

MĀORI LAND COURT

Place: Hamilton
 Present: WW Isaac, Chief Judge
 C Whitiora, Clerk of the Court
 Date: 17 August 2012

Pānui No: SAug3 Application No: A20100001098

Subject: CJ 2010/01 – Harataunga 2C1 Block – and orders made at 78 Hauraki MB
 4 of 2 July 1962 – application to the Chief Judge

Legislation: Section 45, Te Ture Whenua Māori Act 1993

Present: Mr Aidan Warren and Ms Leone Farquhar, (*Counsel for the applicant*), Mr John Kahukiwa and Ms Alana Thomas, (*Counsel for respondents*), Cam Hunter, Margaret Hunter, John McLeod, Nancy Kemp, Olga Hale, Marie Dobbs, John Rabarts, Kingi Ihaka, Janet Ihaka, Windy Harrison, Elizabeth Ngarimu, Ritihia Katipa, Linley White, William Willis, Dawn White, Nellie Katipa, Heni Morrell, Peggy Harrison, Stephanie Palmer, Hare McIlroy Wawata Hokianga-Rogers, Rawiri Keremeneta, Sam Paora, Sandy Walker, Daniel Mareroa, Edwad McLean, Whetu White, Ricki Apiata, Beau Haereroa, Glenn Tootill, Rachel Hall

Details of the applicant are as follows:

Applicant	Address
Dean Katipa	C/- P O Box 9348, Hamilton

Transcript of Recorded Hearing:

[He karakia timatanga nā Kingi Ihaka]

Court: Tēnā koe. Tēnā koe E Pā. Tēnā koe mō o karakia mō tātou i te wā nei. Nō reira tēnā koe hoki mō tō...tō mihi ki ahau. Nō reira kia koutou katoa kua tae mai nei ki te tautoko tēnei kaupapa whakahirahira kei mua i Te Kooti, ka nui te mihi ki a koutou. Tēnā koutou, tēnā koutou, nau mai haere mai ki Te Kooti Whenua.
[Court Clerk announces application]

Court: Kia ora, thank you. Yes, who is appearing?

Mr Warren: Tēnā koe. Tēnā koe e Pa. Tēnā koe mō o karakia mō tātou i te wā nei. Nō reira tēnā koe hoki mō tō mihi ki ahau. Nō reira, kia koutou katoa kua tae mai nei ki te tautoko tēnei kaupapa whakahirahira kei mua i Te Kooti. Ka nui te mihi ki a koutou. Tēnā koutou, tēnā koutou, nōu mai haere mai ki Te Kooti Whenua.

May it please the Court, counsel's name is Aidan Warren. I appear with Ms Farquhar for the applicant.

Court: Thank you Mr Warren.

Mr Kahukiwa: Tēnā koe...a...Te Aupōuri. Tēnā koutou ngā matā waka katoa. Tēnā tātou Ngāti Porou. Tēnā koe Sir.

Court: Kia ora.

Mr Kahukiwa: Kahukiwa and Ms Thomas for the eight respondent trustees.

Court: Thank you. Yes Mr Warren?

Mr Warren: Sir if I can just deal with some preliminary matters before we open proceedings for the applicant. Just firstly confirming Sir that Dean Katipa, the applicant, is not present today. Instructions are that he's got ill children. He couldn't make his way down from the Coast.

Sir, just to be clear in terms of the material before you, I think everything you've received to date. Sorry about the lateness of some of the documentation but I think we're all under a little bit of pressure in preparation for this one.

Court: Yes.

Mr Warren: You should have Sir, submissions from me, four statements of evidence and bundles of documents that relate to the Court record and a bundle of *[coughing - inaudible words]*.

Court: Yes I do, yes.

Mr Warren: Sir, in terms of the process this morning, I've had a chat to my friend and it was his suggestion, Sir, that Ms Samantha Nepe give evidence in relation to her Registrar's report. My friend, I know he's raised that with her on a couple of occasions. I have no issue with that if you're going to grant leave for that to happen. Once that happens Sir, I propose then just simply to call the applicant's evidence. Most of those statements, Sir, will be taken as read and simply confirmed and they'll be available for cross examination. My friend will then open his case, call his evidence and then we will both make some closing comments Sir, and that will be the end of our proceedings.

Court: Alright, thank you Mr Warren. Just in relation to Ms Nepe's report, what is the basis for wanting to cross examine Ms Nepe in relation to the report, having regard to the fact that it is simply a background to the application? It relates to the documents on the Court record and that document has been sent out to all parties involved, or it should've been certainly to the major parties. Is there any point that you wish to make from examining Ms Nepe? I mean, I'm certainly not opposed to it but I just want to understand why? In the 45's that I've heard, this request has never been made so on what basis is it being made Mr Kahukiwa?

Mr Kahukiwa: With the greatest of respect, Sir, I can answer it by asking another question which is, to what extent would Your Honour seek to refer to rely upon the findings of her report? But if it's not coming into your thinking at all, then we carry on but if you have...

Court: I've read it.

Mr Kahukiwa: You've read it.

Court: So it's in my head.

Mr Kahukiwa: Yes, it's in your head, well there are some matters that, in my submission, would be the subject of examination by me for the purpose of... on the one hand, understanding the extent to which... well the status of this report. My understanding is that this was prepared under the old rule 87, given that the new rules came into force on 1 December last year. That rule, from my recollection, says that the preliminary report is, in first instance, prepared by the Registrar.

Court: Yes.

Mr Kahukiwa: I'm not clear whether Ms Nepe holds that role, first of all, and then if she doesn't, then what becomes of that report. Secondly, my reading of that report is that, as Your Honour has helpfully said, those sorts of reports are based on the record of the Court. There are a couple of instances in that report which, in my submission, appear to go beyond the record and my submission would be that my clients are entitled, if this is going to be used as part of Your Honour's... within Your Honour's decision making, if it's going to be used my clients are entitled to examine those aspects of the report.

Court: Yes I don't doubt that and I have no, as I said, I have no issue with that. In general terms reports, as I said, refer to the record of the Court and attempt to set out, for those interested parties, the background to a particular application, and any relevant minutes or Court record that are relied on by the applicant, but I understand the point that you're wishing to make. In this report, as with others, there is also a recommendation and, if I can ease counsel's mind, the Chief Judge certainly does not use this recommendation all the time to form the basis of a decision. In relation to decisions that are made by the Chief Judge you look at... well as the evidence has shown in the bundle of documents that are being put before the Court, clearly set out that the Chief Judge has a discretion to either accept or not, the evidence and recommendations made by the case manager in this case or, in fact, by counsel.

But if you wish to ask any questions in relation to the recommendation, I'm sure Ms Nepe would be happy to help but if I could, as I say, ease your mind I was trying to think of the percentage of times that a recommendation is followed but certainly not a hundred percent with blind eyes. And often the Chief Judge has had other Judges carry out an enquiry and make a recommendation and, again, those recommendations are not always followed. So this jurisdiction is that of the Chief Judge. It's a unique jurisdiction, as you'll be aware, and it's for the Chief Judge to determine on the evidence, and on the record, what is the true situation in relation to any particular application. But I'm certainly... she's flown up from Wellington to be at your disposal Mr Kahukiwa, so we might as well make use of the tax payers dollar.

[Laughter in the Court]

Mr Kahukiwa: Much obliged Sir.

Court: *[Directed at Court Clerk]* Alright, so can we have Ms Nepe sworn in?
[Court Clerk swears in Ms Samantha Nepe]

Mr Kahukiwa: Sir I'm happy for Ms Nepe's report to be taken as read and just dive straight in.

Court: Alright, that's fine.

Mr Kahukiwa: Tēnā koe Ms Nepe.

Samantha Nepe: Tēnā koe John.

Mr Kahukiwa: So what exactly is your role in the Court?

Samantha Nepe: My role is a case manager in the Court and preparing 45's, appeals, *[inaudible word]* applications and researching it, and bringing together a *[sounds like]* process similar in respect to this one as to the Court record, what lies in the Court record, and doing preliminary report to the Chief Judge.

Mr Kahukiwa: So how long have you been employed by the Court?

Samantha Nepe: 22 years, broken service.

Mr Kahukiwa: Do you hold the role of Registrar or Deputy Registrar?

Samantha Nepe: No, just case manager, but for the Deputy Registrar.

Mr Kahukiwa: Right. Your report was signed by yourself and...

Samantha Nepe: Kura Barrett.

Mr Kahukiwa: Kura, yes.

Samantha Nepe: Yes.

Mr Kahukiwa: Is Kura a Registrar?

Samantha Nepe: No, she is a specialist applications manager. She's my manager.

Mr Kahukiwa: In terms of... so over that 22 years, any idea how many reports you've done?

Samantha Nepe: With special apps, I've only been doing the role three years but, prior to that, it was all Lower Court stuff based in the Māori Land Court in Gisborne and so, for the 45's, it's been basically three years.

Mr Kahukiwa: In your time, your 22 years in the Court, has the... and not particularly... so you've done a few Māori reservations in that time?

Samantha Nepe: Yes.

Mr Kahukiwa: Just in your experience, has the Court ever relied on the evidence of people who are not owners, fronting applications to have lands set aside as a reservation?

Samantha Nepe: I can only take it from the ones in Gisborne. No, usually the ones that actually file their applications, they're either the trustees who had a previous meeting prior to making recommendations to set apart as a Māori reservation and appointing trustees. So, yes, there's always been meetings and minutes taken from those meetings.

Mr Kahukiwa: But it's not unheard of, in your experience, that owners aren't present. The Court can still make decisions on applications can't they?

Samantha Nepe: Yes, at the Court's discretion.

Mr Kahukiwa: In your preparation of these so called preliminary reports, would it be fair to say that in some cases the Māori Land Court record is incomplete?

Samantha Nepe: We can only go by what's before us in the Court record. It's up to people to provide other evidence otherwise, to suggest that there is a change in there. So, yes, we can only go by what's in Court record.

Mr Kahukiwa: So on some occasions then a member of the public could bring something which is not on the Court file and might have been lost or something like that that happens?

Samantha Nepe: Yes, but there's usually somebody in the background that's got a copy of it anyway.

Mr Kahukiwa: So in the background of the Court?

Samantha Nepe: The Court or the parties.

Mr Kahukiwa: Right. So would you accept my general proposition that sometimes the Court record is not as complete as it might be?

Samantha Nepe: Yes.

Mr Kahukiwa: Stuff goes missing in the office?

Samantha Nepe: If there is, if stuff has gone missing that's been before the Court, there's usually a direction anyway, that's sought from case managers, for a desk check in the archival area to see whether we can locate them.

Mr Kahukiwa: Right.

Samantha Nepe: That piece of record or document.

Mr Kahukiwa: So when you get the request to make this kind of preliminary report, do you call up the file from this Court?

Samantha Nepe: Yes.

Mr Kahukiwa: Or do you come here?

Samantha Nepe: No, we ask for the Lower Court record to be sent to Wellington.

Mr Kahukiwa: So is that physically sent in paper form?

Samantha Nepe: It can be paper form or it can be in electronic form.

Mr Kahukiwa: And so you just... you're looking at what you've called up?

Samantha Nepe: Yes.

Mr Kahukiwa: You wouldn't know if there, again, there are bits missing or not because you're just given what you're given?

Samantha Nepe: Yes. We look at the actual electronic record first and then we call the physical file to see if it meets with what's there.

Mr Kahukiwa: And your report is based solely on that record?

Samantha Nepe: Purely on the record, on the Court record.

Mr Kahukiwa: So if I could take you to paragraph 17 of your report?

Samantha Nepe: Yes.

Mr Kahukiwa: So if you just read paragraph 17 for me.

Samantha Nepe: *"The matter is a complex situation and, because of this, beneficiaries of Heni Ngaropi have not been given the opportunity to comment because they are not residents of Kennedy's Bay".*

Mr Kahukiwa: What do you base that on?

Samantha Nepe: I based it on knowing that the list of beneficiaries of Heni Ngaropi, were not residents of Kennedy's Bay.

Mr Kahukiwa: So these are the successors entitled to Ngaropi?

Samantha Nepe: Yes.

Mr Kahukiwa: And what exactly are you referring to there in terms of not been given the opportunity to comment? Are you referring to what is happening at the marae to date?

Samantha Nepe: Yes. I based it on the beneficiaries, where they reside if not in Kennedy's Bay and also the opportunity of going to... in terms of the Gazette Notice which says, quite clearly, "residents of Kennedy's Bay", if they were to go to any hui there, would they have access to any hui that is going on knowing full well that they don't reside in Kennedy's Bay.

Mr Kahukiwa: Because they've said, haven't they, that they don't have a say because they're not residents. They've said that. So where on the Court record, that you looked at, is that point made?

Samantha Nepe: From Judge Milroy's last decision where interim trustees were appointed. It was quite clear by Hori Tutaki's submission there, to the Court, where it stated that.

Mr Kahukiwa: So the file is the complete Harataunga 2C1 from...

Samantha Nepe: Yes, sort of, in between.

Mr Kahukiwa: Oh, in between?

Samantha Nepe: The Court records.

Mr Kahukiwa: Right. Can you clarify that for me?

Samantha Nepe: I based it on that earlier minute where the interim trustees were appointed where the Court directed.

Mr Kahukiwa: Right, but going back to the file, because my understanding is that title was created in 1955, is it, the partition order was about then?

Samantha Nepe: Yes.

Mr Kahukiwa: So have you got a file in front of you that starts at the 1955 partition order right through to August or September of 2011?

Samantha Nepe: I requested the partition order of 1955 through the case managers here. That file had to be... there was a process that they had to go through because it was in the archives area, so there was a search that was made for the partition order. But, upon their findings, there was no partition order there. It had rolled into the later application of Ray Hovell's, Richard Hovell's.

Mr Kahukiwa: There was no later, sorry?

Samantha Nepe: There was no partition order in the actual physical application in archives.

Mr Kahukiwa: Right.

Samantha Nepe: Yes, it had later rolled on into the Ray Hovell's one, which is the 1964/65 application for...

Mr Kahukiwa: So did that file have, for instance, because the trustees, as you may be aware, were freshened up probably the early 2000's. Was that on the file?

Samantha Nepe: Yes, it does roughly. It's one of the consequential orders.

Mr Kahukiwa: Right so, on that record, it would be fair to say that there isn't this type of issue or concern being raised by the beneficiaries of Heni Ngaropi. That be correct wouldn't it?

Samantha Nepe: Not at that time, no.

Mr Kahukiwa: No.

Samantha Nepe: Not at that time.

Mr Kahukiwa: If I take you to paragraph 15 of your report, just read your statement there please.

Samantha Nepe: *"Why would an owner of a solely owned block want to alienate themselves or beneficiaries from their own whenua?"*

Mr Kahukiwa: Are you able to say how that question that you raised is based on the record that you were looking at?

Samantha Nepe: There didn't seem to be any consent on file from Heni Ngaropi to say that the classification of when she first filed the application would change. There's nothing on the Court record to indicate from any of the partition hearings, the recommendations, the appointment of trustees, that notification was given to her of any Court hearings. So that's what I based it on.

Mr Kahukiwa: So it's solely on the basis that there were, on your perusal, no...

Samantha Nepe: No documentation.

Mr Kahukiwa: No written...

Samantha Nepe: No written documentation to support it.

Mr Kahukiwa: Right. When you say alienate, what do you mean?

Samantha Nepe: Alienate, not being able to... well, physically, have a solely owned owner in a block and to hand it over to, in terms of the Gazette Notice, "residents of Kennedy's Bay" full well knowing, maybe, that there were uri that were coming underneath, would they be entitled to be part of that.

Mr Kahukiwa: So is it your view that they would not be entitled?

Samantha Nepe: At that time, no.

Mr Kahukiwa: Sorry?

Samantha Nepe: At that time, no.

Mr Kahukiwa: At that time?

Samantha Nepe: Yes, the uri wouldn't be.

Mr Kahukiwa: Because the class is defined as "residents of Kennedy Bay".

Samantha Nepe: Of Kennedy's Bay, yes.

Mr Kahukiwa: What about the fact that it's a marae?

Samantha Nepe: The Gazette Notice still reads "for the purpose and benefit of residents of Kennedy's Bay". I mean to say any marae is, you know, it has its own classifications. Anybody attends a marae, whether they're classified as a beneficiary or not, anybody attends it. You don't have to be a classification to attend a marae.

Mr Kahukiwa: I agree with you. Paragraph 12, if I take you to paragraph 12, you say there, don't you, and we've already traversed this.

Samantha Nepe: Yes.

Mr Kahukiwa: You didn't see any documents which showed a Ngaropi consent, so nothing signed by her?

Samantha Nepe: Yes, any documentation to support the change.

Mr Kahukiwa: Right. But you then say at paragraph 12, "*She was not given the opportunity to speak to any of these applications*".

Samantha Nepe: 12 or 11?

Mr Kahukiwa: End of 12 according to mine.

Samantha Nepe: Oh, yes. Yes, she wasn't given any opportunity to speak.

Mr Kahukiwa: Well I'll put it to you that that is an illogical leap. There's no consent on the file but you don't know, from the record, what opportunity she was given do you?

Samantha Nepe: No, only I based that on that there was no documentation, written documentation, for her to attend a Court hearing.

Mr Kahukiwa: And no one would refute that. What I'm putting to you is your next sentence, your next conclusion, is that she was not given the opportunity to speak.

Samantha Nepe: No, she wasn't.

Mr Kahukiwa: Would you accept that that is a pure conjecture on your part?

Samantha Nepe: It could be, but purely from the Court record

Mr Kahukiwa: She may have been given the opportunity verbally?

Samantha Nepe: May have been. In this case it looks like it.

Mr Kahukiwa: Precisely. She may have been given the opportunity in writing but that particular writing is lost forever. Would you accept that?

Samantha Nepe: No.

Mr Kahukiwa: So you wouldn't accept that?

Samantha Nepe: I would give a verbal... no, I accept giving verbal instructions and that's clearly in the Court record.

Mr Kahukiwa: But would you accept that if there was something in writing that's now lost, that's another possibility? It's a theoretical possibility, isn't it?

Samantha Nepe: It's a theoretical possibility but I wouldn't accept it from a case manager's point of view.

Mr Kahukiwa: At paragraph 11 you say, and I quote, "*At no time did she consent to her block of two acres being used as a marae for all the district*". Am I correct in saying that what you mean there is there's no written consent?

Samantha Nepe: Yes.

Mr Kahukiwa: And then at paragraph 13, I'll take you to paragraph 13, your statement there that "*She was not provided with any of the minutes from those hearings nor notified of any Court hearing.*" Again you've made a deduction that because there's nothing on the record, your view is she wasn't provided with it.

Samantha Nepe: Yes, only purely going what's on the record.

Mr Kahukiwa: On the record. She may have been but the record doesn't show that?

Samantha Nepe: No, it doesn't.

Mr Kahukiwa: Can I just quickly put to you a couple of documents? Sir, if I can have leave to put to the witness a couple of documents?

Court: Yes.

[Evidence handed to the bench for distribution]

Mr Kahukiwa: Now these, the two pages, the first page is headed up "Purchase Agreement".

Samantha Nepe: Yes.

Mr Kahukiwa: Just before that, is this kind of... there are two pages, "Purchase Agreement" and the other one's headed up "Certificate evidence and purchase of interest by Māori Trustee".

Samantha Nepe: Āe.

Mr Kahukiwa: Are these forms familiar to you in your 22 years experience?

Samantha Nepe: Yes the second one is, the certificate, the Māori Trustee's one.

Mr Kahukiwa: Right, is the first one?

Samantha Nepe: Yes, sort of. Oh, yes, the conversion thing is sort of.

Mr Kahukiwa: The Purchase Agreement, whose name is at the top of the page there?

Samantha Nepe: Is it on the first page, yes, Heni Ngaropi.

Mr Kahukiwa: And you can see there that this is an agreement to sell. I know the page is sort of smudged in the middle of it but...

Samantha Nepe: Yes.

Mr Kahukiwa: And there appears to be a signature there. It says "vendor's signature". Do you see that on there?

Samantha Nepe: Yes.

Mr Kahukiwa: Can you see the date? Can you see the date that it appears to have been witnessed?

Samantha Nepe: 18 May 1966, the first one.

Mr Kahukiwa: It looks to be that date, yes.

Court: The 18th or the 5th?

Samantha Nepe: 18 May... oh, 18/05/1966.

Court: Oh, it's witnessed...

Mr Kahukiwa: Actually His Honour might be correct. It might be 5 May.

Court: It's witnessed on the 5th and it's accepted by the office of the Māori Trustee on the 18th.

Mr Kahukiwa: If you go down to the schedule, it sets out the land block. Can you just read that out there what block it is?

Samantha Nepe: Harataunga 2F2.

Mr Kahukiwa: Okay, now turning to the form that you have seen before, "Certificate evidence and purchase of interest by Māori Trustee", that's that second page. Where do you... what's your familiarity or knowledge of these sorts of forms?

Samantha Nepe: My familiarity on the conversions one it's very vague, in terms of these.

Mr Kahukiwa: In basic terms, what do these documents or this document show?

Samantha Nepe: It shows that Heni Ngaropi... purchase price was £227.

Mr Kahukiwa: Yes, what was she doing?

Samantha Nepe: Share purchase was 12, it could've been selling.

Mr Kahukiwa: I'll put it to you that she was selling. Alright, thank you Ms Nepe. Those are my questions Your Honour.

Court: Thank you. Mr Warren, any questions arising?

Mr Warren: Just a couple Sir. Just in regards to the last line of questioning on this agreement, I haven't seen this before.

Court: No, nor have I.

Mr Warren: It wasn't brought to my attention but, I mean, I'll need to reflect on that in terms of getting instructions.

Court: It may well arise later. Will it Mr Kahukiwa or was this just going to be dropped on us with no backup?

Mr Kahukiwa: Yes, look my apologies for this late notice. As my friend said earlier, this has been a fairly whirlwind preparation but in any event, it's off the Court record.

Court: Yes.

Mr Kahukiwa: It has relevance in terms of some of the evidence in support of the application, utterly states that this is why it did not sell land and, therefore, would not have consented to this kind of reservation.

Court: Right.

Mr Kahukiwa: And that's the relevance.

Court: Alright, thank you.

Mr Warren: As I say Sir, we will reflect on that in the break and see if we can respond if it's relevant.

Court: That's alright, thank you.

Mr Warren: Did you want to sit Ms Nepe?

Samantha Nepe: It's alright.

Mr Warren: If that's okay Sir, I was just going to sit so I can control the paperwork.

Court: Yes, that's fine, yes.

Mr Warren: Thank you Ms Nepe for your report and answering my friend's questions openly and honestly. Just firstly, and you gave evidence that you've had 22 years

experience in the Māori Land Court, I suspect you've come reasonably familiar with Court documentation. Would you accept that?

Samantha Nepe: Yes.

Mr Warren: You said three years of dealing with section 45 applications and my friend put to you that sometimes the record is not complete and you accepted that. But you did go on to say that, at times, parties to a proceeding do produce their own documentation to assist a Court record. Have those in opposition or the respondents produced any documentation to address some of the key issues you've put in your report around Heni Ngaropi or whether she got notice or not?

Samantha Nepe: No.

Mr Warren: Sorry?

Samantha Nepe: No.

Mr Warren: My friend asked you a number of questions in relation to paragraphs 12, 13 and 15.

Samantha Nepe: Yes.

Mr Warren: That section of your report, you are attempting, are you not, to highlight areas of difficulty?

Samantha Nepe: Yes.

Mr Warren: Which then assist you in making a recommendation to the Chief Judge?

Samantha Nepe: Yes.

Mr Warren: And again, he asked you questions in paragraph 17. Under that section you're looking at considerations as to whether the matter needs to go to a full hearing or not?

Samantha Nepe: Yes.

Mr Warren: So you're just outlining the factors?

Samantha Nepe: Yes.

Mr Warren: And, in your recommendation, you do suggest to the Chief Judge that if he's minded to exercise his direction that you would, if there were objections, set the matter down for hearing?

Samantha Nepe: For a hearing, yes.

Mr Warren: That was your recommendation and here we are today.

Samantha Nepe: Āe.

Mr Warren: Thank you, no further questions. Thank you Sir.

Court: Kia ora Ms Nepe. I've got a couple of points arising from your report, which I wanted to clarify, and you're probably the best person to clarify this. You refer at paragraph

10 to an application filed by Heni Ngaropi on 4 March 1954 for the setting aside of Harataunga 2C1 as a Māori Reservation.

Samantha Nepe: Āe.

Court: And then in response to one of the questions by Mr Kahukiwa, you said that... I think your words were "*she hadn't agreed to a variation*". Were you referring to a variation of that original application?

Samantha Nepe: Yes.

Court: So what happened to that original application?

Samantha Nepe: It didn't go anywhere. It sort of, the original application in 1954, it sort of rolled into the partition, and the recommendation set apart as a Māori reservation and then vesting in trustees. It didn't go anywhere. From the Court record it doesn't show anything.

Court: Was it granted or dismissed?

Samantha Nepe: It didn't even get to that stage.

Court: The application that was filed by Richard Hovell, was that an application for variation or was that a new application?

Samantha Nepe: It was a whole new application.

Court: So was it linked in any way to the original application of 4 March 1954?

Samantha Nepe: No.

Court: It wasn't?

Samantha Nepe: No.

Court: And the Court record doesn't reveal any link?

Samantha Nepe: No.

Court: Alright, thank you. Anything arising from that?

Mr Kahukiwa: Yes, just a question. Ms Nepe, the word "linked" what does that mean? Is that Court speak for...

[Laughter in the Courtroom]

Court: Sorry, I don't think that could speak for anything.

Mr Kahukiwa: Does it mean there other pieces of paper on the record that connect those applications? Is that what you mean?

Samantha Nepe: Yes, the only connection... well, the 1954 application didn't go anywhere so when Richard Hovell's application was put forward and filed, it was in terms of setting it apart as a Māori reservation but it wasn't based on the intention of Heni Ngaropi's first application in 1954.

Mr Kahukiwa: Was Mr Dye, D Y E, Registrar at the time, was he a Registrar in 1954/55?

Samantha Nepe: There is a mention of a Mr Dye, but I haven't got the Court record before me for that, but there is.

Mr Kahukiwa: Yes, Your Honour, he appears to be the person who Mr Hovell was corresponding with in 62.

Court: Yes, I see that correspondence.

Mr Kahukiwa: But he can't remember whether this Mr Dye person held the same office in 1954/55. Thank you.

Court: Alright, thank you. Kia ora Sam. Mr Warren?

Mr Warren: Thank you Sir. So, as intimated earlier, I'm going to now proceed to work through the evidence of the applicant. Sir, I'm going to call Mr Winiata Harrison. Before I do that, I forgot to mention earlier that Mr Haereroa, who has given a sworn statement of evidence, we're trying to track him down. He did foreshadow last week that he had commitments today at Turangawaewae, and we have been trying to get a message out to him. He said he might be able to make it later today but that's up in the air and once we know, we'll let you know what the options are in terms of putting it through by way of affidavit and those sorts of things.

Court: Alright, thank you.

*[Mr Winiata Harrison approaches the witness box]
[Court Clerk swears in Mr Winiata Harrison]*

Mr Warren: Matua did you want to have a seat?

Winiata Harrison: Winiata Harrison

Mr Stuart: Did you want to have a seat?

Court: Have a seat.

Mr Warren: Ka pai. Tēnā koe Mr Harrison. I just want you to confirm that the statement of evidence that you filed with the Court is true and correct?

Winiata Harrison: Yes.

Mr Warren: We agreed before that you will have your evidence taken as read and my friend, Mr Kahukiwa, would ask you some questions and perhaps His Honour. Is that still your position?

Winiata Harrison: Yes.

Mr Warren: Okay.

Mr Kahukiwa: Tēnā koe e pā.

Winiata Harrison: Kia ora.

Mr Kahukiwa: Can you hear me? Am I coming through loud and clear?

Winiata Harrison: Yes.

Mr Kahukiwa: Winiata, you're a resident of Kennedy Bay aren't you?

Winiata Harrison: Yes.

Mr Kahukiwa: And you're also of the three hāpu?

Winiata Harrison: Yes.

Mr Kahukiwa: In your view, does resident... being resident, does that approximate to ahikāroa?

Winiata Harrison: Yes.

Mr Kahukiwa: Sir I seek leave to put to the witness two further pieces of paper?

Court: Have you seen those Mr Warren? You're about to.

Mr Warren: I'll tell you in a minute Sir.

[Pause]

The shorter answer is no Sir, but obviously we need to know where my friend's going with this.

Court: We'll see where they lead, alright. Can I have a copy please?

[Evidence handed to the bench for distribution]

Mr Warren: Sir I must record a growing concern. I appreciate the comments I made about the rush and the Court can accept evidence as it pleases. I mean, this is the only opportunity we may get to hear and respond and obviously consider some of these documents but let's deal with it on a case by case when I've had time to understand exactly what they are Sir.

Court: Alright, thank you.

Mr Kahukiwa: Yes Sir, not intended to ambush anyone. This just came most recently and, in fact, after the evidence is in so apologies for that but, in my submission, relevant to the matters at hand and therefore, in the interest of justice, ought to be traversed.

Court: Alright, well, we'll see you where you go with it.

Mr Kahukiwa: Winiata, there's a page with a number four on the top of it. It's a bit blurry. Have you got that one there?

Winiata Harrison: In?

Mr Kahukiwa: It's actually in your hand there.

Winiata Harrison: In this one?

Mr Kahukiwa: If I could just approach?

Court: Yes.

Mr Warren: Sir I don't mind if Ms Nepe or someone can assist the witness.

Court: Alright, thank you.

[Ms Samantha Nepe sits at the witness box to assist Mr Winiata Harrison]

Mr Kahukiwa: So looking at that document, are you familiar with that document? Have you seen it before or is it part of your memory?

Winiata Harrison: Yes.

Mr Kahukiwa: Because, on the bottom of it, it's signed by... well, it's in your name, Windy Harrison, president Harataunga Māori Committee.

Winiata Harrison: Yes.

Mr Kahukiwa: So this is a Harataunga Marae newsletter of about November 1980. Does that ring any bells for you?

Winiata Harrison: Yes.

Mr Kahukiwa: Can you... what's your memory of this piece of paper? Do you have any memory of it?

Winiata Harrison: Well I thought a lot of the lady herself and she was part of marae business, especially of the Pākehā side. I didn't have any worries with it.

Mr Kahukiwa: Okay. Just going back to this piece of paper, so you were the head of the Harataunga Marae Committee in about 1980?

Winiata Harrison: Yes.

Mr Kahukiwa: And so you were leading the charge for fundraising at that time?

Winiata Harrison: Yes.

Mr Kahukiwa: Which was ultimately successful?

Winiata Harrison: With?

Mr Kahukiwa: It was ultimately successful?

Winiata Harrison: Yes, well I knew a lot of people in the fundraising game.

Mr Kahukiwa: Āe. The second page, this is headed up "Kennedy's Bay Meeting House Project" and it's dated 23 November 1987. Is that a document that's familiar to you?

Winiata Harrison: Yes.

Mr Kahukiwa: This is not one that you've signed, signed by W Te Moananui as chairman.

Winiata Harrison: Who?

Mr Kahukiwa: W Te Moananui as chairman.

Winiata Harrison: Yes, that's right.

Mr Kahukiwa: Because he would've been leading the charge for funding at that time wouldn't he?

Winiata Harrison: Well we could say that, yes.

Mr Kahukiwa: Right, at least on this piece of paper.

Winiata Harrison: Yes.

Mr Kahukiwa: Okay.

[Pause]

Amongst the residents of Kennedy Bay, there's yourself who is also of the three hāpu. Are there others?

Winiata Harrison: Of the other?

Mr Kahukiwa: So your co residents?

Winiata Harrison: Yes.

Mr Kahukiwa: Are there others of your co residents who are also of the three hāpu?

Winiata Harrison: Yes.

Mr Kahukiwa: Quite a few?

Winiata Harrison: I'd say yes, quite a few.

Mr Kahukiwa: You talk in your evidence about a meeting that you attended with your father in the late 60's at the Court.

Winiata Harrison: Yes.

Mr Kahukiwa: Where Ngaropi was also there.

Winiata Harrison: Yes.

Mr Kahukiwa: And you say that it's your recollection that she said she wanted to take the land back. This is your statement.

Winiata Harrison: Ā, ki mai, engari kōrero Māori mai ki au. Koirā, ka whakaae au ki āna kōrero.

Mr Kahukiwa: Engari, ko tō kōrero e puta kei runga i ēnei pukapuka he Pākehā?

Winiata Harrison: Ētahi. Ētahi kare e mōhio ki te kōrero Māori. Ētahi, mōhio ki te kōrero.

Mr Kahukiwa: Mēnā. kei te whakaae tonu ana koe ēnei kupu?

Winiata Harrison: Āe.

Mr Kahukiwa: I te mutunga o tēnā hui, kei Te Kooti. I haere tēnā kuia ki hea? Ki roto i Te Kooti? Ki roto i te whare o Te Kooti?

Winiata Harrison: I kōrero mai ia ki au, "kua whakaae au ki tō pātai. Me hoki koutou ki te kāinga, māku e whakatau i au, ko te take i roto i Te Kooti." Ka hoki mātou ki te kāinga.

Mr Kahukiwa: Ki te whakatika...

Winiata Harrison: Āe!

Mr Kahukiwa: I muri i tēnā i whai atu e koe tēnā whakatika?

Winiata Harrison: Kāo!

Mr Kahukiwa: Waiho...waihotia?

Winiata Harrison: Waiho pēnātia māua, mohio atu au he pono tonu, ōna nei kōrero ki au. Waiho pēna ki au kia takoto pērā.

Mr Kahukiwa: Mohio ana koe ngā kupu kei runga...a...kei runga i te pukapuka Gazette Notice? Mohio ana ngā kupu kei runga?

Winiata Harrison: Kei runga te aha?

Mr Kahukiwa: A, te Gazette Notice. Kao? Ko te whakatuwheratia o te wharenuī i reira koe?

Winiata Harrison: Āe!

Mr Kahukiwa: Arohamai.

Court: Kei te pai.

Mr Warren: You're doing well my friend.

[Laughter in the Courtroom]

Court: Mr Kahukiwa, his evidence is...

Winiata Harrison: Ko tāku tungāne kē, ko ia te tangata i te whakahaere i ērā wā, kei te ora rātou hoki i ērā wā. Kātahi āno au ka uru atu i... i tōna mahi, ka mate rā ia. I te ora tonu e tēnā wā, na reira ka waihongia au ngā take katoa ki aia māna e... e whakanui atu.

Mr Kahukiwa: Āe! Ka pai. He aha te kaupapa o te whare?

Winiata Harrison: Te kaupapa.

Mr Kahukiwa: Āe, te wharenuī.

Winiata Harrison: Te Māoritanga. Tino rangatiratanga. Ērā take Māori katoa, kei runga te whare rā...

Mr Kahukiwa: Koirā!

Winiata Harrison: Āe! Pātai mai tētahi tangata mai ki au, "he aha te take kare koe e ingoangia te whare nei?" Ka utu ki aia, "O, kia pātai mai ētahi, ā, ka mōhio kē, ka mōhio e rātou ko Ngaropī te ingoa o tēnā whare. Nāna hoki i tuku mai ngā whenua hei tūngā te whare... hei tūngā mō... mō tō mātou whare i konei.

Mr Kahukiwa: Kia ora. Kia ora. E tā ngā mihi atu ki a koe, mō te whānau hoki. Kei te mutu... kua mutu aku kōrero ki ā koe mō tēnei wā.

Court: Ngā patai Mr Warren?

Mr Warren: I'm a bit nervous now. We didn't discuss this, this morning, Mr Harrison.

Court: It might be simple just to read his evidence back to him and ask him to respond. It's all in English.

Mr Warren: Āe, e tika. Sir, I perhaps should have done this earlier but I'm sure my friend won't mind. I do have some supplementary questions arising out of the evidence we received yesterday from my friend that I want to put to Mr Harrison to respond to.

Court: Āe.

Mr Warren: Ka pai Winiata?

Mr Kahukiwa: No objection.

Court: Thank you.

Mr Warren: I might approach and hand those up to Ms Nepe just in case we need them.
[Evidence handed to the bench for distribution]

Matua, these are the witness briefs of Ms Dobbs and Mr McLeod. My friend asked you some questions about the meeting you had with Heni Ngaropi in the 1960's and John McLeod, in his evidence, talks about that same conversation and attached is a letter from Mr Hovell who was present. Was that conversation e roto e te reo or in English?

Winiata Harrison: I roto i te reo tonu. Ēngari i mea ana rātou i patai ki aia ka whakahokingia aia ki a rātou i roto te reo Pākehā. Ēngari i kōrero mai ia ki au he kōrero Māori katoa i ngā wā katoa.

Mr Warren: And could George Hovell speak Māori?

Winiata Harrison: No.

Mr Warren: Could he understand Māori?

Mr Kahukiwa: Objection Your Honour. It calls for the witness to give a statement about someone else which goes to the state of mind of that other person.

Court: State of mind?

Mr Kahukiwa: My friend, as I understand it, said "did he understand Māori?"

Court: Yes.

Mr Kahukiwa: Well that's trying to delve into Mr Hovell, who's deceased, into his state of mind, into his mind. This witness is unable to speak for him.

Court: Or linguistic ability. He's not delving into his mind, he's just asking a straight question or fact, could he speak Māori, no, could he understand Māori? There doesn't seem to be any issue from my perspective with getting an answer.

Mr Kahukiwa: How would the witness know, how would anyone know?

Court: Well, if I've listened to you and I was asked can you speak Māori or understand Māori, I would have a response.

Mr Kahukiwa: I'll leave it there Sir.

Mr Warren: Thank you Sir. In the evidence of John McLeod and Iritekura Dobbs, they talk about Tuateawa and seem to be saying that this has always been considered as part of Kennedy's Bay. Where is Tuateawa located in relation to Kennedy's Bay matua?

Winiata Harrison: Yes, just the name itself tells us everything. Tuateawa, on the other side of Kennedy's Bay, on the other side of the creek, that's what that means, the name itself, Tuateawa, on the other side of the creek, on the other side of Harataunga.

Mr Warren: Have you ever considered it being part of Kennedy's Bay?

Winiata Harrison: No.

Mr Warren: What about in relation to the toku whenua and the name Harataunga, does Tuateawa form part of that in your view?

Winiata Harrison: No. Harataunga is apart from Tuateawa, as the name suggests, although Tuateawa was still Ngāti Tamaterā and we always confide in Tamaterā, that's the marae issues between Tamaterā and Harataunga are all the same but the boundaries were different between the two places.

Mr Warren: You've seen the list of residents that has been produced by Ms Dobbs in her statement of evidence? Perhaps Ms Nepe could... that's attachment "B".

[Ms Samantha Nepe assists Mr Winiata Harrison]

You'll see the first two names there, John Rabarts and Jackie Carey, and their addresses Tuateawa Road. Do you know whether they live in the area that we know of Tuateawa? Is that where they reside?

Winiata Harrison: Yes.

Mr Warren: Are there non Māori people listed in attachment "B"?

Winiata Harrison: Yes, John Rabarts, well his people sold all that end and that's one reason why I was against the selling of all that property on that side, Tuateawa side. It's left Tamaterā without... there's only a devastated quarry there now and that sort of thing. They've developed the whole place and sold it all.

Mr Warren: My question is, are there non Māori residents listed in this list, people who aren't Māori, Pākehā perhaps or other races?

Winiata Harrison: Yes there's a few there.

Mr Warren: Are there Māori who do not whakapapa to Ngā Hapū e Toru listed on this list?

Winiata Harrison: Yes.

Mr Warren: Paragraph 18 of the evidence of John McLeod talks about his father George, who has passed away, often said to John, and I quote, "not to chuck out residents, you could add to it. I do not believe you build a house with someone and, when it's built, kick that someone out". In giving evidence in support of this application matua, you are not trying to kick anyone out of participating in the marae are you?

Winiata Harrison: No, well Māori never do that. If they... if Pākehā say it, well I can't condemn but if Māori done it, I'd soon chip them about it but in this case, now George was an uncle of mine but he's from a different hapū. That's why he couldn't host the claims, couldn't host the tribunal claims. They looked down the list, my name was there mōhio anō

tēnei tangata te kōrero Māori...āe, ā, māna e whakahaere ngā pātai rāua ko mea, Milroy me Judge Augustus Wallace, nā mātou i whakahaere ngā kerēme.

Mr Warren: Kia ora. Just a final question, how important is the tuku whenua and the history behind that today?

Winiata Harrison: It doesn't change. It doesn't affect the whenua at all but as certain things that are done affect the people, there's no change in the whenua.

Mr Warren: Thank you Mr Harrison.

Court: Mr Kahukiwa, any re-examination in English?

Mr Kahukiwa: Kare kou Your Honour.

Court: Kia ora Mr Harrison, I've got one question for you. Mr Kahukiwa referred to the Gazette Notice.

Winiata Harrison: Mr?

Court: Kahukiwa, the lawyer.

Winiata Harrison: Oh, yes.

Court: To the Gazette Notice which reads "*this marae is for the use and benefit of the residents of Kennedy Bay and is to be called Heni Ngaropi Reservation*". Would you have any objections, and I've been reading your evidence and reading the other evidence in the background to this case, would you have objection to an amendment to that which would read "for the use and benefit of the residents of Kennedy Bay including Ngā Hāpu e Toru" and to list those hāpu?

Winiata Harrison: I think my view is that it's up to the owners.

Court: Right.

Winiata Harrison: Whatever the owners say, I'll agree to it.

Court: Āe, alright. Kia ora, thank you. Mr Warren?

Mr Warren: Thank you Sir.

Court: Before we go any further this is an application, under section 45, to amend or cancel an order which was made in 1962 and that is to be done or, in terms of the Act, can be done if the Court made an error or if there was an error in presentation of the facts to the Court. I would like us to concentrate on that. What is the error made by the Court? What is the error made in the presentation of evidence to the Court? Those are the only matters in which I can exercise my jurisdiction. Alright, I'll leave it there.

Mr Warren: I think I know what you're saying, Sir, in the sense that obviously, if you get to that point, there needs to be evidence of the prejudice in the weighing of the interests of justice. And a lot of the evidence goes to that point because the Court record, in many respects, speaks to what we say is the error of law in the facts and certainly I'll be focusing on those issues in submissions.

Court: Because you referred to a number of principles which have been espoused by this Court and by the Chief Judge, and also by the Māori Appellate Court, and those principals refer to the onus of proof being on you.

Mr Warren: Yes.

Court: They refer to evidence at the time being the best evidence.

Mr Warren: Yes.

Court: They refer to the decisions made at the time, unless there is contrary or evidence which clearly shows that that evidence was wrong as being, again, the best evidence. So whatever years later, 48 years later, the onus is quite difficult and quite high and in relation to, for example, Mr Harrison's evidence, no evidence going directly to the point that I'm being asked to look at.

Mr Warren: I suppose the response Sir, on a preliminary basis, is the first error we say occurred as a matter of law, that the definition of "residents of Kennedy's Bay" is not a class of Māori. It was enough evidence before the Court.

Court: And that's a matter for your submission.

Mr Warren: Submission, yes.

Court: And you've referred to that.

Mr Warren: And we can't give you evidence on that point in my submission.

Court: No.

Mr Warren: The issue around intention and whether she got consent is partly factual in the sense have we got evidence as to whether she knew about the application and you've got evidence before you about that. But it's also partly about whether the Court erred in terms of natural justice, so I take your point Sir.

Court: Yes, I understand that. And just one point, which I would put out now for both Counsel, in relation to legal submissions the application was done under section 439?

Mr Warren: The 53 Act, yes.

Court: In the 53 Act, yes.

Mr Warren: I think that's right, yes.

Court: There was no mention of subsection used. You've referred to a few. There are others in that section as well. I just leave it there, alright?

Mr Warren: Yes Sir.

[Mr William Willis approaches the witness box]
[Court Clerk swears in Mr William Willis]

Tēnā koe Mr Willis. You have produced a statement of evidence for the Court. You confirm that's true and correct?

William Willis: Yes.



Mr Warren: Just remain there and answer any questions from my friend, Mr Kahukiwa, or His Honour.

Court: Kia ora Mr Kahukiwa.

Mr Kahukiwa: Tēnā koe William, Mr Willis. Your knowledge about Harataunga 2C1, it's of fairly recent times, isn't it?

Williams Willis: Well I actually used to go down there, not a lot, but when I was younger I used to follow my great grandmother around everywhere, any time there was a funeral, but recently I've only been there about once in about twenty years.

Mr Kahukiwa: So you're in Gisborne, so you followed her around, would she frequent the Court in Gisborne?

Williams Willis: Oh, we'd go all over the place, yes.

Mr Kahukiwa: What year were you born?

Williams Willis: 53.

Mr Kahukiwa: And you say, don't you, that the history of Harataunga 2C comes from your brother?

Williams Willis: Yes.

Mr Kahukiwa: And so would I be correct in assuming that the period of time in which he's relaying this information to you, would that be in 2000's?

Williams Willis: Yes, it could be that... when he actually shifted up to Harataunga, yes.

Mr Kahukiwa: Because he shifted there...

Williams Willis: Oh, look, I wouldn't be able to tell you the dates when he shifted up there.

Mr Kahukiwa: Okay. You... no, those are my questions Mr Willis, thank you.

Court: Kia ora, thank you. Any re-examination?

Mr Warren: No, no re-examination. Thank you Mr Willis.

Court: Thank you.

[Ms Ritihia Katipa approaches the witness box]

[Court Clerk swears in Ms Ritihia Katipa]

Just have a seat.

Mr Warren: Kia ora Mrs Katipa. Have you made a decision as to whether you wish to read your evidence?

Ritihia Katipa: Yes I would like to read my evidence please.

Mr Warren: Okay, thank you.

Court: Thank you.

Ritihia Katipa: My name is Ritihia Katipa known as Missy. I whakapapa to Te Aitanga-a-mate, Te Aowera and Te Whānau-a-Rakairoa. I'm the great granddaughter of Heni Ngaropi White. My mother is Hine Mataera-i-te-Rangi. Te Rakahurumai; Nehe White, son of Ngaropi White, was my mother's father. As she was the eldest mokopuna, my mother was brought up by Heni Ngaropi. My two older brothers, Parekura, known as Paddy, and Pirirangi, known as Bill, were also both brought up by the kuia as they are the eldest mokos... great grandmokos in the whānau.

I was only three when Nanny Ngaropi passed away but I remember this little old lady in our house speaking te reo. My mother always talked about her while I was growing up. My mother thought of and spoke very highly of the kuia, Heni Ngaropi White. I remember my mum always saying that nanny was a strong woman with strong beliefs about whenua. She instilled those strong beliefs in my mum who, in turn, instilled those within me.

Mum said that nanny would always talk about how important land is to our people and our whānau, that she was adamant that we were to look after it and that it was never to be sold. Mum said that Nanny Ngaropi did not believe in sharing our land with Pākehā, whether they were whānau members or not, and that no Pākehā was to have anything to do with our land as they are most likely to sell it. For that reason, nanny would not have agreed with Pākehā participating in running our marae and benefiting from our whenua, which is what is happening now as a result of the 1962 order.

In about 1993 my mother's kōrero regarding the land of Harataunga became more prominent. That was the year that we had a big hui with our immediate whānau at Harataunga for a long weekend. I was not aware of our Harataunga ties until then, as we are from Gisborne and nanny had always lived on the Coast. Mum wanted to go back there to show our faces and our connections to the land. She said that nanny treasured Harataunga. The night before the hui and on the way there, my mother and I talked about how the kuia came to own the land and how she had, in turn, gifted the land to Te Aitanga-a-mate, Te Aowera and Te Whānau-a-Rakairoa. We talked about this again as we stood on the whenua waiting for the pōwhiri to begin.

Mum told me that the land at Harataunga was a tuku whenua by a tipuna from Ngāti Tamaterā to Te Aitanga-a-mate, Te Aowera and Te Whānau-a-Rakairoa as this is where our tipuna would dock when travelling from the east coast to Auckland to trade. I tautoko the kōrero of my brother, Pirirangi, in reference to my brother Paddy's research about the history of the land.

Mum said that nanny wanted Harataunga 2C1 set aside as a marae reservation for Te Aitanga-a-mate, Te Aowera and Te Whānau-a-Rakairoa so that the hāpu had somewhere to go when they visited Harataunga. Nanny told mum that, at the time, other whānau in Harataunga were bickering amongst themselves and no outsiders felt welcomed on their marae, so nanny wanted a place for our whānau from the east coast to be able to stay and call home when they visited.

In 1993, whānau members from the east coast were accusing other whānau members of selling land to Pākehā, so mum asked Parekura to build an evidence base to see what lands our whānau had left. This was when he began his work creating his research for the Waitangi Tribunal claim.

Paddy moved from Wellington to Harataunga in 1996 to protect the land of our whānau, as has always been our kaupapa, and stop more land from being sold. Mum and Paddy set up a whānau trust that same year, the Hine Mataera Katipa Whānau Trust for our safety.

Mum passed away in 2003 and then Parekura passed on in 2006. To the date of their deaths, they believed that the land of Harataunga had been set aside for Te Aitanga-a-mate, Te Aowera and Te Whānau-a-Rakairoa, Ngā Hāpu e Toru. Our whole whānau believed this until 2007 when Stephanie Palmer discovered, through her research, what Richard Hovell had done.

From what my mother told me, Nanny Ngaropi could not have known about Richard Hovell's application. If she had known she, as the direct link and sole owner of the land, would have been there and would have made sure that the 1962 order was never made. In addition, no

one in the whānau was told. Until Stephanie carried out her research, we thought the beneficiaries of Harataunga 2C1 were Ngā Hāpu e Toru.

Nanny Ngaropi would never have agreed for the land to be set aside for the residents of Kennedy Bay.

The reason nanny gifted the land to Ngā Hāpu e Toru for a marae, was so that the whānau members who lived on the east coast would have somewhere to go when they visited Harataunga. Nothing I have been told would suggest that she would change her mind to a completely different kaupapa.

The kuia also instilled in my mother that we were never to sell or share our land with Pākehā, hence none of us have married Pākehā. The effect of the 1962 order was that, instead of our own whānau being the beneficiaries of our land, Pākehā are beneficiaries as well as Māori residents who do not whakapapa to Ngā Hāpu e Toru.

From our perspective, our mamae, the understanding of our whole whānau has always been that Nanny Ngaropi gifted Harataunga 2C1 for a marae for Ngā Hāpu e Toru, so that whānau members from the east coast would have somewhere to stay when they went there. That was how the marae was always operated by whānau members who were actively involved in the day to day running of the marae, and also what has always been understood by whānau members living on the east coast.

It is devastating to know that nanny's intentions were not given effect to by the Court in 1962 and that the whānau that she wanted to provide for is now being excluded as beneficiaries. It's even more devastating that non-whānau members, as well as Pākehā, are instead benefiting from nanny's gift and determining matters that affect our whenua.

As uri, feeling excluded from our whenua is hurtful. At the hui in November 2009, held for the purpose of voting on who would be the new trustees of the Harataunga Marae Trust, we were not entitled to vote as we were not residents and therefore not classed as beneficiaries. We could only vote if we had formally succeeded to our interests as underlying owners, which process was not completed due to an oversight by the Māori Land Court. Even having the ability to participate as owners is not enough. Whānau members from the east coast who whakapapa to Ngā Hāpu e Toru, have been excluded as beneficiaries as a result of the 1962 order and that is wrong.

All we want is for nanny's wishes for her whenua to be honoured. The current situation, Pākehā and Māori that do not whakapapa to Ngā Hāpu e Toru running our marae and benefiting from our whenua is not right.

Mr Warren: Kia ora. Just remain there Ms Katipa and answer any questions.

Court: Mr Kahukiwa?

Mr Kahukiwa: Tēnā koe Ms Katipa. I'll take you to paragraph 16 of your statement. So the last sentence there, could you just read that sentence for me?

Ritihia Katipa: *"Our whole whānau believed this until 2007 when Stephanie Palmer discovered, through her research, what Richard Hovell had done"* and if you're wanting me to explain that...

Mr Kahukiwa: Are you saying that Mr Richard Hovell committed a fraud?

Ritihia Katipa: No I'm not stating that at all. I'm just saying that Stephanie Palmer had done research in 2007 which made my whānau aware of what was happening because, at that time, it came out as the gazette for residents and, to me, I thought I was a resident because I was a ratepayer but that wasn't the kaupapa. So I'm not saying that that gentleman has done fraud. That's not what my statement's saying there.

Mr Kahukiwa: Right. What are you saying?

Ritihia Katipa: That we were made aware of, our whānau was made aware of in 2007 by the research and the hui, actually, that Stephanie... we all came to Kennedy Bay to have a hui and she gave a kōrero on the findings, so that's what I'm saying there.

Mr Kahukiwa: Are you saying or is it your statement or evidence that Richard Hovell did something against your nanny's wishes?

Ritihia Katipa: I haven't stated that. I've just said that we were made aware of that a gentleman, Mr Hovell, had put in an application at that time regarding the changes... the wordings of our kuia, her intentions. Her initial intentions were changed, so we were made aware of that time.

Mr Kahukiwa: Right. Okay, those are my questions Ms Katipa. Thank you Sir.

Court: Kia ora. Anything Mr Warren?

Mr Warren: Thank you Ms Katipa, I've no further questions for your evidence.

Court: Ms Katipa, just a minute. It seems from your evidence that you're concerned that those that whakapapa to Ngā Hāpu e Toru are being excluded from this marae. Is that right?

Ritihia Katipa: When it came to having a voting process, yes, and what my kōrero on that is basically, is that our kuia's intention, initially she's the owner and we're the uri that's come after her, and her vision for us has obviously changed, why we're here. So, for me, it's that it's not being respected and for our kuia, she was very prominent for our whānau. So for me and for her hāpu that she stipulated, all we're wanting, all I'm stating here, is that I want it honoured.

Court: Alright. Would it be honoured by amending the Gazette Notice to include the words after "the residents of Kennedy Bay" including "those people that whakapapa to Ngā Hāpu e Toru", and to refer to them specifically?

Ritihia Katipa: I would like it to be honoured what she specifically stated. Kāore he residents on her kaupapa because she knows there were Pākehā there. No disrespect to that terminology but from our kuia, I just wanted her... and our whānau, we've hui'd about it and it's been a long time waiting patiently to come here, is that her wishes we just want it honoured. And it's not to add, it's to take away the residents, and I know you've got to be balancing here but I just want it to be rightfully what she had initially stated and put down on paper as our evidence base.

Court: Alright. You heard Ms Nepe say when she was giving evidence in relation to her report...

Ritihia Katipa: Yes.

Court: That your tipuna's application which included the intention, as you say, that this land be set aside for Ngā Hāpu e Toru went nowhere, it didn't proceed. You heard that?

Ritihia Katipa: Yes.

Court: And then along came another application, so that was in 1954, along came another applicant with a new application in 1962. Your great grandmother being the owner, do you have any... because in your evidence, sorry, you say that you don't think she would've known about it.

Ritihia Katipa: No, I'm adamant she wouldn't have known about it because everybody, in our family, we talk. We would've known. It would've been passed through generations, like my brothers have wandered around with the kuia. They've had the privilege of being with her and other whānau of our Ngā Hāpu e Toru have had the pleasure of being with her with hui and how her stance was.

Court: Yes, and you heard your brother say she wandered around, in answer to Mr Kahukiwa, to the Courts, involved in Courts?

Ritihia Katipa: To tangihanga, yes.

Court: Well he actually said "Court".

Ritihia Katipa: Oh, nē Courts, but I know he wandered with... both the two boys went being the eldest greats.

Court: And people talk at tangihanga don't they?

Ritihia Katipa: Āe.

Court: And your evidence is that from 1962 until 2007, no one in your whānau knew what this marae had been set aside for.

Ritihia Katipa: No, honestly, because Parekura didn't come and do the research. We didn't even arrive there until like my generation, because I'm the youngest out of all of us, there are eight of us, and we were taken there in 1993. And it was only due to that hui that we were there that our aunties and everybody from the coast, who keep it real and straight forward, were sending out allegations towards other whānau who have been living there, selling our lands, so all our mother said to Parekura at that time "you need to fix it up." What that meant is you need to find the evidence base of the... to do his research that went towards the tribunal, the treaty claim.

So, hence we [*inaudible word*] that document and, āe, we didn't know of the kōrero that come through of the change of the intentions of this gentleman. We just thought it was still the same. We've all been kōrero that the gift from the kuia [*sounds like*] is here too. She's gifted this land and wonderful for us to come back to and for our other whanaunga in the east coast, the Ngā Hāpu e Toru. So that's what I talk to is that's all we've known.

Court: Have you ever been excluded from this marae?

Ritihia Katipa: Have I been excluded oh, yes, we've had battens that we couldn't even go to a hui there but from the hui we did hope... well we were hoping to be part of the voting process for the marae, my whole whānau. Most of us turned up and we were devastated to find that hence, we thought we had succeeded to everything and this particular block wasn't placed in there. So it was disheartening on our part to sit there and have people who reside there and we tried everything like residing there. Because we paid rates I thought we were... we were trying to find the definition of it but being a ratepayer didn't mean anything. It excluded not only ourselves as the uri, but it excluded our whānau from the east coast Ngā Hāpu e Toru.

Court: Alright, okay, thank you.

Mr Warren: Sir, I've just got a note that Mr Haereroa is about 10 minutes away. Perhaps we take the morning adjournment?

Court: Alright, any objections to that Mr Kahukiwa?

Mr Kahukiwa: No, none.

Court: Alright, we'll come back about ten past twelve?

Mr Warren: Ten past twelve, yes Sir.

Court: Thank you.

[Court is adjourned at 11.45 am]

[Court is reconvened at 12:18 pm]

Court: Yes Mr Warren?

Mr Warren: Sir, Mr Haereroa has helpfully arrived and I'll just ask him to come forward to the witness box.

[Mr Haereroa approaches the witness box]

[Court Clerk swears in Mr Tuta Haereroa]

Tēnā koe Mr Haereroa. Just remain there. Firstly, apologies for taking you away from the important matters you had on today. Just confirming, Mr Haereroa, that you've prepared a statement of evidence and you're happy with the contents of that?

Tuta Haereroa: Yes.

Mr Warren: Mr Haereroa has agreed just to have his evidence taken as read Sir.

Court: Yes.

Mr Warren: And any questions from my friend and yourself.

Court: Thank you. Mr Kahukiwa?

Mr Kahukiwa: Tēnā koe Mr Haereroa. Ko John tōku ingoa. Ko āu te rōia mō ngā...mō ngā trustees e waru. If I could just take you to paragraph 23 of your statement. So you say there, don't you, that you were refused entrance on to the marae. When was that?

Tuta Haereroa: Pai noa te kōrero Māori?

Samantha Nepe: Āe.

Tuta Haereroa: Koirā i wareware i āu te tau engari ko taua wā kua eke ā mātou...he rite tonu tō mātou hara mai ki roto o Harataunga mō ngā hui. Engari ko tēwhea o ngā hui, ā, kua kaha i ngaro i tāku hinengaro...i te rā tika ake. Tērā pea ko tētahi ngā hui...te wā tīmata ai mātou ki te whakahuihui ake i a Ngāti Porou ki roto ake o Harataunga. I hara mai mātou mai i Potikirua ki te kohikohi haere ngā ū ka tau atu ki roto o Te Whānau o Ruapani, kei Tūranga tērā, kei tu atu o te Tokateia. I reira ka timata mātou ki te kohikohi haere i ngā uri. Kātahi ka hara mai ki runga i te huarahi ki Harataunga. Engari ko tō mātou...tō mātou tino wawata ko tērā...ko te...ko te whakangā, whakatā me te huinga tahi i runga ake i te marae i whakaritehia ake e tō mātou tipuna, i ā Ngaro, hei tūranga marae o konei.

Mr Kahukiwa: So...kare koe e maumahara te tau mō tēnei...mō tēnei hui?

Tuta Haereroa: Tērā pea ki roto i te tau rua mano, tahi, rua rānei. Ko ērā o ngā tau.

Mr Kahukiwa: Ko wai te rangatira o te...o tēnei marae i taua wā?

Tuta Haereroa: I te ora tonu tēnā o mātou...i tēnā ō mātou whānaunga, i reira...i reira i noho ana. Ko te āwangawanga, a, ko tērā i runga i tō mātou tu kaha te whakaaro mai i runga i ngaro atu. Ki o mātou whakaaro a tō mātou tipuna kuia, a, Heeni Ngaropi Waiata. I runga i tērā tu momo āhuatanga kua timata ki te āwangawanga ētahi o ngā koroua pakeke, nō reira.

Mr Kahukiwa: Engari, ko wai rātou ngā rangatira o te marae o taua wā? Ko wai rātou...Ko Paki mā?

Tuta Haereroa: Ko tērā pātai kore taea āu te whakautu i runga i tāku kōrero ētahi o ō mātou. He whānaunga anō mātou ko ētahi kare tonu ana mātou tino mōhio, o, kare āu tino mōhio ko wai rātou. Nā te mea kare i tipu mai i te wā kāinga.

Mr Kahukiwa: E hia ngā wā i whakaaukati koe ki tēnei marae? E hia?

Tuta Haereroa: E hara ko āu i aukati tā mātou haerenga mai. Engari ko tahi te wā kei te mōhio āu te mata taua. Engari i roa kōrero me...mō ētahi atu āwangawangatanga engari ko tahi te haerenga mai, i roto āu i taua roopu.

Mr Kahukiwa: Tēnā koe e Pā. Kua mutu aku pātai ki a koe mō tēnei wā. Tēnā koe Sir.

Court: Kia ora. Mr Warren? Thank you. Kare he pātai.

Mr Warren: Thank you Mr Haereroa. Sir, that concludes the evidence for the applicant. As indicated prior, my friend will open his case and we will deal with legal submissions at the conclusion unless you want to hear from me now.

Court: Oh, no, we'll deal with them at the end thank you. Yes, Mr Kahukiwa?

Mr Kahukiwa: Thank you Sir. I filed an opening address in writing yesterday which I trust Your Honour has received.

Court: Yes.

Mr Kahukiwa: This opening intends to supplement the written submission that I filed in February of this year. Basically my clients oppose the application. Their contention in response to this case is that, firstly, there is altogether no error to speak of in the sense of the error that's required to raise Your Honour's jurisdiction under section 45 of Te Ture Whenua Māori Act 1993. They respond that regretfully, the way in which the case is framed, it effectively impugns the integrity of Messrs Hovell and Bright and indeed the 1962 Court and it's contended, by way of my submission, these are serious allegations.

The third contention in response is that instead, these complaints that are raised appear to be in the nature of how this marae is being administered in recent times which are being confused with or blamed on a recommendation that Your Honour alluded to of almost 50 years ago. And it's our case, in essential terms, that these matters are not the province of section 45 and so they're asking that the application is dismissed.

My friend's indicated in an earlier submission what the issues are. I would submit that the issues are two-fold and that relates to this phrase "the residents of Kennedy Bay". Our contention is that that phrase more than perfectly fits within the section 439(3) requirement which, self evidently, reservations are for Māori and by Māori. There's no contention with that. Our case though is that the phrase "the residents of Kennedy Bay" is not an anathema to that legal requirement.

We also say that, as a matter of fact, just simply as a matter of fact and looked at in the round, Mrs Ngaropi White did consent to the reservation being set aside as a meeting place, sports and recreation ground et cetera for the residents of Kennedy Bay. And we correspondingly say that Mr Hovell and Mr Bright and the Court didn't do anything wrong.

So the issues are does this phrase, does this phrase fit within the contemplation of 439. If it doesn't, then I'll have to accept there is an error. As my friends say, that's a point of jurisdiction. If it does no error. We, of course, say the latter.

The other issue raised, in my submission, is this one around consent and, in my submission, the consent issue boils down to this and it's whether Mr Hovell and Mr Bright, in fact, fraudulently misled the 1962 Court in their representation of Mrs White's approval to set this land aside as a meeting place for the residents of Kenney Bay. Extending that out, the related boiled down issue is whether the Court can be said to, in effect, colluded with Mr Hovell and Mr Bright in a range of ways, in effect to deny Mrs White her actual intention for this land. That is what you're being asked to rule on, in my humble submission, Your Honour.

I've attempted to set out the key events in the chronology which is attached to my opening document. To be clear to my friend, I haven't made time to put this to my friend. I would have liked to but this has come in from me, Your Honour. The events there are set out and just quickly running through those March of 1954 is Mrs White's application to partition the two acres and set aside the land which says, on her application "*for a marae for the use of Te Aitanga-a-mate, Whānau-a-Rakairoa and Te Aowera hapū.*"

In January 1955 the Court sits at Kennedy Bay and it appears to be principally in relation to another block of land but the Court raises Mrs White's application at that time and discusses with the Ngapo Whānau, and I'm interpolating here, their attitude to another marae. I think the record shows that they go away and have a think about it and say no, no, everyone can use the church but our place is a private use place and the key words in the Court's record, as a result of that January 1955 hearing, is I quote "*2C1 will be recommended for marae for all of district on payment of survey.*"

Nothing seemed to happen for seven or so years and in 62, early June 1962, the secretary of the marae committee at Kennedy Bay writes to Mr Dye, Deputy Registrar of the Court, and attaches a partition signed by the residents and householders of Kennedy's Bay. That particular document is in the bundle that the applicant's counsel has provided. The partition itself is signed by at least 35 individuals and I've just noted that, as a matter of fact, one of the witnesses in support of my client's case, Ms Dobbs, her mother has signed that. That's followed by another public meeting later on in the month of June and, in that meeting, there was the election of or selection or election of tribal committee together with trustees for a marae.

Penultimately the matter comes before the Court 2 July 1962, and this is the key event, where the 1962 Court as I've called it, makes the orders to recommend that Harataunga 2C1 be set apart as a Māori Reservation to be called the Heni Ngaropi Reservation for the purposes of a meeting place and sports and recreation ground for the use and benefit of all the residents of Kennedy Bay and, of course, the list of the trustees is submitted there. The Order in Council is subsequently made and gazetted. I took the date to be January 1963 and then the formal orders appointing the trustees vesting the reservation in those trustees was made in February of 1963.

In the late 60s there's, in my submission, a key event which has been traversed with Mr Harrison and this is the meeting at the Court where Mrs White was in attendance and around that time there's also another key event, in my submission, which Mrs Dobbs will speak to in her evidence about a conversation with Mrs White around this time.

The three other key parts of the chronology that I've referred to there, the two notices that I put to Mr Harrison, these are the fund raising notices, and then there's a letter of August 2009 penned by, as I understand it, Mr Wilson Bright who gives a statement there relevant to this matter.

In terms of the applicable law, Your Honour has already helpfully run through the key aspects. I won't repeat those.

Court: One thing I left out, which I think is important in relation to this application, is that section 44 gives the Chief Judge a discretion, whether or not even if there is a mistake, even

if there's an error, gives the Chief Judge a discretion in the interests of justice to make the order or not, the last few words of that section.

Mr Kahukiwa: Yes.

Court: And I just thought I'd raise that because I didn't refer to that earlier.

Mr Kahukiwa: Sir my immediate submission is that the operation of your powers under this part of the Act, the prerequisite is the error. My submission would be that the nature of that error is one that is in the serious category. I think *Raroa* referred to a patent defect which, in my submission, is an error that is more serious than perhaps one might say it is a technical issue when one say compares the corrective powers of the old District Land Registrar under the Land Transfer Act where their powers to correct errors were certainly confined to technical matters and not substantive matters. My submission would be that Your Honour's authority and jurisdiction flows necessarily from an error which, in the interests of justice, requires to be fixed which, in my submission, tends to be in that serious and substantial... substantive category.

Whether Your Honour has the power to simply exercise an overall discretion without an error, I would respectfully... my submission would be no, does this go that far? It's all interlinked. In fact section 44(1) is basically one sentence.

Court: I think it actually means the other way, even if there is an error the Chief Judge has a discretion whether or not to amend.

Mr Kahukiwa: Yes, I accept that, yes. I perhaps mistakenly understood that Your Honour was suggesting that you might have a discretion, notwithstanding no finding of error. The other legal point which I raised in the opening is this notion that where, in a civil matter, there is an allegation of fraud, that the general principle that my friend espoused in respect of the standard by which the allegation is tested, my submission is that in cases where fraud has been alleged the law appears to say that the standard is raised but within the balance of probabilities. How that works in practice, I've been thinking about that Your Honour and I'm not sure because it seems to then, as a matter of logic, take this [*inaudible word – coughing*], the standard if you like, towards the beyond reasonable doubt sort of standard which the Māori Appellate Court in *Tau* has said well, no, that's not the standard although they weren't... in the *Tau* Māori Appellate case they did not have this matter of an allegation of fraud in front of it.

The short point is that, in my submission, not only did my friends in their case have the onus firmly upon them to prove the error as is standard with any section 45 application, they have an additional burden, additional pressure, to prove what in effect is an allegation of fraud on those actors in 1962.

Now the evidence in my submission... oh, sorry, this case is essential one of fact and that relates to the two issues that are raised. To that extent, is this phrase "residents of Kennedy's Bay" capable of being read in a manner that is consistent with the provisions of section 439 which, of course, we say it does and, the other key question, did Mrs White consent.

In determining these matters, it's my respectful submission that the applicant's case has not revealed what we might colloquially call "the smoking gun". That's in relation to documents. We don't have the people here to call on, they're all passed away, so what is there? Now the best evidence rule what's next, documents. There are no additional documents, what's next inference from circumstances.

And we also have the challenge that the donor herself doesn't appear to have provided any, well at least any recorded testimony certainly in the former Court hearings and also to the Court. In my submission this means that the circumstances will be everything. This means that logical inference will be everything and it means that context will be everything. With

that in mind, it is submitted that the evidence will show and does show that "the residents of Kennedy Bay" has a legal meaning under section 439 because, as a matter of fact, Harataunga was and is, for all purposes, a Ngāti Porou enclave. It's possessed by Ngāti Porou and the reservation status, namely the meeting place, marae et cetera, it only has meaning to section 439 if it's for and by Māori. Otherwise, in my submission, it's not a Māori Reservation so my case is not to contend that point. My case is that, factually, "the residents of Kennedy Bay" fits within the contemplation of section 439 and subsection 3.

Court: So you're saying that the residents of Kenney Bay refer to the Ngāti Porou residents of Kennedy Bay?

Mr Kahukiwa: What I'm saying Your Honour is that 439 requires the class to be Māori unless, and I couldn't find the reference to this, but we of course have those possibilities under section 340 in today's terms and we have Māori Reservations for New Zealanders I think is the phrase.

Court: Yes.

Mr Kahukiwa: So under 439 I do not contest my friend's argument or interpretation of 439 that it must be for Māori and by Māori, I don't contest that. The whole layout of section 439, it starts off with "*land can be set aside for culturally significant sites for Māori*". It doesn't say it can be set aside for culturally significant sites for Pākehā or Hainamana or anyone else, it says for Māori. And as Eddie Durie said in the *Tauhara* case, the 439 reservation which stems from, I think it's 262 of the Native Land Court 1909 legislation, stems from one of the last vestiges of the Crown looking to protect Māori land for Māori use. I don't understand within that contemplation or that genesis that there's any room for it to be other than that.

Court: Well Mr Warren is saying that residents of Kennedy Bay include Pākehā so how can that provision or that Gazette Notice be correct or that recommendation by the Court?

Mr Kahukiwa: Because it can also mean Ngāti Porou. It could mean the Māori residents, that's why it works. That's why it works and, additionally, as a matter of tikanga, as Mr Harrison in his evidence said, the marae is for everyone. So I wonder if part of this case has kind of gotten a bit caught up in an issue which is not really the right issue. There seems to have been, in my humble submission, a bringing in of certain perhaps legal rights to do with trusts and beneficiaries and rules and those sorts of things when, at the end of the day, it is set aside as a marae. By its very nature it is inclusive.

Court: Where in any of the Court documents is there reference to, in terms of this application and in terms of the setting aside of this marae, reference to section 439 subsection 3? Section 439 is referred to.

Mr Kahukiwa: Yes. Um...

Court: I mean could we be arguing or could we be looking at perhaps section 439(12) which talks about setting aside a reservation, a Māori Reservation, for the benefit of people of New Zealand.

Mr Warren: Sir, can I just assist. In my original submissions I did raise that point and double checking that's what hasn't come through in the latest submissions and perhaps and you can double check, and no doubt my friend will, is whether subsection 12 was enforced as at 1962.

Court: Or was it section 440 then?

Mr Warren: It could well have been Sir. I'll have to double check.

Court: But, I mean, it had exactly the same effect.

Mr Warren: Yes and the point I made in my original submission was if that was the intention, then that ought to have been for the benefit of New Zealand, that ought to have been the order and in my view if that was...

Court: But your submission is that you can't have a marae for any one other than Māori is it not?

Mr Warren: Yes, unless if that provision was in force Sir, unless it was clearly for the benefit of the whole country and that certainly wasn't the application.

Court: Well what about this scenario and you'll be aware of it, where Pākehā own Māori land and, in terms of the applications under section 439 and the present legislation, those same owners can set up a Māori Reservation, which has happened, for the benefit of themselves and their whānau and their descendants who are Pākehā. Tell me how that fits?

Mr Warren: So, if I understand the law Sir, they would have to get around subsection 3 if that's still the subsection today that it must be for a class of Māori or owners.

Court: Or "owners", exactly.

Mr Warren: So they would tick that box absolutely?

Court: Yes.

Mr Warren: And the other option available to them, to set aside for the class of New Zealanders.

Court: So I guess my question is, which I put to both of you, there is clearly provision for setting aside a Māori reservation for a class of New Zealanders in terms of the legislation and that's why I go to this section and say where, in that section, is there specific reference to section 439(3)?

Mr Warren: Sir, if I'm correct in saying that subsection 12 wasn't in 439 then the order was made under 439, so it must comply with subsection 3. If it was made under 440 or that was the intention...

Court: Yes, it should have said that.

Mr Warren: ...it should have said that and therefore that's... well that's an error but that wasn't the basis of the application and I do think about that Sir as to whether that was what the Court was trying to do. I mean my submission is simply that in 1962, it was predominantly Māori. I mean Mr Winiata's evidence is clear on that but there were non Māori at the time. That definition is an error because it included albeit a few non Māori and the Act did not allow for that. That's where I say the error is and, of course, I know we have to focus it on that period.

Court: 1962, where did the interests of justice lie for Kennedy Bay?

Mr Warren: Good question Sir.

Court: Well that's at the heart of this application. That is at the heart of this application.

Mr Warren: But I think in terms of your discretion and powers under section 44 it's the interests of justice today, what's happened today, and the evidence before you has tried to paint a picture that there's been significant people locked out and I know there are other reasons for that. The fact that Mr Haereroa is resident in Hamilton he, by definition, is not a resident and not a beneficiary.

Court: Options were given to one of your witnesses to prevent that happening. She didn't like it.

Mr Warren: Sorry, what was the question Sir?

Court: I said an option was given to Ms Katipa that if this definition or this class for this reservation included along with the residents of Kennedy Bay, something along the lines that "and those that whakapapa to Ngā Hapū e Toru" and to list them.

Mr Warren: Yes and, in that question, were you envisaging non resident hapū wherever they reside?

Court: Absolutely.

Mr Warren: Would that be in breach of the current legislation, Sir, where subsection 3 still applies because that definition would include non Māori residents. Perhaps, and I'll need to take instructions, if the order of the Court was Māori residents of Kennedy's Bay, and I'll have to consider whether that was outside of the Ngā Hapū e Toru kaupapa and non resident Ngā Hapū e Toru, that may meet the interests of justice in this particular situation. Because I think my friends go on to say it's about being inclusive, and I don't want to give evidence from the bar, but all marae have situations where non Māori participate and contribute greatly. That's not unusual. Should they have the ability to vote on important things that may come up in the course of a marae's history, clearly the Act doesn't envisage that other than the situation that you described Sir where, if the owners are non Māori, they can set up a reservation under the law.

Court: Because sitting back and looking at this and I know that we haven't heard from Mr Kahukiwa's witnesses, but this needs to be sorted.

Whānau: Absolutely.

Court: You know, in the interests of everyone. In the interests of those that live in Gisborne, those that live up the coast, those that live in Kennedy Bay and everyone has said let us be inclusive, it would seem, but really you're not saying that are you?

Mr Warren: The evidence of Mr Harrison and Mr Haereroa was about the concept of manuhiri and people's place and that's come through in some of those authorities.

Court: Yes, I mean it's all about mana. Well it's a lot about mana, it's not all about mana.

Mr Warren: The whakapapa I think Mr Haereroa gave evidence about in terms of that tuku which is the starting point and I know there's historical debate about the origins et cetera, and I'm not here to solved that, but I mean obviously we've got evidence to hear and submissions to make. If you're right Sir, and I haven't picked up this point before to be honest and my friend tried to respond to it, if your jurisdiction is regardless of whether there is an omission or error or mistake and you can still meet the interests of justice in your discretion, then that's something I think the applicants or the applicant and his supporters may need to consider in what submission they make too.

Court: Well, have a look at it.

Mr Warren: I quickly tried to get my head around it Sir so...

Court: So if there's an error, was erroneous in fact or law because of an omission on the part of the Court or the Registrar or in the presentation of the facts to the Court or the Registrar, the Chief Judge can amend, cancel or amend an order or certificate or make another order or issue such certificate of confirmation which, in his opinion, is necessary in the interests of justice to remedy the mistake or the omission okay?

Mr Warren: The key word is there Sir the last three.

Court: To remedy, the mistake or the omission.

Mr Warren: I think that's what my friend was trying to say. I mean, I know what Your Honour is trying to do and it has found favour in the sense of the questions you've put. Obviously we haven't had a chance to have a great discussion and, no doubt, if there's a way that Your Honour can give effect to what you're sort of suggesting, subject to instructions...

Court: There have been many cases, in the past, where the Chief Judge has said "yes, there is an error but in the interests of justice I'm not going to do anything about it."

Mr Warren: Yes.

Court: It makes no sense. You, I'm not saying you but the particular applicants and parties need to sit down and sort it out and if the Chief Judge can make an order that will assist in building those bridges, then they do that or they have done that in the past. And I think looking at this and looking at the evidence and the submissions, this is a case which is calling for that.


Mr Warren: Yes. Well that's helpful Sir and, you know, no doubt we'll have a break at some point and that's an opportunity. I mean, I don't have many questions for the next two witnesses and then it's into submissions and no doubt... I mean, we've got until the end of the day I suppose and no doubt we have to talk to our respective clients [*inaudible words – coughing in background*].

Court: Alright, we'll go to Mr Kahukiwa and if he wishes to call his witnesses.

Mr Warren: Because we haven't heard Mr Kahukiwa's client's position on that opposition of course.

Court: No, no.

Mr Kahukiwa: Sir, my client's have simply approached this on the basis that they're responding to the section 45 application. I mean they actually indicate that things that are raised ought to be raised in another way. So my submission is don't... well, not don't but be hesitant around trying to contrive a process out of one that is not suited for it. My submission is dispose of the application in the usual way, hear from the parties the submissions. If, as Your Honour apprehends, there is something that needs to be done beyond that, then that's the way to go rather than... because my clients are of the view that this is not the right forum or process or procedure. There are other processes and procedures. The difficulty has been is that some of the allegations of the running of this marae might come under say the trustees' performance obligations. Some might come under mana



historical, which aren't anything to do with the Court but are the province of, you know, too difficult in this process to actually clearly weed out which goes with which. This process is about error, if there's an error. If there's not, the application is dismissed.

Court: And we might, I'm not saying we still have, we might still have the same issues arise in 10 years time. We might still have the same problems that we've heard about.

Mr Kahukiwa: More than likely but again...

Court: So, if it's more than likely, is it not better to try and arrive at a solution which assists both those residents in Kennedy Bay and those residents who descend from the original owner of this land E Ngā Hapū e Toru to try and sort it out?

Mr Kahukiwa: Mr McLeod's own statement suggests that these matters be run through the rūnanga for Ngāti Porou. That is an option that's put up so my clients aren't wilfully blind to this and aren't just simply here to be, you know, disregarding of what was at the heart of this, no. But I would be very reluctant to try and cobble something together in this procedure and more particularly today. I mean there are a whole lot of people that are affected by this marae and they need to be given proper opportunity which is why Mr McLeod suggests that the rūnanga runs our process of fairly ventilating these matters. Now, and in my submission, that must surely be the preference to any Court that tino rangatiratanga and mana dictate that the matters try to be resolved amongst the people first before a Court intervenes.

Court: Yes although I am Ngāti Porou on one side of me, and as are many of the people sitting in this room, but surely we're dealing with land that is not in the Ngāti Porou rohe?

Mr Kahukiwa: Um...

Court: Well we're not, you know, if we want to deal with facts. It may be owned predominantly or may have been owned by Ngāti Porou but that's not where it sits and there are historical reasons for it being owned by Ngāti Porou.

Mr Kahukiwa: Yes.

Court: Right, anyway...

Mr Kahukiwa: Okay.

Court: I declared my allegiances a long time ago.
[Laughter in Court]

Mr Kahukiwa: And we take no issue with that Your Honour as we've said. Okay, would Your Honour be prepared to...

Court: You were going to call some witnesses.

Mr Kahukiwa: Yes. Okay, I call Mr John Thornton McLeod.
[Court Clerk swears in Mr McLeod]
Mr McLeod, have you prepared a Brief of Evidence for this matter today?

John McLeod: Yes I have.

Mr Kahukiwa: And is it dated 15 August 2012?

John McLeod: Yes.

Mr Kahukiwa: Would you please take the Chief Judge through that statement. Just pausing, the witnesses in support would prefer to read their evidence Your Honour.

Court: Alright, thank you. Yes, thank you.

John McLeod: Kia ora, Your Honour, my name is John Thornton McLeod. I live at Kennedy's Bay, Harataunga. I'm a sitting trustee of the Harataunga Marae which is situated on Harataunga 2C1.

There are nine current trustees on our marae. Eight of us oppose this application. We, who oppose, do not accept that there was a Court error in 1962. We believe that Ngaropi White gave the land for a marae for the residents of Kennedy's Bay.

The application raises the matter of what Ngaropi intended for Harataunga 2C1. Attached and marked "A"... shall I read that or just read it at the end, the attached letters?

Mr Kahukiwa: Your Honour, there are these two attachments not made by the witness himself but are entered on the basis that they exist. The witness doesn't attest to the accuracy, otherwise it's simply I put it they exist. Would Your Honour like those to be read out?

Court: I've read them and I'm sure Mr Warren has read them. It's fine thank you.

John McLeod: Okay. Attached and marked "A" is a letter which I believe was signed by Mr George Thomas Woodward Hovell on 31 July 2009 and which I further believe is relevant to the matters at hand. I understand that it was submitted to the Māori Land Court in about 2009, at the time we were having major problems with the marae. Unfortunately Mr Hovell is no longer with us and is unable to speak directly to it.

Also attached and marked "B" is a letter that I believe was penned by Mr Wilson Bright on 25 August 2009. He is the only surviving trustee of the original trustees of our marae. For me this has relevance to Ngaropi's intentions for the land. Unfortunately, I understand that Mr Bright is too elderly to attend this hearing and speak to this letter.

I came to live in Kennedy Bay with my Aunty Kate, Keita Te Ngaro Ngapo, in 1959. I moved away for schooling and a four year stint in the Air Force. I returned in 1975 and have been here ever since.

In the 1950's and 1960's the school at Harataunga was the focal point for the community. There was a gathering place at the Ngapo Pā but that was limited more to the Ngapo whānau. The community wanted a marae that they could all be part of and use. The community always extended to mean and include our Ngāti Porou relatives living at Tuataewa. This is our Harataunga Marae today. It has been operated by the home people as a Ngāti Porou Marae since the whare kai went up in the early 1980's.

I just don't accept that 50 years ago there was an error of the Court and by other people involved in making our marae for the residents of Kennedy Bay. In particular, I knew Mr Richard (Dick) Roy Hovell. He was a good, honest and community person. He would help anybody in need.

I am not against having a proper debate about whether the marae beneficiaries should be changed in this present time and going forward. My father, Mr George McLeod, who has also passed, often said to me "not to chuck out the residents, you could add to it." I do not believe you build a house with somebody and when it's built, kick that somebody out.

I think that this matter should be taken up with the Te Rūnanga O Ngāti Porou ki Hauraki for consideration by a series of hui, inclusive of owners, residents and Ngāti Porou ki Hauraki and then for voting on. If the outcome is to amend, then that could be put to the Court.

Mr Kahukiwa: Mr McLeod, is there anything else that you would like to add to your evidence.

John McLeod: I couldn't sleep last night so I went through some papers and chucked my clothes out of the way and I come up with... and I'm glad I did because I've been looking for it for years, is the booklet that Paki put out for our opening of our marae. And also...

Mr Kahukiwa: Just pausing there Mr McLeod, would you like to add that to your evidence?

John McLeod: Yes I would.

Mr Kahukiwa: Sir, leave to admit the booklet that Mr McLeod has referred to?

Court: Yes. You talked about Paki, is that Paki Harrison?

John McLeod: Yes.

[Evidence handed to the bench]

And also, Your Honour, I also picked up a photocopy of the New Zealand Herald, November 20, 1990 and it shows a photo of Mat Te Moananui, Paki Harrison, George McLeod and Windy Harrison, Danny Maurio and Duane when they were doing the carving and there's some writing there and I just read here "*we wanted to establish a marae complex and for it to be for the whole community, not just Māori people*" says McLeod. And then I think there's another one in there where Paki says basically the same thing but there's the...

Mr Kahukiwa: Just pausing there Mr McLeod. Sir I seek leave to admit that as part of Mr McLeod's evidence, the New Zealand Herald article.

[Evidence handed to the bench]

Court: Thank you.

John McLeod: I've got another piece of paper here that I think will be helpful. It's from Parekura's research which I think he put out in about 1980 and he stated here and I'll read it "*The Harataunga 2C Block was set aside by the Māori Land Court as a Māori Reservation for the purpose of a meeting house, meeting place, sports and recreation ground for the use and benefit of all residents of Harataunga. At the Māori Land Court meeting held at Thames on 2 July 1962, it was agreed by the trustees of the marae, the families of Harataunga and sanctioned by the Māori Land Court that the name of the Harataunga 2C Block Reservation be called Heni Ngaropi. The first trustees of the Heni Ngaropi Marae were...*" I've just got that page Your Honour but that's his books. There are four volumes I think.

Unidentified Female Speaker: Five.

John McLeod: Five volumes for his treaty claim.

Mr Kahukiwa: Your Honour, I seek leave to add that to Mr McLeod's evidence.

Court: What was the date of that?

Mr Kahukiwa: What is the date of that text?

Unidentified Female Speaker: It's an extract.

Court: Well the extract?

John McLeod: Volume 2, Historical Report, chapter 7, Harataunga East land block history. It hasn't got a date on here but I seem to remember him giving it out about somewhere around 1980 or a bit before.

Mr Warren: And I don't have it at my fingertips Sir. I mean, we were counsel for Mr Parekura in the Wai 792 Claim. That report was filed as part of the Hauraki Tribunal Inquiry so it's a matter of public record.

Court: I was interested in the date for a particular reason.
[Discussion between Mr McLeod and whānau present]

Mr Warren: Well the hearings John, when were the hearings?

Court: 1990. The hearings were in early 2000.

Mr Warren: Early 2000, that's correct.

Court: So this research must have been done prior to that?

Mr Warren: Absolutely. When it was formally filed, I imagine it would have been some weeks out from the hearing.

Court: The reason I wanted to know that, is that your witness gave evidence that they weren't aware of this until 2007 so there might be an issue around that, mightn't there, when Parekura, who is her brother, had this information.

Mr Warren: Yes, an issue whether...

Court: At least maybe, well we're talking at least 10 years before.

Mr Warren: Yes.

Court: In fact, more like 20 years before.

Mr Warren: My recollection Sir, I mean I juniored on that matter and Judge Clark was counsel and I recall that the report being produced in the sort of weeks and months leading up to the hearing so... but we can confirm that Sir if that's helpful to the Court.

Court: Well it just goes to the evidence of your client that this issue wasn't before her whānau until 2007 when it clearly was before some of her whānau.

Mr Warren: Certainly before the tribunal, yes.

Court: And then that raises the next question.

Mr Warren: Yes Sir.

Court: Sorry, but this is an important point in relation to 45s as to the timing of an application when an issue or error, if that's the point being taken by your clients, comes first to their notice as to the delay and why.

Mr Warren: Delay in bringing the application...

Court: In bringing the application.

Mr Warren: As an assessment. It's in the interests of justice as to whether the Court can do anything about, even if it finds an error, that assessment Sir?

Court: Well, I guess, the simple question is why the delay. There are procedures around delay. The majority of cases that the Chief Judge deals with, talks about the ability of applicants before the Court if they don't agree with the decision or, if there is an error in the decision, there is provision for rehearing and appeals within a certain time frame. Clearly section 45 doesn't have any specific time frames but that does not mean that it can be simply left to lie with the knowledge that there might be an error. And then there's the provision that orders of the Court are binding and final if they've been in place for 10 years and clearly section 45 is an...

Mr Warren: An exception to that yes.

Court: ...exception to that but...

Mr Warren: Is still a factor.

Court: ...is still a factor.

Mr Warren: Yes. I probably accept that Sir and certainly when Ms Farquhar, when I raised that date with her this morning, certainly after the evidence was given, and I've just got a note from Ms Katipa that that is incorrect.

Court: What is incorrect?

Mr Warren: It should be 1997. Now, whether you wish her to give that under oath...

Court: Oh, I see, so not 2007, 1997?

Mr Warren: That's right.

Court: And that makes it even clearer, hopefully from your perspective, certainly from mine as to why this has been allowed to sit.

Mr Warren: Yes I suppose... I mean, there is a history to this in the sense of a redefinition application that was filed prior to our involvement. And then it became clear, during the course of that proceeding, that Judge Milroy was saying this sounds like a section 45 and that was the course of matters but I take the point. I mean, I'll reflect on that...

Court: And some submissions can be made.

Mr Warren: And if you need more submissions on whether that's an issue but I don't know whether you want that evidence now formally on the record Sir?

Court: No, no, that's fine. You accept that Mr Kahukiwa? I mean it can clearly be referenced to that particular report and...

Mr Warren: Absolutely and I might even reflect on that and file something as to actually when it became public and those sorts of things. Dean Katipa is the applicant. I don't know what his position on this particular issue was but...

Court: Thank you.

Mr Kahukiwa: Yes I accept that, Your Honour.

Court: Yes, sorry about that little sideline.

Mr Kahukiwa: Mr McLeod, anything else?

John McLeod: No, that's it.

Mr Kahukiwa: Okay, please remain for any questions from my friends and also the Chief Judge.

John McLeod: Thank you.

Court: Mr Warren?

Mr Warren: Thank you Sir. Tēnā koe Mr McLeod and thank you for your evidence.

John McLeod: Tēnā koe.

Mr Warren: Are you a descendant of Ngā Hapū e Toru?

John McLeod: Yes.

Mr Warren: And you have children?

John McLeod: Yes.

Mr Warren: Are they resident in Kennedy's Bay?

John McLeod: No.

Mr Warren: Do you accept the evidence of Winiata Harrison that there were some Pākehā living in Kennedy's Bay as at 1962?

John McLeod: Yes.

Mr Warren: When you say at paragraph 16 of your evidence, in reference to the marae that it's been operated by the home people as a Ngāti Porou Marae since the whare kai went up in the early 1980's, I'm just interested what did it operate as prior to the 1980's?

John McLeod: Well there weren't any buildings there.

Mr Warren: Right so it just lay dormant?

John McLeod: It just grew blackberries for quite a while.

Mr Warren: So then it becoming, in your words, a "Ngāti Porou Marae", what was the genesis for that? Was it the establishment of the whare kai or was it more to do with the land?

John McLeod: Well it's the people that are there. Our chief was Paki, Dr Paki Harrison, and we were all... even the old Pā was marked out Ngāti Porou so we were all Ngāti Porou. I'm totally Ngāti Porou apart from my Pākehā side. I'm totally Ngāti Porou and proud of it.

Mr Warren: So your connection to that marae is through your Ngāti Porou connections?

John McLeod: Yes that's right.

Mr Warren: Do you accept the evidence of Winiata Harrison and Beau Haereroa that some Ngā Hapū e Toru not resident feel alienated from the marae? Do you accept that evidence?

John McLeod: Well I can't speak for them but I would say, yes.

Mr Warren: Because you understand that that could happen?

John McLeod: Yes.

Mr Warren: Did you see the letter that the secretary of the Harataunga Marae trustees filed in the Court dated 23 November 2011?

John McLeod: Yes.

Mr Warren: Sir, that's document 16 of the bundle we filed. You're familiar with that letter Mr McLeod?

John McLeod: Yes.

Mr Warren: And that was filed on behalf of the Harataunga Marae trustees of which you're one?

John McLeod: That's right.

Mr Warren: So you confirm the contents of that letter?

John McLeod: It was just about writing in so that we could oppose the section 45 because we wrote in, opposed it and then the Court lady said you've got to have reasons. So Cam was given the... so Cam Hunter was given the job of doing it, just to write a few things of why.

Mr Warren: And you accept those reasons as outlined in the letter?

John McLeod: Sort of but it's a letter that... yes, I'll have to accept it because I was a trustee but I must admit it slipped past the radar if you like.

Mr Warren: Right so, yes, mistakes can be made. At paragraph 6 of that letter, the secretary, on behalf of the trustees, suggests that a way to alleviate this grievance may be to enfranchise all descendants of Heni Ngaropi wherever they happen to reside. You'd agree with that statement?

John McLeod: Yes.

Mr Warren: Because at paragraph 19 or 18 and 19, you're interested in having a proper debate about changing the beneficiary definition.

John McLeod: That's right.

Mr Warren: And you seem to have a concern about residents being "chucked out" of the marae for want of a better phrase. That's a concern of yours?

John McLeod: Of my father's and myself.

Mr Warren: And yourself.

John McLeod: Residents, yes, who put the buildings up.

Mr Warren: Yes. So if there's a way in which we can define the beneficiaries to ensure that everyone is included because as your secretary is saying, in his words, "*we want to ensure to alleviate grievances*" would you consider that if there was a way to ensure everyone was included?

John McLeod: Yes, I'd consider it as long as the ahikā folk of Kennedy Bay had control and we weren't going to get run from the coast.

Mr Warren: So that is a primary concern of yours being run by those domiciled on the East Coast?

John McLeod: Yes. I've seen where they brought buses in to do the voting so I don't want that to happen again.

Mr Warren: Yes. And when you say "ahikā" I suspect you're talking about Māori that uphold ahikā at Kennedy's Bay?

John McLeod: Yes.

Mr Warren: You take no issue with the genesis of the Ngā Hapū e Toru interest at Kennedy's Bay do you in terms of the tuku whenua?

John McLeod: I believe that there's an argument about whether all Ngāti Porou got it, got the tuku from Pare Te Putu and, as far as I'm concerned, I go by now. There are nine hapū of Ngāti Porou. Now why should you cut those ones out? What's going to happen if you win the claim for three hapū...

Mr Warren: What claim are we talking about?

John McLeod: Well I'm just saying that's what Parekura has started, his work for us okay?

Mr Warren: Yes.

John McLeod: So I couldn't really...

Mr Warren: So your motivation is not to cut anyone out, that's what you're saying?

John McLeod: No, no, no Ngāti Porou.

Mr Warren: I mean, you might have already answered this but I'll ask it anyway, do you accept the current definition of the reservation has that effect of cutting people out?

John McLeod: That's why I'm willing to talk and do it properly because my daughter can't vote. That's fair enough and that's a good example.

Mr Warren: Yes, yes.

John McLeod: But she is quite happy because she knew I was voting for her, for this initial stage.

Mr Warren: You've given the Court some evidence about who might be involved in having this discussion and I just want to explore that for a moment. So you're suggesting a series of hui taken up by Te Rūnanga o Ngāti Porou ki Hauraki, inclusive of owners, so here we're talking about the descendants of Heni Ngaropi White. Residents, you're talking here about ahikā Ngā Hapū e Toru residents.

John McLeod: They're all Ngāti Porou.

Mr Warren: Ngāti Porou but Māori, they're Māori?

John McLeod: Yes.

Court: And so I'm just interested in and you say Ngāti Porou ki Hauraki, so just explain that to me what does that envisage?

John McLeod: Ngāti Porou ki Hauraki is just the same as Ngāti Porou ki Harataunga, ki Mataora. It's what we are.

Mr Warren: So it is, I just want to be clear on this, is it those of Ngāti Porou descent who happen to reside in Hauraki?

John McLeod: That's right. That's not the way I wrote it.

Mr Warren: Right.

John McLeod: What I... can I say what I meant?

Mr Warren: Yes.

John McLeod: All Ngāti Porou to take that have got shares there, to come to these meetings, the meetings that... that's only a thought, you know, something to be built on.

Mr Warren: I accept that and thanks for clarifying that because I think we do need to be clear in light of some of the questions His Honour has had about this. So when you say Ngāti Porou ki Hauraki, you are saying that one class of people who should be involved in this discussion are those who have shares in Harataunga but may live let's say in Coromandel or Thames?

John McLeod: Mainly... oh, yes, but even the coast. It's just the way I wrote that.

Mr Warren: Those domiciled on the East Coast?

John McLeod: Yes. We've got land down there too but, you know, can I just say that we don't go down there and interfere in the marae or the land down there. You use our land, that was the old way.

Mr Warren: Yes.

John McLeod: We use your land up here. Don't interfere with us. We don't go down and interfere with them.

Mr Warren: So that seems to be a major grievance okay. Thank you for your answers, Mr McLeod.

John McLeod: Thank you.

Mr Warren: Thank you Sir.

Court: Kia ora, thank you. Any re-examination Mr Kahukiwa?

Mr Kahukiwa: No thank you Your Honour.

Court: Alright. Kia ora, thank you, I've got no questions.

John McLeod: Thank you.

Mr Kahukiwa: Sir, I'm now calling Iritekura Marie Dobbs.
[Court Clerk swears in Ms Dobbs]
Kia ora Marie.

Marie Dobbs: Kia ora.

Mr Kahukiwa: Have you prepared a Brief of Evidence for this proceeding today?

Marie Dobbs: Yes I have.

Mr Kahukiwa: And is it dated 15 August 2012?

Marie Dobbs: Yes.

Mr Kahukiwa: Could you please take the Chief Judge through your statement?

Marie Dobbs: My name is Iritekura Marie Dobbs. I was born in 1934. I am a current trustee of the Harataunga Marae. I am also the treasurer. I am in no doubt, in the end, Ngaropi agreed for this land to be used as a marae by the residents of Kennedy's Bay. On this aspect I have formerly submitted a personal statement to the Māori Land Court in respect of Harataunga 2C1. This was at the time when we were having troubles with our marae. That statement is attached herewith and marked "A". I will read it. I am the youngest daughter of Maku Hale and Riria Harrison. Whakapapa on my mother's side is as follows. Iritekura, Ahinariki = Tutaepa, Aporo Hikitapua = Mere Ngawaka, Mereana Tauke = Frank Harrison, Riria Harrison = Maku Hale, Marie Hale = Harold Dobbs. My parents had a close association with Heni Ngaropi White which extended back and prior to 1922, because she named my fourth brother who was born in Waipiro Bay on 18 April 1922. His name was Tawai Noa Takahi o te Rangi, who eventually became known as Tom. Mrs White owned property in Harataunga including the block known as Harataunga 2C1 which she had gifted to the people of Kennedy Bay for the purpose of a marae. On one of her occasional visits to Kennedy Bay, when she usually stayed with my mother, Mrs White made it clear to us, my husband Harold, Tom and myself, that she was disappointed at the lack of progress regarding the marae and was contemplating giving Harataunga 2C1 to Tom. Eventually she agreed not to change the status of the land providing we assured her that we would do all we could towards getting a building on the land. There was no mention of Ngā Hapū e Toru. Mrs White stated that the marae would serve the people of Harataunga, both Pākehā and Māori. Fundraising became a priority. We were a totally united community focused solely on building a marae. We were fortunate at the time, in the 1970s, that we had a Pākehā couple, Peter and Yvonne Hutchinson, who resided in Kennedy Bay who kept us motivated. In conclusion I would like to say how saddened I am that the request to change the status of the marae has created such discord among the families in Harataunga. The hundreds of people, many of whom are Pākehā, like Helen Mason who gave \$10,000 towards the wharenuī fund, and who ran pottery making classes for the rangatahi of the marae to make vessels for use in the kauta. Many who have helped financially over the years will feel excluded because they do not whakapapa to Ngā Hapū e Toru.

Mr Kahukiwa: Please continue with the front page of your brief.

Marie Dobbs: I would like to add the following statements to that letter. As I have mentioned, it recalls a conversation involving Ngaropi at our house. I believe that this conversation took place in the late 1960's. Ngaropi was frustrated with the lack of progress. In that same conversation, she made me and others give our word that we would work towards getting a building up. We gave her our word. I believe that her main purpose for visiting Harataunga was to deal with her land interests there.

Our lawyer, Mr Kahukiwa, has shown me a copy of the applicant's document number 5. It is a petition made in about 1962 and which was also sent to the Court. My mother is recorded as supporting the desire to establish a marae for the residents of Kennedy Bay.

Kennedy Bay, as a community catchment, has to my knowledge always included our Ngāti Porou people of Tuatēawa. I have prepared a list of residents who are living in that community catchment today. It is attached marked "B".

I have endeavoured to indicate the status of the people who live at Kennedy Bay as either Ngāti Porou or resident, meaning non Ngāti Porou. I have included their names and addresses.

Of the Pākehā or non Ngāti Porou who participate in our marae, by far the majority are those who have married in. Other Pākehā now have minimal participation. For instance, Paul Schubert's parents, who have since passed away, were active in the 1960's but he has not been.

And that's the end of that.

Mr Kahukiwa: Thank you Mrs Dobbs. Please remain for any questions from my friend.

Court: Mr Warren?

Mr Warren: Tēnā koe Mrs Dobbs.

Marie Dobbs: Kia ora.

Mr Warren: And thank you for your evidence. Can I firstly take you to your letter that you attached and marked "A" in your statement of evidence?

Marie Dobbs: Yes.

Mr Warren: I was just interested in your last sentence there "*Many who have helped financially over the years will feel excluded because they do not whakapapa to Ngā Hapū e Toru*". Are you talking here about the Pākehā residents of Kennedy's Bay?

Marie Dobbs: Yes.

Mr Warren: Yes. Do you think that they contributed because they had an order of the Court that residents were the beneficiaries? Do you really think that's the real reason why Pākehā contributed to the construction of the marae?

Marie Dobbs: Yes I think so. I think they understood that they would be welcomed and, you know, included as part of the marae whānau.

Mr Warren: And do you think if they were subsequently excluded that they would no longer wish to participate?

Marie Dobbs: Probably I think they would not feel comfortable.

Mr Warren: You talk about Hine Ngaropi visiting and we've heard evidence today that she spoke Māori predominantly. Do you speak te reo Māori?

Marie Dobbs: A little.

Mr Warren: Proficiently?

Marie Dobbs: No.

Mr Warren: And your letter confirms, very clearly, that her intention for the marae was to serve the people of Harataunga, both Pākehā and Māori. You're very clear about that?

Marie Dobbs: Yes.

Mr Warren: Does it necessary follow that both Māori and Pākehā have to be the beneficiaries of the marae in order for them to participate?

Marie Dobbs: Have to be beneficiaries, I don't think so, no.

Mr Warren: So they can still participate even though they're not beneficiaries?

Marie Dobbs: Yes, well they did.

Mr Warren: Sorry?

Marie Dobbs: They did participate...

Mr Warren: Yes, yes.

Marie Dobbs: ...in all our fundraising efforts, hugely.

Mr Warren: The document that Mr Kahukiwa showed you, which is document 5 in the bundle of documents, do you accept that Heni Ngaropi was not a signature to that partition?

Marie Dobbs: Can you repeat that please?

Mr Warren: Do you accept that Heni Ngaropi was not a signature to that partition?

Marie Dobbs: Yes.

Mr Warren: Just now turning finally to your attachment "B" and helpfully you've set out a list of residents of Kennedy's Bay and I think you've already conceded that it, perhaps, won't be a hundred percent accurate but you've done the best you can do. Is that fair to say?

Marie Dobbs: Pardon me?

Mr Warren: It's not a hundred percent accurate this list but you've done the best you can?

Marie Dobbs: Yes I would say-so, yes.

Mr Warren: Just so I understand the table, so when you say Ngāti Porou 56%, is that Ngā Hapū e Toru people?

Marie Dobbs: Not entirely.

Mr Warren: Or not entirely?

Marie Dobbs: Not entirely no.

Mr Warren: And when we look at residents, and you've got a number of 47 @ 44% of the overall residency, does that include Pākehā?

Marie Dobbs: Yes.

Mr Warren: And would include other Māori who are not Ngāti Porou?

Marie Dobbs: Yes.

Mr Warren: And you say that Tuataewa, where four of the residents reside, is within what you understood was Kennedy's Bay?

Marie Dobbs: Yes well those people attended the Kennedy's Bay school, those children.

Mr Warren: Yes.

Marie Dobbs: They participated in, you know, supporting the marae all the way, all the way through.

Mr Warren: So are those the factors you took into account in confirming that they come within that definition of "residents of Kennedy's Bay?"

Marie Dobbs: They have been living in the area for many years so they would be ahikāroa.

Mr Warren: Yes.

Marie Dobbs: No doubt about it.

Mr Warren: Would that be the same for people who perhaps lived further afield from Kennedy's Bay but continue to have a connection be it through whānau, tangihanga, hui, land meetings and an interest in land there, would you consider them a resident under your definition or having a right there?

Marie Dobbs: They may have a right there but if they don't reside there, I wouldn't say that they could be classed as residents.

Mr Warren: Or, I suppose, it wasn't clearing my question. Would you accept them as beneficiaries of the marae?

Marie Dobbs: Yes I would.

Mr Warren: Yes. Thank you for your evidence.

Marie Dobbs: Thank you.

Court: Kia ora, thank you. I have no questions Mrs Dobbs.

Mr Kahukiwa: Sir that concludes the evidence in support of the respondent's case.

Court: Yes.

Mr Kahukiwa: Just conferring with my friend, if Your Honour pleases, we would be in a position to close our cases today.

Court: Right. Mr Warren, I think I heard you say you wouldn't mind a break?

Mr Warren: Oh, did you hear that matter coming out that loudly Sir?

Court: I did hear it.

Mr Warren: I just want to reflect on some of the discussion we had earlier.

Court: How long do you need?

Court: 15 minutes?

Court: Alright.

Mr Warren: And then we will close at that point or let you know where we've got to.

Court: Alright, thank you.

Mr Warren: Thank you Sir.

Court: We start again at 2:00 pm

[Court is adjourned at 1:46 pm]

[Court is reconvened at 2:13 pm]

Court: Yes Mr Warren?

Mr Warren: Judge, we're going to make closing submissions now. My friend is going to lead off and I'll follow, and that is the end of our day.

Court: Alright, thank you. Mr Kahukiwa?

Mr Kahukiwa: Tēnā koe Sir. Sir, in closing my client's case, I'd like to start with this proposition. It's sometimes easier to start by defining what simply is not, before defining what it is and this case is not about the administration of the marae. It's not about its workability or unworkability. It's not about who is benefiting today and who isn't. It isn't about voting rights. It isn't about what is preferred. Now it is filed under section 45, it is therefore about error.

The matters mentioned, in my submission, are therefore irrelevant to the case at hand. In my submission, it's not just about any error. This jurisdiction demands that there is, in the language of the *Raroa* case a patent defect. It demands that such a defect was committed by the Court and which justice demands is so wrong that it cannot be allowed to continue, it must be put right.

For this case the error is one or two that was alleged to have been committed some 50 years ago but, in my submission, the allegations have gone further. The application has effectively alleged that two Ngāti Porou men of this community defrauded the landowner, Mrs White, and mislead the Court. In my submission that is the net effect of the way in which the application is framed.

Now the applicant says that this case is based on two propositions. First, that Mrs White, the donor, did not know anything about the 1962 Court recommendation setting aside her land as a marae for the residents of Kennedy Bay. This, they say, is based on the Court's own record which is absent any record, from her or to her, evidencing such knowledge. But they go further and they state absolutely, she just didn't know.

Secondly, they say that, what they know of their kuia, she would never have agreed to such a thing and they've taken Your Honour through various implications for that, which amount to a whole lot of raruraru for them.

In my submission, the trouble is with these propositions, is that neither of them have been proved. In my submission the contrary has occurred. It is however accepted in my submission, as a matter of law, that the owner's consent was required. In my submission it's axiomatic that a reservation could not be set aside, for instance, behind an owner's back. However, it is my submission that, as consent under section 439 has no prescription, the form in which that consent manifests, in my submission, can be widely drawn.

It is submitted that a range of circumstances and inferences can combine and corroborate to evidence what is tantamount to consent. This will include approval conveyed by agents and perhaps more importantly, will include the subsequent conduct of the owner and other people around her. In fact, Your Honour, the law does know of something which could be called the appearance of consent. The obvious one is ostensible authority so it's not an unknown proposition at law.

In this case the applicant asserts that, as a matter of fact, Mrs White did not know anything about the recommendation made by the Court in 1962 or the gazettal that followed or the activities that occurred in reliance on the same. In this way, it is my submission that the applicant needs to prove no knowledge, and it would be utterly no knowledge, on the basis that without knowledge consent, as a matter of logic, could not have been given. In my submission, this is no small task.

In my submission the evidence establishes that instead Mrs White was informed, in a range of ways, to the extent that one can fairly infer that she must have had sufficient knowledge of what was going on. The evidence certainly does not fairly lead one to infer that she was completely and utterly ignorant, as the applicant's case might have you believe, in order to maintain the line that her consent was not given.

In my submission, here are the key facts which support that submission. While she principally lived on the east coast, she visited Harataunga periodically and she often stayed with Mrs Dobbs' parents. She was then, albeit minimally, involved in Harataunga. In 1954, what the records show is that she desired to set aside two acres of her land for a marae and so there's documents one and two, in the applicant's bundle, that show that intention. In my submission, in doing so, it can be inferred that the donor would benefit from such a gift. She'd contribute to that community, she would be commemorated. A mechanical benefit would be that she wouldn't have to pay rates and, ultimately, the land would not be alienated.

In 1955 the Court sat at Kennedy Bay and while hearing, the Ngapo whānau traversed a matter of another marae there which, one presumes, was as a result of the donor's 1954 application. In my submission it's material that the Court, at that time, noted that Harataunga 2C1 will be recommended for a marae for all of district. It is submitted that this appears to be as a result of the 1955 Court's interest in recommending a marae for the people of Kennedy Bay.

Nothing much appears to have happened after that until the middle of 1962 when there was a public meeting at the school hall. It resolved to establish a marae at Harataunga for the residents of Kennedy Bay. While Mrs White does not appear to have been there, included in the attendance list was Mrs Dobbs' mother whom, again, was close with the donor which, incidentally, Your Honour doesn't appear to have been refuted. One can infer that Mrs Hale told Mrs White what was occurring. It's reasonable to infer that. One might also infer that the meeting only proceeded because Mrs White had already indicated that her land could be used as a marae by the residents, otherwise why would they convene a public meeting and resolve on such initiative?

It is submitted that it seems too farfetched to infer that such a meeting was covertly designed to go behind the donor's back. The evidence does not support such an inference. It has no features of being a clandestine plot Your Honour. Again it was public. The donor's best friend was there. A copy of the petition was openly lodged with the Court. It could've easily been obtained by Mrs White from an enquiry to the Court. We don't know whether she did or not but it was there.

By the end of June, another meeting had convened and a tribal committee and trustees for the marae had been selected. Again, a record of that hui was made available to the Court, and that's document six of the applicant's bundle. Again, that was done in an open way and, again, was able to be enquired into by Mrs White. It is not a stretch to infer that she was informed about these appointments. Subsequently Mr Hovell, Mr Richard Hovell, submitted the application for recommendation for a Māori reservation to the Court. In my submission, it's material that he corresponded with Mr Dye, the Deputy Registrar.

On 2 July 1962 the chair of this community initiative Mr Richard Hovell, a resident Ngāti Porou Māori, fronted his application at the Court, public Court. He was accompanied by Mr J Bright, another resident Ngāti Porou Māori. Mr Dye, the Deputy Registrar of the Court, was also present. In my submission, there is a continuity of actors. Mr Dye had obviously received the minutes of the public meeting supporting the initiative. Mr Hovell, on oath, informed the Court that Mrs White both knew and approved the application which was for a meeting place and sports ground for the residents of Kennedy Bay. He also affirmed that they would meet the survey costs. In my submission, on the strength of that factual matrix, the Court made the recommendation. No error there.

In the late 1960's, the evidence showed that the donor had become anxious at the lack of progress. The evidence indicates that she was prepared to revoke her gift. So this was the meeting at Mrs Dobbs' parents' house where Mrs Dobbs, as you recall Your Honour, remembers that Mrs White wanted progress. She wanted a marae to serve the people of Harataunga, both Māori and Pākehā. There is also, at this time, there's the meeting at the Court. Your Honour, while the evidence of Mr Harrison conflicts somewhat with the statement of Mr George Hovell, what there appears to be no dispute over is that the donor, Mrs White, did know about the reservation, this is in the late 60's, and was present at the

Court. In my submission that must overrule the evidence presented in support of the application which is to the contrary.

Indeed, my submission is that, again, there was another prime opportunity for Mrs White, for Ngaropi, to dispute or challenge the residents of Kennedy Bay at that meeting or at that time. She's at the Court. She's said to have told Mr Harrison it's for the three hāpu. The opportunity was there to go and check it. The Court record shows no such enquiry or dispute or objection.

It is fair and available and open to Your Honour, on those facts, that the meeting indicated that essentially Mrs White had agreed. By the late 1960's, she had affirmed her agreement. Thereafter, for say two to three years subsequent, in accordance with the Court record and the evidence, Mrs White did nothing. She did not revoke her gift, she did not go to the Court to challenge the designation, she does not appear to have gone to the Court to even enquire into the designation of her land and she didn't pursue her 1954 application notwithstanding it is not linked. By implication, my submission is she abandoned that application. She does not appear to have told her family that she was unhappy. Rather, in my submission, there's been speculation that she ought to have been unhappy but nothing beyond that in my respectful submission.

Pragmatically, at the point that the land became legally vested in the trustees, it would've followed that there would've been no rates payable by Mrs White. In that respect she would have no longer received and I'm presuming there was rates notice or notices to pay rates, and that's for a period of nine years until her death which, in my submission, is not an insignificant period of time. That omission, not getting her rates notices, in my submission would've affirmed for her that the land was being used as a marae. She did nothing. The correct inference, in my submission, is that she was content. The partition had been made, the reservation for the residents set aside and the survey paid for. It has all the hallmarks of an appearance of consent. It is submitted that the applicant's contention that she did not know and thus could not have consented is not available. It's simply not available in this factual matrix Your Honour.

In reliance on Mrs White's quiet, the trustees and everyone else at Harataunga then pursued the establishment of the marae with vigour until the first building went up in the early 1980's, then followed by the meeting house. They acted in a way that was consistent with the reservation. Of note the evidence are the fundraising notices of 1980 and 1987, so those are the notices that I put to Mr Harrison. The 1980 letter shows that it was addressed to a friend, by Mr Harrison, and states "*you would not want your house unfurnished*". The 87 letter is addressed to a Mr Nightingale. It seeks financial assistance and notes "*that help is sought for the important marae project that very much will benefit us all*". In my submission, this shows a seamless commitment to the kaupapa that the marae was operating for a more extensive beneficiary class than the applicant contends. It is submitted that on the basis of that reliance it is arguable that, as a result, a propriety estoppel of sorts arises. And in my submission, this is by way of a consideration for the gift. People acted on the promise and did so over a very protracted period of time.

In my submission, there is also evidence that Mrs White was active in terms of her land shares. The transaction that I traversed with Ms Nepe, it's the one in 1966 that's an example. It shows that she wasn't unfamiliar with what you might call state land administration.

I'd also make the submission, Your Honour, at the risk of belabouring the point, there has been no objection to the actions of the Court until this application was filed in 2009 which, as Your Honour has calculated, is an elapse of about 47 years. And this is in spite of or despite a number of applications to the Court to renew trustees over the years. There's also been the ceremonial occasion of the opening of the whare. There's the public newspaper article in 1990 which, in my submission, affirmed the communitiness or district wideness intended by the reservation but the evidence doesn't disclose any issue.

We also had the reference to Mr Parekura White's book provided by Mr McLeod written, perhaps, some time in the mid to late 90's. No issue, no concern. Respectfully one can't help but adduce that the elapse of that time of some five decades is tantamount to consent or, at the very least, the appearance of consent. I would qualify that submission to say that,

in my submission, the key period is actually 1962-71 and that's the period of the remainder of the life of the donor. If anyone was to make an objection, it was Ngaropi in my submission. The third point is that the phrase "the residents of Kennedy Bay" is entirely capable of being read within the parameters of the Act. It is submitted that to suggest otherwise is absurd. An ordinary reading of those words "the residents of Kennedy Bay" is capable of just meaning the Māori residents. And the evidence has disclosed that there have been many there and in my submission again, since Harataunga ultimately is a Ngāti Porou enclave, indeed my friends appear to have acknowledged this possibility but have disregarded it.

What my friends appear to say is that the Court failed to make that clear, and this is in reference to subs of counsel for the applicant, 9 August, paragraph 26. My submission is that the lack of precision in the form of the recommendation, if that's what it is, I'm not conceding that but, if that's the argument, my submission is that that will not satisfy the type of error that is contemplated under section 45. It must be substantive. In any event, I don't understand that the applicant is actually searching or seeking that type of amendment ultimately to the reservation. It seems to me that that is simply put up as an argument to refute my client's case.

For completeness and as a supplementary point, it is submitted that the manner in which the trust is administered for that class by the trustees, vis-a-vis the reservation, is another matter and ought not to be confused with the justiciability of the phrase itself.

With respect the applicant's case on occasion alleges error, not because of what occurred in 1962 but because of the way in which he and his supporters perceive the way in which the marae has been run. Respectfully, that's altogether a different matter and has nothing to do with any error on the part of the Court.

At the end of the day, it is submitted that the applicant's case has simply failed to prove any of the propositions contended. In common lawyers parlance, failed to discharge the onus that is upon the applicant as a matter of law.

There is not one shred of evidence that Mr Hovell and/or Mr Bright defrauded Mrs White or swindled her or went behind her back, there's not one shred of evidence. And, again, that's what would need to have been proven for this application to succeed. And this is on the basis of the maxim that fraud vitiates consent because that's what you have to prove Your Honour. You'd have to say that your argument, there was no consent, is reinforced by the fact that someone was actually doing something in your stead which is what you didn't want them to do. No evidence.

It is mentioned, in opening, the law to prove that, as it should be, is a higher degree of certainty or probability because of the nature of that allegation. It is respectfully submitted that, on this plank of the applicant's case, he must fail.

Two final points, my respectful submission is that Ms Nepe's report is not one made by the Registrar and is therefore outside of the scope of rule 87. To that extent my submission would be that it has no weight in terms of the Act because there is a critical ingredient missing which is that the rule 87 reports are to be prepared by the Registrar. It wasn't in this case. In my submission, the report ought to have no weight.

Those are my submissions Your Honour.

Court: Thank you Mr Kahukiwa.

Mr Kahukiwa: Kia ora.

Court: Mr Warren?

Mr Warren: Sir, I've prepared a synopsis of the written submissions. *[Evidence handed to the bench.]* I'm not sure how well I'll stick to them Sir but, certainly, just want to have the highlights.

Just a couple of preliminary responses to my friend's submission, starting with his final point about the status of Ms Nepe's report. She gave evidence Sir, under oath, and was cross examined. My friend's line of questioning certainly pinpointed her experience and expertise,

and outlined exactly what she did. Now whether that report is technically not in line with the rules of the Court, I don't think it's fatal in terms of the Court relying on that evidence given what transpired. Today that would be my submission on that point Sir.

Court: Thank you.

Mr Warren: It is interesting my friend didn't touch upon the evidence of John McLeod a lot and particularly his responses to some of the questions in line with where you were heading Sir and I just really want to start off by summarising. It probably goes to the interests of justice question a little bit back to front but I think it's a good starting point in terms of getting to the nub of this issue.

Certainly, in the break Sir, I took instructions and certainly the applicant and the supporters are in the space Sir of wanting resolution and for my friend to say that this issue has only just been filed, that may be correct. But this has been an ongoing issue for a number of years and you heard the evidence of Mr Haereroa about the issues that took place, during the course of the Tribunal hearings, all related to the issue around the marae and who should control it and have rights there.

Mr McLeod accepted that there needs to be discussion around a new definition and that it should not include Pākehā residents or non Māori residents. He accepted that point. He said it should include Ngā Hapū e Toru non resident. Where we differ from the applicant and his evidence is whether Ngāti Porou people who are not Ngā Hapū e Toru, whether they should benefit from the marae but, if I understood his responses, that was the only point in contention in regards to his evidence in opposition to the application.

And I think that that is persuasive and instructive in terms of if you get to that question Sir, of what is in the best interest for all parties before you. My friend talks a lot about context, and certainly there is a context to this back from the 1850's through to the Māori Land Court applications in the fifties and sixties through to today, and my submission is that ought to be taken into account when considering whether the Court exercises its discretion in this regard and bring resolution to the issue.

Sir if I could now turn to the question of, I mean, the applicant's position on the errors and mistakes. Before I do that, my friend he didn't raise in his submissions but I think, for completeness, I'll raise it. He's raised, in his written submissions, whether you have jurisdiction to set aside an order that basically made a recommendation in 1962 to set aside land as a reservation because, ultimately, the decision rests with the Governor General under the legislation. We file some case on that Sir. We think it's on point in the sense the Court sees it as an order and I think practically, if the legislature envisaged that, you wouldn't have jurisdiction in regard to this type of application. It would have made it quite clear but my friend hasn't picked it up in his oral submissions today.

The first issue Sir, it is a legal one and it's the issue around whether the Court got it right in setting aside this land for the residents of Kennedy's Bay and whether the Court had jurisdiction to do that under the legislation of the time. And we say Sir that the order certainly lacks certainty and whilst my friend says we need to focus in on the situation as it was in 1962, and to some extent I accept that, but certainly isn't it cause in effect if an error is made but has no effect, then there's no need for an issue to be raised. But the effect here is the fact that, as at 1962, there were non Māori residents. That was accepted by both Mr McLeod and the evidence of Mr Harrison.

Then, of course, over time the demographics have changed as, in my submission, would have been reasonably foreseeable and, given the nature of what the Court has been asked to do on a section 439 application and the principles that Her Honour Judge Fox set out in assessing what are the key principles under the 53 Act, my submission the Court ought to have been more prudent in assessing whether that definition provided legal certainty to all that may be affected by it. And that is really the point of that legal issue as to whether the Court had jurisdiction and Sir, at paragraph 6, I do set out those principles. You'll be well familiar with them and I don't propose to go through those. But they are obstructive in the

sense that this is the application before the Court and, of course, the Judge did not have the owner affected in front of him at the time and I'll come to that point in terms of consent. Sir if I can turn you to paragraph 10 on page 3 as I think I've made the point around the legal issue and it really comes back to *[sounds like]* this cause and effect. In my submission, the evidence filed by the respondents highlights the level of uncertainty that was created by the 1962 order because you had evidence today that they are confused as to whether Tuatēawa is part of Kennedy's Bay or not and you've got conflicting evidence. You've got the secretary of the trust saying today that oh, we want to include our whanaunga in Coromandel. That's why I say Sir the order lacks certainty and clarity at law because of section 439(3) where it says it must be for a class of Māori. Now technology has allowed me to double check that issue around whether the Court had the power, as it does now, to set aside a reservation for the benefit of all New Zealanders. That and this is through an email Sir, I need to double check this, that wasn't available until the Māori Purposes Act some years later that particular provision. It was a new subsection 12 of section 439 as I understand. I'm happy to double check that Sir and file something if necessary.

So even if, as I've said in my prior submissions, that that's what the Court was thinking, the point is if I'm right in saying that that provision did not exist in 1962, then it must have... it ought to have taken into account subsection 3. It had to be for a class of Māori and I say it's very uncertain because there were non Māori and we've had evidence of that undisputed. Sir issue 2 on page 3, that's where we get into the issue of consent and the key issue there, could the Court in 1962 make an order setting aside land for the purposes of a reservation without the consent of the owner of the land? If not, did the Court have the consent of Heni Ngaropi? So I think it's a trite but obvious point that consent is necessary and the key issue here is what is the form of consent necessary for this type of application? And, in my submission, it must be seen in the context of that fact, what is this? This is an application where a person is effectively transferring her rights in land for the benefit of other people and I think the principles outlined by Judge Fox capture those types of principles that must be taken into account when the Court exercises its discretion. And I say it's a matter of natural justice Sir where you've got an application filed by someone other than the owner.

Now that may not be unusual in 1962 and the key question for the Court is, does the owner know about it and consent? This has to be looked at in the context of a prior application by the owner, Heni Ngaropi, in 1954 for a different class of owners and we don't know what happened. We don't know what happened on the evidence of Mrs Nepe but that ought to, in my submission, been a red flag for the Court and it doesn't seem to have come through in the minutes of that hearing what has happened to that prior application. And we know she wasn't at the partition hearing so I think the Court had that flag, a prior application for a different class, an application filed by somebody else. Yes, he was on oath and I'm not sure whether the evidence we've filed, the submissions we've made have said Mr Hovell was misleading the Court and I can understand why my friend has gone there.

The evidence is quite clear, in my submission Sir, that Heni Ngaropi wanted a marae. That was her motivation. Whether she was a detail person, well we don't know whether she asked for the order. What we do know from the Court records Sir, from Ms Nepe's searches, is that there's no evidence that she received notice and we know she wasn't there. In my submission what's the logical conclusion of that, you're not there.

My friend was arguing through questioning and submissions that she went to all the Court hearings. Well she wasn't at the most critical one and I think that is instructive in regards to looking at whether the Court had enough red flags to pause and say thank you Mr Hovell, we need to call in Heni Ngaropi to satisfy ourselves that justice is being served in light of the nature of the application. And, of course, we know what's happened since.

We know there was a meeting outside the Court where Heni Ngaropi was saying to Winiata Harrison and others, I want the marae built. So she was still actively involved. Did she know what the definition of the reservation was, no one really knows. All we're saying is that others in her whānau didn't. I mean, that's the best we can say in that regard and they've given evidence on that acknowledging there were date issues around Parekura White's

evidence, and they may need to be resolved Sir, and we're happy to file that evidence to confirm exactly when that was to clarify that point.

We filed evidence Sir about the tuku whenua and there wasn't evidence before the Court in 1962 about that but when you're looking at the context in terms of the chronology of events and that was the basis of the interest there, the tuku that translated into an application in 1954, and people are now still talking about that's the basis of the interest. Mr McLeod has a different view and says it's nine hapū of Ngāti Porou but you've got the Tribunal report in front of you and that makes some comments about that.

So I don't think we are saying Sir that Mr Hovell misled or fraudulently gave evidence but I'm asking the Court to look at that context as to why Heni Ngaropi wasn't in attendance and whether the Court ought to have adjourned things to allow direct evidence given the nature of the application. And therein lies, in my submission, the error in this context.

Sir from page 5 and it's outlined in more detail in the full submission, I've looked at the presumptions and you've made it very clear what the test is and it's well settled and helpful. Save to say that we think there is a clear defect in regards to the consent issue on natural justice and in regards to the lack of certainty around the Court Order setting aside for the residents of Kennedy's Bay.

Sir, if you accept there is an error or mistake then we turn to the issue of what's in the interests of justice and we have had a good discussion already on that point. My instructions Sir are that the original intention was for Ngā Hapū e Toru. That was the original application. That is what the order ought to be amended to and I come back to the answers to the questions I put to Mr McLeod that the parties aren't too far off. The only area of contention is around whether Māori who are non Ngā Hapū e Toru, who are resident in Kenney's Bay, ought to be included in any new definition to bring justice to the issue.

Sir, if I move to paragraph 28 of the synopsis, if the Court is minded to exercise its jurisdiction, my submission is that an amended order, in line with the original application of Heni Ngaropi, would have the following effects. It would reflect, in my submission, the wishes of the owner of the land, remove the ability for non Māori to have a say in an important Māori institution which, we submit, cannot have been the true intention of any of the parties to the application including Mr Hovell and the Court. And the point there is Sir, is the law did not allow it and still does not allow it other than in those exceptions that we talked about earlier.

My submission is that an amended order, in line with what we're suggesting, fits well with the historical evidence accepted by the Tribunal that the tuku whenua in 1852 was made to Ngā Hapū e Toru, of which the land in Harataunga was a part. It would be in line with current statutory provisions and importantly the preamble and principles of the Act. This would involve and include Ngā Hapū e Toru wherever they reside, something Mr McLeod accepted. My submission being in line with tikanga and whakapapa are the key points that Mr Haereroa and Mr Harrison made, continuing to include those Māori who are residents at Kennedy's Bay who whakapapa to Ngā Hapū e Toru so as to ensure that those who have maintained elements of ahikāroa remain constant.

So that brings justice to the issues that have been raised by those in opposition in my submission. And I think importantly ensuring that those who move away from Kennedy's Bay in the future for whatever reason and whakapapa to Ngā Hapū e Toru, will continue to have standing and a meaningful interest in relation to their marae, Rakairoa Marae. And the evidence of Mr McLeod clearly put it Sir that his daughter is not a beneficiary of the marae, it didn't make sense to him.

Sir I don't need to go through the next few paragraphs, if I can just go to the conclusion of this particular point. The applicant has submitted evidence from, basically, the main kaumātua of the marae that the current definition of beneficiaries is against tikanga Māori and whakapapa. Also submitted evidence from a non resident Ngā Hapū e Toru kaumātua that again the current definition is against tikanga Māori and whakapapa. And I've already made the point that the current definition goes against the principles and preamble of the current legislation.

36 Sir, the order has resulted in years of injustice for the descendants of Heni Ngaropi and we heard some of that pain today and through the written evidence and the issues that are ongoing, and my friend Mr Kahukiwa conceded that we could be still having these issues in 10 years' time.

And sadly, and I'm instructed to say this, an injustice can never be restored for those who have now passed on but perhaps the Court, in exercising its discretion, can look to the future, draw a line in the sand, be inclusive and essentially that is the wishes of Heni Ngaropi wanted when she made her original application.

I mean, in light of those Sir, I do submit that these are exceptional circumstances and not all of the dirty laundry has been brought before the Court today and I don't think it was necessary Sir.

And for that fact alone amongst the others, as outlined in the evidence and the submissions, they are exceptional circumstances in my submission and justice needs to be brought to bear on this particular issue and resolved as best we can to bring justice to the parties. Those are my submission Sir.

Court: Thank you Mr Warren

Yes, thank you to Counsel for your very helpful submissions and also to the witnesses who have given evidence today. I am going to reserve my decision in relation to this application but in so reserving the decision, and in my view in the interests of justice, I'm going to direct that a meeting take place and I would like that meeting to be held within two months. It's clear that this issue needs to be resolved and, in my view, it should be resolved by the parties rather than the Court. If it cannot be resolved by the parties, then I'm going to ask that it come back to the Court and I'll issue a decision in relation to what I've heard today.

So I'm going to direct that a meeting take place between the following people:

1. Firstly, the current beneficiaries of this marae;
2. Secondly, the descendants of Ngaropi White;
3. Thirdly, they were described as Ngāti Porou ki Hauraki. I'm going to confine that further to say those owners who have Māori land interests in Harataunga; and
4. Fourthly, those people who can whakapapa to Ngā Hapū e Toru.

Audience: Kia ora.

Court: So it's attempting to get as many people with an interest in this particular issue in the same place. Now that same place will be this marae. The meeting is going to be called and run by an officer of the Court. I have spoken in the break to the District Manager and it's been suggested that Dean Haggie run the meeting. I don't know whether you know Dean but if there are any objections to that, can I please have them now.

Mr Warren: I suppose... I mean I know Dean personally Sir.

Court: I see.

Mr Warren: His partner worked with me at McCaw Lewis but unless my friend raises issues...

Court: Alright. That the meeting and the sole purpose of this meeting is to consider whether or not the class of beneficiaries for this marae should change and if it's agreed that they should change, to whom should they change to is the next question. If it's thought that the beneficiaries should not change or if there is no resolution and you cannot agree, then that is to be recorded and, as I say, it will come back to me and I'll make a decision on the

evidence and the submissions that I've heard today. But I think that it is important that, firstly, it go to the people themselves to consider this issue.

So, as I say, I'll adjourn it for two months for that to take place. A copy of this direction will go to the District Manager and arrangements will be put in place for that meeting.

So thank you very much. Kei a koe he karakia whakamutunga mō tātou. Kia ora.
[Karakia whakamutunga nā Kingi Ihaka]

Copy of minute to applicant and interested parties.

A handwritten signature in black ink, appearing to read 'W Isaac', with a vertical line extending upwards from the 'I'.

WW Isaac
CHIEF JUDGE