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*Te Whare Wānanga
o te Upoko o te Ika a Māui*



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"SO LONG LYING IDLE WITHOUT A SCHOOL": *WI PARATA*, *WALLIS* AND *WHITIREIA*, 1848-2008

*R P Boast**

*The Whitireia block at Porirua has an unusual significance in the history of public law in New Zealand, as legal issues connected with this area led not only to Prendergast CJ's famous decision in *Wi Parata v Bishop of Wellington* (1877) but also to the equally significant decision of the Privy Council in *Wallis v Solicitor-General* (1902). This article focuses less on the doctrinal content of the cases and more on the legal history of the Whitireia block itself, from the time when the land was originally gifted by the chiefs of Ngāti Toa to support the establishment of a school or college at Porirua to the present day. The Whitireia trust still exists, although there have been many changes in the interim. The article argues that, notwithstanding the generally high reputation of the decision in *Wallis v Solicitor-General* amongst legal scholars, the outcome of that case was a great disappointment to Ngāti Toa and the issue had to be resolved through parliamentary intervention. It is suggested also that there is little evidence that the Crown ever intended to seize the trust lands for itself. More generally the article attempts to provide for the first time a fully connected history of the Whitireia trust with the aspiration of setting the voluminous case law it generated in its full historical context.*

* Associate Professor in Law, Victoria University of Wellington, Barrister. The author has worked with Ngāti Toa, the original owners of Whitireia, both as counsel and as commissioned historical researcher for over 20 years (in association with D A Edmunds of Kensington Swan, Barristers and Solicitors, Wellington). This article is based on chapter 7 of an unpublished report co-authored with Dr Bryan Gilling completed in 2008 dealing with Ngāti Toa lands from 1865-1965 and funded by the Crown Forestry Rental Trust, Wellington: Richard Boast and Bryan Gilling *Ngāti Toa Lands Report One* (report to the Crown Forestry Rental Trust and Te Runanga o Ngāti Toa, 2008). Professor David Williams of the School of Law at Auckland University has also been working on the Whitireia case for some time, and I wish to acknowledge the benefits I have received from discussing the Whitireia issue with him on a number of occasions and also from his unpublished conference paper on Whitireia presented at the Law in History conference, held at Victoria University in December 2009. Dr Williams' full length study, provisionally entitled *A Gift or a Grant? The Wi Parata case in New Zealand Law and History* will be published by Auckland University Press in 2010. All archival references in this article are to documents held by Archives New Zealand, Wellington, unless otherwise stated. All errors and omissions in this article, as it is customary to say, are of course mine alone.

I INTRODUCTION

Few parcels of land in New Zealand have as intricate a history, or have led to as much litigation, as has the Whitireia block at Porirua. The cases that have resulted, moreover, are of no ordinary kind, as they include – but are, as will be seen, by no means confined to – two of New Zealand's best known judicial decisions. These are *Wi Parata v Bishop of Wellington* (1877),¹ Chief Justice Prendergast's famous "simple nullity" decision of which all New Zealand lawyers have heard (*Wi Parata*),² and the equally famous, though usually more esteemed, Privy Council decision in *Wallis v Solicitor-General* (1902) (*Wallis*).³ A large literature has grown up around the cases. Yet to date, as far as I am aware, this article is the first to join the pieces together to explore the full story of Whitireia and the legal issues that developed around it.⁴ No apology is made here for focusing on the issue from the standpoint of the original owners and donors of the block, the Ngāti Toa iwi (tribe).

A full consideration of the history of the block is revealing in a number of respects. Most importantly, the Privy Council decision in *Wallis*, which has been much praised as a valuable contribution to native title law whereby a fearless and resolute Privy Council showed the New Zealand courts and the New Zealand government a thing or two, was actually regarded by Ngāti Toa as a most unwelcome development, if not a bitter disappointment. The much-criticised New Zealand Court of Appeal decision in the same case was actually far more to Ngāti Toa's liking. The belief that the New Zealand government was bent on dark designs to seize the Whitireia block for itself seems to be a myth. Another overlooked fact is that the Commission of Inquiry that dealt with Whitireia in 1906 and which worked out a solution to the entire intricate mess that most parties were happy with (more or less) was presided over by none other than Sir James Prendergast. The word "complex" can be overworked. But the story of Whitireia certainly is complex.

1 *Wi Parata v Bishop of Wellington and the Attorney-General* (1877) 3 NZ Jur (NS) SC 72 [*Wi Parata*].

2 This statement refers, of course, to the Treaty of Waitangi: *ibid*, 78 (SC) Prendergast CJ: "So far indeed as that instrument purported to cede the sovereignty ... it must be regarded as a simple nullity".

3 *Wallis and others v Solicitor-General* [1902] AC 173 (PC) [*Wallis*].

4 There is a brief earlier report by Janine Ford *A Report Commissioned by the Waitangi Tribunal on the Ati Awa ki Waikanae Claim to the Whitireia Block* (prepared for the Waitangi Tribunal, Wai 89, Document A1, 1991). Ms Ford appended to her report an invaluable two-volume document bank which has been drawn on extensively for this article. Generally speaking the documentation relating to Whitireia is very rich, and not difficult to locate. The most important source relating to Ngāti Toa's own perspective is the Royal Commission on Porirua and Other School Trusts "Report on the Porirua, Otaki, Waikato, Kaikokirikiri, and Motueka School Trusts" [1905] AJHR G 5 ["Report on the Porirua and Other School Trusts"]. This contains a substantial amount of Ngāti Toa and Ngāti Raukawa testimony, albeit given many years after the original gift and Crown grant. The report also reprints most of the relevant early documents, including the original Crown grant and Governor Grey's correspondence with the Colonial Office.

The former Whitireia block is located at the northern end of the Whitireia Peninsula at the south head of Porirua harbour. The area is rich in archaeological sites and has been settled for centuries.⁵ It now belongs to the Crown, and is managed, not too well, by New Zealand's over-stretched Department of Conservation (DOC). DOC has never gone out of its way to do anything much with Whitireia. Anyone can visit it but, as it is lacking in amenities and is now mostly used for rough grazing, few people do, even though it is next door to Porirua city. Nowhere will the visitor find any information about the block's involved tenurial and legal history or its ancient pre-European past. In a country which tends to not much memorialise its history, as anyone who has visited the battle sites of the New Zealand wars or the Wairau battle site at Tuamarina will know, a visit to Whitireia stands out as an especially dismal experience, although the views across Cook Strait can be spectacular on sunny days.

The most important person in the Whitireia story was the Ngāti Toa and Ngāti Awa rangatira Wiremu Te Kakakura Parata (Wi Parata).⁶ Wi Parata was born on Kapiti Island in the mid 1830s and died in 1906. His mother was Metapere Waipunuhau, daughter of the Ngāti Toa chief Te Rangihiroa. His father was an American whaler and merchant named George Stubbs. Hohepa Solomon of Ngāti Toa writes that "the name they gave to their son, Te Kakakura, said to have been taken from the dying speech of Te Pehi Kupe, refers to the red fathers under the wing of the kaka, symbolic of high chiefs".⁷ When his father was drowned in a boating accident near Pukerua Bay, Wi Parata moved with his brother Hemi Matenga and his mother to the great Ngāti Awa pa at Kenakena at the Waikanae River mouth, and it was here that he grew up. He attended the Anglican mission school at Otaki but was always scathingly critical of the poor quality education at missionary hands he received there (he told a Parliamentary select committee that "if I were to state the things that went on there you would not believe me").⁸ Wi Parata became a well-to-do landowner in the region after most of Ngāti Awa returned home to Taranaki in 1848. He was a wealthy and very prominent person in the Waikanae district with a "large and imposing" house in Waikanae and an impressive farm property. Some of his land dealings were in fact controversial, and led to an investigation by

5 A Walton *An Archaeological Survey of Whitireia Park, Porirua* (prepared for the Department of Conservation, Doc Science Internal Series 62, Wellington, 2002). For a map of the Whitireia block, see the appendix.

6 This paragraph mainly follows Hohepa Solomon "Parata, Wiremu Te Kakakura ? – 1906" in *Dictionary of New Zealand Biography Volume 2 1870-1900* (Ministry for Culture and Heritage, Wellington, 1993) 374-375, supplemented by Wi Parata's own testimony to various commissions and inquiries.

7 Ibid, 374.

8 Evidence of Wi Parata to the Native Affairs Select Committee (14 July 1876) Le 1/1876/7 [Wi Parata evidence, Le 1/1867/7]. See also his evidence to the Royal Commission on Porirua and other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 20. Wi Parata said he learned nothing at the Otaki School. He was able to read and write in Māori but was taught to do that by his mother before he went to school. Most of the time the children at the school were engaged "in tilling the soil": Wi Parata evidence, Le 1/1867/7.

the Native Affairs Committee in 1888 following a petition by Inia Tuhata of Ngāti Mutunga.⁹ He was married twice; his second wife, Unaiki, was Ngāti Raukawa and Ngāti Toa, and they had many children. In 1871 he became Member of Parliament for Western Māori, but he was also closely connected with the community at Parihaka, was present at the time of the Crown's invasion of the town in November 1881, and did what he could to assist the Taranaki prophets Te Whiti and Tohu after they had been arrested and detained. Wi Parata was committed to the pacifist principles of Te Whiti: one of the reasons for his dislike of the scheme approved by the Supreme Court for the expenditure of the Whitireia educational trust funds was that an aspect of the proposal required that the children be taught military drill.¹⁰ He played a leading role in the litigation over Whitireia as well as over other land issues. He died at Waikanae in 1906 from injuries from falling from a horse and is buried near St Luke's Church at Waikanae.

The Whitireia cases have typically been approached from the broader perspective of the development of the law relating to native title and to the status of the Treaty of Waitangi. This is not of itself a wrong or misleading perspective. Obviously the broader jurisprudential perspective is an important one, but to Ngāti Toa itself these wider perspectives were not of much interest. Ngāti Toa was not seeking to advance frontiers of native title law or to enhance the status of the Treaty. Nor, to Ngāti Toa, was the Whitireia case primarily a "land claim". To them the key issue was one of education: the land was originally gifted by them to fund a "college" and the goal of high quality education within their own area was always the main priority. The fact that the college was never built led some in the iwi to take the view that the land may as well be returned. That was Wi Parata's own stance, but even as late as 1907 most of the descendants of the grantees were still continuing to search for ways in which local children could be provided with the education their elders wanted them to receive. In achieving that goal the Privy Council decision in *Wallis* was actually a hindrance.

Following the work of Dr Brian Murton of the University of Hawai'i, who in turn based much of his thinking on the work of economists Amartya Sen and the geographers Michael Watt and Hans-Georg Bohle, I have elsewhere argued that the best way to comprehend the plight of Māori in late 19th and early 20th century New Zealand is by means of the concept of a contracting "opportunity

9 Evidence in Report of Petition of Inia Tuhata, 12 June 1888, MA 70/3 and 70/4; Ngarara Commission MA 70/1, Archives New Zealand, Wellington.

10 This comes out very clearly in Wi Parata's evidence given to the Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4. He said:

The object of giving the land was with the object of teaching the new religion, with a view to cause the intertribal wars and the killing of men to cease. Now I hear to-day that it is suggested that the children are to be taught how to kill and destroy human beings. ... Speaking for myself, I disapprove of the present scheme. The part I most disapprove of is the part where it is suggested that Māori children should be taught how to kill human beings – military drill. That is not the work of religion; that was not the purpose for which the land was given.

space".¹¹ Māori became hemmed in by new forms of legal property relationships, a diminished resource base as they were dispossessed of land and resources, and socio-economic changes which weakened social bonds and the power of indigenous elites. The law, especially local statute law, was important in all of these changes, and most especially the first. The function of education as an aspect of this process of historical change probably needs greater emphasis. The New Zealand state had a certain vision as to the kind of education that it deemed most useful and suitable for Māori – one which discouraged Māori students from taking an academic programme in school which would allow them to gain entry to university and which focused instead on teaching practical skills (farming, woodworking, sewing, household management) – which Māori tried to counteract as best they could.¹² Māori did not acquiesce in this situation of contracting opportunities and tried various strategies of resistance, including litigation in the courts. The struggle over Whitireia can best be seen as an example of Māori resistance to declining opportunities. The struggle was long and costly and only partially successful. This analytical framework will be returned to in the concluding section. One aspiration of this article is to escape from a naively legal-formalist doctrinal approach to the history of the Whitireia litigation and to set the story in a broader framework of social and cultural change.

II THE ORIGINAL GIFT

Ngāti Toa is a prominent Māori iwi and is now based in the Kapiti region near Wellington. This area is not their ancient homeland. Led by their famous chiefs Te Hiko, Te Rauparaha, Te Rangihaeata and others the iwi had migrated south from the Waikato coast in the early 1820s. They defeated the local tribes at the famous battle of Waiorua, on Kapiti Island, probably in 1824. Under the organising genius of Te Rauparaha Ngāti Toa built up a major chieftom in central New Zealand

11 R P Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865-1921* (Victoria University Press, Wellington, 2008) 254-260. Murton's ideas were developed in two reports prepared for the Waitangi Tribunal and the Crown Forestry Rental Trust from 2001-2004: Brian Murton *Te Aitanga-a-Mahaki: The Economic and Social Experience of a People 1860-1960* (Report prepared for the Waitangi Tribunal, Wai 814 (Gisborne Inquiry), Document A26, 2001); and Brian Murton *The Crown and the Peoples of Te Urewera: The Economic and Social Experience of Te Urewera Māori, 1860-2000* (Report prepared for the Crown Forestry Rental Trust, Document H12, 2004). Murton relies in particular on Amartya Sen *Poverty and Famines: An Essay in Entitlement and Deprivation* (Oxford University Press, Oxford, 1981) and Jean Drèze, Amartya Kumar Sen and Athar Hussain (eds) *The Political Economy of Hunger: Selected Essays* (Clarendon Press, Oxford, 1995). Also influential in the development of Murton's ideas is Michael Watts and Hans-Georg Bohle "The Space of Vulnerability: The Causal Structure of Hunger and Famine" (1993) 17 *Progress in Human Geography* 43.

12 On educational policy see especially John Barrington *Separate But Equal? Māori Schools and the Crown, 1867-1969* (Victoria University Press, Wellington, 2008). Māori leaders such as Apirana Ngata also wanted to see better technical education for Māori. The difference was that Māori did not see this as the sole option for Māori; many Māori believed that Māori pupils should be able to take academic subjects and gain admission to university if they wished – as Ngata himself had done, availing himself of the opportunities available at Te Aute School under the headmastership of John Thornton.

based on military conquest, careful cultivation of kin linkages and commercial relationships with Europeans.¹³ How this Ngāti Toa polity should be seen, and its lines of development, are important and difficult questions that remain unresolved.¹⁴ Ngāti Toa's history in the 1840s was eventful and dramatic. Ngāti Toa were involved in military confrontations with New Zealand Company settlers at the Wairau and the Hutt Valley, and in 1846 the Governor, Sir George Grey kidnapped Te Rauparaha and detained him without trial. A coalition of militia, British army units and "friendly" Māori – who had very mixed motives of their own – then attacked Ngāti Toa's other great chief, Te Rangihaeata, and drove him and his supporters out of the region. That done, Grey then forced through two key land transactions, the Porirua and Wairau deeds (both 1847), by which Ngāti Toa ceded most of their land to the Crown.¹⁵ Ngāti Toa also lost significant areas of land through the involved processes of the finalisation of the Crown grant to the New Zealand Company for the Wellington–Port Nicholson region in 1848. Further pre-emptive purchases followed in the 1850s, so that by the time of the establishment of the Native Land Court in 1862 Ngāti Toa had very little land

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- 13 A full ethnohistory of Ngāti Toa and its polity in central New Zealand remains to be written, although much preliminary research has been done for various Waitangi Tribunal inquiries and in support of negotiations with the Crown (a substantial part of this research has been carried out by the author). For an accessible account of Te Rauparaha's life and times see Patricia Burns *Te Rauparaha: A New Perspective* (A H and A W Reed, Wellington, 1980). On the context of the migrations the best modern analysis is Angela Ballara *Taua: "Musket Wars", "Land Wars" or Tikanga? Warfare in Māori Society in the Nineteenth Century* (Penguin Books, Auckland, 2003). On the tribal history of the Northern South Island there is now a very large literature arising out of the Waitangi Tribunal's Northern South Island (Te Tau Ihu) Inquiry, reported on by the Tribunal in 2008: Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims: Wai 785* (Legislation Direct, Wellington, 2008) esp chapters 2 and 3, 19-164. See also R P Boast *Ngāti Toa and the Colonial State* (report prepared for the Waitangi Tribunal, Wai 145 (Wellington Inquiry) Document L1, 1998); and RP Boast *Ngāti Toa and the Upper South Island* (report commissioned by the Crown Forestry Rental Trust, Wai 785 (Northern South Island Inquiry) Document A41, 2000).
- 14 It is not easy to think of a term which accurately describes Ngāti Toa in Cook Strait as an organised political and economic foundation. "Chieftdom" seems to be as good a term as any, but of course all Māori political formations were "chieftdoms". Anthropologists and archaeologists use the term "chieftdom" to describe political formations that lie between small-scale tribal societies and true states, although without necessarily subscribing to any evolutionist framework: for a discussion see Patrick Vinton Kirch *The Evolution of the Polynesian Chieftdoms* (Cambridge University Press, Cambridge, 1984) 1-5. As Kirch notes, however, the term "chieftdom" can characterise a wide range of societies, from comparatively small-scale societies at one end of a spectrum to proto-states or kingdoms at the other (of which the clearest example in Polynesia is probably Hawai'i) (ibid, 4). Ngāti Toa's Cook Strait polity may fall somewhere in the middle. To what extent it was different from other Māori chieftdoms and was developing into something new in Māori history is difficult to say on the state of the evidence. It certainly had some unusual features, being based on both sides of Cook Strait and involved in extensive commerce with Europeans.
- 15 The Wairau deed was signed by representatives of Ngāti Toa on 18 March 1847; the Porirua deed on 1 April 1847. Only three Ngāti Toa chiefs signed the Wairau deed, which ceded a vast area of the northeastern South Island (the signatories were Rawiri Puaha, Matene Te Whiwhi and Tamihana Te Rauparaha). Te Rauparaha himself was in Crown custody at the time of both deeds, and was released in January 1848. The context of these deeds cannot be explored here: for a full discussion see RP Boast *Ngāti Toa and the Colonial State*, above n 13 and RP Boast *Ngāti Toa and the Upper South Island*, above n 13.

left remaining to them. Whitireia lies in one of the reserve blocks retained by Ngāti Toa within the boundaries of the Porirua deed.

In the 1840s Māori made a number of grants of land to the Bishop of New Zealand to support schools. One such grant was Ngāti Toa's gift of land at Whitireia. Similar gifts were made by Māori in many places at around the same time, for example at Orakei (Auckland), Te Waerenga-a-Hika (near Gisborne), Te Aute (near Hastings), Otaki, and at Motueka. It seems to have been a clear policy both of the Anglican Church in New Zealand and Governor Grey to encourage Māori to make gifts of this kind. By 1848 Ngāti Toa were already significantly affected by Christian teachings.¹⁶ Within Ngāti Toa it seems that the driving force behind the gift was initially Te Rauparaha's son Tamihana, who was living at Otaki at the time.¹⁷ The Ngāti Toa community proper, at Porirua, was at first reluctant. In 1905 Heni Te Whiwhi, daughter of the Ngāti Toa and Ngāti Raukawa chief Matene Te Whiwhi testified as to what her father had said to her about it:¹⁸

Before, and on the occasion of my marriage to my husband, Te Reii, my father told us at his home how Bishop Selwyn approached him and Tamihana Te Rauparaha, and asked them for a piece of land in Porirua – Whitireia. Tamihana Te Rauparaha agreed to give the land to the Bishop, but I [sic – i.e. he?] did not. Tamihana went to see Ngātitoa in Porirua, and told them of the Bishop's request, and said he had agreed to give the land to the Bishop. The Ngātitoa people told Tamihana that the land was not his to give and that the land belonged to Te Rangihaeata. Tamihana came back to Otaki. The Bishop persistently asked Matene to let him have the land for a school, so that their children could be taught all the knowledge of the pakeha children, and, after many efforts on the part of the Bishop, Matene Te Whiwhi agreed.

Matene knew, Heni added significantly, "that his uncle, Te Rangihaeata, and Te Rauparaha would not override him in this matter".¹⁹

16 To a large degree Ngāti Toa began the process of Christianisation themselves some years before the arrival of missionaries in central New Zealand. The Anglican Church Missionary Society missionary Octavius Hadfield arrived at Wellington from the Bay of Islands in 1840 and established an Anglican mission first at Waikanae and then at Otaki. Other Ngāti Toa living in the South Island became parishioners of the Reverend Samuel Ironside's Wesleyan mission, established at Port Underwood in December 1840. Matene Te Whiwhi and Tamihana Te Rauparaha were both active and committed Christians with close links to Hadfield.

17 Both Tamihana Te Rauparaha and Matene Te Whiwhi had attended St John's College in Auckland – in fact they were there when Te Rauparaha was brought to Auckland by Grey as a prisoner on board HMS Calliope in 1847.

18 Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 8.

19 Ibid. Te Rauparaha was a donor in his own right of course.

The formal mechanism for the gift was a deed of cession of 16 August 1848 by which eight individuals of Ngāti Toa, including Te Rauparaha, Tamihana Te Rauparaha, and Matene Te Whiwhi granted land to the Crown for the establishment of a school at Porirua. The deed states:²⁰

Friend Governor Grey. –

Greeting! It is a perfect consenting on our part that Witireia shall be given up to the Bishop for a College.

We give it up not merely as a place for the Bishop for the time being, but in continuation for those Bishops who shall follow and fill up his place, to the end that Religion and faith in Christ may grow, and that it may be, as it were a shelter against uncertain storms that is against the evils of this world. This is the full and final giving up of that place, as a College for the Bishops of the Church of England.

Unlike some of the gifts in other areas, such as at Te Aute, the donors made no stipulation as to who should attend the "college"—that is, whether they should be children of both races, only Ngāti Toa, or whatever. But it seems obvious that the donors would have been acting in the expectation that the principal purpose of the gift would be to benefit Ngāti Toa children and provide them with a Christian education. On the hand other children of all races would have been welcome to attend.

St John's College, which both Tamihana Te Rauparaha and Matene Te Whiwhi had attended, was founded by Bishop Selwyn, New Zealand's first Bishop, in 1843. Originally located at Waimate, in the Bay of Islands, the college was soon moved to a site near Auckland. The college was a combined theological training centre and a boys' boarding school based on a concept of racial equality between Māori and Pakeha. Selwyn's idealistic vision was that boys drawn from Māori and Pakeha elites would be given a first-rate education side by side in an atmosphere influenced by the best scholarly traditions of the Anglican Church. Ironically not all of the Anglican missionaries in New Zealand were enthusiastic: they were mostly low-church evangelicals from fairly humble backgrounds, but Selwyn had high-church leanings, had attended Eton and Cambridge (where he read classics) and before his ordination had worked as an assistant master at Eton. He was an elite figure, but then so were Tamihana Te Rauparaha and Matene Te Whiwhi. Selwyn's vision was one which Tamihana Te Rauparaha and Matene Te Whiwhi, both devout Anglicans, found congenial and which they wished to see established in their home territory. To them, perhaps, the college would not merely be a school to teach Ngāti Toa children and writing; rather it would be a centre of Christianisation which would spread enlightenment and culture over a wide area. Whether all of Ngāti Toa shared exactly the same visions and aspirations as the two young chiefs is not clear, but

20 Citing the official English translation of the Māori text (Māori text omitted). The original deed of gift, Deed No 263, is held at Land Information New Zealand's Wellington office, and is also reprinted in H Hanson Turton *Māori Deeds of Land Purchases in the North Island of New Zealand: Volume 1* (Government Printer, Wellington, 1877) Deeds of Gifts, No 1, 785.

many would have. Ironically St John's College had a troubled history and was closed in 1853.²¹ It later reopened as an Anglican theological college, and remains so today.

The donors were Te Rauparaha himself, Tamihana Te Rauparaha, Matene Te Whiwhi, Hoani Te Okoro, Wiremu Kanae, Watarauhi Nohorua, and Rawiri Hikihiki. Wi Parata was later to claim that the persons "who actually gave the land were not real Ngātitoa; they were partly Ngātiraikawa and partly Ngātitoa".²² He also stressed that the deed of gift was signed not at Porirua but at Otaki, seeking perhaps to give the impression that not all at Porirua knew about the deed of gift or had consented to it. Whether that is actually the case is hard to say. It is surely significant that Te Rauparaha himself signed the deed, and that others who signed it included the prominent chiefs Wiremu Kanae and Watarauhi Nohorua, as well as Matene Te Whiwhi and Tamihana Te Rauparaha. Most of the Ngāti Toa leadership at the time can be said to have assented to the gift. Certainly the Court of Appeal in *Hohepa Wi Neera v Bishop of Wellington (Hohepa Wi Neera)*,²³ decided in 1902, concluded that there had been a valid cession of the land. Stout CJ felt "certain" that few at the time "would have attempted to question the action of Te Rauparaha and the other chiefs when speaking or acting on behalf of the tribe".²⁴ While a number of the findings in *Hohepa Wi Neera* would be unlikely to be accepted by a modern court, on this point at least it seems Stout CJ is probably right: Te Rauparaha's involvement in the transaction is obviously significant.

As noted, some of the donors seem to have had very high expectations as to what would be constructed at Porirua – not simply a school, but rather some kind of superior school or even a tertiary institution of some kind perhaps to train Māori for the Anglican ministry. In 1876 the Bishop of Wellington gave evidence to the Legislative Council about (inter alia) the Porirua grant. He said that the grant "was for the whole diocese, and for a higher class of education"; the plan "was to make it like St John's College".²⁵ The objectives of the donors have not received nearly enough attention in the literature on Whitireia. To Wi Parata, "the object of giving the land was with the object of teaching the new religion, with a view to cause intertribal wars and the killing of men to cease".²⁶ A mere primary school was not what Tamihana Te Rauparaha and Matene Te Whiwhi were hoping to see at all. Perhaps to these men a developing relationship with the Crown and the

21 For further information on St John's College see K N Booth "The Founding of St John's College" in W E Limbrick *Bishop Selwyn in New Zealand, 1841-68* (Dunmore Press, Palmerston North, 1983) 51-74 and Ian Breward *A History of the Churches in Australasia* (Oxford University Press, Oxford, 2001) 91-93.

22 Wi Parata evidence, Le 1/1867/7, above n 8.

23 *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA) [*Hohepa Wi Neera*].

24 *Ibid*, 667-668 (CA) Stout CJ (Edwards and Conolly JJ concurring).

25 Evidence of Bishop of Wellington "Report of the Select Committee on Te Aute College and other Educational Trust Estates" [1875] AJLC Appendix 4, 39.

26 Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 20.

Church, a readiness to make concessions over land claims by other tribal groups, an interest in establishing some kind of Māori monarchy, taking steps to eliminate the divisions caused by the Wairau engagement of 1843, and the establishment of a prestigious Church of England College at Porirua were all part of a single, idealistic, modernising vision.

On 8 December 1850 the land at Porirua was in turn granted by the Crown to George Augustus Selwyn, Bishop of New Zealand, for the maintenance of a school at Porirua "so long as religious education, industrial training, and instruction in the English language shall be given to the youth educated therein or maintained thereat".²⁷ The legal mechanism that was employed at Whitireia – as well as at Waerenga-a-Hika, Te Aute and a number of other places – was for the gift not to be made directly to the Bishop by the Māori owners, but rather by means of a gift to the Crown, and for the Crown in turn to make a Crown grant to the Bishop of New Zealand on trust. The reason for that is simple: at that time only the Crown had power to extinguish Māori customary title and so any conveyance from Māori directly to a private person or to a church would be legally void. This remained the legal position until the enactment of the Native Lands Acts and the establishment of the Native Land Court in 1862 to 1865. This seems to have been the standard procedure with other gifts made around the same time. To support a school at Waerenga-a-Hika (near Gisborne), for example, Turanga Māori gifted land to the Crown, which was in its turn Crown-granted to the Bishop of New Zealand. In the case of Whitireia, Ngāti Toa gifted around 500 acres of the area reserved to the iwi in the 1847 Porirua deed to the Bishop for a school, but strictly speaking the gift went to the Crown, which was followed in turn by a Crown grant to the Bishop of New Zealand.

In all these cases, however, the involvement of the Crown was a mere conveyancing formality: the gift was in reality one from Māori to the Church of England. The question of the nature of the Crown's involvement in the gift and in the Crown grant was later to become a major issue in the Court of Appeal and in the Privy Council in the case of the Whitireia grant. It is very likely that to Ngāti Toa itself the gift was conditional, or perhaps was only for a limited time. The formalities of the gift being perfected by means of a Crown grant were, it seems safe to say, something that the donors would not have understood. Wi Parata later said that the donors "did not understand that the Bishop would keep the land for himself".²⁸ In other words, the gift was to support the establishment of a college at Porirua: if the college project was not proceeded with then the land should be returned. Another point that seems important is that the gift and grant was made not to fund a college, but rather to support a college which was to be separately established by the Church of England. This was seen as significant by the New Zealand Court of Appeal in its decision in *Solicitor-General v Bishop of Wellington*, in which Williams J observed that "[i]t is to be observed

27 "Report of the Select Committee on Te Aute College and other Educational Trust Estates", above n 25, No 4, 4.

28 "Report of the Select Committee on Te Aute College and other Educational Trust Estates", above n 25, Appendix 4, 41.

that the grant is not made for the purpose of founding a school, but for the purpose of assisting a school which is about to be established apart from the grant, and which would, of course, require funds to be provided for its establishment other than those arising from the rents and profits of the land granted."²⁹ Notwithstanding all the criticism that this decision of the Court of Appeal has received – beginning with Lord Macnaghten's harsh criticisms in the Privy Council on appeal – there is much to be said for the Court of Appeal's view. The failure of the Church to establish the promised college was the main reason why the Court of Appeal concluded that the Crown had been "deceived in its grant".

For reasons that are not clear the Bishop of New Zealand decided to delegate the management of various trusts to the Anglican Synod, and this delegation was done by means of an Act of Parliament, the first of many legal interventions in the various trusts. On 3 July 1858 Parliament enacted the Bishop of New Zealand's Trusts Act.³⁰ The preamble to the Act referred to a General Conference of the Bishops and other representatives of the clergy and laity of the Anglican church held at Auckland on 13 June 1857, which marked the formal establishment of the Anglican Church in New Zealand (technically, a branch of the "United Church of England and Ireland") and at which was set up a General Synod for the management of the affairs of the Church. Section 1 of the Act allowed the Bishop to convey any lands Crown-granted to the Bishop for educational and charitable purposes to trustees appointed by the General Synod. Any such conveyance would be subject to the original trusts in the various grants.³¹ In the case of the Whitireia gifted lands a trust was set up and the land then conferred on the trustees by deed in 1858. The first Whitireia trustees were the Bishop of Wellington, Octavius Hadfield (at that time Archdeacon of Kapiti), Henry St Hill and Stephen Carkeek.³²

In the case of Whitireia, then, the legal owners of the land after 1858 were the trustees. They held the land on the same terms as in the original Crown grants. As owners of the land they of course had full power to manage and lease the land provided that this was not inconsistent with the terms of the trust. It is important to emphasise that as a matter of law the terms of the trust were not those of the original gift by Māori to the Crown, but rather the terms of the subsequent Crown grant to the Bishop.

29 *Solicitor-General v Bishop of Wellington* (1901) 19 NZLR 665, 678 (CA) Williams J.

30 Bishop of New Zealand Trusts Act 1858: "An Act to authorise the Bishop of New Zealand to convey certain hereditaments and premises to Trustees to be appointed in that behalf by the General Synod of the Church of England in New Zealand".

31 Bishop of New Zealand Trusts Act 1858, s 1.

32 See the registered copy of Porirua Trust Deed 1858 (LINZ Wellington office, Deeds Index vol 4, Folio 667) 517.

The 1860s was the decade of the New Zealand wars. Both Ngāti Toa and nearby Ngāti Raukawa were Waikato-Tainui descent groups, and thus were naturally concerned in the fate of the Māori King movement (the Kingitanga) and by the Crown's invasion of the faraway Waikato in 1863. Otaki was something of a bastion of support for King Tawhiao in central New Zealand, and the progress of the war in Taranaki and the Waikato was keenly followed there.³³ Nevertheless the New Zealand wars did not spread to the region. The closest the actual fighting came to the region seems to have been the battle at Moutoa on the lower Whanganui, on 14 May 1864. During the war years the Whitireia block remained leased by the Church to a private farmer.

III EARLY PETITIONS AND INQUIRIES

Endowing lands for Church schools was a potent issue in colonial politics, and there was a great deal of parliamentary scrutiny of the various grants. In 1875 a Select Committee of the Legislative Council reported on Te Aute College and other educational trust estates, including Whitireia.³⁴ Various recommendations about educational trusts generally were made.³⁵ This 1875 report found that no school had yet been built at Whitireia. At that time the Whitireia land was being let at a rental of £75 per annum. Grants had been made out of the endowment fund from time to time to support a school some distance away in Otaki and at that time there was a balance in the endowment fund of £2000 "which might be devoted to a school at Porirua".³⁶ Wi Parata made a statement to the Committee in the Māori language, describing the origins of the grant and asking for the land to be returned given that no school or college had been erected at Whitireia.³⁷

In 1876 Wi Parata petitioned Parliament directly about Whitireia. His petition complained that as no school had ever been built at Whitireia the gift had failed and that the land should be returned to its true owners. On 14 July 1876 he testified at some length before the Native Affairs Committee in support of his petition. Wi Parata tried to claim that the donors were not "real" Ngāti Toa but were partly Ngāti Toa and Ngāti Raukawa – which was in fact only partly the case. Wi Parata's principal argument however was twofold: that the validity of the original gift was doubtful, and that title to Whitireia needed to be reinvestigated by the Native Land Court and its true owners

33 Searancke to McLean "Commissioners' Reports Relative to Land Purchases" [1861] AJHR C 1 No 71 296.

34 "Report of the Select Committee on Te Aute College and other Educational Trust Estates", above n 25, No 4. The committee reported on Te Aute on 14 October 1875. The educational endowment lands considered by the committee were at Waerenga-a-Hika, Te Aute, Otaki, Porirua (Whitireia), Motueka, Papawai and Ngaumatawa.

35 *Ibid*, 3.

36 *Ibid*.

37 "Report of the Select Committee on Te Aute College and other Educational Trust Estates", above n 25, Appendix 4, 41. This seems to have been a written statement from Wi Parata handed in to the Committee and read into the record.

ascertained.³⁸ He was not, in other words, seeking that the land should revert to the original donors, but rather that "as tribal property" (as he put it) the land had to be investigated under the Native Lands Acts.

On one point that came up in the course of discussion Wi Parata was particularly insistent. He was asked by Sir Donald McLean whether, in essence, the gift had really failed at all: "Are you not aware that it is not necessary to erect a school on every piece of land that would be given in support of a school or college?"³⁹ In other words, even if no actual school was on the land at Whitireia, nevertheless the income from the trust was presumably being applied to the purposes of Māori education in a general sense, and thus the gift had succeeded in its objectives. To this Wi Parata was insistent: the land was given in the expectation that a school would be built at Porirua. Wi Parata said he was certainly aware that sometimes gifts could simply be endowments, but not here: "this was different". Whitireia was "given with the view and in expectation that a school would be erected upon it so that our children might be taught". We would, he said, "not have given the land for an endowment".⁴⁰

By 1876 the situation had already become complex. No school had been built; but did that really mean the gift had failed provided the income was applied appropriately? What was the legal position: did the Bishop hold the land absolutely, or was it held on trust from the Crown – and if the trust had failed, did that not mean that the land ought to revert perhaps to the Crown? Perhaps it was also hoped that the Government's own planned system of native schools might deal with the educational needs of the Māori children living at Porirua. The 1876 Committee declined to take any action over Whitireia but did draw attention to the general issue of educational grants and trusts. The Committee reported that it was "especially clear" that no school had been established at Whitireia, and indeed that the Church of England had no intention of establishing one: "it does not appear that there is any intention on the part of the trustee to fulfil this condition of the Trust".⁴¹ But the Committee did not feel able to recommend that legislation be enacted to return the land back to the donors. There were a number of Trusts similar to Whitireia in existence all over the country, and the Committee felt that "the present position of the religious, charitable and educational trusts of the Colony requires the most serious and careful consideration of the Houses".⁴²

The Committee's report shows that the specific issue of the Porirua grant had become merged with a much larger issue, that of "the religious, charitable and educational trusts of the colony". This

38 Wi Parata evidence, Le 1/1876/7, above n 8.

39 Ibid.

40 Ibid.

41 Report on Wi Parata's Petition, *ibid.*

42 Ibid.

was a highly politicised question at the time, with many coming to feel that the earlier grants and private trusts were no longer appropriate in a new world of state-provided primary education for both Māori and non-Māori children. Many were opposed to such grants on principle and believed they should be resumed by the State. There were well-founded doubts about the quality of the education provided at the endowed Church schools even where they had been actually established – doubts that Wi Parata's scathing remarks about Otaki, or the comments by some Hawke's Bay rangatira about Te Aute in its early days would have abundantly reinforced.

There were some who were hostile toward all educational grants to the Church of England on principle and who believed that they should be resumed by the Crown. In fact in 1877 the Reverend Samuel Williams, who managed the Te Aute estate, was asked by one Member of Parliament (Swanson) whether "these educational endowments would be much more efficiently managed, and turned to much better account, if the State were to resume possession of them" ("I very much doubt it", Williams said).⁴³ A less radical position was that educational trusts arising from donations by Māori or from Crown grants to religious dominations should be subjected to closer Crown oversight. Many politicians certainly thought so. Partly this may have arisen from a commitment to secular, state controlled education. The Native Schools Act 1867 began in that year the establishment of the state system of secular government Māori schools, although it did not become compulsory for Māori children to attend school until 1894 (it became compulsory for Pakeha children in 1877).⁴⁴ The old educational trusts and land grants seemed to many to have served their purpose and to now reflect an outmoded approach towards Māori education. There was also community pressure in some places – Te Aute, especially – for the endowments to be resumed by the Crown and let or granted to Pakeha settlers.

The 1875 Legislative Council select committee report on Te Aute and other trusts had also made a number of recommendations along these lines, suggesting that "all educational trusts arising from donations by the Māoris or from the Crown to any denomination should be connected with some one of the departments of Government".⁴⁵ Furthermore, the trustees of all such grants should send their accounts to the government each year together with "a report on the condition of the school under the trusts"; the accounts should be audited by the government auditors, and the accounts and the reports should be laid before parliament and "published annually in the *Waka Māori* for the information of the Native race".⁴⁶ The government was of course engaged in the process of setting

43 "Report on Four Petitions of Residents of Hawke's Bay, Relative to the Te Aute Estate, Together with Minutes of Evidence" [1877] AJHR I 2C 9.

44 See generally Barrington, above n 12.

45 "Report of the Select Committee on Te Aute College and other Educational Trust Estates", above n 25, Evidence of Bishop of Wellington, 3.

46 Ibid.

up its own system of native schools in the 1870s. By 1875 there were already 1,010 boys and 423 girls enrolled at these schools.⁴⁷

There was also the legal issue as to what kind of trusts these gifted lands were: were they public trusts of some kind, amenable to supervision by the government and Parliament? Or were they private trusts for which the trustees were answerable only – as all trustees are and charitable trusts especially – to the Supreme Court? In 1875, Stokes, one of the Te Aute trustees, explained to a Select Committee of the Legislative Council that the Bishop of New Zealand did not exercise that trust personally and no doubt the same would have been true of Whitireia. The Bishop had delegated the administration of the trust to the Church of England in New Zealand. It was the General Synod of the Anglican Church who appointed the trustees and it was to the Synod that the trustees reported. Stokes did not believe that Parliament had any right of its own motion to review the trust's affairs or inspect its accounts: rather, the trust was answerable only to the Supreme Court.⁴⁸ Nevertheless the unending controversy over Whitireia, Te Aute and other such grants was in part founded on the assumption by some politicians that the government and the public at large had a significant interest in them.

IV THE DECISION IN WI PARATA

In 1876, Wi Parata and 18 others had petitioned Parliament that the land at Whitireia be returned to Ngāti Toa. Following the Native Affairs Committee's conclusion that it felt unable to make any recommendation that legislation be enacted to reconvey the land at Porirua back to Ngāti Toa,⁴⁹ Wi Parata brought declaratory proceedings in the Supreme Court seeking, inter alia, to have the Crown grant to the Bishop set aside and the land "declared to be to be part of the native lands lawfully reserved for the use and benefit of the Ngātitōa tribe". Wi Parata also sought to have the Bishop of Wellington declared a trustee for Ngāti Toa and to have the Crown grant declared void "as a fraud upon the donors, and *ultra vires*". A demurrer – that is, a formal pleading that the statement of claim failed to disclose a cause of action known to the law - was filed in reply by the Crown. As this article has emphasised, the Whitireia trust was but one of many, so if Wi Parata had been successful then many other similarly situated trusts might likewise fail and Māori would be able to seek a return of such parcels of land all over the country.⁵⁰

As the Court accepted the Crown's demurrer the case never got beyond the stage of legal argument and no evidence was called. The procedural complexities were difficult for Wi Parata to

47 "Further Report Relating to Native Schools" [1875] AJHR G B 1, 3.

48 "Report of the Select Committee on Te Aute College and other Educational Trust Estates", above n 25, Evidence of Bishop of Wellington, 9.

49 Wi Parata evidence, Le 1/1876/7, above n 8.

50 Fredericka Hackshaw "Nineteenth Century Notions of Aboriginal Title" in IH Kawharu (ed) *Waitangi: Māori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 110.

understand. Some years later Wi Parata explained why he had brought the case and his surprise at the fact that he never had an opportunity to give evidence:⁵¹

Fifteen years after 1860 I took proceedings at law against the Bishop, for the reason that the purpose for which the land had been given had not been carried out. But I did not appear in presence before the Supreme Court, the matter was conducted in another room, and there it was decided that this was Crown land, and apparently the original gift by the Māoris of the land was put on one side and not considered at all.

Questioned further by the Committee on that occasion Wi Parata (by this time an old man) explained:⁵²

12. Whom did you represent – yourself only, or any others? – I took proceedings on behalf of myself and a lady sitting over there for the people of Porirua.

13. The Ngātiraikas were not mixed up with it? – No.

14. Did the people of Porirua ask you to take those proceedings? – No, I did it myself because of what I had heard said at Kohimarama, and also because the land had been so long lying idle without a school.

15. Nobody else moved in the matter but you? – Myself only. The reason why I took action myself was that I knew the people at Porirua did not know how to go about getting the land back; they had no idea they could do so.

The outcome was, of course, the famous – or notorious – judgment in *Wi Parata v The Bishop of Wellington and The Attorney-General* (1877)⁵³ delivered by Chief Justice Prendergast.⁵⁴ Putting to one side all of Prendergast CJ's controversial remarks about the Treaty of Waitangi and the non-existence of Māori customary law, the practical outcome of the case was the Supreme Court held

51 Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 20.

52 Ibid. The reference to Kohimarama relates to the government conference of Māori chiefs held there in 1860. At the conference a Ngāti Toa representative complained about Whitiāreia.

53 *Wi Parata*, above n 1. Useful discussions on Wi Parata and the subsequent cases on Whitiāreia include Fredericka Hackshaw "Nineteenth Century Notions of Aboriginal Title", above n 50, 109-117; Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 117-122; and Grant Morris "James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty during the latter half of the Nineteenth Century" (2004) 35 VUWLR 117 ["Prendergast and the Treaty of Waitangi"].

54 For information on Prendergast see Morris "Prendergast and the Treaty of Waitangi", above n 53, 118-119; Grant Morris "Chief Justice Prendergast and the Administration of New Zealand Colonial Justice, 1862-1899" (PhD Thesis, University of Waikato, 2001) ["Chief Justice Prendergast"]; and Judith Bassett and J G H Hannan "Prendergast, James 1826-1921" in *Dictionary of New Zealand Biography Volume 1 1769-1869* (Ministry for Culture and Heritage, Wellington, 1990) 335.

that the grant itself amounted to a clear declaration on its face that the native title had been extinguished, something which could not be questioned in any court.⁵⁵ The Court also stated that "in law the Crown is to be regarded as the donor and not the Ngātitoa tribe",⁵⁶ which is true enough strictly speaking, but does not in fact reflect the reality of the arrangement.

With regard to the trust itself, Prendergast CJ found that even if it could be shown that the terms of the grant to the Bishop could not now be met, that would not mean that the trust (or the grant) failed, but that the trust income ought to be applied to some other charitable purpose under the *cy-près* doctrine:

If it were made out that this supposed object of the grant had become impracticable, there is abundant authority for the application of the rents and profits of the land to some purpose as nearly as possible similar to the object of the original trust, according to the doctrine of *cy-près*.

But since the Crown grant could not be circumvented, and because legally it was the Crown and not Ngāti Toa who were the donors, it was not necessary to pursue this further. As will be seen, however, in later cases over Whitireia the Crown decided to oppose the application of the *cy-près* doctrine, arguing instead that the trusts attached to the grant had failed and therefore the land and its accumulated income reverted to the Crown.

There is no need here to pursue at any length the legal and historiographical controversy over the *Wi Parata* decision.⁵⁷ Prendergast CJ's dismissal of the Treaty of Waitangi as a "simple nullity" and his rejection of the proposition that Māori had a system of customary law⁵⁸ have not endeared

55 *Wi Parata*, above n 1, 78 (SC) Prendergast CJ.

56 *Ibid*, 83 (SC) Prendergast CJ.

57 For a thorough discussion see Morris "Chief Justice Prendergast", above n 54, 199-234. There are still those who argue that Prendergast CJ was, and indeed is, right, including Guy Chapman "The Treaty of Waitangi – Fertile Ground for Judicial (and Academic) Myth-Making" [1991] NZLJ 228 and David Round *Truth or Treaty: Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, Christchurch, 1998).

58 *Wi Parata*, above n 1, 77 (SC) Prendergast CJ: "the aborigines were found without any kind of system of civil government, or any settled system of law"; and at 79 (referring to a reference in the Native Rights Act 1865 to Māori custom and usage): "as if some such body of customary law did in reality exist ... a phrase in a statute cannot call what is non-existent into being". I stand by my own criticism that Prendergast's denial goes much too far even by the standards of the day – and is inconsistent with statutory directions in, for example, the Native Lands Acts of 1862, 1865 and 1873. RP Boast "The Law and the Māori" in Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2 ed, Brookers, Wellington, 2001) 129-130. In fact the whole structure of Māori land law as it has evolved in New Zealand would be meaningless if it were in fact the case that there were no ascertainable Māori customary legal rules relating to title to land, and the same can be said of the common law rules relating to native title and now recognised in New Zealand statute in the Foreshore and Seabed Act 2004. The contention that there was no such thing as Māori customary law occasioned considerable surprise to the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561 and is no longer the view of the New Zealand courts: *Public Trustee v Loasby* (1908) 27

him to many modern commentators. It could perhaps be argued that Prendergast was doing nothing more than repeating the legal platitudes of his day, but this is a proposition Paul McHugh has disputed, correctly in my view.⁵⁹ Probably the most important aspect of the decision was that it treated Māori proprietary claims against the Crown – unless brought in the Native Land Court – as essentially non-justiciable.

V DEVELOPMENTS RELATING TO WHITIREIA 1896-1907

A Introduction

The period from 1894 to 1907 forms an extremely convoluted story, complicated by the fact that essentially there were two separate, if interlocking, struggles over Whitireia occurring at once. The first was the continued effort by Ngāti Toa to either get Whitireia back or get a school at Porirua, which involved numerous petitions to Parliament and also litigation (most notably Hohepa Wineera's claim that native title to Whitireia had never been extinguished).⁶⁰ The second struggle did not involve Ngāti Toa except indirectly: it was a struggle between the Anglican Church and the New Zealand Government over control of the Whitireia block, as well as over various other educational gifted lands. Out of this second struggle arose one of the more celebrated incidents in New Zealand legal history, the famous protest by the New Zealand bench and bar following the scathing comments made by Lord Macnaghten in the Privy Council decision in *Wallis v Solicitor-General*⁶¹ regarding the behaviour of both the Solicitor-General and the New Zealand Court of Appeal.

Crown grants to the Church of England to endow various educational and religious purposes continued to be a controversial issue in New Zealand politics.⁶² Many politicians, especially those on the left wing of the Liberal Party (which governed from 1891 to 1912) continued to be opposed to such grants on principle, sometimes arising out of hostility towards government support for private and religious schools. It was felt by many politicians that these assets should be removed from Church control and used by the state to help support a system of state funded education. One prominent exponent of this point of view was the Liberal politician A W Hogg. Hogg was a radical Liberal on the left wing of his party, a champion of the rights of the small settler who held strong views about education; he had supported the establishment of Victoria University College and had

NZLR 801; *Hineiti Rirerire Arani v Public Trustee of NZ* [1920] AC 198 (PC); and *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 215 (HC).

59 McHugh, above n 53, 113-114; but see Paul G McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford University Press, Oxford, 2004) 171-173.

60 *Hohepa Wi Neera*, above n 23.

61 *Wallis*, above n 3 (PC) Lord Macnaghten. See also *Bishop of Wellington v Solicitor-General* (1900) 19 NZLR 214; *Solicitor-General v Bishop of Wellington*, above n 29; and *Hohepa Wi Neera*, above n 23.

62 See generally Barrington, above n 12, 141-171.

been a member of its first council. Hogg was a committed supporter of local Education Boards against the Department of Education, and in 1901 had chaired a Royal Commission on primary schools.⁶³ One particular target of the radical educational reformers within the Liberal Party was Te Aute School, by now a prestigious boarding school for Māori boys in Hawke's Bay with a solid academic reputation. The school had to put up with considerable criticism from politicians that it was too "elitist" and in 1906 the Prime Minister, Richard Seddon, launched an extraordinary attack on the school in a speech at Waimarama in February 1906. This occurred shortly after the trustees had turned down a request from the government to sell part of the Te Aute estate to the Crown under the Lands for Settlement Act.⁶⁴ The Government itself, it must be said, did nothing whatever about establishing Māori secondary schools, but it did fund scholarships to the endowed or Church schools such as Te Aute. As a result it felt it had the right to intervene in what was taught at these nominally "private" schools. On the whole officials were opposed to an academic education for Māori children, favouring manual or technical education. All of these issues surfaced in the Royal Commission on Te Aute and Wanganui School Trusts in 1906, which had been preceded in 1905 by a Royal Commission into the Porirua (Whitireia) and other school trusts. The issue was, as can be seen, of some political importance at the time.

B Heni Matene Te Whiwhi's Petition (1896)

The years 1896 to 1897 were difficult ones for Ngāti Toa. On 16 October 1896 the Government enacted the Native Reserves Amendment Act 1896, which dealt with the Taupo No 2 block at Plimmerton. The area was a cemetery reserve. Section 5 of the 1896 Act transferred the land from Wi Parata to the Public Trustee. Section 6 of the Act empowered the Public Trustee to set aside one acre of the land as a burial reserve and to lease the balance on long term leases of 42 years. This was a substantial erosion of Ngāti Toa's remaining land base, part of the continuing contraction of the tribe's "opportunity space". Then, in December 1897 the Government enacted the Kapiti Island Public Reserve Act, which established a statutory mechanism for pre-emptive purchase of Ngāti Toa's remaining interests on Kapiti Island. The Government wanted the island for a nature reserve.⁶⁵ Perhaps it was these attacks on what remained of Ngāti Toa's traditional lands that re-energised the determination of various individuals of Ngāti Toa to regain control over Whitireia. There was, needless to say, still no school there. The land was leased by the Church to a private farmer. It is possible that there was also a factional struggle within the Ngāti Toa community over Whitireia at this time, although this is uncertain. Wi Parata remained insistent that the land should not be returned to the donors but instead should be brought before the Native Land Court and title

63 For information on Hogg see Rollo Arnold "Hogg, Alexander Wilson 1841-1920" in *Dictionary of New Zealand Biography Volume 3 1901-1920* (Ministry of Culture and Heritage, Wellington, 1996) 223-224.

64 (28 February 1906) *Hawkes Bay Herald* Hawkes Bay 2.

65 See generally Chris and Joan McLean *Waikanae: Past and Present* (Whitcombe Press, Waikanae, 1988) 214-215.

reinvestigated. Thus there may have been a difference of opinion between those who represented the original donors and those who claimed to speak for the Ngāti Toa community at Porirua. Ngāti Toa were very unhappy about Whitireia, that is clear. But there were still those who remained committed to the ideal of providing a solid education for local children.

Heni Te Whiwhi was Matene Te Whiwhi's daughter. Matene had been one of the original donors as well a signatory of the Wairau and Porirua deeds of 1847, and had been a leading rangatira of Ngāti Toa and Ngāti Raukawa from 1847 to 1870. In 1896, when she would have been about 61 years of age, Heni and 13 others petitioned Parliament seeking the return of Whitireia. (Later, as will be seen, Heni shifted ground and was prepared to support a variation of the Whitireia trust by combining it with a similar trust at Otaki, also an area of Ngāti Toa residence at the time.) At the same time, Hamuera Karaitiana and 123 others filed a similar petition relating to the Ngaumutawa block near Masterton, the site of a similar gift and grant to the Bishop of New Zealand. The Native Affairs Committee was sympathetic and recommended that both grants be cancelled, the land be given the status of Māori customary land and returned to the donors or their successors, "along with all the rents accrued thereon".⁶⁶ This Committee was presided over by Sir Robert Stout, who later – sitting as a Supreme Court judge – approved the scheme put forward by the trustees to vary the trust *cy-près*.

C Application of the Cy-près Rule and Rejection of the Trustees' Proposals

The Government took no action with respect to the Select Committee recommendations. But the Committee's 1896 decision seemed to galvanise the trustees into action.⁶⁷ In April and May of 1899 the vexed matter of the Whitireia Block was once more before Prendergast CJ, who had given the first Whitireia decision 22 years earlier. This time he was asked by the trustees to determine whether the income from the trust could be reapplied under the *cy-près* doctrine now that the trust could not be carried out, and, if so, whether the Court was prepared to approve a scheme put forward by the trustees to use the money to fund scholarships to Church of England schools elsewhere. The case took the form of an action by the Bishop against the Solicitor-General. The Crown, however, argued that as the trust could no longer be performed the property reverted to the Crown, but in the alternative proposed a scheme of its own.⁶⁸ The Crown proposed that the money should be used to

⁶⁶ [1896] AJHR I 3, 7.

⁶⁷ It seems impossible to believe that there can be no connection between the findings of the Select Committee and the approach made by the trustees to the Supreme Court. This connection seems, however, to have been one that the Privy Council was unaware of in *Wallis*, in which Lord Macnaghten saw the application made by the trustees as owing only "to the falling off of the Native population": *Wallis*, above n 3 (PC) Lord Macnaghten.

⁶⁸ *Wallis*, *ibid*. As schemes go, in fact, the Crown scheme was not a bad one. But Prendergast CJ rejected it in any case, along with that proposed by the Bishop.

establish an industrial and technical training school at Otaki, with some of the money being used to send pupils to attend science classes at Victoria University College, preference being given to members of Ngāti Toa. This was not a bad plan at all, although as noted it was Ngāti Toa's own view that the essence of the gift from their viewpoint was that a college be established at Porirua. The emphasis on technical education for Māori fitted with the views of Hogg, Seddon and some other Liberal politicians that Māori needed manual and technical training above all. Ngāti Toa themselves, however, knew nothing about the proposed scheme to vary the trust.⁶⁹ The Church made no effort, it seems, to consult with Ngāti Toa or Ngāti Raukawa about the proposed scheme. It is quite wrong to imagine that the scheme as finally approved by the Privy Council was one the descendants of the donors accepted or, initially, even knew about. In fact as soon as they found out the details they opposed it strenuously.

Prendergast CJ gave his judgment on 19 May 1899.⁷⁰ He found that as far as was known, no school had ever been established at Porirua. Years ago a schoolmaster had been temporarily placed there, but this was short lived: "the reason being that the attendance of the Māori children was irregular and the number small".⁷¹ By this time, he noted, the accumulated funds totalled £6,480 – quite a substantial amount. But Prendergast did not believe that the gift had failed. This was because of the particular view he took of the nature of the gift (which was not the same as Ngāti Toa's): he thought it could be "inferred" that "the general object was charitable" and that if a school could not now be practicably established at Porirua then "a case had been made out for the application of the doctrine of *cy-près*." However, neither the Bishop's proposed scheme (the scholarships proposal) nor the government's proposed scheme (a technical school at Otaki) found favour with the Supreme Court. The stalemate continued.

D The Papawai Scheme, Supreme Court Approval and Ngāti Toa Opposition

In March 1900 a revised scheme was placed before the Supreme Court for its approval. This time the plan was for the income to be spent on the support of a school at Papawai in the Wairarapa, near Masterton. The Crown appeared before the Supreme Court and opposed the scheme on the basis that the specific nature of the trust meant that the *cy-près* rule should not apply.⁷² Crown counsel pointed out that the "locality of the school is vital" and that a school in the Wairarapa would not be suitable. W H Quick, counsel for the Bishop, defended the Wairarapa scheme. What needs to

69 So Heni Te Whiwhi said to the Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 9. The application to the Supreme Court by the trustees was made, she said, "unawares to us".

70 *Bishop of Wellington v Solicitor-General*, above n 61.

71 *Ibid*, 220 (SC) Prendergast CJ.

72 *Ibid*, 224-225 (SC) Prendergast CJ.

be emphasised here is that the Crown's view and that of Ngāti Toa coincided. Ngāti Toa, whatever divisions of opinion they may have had, were united in being utterly opposed to the Wairarapa scheme.

This time judgment was given by Stout CJ. He dismissed the Crown objections and approved, subject to certain modifications, the Church's scheme. Stout CJ thought it was "conclusive" that it would be "a waste of the trust moneys" to build a college at Whitireia.⁷³ An approved scheme along the lines of the minor modifications advanced by Stout CJ was formally endorsed by the Supreme Court on 15 October.⁷⁴ The revised scheme referred to the new "training-school" about to be established in the Wairarapa and stipulated that net rents and income in the hands of the Whitireia trustees were to be devoted to "the maintenance of scholars in the Wairarapa institution, a fair sum being charged for maintenance and education."⁷⁵ This was a Church school, with religious instruction to be taught as approved by the Anglican Church, although it was also stipulated that no child could be debarred from attending the school on the basis of religious affiliation.

The Wairarapa scheme was, as noted, strongly opposed by Ngāti Toa themselves. The reasons for their opposition are easy to understand. The Wairarapa scheme meant that the income from Ngāti Toa's Whitireia land would be expended in the district of another Māori iwi, Ngāti Kahungunu, who happened to have been former political and military opponents of Ngāti Toa. However, the reason for the opposition was not really because of any existing enmity between Ngāti Kahungunu and Ngāti Toa, which was fairly ancient history by 1900. It was partly to do with the difficulty of sending children all the way to a boarding school in the Wairarapa, but more especially because expending the money on a school in the Wairarapa would frustrate the wishes of the original donors and diminish Ngāti Toa prestige. It would make Ngāti Toa seem subservient. It was, indeed, a matter of Ngāti Toa mana. There were some variations in opinion amongst the Ngāti Toa community but generally all agreed that hardly anyone would even consider sending their children to a school in the Wairarapa. Heni Te Whiwhi said that establishing the school in the Wairarapa would make Ngāti Toa "subservient": moreover "we have the prior right and the absolute right according to Native custom".⁷⁶ Heni favoured a combination of the Whitireia and Otaki Trusts, but not all in Ngāti Toa were in favour of that. There were also those, seemingly a minority within the iwi, who took the line that as no college had been built the land should simply be returned. That of course was Wi Parata's stance, and he continued to be of that opinion. Raiha Puaha's opinion was

73 Ibid, 236 (SC) Prendergast CJ.

74 The revised scheme is reprinted in Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 156.

75 Ibid.

76 Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 9.

the same. Raiha's preference was to see a school at Porirua, but failing that the land should be returned. She expressed her opinion forcibly to the 1905 Royal Commission:⁷⁷

My uncle, Hohepa Tamaihengia, had always urged Bishop Hadfield to have a school built, but of no avail. If the wish I now express cannot be given us, then I would ask that the Porirua land be given back to the descendants of the donors.

E Parliamentary Scrutiny

There were two abortive efforts to deal with the matter in Parliament prior to the Privy Council's decision in *Wallis v Solicitor-General*. In 1898 the Government introduced the Porirua School Grants Bill, which was simply (as Seddon described it) "a suspensory Bill", but it ran into considerable opposition in the House and the Government agreed to it being adjourned. Clause 2 of the Bill provided that "the original trusts as specified in the Crown grant set forth in the Schedule hereto shall remain unaltered until the expiration of ten days after the close of the now next-ending session of Parliament".⁷⁸ According to the preamble, "it was expedient that the original trusts should not be altered until Parliament has had an opportunity of considering the matter".⁷⁹ Opposition revolved mostly around the view that it was undesirable as a matter of policy to interfere with the operation of private Trusts. Seddon admitted that the main purpose of the Bill was to prevent any significant variation of the trust for the time being. Interestingly, he also stated that while he could not accept the Native Affairs Committee's 1896 recommendation that the reserves should be re-vested in Māori, it was nevertheless important to discuss the matter with the descendants of the Ngāti Toa donors: Ngāti Toa "had a direct interest" and "ought to be consulted".⁸⁰ However, as noted the Bill was not enacted. Some Members of Parliament (MPs) thought that there was not enough information on the matter before Parliament to enable a sound decision to be made on the matter. Debate was adjourned and the Bill lapsed.

In 1900 the Government attempted to introduce legislation that would override Prendergast CJ's decision and refer the matter of the Porirua and Otaki Trusts to a Royal Commission – which is what was eventually done. The Bill was strongly supported by Hone Heke Rankin, MP for Northern Māori, and by Mr Field, MP for Otaki. Both had been working closely with Ngāti Toa and Ngāti Raukawa leaders like Heni Te Whiwhi and were well aware of the opposition to the scheme. Field, who had good connections with the Ngāti Toa community, was strongly critical of the suggestion that the population of Ngāti Toa had dwindled to the point that there was no longer any point in

77 Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 10-11.

78 Porirua School Grant Bill 1898 [not passed], clause 2.

79 *Ibid*, preamble.

80 (18 October 1898) 105 NZPD 100.

establishing a school for the iwi. In fact it is very clear from Field's remarks that in opposing Prendergast's decision in the Supreme Court he saw himself as vindicating the interests of the Ngāti Toa donors:⁸¹ "It is not only desirable but absolutely urgent, in the interests of the Natives, that this Bill should be passed".⁸² He continued:⁸³

[A]s I have shown, the Natives were never represented. The Natives who made this grant for the purposes of a Māori College were never represented at these actions at all. Thirdly, it was not represented at represented at the Court that the Ngātitoa, Ngātiraokawa, and Ngātiawa Tribes, living on the west coast of the North Island, were as numerous as the Ngātikahungunu Tribe living in the Wairarapa.

But again the Bill ran into trouble because of opposition from more politically conservative MPs who regarded the legislation as an interference with private Trusts and with the powers of the Supreme Court. According to one MP the Bill was "a most extraordinary reversal of the practice of the Court and Parliament in the Old Country".⁸⁴ As with the 1898 Bill, the 1900 Bill was adjourned. As a direct result of this, it would appear, the Government opted for a different approach and appealed Prendergast CJ's decision to the Court of Appeal.

F The Court of Appeal Decision in Solicitor-General v Bishop of Wellington and others (May 1901)

The Court of Appeal decision in *Solicitor-General v The Bishop of Wellington and others* was released on 22 May 1901.⁸⁵ This decision was later to be criticised in the strongest of terms by the Privy Council on appeal and on the whole commentators have had nothing to say in favour of it. But, ironically, whatever the correctness of the Court of Appeal's reasoning, the suggestion that the Court was colluding with some devious plan by the Crown to seize the land at Porirua to the disadvantage of the original Ngāti Toa donors is without foundation. The decision arose out of opposition by Ngāti Toa and other groups relating to the scheme which was submitted to the Supreme Court for approval and approved by it. Ngāti Toa, Ngāti Raukawa and Ngāti Awa were strongly hostile to the income and accumulated rentals from the trust being expended on a hostel in the Wairarapa. By this time £6480 had accumulated in the hands of the trustees.⁸⁶ The Court of Appeal judgment was given by Williams J.

81 (18 October 1900) 115 NZPD 431-435 (Porirua, Wairarapa and Other School Grants Bill).

82 Ibid, 431.

83 Ibid, 434.

84 Ibid, 437.

85 *Solicitor-General v Bishop of Wellington*, above n 29.

86 Ibid, 676 (CA) Williams J for the Court.

The Court of Appeal found that both the land and the money had become the property of the Crown as the Crown had been "deceived in [its] grant".⁸⁷ According to Williams J:⁸⁸

The contemplated establishment of the school was the cause, and the sole cause, of the Crown making the grant. It is to be observed that the grant is not made for the purpose of founding a school, but for the purpose of assisting a school which is about to be established apart from the grant, and which would, of course, require funds to be provided for its establishment other than those arising from the rents and profits of the land granted. More than fifty years have elapsed since the date of the grant, and no school of any kind has been established. ... This appears to us to bring the case within the principle that a grant by the Crown is void if the King be deceived in his grant.

The problem with this reasoning is that the gift was in reality not from the Crown but from Ngāti Toa, and if anyone was "deceived" it was the original Ngāti Toa donors. What is not known for certain is what the Crown planned to do with the Whitireia land and accumulated income following the decision. It could simply have kept it, or it may have been intending to re-vest the property in the Ngāti Toa donors or at least work towards a solution that Ngāti Toa was happy with. All the indications are that the latter was in fact the Crown's intention.⁸⁹ The situation is a truly ironic one, as the decision that has been the subject of hostile criticism (*Solicitor-General v Bishop of Wellington*) in fact paved the way for justice to be done to the donors, whereas the Privy Council decision, hailed as a far-sighted recognition of Native title, in fact prevented that. The Crown at least sought to argue – and the Court of Appeal accepted this – that it had intervened to in fact protect the donors (Ngāti Toa) who were strongly opposed to the variation of the Trusts *cy-près* as had been approved in the Supreme Court. This point appears in the last paragraph of the judgment:⁹⁰

The position appears to be somewhat as follows: The Crown, as *parens patriae*, through the instrumentality of this Court, sees that property devoted to charity shall be applied for the purposes of charity, and that where no purposes are specified the Court, as representing the Crown, is to define the purposes. The Crown, also as *parens patriae*, is under a solemn obligation to protect the rights of the Native owners of the soil. *When, therefore, the Crown, as parens patriae, asserts that in that capacity it is under an obligation to Natives in respect of a property, can this Court, representing the Crown as parens patriae, say to the Crown, You shall not carry out this obligation, but the property you have*

87 Ibid, 678 (CA) Williams J for the Court.

88 Ibid, 678-679 (CA) Williams J for the Court.

89 The clearest evidence pointing in this direction is the failed 1900 Bill, which sought to override the scheme approved by Stout CJ and establish a Royal Commission. In the debates in the House Mr Field, the Member for Otaki – who was closely associated with Ngāti Toa and Ngāti Raukawa – stated that in the Supreme Court "the Crown urged that trust could not be carried on, and therefore reverted to the Crown, *it being the intention to afterwards perform the trusts as far as possible*" (16 October 1900) 115 NZPD 433 (emphasis added).

90 *Solicitor-General v Bishop of Wellington*, above n 29, 686 (CA) Williams J for the Court (emphasis added).

granted shall be devoted to charitable purposes, to be determined by the Court irrespective of your obligations? We see great difficulty in holding that, in such circumstances, the Court could or ought to interfere.

G The Decision in Wallis and others v Solicitor-General (10 February 1903)

This case arose out of the proposed scheme put to the Supreme Court by the Bishop for the rearrangement of the Whitireia trust and was the appeal to the Privy Council from the Court of Appeal decision in *Solicitor-General v Bishop of Wellington*. Ngāti Toa themselves were not involved in the case and played no role in the argument: it was strictly a dispute between the trustees and the New Zealand government. Counsel for the trustees defended the proposed scheme *cy-près*. The Crown continued to oppose the application of the *cy-près* doctrine and argued instead that as the trust had failed the property should now re-vest in itself, but failed to make it clear to the Judicial Committee that a principal reason why it was making this argument was to protect the interests of the donors.

In *Wallis* the Privy Council was not prepared to tolerate the suggestion that the donor of the trust was the Crown, either in fact or in law. Although the Judicial Committee was under a misapprehension as to the ability of Māori to freely alienate ungranted Māori-owned land at the relevant time, its view that "nothing of value" in terms of the grant ever came from the Crown is certainly correct:⁹¹

The Governor, it will be observed, sanctioned the proposed cession, and undertook to give effect to it without attempting to make any stipulation, condition, or reservation of any sort or any kind. As the law then stood under the Treaty of Waitangi the chiefs and tribes of New Zealand and the respective families and individuals thereof were guaranteed in the exclusive and undisturbed possession of their lands so long as they desired to possess them, and they were also entitled to dispose of their lands as they pleased subject only to a right of pre-emption in the Crown. It was not until 1852 that it was made unlawful for any person other than Her Majesty to acquire or accept land from the Natives...The founders of the charity therefore were the Native donors. All that was of value came from them. The transfer to the Bishop was their doing. When the Government had once sanctioned their gift, nothing remained to be done but to demarcate the land and place on record the fact that the Crown had waived its right of pre-emption. That might have been effected in various ways. The course adopted was to issue a Crown grant. That perhaps was the simplest way, though the Crown had no beneficial interest to pass. After all it was only a question of conveyancing as to which the Native owners were very possibly not consulted.

⁹¹ *Wallis*, above n 3, 26-27 (PC) Lord Macnaghten.

The Privy Council, thousands of miles away and much further removed from events chronologically than the Supreme Court in *Wi Parata*, was nevertheless much better able to grasp the essential nature of the gift than Prendergast CJ had been able to in 1877.

The Privy Council was very critical of the Court of Appeal's finding that the Crown had been "deceived in its grant". "What evidence is there", asked Lord Macnaghten, "that the Crown was deceived?":⁹²

Absolutely none. The evidence is entirely the other way. The Governor undertook to complete the arrangement proposed by the Native donors as soon as he received their letter. He did not even wait to communicate with Bishop Selwyn. It is not suggested he communicated on the subject with anybody else. Now it would be absurd to found a charge of misrepresentation on the Native donors. But if the Native donors were innocent, with whom is the blame to rest? The evidence which the Court of Appeal said was sufficient to prove misrepresentation was discovered by them in the introductory recitals of the Crown grant. But the grant is not a deed *inter partes*. The statements in it are statements of the Crown.

And so on. The decision of the New Zealand Court of Appeal was reversed. That meant that the scheme for the trust land and accumulated funds as approved in the Supreme Court now stood. But of course the scheme was opposed by Ngāti Toa. Commentators who see the decision of the Judicial Committee as a blow struck for Māori rights by the Privy Council against the hidebound opposition of the New Zealand courts are in fact mistaken (although a case could be made that this was what the Judicial Committee believed it was doing). Counsel for Ngāti Raukawa and Ngāti Toa explained to the 1905 Royal Commission on the Porirua and Related Trusts that the core issue for his clients was their absolute opposition to the scheme approved by the Supreme Court and by the Privy Council: "[t]he scheme that has been suggested by the Supreme Court will only result in the granting of the funds from Porirua for the benefit of some one other than the donors".⁹³ On the same occasion Heni Te Whiwhi was to make her opposition plain: "I, Ngātiraikawa, and Ngātitoa are against this action of the Whitireia trustees".⁹⁴

It is not known what the Government would have done with Whitireia had it been successful in the Privy Council. It would have been for the Crown to decide what it did with the land at that point. Given the way in which argument was put in both the Supreme Court and in the Court of Appeal the Crown seems to have intended only to have been trying to safeguard Ngāti Toa's position, it being well known that Ngāti Toa were strongly opposed to the Wairarapa project. The Crown's original scheme, rejected by Prendergast CJ, was the scheme for a school at Otaki (which seems to have

92 Ibid, 29 (PC) Lord Macnaghten.

93 Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 7.

94 Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 9.

been what many people of Raukawa and Ngāti Toa preferred). Certainly the Privy Council let the Church of England off much too lightly. While it had quite a few scathing words for both the New Zealand Government and for the New Zealand Court of Appeal, it had none at all for the Church. And yet it was the Church that had received the land and had allowed the income from it to be built up for over 50 years while doing little or nothing to construct a college at Porirua.

H Court of Appeal Decision in Hohepa Wi Neera v Bishop of Wellington (1902)⁹⁵

Just before the Privy Council decision the New Zealand Court of Appeal dealt with a somewhat different argument about Whitireia in *Hohepa Wi Neera v Bishop of Wellington* (1902).⁹⁶ Hohepa Wi Neera argued that native title at Whitireia had simply not been extinguished at all. Hohepa was able to say that he was descended from Nopera Te Ngiha, who had been one of those who had executed the Porirua deed of 1847 but who had not been a party to the gift to the Church. Hohepa Wi Neera was also, however, a descendant of Matene Te Whiwhi, a donor, which gave him two strings to his bow. As Stout CJ explained in his judgment:⁹⁷

The plaintiff claims, first, as a successor according to Native custom, of Nopera Te Ngiha, alleging that Ngiha, being an owner or having an interest in the land, never consented to the cession; second, as a successor according to Native custom of Matene, one of the grantors of the cession, on the ground that the land, never having been used as a college, reverts to the descendants of the grantors.

Stout CJ held, essentially, that *Wi Parata* was rightly decided and that the Court had to treat the Crown grant as amounting to a valid extinguishment of the customary title.⁹⁸ In any event Hohepa Wi Neera's claim was blocked by effluxion of time. Although the Limitation Act did not apply the claim was barred by the equitable doctrine of laches: "the tribe, including the ancestors of the plaintiff, having given up their occupancy and possession in 1848, it is, in my opinion, too late for the plaintiff, even if he can sue, to be heard to claim possession of the land".⁹⁹ The net effect of the decision was that Ngāti Toa's legal options were blocked. There was no way to get around the Crown grant, which had to be treated as being valid on its face and thus as an extinguishment of Ngāti Toa's customary title, irrespective as to whoever had actually signed it. The decision in *Wallis*,

95 For more on this case see especially John William Tate "*Hohepa Wi Neera*: Native Title and the Privy Council Challenge" (2004) 35 VUWLR 73 ["*Hohepa Wi Neera*"].

96 *Hohepa Wi Neera*, above n 23.

97 *Ibid*, 664 (CA) Stout CJ (Edwards and Conolly JJ concurring).

98 *Ibid*, 667 (CA) Stout CJ (Edwards and Conolly JJ concurring). See also the comments of Williams J in the same case at 671: "I think the issue of the Crown grant in 1850 is conclusive evidence that any Native rights then existing in the land had been ceded to the Crown, and that the cession had been accepted by the Crown".

99 *Ibid*, 668 (CA) Stout CJ (Edwards and Conolly JJ concurring).

while supportive of Ngāti Toa's understanding of the nature of the original gift and grant, did not actually help the iwi, as it was concerned not with customary title but rather with the validity of a scheme to rearrange the trust.

The decision in *Hohepa Wi Neera* has been analysed by John William Tate.¹⁰⁰ Tate sees the decision as demonstrating a clear strategy on the part of the Court of Appeal to preserve the effect of the *Wi Parata* decision and to limit as much as possible the effects of a recent Privy Council on native title issues in New Zealand, *Nireaha Tamaki v Baker (Nireaha Tamaki)*.¹⁰¹ Tate argues that *Nireaha Tamaki* amounted to "nothing less than a fundamental upheaval in the New Zealand legal landscape concerning issues of land settlement".¹⁰² The New Zealand Court of Appeal decision in *Nireaha Tamaki* was another example of the New Zealand courts going out of their way to deny remedies to Māori who sought to bring claims based on customary titles against the Crown.¹⁰³ But it had been fairly robustly – and rightly – repudiated by the Privy Council in its decision on appeal in the same case. Given this situation the strategy of the Court of Appeal in *Hohepa Wi Neera* was basically aimed at preserving the status quo in New Zealand while paying lip service to *Nireaha Tamahaki*, which of course was binding on the New Zealand Courts. Much of Stout CJ's and Williams J's judgments revolved around the effects of the Native Rights Act of 1865 and there is no need to pursue this issue here – save to note that Ngāti Toa's particular interests in Whitireia had now become caught up in a much bigger controversy over native title in New Zealand, and, perhaps, in something of a power struggle between the New Zealand Court of Appeal and the Privy Council.

The optimal solution, obviously, was for Ngāti Toa to get the land back. But the Crown did not own the land: rather, the Crown had granted it to the Bishop of New Zealand. To give the land back to Ngāti Toa the land would first have to be taken off the Bishop. Perhaps the Bishop could have given the land back to Ngāti Toa, but of course the Bishop in turn held the land from the Crown by means of a Crown grant subject to a trust to establish a school. One feels that between the Government and the Church of England something could have been worked out to the advantage of Ngāti Toa, but so far what, if anything, was discussed between the Church and the Government here has not come to light.

100 Tate "*Hohepa Wi Neera*", above n 95. A more contextualised study is Peter McBurney *The Court Cases of Nireaha Tamaki of Ngāti Rangitaane* (Report prepared for the Crown Forestry Rental Trust, March 2001.)

101 *Nireaha Tamaki v Baker*, above n 58.

102 Tate "*Hohepa Wi Neera*", above n 95, 78.

103 *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, 488 (CA) Richmond J.

VI THE 1905 ROYAL COMMISSION AND THE 1907 ACT

In 1905 another inquiry took place into the various educational trust grants. This was a Royal Commission on the Porirua, Otaki, Waikato, Kaikokirikiri and Motueka School Trusts.¹⁰⁴ The composition of the Royal Commission was interesting, as it was chaired by none other than Sir James Prendergast! His connections with the Porirua trust issue could certainly be said to be longstanding. Prendergast had retired as Chief Justice of the colony in 1899.¹⁰⁵ The other members of the Commission were H S Wardell, W H Quick and I Hutana. Quick was a prominent Wellington lawyer and had appeared for the Bishop in the Supreme Court and Court of Appeal decisions on Whitireia and was New Zealand solicitor on the record for the Privy Council decision in *Wallis*. The Commissioners were required to report on what the trust estate now comprised, whether the trusts had been carried out and whether the scheme approved by the Supreme Court reflected the aspirations of the donors.¹⁰⁶

Those who gave evidence to the Commission included Wi Parata himself, Raiha Puaha, Tautana Whataupoko, Heni Te Whiwhi, and Hone Heke Rankin, who was the Member of Parliament for northern Māori and who had been assisting Heni and others with their petitions and grievances for a number of years. The Commission began its hearings in June and reported on 23 August 1905. At the start of the hearing counsel for Ngāti Raukawa and Ngāti Toa, a Mr Stafford, asked for time to consult with everyone present to discuss the proposal that he planned to bring before the Commission. Wi Parata then said he wanted the government to appoint counsel to represent himself and others of Ngāti Toa, while Stafford explained that "I represent some of the Ngātitoas, and I believe I represent the whole, except, perhaps, Wi Parata".¹⁰⁷ This probably points to a division of opinion within Ngāti Toa: that is, some were happy to see the Trusts varied; others wanted the land returned.

Stafford put to the Commission a scheme to combine the Otaki and Porirua trusts and re-establish a school at Porirua. He made it very clear that the project to fund a school in the Wairarapa could not possibly work for his clients, claiming in fact that Ngāti Toa viewed Kahungunu as a "conquered race", which is certainly overstating Ngāti Toa perceptions.¹⁰⁸

104 Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4.

105 Morris "Chief Justice Prendergast", above n 54, 259.

106 *Ibid*, iii.

107 Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts ", above n 4, 6.

108 Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", above n 4, 6-7

It is against their custom, and they will not do it. It is in a place where the former hostile tribes are situated – one of the very tribes from which they were driven from this very spot by the donors of this property; and it is against their custom, and not proper, that the property which belonged to their ancestors should be utilised for any purpose in which these conquered races should have any interest at all. They say definitely and positively that it is useless to expect children from this Coast to go to Papawai. Further, there are no children really of the Ngātiraikawa or Ngātitoa who were ever educated at that school. They are not Ngātitoas who are being educated there; they are Ngātikahungunu, so you will see as far as the Natives here are concerned that is a useless scheme.

Stafford's scheme had widespread support, or at least he had prepared a well-organised case to give that impression. A number of Ngāti Raukawa and Ngāti Toa people gave evidence in favour of it, although two key individuals of Ngāti Toa, Wi Parata and Raiha Puaha, were opposed and asked for the land to be returned. Wi Parata said plainly that "You must not understand me to mean that I wish to have a school, the school is too late for us now."¹⁰⁹ Opposition to the Wairarapa project was close to universal, although some people were careful to explain that this was not actually because of a sense of animosity towards Ngāti Kahungunu.¹¹⁰

The report of the Commission traversed briefly the history of the Porirua trust before moving on to describe the current state of the trust estate. By 1905 the land was still leased as a farm and was worth from £4,000 to £5,000. By this time, however, sections were beginning to be surveyed off and houses had been built at nearby Titahi Bay, which – in the view of the Commissioners – was certainly going to drive up land values at Whitireia: "[t]he land is bounded on three sides by the sea, and it would lend itself well to subdivision for seaside residences".¹¹¹ The land was let at a rental of £200 per annum but it was in fact earning considerably more than the rent from investments (£472) – because, of course, the funds had never been expended on a college. So the trust had become quite a valuable asset.¹¹²

As to whether the original trust had been carried out, it clearly had not been. This amounted to an acceptance of Ngāti Toa's own position: that the essence of the original gift was the establishment of a school at Porirua itself. According to the Report, it was clear to the Commissioners "that no school has been established at Porirua as promised to the Native donors" and that "the trust has not been carried out and its object has not been attained".¹¹³ As seen above,

109 Evidence of Wi Parata, Royal Commission on Porirua and Other School Trusts "Report on the Porirua, and Other School Trusts", above n 4, 21.

110 See for example evidence of Tautana Whatupoko, Royal Commission on Porirua and Other School Trusts "Report on the Porirua and Other School Trusts", 1.

111 *Ibid.*, vi.

112 *Ibid.*

113 *Ibid.*

Prendergast CJ had earlier concluded in *Wi Parata* that the trust had not failed, or at least that it could still be performed. So he had now obviously changed his mind. Perhaps the reason for this was Ngāti Toa's opposition to the Wairarapa project.

The other question was whether the proposed scheme approved by Stout CJ and the Privy Council in *Wallis* gave effect to the trust. Here the Commissioners were also unanimous in agreeing that it did not – and in this were clearly right (which gives something of an interesting twist to much of what has been written about the *Wallis* decision):¹¹⁴

We are called upon by Your Excellency to report whether the approved scheme just referred to gives effect to the original intention of the trust. Our opinion is that it fails to do so, inasmuch as the original intention was to establish a local school in the neighbourhood of Porirua, and, as we think, chiefly for the benefit of children of the Ngātītoa, Ngātīraukawa, and Ngātīawa Tribes resident in the neighbourhood, and, further, because the devotion of the rents and profits of this estate to the maintenance of a school at Wairarapa, or of scholars in such school, is hostile to the sentiment of the Natives of these tribes, a sentiment operating powerfully at the present time, but even more so at the time of the creation of the trust. As a result of this feeling the Māoris of Porirua and the West Coast absolutely refuse to send their children to that school.

The Commission also considered carefully the situation of the school at Otaki, which by that time had a chequered history of its own. Although the original grants were similar in intent, the two trusts ended up with different legal owners and were quite separate. In the case of Whitireia the legal owners, the trustees, derived their authority from the General Synod of the Church of England in New Zealand. The grantees of the Otaki lands were, however, "trustees of the Church of England Missionary Society, an English society now represented in this colony by the Mission Trust Board".¹¹⁵ This complicated, although not fatally, the proposal to amalgamate the two Trusts. The Commissioners concluded that the Porirua and Otaki Trusts should be combined. The Commissioners also thought it important that "the denominational character of the trust should not be destroyed" and recommended that the General Synod of the Anglican Church should be the authority "for appointing or providing for this new body of trustees".¹¹⁶

The Otaki and Porirua Empowering Act, passed on 26 October 1907, was described in its long title as an "Act to amalgamate the Porirua and Otaki trust Properties, and to enable the same to be heard and dealt with by the Porirua trustees for the Purposes of the Establishment and Maintenance of a School or Schools at Otaki or in the Otaki District". The Act implemented the findings of the Royal Commission. It began with a long recital setting out the complicated legal history of the

114 Ibid.

115 Ibid, vii.

116 Ibid, viii.

separate Trusts and then provided for their formal merger. Section 2 of the Act provided – as far as it can be fathomed – that the funds from the Otaki trust were to vest in the Porirua trustees. From the combined funds the trustees were then empowered to construct and maintain a school or schools at Otaki and also for the maintenance of scholarships "at any one of three colleges to be selected by the General Synod" (for example, Te Aute). Preference was to be given to members of Ngāti Raukawa, Ngāti Awa and Ngāti Toa.

The Act at least kept the Porirua estate intact, rather than "revesting" it in the Crown, but it essentially converted it into an ordinary endowment to support a school at Otaki and to fund scholarships to Church boarding schools. It is true that Ngāti Toa got neither a college of its own at Porirua nor a return of the land, but it seems clear that the plan to amalgamate the trusts emanated largely from Ngāti Toa itself, or from the three iwi affected (Ngāti Toa, Ngāti Awa and Raukawa). So the Act in fact gave effect to the plans of most local Māori, following their endorsement by the 1905 Royal Commission.

VII AFTER THE 1907 ACT

The history of the trust, which – in a somewhat attenuated form – is still in existence today, by no means came to any kind of satisfactory end with the 1907 legislation.

The Otaki school was duly built, with a boarding hostel, located on a 20-acre site at Te Rauparaha Street, Otaki. The land was purchased by the Porirua College Trust Board from the New Zealand Mission Trust Board in 1908: eight acres for the school and 12 acres for the school farm. The hostel catered for 20 boys, with a master's room and a principal's apartment, and the school itself was built for 100 students. By 1913 Otaki College was one of 10 schools nationwide which offered "some form of education for Māori pupils beyond the level of the native primary schools".¹¹⁷ The combined assets of the Board included Whitireia, the school and farm and the gifted properties at Otaki, being 460 acres on Tasman Road and 32 acres on Anzac Road. In 1924 the trustees sold some of the land at Whitireia (25 acres) and in 1935 a further 100 acres at Whitireia were sold to the New Zealand Broadcasting Board.

Despite all the high hopes, effort and struggle which went into its establishment the Otaki school was not particularly successful. By 1936 there were only three pupils in the primers and junior standards, looked after by a Māori assistant teacher, and 31 in Standard 4 to Form 2, taught by headmaster H Wills, who had been there for some 20 years. The school was forced to close in 1939. After various petitions in the early 1940s yet another Act was passed dealing with the trusts, the Otaki and Porirua Trusts Act 1943. The 1943 Act dissolved the former Porirua College Trust Board

¹¹⁷ Barrington, above n 12, 142. Other such schools included Te Aute, St Stephen's, Hukarere, Queen Victoria College and Turakina Māori Girls' School. The Otaki College seems to have been something of a poor relation.

and replaced it with a new body, the Otaki and Porirua College Trust Board.¹¹⁸ The new Board was comprised of eight persons appointed by the Governor-General, four on the recommendation of the Diocesan Trusts Board of the Diocese of Wellington, three on the recommendation of the Raukawa Marae trustees (of whom at least one had to be of Ngāti Toa descent) and one on the recommendation of the Minister.

However, for reasons unknown, this was altered in 1946 by the Otaki and Porirua Trusts Amendment Act of that year. This changed the Board from eight members to 10, of whom five were to be nominated by the Diocesan Trusts Board, four by the Raukawa Marae trustees and one on the recommendation of the Minister. One of the five members chosen by the Board had to be of Māori descent and a member of Ngāti Toa, Ngāti Awa or Ngāti Raukawa. The requirement that at least one of the Raukawa Marae Trust Board's nominees be of Ngāti Toa descent was retained. That was to change the composition of the Board substantially and certainly created the possibility that there would be just one Ngāti Toa representative on the Board out of 10 members. As the income from even the combined trusts now seemed insufficient to support a school, the Act provided for the Board to expend the money on a range of educational purposes, giving preference to Ngāti Toa, Ngāti Awa and Ngāti Raukawa children.

The Board was empowered to sell the lands vested in the Board – including, of course, Whitireia – at any time, with the consent of the Māori Land Court. However section 8 of the 1946 amending Act removed the requirement for Māori Land Court approval and instead gave the Board power to sell simply with the consent of the Raukawa Marae trustees.¹¹⁹ On 14 December 1973 the remaining portion of Whitireia (283 acres), following various public works takings and earlier sales, was sold to the Crown for the purpose of a public reserve. Whitireia remains in DOC ownership to this day. The trust is still in existence, but its assets no longer include the Whitireia reserve itself.

VIII CONCLUSIONS

The history of Whitireia has not been a happy one for Ngāti Toa, to put it mildly. In 1848 representatives of the iwi gifted a fairly substantial portion of Ngāti Toa's dramatically contracted remaining estates to the Church for the establishment of a college, but never saw one created. Attempts to have the land returned once it became clear that no college was ever going to be established proved unsuccessful. Whitireia became the centre of a complex, three-cornered dispute between the government, the Church of England and Ngāti Toa, finally resulting in a Privy Council decision and special legislation in 1907. As a second-best option the iwi went along with plans to amalgamate the Whitireia trust lands with similarly gifted lands at Otaki in order to support a school at Otaki, but eventually this too failed and the Otaki school was closed in 1939. The trust is still in existence, but is now dominated by the Raukawa Marae trustees at Otaki. Its assets no longer

118 Otaki and Porirua Trusts Board Act 1943, s 3.

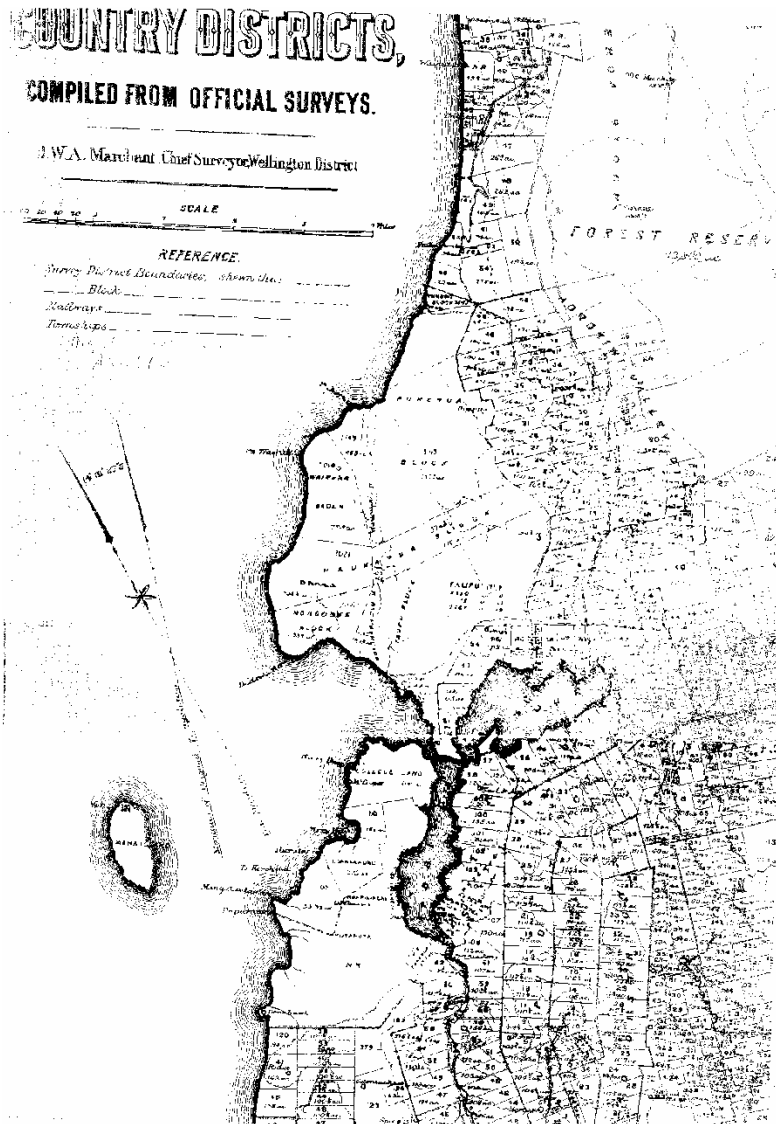
119 Section 14 of the Otaki and Porirua Trusts Board Act 1943 allowed the Board to sell or lease its lands.

include the land gifted in 1848. Whitireia itself has been sold to the Government, which has managed it indifferently.

Put in those terms the story of Whitireia comes across as yet another historic grievance, but to see matters in that simplistic way drains the story of most of its complexity and some of its meaning. In seeking to gain redress for Whitireia, Ngāti Toa engaged with a range of institutions of the colonial state: with the courts, with Parliament and with the executive government. This certainly demonstrates not only the determination and resilience of the iwi and of key elite leaders such as Wi Parata, but also of a degree of receptiveness on the part of the institutions concerned. Ngāti Toa certainly did not fail in their aspirations at every turn. Its biggest success seems to have been in Parliament, when in 1896 a Select Committee of the House of Representatives concluded that Whitireia should be returned and the accumulated trust funds paid out to the iwi. On the other hand, legislation introduced into the House by the government of the day in order to assist Ngāti Toa failed on two separate occasions. Ngāti Toa's run of success in the courts, as this article has shown, was even more mixed. With regard to the litigation which culminated in the Privy Council decision in *Wallis*, the most important fact is that Ngāti Toa were not able to influence events: the litigation did not concern them and did not involve them. The two occasions on which Ngāti Toa leaders sought directly to challenge the loss of Whitireia, in the *Wi Parata* and *Hohepa Wi Neera* cases, were both clear courtroom defeats. Turning to the third arm of the state, the executive government, it can be seen that officials and politicians were not always indifferent to Ngāti Toa concerns, and on occasion were prepared to devise solutions that the iwi felt able to accept. Influential politicians such as Hone Heke Rankin did lend their support to Ngāti Toa and the 1907 Act was a reasonable compromise which did make some effort to provide high quality secondary education for the children of the iwi. But, to repeat a general observation made earlier in this article, these events took place against a general background of overall contracting opportunities for Ngāti Toa, as its population plummeted and its land base fell. In 1900 Ngāti Toa was still able to win friends and influence people within the political elite, but this was a long way from Ngāti Toa's position in the region 60 years earlier, when the iwi dominated a powerful polity based on both sides of Cook Strait – a polity which had been a significant obstacle to the establishment of the hegemonic colonial state in central New Zealand.

In the present day the historical wheel has turned yet again and Ngāti Toa, after many years of litigation in the courts and more recently before the Waitangi Tribunal, is now engaged in the process of the settlement of their various historic grievances with the Government. At the time of writing the negotiations are still in progress. One issue that has arisen for negotiation and settlement – one among many – is Whitireia. How matters will eventuate remains to be seen. The final act of the Whitireia story cannot yet be told.

APPENDIX: MAP OF WHITIREIA BLOCK¹²⁰



¹²⁰ The gifted area which was the subject of all the litigation is the area marked on the map as "College Land", located at the northern end of the Whitireia peninsula projecting into Porirua harbour. The smaller surveyed titles are mostly country sections granted to settlers by the New Zealand Company out of the Wellington Crown grant.