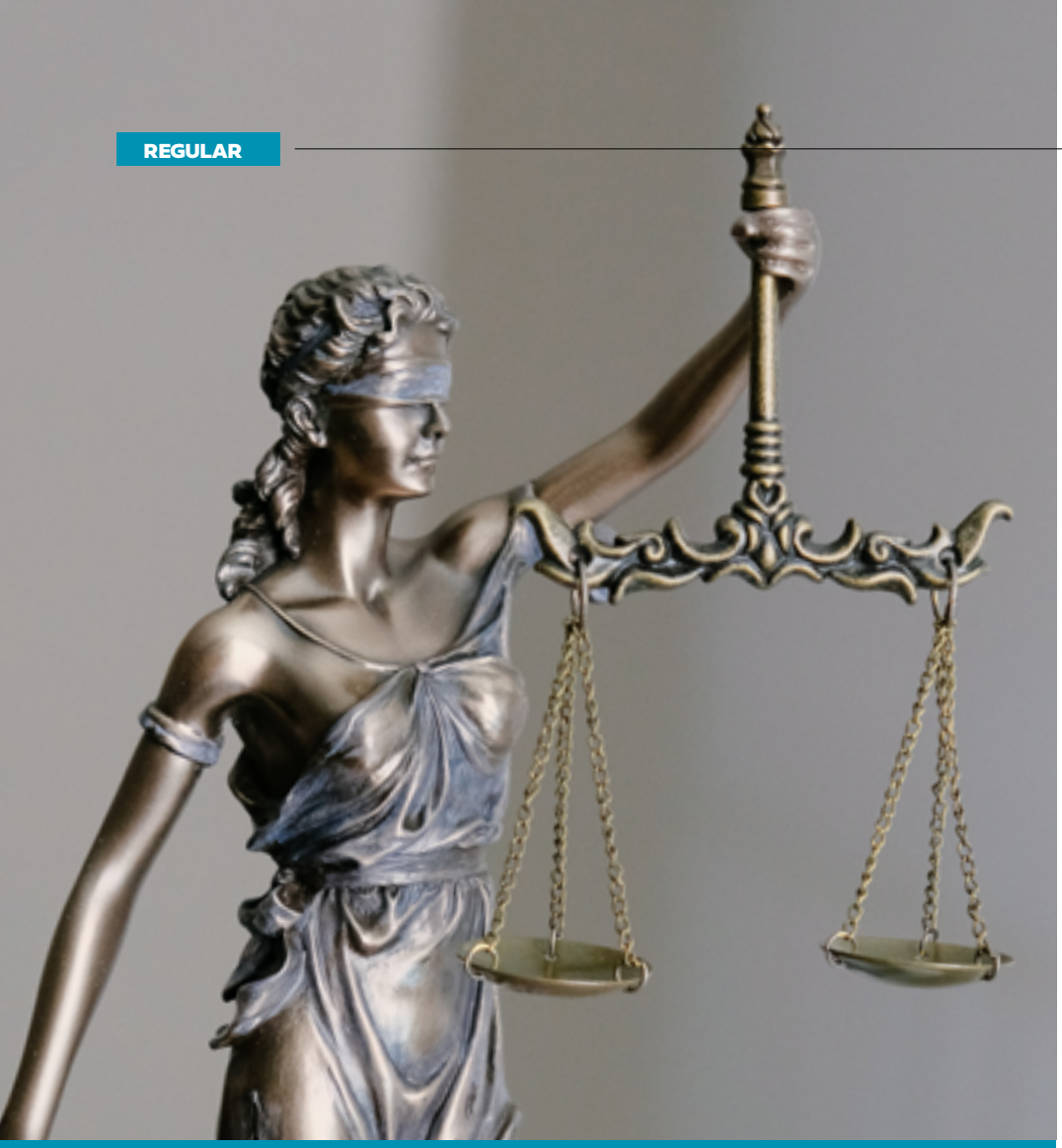


Case in Brief:

Esk Valley marae injunction

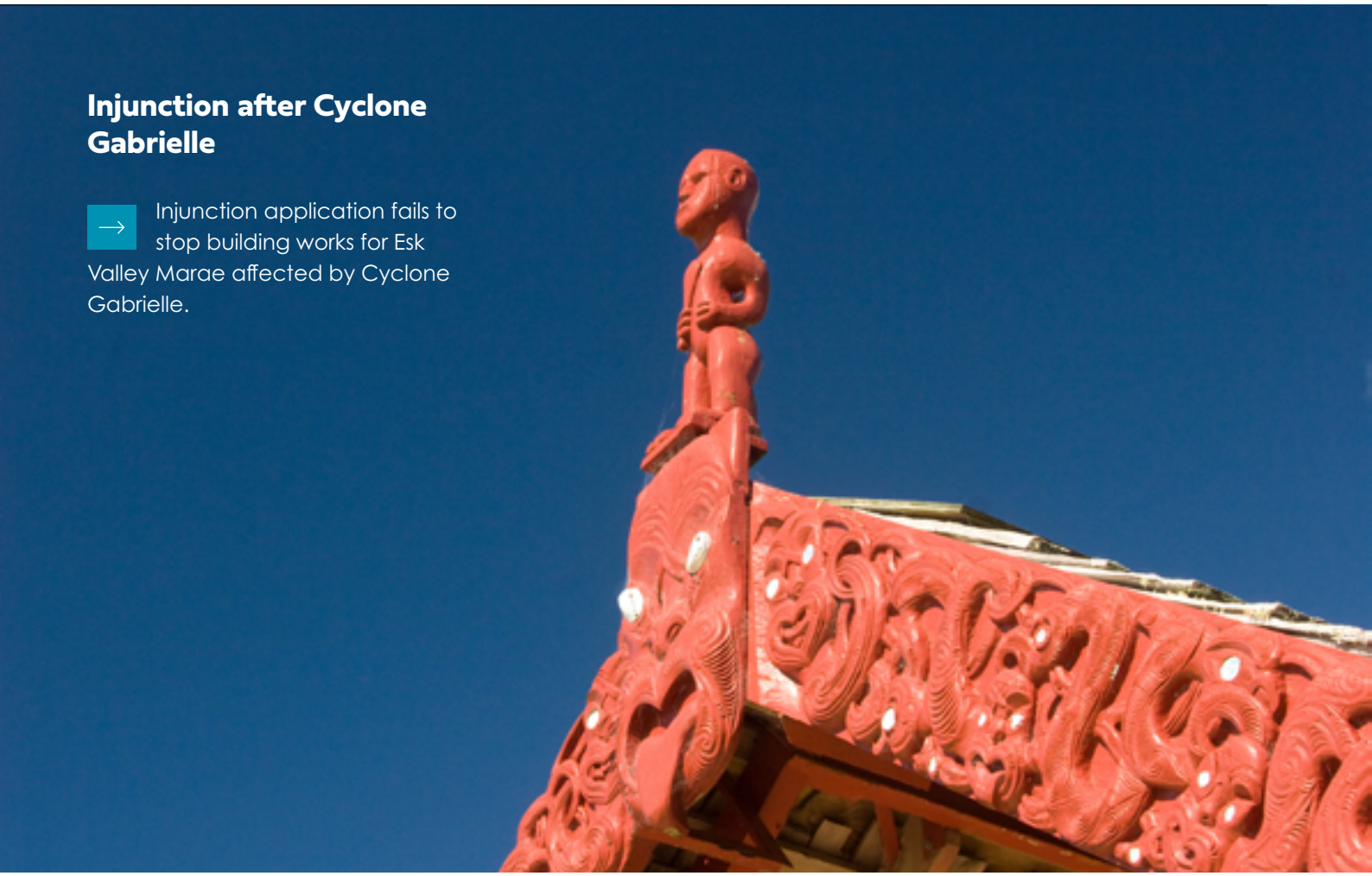
In Hiha v Reti [2023] NZMLC 31, the Māori Land Court had to consider an application for an injunction to stop building works on a Hawke's Bay marae. The application was unsuccessful.

WRITTEN BY RICHARD PIDGEON

Petane Marae is in the Esk Valley and presently has no wharenui. A building grant was obtained along with resource and building consents, before Cyclone Gabrielle hit in 2023. The Valley was subjected to flooding and is now likely to be in category 3 land. This means it is not safe for people to live there. There was dissension between trustees of the Marae as to whether to begin building or to wait for more clarity from the Hastings District Council about the status

Injunction after Cyclone Gabrielle

→ Injunction application fails to stop building works for Esk Valley Marae affected by Cyclone Gabrielle.



of the land. Those against building sought an injunction to prevent it.

The application

Of the six trustees, two wanted to wait, three wanted to proceed with building and one had informally resigned. The applicants sought to stop building and the respondents wished to proceed.

On 28 October 2022 the Council granted a resource consent to build the new wharenui and two months later the trustees obtained a building consent. At that stage all trustees wished to proceed with the building works. The works were put out to tender and on 2 February 2023 Hawke's Bay Construction Limited (HBCL) submitted the successful tender. On 14 February 2023 Cyclone Gabrielle hit and the Esk Valley was inundated.

The local authorities have assessed the land as having an unacceptable level of risk of injury or death associated with future severe weather events. While the risk assessment was underway the Marae trustees gained $1,618,270 in funding from the Department of Internal Affairs on 4 May 2023. The preliminary assessment of category three was notified to the trustees on 1 June 2023. A community engagement process is underway before the assessment is made final.

The trustees face the possibility of losing the funding, tender and consents if building does not get underway soon. They face wasted expenditure if the final classification is for category three land.

A hapū hui occurred on 11 June 2023 but no relevant evidence emerged from it. On 20 June a trustee meeting occurred to sign the contract with HBCL but only the respondents signed it, the applicants did not. The contract contemplated building to begin on 12 July 2023.

Complicating things was the fact one trustee resigned by email on 31 January 2023. An application for formal removal as a trustee was filed with the Court on 14 April 2023. It was yet to be considered when the application for an injunction came before the Court.

On 7 July 2023 the applicants filed an application under section 231 of Te Ture Whenua Māori Act 1993 (**Act**) seeking a review of the Petane Marae trust decision to commence building. An application for an injunction was also filed under section 19(1)(d) of the Act at the same time. On 10 July 2023 the respondents filed an application under section 240 of the Act to remove the applicants as trustees.

After a preliminary conference on 11 July 2023 the hearing took place by AVL on 12 July.

The decision

The Court applied the traditional framework for an injunction, considering whether:

1. there was a serious issue to be tried;
2. where the balance of convenience lay; and
3. what is the overall justice of the case.

Judge Stone found it was a proper question as to whether it was prudent for the trustees to continue with the building of the new wharenui if the Marae land is deemed no longer suitable for occupation. A serious question to be tried existed.

The application hinged on the second limb of the test, as to where the balance of convenience lay. Judge Stone noted:[1]

> There are significant uncertainties at play, including the final land classification for Petane Marae, what that classification will mean in terms of land use, whether (or not) the new wharenui will be insurable (and, if so, the premium levels), whether flood mitigation measures can be implemented (and, if so, what they may cost), and how the government will deal with category 3 land. The applicants say that there are too many unknown factors at this stage to proceed with the building work.

The Court was mindful that a number of external parties had essentially approved the building of the new wharenui. Granting the injunction might see HBCL simply walk away and place the government funding at risk. It was uncertain whether flood mitigation steps would be successful, but even if the wharenui were built it could likely be still utilised even if overnight accommodation were precluded. The Court found that if the funder was still prepared to engage, it was the funder's money after all.

The overall justice of the case favoured the building of the wharenui as the purposes of the Act spoke to the facilitation and promotion of the retention, use, development, and control of Māori land as taonga tuku iho. Building fostered those principles. The application for an injunction was declined.

Acting in chambers, Judge Stone *formally* removed the trustee who had informally resigned. This meant from 31 January to 13 July a majority of the six trustees was four. The contract with HBCL therefore needed to be re-signed at a freshly convened meeting of trustees.

The hearing of the substantive applications for review under section 231 and removal of trustees under section 240 of the Act needed timetabling, and a further judicial conference to timetable these matters was foreshadowed.

Judge Stone noted that these are matters on which *reasonable minds might disagree*,[2] whereby he implored the parties to work together for the betterment of the Marae rather than entrench their opposing positions.

Conclusion

This case deals with a unique set of circumstances in a traditional framework which ultimately turns on its own set of facts. The proceeding exemplifies the turmoil Cyclone Gabrielle has wreaked on parts of the country, with Hawke's Bay especially affected. Judge Stone was entitled to take the approach he did in a thoroughly orthodox application of legal principle.

1 *Hiha v Reti* [2023] NZMLC 31 at [25(b)].
2 *Hiha,* above n 1, at [40].