is unsustainable when taken in context with the whole email and particularly the statement that "we must be vigilant and act with the utmost diligence in preparation for the AGM;"

(n) the failure to provide information to the "dissident" shareholders that did attend the meeting at Ratana Pa is consistent with the applicant's theory that these were secret meetings and that a decision had been taken to exclude people who were likely to express a contrary review. There was no advertising of the meetings, or minutes kept, no attendance lists and no list of invitees, all confirming the applicant's suspicion that these were secret meetings;

(o) the major purpose of the meetings was to advance the CEO appointment proposal and this was a significant election issue. This makes it unlikely that the meetings were conducted prior to the annual general meeting for any other purpose other than to influence the election result;

(p) had Ms Benevides and Ms Ann Waitai been elected, because of the balance in the committee of management, there would likely have been a change in approach to the CEO appointment;

(q) the impact of the meetings should not be assessed purely in terms of proxies gathered although Mr Murphy Peehi in his supplementary brief has detailed a small amount of proxy gathering that occurred during those meetings. Mr Waho said at paragraph 59 of his evidence that the participation level in the 2006 election in person and by proxy was the largest ever. He goes on to say that in his view this shows that the committee had ignited the interest of the shareholders who decided to express their views and further, that the candidates who supported the CEO won the election. The method by which the committee ignited that interest was by the meetings which contributed significantly to the fact that there were over 117,000 more shares voted in the 2006 election than in the previous year;

(r) several problems exist with the proxy forms that may have distorted the election result:

(i) proxy forms were replaced without cancellation in writing. Mr Brown confirmed that he treated a later dated form as being a cancellation in writing but this practice does not comply with the constitution;

(ii) Tui Teka witnessed at least 63 proxies over two days. It is unlikely that the signatories were present when all those forms were witnessed;

(iii) 140 forms are undated, leading to actual or possible confusion as to the circumstances in which they were witnessed; and

(iv) 34 forms were dated 30 November 2006. The cut off time for filing was 10am on that date it is unlikely that those forms were correctly witnessed.

(s) a further concern is the method adopted by Mr Brown for voting proxies. The form says in relation to the appointment of the secretary as proxy you should instruct the secretary to vote for or against. In the case of eight shareholders who appointed the secretary as proxy it gave no directions as to the manner in which the votes should be cast, and so 1,790.88 votes were allocated as determined by the secretary. It is improper for the secretary to vote unless he is directed by the shareholder. With an issue of this nature he should be neutral. As an employee of the committee of management exercising judgment on this issue he is making a decision that affects himself personally. While the votes were small they do make a difference in the analysis. This is an aspect of the conduct of the election that can and should be considered in the context of deciding whether to order an investigation;

(t) there was no mechanism to ensure that proxies that had been received in the office were not subsequently removed. The applicant was told by Mr Murphy-Peehi that the latter had been through the proxy forms raising suspicion that shareholders had been targeted to change their proxies but leaving no evidence that this had been done;

(u) the impact of the meetings cannot be determined with any precision. It has been calculated that there were over 117,328 more shares voted in 2006 than in the previous year. The bulk of those shares were voted in favour of the two successful candidates. One possible assessment is that the pre-election meetings generated the extra votes. If those extra votes are deducted from the declared result, Ms Waitai would have had the most votes and Ms Benevides would have been only 2,263 votes behind the second place getter, Don Robinson;

(v) of 369 proxies, 140 were undated representing 98,463 votes. These undated proxies should not have been allowed since the absence of a date has prevented any meaningful analysis about the possible impact of the meetings on participation in the election by way of proxies;

(w) if the 30 November 2006 proxies are eliminated because it is likely they were not signed on that date as well as those dated 29 November witnessed by Mrs Teka, this contributes to the result being reversed in favour of Ms Waitai and Ms Benevides;

(x) 13,297 shares were disallowed for the original proxy holder Mark Gray originally cast in favour of Ms Benevides and Ms Waitai. These were subsequently replaced

by proxies in favour of the two successful candidates, Mr Robinson and Mr Hepi. These proxies should not have been disallowed because the replacement of a proxy by a later dated proxy does not comply with the constitution;

(y) an obvious check of the validity of the election result would be to compare the floor votes with the final outcome. At the AGM all candidates had an opportunity to speak and present their views. Ms Benevides confirmed that she was satisfied that she had adequate opportunity to get her message across to the assembled shareholders. Mr Murphy-Peehi said that the meeting was supportive of the majority position and that he received a standing ovation after delivery of his report to the shareholders. The AGM was the only time in the campaign that there was a level playing field between the candidates. On the basis of the estimated figures Ms Waitai and Ms Benevides would have won the election. This hypothesis has been interpolated from available information but cannot be checked because a breakdown of votes from the floor has not been supplied;

(z) if the proxy votes were excluded from the final result it is estimated that the result of the AGM would be Ms Waitai would end up with 91,857.39 votes, Ms Benevides with 81,453.24 votes, Mr Robinson with 70,105.92 votes and Mr Hepi with 54,156.58 votes;

[30] In conclusion, counsel submitted that the incorporation is a significant business with a large land holding and over 8,000 shareholders. It must be managed in strict compliance with Te Ture Whenua Māori Act 1993 and the constitution of the incorporation. Appropriate governance standards are required of the committee to ensure that the interests of the shareholders are adequately protected. The applicant as a concerned shareholder was motivated to file his application because of his concerns that the election results in 2006 were unsafe for the reasons set out. Despite the fact that Mr Hipango has had to face the might of the incorporation and all its resources, and given the lack of adequate disclosure by the committee, the Court must be satisfied that there are now sufficient grounds to order an investigation into the election.

Respondents' submissions

[31] Mr Unsworth submitted:

(a) the allegation that the pre-AGM shareholder meetings were a ruse to gather proxies for committee members Don Robinson and Abraham Hepi is denied. There is no evidence to support the allegation and while the applicant is entitled to his own opinion as to the purpose behind these meetings, there is nothing before the Court to substantiate this allegation;

(b) the subcommittee created by the committee of management had as its principal focus the progression of the Chief Executive officer proposal. The idea of holding meetings to better inform shareholders regarding this proposal came later. In either case the committee were acting within their mandate. The subcommittee did not seek to exclude anyone. The two committee members who were not elected to the subcommittee stood aside from the process as they did not support the idea of creating a chief executive position;

(c) there is no evidence of any deliberate attempt by members of the subcommittee to exclude candidates for the upcoming election from attending the meetings. While the arrangements for the meetings were informal and ad hoc to accommodate the travel schedules and other business of committee members, there is no evidence of exclusion;

(d) there is no evidence from the various shareholder meetings held before the 2006 AGM to support the allegations made by the applicant, beyond his own evidence and that of those supporting his position;

(e) the evidence of Hari Benevides, Anne Waitai and Robert Gray reflects their own opinions on these events. This does not however amount to evidence of sufficient credibility to confirm that the allegations have been made out. All three individuals have previously expressed their opposition to the chief executive proposal. It must also be borne in mind that these three witnesses have been unsuccessful candidates for election to the committee;

(f) there is no evidence to support the allegation that there was a concerted campaign of electioneering and proxy gathering at the various shareholder meetings held prior to the 2006 annual general meeting. Mr Murphy-Peehi's evidence is that, apart from a handful of individuals, he was not provided with proxies for a significant number of shareholders as has been suggested;

(g) there is no way of knowing what effect if any the pre-election meetings had on shareholder voting and turn out for the 2006 annual general meeting. Any attempt to assess the effect and impact of those meetings would be speculation;

(h) it is not unlawful for any person to ask a shareholder to change their minds and cast a new proxy. From the evidence of Dennis Brown, of the eleven proxies superseded by a later proxy, six were in favour of Mark Gray who was canvassing for Ms Benevides or Ms Waitai and five had instructions to vote for Robinson, Hepi or Peke-Taiaroa;

(i) the chairman has an obligation to examine the proxies to confirm their compliance with the regulations and the constitution. That is uncontroversial and is one of his duties;

(j) the claim that the process of allowing a later proxy to cancel an earlier one does not comply with the constitution is rejected. To be valid a subsequent proxy must be in writing, signed by the shareholder and lodged in the office of the incorporation in the appropriate time. In this context it is important to consider the evidence of Mr Pat Brown who confirmed that overall the process for obtaining and using proxies was legitimate;

(k) there is no evidence from any of the proxy givers to support the applicant's allegations that proxies were somehow signed and witnessed incorrectly, on conflicting days or not in the presence of a witness. The applicant had ample opportunity to present such witnesses but failed to do so;

(l) counsel for the applicant is asking the Court to reject all of the proxies collected by Mrs Teka on 29 and 30 November 2006 without evidence to support their invalidity;

(m) on the issue of the dating of proxies, the Court has previously held that there is no law requiring that the completion of a proxy requires dating to avoid invalidity: in *re The Proprietors of Tahora 2C1 section 3 Incorporation* (1962) 66 Wairoa MB 83. The more important point is that the proxies signed by the shareholder and witnessed were date stamped by the incorporation within the relevant timeframe. The Court must therefore find that these proxies are valid;

(n) the submissions regarding the exercise of proxies by the secretary are irrelevant and rejected;

(o) the various formulae on how the election result might have changed that the applicant's counsel propounds are irrelevant. They are supposition based on a lack of evidence, involve speculation and are nonsensical;

(p) the claims of counsel regarding discovery are rejected. If the applicant had any legitimate basis for his application then it should have been made with a proper evidential foundation. The efforts by counsel to shore up the applicant's "fragile case" with complaints of non-disclosure are too late. The applicant should have assembled the evidence, asked the appropriate questions and when if not satisfied sought advice as to whether an application to the Court was warranted; and

(q) there is ample evidence before the Court to cast real doubt over the merits and motivations of the present application. The applicant's attitude as an aggressive opponent of the committee is manifested by the nature of the special resolutions he was proposing for the AGM and by the content of his email sent by Hari Benevides dated 30 November 2006.

[32] In summary, Mr Unsworth implored the Court to dismiss the application and to award costs against the applicant. His clients considered that the application was without merit, lacked a proper evidential foundation and was motivated by matters known only to the applicant and his supporters. The processes employed by the incorporation were robust and appropriate in all the circumstances. There was no evidence of wrong doing on the part of any of the committee, their employees or agents. Indeed, the professionals employed by the incorporation at all times demonstrated a high degree of integrity and the Court's independent expert, Mr Pat Brown, confirmed this.

[33] Mr Unsworth argued that this entire episode has distracted the committee and the shareholders from their real priorities and was a proceeding without foundation from the outset. Counsel contended that the Court has a discretion on whether or not to order an investigation. On the balance of probabilities, counsel submitted that there was simply no basis for the Court to exercise its discretion in favour of the applicant, given the paucity of evidence supporting his claims. Accordingly, counsel submitted that the application should be dismissed.

The Law

[34] Section 269(6) of the Act states:

> *"(6) The Court may, on the application of any shareholder or officer of the incorporation, investigate the conduct of any election of a member or members to the committee of management, and may either—*
>
> *(a) Confirm the appointment of the person or persons elected; or*
>
> *(b) Declare the election invalid and order a new election to be held."...*

[35] This issue is considered by His Honour Judge G D Carter in the decision *Rickard v Tukiri, Te Kopua 2B3 block Incorporated* (2000) 92 Waikato MB 157. In that judgment, at page 161, the learned judge emphasised the discretionary nature of the jurisdiction:

> *"In many cases where there is legislation allowing for elections to be challenged strict time limits are prescribed within which an application must be filed. Te Ture Whenua Māori Act 1993 contains no such time limits. Section 269(6) does provide that the Court may investigate the conduct of an election and may come to a determination. This allows the Court's own discretion in coming to a decision. In some cases the breaches complained of maybe merely technical and have no bearing on the result of an election. In such cases the Court could use its discretion not to interfere. However, where the breach is fundamental the Court would have no alternative but to act."*

[36] In that case His Honour found that there had been a breach of basic procedure in that the respondent had been allowed to stand and had been elected to the committee of management contrary to the incorporation's constitution. The judge went on to declare that the election of the respondent was invalid by virtue of breach of the provisions of the constitution of that incorporation. The Court removed the respondent and this caused a casual vacancy.

[37] On the issue of the dating of proxies, the only significant authority that has emerged is *Kapene & Ors v Baker & Anor – Tahora 2C1 section 3* – (1962) 66 Wairoa MB 83. Reference has also been made to the judgment of His Honour Judge N F Smith in *Tibble v Sadlier, Pakihikura A1* (1961) 129 Waiapu MB 243. I note that Judges Smith and Sheehan express contrasting views as to the effect of dating on the validity of a proxy. It should be underscored however that Judge Smith in *Tibble* was dealing with a case of alienation by lease and so he stresses the necessity of documents being appropriately dated to avoid any potential for fraud or other improper purpose. In the *Tahora* decision Judge Sheehan was dealing, like the instant case, with a situation of election of members to a committee of management of a Māori incorporation.

Discussion

[38] It is an understatement that Atihau-Whanganui Incorporation is a substantial business. It requires both competent governors dealing with policy matters and professional management from experienced executives. Anything less would not be in the interests of the underlying owners of the land and assets of the incorporation- the shareholders. The sheer scale of the incorporation's activities as a farming and business venture must put it within the top 5 or 10 % of Māori land organisations, comparable with Parininihi ki Waitotara, Wakatu and Mangatu incorporations and the Lake Taupō Forest, Lake Rotoaira, Pukeroa Oruawhata and Tuaropaki trusts. The incorporation's recent settlement of outstanding Treaty of Waitangi claims against the Crown has added a further and significant layer of resources to the committee's existing responsibilities.

[39] As a general observation, it is evident that the incorporation has been undergoing some change in the manner in which it both governs itself and conducts its business. It has been, one might suggest, a fundamental change in both philosophy and approach. Evidence was given by Mr Waho as to the way in which past committees have, in his view, concerned themselves with management and governance rather than maintaining an appropriate separation, for example at 197 Aotea MB 66. Mr Waho referred to the past practices of the committees from the 1970s up until 2004 suggesting that a more "professional" approach was necessary in the twenty first century, one that involved implementing a policy of clear delineation between governance and management. A cornerstone of that policy was the appointment of a chief executive to manage the affairs of the incorporation. Previously, according to the evidence, the "E-Team" dealt with what were effectively the management aspects of the incorporation's activities on an interim basis. The chief executive position would doubtless subsume those responsibilities into the one position.

[40] There can be little doubt that any change, particularly one of such moment in the history of the incorporation, is bound to excite shareholder responses, both for and against the proposal. This is understandable and indeed, unsurprising. That the change has created some tension and even hostility between committee members, shareholders and their supporters was equally predictable. Shareholders who have been used to participating directly in the running of the incorporation's business through election to the committee and then dealing directly with staff, budgets and balance sheets on a regular basis might find the delegation of those roles to one individual surprising, even startling. They might also find the transition process uncomfortable.

[41] The issue certainly caused disagreement within the committee itself. Arguably the best evidence on the process and the underlying background came from Toni Waho and Manson Bell, the latter of whom relayed how he was opposed to the chief executive position as a concept primarily because of a lack of detail about the role, 197 Aotea MB 21. While he was careful not to say that he agreed with what had happened, he did nonetheless express support for the chief executive today, despite misgivings over long-term sustainability. Of course Mr Bell like Mr Gray had been appointed a "daily supervisor" on an interim basis according to Mr Waho and they also opposed the appointment of a farm operations manager. So it is at least arguable that there has been some blurring in their roles as governors and employees that may have affected, to a degree, their views on the restructuring proposals.

[42] In a telling comment Mr Bell noted how his opposition to the chief executive issue had become personalised and how the committee itself had become unnecessarily divided into what others on the committee called opposing "camps", 197 Aotea MB 21, 24. So this background to the application provides some context for the present proceedings where a change in governance in management has provoked a wide range of responses it would seem from the shareholder community, including members of the committee, past and present.

[43] What is beyond doubt however is the fact that the allegations made by the applicant are serious. In essence, he claims that the committee has used the incorporation's resources to unfairly conduct secret meetings in bad faith to promote the chief executive concept and to gather proxies to use at the AGM. That concept was uppermost in the minds of the committee and indeed was one of the principal decisions for the hui in the context of the elections. Mr Hipango also claims that the committee deliberately withheld details of the "secret" meetings to ensure a contrary view was not put and to shut out the candidates standing for election who opposed the chief executive concept from attending. This he says has unfairly affected the election outcome.

[44] He alleges further that committee members have abused their positions by accessing proxies, identifying opponents then lobbying those shareholders to change their votes to support the committee's stance. Even more serious, Mr Hipango goes on to allege that proxies were obtained and used improperly, despite obvious defects on their face leading to invalidity, and contrary to the incorporation's constitution, to procure an election result that supported the committee's preferred candidates. Unsurprisingly, as I have noted previously, the committee completely refutes all the allegations without exception.

[45] I have treated the present proceedings as an inquiry into whether an investigation per section 269(6) was justified, as discussed with counsel at the November 2007 hearing, 197 Aotea MB 3-6. Given the extensive evidence and submissions of the parties, I am satisfied that the key issues have been thoroughly canvassed, sufficient for me to determine whether an investigation is warranted. By way of observation, it is arguable that to a considerable extent, the detailed and comprehensive extent of the parties' respective cases could be treated as an investigation as if an order had in fact been granted per section 269(6) of the Act.

Shareholder meetings held prior to the 2006 AGM

> "...*As far as I'm concerned if the meetings were available for everybody to go to and to make everybody aware of the new direction, fine, but I don't think enough people actually went, I don't know who went to the meetings, but I know that I've relations in Wellington and he was never invited and he's quite into the Atihau, so the mistake that's been made I think is the fact that the meetings weren't open enough and far and wide.*"
>
> Manson Bell, 197 Aotea MB 22

[46] It is within the power of the committee to call shareholder meetings for legitimate purposes and to use incorporation resources for such hui. Indeed, given the nation-wide spread of ownership beyond tribal boundaries it is eminently desirable that committees of management and trustees alike do all they can, within reason, to keep their owners informed of the business of the incorporation or trust. The deleterious and continuing effects of individualisation and fragmentation are compounded further by the impact of urbanisation and disconnection from iwi heartlands with the result that often Māori land managers do no have addresses for large numbers of their owners. The transitional lifestyles and employment opportunities of many within the shareholder community often exacerbates this problem to the point where many Māori have become absentee landowners oblivious to the fate and destiny of their ancestral lands – lands over which they are the custodians for their lifetimes.

[47] Accordingly, in this twenty first-century global village, communication via all forms of available media and through the use of regular hui both at the hau kainga and in other locations of significant shareholder concentration is to be encouraged. Keeping owners informed and involved in discussions on key issues must remain a priority for Māori land managers where resources support such initiatives. I therefore take no issue with the mandate of the committee to call meetings to keep all shareholders informed of development plans, to obtain feedback on specific proposals and to consider those responses in the

committee's decision making processes so that consultation with shareholders remains meaningful. It must be stressed that all shareholders are entitled to notice of such hui, regardless of whether or not their circumstances permit their attendance.

[48] Similarly I find nothing untoward in the process for creating the sub-committee, its membership and its allocation of the modest sum of $5,000 for the purpose of such hui. Indeed, the committee members who were not part of the subcommittee remained outside of that group by choice, not because of any deliberate attempt at exclusion, as relayed by Manson Bell: 197 Aotea MB 24-25. His evidence was that he did not wish to be part of committee promoting an idea that he did not support. He also confirmed when questioned by me that by the time of the hearing at least he had no issues with how the process unfolded, apart from a lack of notice to potential attendees, 197 Aotea MB 24:

> *"**Court:** So do you have concerns as to how these meetings had been conducted?*
>
> ***Mr Bell:** Not really, the board majority decided they were going to have the meetings and they took place and that was the way it is, like I said before, the only thing is, just from hearing what's been said today is that the meetings, there should have been more people that should been able to go, it should have been advertised that we're having meetings in your area or whatever, no I didn't make a song and dance about it . They went around and did it.*
>
> ***Court:** Let's just say you were prepared to accept the majority decision to conduct the meetings, to form the subcommittee and to vote the funds for the purpose.*
>
> ***Mr Bell:** Yep.*
>
> ***Court:** And your only criticism, if you could label it that, is it would have been preferable that the meetings were properly advertised two a wider shareholder community.*
>
> ***Mr Bell:** Definitely, given that it's such a big thing for Atihau to appoint a CEO and this openness, it's what I believe in, everybody should have a chance to listen and make their own minds up and not be influenced by."*

[49] Compare this however with his email to Mr Brown dated 9 November 2006 and included with the evidence of Robert Gray where in rather forceful terms Mr Bell makes his displeasure at having to ask for the meeting details quite plain. He also says that the meetings should be for all shareholders located in the relevant district where the meetings were held that nor just for " *...a segregated few. It's a set up!*" So at one point both Mr Bell and Mr Gray did seek details of the meetings and their evidence is that it was not provided. That omission seems surprising. It must also be remembered that by 5 November 2006 details of the meetings were at least prepared in draft for the hui to be held at Mr Dana Blackburn's home, which is considered later in this judgment.

Organisational failures with shareholder meetings

[50] Turning then to the meetings my overall assessment of the pre-AGM hui process is negative. In short, the meetings were poorly organised and less than I would expect of the incorporation. It is conceded that there was no advertising, no record of invitees or attendees and no record kept of what was presented and discussed. In my experience of shareholder meetings, informal or otherwise, this seems inexplicable. When using incorporation resources in this manner it is the duty of the committee to ensure proper records are kept. Otherwise, allegations over improper use of incorporation funds can be given life by the absence of minutes, schedules, invitee lists and related documentation. In the business world it would be surprising, I suggest, for an organisation of comparable size to conduct important meetings of its shareholders in such a fashion. To an extent, taking into account the background and history to the 2006 AGM, and considering the evidence of how the meetings were arranged and conducted, it is perhaps unsurprising that the applicant has levelled his existing allegations at the committee.

[51] It should be noted however that Mr Waho stresses the view that the meetings were arranged according to various travel and business schedules of himself and other committee members and so these arrangements involved a degree of flexibility and change depending on circumstances. Mr Waho also underscored the fact that the subcommittee had allocated only $5,000 for the hui and so advertising costs would exceed that mandate. This was possible he says when the extensive advertising costs relating to the various special resolutions that had been requested by the applicant are considered.

[52] Even so, while in the circumstances a degree of informality is understandable, and the meetings had to fit in with other imperatives, the irony is that the committee were promoting - via the chief executive concept - a more professional approach to how the incorporation conducts its business. The "organising" behind these hui fell short of "professional". Even Mr Waho accepted, in effect, that while funds were limited, if the meetings were to have any reach into the shareholder community, advertising of the hui should have occurred. The complaints from the applicant and his supporters would have had less weight if, as Mr Bell suggested, more people had been advised of and invited to the meetings. I see nothing unreasonable in that suggestion.

[53] With the benefit of hindsight it is obvious that it would have been preferable that the shareholder meetings complained of were properly advertised, publicly or at least to the shareholder community, as far as this was possible in the time available. Mr Waho agreed

that this would have been preferable, 199 Aotea MB 123, as did Mr Murphy-Peehi, 197 Aotea MB 65, while noting that the timeframe was tight. Mr Bell also agreed that more effort should have been made to advertise the meetings more widely, as did other witnesses. The evidence of Mr Waho and Mr Gray confirms that shareholders meetings were organised around the time of Ms Benevides request for information on the dates and venues. I also accept Mr Brown's evidence that he was not aware of these arrangements when he replied to Ms Benevides request on 6 November 2006.

[54] My conclusion is that the committee failed to arrange these important meetings to a reasonable standard of professionalism by advertising, by keeping lists of invitees and attendees and by keeping minutes or at least a record of what had been discussed. In the circumstances, taking into account the significance of the chief executive proposal and the importance of this issue for the up coming annual general meeting, these hui should have been advertised. While poor organisation of such hui is not unlawful or a breach of the incorporation constitution, the committee must accept the criticism that they should have done more to better organise these meetings, and keep proper records as to what occurred. Compounding these organisational failures was the "decision", inadvertent or otherwise, not to provide details of the meetings to Ms Benevides and the applicant when they specifically requested that information.

Failure to invite shareholders to the meetings

[55] Mr Waho's email of 1 November 2006 refers to "surprise visitors" at the Ratana hui and how they had "caused disruption". He also refers to "plans for meetings throughout the rest of the motu going well" and how all co-ordinators are "nearly in place" while travel arrangements and venues were "looking good". Then there are the notes of the meeting held at Dana Blackburn's home 4 days later on 5 November 2006, which included a schedule of the proposed meetings. So it seems clear enough that by this date the details of hui, even if only tentatively made, were available from Messrs Waho, Murphy-Peehi, Robinson and Blackburn by 5 November 2006. Ms Benevides request to Mr Brown was made the next day. Mr Brown replied that he had no details of any meetings. I have already accepted his evidence on this point.

[56] The real cause of this communication confusion lay, it would appear, with the committee members, Waho, Blackburn, Robinson and Murphy-Peehi in not passing this information on to Mr Brown, the secretary. Mr Murphy-Peehi was part of the presentation team and so it is obvious that he would have known about the proposed meetings schedule.

Ms Benevides says she included Mr Murphy-Peehi in her email communication with Mr Brown but received no reply from Mr Murphy-Peehi. If Mr Brown did not know then presumably he might have directed Ms Benevides for details to Mr Murphy-Peehi and the other subcommittee members in the first instance or he might have asked Mr Murphy-Peehi directly.

[57] Mr Unsworth submits that the applicant, Ms Benevides and Ms Waitai all attended the Ratana Pa meeting, which had been arranged by Sorya Peke-Taiaroa, according to Mr Waho's evidence, 199 Aotea MB 118. Yet they say they were not invited or notified and found out about the meeting by chance, 197 Aotea MB 17-18. I acknowledge the claim that the meetings were not a "meet the candidates" event, apart from perhaps the Ratana meeting. Even so, I find it difficult to accept the suggestion that there was no information on the proposed meeting dates that could not have been given to those owners seeking such details.

[58] There is no evidence of a general and public invitation to shareholders in general, let alone the applicant and his supporters in particular, despite their requests for that information. There was no advertising, no mail out to shareholders (apart from possibly for the Ratana hui by one of the candidates and the Whanganui hui), no postings of a notice on the incorporation website or related organisations' notice boards, 197 Aotea MB 58. Certain shareholders were telephoned or advised by word of mouth. It seems inexplicable that information about the shareholder meetings was not provided to those shareholders that had made a specific request. The fact that Ms Benevides was to be a candidate in the upcoming election is irrelevant. She is a shareholder entitled like any other to attend shareholders' meetings.

[59] With respect I struggle to understand why she and other interested shareholders were not advised of the meetings when by the time of the hui at Mr Blackburn's home on 5 November 2006, which was to have been attended by most of the committee, a draft schedule had been prepared. It would certainly have been inappropriate if the details of the meeting schedules were deliberately withheld from Ms Benevides and the applicant. Shareholders are entitled to information on where and when shareholder meetings have been arranged. It is the duty of the committee of management to provide that information when it is requested and if they do not know then they should find out. After all, it is their responsibility to know such details, given the circumstances.

[60] In addition, whether or not the applicant and his supporters from amongst the shareholders were to receive a repeat performance of an earlier presentation on the chief

executive proposal at subsequent meetings as counsel contends is, with respect, irrelevant. I stress again, it is elementary that shareholders of Māori incorporations are entitled to attend any meeting of shareholders arranged by their committee to discuss whatever subjects are on the agenda for the meeting and any other matters properly raised and considered appropriate by the chairperson of the hui. Shareholders are entitled to attend, to ask questions, to challenge the proposals and express their concerns and reservations. What they cannot do is give false, incorrect or misleading information to the meetings or behave inappropriately by disrupting a meeting to the point where chaos ensues and the hui must be abandoned.

[61] The proper place for debating policy issues and any other matter relevant to the incorporation's shareholders is at a properly convened shareholder meeting. There can be nothing controversial about that and committees of management should do all they can within reason to ensure the shareholders are invited to such meetings and that there is informed and robust debate about issues of importance. Indeed, that is what I understood Mr Murphy-Peehi to say at paragraph 4 (e) of his original brief of evidence where he notes "...[e]*veryone was welcome at every meeting we had.*" Which can be contrasted with Mr Waho's reference to "*surprise visitors*", notwithstanding his subsequent explanation, 199 Aotea MB 126, and Mr Murphy-Peehi's apparent failure to respond to Ms Benevides email request for details of the hui.

[62] Ultimately, if the chief executive concept was sound, presumably the shareholders would support the proposal once they had the relevant facts, the pros and cons before them. Whatever the eventual outcome it was not unreasonable to expect a contrary view to be put to the meetings by the applicant, the candidates or even Messrs Gray and Bell. If they were not invited to the meetings or did not receive details when they requested that information then no such view could be put. For the committee's processes to be transparent in accordance with best practice, then some improvement on organising such shareholder meetings in the future will be necessary. What should also be borne in mind by the shareholders is that, while I agree with the applicant's criticisms over how the meetings were arranged, the final decision on the chief executive proposal lay with the committee, not the annual general meeting.

[63] My conclusions are that the applicant and his supporters were not told of the meeting arrangements even when they had specifically asked. It would not be unreasonable to infer from the evidence that they were not welcome at the hui despite what Mr Murphy-Peehi says. Certain members of the committee, for whatever reasons, saw the applicant and his group as troublesome, negative and a distraction for the shareholder meetings. That is

clear from the evidence. What is equally clear, as I have stressed *ad nauseum*, is that the applicant, like any shareholder, was entitled to notice of the meetings and entitled to attend. The fact that requests for meeting details were not met does not reflect well on the subcommittee.

[64] I therefore do not accept the suggestion by Mr Waho set out in paragraph 8 of his brief that the committee is entitled to meet with select groups of shareholders without notice to all other shareholders when the claimed purpose is to engage with shareholders over the chief executive proposal. The distinction between general meetings, to which all shareholders are entitled, he seems to further suggest, and "other" meetings is, with respect, artificial and somewhat disingenuous. As a general principle, either a committee calls a meeting of *all* shareholders publicly notified for a legitimate reason or it calls a meeting of select shareholders for some other purpose. I cannot see how it would be appropriate for the latter to occur with incorporation resources and be organised by the committee. Such a process would be irredeemably tarnished by the taint of impropriety. I do not suggest that the committee's reasons for calling the meetings were anything other than for genuine discussion of the chief executive proposal, but the argument that it is entitled to call groups of shareholders together without any obligation to notify all shareholders is untenable.

[65] Finally on this issue I observe that it would have been politic and sensible from a tactical perspective in terms of an overall strategy for the sub-committee to ensure those opposed to the concept who were in fact standing for election were personally invited to the meetings. Then some genuine debate over the concept could have occurred which would have informed the shareholders as to the issues they needed to consider for the upcoming AGM. After all, I am told that this was the purpose behind the meetings: to inform shareholders of the chief executive concept. That would then have eliminated a substantial part of the present application.

[66] Put another way, if as has been acknowledged, the meetings were properly notified to the shareholder community, then Mr Hipango's allegation of secret meetings held in bad faith could never be sustained. I fail to discern any legitimate reason for the decisions of certain committee members to apparently withhold such inconsequential information from shareholders if the purpose of the meetings was to inform and enlighten, as claimed. The applicant's criticisms about a lack of disclosure of the hui arrangements despite specific requests for those details are therefore justified.

Proxies

[67] The applicant has raised concerns that the use of proxies has improperly affected the outcome of the election. It is noted that counsel also argued that the combined use of proxies and the impact of the pre-election meetings distorted the election result with the effect that the wrong candidates were successful. From counsel's submissions, five essentially procedural issues concerning proxies can be distilled:

(a) whether the proxies witnessed by Tui Teka are valid;

(b) whether the "undated" proxies are valid;

(c) whether the proxies dated 29 November by the incorporation and then 30 November by the shareholder are valid;

(d) whether replacing a first proxy form with a subsequent form amounts to a "cancellation" in writing as required by regulation 18 of the Māori Incorporations Constitution Regulations 1994 and clause 18 of the incorporation constitution, and if not, whether the second or both forms are invalid;

(e) whether proxy forms exercised by Mark Gray were incorrectly deemed invalid; and

(f) whether it was lawful and appropriate for the secretary to exercise proxies where the shareholder had not expressed a view.

[68] Then there is the allegation concerning whether the chairperson had unfair access to proxies and used his position to firstly, identify and secondly, to then lobby certain shareholders opposed to the chief executive position to change their minds. Similarly, there is the claim that there was no effective mechanism for recording proxies once received by the office so that if they were subsequently removed and replaced, some record would exist to confirm that that had occurred.

[69] As a general principle, there must be clear evidence that on balance renders all 370 proxies voted in the 2006 election invalid – surely a serious step in any circumstances and a high threshold to reach – before exclusion is tenable. To excise these votes *in toto* from the election process, in the absence of conclusive evidence of error with the necessary consequence of invalidity would disenfranchise a sizeable section of the shareholder

community on what may be a tenuous basis. That said, I acknowledge there are categories of proxies within the overall election process that do require careful assessment as to their validity.

Proxies witnessed by Tui Teka

[70] I consider that the process for the procuring and use of proxies was problematic, at least in part, and particularly where Mrs Tui Teka had some involvement. Her evidence was at times confused bordering on implausible. While I accept that she believed that she had acted appropriately, I found some of her answers during questioning slightly naïve and on occasion, somewhat wanting in credibility. For example, the gathering of such numbers of proxies in the time available and at geographically challenging locations seems a Herculean effort, but clearly not an impossible one if this evidence is to be believed. The presence of corroborating testimony from those who gave proxies or who accompanied her during her "campaigning" might have cured this uncertainty.

[71] Even so, there was no evidence that Mrs Teka had not witnessed shareholder signatures in front of the individual concerned merely an allegation that she had not. When I put it to her that counsel for the applicant was really suggesting that Mrs Teka's claim to travelling considerable distances in 48 hours to obtain proxies and to then lodge them before 10am on 30 November 2006 was simply a story she had made up, Mrs Teka did not appear fazed by this suggestion. Neither did she appear outraged or even indignant at the allegation, which in crude terms was that she was not being truthful. That of course spoke volumes in the context of her overall reliability as a witness. But the short point is that, while I found parts of her evidence confused and even less than credible, the applicant did not produce any witnesses to confirm that they had *not* signed their proxy form in front of Mrs Teka.

[72] Based on the evidence presently before the Court, despite my reservations as to credibility and weight, in the absence of compelling alternative evidence, on the balance of probabilities and by a narrow margin, I see no alternative other than to accept as valid the proxies witnessed by Mrs Teka. If the applicant had produced a credible witness to deny Mrs Teka's claims then a different outcome concerning the proxies she collected might have been the result. But all that was available was the evidence of Mr Gray that in his experience over may years of collecting proxies the numbers claimed by Mrs Teka seemed excessive, thus casting of doubt over her reliability. I also note for completeness that even if

I determined that the proxies collected by Mrs Teka were in fact invalid, that finding alone would not alter the election outcome.

Dating of proxy forms

[73] On the issue of whether a lack of dating by a shareholder when signing a proxy renders it invalid, Ms Batt cited the decision of Judge Sheehan *Kapene & Ors v Baker & Anor - Tahora 2C1 Section 3* - (1962) 66 Wairoa MB 83. She quoted the learned judge at page 90 of the decision where he said that he *"...concurred entirely with the desirability of completing the proxy by dating..."* but that he "*...could find no law to support it...*".

[74] Ms Batt further noted that the regulations in force in 1962 mirrored almost exactly the wording of the 1994 regulations, especially the words "*...must be in the form in the first schedule hereto or to the like effect...*". There was however, a subtle difference between the 1955 and 1994 regulations, that being the use of the word "*shall*" in the former and "*must*" in the latter. Ms Batt submitted that the 1994 regulations with the use of "*must*" were more mandatory than the "*shall*" in the 1955 version.

[75] The authors of the *Concise Oxford English Dictionary* (Eleventh edition 2006) Oxford University Press, New York, define "*must*" as "*to be obliged to; should*" and "*expressing insistence*;" whereas "*shall*" is defined as "*expressing the future tense*" or "*expressing a strong assertion or intention*" and "*expressing an instruction or command*". Similarly, Spiller in Butterworths *New Zealand Law Dictionary* (Sixth edition, 2005) LexisNexis Limited defines "*shall*" as "*in statutory interpretation, a terms generally used to imply that a provision is mandatory*". As I indicated during the hearing, considering their plain and ordinary meaning, "*shall*" and "*must*" are synonymous and so, with respect, little turns on this argument.

[76] Counsel then contended that form 1 makes no reference to any of its provisions, including dating, being optional. In other words, form 1 includes a provision for the date and accordingly, counsel argued, if there is no date then the proxy must be invalid. Indeed, I understood her argument was that if any of the information required in form 1 was omitted then the proxy form couldn't be valid. I do not agree. If the words "or to like effect" were not present, then counsel's argument would be more sustainable. This issue was canvassed extensively with both counsel: 199 Aotea MB 134-139. If regulation 17(2) read *"...A proxy must be appointed by notice in writing in form 1 in Schedule 2 to the regulations"* there could be no ambiguity and the incorporation would have to use form 1 exactly. Any

deviation from its requirements would render the proxy invalid. But "to like effect" provides some wriggle room, especially when regulation 17 is considered. It states:

> *"...17 Appointment*
> *(1) A proxy for a shareholder is entitled to attend and be heard at a meeting of shareholders as if the proxy were the shareholder.*
> ***(2) A proxy must be appointed by notice in writing in form 1 in Schedule 2 to the regulations or to the like effect.***
> ***(3) The notice must be signed by the shareholder and witnessed.***
> ***(4) The notice must state the particular meeting for which the proxy is appointed.***
> *(5) Any person of full age and capacity, other than a member of the committee or a person who has consented to be nominated for election as a member of the committee, may be appointed as the proxy of any shareholder or any trustee of any shareholder..."*(Emphasis added)

[77] There are five questions to consider when a proxy is used. Firstly, is the person giving the proxy a shareholder? Second, does the proxy conform with form 1 in schedule 2 to the regulations "or to the like effect"? Third, does the proxy form have the date of the meeting recorded, so as to eliminate any claim that a proxy given in 2005 is being used for a 2006 meeting of shareholders? In other words, can it be discerned on the face of the form as for which specific meeting the shareholder has signed a proxy? Fourth, has the shareholder signed the proxy form and has it been witnessed? Fifth, has the proxy form been received by the incorporation 48 hours prior to the start of the meeting or at such later time as the chairperson of the incorporation may permit?

[78] While I accept that there is a slight tension between regulation 17 and form 1, in that the regulation makes no reference to the date of signing while the form does, the words "to the like effect" are relevant. They make room for the possibility that a proxy form may be more informal and something less than form 1, *provided* the terms of regulation 17 are satisfied. The critical questions set out in the preceding paragraph underscore the central purpose of a proxy: can a committee of management or the Court determine the shareholder's intention from a signed proxy form? Put another way, is it sufficiently clear on the face of the form that the shareholder for the meeting in question has appointed a proxy to vote one way or the other on a resolution?

[79] From the evidence, it appears that the five questions set out in paragraph 77 can be answered in the affirmative when the proxy forms in issue are assessed. The only area of possible uncertainty concerns the second question and the interpretation and application of the words "or to like effect". Having considered counsels' submissions on the point, I cannot agree that a lack of dating by the shareholder is fatal to the validity of the proxy. Indeed, to describe them as "undated" is, with respect, slightly misleading – not dated by the

shareholder but received in time by the incorporation is a more accurate description. I make no suggestion of course that counsel has been at all misleading. It is simply the labelling of these specific forms in a pejorative manner that may cause confusion.

[80] More importantly, the crucial date is when the proxy was *received* by the incorporation. The "undated" proxies were stamped received at the offices of the incorporation prior to the cut off time of 10.00am, being 48 hours prior to the annual general meeting. The incorporation's officers and those staff responsible for the task gave evidence on the process, which was not successfully challenged during cross-examination or cast into doubt by alternative evidence. I therefore endorse the decision of Judge Sheehan, including his careful review of the relevant rules that there is no law requiring the dating of proxy forms by the shareholder. Counsel could not point me to any contrary authority that holds unequivocally that if a proxy form is not dated by the shareholder in the context of regulation 17 then it is invalid.

[81] My conclusion therefore is that the "undated" proxy forms, being those date stamped received by the incorporation yet undated by the shareholder are valid. Given the volumes of shares covered by proxies falling into this category and their crucial place in the counting of votes for the election, the effect of this finding is to confirm as valid the election on 2 December 2006 of Don Robinson and Abe Hepi to the committee.

Proxy forms dated 29 and 30 November 2006

[82] Counsel for the applicant argued that since there was not means of recording the date on which a proxy was dated before it was stamped at the office this would throw into doubt the validity of a proxy where two forms had been submitted. In other words, unless it was clear that one of the forms was received later, how could one be preferred over the other? Mr Brown gave evidence as to the process by which proxies were received, date stamped, reviewed and then confirmed or rejected as to validity, 197 Aotea MB 69. He then gave an assurance that any forms received after 10.00am on 30 November 2006 were not accepted: 197 Aotea MB 71. He also said, in effect, that while he noticed some forms were stamped 29 November by the incorporation and were hand dated 30 November, this was immaterial to the validity of the proxy, 197 Aotea MB 69:

> *"**Mr Brown:** I wasn't concerned about the dates its not a requirement for validity and I noticed that there were one or two or three or four that had a date stamp on them that preceded the date that had been hand written and I just assumed that in some cases people had thought that if it's a later date then that might be a good thing."*

[83] More importantly, he noted that this issue covered only 11 proxies and in any event, from his recollection they were evenly split in terms of support for the two successful candidates and the two runners up. Equally importantly, Mr Brown confirmed that, in any event, the votes of these particular proxies would have had no effect on the ultimate election result: 197 Aotea MB 70. Ms Te Porana and Ms Browning, both employees of the incorporation also gave evidence, inter alia, on this issue: 197 Aotea MB 31-32. Then there is the review of the proxies by Mr Pat Brown. Having reviewed the evidence of the witnesses I am not persuaded that anything of moment turns on the dating issue. In the absence of any evidence to the contrary, I find therefore that the proxies dated by the incorporation 29 November 2006 but with a later date from the shareholder are valid.

Cancellation and replacement of proxies

[84] Regulation 18 states:

> *"...18 Cancellation and lapse of appointment*
> *(1) An appointment as proxy may be cancelled in writing by the shareholder who made the appointment and either lodged at the office of the incorporation before 10 o'clock in the morning of the last working day before the day of the meeting or lodged with the chairperson of the meeting.*
> *(2) An appointment as proxy shall lapse in accordance with the terms of appointment or on the death of the person giving the proxy or on the cancellation of the appointment as provided in subclause 1 of this rule.*
> *(3) If a person who has appointed a proxy attends the meeting personally and notifies the chairperson that he or she is present and the chairperson notifies the meeting accordingly, the proxy shall not vote on behalf of that person after the chairperson's notification; but the validity of voting that has already been completed before that notification to the meeting shall not be affected thereby..."*

[85] Ms Batt argued that any replacement of proxy forms by members of the committee must be invalid since they were effected contrary to the constitution of the incorporation. Clause 18 of the constitution simply repeats regulation 18. Mr Brown's evidence was that if two proxy forms for one shareholder were received he treated the latest as valid and in effect a cancellation in writing of the earlier form, 197 Aotea MB 72:

> *"**Mr Brown:** Well, what I am saying is that there were eleven out of four hundred and something situations where a shareholder signed two proxy forms, just eleven situations and so in dealing with that situation I had a look at both forms and made a judgment based on the information that was there, whether it was date stamped, well, I can't remember, it was on a case by case basis and I recall having no real difficulty in deciding which is which, but it seemed to me inappropriate to deprive a shareholder of the right to be present by proxy and to have his or her vote counted merely because they had changed their mind as to what they wanted to do about it and if it was able to be determined that one form was later than the other, then it seemed to me that that was the appropriate actions* [sic] *taken."*

[86] The issue is simply if a shareholder completes a second proxy form, does this comply with regulation 18 or clause 18 of the constitution as a cancellation in writing lodged the last working day before the meeting or given to the chairperson? Alternatively, does the completion of a second proxy invalidate both forms? Again, the key question is on the face of the documents, would an objective eye be able to quickly discern the shareholder's intention? Part of the background is the fact that Mr Waho sent a letter to certain shareholders urging them to vote for Abe Hepi and Don Robinson at the 2006 AGM. In the letter he states "*...Even though you may have already sent in or given away your proxy, you may send in another one. I urge you to use he proxy form enclosed. The latest date on the proxy form determines which is valid.*" He notes that " *...some of you received a letter from one of our kaumatua warning you that "all is not well at Atihau to the extent that the majority have recently voted to appoint a CEO.*" It should be noted that at paragraph 18 of Mr Brown's brief he makes the point that only two proxy forms as sent out by Mr Waho were accepted as valid and these involved 1,641.35 votes – hardly a determinative parcel of votes.

[87] As a starting point I consider that participation by owners of Māori land and shareholders in Māori incorporations must be encouraged, particularly given the fact that involvement by these groups in the meeting process is often quite low. Consider for example this incorporation. It has over 8,000 shareholders, according to the evidence, and yet less than 400 individuals attend the general meetings in person, or less than 5%. And by all accounts that is a significant turnout in the history of general meetings for this incorporation. This is not an isolated situation either as I am aware of the generally low turn out at general meetings across every Māori Land Court district where the same observation can be made with most Māori land management structures from the largest to the smallest. Ironically, on a proportionate basis, it is often the larger, more successful and resource rich trusts and incorporations who have the smaller turnouts compared to more modest hapū and whānau based entities.

[88] In the absence of any explicit provision in the Act, the regulations or the constitution, I would agree that, if the intention of the shareholder can be discerned on the face of the form, then treating the second proxy form as cancelling the first is not an unreasonable interpretation. A shareholder is entitled to have a change of mind and still have their vote counted at the meeting. By implication if not expressly, the second form, provided it complies in every other respect with the regulations and the constitution, ought to be treated as cancelling the first. If there was any ambiguity as to what the shareholder intended then the result should be the invalidity of both forms. I hold that in the absence of

any contrary authority, the submitting of a second proxy form has the effect of cancelling the first. Consequently, the proxies affected by this procedure are valid.

[89] In the context of remedial action for the future, it may be sensible for the committee and the shareholders to consider carefully how the potential for ambiguity concerning cancellation of proxies can be minimised if not eliminated. The constitution and proxy form could be amended to reflect the practice more explicitly so that there is provision for cancellation by completing a fresh form. Alternatively, the committee and shareholders may prefer a statement on the face of the form that if two proxy forms are provided, in the absence of an explicit cancellation in writing, both forms will be rendered invalid. As a general principle it is always preferable to eliminate the potential for doubt if at all possible.

Proxies of Mark Gray

[90] I understood Ms Batt's argument to be that Mark Gray's proxies amounting to 13,297 shares had originally been cast in favour of Ms Waitai and Ms Benevides and that they were changed by replacement forms in favour of Messrs Robinson and Hepi – para 43 of closing submissions. Mr Gray's evidence seems to suggest that he was surprised more votes were not cast in favour of the two unsuccessful candidates Waitai and Benevides due to anecdotal evidence of shareholders who presumably indicated that they had voted for the candidates Mr Gray supported. He claims that he had gathered proxies representing approximately 120-150,000 votes, a huge number by any standards. Yet he goes on to say that he understood that the final amount allocated to his father was less than 60,000 and that Mr Brown advised him that 12 proxies for his father were disallowed affecting "just under 20,000 shares". Mr Gray says that this figure was also below the number of votes he was confident he had secured.

[91] Counsel did not deal with this matter in any detail in closing submissions, apart from contending that approximately 13,000 shares voted in favour of Messrs Hepi and Robinson should instead be reversed to support Ms Waitai and Ms Benevides. Unless there is evidence that somehow the proxies Mr Gray believes he procured were allocated somewhere else then this argument is untenable. Once again in this context the report of Mr Pat Brown must be considered. More importantly, even if these 13,000 votes were reallocated as Ms Batt argues, this would still not alter the election outcome given my earlier findings on what counsel calls the "undated" proxies.

Proxies exercised by the secretary

[92] While those proxies that were exercised by the secretary have raised comment from the applicant I find nothing exceptional in their use by Mr Brown. Similarly, I find that the suggestion Mr Brown acted out of personal considerations unsupported by the evidence. More importantly, as counsel from the applicant conceded these votes were in any case irrelevant to the election outcome. If on the other hand the proxies held by the secretary were crucial to the success or failure of contentious votes then that would be quite different. In such circumstances there would be a more compelling case to discount those votes. I agree with Ms Batt that in the absence of a clear direction to vote one way or the other the secretary exercising votes by proxy should adopt a neutral stance and either support the status quo or simply abstain.

[93] For the avoidance of doubt it may be sensible to alter the rules of the incorporation to ensure that the forms make it plain that where a shareholder has not expressed a preference then the secretary can support the status quo, abstain or vote as they secretary sees fit. Then the shareholder has a series of options that he or she can turn their minds to when completing a proxy form. Alternatively, it may be simpler to make provision for complete invalidity if no preference is expressed to support or oppose a specific resolution. It seems rather untidy to leave the matter unresolved now that it has been raised during these proceedings. The committee should consider this matter very carefully in the new year and raise it for discussion at the next general meeting of shareholders.

Access to proxies by the chairperson

[94] Mr Murphy-Peehi appeared uncertain as to his access rights to the proxies at the incorporation offices, under what circumstances and whether he himself had actually reviewed proxies other than those he collected. Mr Hipango alleges that Mr Murphy-Peehi told him that he had reviewed the proxy forms for the purpose of identifying shareholders that supported the chief executive appointment process so that Mr Murphy-Peehi might persuade those shareholders to change their minds. Unsurprisingly, Mr Murphy-Peehi refuted this claim. In response to my questions he stated that his review of the proxies was confined to those that had been given to him and that he was simply double-checking that they were correct. When I put it to him that he should have checked them for accuracy the first time he looked at them he again said he was double checking that they were correct, 197 Aotea MB 55-56. More importantly he explained on oath in answer to my question that he

did not review any other forms. While I know that the applicant says Mr Murphy Peehi told him that he had indeed done so, his evidence in open Court was to deny that claim.

[95] The difficulty for the applicant once again is that there is no evidence before me from any shareholder to confirm the allegation is correct. While Mr Gray refers in his brief to an example of shareholders being approached for proxies, that of itself is not unlawful or in breach of the constitution. If the evidence confirmed that members of the committee used their positions to access proxies for the purpose of identifying shareholders with the intention of persuading them to change their vote to support the committee's preferred candidates, that would be unfair and an abuse of that position. In such circumstances I would have no hesitation in ruling any such proxies improperly obtained and therefore invalid. But beyond the applicant's assertion, which is denied by the witness, in the absence of any other evidence to corroborate the claim and lend credence to the applicant's theory of what transpired, I make no finding on what may or may not have been said between these two shareholders. Only they will know for sure and in any case, there is no evidence that significant shareholdings were affected by this claimed procedure to impact definitively on the 2006 election result.

Effect of shareholder meetings on 2006 election outcome

[96] On the available evidence there is simply no objective means of assessing the extent to which the shareholder meetings had an effect on the 2006 election. There is no evidence that the meetings were used to procure significant numbers of proxies that then had a direct influence on the election outcome. While there is evidence that the volume of shares voted and the numbers of individual shareholders who attended the hui were more than in previous years, it remains difficult to conclusively determine to what extent the meetings were influential. To say that they had absolutely no effect is unrealistic. To claim that they directly resulted in the election of the two candidates who were successful is equally untenable. On balance I find that it is not unreasonable to accept that the shareholder meetings must have had some effect on the election result but that it is simply impossible to conclusively determine the extent of that effect.

[97] While counsel for the applicant contends that details of the floor vote at the hui are likely to be more reliable, her submission is also premised on the argument that all the proxies ought to be discounted completely. As I have already held, that submission cannot be sustained because the affected proxies are, in my assessment, valid. To discount and remove them from the equation on the evidence would be inappropriate and consequently,

the election result cannot now be displaced. As a general observation it must be obvious that proxies are an inescapable aspect of voting in Māori incorporations since the Act and the regulations make provision for their use. Shareholders and those seeking their favour will continue to court votes by proxy. The question here is simply how can the existing processes be improved to avoid the confusion that has arisen surrounding the 2006 election? Some suggestions have already been made and it is now up to the committee to consider what its response to these issues will be in due course.

[98] For completeness, I note that while there is nothing unlawful about committee members writing to shareholders and advocating that they vote a particular way, care must be taken to ensure that the risk of a perception of interference or possible undue influence is minimised. I was surprised to see from the evidence that completed voting forms were being circulated to shareholders, some of which may have already cast their votes. That surprise was compounded by Mr Murphy-Peehi's statement at paragraph 4 (f) of his first brief of evidence that during the shareholder meetings "*...it was clearly stated by me that we were not there to collect proxies or to tell people how to vote – that was up to them.*"

[99] If committee members were advocating a particular position, then in exercising their judgment carefully, it ought to have been obvious that in fairness the alternative view and the reasons behind it were also put to the shareholders for consideration. While I acknowledge that those supporting the applicant's concerns had themselves written to shareholders in fairly partisan and unequivocal terms, they are not the committee. It is the committee that has been entrusted with the shareholders' confidence, and where possible in such situations it should demonstrate leadership, whatever the possible original reason or provocation might have been. On this occasion at least, responding in like kind, on reflection, may have been unnecessary.

Disclosure

[100] It is of concern that material emerged during the hearings that ought to have been properly disclosed, including the emails of Mr Waho and Mr Brown. They do confirm that the meetings were to some degree organised and make it clear that a modicum of preparation and planning was evident. I would have expected that any correspondence not covered by privilege that concerned the shareholder meeting arrangements was relevant to the applicant's request for proper discovery. These items should have been disclosed from the outset. They do provide confirmation that details of the some of the meetings were available at the time of Ms Benevides' request. It was just that Mr Waho, Mr Blackburn and others

who knew had not made Mr Brown aware of those arrangements. Mr Waho and Mr Blackburn should have provided those details if they were aware of the request by those shareholders seeking such information. Mr Murphy-Peehi was also copied into Ms Benevides communication but as counsel stated, no response was forthcoming. As I have already noted, there can be no real justification for failing to provide such details to any shareholder. That said, as my ultimate conclusion is that the application cannot succeed because the proxies dated by the incorporation but undated by the shareholder are valid, then little turns on these emails apart from providing a revealing window into the discussions of committee members.

Relationships

[101] I have hesitated long before making any comment on the tone and content of the evidence but on careful reflection consider this observation appropriate. I was surprised by the rancour and hostility displayed as between committee members themselves and between committee members and shareholders – more so when the close whānau links are considered. Aspects of the correspondence were equally disconcerting in its content and tone, which in at least one instance bordered on hysterical – and I do not use that description lightly. That the chief executive idea had engendered such friction within Atihau Whanganui confirms that the implications of the proposed changed must have cut deep into sections of the shareholder community. The past and present overlapping roles carried out by many who gave evidence in this case underscores the close affinity of the shareholders to each other and to the land over many long years of association and involvement. That involvement, generally speaking, ought to be a strength for the incorporation, where this deep well of knowledge and experience should be seen as an asset rather than as a liability.

[102] I do not doubt for a moment that the applicant and the respondents both sincerely believe that they have the interests of the shareholders as a whole at heart and are acting from genuine concerns for the long term future of this cornerstone tribal asset. But given the stakes involved, I would have thought that some minimum levels of professionalism and civility were required in terms of relationships – certainly in formal settings, despite the conflicts and disagreements that seem to be a natural part of collective ownership of resources in any culture. While individuals and their supporters may disagree, and do so in the strongest possible terms, the tone of some of the evidence was both disappointing and inappropriate for those carrying such important responsibilities. I include both committee members, past and present, and shareholders that have participated in the processes before me in this observation. That allegations of threats to personal safety have been made in open

Court must be deeply distressing for the individuals involved and doubtless the shareholders. They have reposed, to a significant degree, their trust and confidence in the committee, who are the custodians of these important cultural and economic assets, to act in a manner congruent with the significance of those responsibilities.

[103] Similarly, those who hold key shareholdings will also maintain this same sense of responsibility, which I have no doubt, they will continue take seriously, as is their right. In this context, criticism of the applicant for bringing these proceedings is not entirely warranted since, as I have found, there were aspects of these events, particularly the shareholder meetings and all the surrounding circumstances, that were wanting. Potential enhancements to the proxy procedures have also been identified and while the applicant has not prevailed on the principal application, the proceedings did provide an opportunity for a review of related aspects of the committees' performance.

[104] When all the events complained of are carefully considered, because of certain errors actual or perceived, communication mishaps, heated exchanges and the resultant animosity that had arisen over the chief executive proposal, it is unsurprising that the original application was filed. Having reviewed all the evidence I can understand why the applicant may have believed that something untoward was brewing, until all of the relevant facts were disclosed through these proceedings, explanations provided and an independent audit of proxies by Mr Pat Brown was completed. Put another way, I acknowledge that the applicant's concerns were genuine, and I accept his evidence that the application was not motivated by malice, even though ultimately, regarding the proxies, his concerns on crucial issues were unfounded.

[105] In conclusion, the 2007 and 2008 annual accounts confirm that Atihau Whanganui still faces many challenges. The degree to which global factors continue to wreak havoc on the local farming environment cannot be underestimated as commentators forecast a deepening recession in 2009. It is obvious therefore that a firm hand is needed at both the governance and management levels of this organisation to ensure the incorporation is well placed to weather the unsettling economic times that lie ahead. To maintain the support of their diverse shareholder base in such challenging times the committee and the chief executive will doubtless ensure that where improvements in shareholder communications can be made and enhancements to feedback opportunities are available they will act appropriately. Once again I encourage this committee, like all other Mäori incorporations, to do all they can, within reason, to engage their shareholders at every available opportunity on important issues to the fullest extent possible.

Decision

[106] I decline to exercise jurisdiction to order an investigation into the 2006 election for two members of the committee of management for Atihau Whanganui Incorporation. Accordingly, the application is dismissed.

[107] The committee are directed to raise the matter of changes to the constitution and proxy form as referred to in paragraphs [89] and [93] of this judgment with the shareholders at their next general meeting and report to the Court on the outcome within 30 days of that hui.

[108] Costs follow the event. However, without having heard from counsel yet, my preliminary view is that costs should lie where they fall. In any event Mr Hipango is in receipt of Special Aid. If the incorporation considers that costs remain a live issue, and believe that an order per section 40(4) of the Legal Services Act 2000 is appropriate, then counsel for the respondents have until 20 January 2009 to file a memorandum.

[109] Counsel for the applicant will then have 14 days to reply before any decision is issued. For an example see *Eriwata & Ors v Eriwata – Waitara SD section 6 & 91 Trust* (2006) 165 Aotea MB 37.

Pronounced in open Court in ROTORUA at 7.45 ~~am~~/pm

on TUESDAY this 30TH day of DECEMBER 2008

L R Harvey
JUDGE