Judge Aidan Warren

Dispute Resolution

February 2022

As a newly appointed Judge of the Māori Land Court it is highly appropriate that my contribution to the Judges' Corner relates to one of the new tools added to our kete by the legislative changes that came into effect in February this year.

The new Mediation regime establishes a dispute resolution process based on tikanga Māori to assist owners of Māori Land to resolve disagreements and conflict about their land. The mediation process available is a simplified version of the process that was provided for in the proposed changes to Te Ture Whenua Māori Act 1993 developed by the previous National Government.

The mediation process will be limited to matters within the Māori Land Court's jurisdiction and administered by the Court. However, it will be available for proceedings that are already before the Court as well as disputes for which Court proceedings have not been initiated. Unlike under the previous proposal, the mediator cannot adjudicate the dispute if it is not resolved through mediation. That is, there is no longer a decision-making role for the mediators.

What follows is a simple overview of the mediation process together with some observations.

Voluntary Process

Mediation will always be voluntary. That is, a Judge or Registrar of the Court cannot compel the parties to use the mediation process nor can one of the parties compel another party. This is consistent with the theory that if you are compelling parties to a dispute resolution process, it is unlikely to create an environment whereby the parties will reach agreement. Interestingly, in Samoa, the Courts have the power to compel parties to mediation. A Judge of the Māori Land Court now has the power to direct a Judicial Settlement Conference, which has some similarities to mediation.

Proceedings on foot or not

As noted above, one of the benefits of the proposed mediation process is that mediation is not only available where there are proceedings on foot, but also where there are no formal proceedings or applications before the Court. A simple application by the Registrar and the consent of the parties to the dispute is all that is required. This is a helpful tool whereby disputes can be solved at an early stage, as opposed to having to wait for a hearing. With the involvement of a skilled mediator, the parties may avoid significant costs (financial and relationship) by trying to resolve disputes early.

Appointment of Mediator

Either one or two persons are to be appointed as a mediator, with a clear indication that the appointments should reflect the skills required for the nature of the dispute.

Having the ability to appoint up to two mediators is helpful, given that at times one single mediator may not necessarily have all of the relevant skills, particularly if there are a range of property law matters, together with issues of tikanga or where the parties wish to hold the mediation in te reo Māori. There may be occasions, for example whereby a sole mediator may have strengths in the law and property issues, but may not have the ability to manage tikanga issues that underline the dispute; thus having two mediators who together have these skills could prove helpful.

The Chief Executive of the Māori Land Court is required to record a list of persons who are approved as mediators. There is the ability to appoint a mediator beyond that list if the parties consider that it is justified in the circumstances and the appointment is approved by the Chief Executive and the Judge or Registrar who referred the matter to a mediator.

There is also an important circuit breaker provision whereby even though the parties may agree to mediate, there will be circumstances where they simply cannot agree on the mediator. The Act provides for the Judge or Registrar to make an appointment if the parties cannot agree. This is an important provision given that there will always be a number of potential conflicts of interest in the Māori world.

For a period of time, it will only be Judges of the Māori Land Court who can be appointed to act as mediators under Part 3A of the Act.

Conduct of Mediation

The mediation process gives the mediator wide discretion on how the mediation will operate and makes it clear that that the process will be a confidential one and conducted on a without prejudice basis, meaning that confidential documents or settlement offers made in the mediation cannot be used against a party Court if the matter does not settle at mediation. This is standard in most mediation processes.

One of the key considerations with any new mediation process established by legislation is to ensure that the parties have a consistent experience, to the extent possible. Although flexibility is a critical benefit of mediations, key questions that the Court will need to monitor as we navigate this new development include:

- Will mediators adopt an evaluative approach whereby they may give their view on the merits of the dispute or simply facilitate the discussions?
- Will mediators provide settlement solutions or simply leave that to the parties, given the risk of solutions adopted by the parties turning out to be unworkable or inconsistent with the law.

Because the work of the Māori Land Court is highly regulated by the governing legislation and rules of the Court, private mediators will need to be mindful that many settlement agreements will need formal orders of the Court. For example, a private mediation appointed by consent under the Act, cannot create an outcome whereby the parties have agreed to a change of status from Māori Land to General Land in their mediated agreement and expect that to be rubber stamped by the Court. The Court would retain the ability to reject that agreement if the parties did not meet fully the legal test under the Act. It will therefore be important that mediators with some working knowledge of the relevant legislation are appointed once private mediators can be appointed under Part 3A of the Act.

Written Reports and Settlement Agreements

The appointed mediator must provide written reports to keep the Registrar informed of the progress of the mediation. The mediator is also to record the terms of the resolution reached at mediation and report them to the Judge or Registrar who referred the issue/s to the mediator. In the case of an unsuccessful mediation, the mediator is required to report to the Judge about the lack of resolution and state the issues that are unresolved.

Given that many of the parties before the Māori Land Court are unrepresented it is understandable why the mediator is required to play this reporting role. In private mediations, some mediators have a practise of not preparing the settlement agreements for the parties or being very careful when they are tasked with this job. The simple point is that settlement agreements arising from mediations can be legally binding documents and if there is a dispute about the validity of the agreement, then it may turn on who actually recorded the agreement and whether it was correct.

Most professional mediators will have their own standard Agreement to Mediate, which sets out the rules of the mediation and the basis of the mediator's appointment. The question is whether the mediation process will allow for mediators to have these agreements signed by the parties, to provide extra protections to them above those provided under the Act. That will of course depend on how the mediator appointments are managed.

In the employment dispute context, mediators are required to certify settlements and general template agreements are available. The key difference is that the remedies for resolving employment disputes are generally highly regulated by the law. While this could be said to be the same for Māori Land law, the breadth of disputes is much greater, creating the possibility of a wide range of settlement outcomes. The short point is that templates and practise notes may be required to give all players in the mediation process greater certainty.

Overall, the more simplified mediation process now included in the Act, premised on tikanga Māori and flexibility, is welcomed. The challenge now is to develop a robust and consistent framework, so that those owners of Māori Land who seek genuine resolution can use this service and avoid determinations that result in a winner and loser.

To conclude, I quote from the learned Sir Ivor Richardson [former President of the Court of Appeal] who noted that “It is not the absence of disputes that define a society or community but rather the processes developed to resolve those disputes that does”.

The new mediation provisions give the Court and Māori land owners a grand opportunity to define how we will resolve differences for the benefit of whānau, hapū and iwi.

Mā te huruhuru ka rere te manu, (with feathers the bird will fly)

Mauri ora