**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 47/2015**
**[2016] NZSC 62**

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| BETWEEN | MITA MICHAEL RIRINUI<br>Appellant |
| AND | LANDCORP FARMING LIMITED<br>First Respondent |
| | THE ATTORNEY-GENERAL<br>Second Respondent |
| AND | WHEYLAND FARMS LIMITED<br>Interested Party |

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| Hearing: | 17, 18 and 19 August 2015 |
| Court: | Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ |
| Counsel: | M T Scholtens QC, A N Isac and J B Orpin for Appellant<br>J E Hodder QC, B Gnanalingam, B J Maltby and, on 19 August 2015, S A Barker for First Respondent<br>D J Goddard QC, J R Gough and S J Humphrey for Second Respondent<br>A A Hopkinson for Interested Party |
| Judgment: | 9 June 2016 |

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## JUDGMENT OF THE COURT

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**A The appeal is allowed in part.**

**B The following declarations are made:**

**(i) The decision of Landcorp Farming Limited's shareholding Ministers and the Minister for Treaty of Waitangi Negotiations not to intervene in the tender process on behalf of Ngāti Whakahemo as they did on behalf of Ngāti Mākino was a wrongful exercise of a public power because it was made under a material mistake.**

**(ii)** **The decision by Landcorp Farming Limited on 28 February 2014 to sell Whārere farm to Micro Farms Limited was a wrongful exercise of a public power because it was made under a material mistake.**

**C** **All other forms of relief claimed by the appellant are declined.**

**D** **The restraining order made by this Court in Order C of its judgment granting leave to appeal (*Ririnui v Landcorp Farming Ltd* [2015] NZSC 72) is discharged.**

**E** **Costs are reserved. The parties may file written submissions as to costs in this Court and in the Courts below if they are unable to reach agreement.**

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**REASONS**

**ELIAS CJ AND ARNOLD J**
(Given by Arnold J)

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## Introduction

[1] This is a judicial review case. Judicial review is a supervisory jurisdiction which enables the courts to ensure that public powers are exercised lawfully. In principle, all exercises of public power are reviewable, whether the relevant power is derived from statute, the prerogative or any other source. The courts acknowledge limits, however. These limits are reflected primarily in the notions that the case must involve the exercise of a public power, that even if the court has jurisdiction, the exercise of power must be one that is appropriate for review and that relief is, in any event, discretionary. It is the scope of these limits that is at issue in the present case.

[2] The appellant, Mita Ririnui, is the Chairman of the Ngāti Whakahemo Claims Committee and Te Runanga o Ngāti Whakahemo. He brought judicial review proceedings on behalf of Ngāti Whakahemo in an attempt to halt the sale of a farm

property, Whārere, over which Ngāti Whakahemo claim mana whenua. The respondent, Landcorp Farming Ltd (Landcorp), a state-owned enterprise, was the vendor and the interested party, Wheyland Farms Ltd (Wheyland), was the purchaser (by nomination).

[3] In this Court, the principal relief sought by Ngāti Whakahemo seek an order setting aside the agreement for sale and purchase. By way of background to the description of the factual and other context which follows, their contentions may be summarised as follows:

(a) First, the agreement was tainted by bad faith on Landcorp's part. Were it not for Landcorp's bad faith, Ngāti Whakahemo would have issued these proceedings before the agreement had been concluded and sought an interim injunction to prevent any sale prior to their resolution.

(b) Second, Landcorp was labouring under an error of law as to Ngāti Whakahemo's status at all relevant times. But for that error, Landcorp would not have entered the agreement in the way that it did.

(c) Third, the shareholding Ministers refused to intervene in the sale process both because they wrongly thought they had no ability to intervene and also because they were labouring under the same error as Landcorp as to Ngāti Whakahemo's status.

**Factual background**

[4] For ease of presentation, we will divide the description of the factual background into two segments – the facts primarily relevant to the bad faith ground and those primarily relevant to the error of law grounds (although there is, of course, no rigid line between the two). In terms of the narrative, the facts relevant to the error of law grounds come first in time, and those relevant to the bad faith ground second.

*Facts primarily relevant to the error of law grounds*

[5] Landcorp is a state-owned enterprise governed by the State-Owned Enterprises Act 1986 (the SOE Act). Its shareholding ministers are the Minister of Finance and the Minister for State-Owned Enterprises. It owns a large amount of farm land, much of which was, before Landcorp's incorporation, in Crown ownership and is now subject to the memorial regime in the SOE Act.[1] In 2013 Landcorp owned a large block of land in the Bay of Plenty known as Whārere, on which there were five dairy farms.[2] Whārere, which comprises 404 ha on one title, had been acquired by the Crown between 1880 and 1912. It is subject to a memorial under s 27B of the SOE Act.

[6] In 2013, Landcorp decided to investigate the sale of Whārere as, although profitable for dairy farming, it was no longer a ready fit with Landcorp's other operations due to its isolation and because its facilities needed some upgrading. In August 2013, before it had embarked on any sale process, Landcorp advised the Office of Treaty Settlements (OTS) that it was investigating the sale of Whārere and asked whether the property was potentially of interest to the Crown for Treaty of Waitangi settlement purposes. Landcorp took these steps in accordance with a protocol which it had agreed with OTS in April 2012 (the Protocol). This Protocol, which is described in its preamble as "not legally binding", established a process by which Landcorp would give early warning of proposed land sales so that the Crown could consider whether the land was of interest to it for settlement purposes; where land was of interest, the Protocol set out a process by which the Crown would purchase it in order to "land bank" it.[3]

[7] To step back in the narrative for a moment, in February 2008 Ngāti Whakahemo filed a claim, Wai 1471, in the Waitangi Tribunal in respect of an area

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1 Section 27B of the State-Owned Enterprises Act 1986 [SOE Act] provides for the resumption of any land or interest in land by the Crown on the recommendation of the Waitangi Tribunal that such land be returned to Maori ownership. Section 27A provides that the District Land Registrar shall make a note on the certificate of title of any land or interest in land transferred to a state enterprise that the land or interest is subject to s 27B of the Act.

2 Although the farms had originally been run as five individual farms, since the late 1990s they had been run as two farms by sharemilkers.

3 The Protocol and its significance are discussed further below at [45]–[52].

of land which includes Whārere.[4] According to Mr Ririnui, Whārere is part of the ancestral lands of Ngāti Whakahemo, part of their papakainga (home). In a letter dated 29 May 2012 responding to an enquiry from Ngāti Whakahemo about Wai 1471, OTS expressed the view that all Ngāti Whakahemo's historical claims had been settled:

> The historical claims of Ngāti Whakahemo (including Wai 1471) have been settled through the Affiliate Te Arawa Iwi and Hapū Deed of Settlement which was signed on 2 June 2008. Ngāti Whakahemo is listed as a hapū of Ngāti Pikiao in the Claimant Definition of the Affiliate Te Arawa Iwi and Hapū Deed of Settlement.

A year later, on 16 May 2013, Ngāti Whakahemo's solicitors wrote challenging the OTS view. They provided a detailed explanation in support of their contention that Ngāti Whakahemo's historical claims had not been settled, the essential point being that the claims derived from an ancestor not covered by the settlement deed, namely Maruahaira. OTS responded by letter on 28 May 2013 maintaining its view, which prompted Ngāti Whakahemo's solicitors to write to the Minister for Treaty of Waitangi Negotiations, the Hon Christopher Finlayson QC, on 17 June 2013 drawing his attention to the dispute and summarising the basis for the contention that Ngāti Whakahemo's claims had not been settled. The solicitors sought a face-to-face meeting with the Minister and OTS to discuss the position. The Minister responded by letter on 16 July 2013, reiterating the Crown's position that Ngāti Whakahemo's historical claims had been settled.

[8] The Crown continued to maintain its position that Ngāti Whakahemo's historical claims had been settled until the present proceedings were issued in March 2014. At that point, the Crown accepted that the claims had not been settled, for the reasons given by Ngāti Whakahemo's lawyers in their May 2013 letter. The Crown's persistent adherence to its erroneous view is a central feature of the present proceedings.

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[4] There was some dispute about whether Wai 1471 applied to Whārere as it was not specifically mentioned in the claim. Williams J held that Whārere did fall within the claim: see *Ririnui v Landcorp Farming Ltd* [2014] NZHC 1128 (Williams J) [*Ririnui* (interim judgment)], at [65]–[78].

[9] Returning to the more immediate narrative, on 12 September 2013 OTS wrote in response to Landcorp's advice under the Protocol that it was considering selling Whārere. OTS said that the property was not of potential interest for a future Treaty settlement. It also asked that Landcorp advise Ngāti Mākino and Ngāti Whakaue of its intentions for Whārere once it had completed its investigations. OTS said that this advice should be given as a courtesy and not to provide those groups with any preferential treatment.

[10] The significance of Ngāti Mākino is that in the course of negotiating their Treaty settlement with the Crown in 2008, Ngāti Mākino signalled an interest in purchasing, or having a right of first refusal over, Whārere. When the Minister for Treaty of Waitangi Negotiations wrote to Landcorp about this in September 2008, Landcorp advised that the property was not surplus to requirements as it was strategically important and, in any event, Landcorp considered granting rights of first refusal to be unattractive. In the Agreement in Principle which the Crown and Ngāti Mākino signed in October 2008, the Crown agreed to explore with Landcorp the possibility of offering Ngāti Mākino redress in the form of an option to purchase Whārere or some form of joint venture mechanism. In October 2010, after discussions between OTS and Landcorp, the Minister for Treaty of Waitangi Negotiations wrote to the Minister for State-Owned Enterprises seeking a right of first refusal for Ngāti Mākino over Whārere and other Landcorp properties. The Minister for State-Owned Enterprises replied that providing a right of first refusal over Whārere was not a viable commercial option for Landcorp. Ultimately, when the Deed of Settlement between the Crown and Ngāti Mākino was signed on 2 April 2011 (which was a full and final settlement of Ngāti Mākino's historical claims),[5] rights in relation to Whārere were not included as part of the redress.

[11] However, by 2013 Landcorp had changed its mind as to Whārere's strategic importance. Once advised that the Crown had no interest in Whārere for Treaty settlement purposes, Landcorp's board decided to sell the property on the open market. Tender documents were issued in late October 2013. Towards the middle of November 2013, Ngāti Whakahemo became aware of the sale, apparently by chance. On 18 November their solicitors wrote to Landcorp saying that Ngāti Whakahemo

5 Ngāti Mākino Claims Settlement Act 2012, s 11.

had an historical claim covering Whārere (Wai 1471) and registering Ngāti Whakahemo's interest in the property. They advised that Ngāti Whakahemo had been in contact with the real estate agent handling the tender. Given the terms of the letter, Landcorp sought clarification from OTS. OTS responded by email on 19 November 2013 reiterating the view that Ngāti Whakahemo's claims had been settled and suggested that Landcorp "treat the letter as it reads, as an expression of interest in the property". On 25 November 2013, Landcorp replied to the solicitors' letter repeating OTS's advice and inviting Ngāti Whakahemo to participate in the tender process "along with other interested parties".

[12] Around this time, Ngāti Whakahemo engaged a consultant, Mr Willie Te Aho, to act on their behalf in dealing with the Crown over Whārere. On 25 November 2013 Mr Te Aho emailed the Minister of Finance's office and OTS saying that Ngāti Whakahemo wanted to discuss the commercial purchase of Whārere and the settlement of Wai 1471 in conjunction with that. Ms Houkamau of the Minister's office replied later that day that the Minister was away but she would rely on OTS in formulating her advice to the Minister. Mr Te Aho responded that same day, saying he would like to meet the shareholding Ministers "before a decision is made by the Landcorp Board". He said that Ngāti Whakahemo wanted to buy Whārere at a commercially agreed price and explained why it was not prepared to enter the tender process. If he did not receive an undertaking, Ngāti Whakahemo would file a resumption application. Ms Houkamau responded that she would put the matter before the Minister of Finance "to seek his agreement for a clear signal to be sent to relevant Ministers regarding [the] Minister's expectations of a timely, fair, commercial and [Treaty of Waitangi] cognisant sale of the Landcorp – Whārere Farm". She indicated that Mr Te Aho's proposal had merit but noted that there were time constraints. Mr Te Aho replied later the same day.

[13] Following two further emails from Mr Te Aho, Ms Houkamau gave the Minister of Finance's formal response by email on 2 December 2013. In that email she repeated the Crown's erroneous view that Ngāti Whakahemo's claims had been settled and invited Ngāti Whakahemo to participate in the tender. She indicated that if a tender was submitted by the closing date of 4 December 2013, Landcorp would

agree to confirmation of funding arrangements by 11 December 2013 (which was, of course, a concession to Ngāti Whakahemo). Ms Houkamau went on to say:

> Given the public tender process and in ensuring good faith to those who have already completed tenders or are working within the confines of the advertised date for tenders of 4 December, I understand that Landcorp cannot agree to delay or stop this process.

[14] Mr Te Aho replied on 2 December 2013 saying that as there was no guarantee that Ngāti Whakahemo would secure the land, his "constructive approach" had failed. Later on 2 December, Mr Te Aho sent the email chain to numerous people outlining how he proposed that matters should proceed from this point. One of the steps to be taken was the filing of a resumption claim in the Waitangi Tribunal. This was filed on 4 December 2013 and served on Crown Law, OTS and Landcorp on 5 December 2013.

[15] At the same time as these events were occurring, there were dealings between OTS and Ngāti Mākino about the sale of Whārere. In particular, on 29 November 2013:

(a) OTS wrote to Ngāti Mākino advising that OTS had waived its interest in the farm and that the property was now being advertised for sale. OTS advised Ngāti Mākino that if they were interested in purchasing the property they should contact Landcorp and advise of their interest; and

(b) Ngāti Mākino wrote to the Minister for Treaty of Waitangi Negotiations outlining their concern over the sale and asking to meet him, OTS officials and Landcorp about it. They asked that the tender be called off in the interim.

[16] The tender closed on 4 December 2013. Micro Farms Ltd (Micro) was the highest tenderer, having offered a purchase price of $19.025 million. On 5 December 2013 there was a meeting between officials and the Minister for Treaty of Waitangi Negotiations about the background to the Ngāti Mākino request. Although there were further meetings between 10–13 December 2013 involving

Ministers, officials and Landcorp about the tender and Ngāti Mākino's position, it may be that a decision to halt the tender process had effectively been made earlier. Mr Pamment, who is a director of both Micro and Wheyland Farms Ltd[6] and had the carriage of Micro's tender, gave uncontradicted affidavit evidence that on 6 December 2013 he and his wife were told by the real estate agent handling the sale that Ngāti Mākino had claimed that Whārere should have been offered to them and that the tender process would be cancelled as a consequence. He said how disappointed they were at this news.

[17] Be that as it may, on 12 December 2013, the Landcorp board met by way of conference call. The board agreed that its decision "came down to an exercise of judgement by the directors, having regard to all the issues identified, to decide whether the proposed course of action was in the interests of Landcorp". The board then resolved:

> To Note that:
>
> (a) [Landcorp] in good faith commissioned a tender process for the sale of Wharere, having made due inquiry of OTS of any treaty claimant interest;
>
> (b) Following confirmation that no treaty claims affected Wharere, the property was marketed for a period of six weeks, with tenders closing on 4th December 2013;
>
> (c) During this process and subsequently, Ngati Makino sought redress for failure of the Crown to include the property in their treaty settlement;
>
> (d) The Shareholding Ministers, at the request of the Minister for Treaty of Waitangi Negotiations, have requested Landcorp to delay acceptance of any tender to allow Ngati Makino the opportunity to purchase the property;
>
> (e) Landcorp had contacted Ngati Makino and accepted an invitation to meet with them on Tuesday 17 December 2013 to explain Landcorp's position and to explore with them ways in which the two parties could co-operate in any other areas to their mutual benefit.

[18] The board went on to agree the following proposal:

> (a) To cancel the current tender;

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[6] The tender was submitted by Micro Farms Ltd and Wheyland Farms Ltd was subsequently set up the complete the transaction as Micro's nominated purchaser.

(b) To give Ngati Makino and other iwi, as agreed by Ngati Makino, first right of refusal to purchase Wharere at the market price, as determined by the current tender process;

(c) That Ngati Makino … respond by 28th February 2014 with settlement on 1st June 2014;

(d) That if the market price is not matched by 3pm on 28th February 2014, then Landcorp will be free to remarket the property by a new tender process, or by private treaty if the current market price is matched;

(e) That the Minister for Treaty of Waitangi Negotiations will issue a press statement explaining the background to the cancellation of the Tender and confirming that Landcorp had acted professionally and in good faith and in accordance with its obligations under the State Owned Enterprises Act 1986;

(f) To ensure the integrity of the current tender process, this proposal would remain open for acceptance by the Shareholding Ministers and the Minister for Treaty of Waitangi Negotiations until 9.00am Tuesday 17 December 2013.

[19] The board received confirmation from the Ministers of their acceptance of its proposal and the board held a further meeting on 18 December 2013, at which it confirmed the first four resolutions and considered the terms of a draft press release to be issued by the Minister for Treaty of Waitangi Negotiations.[7] On 13 December 2013 Ngāti Awa had also written to the Ministers expressing concern about the tender. This resulted in a meeting on 18 December between the Minister for Treaty of Waitangi Negotiations**,** Ngāti Awa and Ngāti Mākino. Although not invited, Ngāti Whakahemo learnt of this meeting and also attended it. Mr Ririnui indicated that Ngāti Whakahemo was interested in participating in a joint purchase of Whārere, but only on a basis that recognised Ngāti Whakahemo's mana whenua over the property. This meant that Ngāti Whakahemo required a leadership role in the purchase and in any post-purchase structure.

[20] On 20 December 2013, the Minister for Treaty of Waitangi Negotiations issued a press release welcoming Landcorp's decision to provide Ngāti Mākino and their neighbouring iwi a further opportunity to purchase the farm. It read in part:

> Although Landcorp had followed all the agreed protocols with the Office of Treaty Settlements, the Landcorp Board after considering the exceptional circumstances in this case and the very short period of time since Ngati

[7] The 18 December Board meeting is referred to in more detail below at [68].

> Makino's settlement, has agreed to cancel the tender process and allow Ngati Makino and their neighbouring iwi, an opportunity to make a formal commercial offer for the farms.
>
> We recognise that throughout this process, Landcorp has acted appropriately and in good faith, and in accordance with its obligations under the State Owned Enterprises Act.

[21] The upshot was, then, that despite Ms Houkamau's advice to Mr Te Aho on 2 December 2013 that Landcorp could not agree to stop or delay the process, Landcorp did in fact "cancel" the tender soon after, and offered Ngāti Mākino "first refusal" in respect of Whārere at or above the market price. Landcorp identified a price range based on Micro's tender and allowed Ngāti Mākino a two month window, expiring on 28 February 2014, to complete negotiations.

[22] On 10 December 2013, Ngāti Whakahemo filed a memorandum in the Waitangi Tribunal seeking an urgent hearing of their application for resumption. The Tribunal held a teleconference on 20 December to address the application. Crown counsel advised the Tribunal that the tender had been cancelled to give Ngāti Mākino and neighbouring iwi an opportunity to make a formal commercial offer for Whārere. The Tribunal gave directions that Ngāti Whakahemo were to advise the Tribunal by 31 January 2014 whether they still sought urgency, the Crown was to file its response by 14 February 2014 and Ngāti Whakahemo to file any reply by 21 February 2014. Ngāti Whakahemo advised the Tribunal on 31 January 2014 that they were still seeking urgency. The Crown sought an extension of time to respond until 4 March 2014, but did not in fact file its response until 6 March 2014, when it advised that Whārere had been sold (these dates are relevant to the "bad faith" claim). The Crown advised that it opposed urgency.

[23] In discussions with Ngāti Mākino in February 2014 concerning the purchase of Whārere, Landcorp indicated that it was prepared to consider ways in which it might assist Ngāti Mākino to fund the purchase. Landcorp also indicated that it would be willing to manage the property for Ngāti Mākino on a sharemilking or other basis. For their part, Ngāti Mākino said that they were interested in involving Ngāti Whakahemo as a partner in the project as Ngāti Whakahemo had the mana whenua interest in Whārere. Ngāti Mākino undertook to talk to Ngāti Whakahemo

about participating in the purchase and about resolving their resumption application before the Waitangi Tribunal.

[24] Discussions between Ngāti Mākino and Ngāti Whakahemo did not occur until 24 February 2014, four days before Landcorp's offer was due to expire.[8] The discussions came to nothing, apparently because Ngāti Whakahemo could not accept that Ngāti Mākino would take the lead role in the project. Ultimately, Ngāti Mākino was not able to put together a viable offer and advised Landcorp on 27 February 2014 that it was withdrawing from the process.

[25] Ngāti Whakahemo's solicitors wrote to Landcorp on 27 February 2014 with reference to Landcorp's letter of 25 November 2013.[9] The solicitors said that the advice that Landcorp had received from OTS as to the settlement of Ngāti Whakahemo's claims was incorrect and that the claim to Whārere had not been settled. The letter went on to say:

> 8. We note that Landcorp cancelled its tender for Wharere Farm late last year as a result of Ngati Whakahemo's [resumption] application to the Waitangi Tribunal.
>
> 9. Notwithstanding the urgent application for resumption, and cancellation of the tender, we understand that Landcorp is prepared to entertain offers to purchase the Wharere Farm from third parties and that it has or may shortly receive such offers. The sale of the Wharere Farm by Landcorp to a third party would prejudice Ngati Whakahemo's claim to the land under Wai 1471 and the prospects of the land being resumed pursuant to s 8A of the Treaty of Waitangi Act 1975.
>
> 10. In order to preserve Ngati Whakahemo's claim to the Wharere Farm, we ask that Landcorp provide an undertaking that it will not enter into any agreement (whether conditional or unconditional) to sell the Wharere Farm without first giving Ngati Whakahemo 20 working days' notice of intention to do so by way of written notice to this firm.
>
> 11. If an undertaking is not received by this firm prior to Thursday 6 March 2014 at 5.00 pm, Ngati Whakahemo will be obliged to make an urgent application to the High Court for an injunction preventing the sale of the Wharere farm pending the hearing and final determination of Wai 1471.

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8 Ngāti Whakahemo were not aware of this deadline: see *Ririnui* (interim judgment), above n 4, at [45].

9 See above at [11].

[26] Also on 27 February 2014, Mr Te Aho emailed Ms Traci Houpapa, the deputy chair of Landcorp's board, indicating that Ngāti Whakahemo had approved the issue of proceedings to stop the sale of Whārere and attaching a copy of their solicitors' letter of the same day. Mr Te Aho said that the discussions with Ngāti Mākino had broken down and suggested that representatives of Ngāti Whakahemo and Landcorp meet on 4 March 2014 for "without prejudice" discussions to see if a way forward could be found. Ms Houpapa forwarded this email to Landcorp's Chief Executive, Mr Steven Carden. Ngāti Whakahemo were not aware that the deadline for Ngāti Mākino to make an offer was to expire the following day.

*Facts primarily relevant to the bad faith ground*

[27] On 28 February Mr Carden called the Minister for Treaty of Waitangi Negotiations' press secretary to say that the Landcorp board would be meeting that afternoon to resolve that, following Ngāti Mākino's withdrawal, Landcorp would re-enter negotiations with the highest bidder in the "previously abandoned public tender" (Micro) and that Landcorp expected Ngāti Whakahemo to restart its Tribunal application for resumption. The Landcorp board did meet and, having noted the failure of Ngāti Mākino to put together a bid, as well as Ngāti Whakahemo's request for an undertaking and threat to issue proceedings to delay or prevent the sale, the board resolved (among other things):

(a) to enter negotiations for the sale of Whārere with Micro, with settlement to be no later than 31 May 2014; and

(b) that Micro would be advised of Ngāti Whakahemo's Waitangi Tribunal claim (Wai 1471) and of its threatened injunction proceedings.

The same day, Mr McKenzie, whose role as General Manager – Property and Environment involved negotiating and carrying out Landcorp's various land sales including the tender and negotiations to sell Whārere,[10] telephoned Mr Pamment to advise that Landcorp wished to accept Micro's tender bid. Mr McKenzie met

[10] Mr McKenzie was also one of Landcorp's seven authorised signatories.

Mr and Mrs Pamment later in the evening to discuss the purchase. Mr Pamment's evidence was that he asked Mr McKenzie whether Wai 1471 could have any impact on the sale of the property and was told that OTS had advised that Ngāti Whakahemo did not have a credible claim and Landcorp was relying on that advice.[11] Mr Pamment deposed:

> He [Mr McKenzie] also told us that Landcorp would not enter into an agreement to sell the property if it thought Ngati Whakahemo had a credible claim.

Mr Pamment went on to say that Mr McKenzie advised that Landcorp would include a provision in the sale and purchase agreement providing for a leasing arrangement if settlement was delayed.[12]

[28] The following day, Mr Carden contacted Ms Houpapa and suggested that she contact Ngāti Whakahemo and offer a meeting on 7 March 2014. He cautioned against setting an expectation that Landcorp was meeting to negotiate. In an email later that day he referred to meeting with Ngāti Whakahemo's leadership "to listen to their concerns". Ms Houpapa emailed Mr Te Aho that evening. Her email said:

> The Landcorp board has met and decided not to extend the timeframe. The Landcorp lawyers have been asked to respond to [your solicitors'] letter accordingly.
>
> Steven [Carden] and I are still available to meet with [Mr Ririnui] and [another Ngāti Whakahemo representative] to discuss the situation if they would like – unfortunately, prior commitments mean next Friday 7 March is the earliest we could both meet in Wellington or Rotorua (if that was more convenient) so please let us know.
>
> Willie, you and I both know that wise minds around a table make for good outcomes; e hoa, I'm sorry that, in this case, timeframes have conspired against us.

[29] On 3 March 2014, Landcorp's solicitors emailed a letter dated 28 February 2014 responding to the request from Ngāti Whakahemo's solicitors for an undertaking. They declined to give the undertaking, said that Ngāti Whakahemo was

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[11] Mr Pamment also said that when he had raised Ngāti Whakahemo's claim with Mr McKenzie earlier in February, he was told that Landcorp had done its own due diligence before offering Whārere for tender and was satisfied that the claim had no substance.

[12] The relevant clauses of the agreement for sale and purchase, cls 21 and 22, do more than simply provide for a leasing arrangement in the event settlement is delayed, however: see below at [33]–[34].

adequately protected by the resumption provisions in the SOE Act and asked that they be advised if any application for interim relief was made. Ngāti Whakahemo's solicitors replied on 4 March 2014 summarising the background and indicating that Ngāti Whakahemo was prepared to participate in an urgent process before the Waitangi Tribunal to have the historic claims covered by Wai 1471 determined as a preliminary point. They renewed their request for an undertaking. On the same day, the solicitors sent copies of their recent correspondence with Landcorp's solicitors about an undertaking to the shareholding Ministers and to the Minister for Treaty of Waitangi Negotiations. The solicitors again proposed that Ngāti Whakahemo's historic claims covered by Wai 1471 be determined as a matter of urgency by the Waitangi Tribunal and requested the same undertaking from the Ministers as had been sought from Landcorp. They asked for a response by 5 pm on 6 March 2014.

[30] Mr Te Aho responded to Ms Houpapa's email of 1 March on 4 March. He agreed to a meeting on 7 March in Rotorua, noted that he understood that Landcorp was "now re-engaging with the highest bidders" and confirmed a discussion which he had had with Ms Houpapa at Waitangi on 4 February, to the effect that Ngāti Whakahemo was keen to do a commercial deal with Landcorp for acquisition of Whārere but had been shut out of the process. He sent a follow up email later that day which indicated that Ngāti Whakahemo was arranging talks with a bank to "firm up lending arrangements". There was then a series of text messages between Mr Te Aho and Ms Houpapa which indicated that Ngāti Whakahemo was working on putting together a bid. Mr Te Aho telephoned Ms Houpapa on 4 March on a confidential basis and asked her what "ballpark" figure Ngāti Whakahemo would have to offer for Whārere. Ms Houpapa responded that the offer would have to be in the vicinity of $23 million (which was, of course, well above Micro's tender price of $19.025 million). Mr Te Aho emailed Mr Ririnui and other representatives of Ngāti Whakahemo late on 4 March, confirming the 7 March meeting with Ms Houpapa and Mr Carden and saying "I am advised that if our purchase price is $23m, we will be in the ball park". Mr Te Aho then discussed some joint venture options involving Ngāti Awa. In a further email he said that he had confirmed that the $23 million was for the land and buildings only (the stock belonged to the sharemilkers). This clarification came about because a Ngāti Awa representative had asked Mr Te Aho whether the $23 million included stock. As Mr Te Aho did not know, he telephoned

Ms Houpapa again to ask her, and she responded that the figure did not include stock.

[31] While this was going on, Landcorp was finalising the agreement for sale and purchase of Whārere with Micro. There were several discussions involving variously Mr Carden or Mr McKenzie and Mr Pamment concerning, among other things, the position of Ngāti Whakahemo. On 3 March 2014, Landcorp's solicitors sent a draft agreement for sale and purchase as well as other documents (including the letter from Ngāti Whakahemo's solicitors quoted at [25] above) to Micro's solicitors. Micro signed the agreement on 4 March but raised several queries. The matters raised caused no difficulty from Landcorp's perspective, and Landcorp representatives proceeded to sign the agreement, Mr McKenzie on 4 March and Mr Kennedy-Good[13] on the morning of 5 March 2014. Shortly after Mr Kennedy-Good had signed the agreement, Landcorp's solicitors advised Ngāti Whakahemo's solicitors that no undertaking would be provided. In addition, on 6 March Mr Finlayson wrote to Ngāti Whakahemo's solicitors on behalf of himself as Minister for Treaty of Waitangi Negotiations and Attorney-General, as well as on behalf of the shareholding Ministers.[14] He said:

> Shareholding Ministers cannot make the undertaking you seek. The powers of Landcorp's shareholding Ministers are set out in the State-Owned Enterprises Act 1986. The Act is designed so that these powers are exercised at a high-level (e.g. relating to the Statement of Corporate Intent or the State-Owned Enterprise's objectives) or in a light-handed way. The Courts have also confirmed that the Act is part of a light-handed regulatory regime that cannot countenance 'heavy-handed' ministerial or parliamentary control of the State-Owned Enterprise's trading activity.
>
> Intervening to provide an undertaking, particularly when Landcorp have declined to do so, is clearly inconsistent with the provisions of the Act.
>
> Ministers did consider it appropriate to promote the concept of a delay with Landcorp in order to provide Ngati Makino and other iwi with the opportunity to purchase the property. We understand Ngati Whakahemo was involved in the discussions and was invited, but declined, to be part of any purchase.

[32] There was a further text message exchange between Mr Te Aho and Ms Houpapa on 5 March 2014, the terms of which made it clear that Ngāti

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13 Mr Kennedy-Good was the Company Secretary of Landcorp and an authorised signatory.

14 A draft of the Minister's letter was provided to Landcorp for comment.

Whakahemo were still working on putting an offer together. However, on the afternoon of 6 March 2014, Ms Houpapa telephoned Mr Te Aho to advise that Landcorp had concluded a sale and purchase agreement for Whārere with Micro. The meeting scheduled for 7 March between representatives of Landcorp and Ngāti Whakahemo nevertheless went ahead. According to Mr Ririnui's note of the meeting, Ms Houpapa confirmed her advice of the previous day that Whārere had been sold. Ngāti Whakahemo expressed their "disgust" at Landcorp's handling of the matter and said that they thought the $23 million figure was well above the value of Whārere. Mr Carden expressed his agreement with that and said that Landcorp was really surprised at the bid.

*The sale and purchase agreement: cls 21 and 22*

[33] At the time the sale and purchase agreement was concluded, both Landcorp and Micro knew that Ngāti Whakahemo had an application for urgency before the Waitangi Tribunal in relation to its resumption application and had threatened litigation in the High Court, in the context of which it intended to seek an interim injunction halting the sale process. Accordingly, cls 21 and 22 were included in the agreement. These clauses provide:

> **21 Purchaser's acknowledgements**
>
> 21.1 The Purchaser acknowledges and agrees that:
>
> (a) the Property is sold subject to all the interests registered on the computer freehold register for the Property, including, without limitation, the memorial registered under the State-Owned Enterprises Act 1986 (referred to in further term 21.1(c));
>
> (b) It has fully informed itself as to the nature and effect of:
>
> (i) the memorial registered under section 27A State-Owned Enterprises Act 1986; and
>
> (ii) section 27B State-Owned Enterprises Act; and
>
> (c) it is aware that the Property is currently subject to a historical Treaty of Waitangi claim (WAI 1471) and that Ngāti Whakahemo has filed an urgent application for resumption of the Property pursuant to section 8A of the Treaty of Waitangi Act 1975 presently before the Waitangi Tribunal ("**the Claim"**).

**22 Intervening Event Clause**

22.1 If at any time up until settlement, there is a charging order, caveat, or other encumbrance registered against the title to the Property, or an injunction or court order relating to the Claim **("competing interest")** that would prevent registration of a memorandum of transfer in favour of the Purchaser, and the Vendor is unable, or believes that it will be unable, by the Settlement Date to resolve the competing interest, then the parties agree that the Vendor shall grant to the Purchaser a lease of the Property on standard farming terms and conditions to be agreed between the parties. The Lease shall commence on Settlement Date, being 30 May 2014 and, subject to further term 22.4, shall continue until the settlement date specified in accordance with further term of sale 22.2.

22.2 The Settlement Date shall be deferred to that date being five (5) working days after the Vendor notifies the Purchaser, in writing, that it is willing and able to settle, or such other date as may be agreed between the parties.

22.3 The Vendor will use all reasonable endeavours to pursue withdrawal or resolution of the competing interest by negotiation or litigation, and shall keep the Purchaser fully informed.

22.4 If by 30 May 2015 (or such other date as may be agreed in writing between the parties) the Vendor has not been able to resolve the competing interest, then either party may by notice in writing to the other, cancel the contract evidenced by this Agreement.

22.5 In no circumstances shall the Vendor be liable to the Purchaser for damages or compensation in the event that settlement is delayed pursuant to the provisions of this clause. If either the Vendor or the Purchaser in the exercise of its rights under this clause cancels this Agreement, then the Purchaser shall be entitled to a refund of its deposit and neither the Vendor nor Purchaser shall have any further right or claim against the other.

[34] The effect of these provisions is that, if the parties were unable to settle on 30 May 2014 (the settlement date) as a result of (relevantly) an injunction or court order in relation to Ngāti Whakahemo's historic claim, Landcorp would grant Micro a lease to enable it to farm the property. In the meantime, Landcorp would use reasonable endeavours to secure the withdrawal or resolution of Ngāti Whakahemo's claim by negotiation or litigation. If Landcorp was not able to achieve that by 30 May 2015, either party was entitled to cancel the agreement. If that occurred, Micro would be entitled to the return of its deposit, but apart from that neither party would have any claim against the other.

**The proceedings**

[35] Mr Ririnui issued the present proceedings on 7 March 2014. He sought an interim injunction preventing the sale of the property pending resolution of the proceedings. In an interim decision dated 26 May 2014, Williams J granted an interim injunction;[15] and, indeed, the transaction has not yet settled as a result of the court orders made to date.

[36] In his interim decision, Williams J:

(a) Declared that the decision of OTS under the Protocol to disclaim any interest in Whārere for Treaty settlement purposes was invalid and of no effect. This was because OTS's decision was:[16]

(i) the exercise of a public power affecting Ngāti Whakahemo's interests, which was reviewable at common law; and

(ii) materially influenced by a fundamental error concerning the status of Ngāti Whakahemo's claim, which the Judge characterised as an error of law and as (in effect) a failure to take into account a mandatory relevant consideration.

(b) Declined Ngāti Whakahemo's application for judicial review of Landcorp's decision to sell Whārere on the basis of a breach of s 9 of the SOE Act or on the basis of a legitimate expectation. Williams J held that s 9 applied to the Crown, not to Landcorp,[17] and that there was no basis for the legitimate expectation argument.[18]

(c) Held that the shareholding Minister had the power to intervene to prevent the sale if to allow it to proceed would have been to permit a breach the principles of the Treaty,[19] and that the Ministers should

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15 *Ririnui* (interim judgment), above n 4, at [164].
16 At [87]–[97].
17 At [101]–[109].
18 At [110]–[114].
19 At [136].

have explored "with an open mind and in good faith" how the Crown's obligations to Ngāti Whakahemo, as a group with an unsettled claim in relation to Whārere, might have been satisfied.[20]

(d) Ordered the Minister for Treaty of Waitangi Negotiations to:

(i) reconsider whether Whārere should be dealt with under the Protocol given that Ngāti Whakahemo had an extant claim in relation to Whārere; and

(ii) consult with Ngāti Whakahemo about the possible acquisition of Whārere.

(e) Held that the Court had power to set aside the agreement for sale and purchase, but did not do so.[21] Rather, the Judge delayed settlement for two months to enable the other steps to be taken.[22]

(f) Directed that there be a further hearing two months later.

[37] The Crown and Landcorp immediately lodged appeals. Despite that, the Minister for Treaty of Waitangi Negotiations did reconsider whether, in terms of the Protocol, Whārere was of interest to the Crown for Treaty settlement purposes. He concluded that it was not of interest, either in whole or in part. This was because other Crown properties within Ngāti Whakahemo's area of interest were available and he considered that Whārere was much more valuable than any likely settlement with Ngāti Whakahemo. At the final hearing before Williams J, there was no challenge to the Minister's reconsideration. Rather, Ngāti Whakahemo sought and were granted leave to amend their pleadings to include the bad faith claim. In his final judgment, Williams J dismissed that claim.[23] He found that it was unnecessary to reach any conclusion as to the existence of bad faith because such a finding would not have assisted Ngāti Whakahemo. Their claim depended on the attitude adopted

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20 At [146].
21 At [157]–[163].
22 At [164].
23 *Ririnui v Landcorp Farming Ltd* [2014] NZHC 3402 (Williams J) [*Ririnui* (HC final judgment)].

by the Ministers to their acquisition of Whārere, and the Ministers had refused to provide any assistance. Landcorp's stance was accordingly irrelevant.[24]

[38] The hearing before the Court of Appeal addressed the various appeals and cross-appeals.[25] The Court held that:

(a) The advice given by OTS under the Protocol (and subsequently) to the Ministers (and later to Landcorp) that Ngāti Whakahemo's claim was settled was wrong in law but was not justiciable.[26] It was not justiciable because:

(i) The Protocol was not legally binding and so did not create any legally enforceable rights.[27]

(ii) OTS's erroneous advice did not affect Ngāti Whakahemo's rights or have the potential to do so, directly or indirectly. Ngāti Whakahemo's rights in relation to Whārere were already protected by the resumption memorial.[28]

(iii) The subject matter – Treaty settlement – involved policy and political decisions and was inappropriate for review.[29]

Even if the OTS advice was justiciable, it was incapable of having any legal effect and thus was not of any practical consequence to Ngāti Whakahemo.[30]

(b) Neither the shareholding Ministers nor the Minister for Treaty of Waitangi Negotiations had the power to intervene in March 2014 to prevent the sale of the property. By then, Landcorp had entered into a

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24 At [85]–[87].
25 *Attorney-General v Ririnui* [2015] NZCA 160 (Harrison, Stevens and French JJ) [*Ririnui* (CA)].
26 At [40].
27 At [29].
28 At [30]–[34].
29 At [35].
30 At [37].

contractually binding commitment to sell Whārere. In any event, such intervention was inconsistent with the SOE Act.[31]

(c) Although Ms Houpapa's conduct was misleading, the test for bad faith was not met. But even if it had been, Ngāti Whakahemo did not suffer any prejudice as a consequence because, as a matter of timing, the conduct did not prejudice the integrity of the contracting process. Moreover, even if there was bad faith, it did not affect Ngāti Whakahemo's rights.[32]

**Issues in this Court**

[39] This case has developed as it progressed through the Courts, for understandable reasons. The bad faith allegations did not assume prominence until the final judgment of Williams J as the relevant factual information only became apparent when all respondents' affidavit and documentary evidence became available to Ngāti Whakahemo; Ngāti Whakahemo's challenge under the Protocol was abandoned following the reconsideration by the Minister for Treaty of Waitangi Negotiations after the delivery of the interim judgment,[33] (although the Court of Appeal still addressed the Protocol in the context of the Crown's cross-appeal).

[40] The result is that the three causes of action in the fourth amended statement of claim remain alive, but in truncated form:

(a) The first cause of action alleges that Landcorp's entry into the agreement for sale and purchase was tainted by bad faith.

(b) The second cause of action alleges that the shareholding Ministers' decision on 6 March 2014 not to give the undertaking sought by Ngāti Whakahemo or to take other steps to protect Ngāti Whakahemo's

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31 At [62].
32 At [99].
33 See above at [37].

interests breached s 9 of the SOE Act and was based on the erroneous view that they had no power to intervene.[34]

(c) The third cause of action alleges that the advice of OTS to Landcorp on 19 November 2013 that Ngāti Whakahemo's Wai 1471 claim had been settled was erroneous and that the erroneous advice materially affected all consequent decisions of Landcorp and the shareholding Ministers.

[41] When Ngāti Whakahemo sought and obtained leave to appeal to this Court, the approved grounds of appeal were whether the Court of Appeal was correct to refuse the relief sought based on:[35]

(a) the claimed bad faith on the part of Landcorp;

(b) the acknowledged error by OTS in its advice to Landcorp; and

(c) the failure of the shareholding Ministers to intervene.

**Evaluation**

[42] In argument before this Court, Ms Scholtens QC for Ngāti Whakahemo placed much emphasis on the allegations in the first cause of action that Landcorp's entry into the agreement for sale and purchase was tainted by bad faith on the part of Landcorp personnel and so should be set aside. However, we propose to deal first with issues raised in the second and third causes of action. We will discuss the issues under the following headings:

(a) The context: land sales by Landcorp;

(b) The Crown's error;

(c) The decisions and/or powers at issue;

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34 See above at [31].
35 *Ririnui v Landcorp Farming Ltd* [2015] NZSC 72.

(d) The reviewability of Landcorp's decision to sell Whārere to Micro;

(e) The Ministers' decisions; and

(f) Drawing the threads together.

We will then consider the bad faith claim and the issue of relief.

*The context: land sales by Landcorp*

[43] As the Treaty of Waitangi acknowledges, land is of vital importance to Maori. Parliament has recognised the deep significance to Maori of their ancestral lands in a variety of ways, such as in the preamble to Te Ture Whenua Maori Act 1993 which refers to land as "a taonga tuku iho of special significance to Maori people" and in the resumption provisions of the SOE Act and the Treaty of Waitangi Act 1975. The resumption provisions (ss 27–27D of the SOE Act and ss 8A–8H of the Treaty of Waitangi Act) were enacted in 1988 following the Court of Appeal's well-known decision in the *Lands* case by way of settlement of that litigation.[36] As a result of their enactment, the Crown was able to transfer Crown land to Landcorp and other state-owned enterprises. Not only do the resumption provisions allow land which is subject to a claim under s 6 of the Treaty of Waitangi Act to be transferred by the Crown to a state-owned enterprise, they also allow a state-owned enterprise to transfer land to any other person.[37] However, where land is transferred by the Crown to a state-owned enterprise, a memorial must be noted on the certificate of title, as follows:[38]

> Subject to section 27B of the State-Owned Enterprises Act 1986 (which provides for the resumption of land on the recommendation of the Waitangi Tribunal and which does not provide for third parties, such as the owner of the land, to be heard in relation to the making of any such recommendation).

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[36] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC and CA) [the *Lands* case]. See also *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA). In his judgment in the first case, Cooke P noted the "transcendent importance" of land and the Treaty of Waitangi to Maori: at 658. Other members of the Court also acknowledged the fundamental significance of land to Maori: at 674 per Richardson J, at 700 per Casey J and at 717 per Bisson J. For a fuller account of the background to, and operation of, the resumption provisions see Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 190 and following.

[37] SOE Act, s 27.

[38] Section 27A.

Although the resumption process ignores the interests of third party owners, it does, of course, provide for compensation to be payable in respect of land acquired by the Crown under the resumption process.[39]

[44] The Waitangi Tribunal's powers to recommend resumption are set out in ss 8A–8H of the Treaty of Waitangi Act. Initially the Tribunal makes an interim recommendation, which becomes final after a 90 day period if the parties have not resolved the matter.[40] Once the recommendation has become final, the Crown is obliged to resume the land and return it to Maori ownership.[41] As it has turned out, the Crown has actively opposed the making of resumption orders in hearings before the Tribunal, and the Tribunal itself has identified difficulties in making such orders.[42] The Tribunal has not yet made a resumption order, although it came close to doing so on at least one occasion.[43]

[45] Although the memorial process facilitated the sale by Landcorp and other state-owned enterprises of land to third parties, it did not facilitate the efficient negotiation of Treaty claims. Williams J described the problem as follows:[44]

> On the one hand, claimants wanted access to [state-owned enterprise] lands for their settlements and OTS needed certainty over what lands might be available to be offered in the negotiation. On the other hand, Landcorp needed to be free in the ordinary course of business, to sell lands it no longer wished to retain. While the memorial regime facilitated on-sale (as it was designed to do), it did nothing to provide certainty to OTS. This was making OTS' job difficult.

In an effort to resolve this difficulty, Landcorp and the shareholding Ministers (on behalf of the Crown) entered into an agreement in September 2007 (known as the Protected Land Agreement) under which Landcorp agreed not to offer any of its properties for sale for four years (the moratorium)[45] and (broadly speaking) the

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39 Section 27C.

40 Treaty of Waitangi Act 1975, s 8B.

41 SOE Act, s 27B.

42 See, for example, Waitangi Tribunal *The Ngāti Kahu Remedies Report* (Wai 45, 2013), where the Tribunal noted the difficulty of granting resumption orders in areas where there are overlapping customary rights or interests: at 99–100.

43 Waitangi Tribunal *The Turangi Township Remedies Report* (Wai 84, 1998) at [5.5.3] where the Tribunal recommended the return of memorialised land. This triggered the 90 day period under s 8B of the Treaty of Waitangi Act. The parties reached agreement before the period expired.

44 *Ririnui* (interim judgment), above n 4, at [24].

45 The moratorium was later extended by approximately six months.

Crown agreed to purchase specified properties for use in Treaty settlements at agreed values. The properties specified were protected and were to remain in Landcorp's ownership and under its care and management until required by the Crown. Half of the purchase price was to be paid up front, and the remainder was to be funded from diverted dividends. The Crown took redeemable preference shares in Landcorp to the value of the amounts actually paid from time to time, presumably to reflect the fact that the properties remained in Landcorp's possession. The agreement was subsequently amended on several occasions.

[46] For present purposes, two of the recitals to the Protected Land Agreement are noteworthy. They provide:

> C. Landcorp's primary business is sustainable and commercially successful pastoral farming. Landcorp sells land from time to time to maintain an optimal portfolio of properties to align with value for farming use and livestock production requirements.
>
> D. Landcorp has identified land intended for sale. The Crown wishes to protect from sale, that land which is sensitive to public policy issues, being as defined in Clause 1 of this Agreement ("Protected Land").

The "public policy issues" referred to encompassed the need to protect land for Treaty claim purposes.

[47] On 1 April 2012, following the expiry of the moratorium, Landcorp and OTS (rather than the shareholding Ministers as occurred with the Protected Land Agreement) entered into the Protocol. The Protocol is expressed to be not legally binding. Recital D provides:

> Although this Protocol is not legally binding, both Parties are committed to following the policies and procedures it defines. This commitment is indicated by the signatures below. The signatures represent each Party's intention to follow the policies and to maintain a process of consultation about issues which affect each Party's responsibilities.

In relation to Whārere, Landcorp was expected under the Protocol to give OTS advance warning of its intention to sell. Although the various steps under the Protocol are rather more complex than described here, in essence OTS was required to indicate whether the Crown was interested in the land for Treaty settlement purposes. If OTS had indicated an interest, Landcorp would have been required to

set the property aside for purchase by the Crown in accordance with the pricing mechanism in the Protocol. However, because OTS indicated that the Crown had no interest in the property, Landcorp was free to sell it (albeit that it was subject to the resumption provisions).

[48] These various arrangements between the Crown and Landcorp recognise the significance of land to Maori and the need for the Crown to have access to substantial parcels of land to meet its Treaty obligations.[46] They are reflected in Landcorp's Statement of Corporate Intent.[47] In particular, in its 2013–2016 Statement of Corporate Intent, Landcorp:

(a) describes its business activities over the upcoming three years as including optimising its farmland portfolio by (among other things) "selling non-strategic properties including land of higher value than farming *and land sought by iwi (subject to the requirements of the new protocol agreed between Landcorp and the OTS)*";[48]

(b) notes the arrangements made under the Protected Land Agreement:[49]

> Under the Protected Land Agreement ("PLA"), the shareholder has purchased redeemable preference shares in Landcorp up to the agreed market value of land that has been protected from sale. This share capital has been provided by a combination of one-off capital injection ($52.2 million) with the balance ($52.347 million) being achieved by 31st October 2010 through dividend diversions.

(c) records that where the Crown requires it to undertake activities or assume obligations "which will have a negative effect on Landcorp's profit or net worth, or are of a non-commercial nature", Landcorp

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46 The Crown's Treaty obligations are not limited to providing redress for historical wrongs, but, of course, go much further than that. Moreover, while resumption orders and formal settlements following negotiation are mechanisms by which the Crown can meet its Treaty obligations in relation to land, facilitating the commercial purchase of ancestral lands is also a means by which the Crown can meet its on-going Treaty obligations to particular iwi or hapu. See further at [50]–[51] below.

47 See SOE Act, s 14.

48 Emphasis added.

49 The Protected Land Agreement required Landcorp to incorporate the arrangements reflected in the agreement in, among other things, its Statement of Corporate Intent "in a fully transparent manner": cl 25.

would seek compensation to ensure that its commercial position was maintained.[50] This included "compensation for retaining properties normally intended for sale but which might be required by the Crown to fulfil Treaty of Waitangi obligations".

[49] Section 5(2) of the SOE Act indicates the importance of a statement of corporate intent to the operations of a state-owned enterprise. It provides:[51]

> All decisions relating to the operation of a State enterprise shall be made by or pursuant to the authority of the board of the State enterprise *in accordance with its statement of corporate intent*.

Section 14 governs the content and preparation of a statement of corporate intent. Relevantly, it provides:

> **14 Statement of corporate intent**
>
> (1) The board of every State enterprise shall deliver to the shareholding Ministers a draft statement of corporate intent not later than 1 month before the commencement of each financial year of the State enterprise.
>
> (2) Each statement of corporate intent shall specify for the group comprising the State enterprise and its subsidiaries (if any), in respect of that financial year and each of the immediately following 2 financial years, the following information:
>
> (a) the objectives of the group:
>
> (b) the nature and scope of the activities to be undertaken:
>
> …
>
> (e) the performance targets and other measures by which the performance of the group may be judged in relation to its objectives:
>
> …
>
> (i) any activities for which the board seeks compensation from the Crown (whether or not the Crown has agreed to provide such compensation):
>
> (j) such other matters as are agreed by the shareholding Ministers and the board.

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50 See SOE Act, s 7.

51 Emphasis added.

…

> (4) The board shall consider any comments on the draft statement of corporate intent that are made to it not later than 14 days before the commencement of the financial year by the shareholding Ministers, and shall deliver the completed statement of corporate intent to the shareholding Ministers on or before the commencement of the financial year or such later date as the shareholding Ministers may determine.

As will later become relevant, s 14 contemplates that shareholding Ministers will have the opportunity to comment on a draft statement of corporate intent before it is adopted. Moreover, s 13(1)(a) allows the shareholding Ministers of Landcorp (and other state-owned enterprises specified in sch 2 of the SOE Act) to direct the board to include in, or omit from, the statement of corporate intent provisions of the kind set out in s 14(2)(a) to (h).

[50] Mr Hodder QC for Landcorp submitted that the memorial and resumption process is a "bespoke and available statutory procedure for [historical Treaty of Waitangi] claims". That is, of course, true. But it is not the only process available for the settlement of Maori land claims – indeed, to date it has not been the Crown's preferred process. It was because the Crown considered that there were other more desirable ways for resolving Maori land grievances that it entered into the Protected Land Agreement and the Protocol with Landcorp rather than simply relying on the operation of the resumption provisions. In adopting these alternative mechanisms, the Crown obviously considered that they enabled it to meet its obligations under the Treaty, and therefore to act consistently with s 9 of the SOE Act. As this Court confirmed in *New Zealand Maori Council v Attorney-General*,[52] the importance of s 9 must not be underestimated: it expresses "a broad constitutional principle".[53]

[51] Facilitating the commercial purchase by Maori of ancestral lands is a means by which the Crown can (and does) meet its ongoing Treaty obligations, broadly construed. The Crown's Treaty obligations in relation to righting historical wrongs do not necessarily end with a settlement, as is illustrated by the Ministers' response to Ngāti Mākino's concerns about Landcorp's sale of Whārere. Moreover, the Crown's Treaty obligations to Maori are not confined to righting historical wrongs

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52 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

53 At [55], citing the *Lands* case, above n 36.

but are continuing and forward-looking.[54] Creating the opportunity for Maori to re-acquire ancestral lands by encouraging Landcorp to negotiate with the traditional owners on a commercial basis is a means by which the Crown can assist Maori to re-establish their connection with their lands and obtain all the cultural, spiritual and other benefits that go with that, including opportunities for economic development.

[52] The fact that references to sales of land to Maori, to the Protocol and to the Protected Lands Agreement were included in Landcorp's statement of corporate intent, with the agreement of the shareholding Ministers, reflects these realities and is an important part of the context against which the parties' arguments must be evaluated. It is a context which simply cannot be ignored.

*The Crown's error*

[53] There is now no dispute that OTS, and thereby the Crown, was wrong throughout the relevant period in considering that Ngāti Whakahemo's Wai 1471 claim had been settled. Further, it is beyond dispute that the responsibility for the error lies with the Crown – through its solicitors, Ngāti Whakahemo explained carefully why the Crown's view was incorrect, but the Crown refused to accept the explanation, at least until these proceedings were issued. Moreover, there seems little doubt that the mistake was material, in the sense that it influenced decisions made by both the Ministers and Landcorp, a point to which we will return.

[54] Ngāti Whakahemo characterise the Crown's error as one of law, a characterisation accepted in both the High Court[55] and the Court of Appeal[56] and not challenged in this Court. There may be scope for argument about whether the mistake was one of fact or of law, a distinction which may, in some instances, be

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54 For example, it is a well-established Treaty principle, applied by both the Courts and the Waitangi Tribunal, that the Crown has a duty of "active protection" of Maori interests. See for example: the *Lands* case, above n 36, at 664; Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [5.1.5]; and Waitangi Tribunal *The Tamaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 101–102.

55 *Ririnui* (interim judgment), above n 4, at [89].

56 *Ririnui* (CA), above n 25, at [33].

significant in a judicial review context.[57] But in the circumstances of this case, we do not regard the distinction as material. Even if it is regarded as a mistake of fact, it is a mistake made in circumstances which would render a decision based on it susceptible to review (assuming the decision was otherwise reviewable).[58]

[55] As Mr Goddard QC submitted for the Crown, the fact that advice given by an official or an agency is erroneous (whether in law or fact) does not mean that the official or agency has acted unlawfully. What is important is (a) whether a decision is made or a power is exercised on the basis of the erroneous advice and (b) whether that decision or exercise of power is reviewable. Accordingly, it is necessary to ask what decisions were made on the basis of the erroneous advice and whether those decisions are reviewable, a matter to which we now turn.

*The decisions and/or powers at issue*

[56] As we have said, we are focussing on the second and third causes of action at this point:

(a) The second cause of action puts in issue the decision of the shareholding Ministers on 6 March 2014 not to give an undertaking that Landcorp would not enter into any agreement to sell Whārere without giving Ngāti Whakahemo 20 working days notice of its intention to do so or to take any other steps to protect Ngāti Whakahemo's position.

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[57] See, for example, the discussion in Paul Craig *Administrative Law* (7th ed, Sweet & Maxwell 2012) chs 16 and 17. Only in the 1980s was it suggested in New Zealand that mistake of fact could be an independent ground of review: see Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [15.12]–[15.20]; *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 145–149 per Cooke J; and *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552 per Cooke P.

[58] See, for example, *E v Secretary of State for the Home Department* [2004] QB 1044 (CA), especially at [61]–[66], a decision in an asylum context which, according to Wade and Forsyth has "both judicial and academic support". See HWR Wade and CF Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 231. *E v Secretary of State for the Home Department* has been applied in New Zealand: see *Woods v Legal Complaints Review Officer* [2013] NZHC 674, [2013] NZAR 577 at [40]; *Zhao v Legal Complaints Review Officer* [2012] NZHC 3247, [2012] NZAR 193 at [70]–[83]; *Zafirov v Minister of Immigration* [2009] NZAR 457 (HC); and *Queenstown Lakes District Licensing Agency Inspector v Turnbull Group Ltd* [2011] NZAR 554 (HC).

(b) The third cause of action challenges the advice of OTS to Landcorp on 19 November 2013 that Wai 1471 was settled. Ngāti Whakahemo allege that OTS's 19 November advice was materially affected by the error as to the settlement of their claim "as were all consequent decisions and actions by the defendants". They allege that they were prejudiced by the Crown's error because (relevantly):

> If OTS had not made the error of law, Landcorp and the Crown would not have continued to deal with Ngāti Whakahemo during the process leading up to the sale of Whārere Farm on the basis that Wai 1471 had been settled.

Among the relief sought is a declaration that "the decisions as well as the agreement for sale and purchase of the Whārere Farm are invalid".

[57] There is a question as to precisely what is covered by the third cause of action. In response to questions from the Bench as to what Ngāti Whakahemo would have received had the Crown not misunderstood the position as to settlement of their claims, Ms Scholtens said that Ngāti Whakahemo should have been treated in the same way as Ngāti Mākino, that is, offered the opportunity to purchase Whārere at or above the market price, a point made several times in Ngāti Whakahemo's written submissions. When this was put to Mr Goddard, he said the argument was not squarely raised in the pleadings (no decision by the Ministers on that point was identified in the statement of claim as a decision for review) and, if it had been, there would have been evidence and written submissions directed specifically to the point.

[58] Mr Goddard is right that the statement of claim does not specifically identify for review a particular decision by the Ministers that Ngāti Whakahemo would not be given the same opportunity as was afforded to Ngāti Mākino. The decisions for review specifically identified in the fourth amended statement of claim (at para 44) are (relevantly) Landcorp's decision to enter into an agreement for sale and purchase of Whārere, the Ministers' decision on 6 March 2014 not to offer an undertaking or take other steps to protect Ngati Whakahemo's position and the advice given by OTS to Landcorp on 19 November 2013 that Ngāti Whakahemo's claim had been settled.

[59] Having identified the decisions, the statement of claim goes on to set out the three causes of action, the first and third of which are relevant for present purposes. As previously noted, the first cause of action seeks judicial review of Landcorp's decision to enter into the agreement for sale and purchase, the only ground remaining live being bad faith. The third cause of action deals with OTS's erroneous advice to Landcorp on 19 November 2013. It alleges that OTS made an error of law as to the effect of the Te Arawa Affiliates Settlement on Ngāti Whakahemo's Wai 1471 claim and further alleges that this error materially affected its 19 November advice to Landcorp. The Crown now concedes both points.

[60] However, the third cause of action goes on to allege that all "consequent decisions and actions by [Landcorp and the Ministers]" were affected by the error and that, absent the error, Landcorp and the Ministers "would not have continued to deal with Ngāti Whakahemo during the process leading up to the sale of the Whārere Farm on the basis that Wai 1471 had been settled". The relief sought in the third cause of action includes:

> (c) A declaration that the decisions as well as the agreement for sale and purchase of the Whārere Farm are invalid; alternatively –
>
> (d) An order that settlement of the sale of Whārere Farm is not to take place until the Resumption Application is finally determined by the Waitangi Tribunal or until further order of this Court; alternatively
>
> (e) An order for certiorari with respect to the decisions of the defendants as well as the agreement for sale and purchase of the Whārere Farm.

[61] The word "decisions" in (c) and (e) must refer to the various decisions of Landcorp and the Ministers after 19 November 2013 based on the OTS error (that is, the "consequent decisions") rather than being a reference to "decisions" as defined in para 44 of the statement of claim. Among these "consequent decisions" are the Ministers' decision in early December 2013 not to intervene on behalf of Ngāti Whakahemo and Landcorp's decision on 28 February 2014 to sell Whārere to Micro.

[62] Although the third cause of action should have contained proper particulars of the decisions referred to in the allegations and relief sought, it does (a) allege that actions and decisions of both Landcorp and the Ministers subsequent to the 19 November advice were made under the influence of the OTS error and that this

was material to the ultimate sale and (b) seek relief in relation to those decisions. Despite the lack of full particulars, we consider that Ngāti Whakahemo are entitled to pursue their argument that the Ministers' refusal to intervene on behalf of Ngāti Whakahemo in the way that they did shortly after on behalf of Ngāti Mākino was materially influenced by the OTS error and should be open to review on that basis. We do not accept that there might be further material evidence on this aspect of the case. The existing evidence shows why the Ministers decided to intervene on behalf of Ngāti Mākino and why they refused to intervene in a similar way on behalf of Ngāti Whakahemo. For the same reason, we consider that Ngāti Whakahemo are entitled to pursue their argument that Landcorp's 28 February decision to sell to Micro is reviewable on grounds other than simply bad faith.

[63] As we see it, then, the decisions or powers at issue are:

(a) the decision of Landcorp's board on 28 February 2014 to revert to Micro as the highest tenderer once Ngāti Mākino had indicated they could not make a proposal; and

(b) the decisions of the Ministers:

(i) in March 2014 not to provide the undertaking sought by Ngāti Whakahemo or to take other steps to protect Ngāti Whakahemo's position; and

(ii) in December 2013 not to intervene on behalf of Ngāti Whakahemo in the way that they intervened on behalf of Ngāti Mākino.

We will deal first with Landcorp's decision and then with the Ministers' decisions.

*The reviewability of Landcorp's decision to sell Whārere to Micro*

[64] In *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*,[59] the Privy Council held that contracting decisions by state-owned enterprises were amenable to judicial review both under the Judicature Amendment Act 1972 and under the common law,[60] but said that it seemed unlikely "that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith".[61] In *Lab Tests Auckland Ltd v Auckland District Health Board* the Court of Appeal added a gloss to this by accepting that judicial review may be also available in respect of commercial contracting decisions in circumstances analogous to fraud, corruption or bad faith, such as decisions involving the misuse of inside information or involving persons with a conflict of interest.[62] The respondents' counsel both argued that Landcorp's decision to sell Whārere was reviewable only on this limited basis. As a consequence, even if Landcorp's board did make a mistake of fact or law when it decided to sell Whārere to Micro on 28 February 2014, its decision would not be reviewable.

[65] No party challenged the general proposition that a decision by a state-owned enterprises to enter into a commercial contract is unlikely to be reviewable in the absence of fraud, corruption, bad faith or some analogous circumstance. But even if that proposition is accepted, it does not necessarily apply to all contracting decisions made by state-owned enterprises. We see the present case as falling outside the general proposition because we do not accept that this was an ordinary commercial transaction, given the special context of former Crown land, the Treaty and Maori interests. We make two points.

[66] First, as noted earlier, the significance of the context within which Landcorp operates from time to time is recognised explicitly in its statement of corporate intent and cannot, in our view, be ignored.[63] As the references in Landcorp's statement of

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59 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC).
60 At 388.
61 At 391.
62 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [91] per Arnold and Ellen France JJ.
63 See above at [48]–[52].

corporate intent show,[64] assisting the Crown to meet its Treaty obligations outside the ambit of the resumption provisions has been accepted by both Landcorp and its shareholding Ministers as one of Landcorp's legitimate activities. The Crown's long-standing approach of attempting to resolve Maori grievances by direct negotiation and such-like rather than relying exclusively (or, indeed, significantly) on the Waitangi Tribunal and resumption processes required some accommodation between the Crown and Landcorp as to the treatment of former Crown land held by Landcorp that was potentially important to Maori. The key role played by the Minister for Treaty of Waitangi Negotiations in these events illustrates this point.

[67] Second, the Landcorp board saw itself as acting in accordance with its obligations under the SOE Act when it decided to cancel the tender and offer Ngāti Mākino the opportunity to negotiate to buy Whārere at market value (as determined by the tender process). To explain, at their meeting of 12 December 2013, the Landcorp board agreed that their decision in relation to the Ministers' request to halt the sale process so as to give Ngāti Mākino the opportunity to acquire Whārere at a commercial price "came down to an exercise of judgement by the directors, having regard to all the issues identified, to decide whether the proposed course of action was in the interests of Landcorp". It will be recalled that at this meeting, the Landcorp board resolved to put what was described as a "proposal" to the Ministers, which the latter could accept by 9 am on 17 December 2013.[65] The board said that the "proposal" had to be agreed not only by the shareholding Ministers but also by the Minister for Treaty of Waitangi Negotiations. The board's requirement for the consent of the Minister for Treaty of Waitangi Negotiations to be given indicates the close connection between Landcorp's land-owning activities and the Crown's fulfilment of its Treaty obligations to Maori in the broad sense discussed above.[66] Moreover, as part of the "proposal", the board required the Ministers' confirmation that Landcorp was acting in accordance with its obligations under the SOE Act in taking the steps proposed. In the event, the Ministers accepted the board's proposal, and the subsequent media release, issued not by the shareholding Ministers but by

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64 See above at [48].
65 See above at [18].
66 See above at [51]–[52].

the Minister for Treaty of Waitangi Negotiations,[67] stated that Landcorp was acting consistently with the SOE Act.

[68] The board met on 18 December, following receipt of the Ministers' acceptance of their proposal, and decided to go ahead. The minutes record:

> 3. The Chief Executive noted three positive outcomes of acceptance of the proposal and three possible negatives:
>
> On the positive side:
>
> - Creates goodwill from Ministers;
> - Send a positive signal to Maori that we are prepared to engage with them in a constructive manner;
> - Avoids possible occupation of the farms.
>
> On the negative side:
>
> - Difficult to explain the change;
> - Risk that commercial reputation is tarnished;
> - Would create an unwelcome precedent.
>
> 4. The Chief Executive noted that ethically it was open to directors to agree or disagree with the proposal. For his part he was seeking a pragmatic solution having regard to where the Board wanted to take Landcorp in the future.

There is no doubt, then, that the board considered that agreeing to the Ministers' request was both proper and consistent with Landcorp's interests.

[69] Taken together, all this demonstrates that both the shareholding Ministers and the board considered that it was consistent with Landcorp's obligations as a state-owned enterprise under the SOE Act, and with its statement of corporate intent, that it cancel the commercial process that it had embarked on for the sale of Whārere and offer a party which had not participated in that commercial process (despite having been invited to do so) the opportunity to purchase the property at or above the tender price. Landcorp took these steps at the Ministers' request. The Ministers

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[67] The press release appears to have been issued by the Minister for Treaty of Waitangi Negotiations on behalf of all three Ministers as it uses the word "we" when acknowledging that Landcorp has acted in accordance with its obligations under the SOE Act: see above at [20].

made the request because they considered that the honour of the Crown was engaged: Ngāti Mākino had sought to acquire Whārere in the context of its Treaty settlement negotiations but had been refused because Landcorp considered that Whārere was of strategic importance, an assessment which later changed.[68] Notwithstanding that Ngāti Mākino's Treaty claims had been the subject of a full and final settlement, the Ministers considered it appropriate to intervene on Ngāti Mākino's behalf to give them the opportunity to purchase Whārere on commercial terms.

[70] There were undoubtedly significant commercial elements to the decision of Landcorp's board to accede to the Ministers' request. In particular, Landcorp would receive a market price for Whārere, so there was no issue of providing a subsidy or suffering some other form of financial disadvantage.[69] This is important because Landcorp was required under its statement of corporate intent to fund its capital requirements from land sales. In addition, Landcorp thought that an acquisition by Ngāti Mākino offered it the possibility of further commercial opportunities, for example by way of operating Whārere as a dairy operation on behalf of Ngāti Mākino. And, of course, Landcorp thought that agreeing to the Ministers' request would enhance its relationship with its shareholding Ministers, and serve its longer-term interests.

[71] But it is not correct, in our view, to see the decision of Landcorp's board to cancel the tender and offer Ngāti Mākino the opportunity to purchase as simply a commercial one. Rather, it had a substantial public interest component to it, in that it enabled the Crown to act towards Ngāti Mākino in a way that the Ministers, and in particular the Minister for Treaty of Waitangi Negotiations, considered appropriate in the circumstances. Both the Ministers and Landcorp's board thought that Landcorp could, consistently with its obligations under the SOE Act and statement of corporate intent, facilitate the Crown's wish to accommodate Ngāti Mākino's concerns in relation to Whārere, even though Landcorp stood to suffer some damage to its commercial reputation as a consequence of cancelling a commercial sale process after the date for the submission of offers.

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[68] See above at [10]–[11].

[69] Landcorp was open to various funding arrangements to assist Ngāti Mākino, however.

[72] The fact that there was a Treaty dimension to Landcorp's decision-making concerning Whārere is further illustrated by the evidence that Landcorp would not have proceeded with the sale to Micro had it thought that Ngāti Whakahemo had a viable Treaty claim. As previously noted,[70] Mr Pamment deposed that he was told by Landcorp's Mr McKenzie in February 2014 that:

(a) OTS had indicated that it had no interest in Whārere for settlement of any Treaty of Waitangi claims;

(b) Landcorp had "done its own due diligence before offering the property for sale by tender and they were satisfied that Ngati Whakahemo's claim had no substance"; and

(c) Landcorp would not have proceeded with the sale of Whārere if it had thought that Ngāti Whakahemo had a credible Treaty claim.

It seems implausible that Landcorp would have gone beyond making enquires of OTS and carried out its own investigations into the validity of Ngāti Whakahemo's claim. However, given Mr McKenzie's status and role within Landcorp, there is little reason to doubt the accuracy of the statement that Landcorp would not have proceeded with the sale of Whārere if it thought Ngāti Whakahemo had a credible Treaty claim. That this was Landcorp's view is supported by the fact that even after it had received the 12 September 2013 advice from OTS under the Protocol that the Crown did not require the farm for Treaty settlement purposes, it reverted to OTS for advice when it received Ngāti Whakahemo's letter of 18 November 2013 advising of their historical claim and registering their interest in the property.

[73] Along with the other matters mentioned, Landcorp's unwillingness to proceed with the sale in the face of a credible Treaty claim by Ngāti Whakahemo indicates that, as long as its commercial objective was not unduly impeded (in particular by obtaining a commercial price), Landcorp recognised the relevance of Maori interests to its decision-making in relation to the sale of Whārere.

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[70] Above at [27].

[74] To summarise, we consider that Landcorp's decision to cancel the tender process and allow Ngāti Mākino the opportunity to purchase Whārere was as a decision which, while largely accommodating Landcorp's commercial interests, was taken for broader public interest reasons. That has implications for Landcorp's decision to sell to Micro. By acceding to the Ministers' request, Landcorp accepted that Ngāti Mākino had an interest in purchasing Whārere which merited special treatment. The uncontested evidence indicates that had Landcorp understood the true position in relation to Ngāti Whakahemo's historical claims, that would have influenced its decision-making. In short, then, Landcorp's decision-making in respect of Whārere had a dimension to it that was not simply commercial in nature.

[75] The result is, in our view, that Landcorp's decision to sell is reviewable on a broader basis than simply fraud, corruption, bad faith or something analogous. This conclusion is, however, subject to a point that we discuss below in the context of Ministerial decision-making. One of the reasons advanced in support of the argument that the Ministers did not make any decision that is susceptible to review was that Ministerial decisions in the Treaty settlement context are policy-laden and therefore not justiciable. If the Ministers' decisions are not susceptible to review for this reason, it is difficult to see how Landcorp's decision to sell to Micro can be susceptible to review.

[76] Putting that issue to one side for the moment, if Landcorp's decision is otherwise susceptible to review, its decision to sell should, in principle, be reviewed, given that it was based on what was, on the evidence before the Court, a material mistake as to the status of Ngāti Whakahemo's historical claims. That then raises the difficult question of what, if any, remedy should be granted, a question which we defer addressing at this stage.

*Decisions of Ministers*

[77] As previously noted, two Ministerial decisions or exercises of power are at issue. The first is the decision of the Ministers in March 2014 not to provide the undertaking sought by Ngāti Whakahemo or to take other steps to protect Ngāti Whakahemo's position. The second is the decision of the Ministers in December

2013 not to intervene on behalf of Ngāti Whakahemo in the way that they ultimately intervened on behalf of Ngāti Mākino. For ease of reference, we will refer to these as the March 2014 decision and the December 2013 decision. We will deal with the March 2014 decision first.

*March 2014 decision*

[78] An issue argued in the lower Courts and in this Court concerned what powers shareholding Ministers have in relation to a state-owned enterprise under the SOE Act and under general company law. A question raised in the latter context was whether the *Duomatic* principle applied in New Zealand and, if so, how it applied to a state-owned enterprise.[71] That principle is to the effect that the assent of all members of a company is effective to bind the company even if the formalities (in companies legislation or the company's constitutive documents) are not complied with. In addition, Ngāti Whakahemo argued that the Ministers had the power to intervene by virtue of s 7 of the SOE Act (non-commercial activities) or by changing Landcorp's constitution so as to give themselves the power to intervene.

[79] We do not think it necessary to address these arguments. This is because, even assuming the shareholding Ministers did have the power to intervene in one or other of the ways contended for by Ngāti Whakahemo, the second cause of action could not succeed for reasons which we can explain shortly.

[80] Following Ngāti Mākino's notification that it would not be making an offer, the Landcorp board resolved on 28 February 2014 to offer Whārere to Micro as the highest bidder at its tender price. Landcorp's management team and solicitors then implemented the board's decision. Landcorp's solicitors forwarded a draft agreement for sale and purchase to Micro's solicitors by email on 3 March 2014, asking that Micro's solicitors inform their clients "that Landcorp is willing to execute this agreement as soon as possible". Micro's solicitors returned the executed agreement on 4 March 2014, raising several points to be drawn to Landcorp's attention before execution. Landcorp's solicitors advised Landcorp of this, noting that the points raised "seem very reasonable". As previously noted, Landcorp's two

[71] *Re Duomatic Ltd* [1969] 2 Ch 365.

authorised signatories signed the agreement on 4 and 5 March 2014 respectively and its solicitors emailed the executed copy to Micro's solicitors and the real estate agent at 12.17 pm on 5 March 2014. The agreement was dated 4 March 2014.

[81] The first request from Ngāti Whakahemo's solicitors to the Ministers for an undertaking was made by way of a letter faxed to the office of the Minister for Treaty of Waitangi Negotiations at 6.20 pm on 4 March 2014. By that time, the agreement for sale and purchase had been signed on behalf of Micro, the points raised by Micro had been accepted by Landcorp and one of the two authorised Landcorp signatories had signed the agreement. The Ministers could not reasonably be expected to respond to Ngāti Whakahemo's request without taking advice, and inevitably that would have taken some time. Given that the final step to complete the agreement was a formal one, that is, the second Landcorp representative had to sign it, it is simply unrealistic to allege that the Ministers had the opportunity to intervene, even if they had the power to do so.

[82] Accordingly, this aspect of Ngāti Whakahemo's claim must fail.

*December 2013 decision*

[83] The effect of Ms Houkamau's email of 2 December 2013 was that the Ministers were not prepared to meet Ngāti Whakahemo representatives to discuss a commercial purchase of Whārere outside the tender process. It will be recalled that Ms Houkamau had advised Mr Te Aho that she would be relying on OTS in formulating her advice to the Minister of Finance. No doubt reflecting what she was told by OTS, Ms Houkamau's 2 December email repeated the Crown's erroneous view of the position in relation to Ngāti Whakahemo's Wai 1471 claim before going on to say:[72]

> Given the public tender process and in ensuring good faith to those who have already completed tenders or are working within the confines of the advertised date for tenders of 4 December, I understand that Landcorp cannot agree to delay or stop this process.

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[72] See above at [13].

[84] By the time this email was sent, Ngāti Mākino had raised their concerns about the sale process with the Minister for Treaty of Waitangi Negotiations and through him, with OTS.[73] Despite what was said in the 2 December email about the inability of Landcorp to stop the tender process, a few days later, on 6 December, Mr Pamment of Micro was told that the tender (which had closed on 4 December) was being cancelled as a result of Ngāti Mākino's concerns. The Landcorp board then met on 12 December, made the proposal described earlier to the Ministers, which the Ministers subsequently accepted.[74] Following that, the Landcorp board finalised its decision on 18 December. In short, what Ngāti Whakahemo had been told could not happen did happen almost immediately afterwards.

[85] There is a question as to the basis on which the Ministers acted when they asked Landcorp to halt the tender process in order to give Ngāti Mākino the opportunity to purchase Whārere at or above the tender price. In addressing this question, we will proceed on the assumption that Mr Goddard is right that the shareholding Ministers were not acting under s 7 and did not have the power to intervene on the basis of the *Duomatic* principle (there was, of course, no change to Landcorp's constitution).

[86] We make four points:

(a) The material before the Court indicates that the Minister who took the initiative in dealing with Ngāti Mākino, and with Landcorp in relation to Ngāti Mākino's concerns, was the Minister for Treaty of Waitangi Negotiations, not the shareholding Ministers. Given the land/Treaty context, the Minister's responsibility for Treaty settlement negotiations and his role under the Protocol, there is nothing untoward about this – indeed, it is to be expected.[75] There seems little doubt that all involved, Landcorp and the shareholding Ministers in particular, accepted that the Minister for Treaty of Waitangi

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73 See above at [15].
74 See above at [17]–[19].
75 In this context it is relevant to reiterate that the Protocol was agreed between Landcorp and OTS, unlike the Protected Land Agreement, which was agreed between Landcorp and the shareholding Ministers on behalf of the Crown.

Negotiations had the leading role in the process from the Crown's perspective.

(b) Under s 14 of the SOE Act, the directors of a state-owned enterprise must provide their shareholding Ministers with a draft of the entity's statement of corporate intent and must consider any comments the Ministers make on the draft; under s 13, the shareholding Ministers of Landcorp (and other state-owned enterprises listed in sch 2 to the SOE Act) may give directions as to the contents of the statement of corporate intent.[76] These and other provisions of the SOE Act led the Privy Council in *New Zealand Maori Council v Attorney-General* to describe a state-owned enterprise as "very much the Crown's creature".[77] The Privy Council noted that the effect of various provisions of the SOE Act was that the Crown had the ability to exercise a substantial degree of indirect control over the manner in which a state-owned enterprise deployed its assets. This is particularly true in the case of Landcorp, at least in so far as its activities involve the sale of what was formerly Crown land.

(c) The shareholding Ministers were not exercising a formal statutory power when they intervened on behalf of Ngāti Mākino. Nevertheless, there is no doubt that they were entitled to ask Landcorp to consider cancelling the tender to give Ngāti Mākino the opportunity to acquire Whārere even if they could not insist that Landcorp do so. It was then up to Landcorp to decide whether it would accede to their request.

(d) No one has suggested that Landcorp acted improperly when it decided to accede to the Ministers' request. Both the Ministers and Landcorp thought that Landcorp could accede consistently with its statutory and other obligations, as the media release issued by the Minister for Treaty of Waitangi Negotiations indicated.

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[76] See above at [49].

[77] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 520.

[87] Against this background, we consider that:

(a) the shareholding Ministers were acting within their powers when they asked Landcorp to halt the tender process and to give Ngāti Mākino the opportunity to purchase Whārere on a commercial basis; and

(b) their decision involved the exercise of a public power.

In the event, Landcorp went even further than they had been asked, by offering Ngāti Mākino various arrangements that were designed to facilitate Ngāti Mākino's acquisition of the property.

[88] Two questions now arise:

(a) The first is whether the Ministers' decision to intervene is a decision of a type that is non-justiciable on account of its policy/political content.

(b) The second is, if the decision is justiciable, whether any public law principle was engaged when the Ministers refused to request the same opportunity for Ngāti Whakahemo as they sought for Ngāti Mākino.

As these issues are to some extent linked, we deal with them together.

[89] While the modern view is that courts have the power to review all exercises of public power whatever their source,[78] the courts accept that some exercises of public power are not suitable for judicial review because of their subject matter. Decisions about the allocation of national resources[79] or involving issues of national defence or national security[80] or involving national political or policy considerations[81] have been held to be not reviewable by the courts, although courts

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78 See, for example, *Wilson v White* [2005] 1 NZLR 189 (CA) at [21].

79 See, for example, *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 641 (PC) at 655–656.

80 *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [22]–[28].

81 See, for example, *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 197–198 per Richardson J and *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA) at 38 per Cooke P and 46 per Richardson J.

in recent times have been more willing to review decisions in areas previously regarded as inappropriate for review, the most obvious example being decisions in relation to national security.[82] Courts have treated decisions about Treaty of Waitangi settlements as inappropriate for judicial review, not simply because they often involve legislation but also because the issues involved in settlements – such as the nature, form and amount of redress – are quintessentially the result of policy, political and fiscal considerations that are the proper domain of the executive rather than the courts.

[90] That does not mean, however, that any decision having some Treaty context is inappropriate for judicial review.[83] In the present case, Ministers did decide to intervene on behalf of Ngāti Mākino, with telling effect, while almost at the same time advising Ngāti Whakahemo that such intervention was not possible. There is no indication in the record before the Court that the Ministers' decision not to intervene on behalf of Ngāti Whakahemo was based on anything other than the Crown's mistaken view as to the settlement of Ngāti Whakahemo's historical claims (a concluded settlement was, of course, not a disqualifying consideration in the case of Ngāti Mākino). That is, it does not appear that there were any additional policy or similar considerations involved. This being so, if the Ministers' non-intervention decision breached some principle of public law, the fact of the Treaty context should not preclude review.

[91] We have said that the Ministers' decision to intervene on behalf of Ngāti Mākino involved the exercise of a public power. Equally, the Ministers' decision not to intervene on behalf of Ngāti Whakahemo involved an exercise of a public power. It was an exercise of a public power that was based on a material error, albeit not one of the Ministers' making.[84] Unlike the Court of Appeal,[85] we consider that Ngāti Whakahemo's interests were affected, for three reasons:

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82 See, for example, Jonathan Auburn, Jonathan Moffett and Andrew Sharland *Judicial Review Principles and Procedure* (2013, Oxford University Press, Oxford) at [2.84] and following.

83 Compare the position taken by the Court of Appeal in *Ririnui* (CA), above n 25, at [35].

84 By describing the error as "material" we do not mean to suggest that Ministers would necessarily have made a different decision if they had had the proper information. The point is simply that, as a matter of fact, the error did have a material effect on the decision they made.

85 *Ririnui* (CA), above n 25, at [30]–[34].

(a) Given the constitutional importance of judicial review, the courts have been prepared over time to take a more relaxed attitude to standing in judicial review cases.[86] Declaratory relief has been granted even though there is no "decision" having a direct impact on any individual's rights.[87] But if there is a decision which does impact a person's rights or interests,[88] the case for relief will be strengthened.

(b) Realistically, given the history of resumption applications to date, the best (and certainly the most timely) opportunity for Ngāti Whakahemo to acquire Whārere was by way of a commercial purchase, particularly if the Crown considered that Whārere exceeded the value of any possible breach and that, in any event, it had other land available to use as redress. It is relevant to note here that Landcorp did accede to the Ministers' request in relation to Ngāti Mākino and the Ministers presumably appreciated that it was likely that Landcorp would accede to the request.[89] Accordingly, had the Ministers asked Landcorp to provide an opportunity for Ngāti Whakahemo to acquire Whārere on commercial terms, there is every prospect that Landcorp would have acceded to that request.

(c) While Whārere remained in Landcorp ownership, s 27D of the SOE Act applied to it. Under that section, the Governor-General is empowered to order that certain land transferred to a state-owned enterprise under the SOE Act be resumed by the Crown. This is land that is wahi tapu, "being of special spiritual, cultural or historical tribal significance". That opportunity is lost once the land is out of the ownership of the state-owned enterprise. It is not clear from the material before the Court whether there are such areas of special

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86 See the discussion in Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [27.6].

87 See at [22.6].

88 These concepts are interpreted broadly: see Taylor, above n 57, at [5.19].

89 A similar situation occurred in *Hauraki Maori Trust Board v Attorney-General* HC Hamilton CIV-2007-419-245, 21 August 2008. In this case the Hauraki Maori Trust Board brought proceedings seeking to stop the sale of Whenuakite Station by Landcorp because of a concern that the sale would defeat part of their Waitangi Tribunal claim and breach s 9 of the State-Owned Enterprises Act 1986. After discussion with the Crown, Landcorp agreed to defer the sale of the land for 12 months, leading to a discontinuance of the proceedings.

> spiritual, cultural or historical significance to Ngāti Whakahemo within Whārere, although it seems likely that there are given Mr Ririnui's description of Whārere as Ngāti Whakahemo's papakainga (its original home). If that is the case, transfer to a third party will have an immediate effect on Ngāti Whakahemo's interests.

[92] While we do not consider that the Ministers were obliged to intervene in the sale process on behalf of Ngāti Mākino, they chose to do so, as they were entitled to do. The question is whether the Ministers could rationally refuse to intervene on behalf of Ngāti Whakahemo, telling them that such intervention was not possible, when, within a matter of days, they did intervene, successfully, on behalf Ngāti Mākino. Does the Ministers' decision to intervene on behalf of one group have any implications for their refusal to intervene on behalf of the other?

[93] Mr Goddard was, as we understood it, inclined to accept that something had gone wrong in this case as a result of the Crown error. But he argued that judicial review cannot cure every problem in public administration, a proposition which is obviously correct. Here, however, two important principles of public administration are potentially engaged, namely consistency of treatment and material error in decision-making.

[94] In *Matadeen v Pointu*, a case from Mauritius concerning the constitutional validity of certain regulations, Lord Hoffman said for the Privy Council:[90]

> As a formulation of the principle of equality, the court cited Rault J in *Police v Rose* [1976] M.R. 79, 81: "Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently." Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational: see Professor Jeffrey Jowell Q.C., "Is Equality a Constitutional Principle?" (1994) C.L.P. 1, 12–14 …

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[90] *Matadeen v Pointu* [1999] 1 AC 98 (PC) at 109.

Lord Hoffman went on to point out, however, that while the principle is easy to state, it is often difficult to apply – what counts as a reason to treat people differently and who ultimately makes that decision?[91]

[95] Parliament has not enacted a general principle of equality as part of the rights recognised in the New Zealand Bill of Rights Act 1990. The White Paper that preceded the legislation referred to such a specific right as unnecessary because the principle of equal treatment is part of the rule of law.[92] Rather, the New Zealand Bill of Rights Act contains a more specific prohibition on discrimination on specified grounds.[93] Both rule of law considerations and the need for rationality in public decisions mean that consistency of treatment has a role to play in judicial review when issues of arbitrariness or unreasonableness are raised.[94] Here the Ministers believed that the Treaty claims of both Ngāti Mākino and Ngāti Whakahemo had been settled. They chose to intervene on behalf of Ngāti Mākino in light of the particular background to the Ngāti Mākino settlement. That may possibly have been a rational basis for differentiation. But unfortunately the Ministers were wrong in their belief that Ngāti Whakahemo's claim had been settled, and this error was material to their decision.

[96] We do not accept the submission that Ngāti Whakahemo were given an opportunity to acquire Whārere by being invited to participate in the tender – that same invitation was extended to Ngāti Mākino, who did not accept it but sought and received special treatment. Nor do we accept that the invitation to Ngāti Whakahemo to participate in the Ngāti Mākino initiative was sufficient to meet the group's interests. That was an opportunity provided to Ngāti Mākino and any other iwi they wanted to involve, that is, involvement in the proposed enterprise was at Ngāti Mākino's discretion and on Ngāti Mākino's terms. Mr Kennedy-Good deposed that during the two month window, Landcorp would only deal with Ngāti

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91 At 109.

92 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] 1 AJHR A6 at [10.81].

93 New Zealand Bill of Rights Act 1990, s 19 and the Human Rights Act 1993, s 21.

94 In the article cited by Lord Hoffman in the extract quoted at [94] above, Professor Jowell discusses a number of cases in which inconsistency of treatment has resulted in successful applications for judicial review. See also Harry Woolf and others *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at [11–062] and following; Joseph, above n 86, at [23.2.4]; and Taylor, above n 57, at [14.63].

Mākino, in accordance with what it understood to be the Crown's wishes. Moreover, Ngāti Whakahemo's participation in the Ngāti Mākino initiative was limited: the first (and only) meeting between Ngāti Whakahemo and Ngāti Mākino concerning a possible purchase of Whārere took place only four days before the 28 February deadline was due to expire, a deadline unknown to Ngāti Whakahemo. Finally, it is relevant to reiterate that, although Whārere is obviously an area of overlapping Maori interests, Ngāti Mākino recognised Ngāti Whakahemo as having mana whenua over the property.

[97] It is not obvious what decision the Ministers would have made had they been properly informed as to the status of Ngāti Whakahemo's historical claims. Faced with competing claims, they may have decided not to intervene on any group's behalf; or they may have decided that they should intervene on behalf of Ngāti Whakahemo rather than Ngāti Mākino; or they may have attempted to establish conditions for a viable joint purchase arrangement. Ultimately, however, that does not matter. What matters is that the Ministers were given incorrect information about the status of Ngāti Whakahemo's claims, on which they based their decision not to intervene. Against this background, we consider that the Ministers' decision is susceptible to review in the normal way.

*Drawing the threads together*

[98] As we have said, we consider that the decisions of the Landcorp board on 28 February 2014 to offer Whārere to Micro as the highest tenderer and the refusal of the Ministers to intervene on behalf of Ngāti Whakahemo in the way that they did on behalf of Ngāti Mākino are, in principle, amenable to judicial review. We summarise our reasons as follows:

(a) The special arrangements between the Crown and Landcorp as to Landcorp's dealing in land reflect the importance of land to Maori and the need for the Crown to have access to former Crown land for Treaty settlement purposes, both within the formal Treaty settlement process but also more generally. This provides a special context, which is reflected in Landcorp's statement of corporate intent in its

broadest dimension and in Landcorp's decision to cancel the tender process and offer Ngāti Mākino the opportunity to purchase Whārere at or above the tender price, a decision which both Landcorp and the Ministers considered to be both proper and appropriate.

(b) For this reason, we do not consider that Landcorp's decision-making in relation to Whārere can fairly be described as simply "commercial", either its decision to cancel the tender and offer Ngāti Mākino first refusal or its later decision to re-engage with Micro. Accordingly, Landcorp's 28 February decision to offer Whārere to Micro is susceptible to review on broader grounds than simply fraud, corruption, bad faith or something analogous.

(c) Landcorp's decision-making in relation to Whārere was based on the Crown's mistaken view of Ngāti Whakahemo's position. That position was obviously relevant to Landcorp, as is shown by the fact that Landcorp and OTS communicated on several occasions about Ngāti Whakahemo's position. Moreover, given Mr Pamment's uncontradicted evidence that Landcorp would not have sold Whārere to Micro if it thought Ngāti Whakahemo had a credible claim, the likelihood is that Landcorp's decision-making would have been different had it known the true position. Accordingly, in principle, the 28 February decision of Landcorp's board to offer Whārere to Micro is reviewable by reason of a material mistake.

(d) When they intervened in the sale process in favour of Ngāti Mākino, the Ministers were exercising a public power, as they were when, virtually at the same time, they refused to intervene on behalf of Ngāti Whakahemo. Although the intervention was in the form of a request to Landcorp, the Ministers must have been aware that Landcorp's board was likely to accede to their request. Not only were the Ministers' decisions exercises of public power, they were ones that affected rights or interests, in one case of Ngāti Mākino, in the other of Ngāti Whakahemo.

(e) While it is true that many decisions made in connection with Treaty settlements will not be justiciable as they will involve policy, political, fiscal and similar considerations that are the particular province of the executive, that does not apply to all decisions having a Treaty dimension. In the present case, Ministers decided to intervene on behalf of Ngāti Mākino because they thought their particular circumstances justified intervention. When Ngāti Whakahemo sought intervention, however, the Ministers' refusal was based on the Crown's erroneous view of Ngāti Whakahemo's position, which overwhelmed or sidelined any other consideration. In these circumstances, we consider that the Ministers' decision is, in principle, amenable to judicial review.

[99] As the decisions of Landcorp and the Minsters are, in principle, reviewable, and as the decisions of both were materially influenced by mistake there is now a question as to whether any grant of relief is appropriate and, if so, what relief. Before we deal with that, we will briefly address the bad faith claim.

*The bad faith claim*

[100] Ngāti Whakahemo argued that the sale and purchase agreement for Whārere was tainted by bad faith on the part of Landcorp through its director, Ms Houpapa. While they accepted that the decision of Landcorp's board on 28 February 2014 to sell Whārere to Micro for its tender price was made in good faith, Ngāti Whakahemo argued that the sale was tainted by supervening bad faith on the part of Ms Houpapa. It was argued that she had been deceptive in fostering the false impression that there was still time to negotiate for the purchase of Whārere, when she knew that the Landcorp board had decided to sell Whārere to Micro and that decision was being implemented by management. Were it not for her deception, Ngāti Whakahemo would have filed proceedings in the High Court and sought interim orders prior to Landcorp's entry into any agreement for sale and purchase. If the proceedings had been heard before any agreement was entered into, the Court would have concluded that Landcorp's decision to contract was tainted by OTS's error as to the status of Ngāti Whakahemo's Wai 1471 claim and Landcorp would have been required to

reconsider the matter in light of the correct information. Ngāti Whakahemo say that Ms Houpapa's deception can only have been intended to discourage them from pursuing this course.

[101] The Courts below rejected Ngāti Whakahemo's contention. The Court of Appeal considered the argument on the basis that Landcorp's decision to sell Whārere to Micro was a commercial decision reviewable only where there was fraud, corruption, bad faith or something analogous. The Court said that to succeed, Ngāti Whakahemo had to satisfy a high evidential burden of proving that Ms Houpapa was motivated by "ill-will, dishonesty or fraud" towards Ngāti Whakahemo and that she knew what she was doing was unlawful.[95]

[102] As we have said, we disagree with the premise that Landcorp's decision to sell to Micro was a commercial decision reviewable only on limited grounds. We also consider that caution is needed when the term "bad faith" is used in a judicial review context. Sometimes the term is used in a way that involves proof of dishonesty. But more commonly the term is used in a way that carries no connotation of dishonesty: saying that a decision was made in bad faith is simply another way of saying that a public power has been used for an improper purpose or has been exercised unreasonably/arbitrarily/irrationally or that a relevant consideration has not been taken into account.[96]

[103] In the present case, we agree with the Court of Appeal that "bad faith" is used in the narrow sense.[97] It is claimed that Ms Houpapa set out to mislead the Ngāti Whakahemo representatives into thinking that there was still an opportunity for them to negotiate for the purchase of Whārere although in fact the Landcorp board had decided to sell to Micro. Her advice to Mr Te Aho on 4 March that Ngāti Whakahemo would need to make an offer in the vicinity of $23 million to justify consideration by Landcorp exemplifies this. Ms Houpapa's object, it is said, was to divert Ngāti Whakahemo from pursuing their foreshadowed proceedings (including an application for interim relief) until after the agreement for sale and purchase was

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95 *Ririnui* (CA), above n 25, at [77]–[78].

96 See, for example, Paul Craig, above n 57, at [19–011]; Wade and Forsyth, above n 58, at 354–356.

97 *Ririnui* (CA), above n 25, at [78].

finalised. It will be recalled that Ngāti Whakahemo's solicitors sought an undertaking by 5 pm on 6 March 2014, in the absence of which proceedings would be issued.

[104] One of the difficulties the Court faces in addressing this issue is that neither Ms Houpapa (a Landcorp director) nor Mr Carden (its Chief Executive) filed any affidavit evidence. Landcorp's other directors did file brief affidavits stating that their decision to sell Whārere to Micro was made in good faith. Other senior members of Landcorp's executive team, Mr McKenzie and Mr Kennedy-Good in particular, made affidavits to the effect that the board had acted in good faith. But the two people whose activities are central to the bad faith claim, Ms Houpapa and, to a lesser extent, Mr Carden, did not make affidavits.

[105] The courts in both New Zealand and the United Kingdom have pointed out that the fact-dependent nature of judicial review means that those whose decisions are challenged have a duty to explain the decision-making process, the relevant factual and other circumstances and the reasons for the decision – the so-called "duty of candour".[98] It is not, of course, a legally enforceable duty, but rather a responsibility attaching to public decision-making. Where such evidence is not provided, a court may well draw adverse inferences, as the Court of Appeal did to some extent in the present case.[99]

[106] There is little doubt on the evidence that Ngāti Whakahemo were, as a matter of fact, misled into thinking that there was an opportunity for them to put together a bid to acquire Whārere in early March 2014, and that they attempted to do so. They did not file proceedings in the meantime. We consider that an inference can fairly be drawn that Ms Houpapa intended to mislead Ngāti Whakahemo in this way, to buy time to enable the agreement for sale and purchase with Micro to be finalised. We also consider that it is a fair inference that Mr Carden was aware of this. Accordingly, we think it is fair to conclude that there was bad faith (in the sense of a

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98 For discussion of the duty and the relevant authorities, see Joseph, above n 86, at [22.14]; Taylor, above n 57, at [10.23]; Wade and Forsyth, above n 58, at 554–555; and Auburn, Moffett and Sharland, above n 82, at [27.38]–[27.44].

99 *Ririnui* (CA), above n 25, at [93].

deliberate attempt to mislead) on the part of both. We would not grant any relief on this basis, however, for two reasons.

[107] First, the bad faith at issue did not come into play until after the Landcorp board had made its decision to sell to Micro on 28 February 2014, a decision which Ngāti Whakahemo accepts was made in good faith. What followed was implementation of the board's decision, and it is in that process of implementation that the bad faith conduct occurred.

[108] Second, the claim is in any event somewhat speculative. Ngāti Whakahemo say that they were, in effect, denied the opportunity to issue proceedings at a time when they stood the greatest chance of obtaining interim relief, which would have prevented the sale and purchase agreement from being finalised. Whether a court would have granted such relief and, if so, on what terms is, of course, unknown.

[109] However, while we would not grant relief solely on the basis of the bad faith claim, we consider that it is a factor which is relevant to the exercise of the discretion to grant relief on the claims that Ngāti Whakahemo has succeeded in establishing.

**Relief**

[110] We have concluded that the Ministers' decision that they would not intervene in the sale process for Whārere on behalf of Ngāti Whakahemo in the way they did on behalf of Ngāti Mākino was based on a material error as to Ngāti Whakahemo's position and so was a wrongful exercise of public power. Ngāti Whakahemo are entitled at least to a declaration to that effect. Also, we consider that Landcorp's 28 February decision to sell to Micro was affected by the same material error, and is accordingly reviewable. Ngāti Whakahemo are entitled to a declaration to that effect also. But the principal relief sought by Ngāti Whakahemo is the setting aside of the agreement for sale and purchase. This is in the context that it seeks the same opportunity as was accorded to Ngāti Mākino to purchase Whārere at the tender price. Whether or not such relief should be granted is an issue of some difficulty.

[111] We make two points at the outset. First, if OTS had not given Landcorp and the Ministers erroneous advice as to the status of Ngati Whakahemo's historical

claims on 19 November 2013 and subsequently, both Landcorp and Ministers *may* have made different decisions, that is, the Ministers *may* have intervened on behalf of Ngāti Whakahemo to stop the tender process and Landcorp *may* have been prepared to negotiate with Ngāti Whakahemo on the same basis as it ultimately did with Ngāti Mākino. What Ngāti Whakahemo has lost is the opportunity to have their position considered on a properly informed basis by both Landcorp and the Ministers. Any relief awarded should not go further than addressing that failure.

[112] Second, although relief in judicial review is discretionary, courts today will generally consider it appropriate to grant some form of relief where they find reviewable error.[100] Where there has been a fundamental error by a decision-maker concerning an applicant's legal status, for which the decision-maker is responsible, a court would usually grant relief by ordering the decision-maker to reconsider on the correct basis. Here, however, the position is complicated by two interrelated factors:

(a) First, there is a concluded agreement for sale and purchase in relation to Whārere. This raises the question of the circumstances in which a court will be prepared to set aside a contract in judicial review proceedings.

(b) Second, the other contracting party, Wheyland, argues that it is an innocent third party which will suffer significant prejudice if the relief sought is granted.

The Court thus faces a rather stark choice: arguably, the only meaningful remedy is to allow Ngāti Whakahemo the opportunity that the Crown's persistent error deprived them of; but if that opportunity is granted, it may well result in an interference with Wheyland's legal rights.

[113] Before discussing the factors relevant to relief, we will consider whether s 21 of the SOE Act has any effect upon the availability of review in respect of Landcorp's actions.

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[100] See the discussion in Joseph, above n 86, at [27.4].

*Section 21*

[114] Section 21 of the SOE Act provides:

> **Saving of certain transactions**
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> A failure by a State enterprise to comply with any provision contained in Part 1 of this Act or in any statement of corporate intent shall not affect the validity or enforceability of any deed, agreement, right or obligation entered into, obtained, or incurred by a State enterprise or any subsidiary of a State enterprise.

The question is how this provision should be interpreted – is it, in effect, a privative clause which seeks to limit the scope for judicial review in respect of state-owned enterprises or does it have more limited application?

[115] In his article "State-Owned Enterprises and Social Responsibility: A contradiction in terms?" the late Professor Taggart drew attention to the legislative history of s 21.[101] He noted that in the State Owned Enterprises Bill 1986, clause 20 (as s 21 was then introduced) provided:[102]

> Nothing in this Act shall affect the validity or enforceability of any act, omission, [contract], deed, right or obligation carried out, entered into, obtained, or incurred by a State enterprise in breach of any of the provisions of this Act.

Noting that s 21 was amended to its present form as a result of heavy criticism of the original in the Select Committee, Professor Taggart concluded that "[t]his shows that Parliament did not intend to exclude the Court's review powers in relation to compliance with pt I. On the contrary, the possibility of Court review was recognised and deliberately left open".[103] Similarly, Graham Taylor considers that s 21 "relates to the law of contract and does not affect judicial review".[104] Finally, we note that the Privy Council in *Mercury Energy* obviously did not see s 21 as preventing judicial review of a commercial decision by a state-owned enterprise to enter into a contract, if appropriate grounds were made out.[105]

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101 Michael Taggart "State-Owned Enterprises and Social Responsibility: A contradiction in terms?" [1993] NZ Recent Law Review 343 at 353 and following.

102 State-Owned Enterprises Bill 1986 (71-1), cl 20.

103 Taggart, above n 101, at 353.

104 Taylor, above n 57, at [2.03].

105 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*, above n 59. The Privy Council did not specifically address s 21, however.

[116] Mr Goddard submitted that s 21 would operate to prevent a remedy in judicial review proceedings where the claim was that the contract was entered into in breach of pt 1 or of the enterprise's statement of corporate intent. Ultimately we do not need to determine that as we do not see Ngati Whakahemo's claim (to the extent that we have upheld it) as being based on non-compliance with pt 1 or Landcorp's statement of corporate intent.

[117] As we see it, the primary focus of s 21 is to prevent a state-owned enterprise from arguing that a contract it has made is unlawful because there has been a breach of the enterprise's obligations under pt 1 of the SOE Act or under its statement of corporate intent. It may also operate to prevent the other contracting party from refusing to perform the contract on a similar basis. But it does not prevent the court from granting relief in respect of a contract in judicial review proceedings, at least where the grounds do not involve non-compliance with pt 1 or with the enterprise's statement of corporate intent.

*An agreement has been concluded*

[118] As previously noted, the agreement for sale and purchase between Landcorp and Micro was concluded at the latest on 5 March 2014 when the second of Landcorp's authorised signatories, Mr Kennedy-Good, signed it. However, the transaction has not yet settled, as a result of the court orders made to date. Wheyland (as the nominated purchaser) has occupied the property pursuant to a lease with Landcorp, as provided for the agreement for sale and purchase.

[119] Mr Goddard submitted that because the agreement for sale and purchase was within Landcorp's capacity and powers, it could not be set aside in judicial review proceedings. He submitted that the fact that Landcorp's decision might be impugned on public law grounds does not affect the validity of the agreement or enable the Court to make orders affecting the contractual rights of the other contracting party, unless some orthodox contract law basis for setting aside the contract is pleaded and established. Mr Goddard acknowledged that in the well known "swaps" cases, the English courts had set aside contracts, but those were contracts that were invalid as

the public bodies who entered into them lacked the capacity to do so.[106] In the present case there is no doubt that Landcorp had the capacity to enter into the agreement. If it did so as a result of an operative mistake, the only relief available is under the Contractual Mistakes Act 1977. Similarly, where a public body has entered a contract inconsistently with statutory requirements, the impact of the non-compliance on the contract must be determined by reference to the Illegal Contracts Act 1970 (assuming the non-compliance does not deprive the body of its capacity to make the contract). Mr Goddard made reference to two decisions of the English Court of Appeal, *Crédit Suisse v Allerdale Borough Council*[107] and *Charles Terence Estate Ltd v Cornwall Council*[108] in the course of his argument. Mr Hodder's argument was to similar effect.

[120] We do not accept that a court will only set aside a contract by way of relief in a judicial review case where the public body or officer lacked capacity to enter the contract and that otherwise, a private law avenue must be available. That restricted approach is not consistent with what the Privy Council said in *Mercury Energy*, nor is it consistent with other New Zealand authorities.

[121] In *Mercury Energy*, the Privy Council said that it did not seem likely that a state-owned enterprise's decision to enter into a commercial contract to supply goods or services would be the subject of judicial review in the absence of fraud, corruption or bad faith.[109] If a third party challenged in judicial review proceedings a state-owned enterprise's decision to contract with a competitor rather than the third party in circumstances where the state-owned enterprise had acted in, say, bad faith, it does not seem to us right that the availability of meaningful relief in judicial review proceedings should depend on whether or not the contract with the competitor can be classified as an "illegal" contract, sufficient to engage the Illegal Contracts Act. The real issue in such a case is whether the competitor will be unfairly prejudiced if the contract is set aside, and that may involve a range of considerations.

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106 See *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 (HL).
107 *Crédit Suisse v Allerdale Borough Council* [1997] 1 QB 306 (CA).
108 *Charles Terence Estate Ltd v Cornwall Council* [2012] EWCA Civ 1439, [2013] 1 WLR 466 .
109 *Mercury Energy*, above n 59, at 391.

[122] In *Minister of Education v De Luxe Motor Services (1972) Ltd* the Government had introduced a policy of competitive tendering for school bus routes.[110] To put the policy into effect, existing school bus contracts had to be terminated. A number of school bus operators who had contracts with the Wellington School Board disputed the Board's right to terminate their contracts, which resulted in the litigation. Relevantly, one group of operators from Marlborough whose contracts had been terminated sought an order for review quashing the Board's decision to award contracts to other operators following a tender process, on the ground that the tender process was defective. At trial, Ellis J accepted that the tender process was defective and, by way of relief, set aside the new contracts and ordered that the tender be conducted again.[111]

[123] On appeal, this order was quashed. For the Court, Cooke P explained the reasons as follows:[112]

> It is better not to say anything more about these issues, because unfortunately the case has miscarried. The successful tenderers have not been made parties to the proceedings and have been given no opportunity to be heard. They should have been cited by the applicants in the High Court as respondents … . Their interests are directly affected by the judicial review application. Natural justice requires that whose granted rights are in jeopardy be given the opportunity of being heard. That has been the practice in cases where an applicant for judicial review or a prerogative writ has been challenging the grant of a licence or concession to someone else. Examples of this kind of litigation are *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 and *Newman Bros Ltd v Allum SOS Motors Ltd* [1934] NZLR 694.

As can be seen, the Court of Appeal's concern was a natural justice one; the Court did not suggest that setting aside the new contracts was an inappropriate form of relief in this type of judicial review case (there was, of course, no doubt that the Board had capacity to enter the new contracts). The focus was on giving third parties who had acquired rights the opportunity to identify any relevant prejudice.

[124] Similarly, in *Ritchies Transport Holdings Ltd v Otago Regional Council*, the Court of Appeal considered the tendering process for certain bus routes in Dunedin.

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110 *Minister of Education v De Luxe Motor Services (1972) Ltd* [1990] 1 NZLR 27 (CA).

111 *De Luxe Motor Services (1972) Ltd v Wellington Education Board* HC Wellington CP38/88, 21 June 1989 at 29–34.

112 *Minister of Education v De Luxe Motor Services (1972) Ltd*, above n 110, at 34.

The Court ordered that a contract entered into by the Otago Regional Council with a bus operator for a particular route be set aside and directed that the Council reconsider the tenders for the route.[113] The Court declined to make similar orders in relation to other contracts, however, in part because of the disruption that such relief would cause.[114]

[125] There are, in addition, some decisions of United Kingdom courts in which contracts have been set aside in judicial review proceedings even though the capacity of the relevant body to make the contract was not in doubt, albeit with little discussion. An example is *R v Legal Aid Board, ex parte Donn & Co*.[115] There, the Legal Aid Board awarded to a firm of solicitors a contract to provide legal services to a group of war veterans. A competitor firm challenged the tender process in judicial review proceedings. Ognall J upheld the judicial review application, quashed the contract and ordered the Legal Aid Board to reconsider the tenders. A further example is *R (Angello) v London Borough of Hounslow*, which concerned the award of contracts for tenancies in a new fruit and vegetable market which was replacing a long-established, and larger, market.[116] Contracts for tenancies in the new market were quashed as a result of procedural deficiencies in the selection process. Silber J noted that those who were successful in obtaining tenancies in the new market had been joined as interested parties, but none took any part in the proceedings.[117] He therefore had no basis to conclude that they would be prejudiced if their contracts were quashed.

[126] This brings us to the two cases referred to by Mr Goddard, *Crédit Suisse v Allerdale Borough Council* and *Charles Terence Estate Ltd v Cornwall Council*. The councils in both cases had private law claims brought against them and sought to defend the claims on the basis of public law considerations. In *Allerdale Borough Council* the council wished to construct a swimming pool complex and

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113 *Ritchies Transport Holdings Ltd v Otago Regional Council* CA152/91, 16 August 1991. The contract was made terminable on a month's notice in light of the proceedings challenging the tender process.

114 At 47.

115 *R v Legal Aid Board, ex parte Donn & Co (a firm)* [1996] 3 All ER 1 (QB). The Judge noted that the respondent had not argued the quashing of the contract by way of public law relief "would leave the contract binding in civil law" despite invitations to do so: at 16.

116 *R (Angello) v London Borough of Hounslow* [2003] EWHC 3112 (Admin), [2004] LLR 268.

117 At [41].

associated time-share units, the sale of which was intended to fund the development. The council set up a company to do the work, which borrowed funds from a bank, guaranteed by the council. The development was not successful, however, as the company was unable to sell a sufficient amount of the time-share units. When the bank sought repayment, the company went into liquidation. The bank then sued the council on its guarantee. The council sought to resist the bank's claim, on the basis that the guarantee and the underlying borrowing were outside the council's statutory powers. This defence succeeded at trial and in the Court of Appeal.

[127] All members of the English Court of Appeal agreed that the guarantee was unenforceable because the council lacked the legal capacity to give it. However, Neill LJ went on to say that he considered that the same consequence of unenforceability would follow if any of the grounds of judicial review applied (for example, irrationality or procedural impropriety).[118] This followed from the assimilation in *Anisminic Ltd v Foreign Compensation Commission* of the various types of public law error under the general rubric of "ultra vires".[119] Hobhouse LJ took a different view, however, saying that private law issues should be determined in accordance with the rules of private law,[120] so that procedural impropriety which might justify relief in a public law setting would not affect rights in a private law setting unless there was a private law corollary.

[128] This division of view was addressed by the English Court of Appeal in *Charles Terence Estate Ltd v Cornwall Council*.[121] The appellant company sued the council for rent arrears and interest arising under lease agreements which it had entered into with the council.[122] The council pleaded that the leases were void on public law grounds and unenforceable. It succeeded at first instance but failed on appeal. The Court of Appeal held that the council had the legal capacity to enter into the leases. If there was any public law breach (which the Court did not accept), it was a breach of fiduciary duty to ratepayers in setting rents without having regard to market rents. On the assumption that there was such a breach, the Court considered

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118 *Allerdale Borough Council*, above n 107, at 343.

119 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

120 *Allerdale Borough Council*, above n 107, at 355–357.

121 Above n 108.

122 The agreements had been entered into with two predecessor bodies of the council, but we will refer simply to the council for ease of presentation.

that it would not give rise to a defence in what were private law proceedings. In this regard, a distinction was drawn between lack of legal capacity (which would always result in invalidity in a private law setting) and other public law failures (which may result in invalidity in a private law context, depending on the nature and circumstances of the breach).

[129] The distinction drawn by the English Court of Appeal in *Charles Terence Estate Ltd v Cornwall Council* is obviously appropriate in the particular setting. To allow a public body to defend a claim against it in contract by relying on its own public law breaches (not amounting to lack of legal capacity to make the contract) would effectively circumvent restrictions that would apply in a judicial review context, such as the need to bring proceedings without delay, the fact that relief is discretionary and so on.[123] But to accept this is not to accept that relief in the form of quashing a contract should only be given in judicial review proceedings where the public body making the contract lacked the legal capacity to do so. This is because contracts are made in a wide variety of circumstances, so that in some cases, quashing a contract may cause no (or little) prejudice (as the Court thought was the situation in *R (Angello) v London Borough Council*), whereas in others, it may cause significant prejudice.

[130] Accordingly, as we see it, the fundamental issue where an applicant for judicial review seeks to have a contract set aside in a case where the contracting public body has capacity to make the contract is the existence and extent of prejudice to third parties. It is that consideration that should be the focus of the analysis, rather than the nature of the relief sought per se.

*Third party prejudice*

[131] In the present case, Wheyland submits that it is an innocent third party and that setting aside the agreement for sale and purchase of Whārere would operate to its prejudice. It says that it has expended considerable funds in acquiring a dairy herd and Fonterra shares, hiring staff and purchasing additional machinery in order

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[123] See, for example, *Charles Terence Estate Ltd v Cornwall Council*, above n 108, at [52] per Etherton LJ.

to operate Whārere as a dairy farm, and would suffer substantial losses if the agreement were to be set aside.

[132] Ordinarily, impacts of this nature on an innocent third party are likely to be decisive when a court considers relief in a case where the public body has acted within its legal capacity but has committed some other public law breach. However, we do not see them as being decisive in this case.

[133] When it entered into the agreement, Wheyland[124] was well aware that Ngāti Whakahemo would be pursuing relief in relation to Whārere both before the Waitangi Tribunal and in proceedings in the High Court. It was for this reason that cls 21 and 22 were included in the agreement for sale and purchase. Those provisions contemplate that the Waitangi Tribunal may make a resumption order in respect of Whārere, in which case Wheyland's interests would not be taken into account under s 27B of the SOE Act (except as to compensation). The contractual provisions also contemplate that Landcorp may be prevented from completing the transaction by court order and identify what is to happen in that eventuality. Initially, Landcorp is to grant Wheyland a lease "on standard farming terms and conditions to be agreed between the parties".[125] If Landcorp has not been able to resolve the "competing interest"[126] in Whārere by 31 May 2015 or such other date as the parties agree, either party is entitled to cancel the agreement,[127] in which case Wheyland is entitled to a refund of its deposit and neither party "shall have any further right or claim against the other".[128] The substantial expenditure made by Wheyland in connection with the farming of Whārere must be viewed against the background that Wheyland was on notice that some risk attached to the transaction.

[134] However, while it is clear that Wheyland was aware of Ngāti Whakahemo's proposed proceedings, and also that they posed some risk for the transaction, it seems equally clear that Mr Pamment thought the risk was relatively slight, on the

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[124] As previously noted, the agreement for sale and purchase was entered into by Micro, which nominated Wheyland to complete the sale. For ease of presentation, we will simply refer to Wheyland.

[125] Clause 22.1, set out above at [33].

[126] See cl 22.1.

[127] Clause 22.4.

[128] Clause 22.5.

basis of his enquiries of Landcorp, in particular his discussions with Mr McKenzie in February 2014. Moreover, Mr Hopkinson argued that the risk Wheyland took as purchaser was that Ngāti Whakahemo's Treaty claim would ultimately succeed and Whārere would be the subject of a resumption order. He said that Wheyland did not enter the agreement on the basis that there was a risk that the agreement might be set aside so as to afford Ngāti Whakahemo the opportunity to purchase Whārere on commercial terms.

[135] We consider that cl 22 goes further than Mr Hopkinson's submission suggests. The right of either party to cancel the agreement after 31 May 2015 (or an agreed replacement date) if it had not settled placed Wheyland in a vulnerable position legally. In terms of the agreement, once the specified date was reached, if the competing interest had not been resolved, Landcorp was entitled to back out of the transaction, its only obligation being to refund Wheyland's deposit. Wheyland's vulnerability under the provisions of cl 22 is, in our view, relevant to the assessment of prejudice flowing from the grant of relief.

[136] Moreover, we note that in an affidavit in support of Wheyland's application for leave to intervene in the proceedings following the interim decision of Williams J, Mr Pamment said that after Ngāti Whakahemo had issued the proceedings, he had discussed the position with his solicitor and decided not to seek to intervene immediately. He said:

> We considered that even if Ngāti Whakahemo was successful in its application before the Waitangi Tribunal, … any decision would be some years away and, in any event, the 27B Memorial would protect those interests. Under these circumstances we were relatively confident that settlement would proceed and we would at least be able to farm the property for several years. We were confident that over that period our substantial capital investment would pay off and we would be able to increase milk production substantially.

The relevance of this, is that Mr Pamment obviously had in mind a relatively short timeframe over which Wheyland would be able to recoup its investment in Whārere. In the event, settlement has not proceeded, and Wheyland has been farming the property since 1 June 2013 under a lease, as provided in the sale and purchase agreement. As well, the dairy market has suffered a significant downturn.

Nevertheless, we consider it significant that Wheyland was prepared to enter the agreement despite recognising the possibility that its period of operation of the farm might be relatively short.

[137] Overall, we consider that Wheyland's knowledge of Ngāti Whakahemo's claim (including its proposed proceedings) and the associated risks before the agreement for sale and purchase was concluded and the inclusion of cls 21 and 22 in the agreement mean that the Court is entitled to give significantly less weight to the prejudice that Wheyland would suffer if the agreement were to be set aside than it would give if Wheyland had been ignorant of the dispute and the agreement had not provided for it.

*Overall assessment*

[138] As we have said, we consider that declarations should be issued in relation to the Ministers' decision to refuse to intervene in the sale of Whārere on behalf of Ngāti Whakahemo as they did on behalf of Ngāti Mākino and in relation to Landcorp's decision on 28 February 2014 to sell Whārere as both decisions were influenced by the same material mistake as to Ngāti Whakahemo's position.

[139] On the question of whether further relief should be granted, relief which may ultimately lead to the setting aside of the agreement for sale and purchase, we see several factors as being relevant in addition to those already discussed.

[140] First, we consider that the particular context of the case is relevant. As previously discussed, this is not a straightforward commercial situation but rather, a situation in which Treaty interests in relation to former Crown land are engaged, (albeit not yet determined). Parliament has acknowledged the importance of this context by enacting the resumption process, which, if invoked, over-rides the interests of third parties, even innocent third parties. While we acknowledge that there is no direct comparison between the resumption process and the circumstances at issue in the present case (there having been no determination of the validity of Ngāti Whakahemo's Treaty claim), Parliament's willingness to allow the overriding of third party interests in favour of meeting Treaty obligations provides a pointer in the present case. Moreover, it was the Treaty context that gave rise to the Ministers'

decision to intervene in what was a commercial sale process on behalf of Ngāti Mākino, to the disadvantage of the highest bidder, Micro. In our view, this context provides a strong countervailing consideration to the prejudice consideration.

[141] Second, when the agreement was made the contracting parties, Landcorp and Wheyland, were aware that (a) Ngāti Whakahemo were seeking an undertaking designed to preserve their position while they sought an urgent determination of their Treaty claim by the Waitangi Tribunal and (b) would issue proceedings and seek an interim injunction if no undertaking was provided by 6 March 2014. There seems to us little doubt that both parties, Landcorp and Micro, sought to have a completed agreement in place before any proceedings were issued, that is by 6 March 2014. While there is no suggestion that Wheyland was aware of it, Ms Houpapa and Mr Carden acted so as to "buy time": their actions created the impression in the first week of March 2014 that it was still possible for Ngāti Whakahemo to reach agreement with Landcorp about the purchase of Whārere, although both were at the 28 February board meeting at which the decision to sell to Micro was made. Rather than issuing proceedings immediately, Ngāti Whakahemo attempted to put together a bid. As soon as they realised that an agreement had been concluded with Micro, Ngāti Whakahemo filed their proceedings and sought interim relief. Obviously, Ngāti Whakahemo would have been in a stronger position had they filed proceedings and applied for interim relief before any agreement was concluded. Given the absence of any explanation from them, we consider that it is fair to conclude that this was a deliberate ploy on the part of Ms Houpapa and Mr Carden.

[142] Accordingly, we would refer the matter back to the Ministers for reconsideration of the question whether, now that they are properly advised as to Ngāti Whakahemo's position, they should request Landcorp to give Ngāti Whakahemo an opportunity of the type that was accorded to Ngāti Mākino. This reconsideration should be conducted on the basis that Whārere is not subject to an existing agreement for sale and purchase. If the Ministers conclude that they should grant Ngāti Whakahemo the same opportunity as was granted to Ngāti Mākino, we would allow Ngāti Whakahemo two months from the date of the Ministers' decision within which to make an offer to Landcorp to purchase Whārere at the tender price, which Landcorp should also consider on the basis that there is no existing agreement

for sale and purchase. In order to allow this to occur, we would continue the injunction preventing the settlement of the agreement for sale and purchase in the meantime. If Ngāti Whakahemo did make an offer acceptable to Landcorp, acting reasonably, within the two month period, we would then make an order that the agreement for sale and purchase be set aside (unless it is cancelled earlier by one or other of the parties under cl 22). Leave would be reserved to apply further.

**Result**

[143] In accordance with the views of the majority, the following declarations are made:

(a) The decision of Landcorp Farming Limited's shareholding Ministers and the Minister for Treaty of Waitangi Negotiations not to intervene in the tender process on behalf of Ngāti Whakahemo as they did on behalf of Ngāti Mākino was a wrongful exercise of a public power because it was made under a material mistake.

(b) The decision by Landcorp Farming Limited on 28 February 2014 to sell Whārere farm to Micro Farms Limited was a wrongful exercise of a public power because it was made under a material mistake.

[144] All other forms of relief claimed by the appellant are declined.

[145] The restraining order made by this Court in Order C of its judgment granting leave to appeal (*Ririnui v Landcorp Farming Ltd* [2015] NZSC 72) is discharged.

[146] Costs are reserved. The parties may file written submissions as to costs in this Court and in the Courts below if they are unable to reach agreement.

**GLAZEBROOK J**

[147] I agree with the judgment of Elias CJ and Arnold J up to and including [130]. I agree that declarations should issue in the terms set out at [110] and [138] of their judgment. I do not agree that the matter should be referred back for reconsideration or that an injunction should issue preventing the settlement of the agreement for sale and purchase in the meantime.[129]

[148] As Elias CJ and Arnold J say, ordinarily impacts on an innocent third party of the nature set out at [131] of their judgment would be decisive when considering relief.[130] I agree that there are countervailing factors in this case,[131] as outlined at [133], [140] and [141] of their judgment. I also agree that cl 22 of the agreement for sale and purchase placed Wheyland in a vulnerable position legally.[132]

[149] These countervailing factors do not, to my mind, outweigh the fact that Wheyland is an innocent third party for the reasons set out at [190]–[192] of O'Regan J's judgment. I would add that Wheyland had no practical means (or indeed any conceivable duty) to make its own inquiries into Ngāti Whakahemo's position. It was entitled to rely on Landcorp's advice, particularly as Landcorp indicated it had made its own inquiries.[133] As to the existence of cl 22, the fact that Landcorp can cancel the contract without penalty may be an additional reason for not granting the injunction. To grant it could be seen as passing onto Wheyland the cost of Landcorp's mistake.

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129 See above at [142] per Elias CJ and Arnold J.
130 Above at [132].
131 See above at [137].
132 See above at [135].
133 See above at [72].

**O'REGAN J**

[150] I generally agree with Elias CJ and Arnold J that the decisions of the first respondent, Landcorp Farming Ltd (Landcorp), the shareholding Ministers of Landcorp (the Ministers) and the Office of Treaty Settlements (OTS) in relation to the sale of Whārere are reviewable. But I take a different view of the decisions in issue in the appeal and the appropriateness of the relief proposed by Elias CJ and Arnold J.

[151] As Elias CJ and Arnold J correctly state, the causes of action in Ngāti Whakahemo's statement of claim focus on three decisions.[134]

[152] The first is the decision of Landcorp made in February 2014 to enter into the agreement for sale and purchase of Whārere to Micro Farms Ltd (Micro). I agree with Elias CJ and Arnold J that the decision is reviewable, that it was made in light of a material mistake, based on OTS's incorrect advice about the status of Ngāti Whakahemo's claim, and that a declaration to this effect should be made. I also agree with them that relief cannot be granted for the bad faith allegation for the reasons they give.[135]

[153] The second is the decision of the Ministers made on 6 March 2014 to refuse to give an undertaking that Landcorp would not enter into an agreement to sell Whārere without giving Ngāti Whakahemo 20 working days notice of its intention to do so or to take other steps to protect Ngāti Whakahemo's position.

[154] The third is the decision of OTS to advise Landcorp on 19 November 2013 that Wai 1471 was settled. It is common ground that OTS's advice was wrong.

[155] In relation to the second decision, I agree with Elias CJ and Arnold J that, as a matter of fact, it was not reasonably possible for the Ministers to intervene in response to Ngāti Whakahemo's request for an undertaking.[136] However, Ngāti Whakahemo's arguments in relation to this aspect of its claim raise some

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134 Above at [40].
135 See above at [100]–[108].
136 Above at [78]–[81].

important issues and, having heard full argument on them, I consider it is useful to set out my views on them. I do so only briefly given they are the views of one Judge only and not essential to the outcome of the case as I see it.

[156] Ngāti Whakahemo argued that the Ministers could have used s 7 of the State-Owned Enterprises Act 1986 (the SOE Act) to direct Landcorp to give Ngāti Whakahemo an opportunity to buy Whārere in much the same way as Landcorp had provided such an opportunity to Ngāti Mākino. Section 7 makes provision for agreements between the Crown and a state-owned enterprise under which the state-owned enterprise provides goods or services in return for payment by the Crown of the whole or part of the price of those goods or services.[137] In my view it is not therefore a provision for directions by Ministers to state-owned enterprises. Rather, it contemplates that an agreement will be reached. It is hard to see how Ministers could have obtained Landcorp's agreement to give Ngāti Whakahemo a chance to buy Whārere, when the board of Landcorp had already resolved to sell it to Micro.

[157] Apart from such practical considerations, there are also doubts about the applicability of s 7 to land transactions, given that it refers to the provision of "goods or services" by a state-owned enterprise, effectively at a price paid for by the Crown. Ngāti Whakahemo argued that the use of the imperative "shall" in s 7 meant that the Ministers could require the state-owned enterprise to enter into an agreement. But, even if that were so, there would still need to be a meeting of minds on the terms of the agreement, in particular the level of subsidy to be provided by the Crown. The board of the state-owned enterprise would be required to act in accordance with their duties to the state-owned enterprise in considering this.[138]

[158] In addition, Ngāti Whakahemo says that the Ministers could have changed the constitution of Landcorp to give the Ministers the power to make decisions in relation to the sale of Whārere, effectively taking over the decision-making power

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137 The full text of s 7 reads: "Where the Crown wishes a State enterprise to provide goods or services to any persons, the Crown and the State enterprise shall enter into an agreement under which the State enterprise will provide the goods or services in return for the payment by the Crown of the whole or part of the price thereof."

138 State-Owned Enterprises Act 1986 (SOE Act), ss 4 and 5.

given to the board of the state-owned enterprise under s 5(2) of the SOE Act, s 128 of the Companies Act 1993 and the constitution of Landcorp.

[159] It is clear from s 128(3) of the Companies Act that the allocation of the management of the business and affairs of the company to the board is subject to any modification, exception or limitation in the company's constitution. So for a company other than a state-owned enterprise, a resolution of shareholders to amend the constitution to confer on the shareholders a power allocated to the board by the constitution is an available option.

[160] There is no doubt that Ministers, as shareholders in a state-owned enterprise, may amend the constitution of the state-owned enterprise: s 17 of the SOE Act contemplates this, requiring that any amendment be tabled in the House of Representatives. However, there are two problems with this argument of Ngāti Whakahemo.

[161] The first is the practical problem set out in the judgment of Elias CJ and Arnold J: the decision of the board of Landcorp to offer Whārere to Micro had already been made and the terms of the agreement for sale and purchase had been agreed.[139]

[162] The second is that a resolution to amend the constitution to reallocate a management power from the board to shareholders would not be consistent with the SOE Act, which legislatively allocates powers between the board and shareholders in a carefully calibrated way.

[163] Section 5 requires all decisions relating to the operation of the state-owned enterprise to be made or pursuant to the authority of the board in accordance with the statement of corporate intent. It is true that s 5(3) says that the board is accountable to the Ministers in the manner set out in Part 3 of the SOE Act and the "rules" (that is, the constitution) of the state-owned enterprise. I accept that this may allow for changes to the constitution to impose additional elements of accountability on the board, but I do not consider that a provision that overrides s 5(2) could be added to

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139 Above at [81].

the constitution consistently with the scheme of the SOE Act. Rather, the participation of the Ministers in the affairs of the state-owned enterprise is provided for by the mechanism of agreements under s 7 as well as the power of the Ministers to require specific provisions to be included in or omitted from the statement of corporate intent and to determine the amount of dividend to be payable.[140]

[164] If the Ministers did have power effectively to take over the role of the board, this would mean they would also assume responsibilities as directors in terms of s 126 of the Companies Act. So, even if, contrary to my view, the Ministers had the power to intervene, I do not consider it would be unreasonable for them to decline to do so, given the statutory scheme of the SOE Act and the personal liabilities they would undertake if they were to assume the role of effective directors.

[165] Ngāti Whakahemo also argued that the Ministers could have intervened according to the principle known as the *Duomatic* principle. [141] This principle is to the effect that where all shareholders assent to a particular action by a company for which a shareholders' resolution is required, the company will be bound by the action even if formal shareholders resolutions have not been attended to.[142] The principle was extended in New Zealand to the situation where there was unanimous assent of all the holders of voting shares to an action within the power of the board, rather than the shareholders in general meeting.[143] An obiter statement of the principle in its broadest guise appears in the advice of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* in these terms:[144]

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140 SOE Act, s 13.

141 *Re Duomatic Ltd* [1969] 2 Ch 365.

142 The historical evolution of the *Duomatic* principle and debate about its continued application in New Zealand since the passing of the Companies Act 1993 is well summarised in John Farrar and Susan Watson (eds) *Company and Securities Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2013) at 268–274 and Peter Watts *Directors' Powers and Duties* (2nd ed, LexisNexis, Wellington, 2015) at 41–48. See also the case notes on the Court of Appeal decision: Susan Watson "*Attorney-General v Ririnui*: core company law preserved in the Court of Appeal" [2016] NZLJ 38 and Peter Watts "The power of a special majority of shareholders, or of all shareholders acting informally, to override directors – *Attorney-General v Ririnui* [2015] CSLB 89.

143 *Westpac Securities Ltd v Kensington* [1994] 2 NZLR 555 (CA).

144 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 12 per Lord Hoffmann citing *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 (CA).

> The unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company.

[166] There is some debate as to whether the *Duomatic* principle still applies in New Zealand. I am of the view that it does not apply to a state-owned enterprise, for the reasons I have already given in relation to the proposition that the Ministers could have allocated management responsibilities to themselves by amending the constitution of the state-owned enterprise.[145]

[167] The Law Commission's reports preceding the enactment of the Companies Act can be taken as indicating a rejection of the *Duomatic* principle.[146] Section 107 of that Act expressly provides for the unanimous assent of shareholders to certain specified actions, which can be taken as an indication of a legislative intent that the *Duomatic* principle is now limited to those specified actions. The allocation of management powers to the board of a company by s 128 of the Companies Act also suggests that, in the absence of a reallocation of such powers to shareholders by the company's constitution, assent by shareholders to an action requiring a board resolution would not be effective. I see these factors as supporting the view that the *Duomatic* principle no longer applies, but as nothing turns on it in the present case I do not express a concluded view on the point.

[168] For these reasons, as well as the reason given by Elias CJ and Arnold J, I agree that the claim for judicial review of the second decision fails.

[169] I now turn to the third decision challenged by Ngāti Whakahemo.

[170] Ngāti Whakahemo's claim is that the incorrect advice given by OTS materially affected "all consequent decisions and actions by the defendants". I see this as a pleading of the consequence of the decision for which judicial review is sought (OTS's decision to give the incorrect advice about the status of Ngāti Whakahemo's claim to Landcorp), but not as a claim for judicial review of any particular decision affected by OTS's incorrect advice.

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145 See above at [162]–[164].

146 Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989) at 41; Law Commission *Company Law Reform: Transition and Revision* (NZLC R16, 1990) at 10.

[171] Counsel for Ngāti Whakahemo, Ms Scholtens QC, indicated at the hearing that Ngāti Whakahemo would like to be treated in the same way as Ngāti Mākino, that is, to be offered the opportunity to purchase Whārere on the same basis as Ngāti Mākino. But that was a statement as to what Ngāti Whakahemo now wants, not an indication that there was a challenge to any failure by the Ministers to replicate the arrangement made in respect of Ngāti Mākino for Ngāti Whakahemo. I accept that the written submissions for Ngāti Whakahemo mentioned in a number of places that, if OTS had not given the incorrect advice referred to earlier, Ngāti Whakahemo would, in all likelihood, have been given a similar opportunity to offer to buy Whārere as was given to Ngāti Mākino. But I did not take this to amount to a challenge to any decision of Ministers not to make a similar request to Landcorp as was made on behalf of Ngāti Mākino. Indeed, I do not think any such decision was made. What the Ministers declined to do was to intervene in the sale process in the manner requested by Mr Te Aho.[147] What he proposed was a commercial negotiation in conjunction with a settlement of Ngāti Whakahemo's Treaty claim.

[172] When it was put to counsel for the Crown, Mr Goddard QC, during the hearing that the Ministers should have tried to arrange with Landcorp for Ngāti Whakahemo to be given the same opportunity as was afforded to Ngāti Mākino, he (correctly, in my view) pointed out that the statement of claim did not plead any challenge to any decision by the Ministers not to do so.

[173] Elias CJ and Arnold J take the view that the reference to decisions that were consequent upon OTS's incorrect advice is enough to put Landcorp on notice of a pleaded challenge to every such decision, including the decision not to replicate the Ngāti Mākino arrangement for Ngāti Whakahemo.[148]

[174] I do not consider that it is appropriate to extend the pleading from a challenge to three identified decisions to a challenge to those three decisions plus every other decision consequent upon OTS's incorrect advice. Mr Goddard made it clear that this was not part of the pleaded claim and had not been the subject of evidence or submissions in the lower Courts or in this Court. He said that if the claim had

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147 Mr Te Aho was the consultant acting on Ngāti Whakahemo's behalf when dealing with the Crown regarding Whārere.

148 Above at [60]–[62].

identified the failure to seek a replication of the Ngāti Mākino arrangement for Ngāti Whakahemo, the defendants would have called evidence and made submissions addressing that issue, something which they had not had the opportunity to do.

[175] I consider that this is a justified concern in this case. For example, Elias CJ and Arnold J refer to the statement made by Mr Pamment that Landcorp had done its own due diligence before offering Whārere for sale and would not have proceeded with the sale if it had thought that Ngāti Whakahemo had a credible Treaty claim.[149]

[176] Elias CJ and Arnold J note the fact that Mr Pamment's evidence was not contradicted,[150] although they accept that it is unlikely that Landcorp would have engaged in a process completely independently of OTS to ascertain the status of Ngāti Whakahemo's claim.[151] It is true that Mr Pamment's comment to the effect that Landcorp would not have proceeded with the sale if correctly informed about Ngāti Whakahemo's claim was not contradicted. But I do not think Landcorp would have left that comment unexplained if it had been on notice that the decision not to replicate Ngāti Mākino's arrangement for Ngāti Whakahemo was an issue it needed to address in these proceedings.

[177] It must be remembered that no request was ever made to any Minister to replicate the Ngāti Mākino arrangement for Ngāti Whakahemo. What Ngāti Whakahemo appeared to be asking the Ministers to do was to give directions to Landcorp in relation to the sale. Much of the argument in this Court is centred on whether the Ministers could have effectively usurped the power of the board of Landcorp to run the sale process and it seems to me that this thinking also applied to the communications between Mr Te Aho and the Office of the Minister of Finance in November and December 2013. As I explain above, I believe that the Ministers were correct in determining that they could not make decisions about the sale process on Landcorp's behalf.[152]

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149 Above at [72].
150 Above at [98](c).
151 Above at [72].
152 Above at [156]–[168].

[178] I accept that the refusal to intervene at Ngāti Whakahemo's request in circumstances where a form of intervention (albeit by way of request rather than direction) on Ngāti Mākino's behalf happened a few days later provides a justified basis for concern by Ngāti Whakahemo. Whether the Ministers would have intervened for Ngāti Whakahemo if properly informed about its extant Treaty claim is far from clear. As Elias CJ and Arnold J acknowledge, there may have been a rational basis for differentiating between them.[153] At a practical level, the existence of the arrangement for Ngāti Mākino would have made it impossible for both Ngāti Whakahemo and Ngāti Mākino to be given exclusive options to purchase: presumably some sort of joint arrangement would have been required.

[179] I accept that Ngāti Mākino appeared to exclude Ngāti Whakahemo from any meaningful involvement in the Ngāti Mākino arrangement, but that is not something that can be laid at the door of a Minister or Landcorp. An arrangement which provided for a shared right between Ngāti Mākino and Ngāti Whakahemo may well not have been acceptable to Ngāti Whakahemo, given its insistence that it, and it alone, should lead any arrangements relating to the purchase of Whārere.[154]

[180] As I see it, there was a significant difference between the positions of Ngāti Mākino and Ngāti Whakahemo. In the case of Ngāti Mākino, it had specifically asked for Whārere, or a right of purchase of Whārere, to be included in its redress when its Treaty settlement was concluded. The fact that Ngāti Mākino had been refused on the basis that Whārere was a strategic asset of Landcorp only for Landcorp to look to sell it a short time later was obviously a matter of embarrassment for the Minister for Treaty of Waitangi Negotiations, which is what seems to have prompted his decision to initiate the arrangement ultimately concluded in relation to Ngāti Mākino.

[181] Ngāti Mākino's situation was a one-off. It was highly unlikely that it would be replicated in the future. The position of Ngāti Whakahemo is different. If Landcorp were to provide effectively a right of first refusal to an iwi with an unsettled claim in an area in which all or part of the farm to be sold was located, that

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153 Above at [95].
154 See above at [19] and [24].

is something which could, for example, affect other farm sales in the future. I would have expected, if the decision not to replicate the Ngāti Mākino arrangement had been directly in issue, for evidence about this not only from the Minister for Treaty of Waitangi Negotiations but also from Landcorp. I think there is a danger in deciding the case without those parties having had the chance to put such evidence before us.

[182] In the normal run of things, the response to an unsettled claim in an area where a farm that is to be sold is located is the activation of the protocol between OTS and Landcorp.[155] OTS's error meant that the protocol was not acted upon as it should have been. But, as a result of the remedy granted in the High Court, the correct application of the protocol took place and the decision by the Minister for Treaty of Waitangi Negotiations to the effect that Whārere was not of interest for Treaty settlement purposes is not challenged.[156]

[183] Elias CJ and Arnold J say that there is nothing in the record indicating that the Ministers' decision not to intervene on behalf of Ngāti Whakahemo was based on anything other than the Crown's mistaken view that Ngāti Whakahemo's claim was settled.[157] They add that there does not appear to be any additional policy or similar considerations involved. For the reasons I have given, I would not be prepared to reach that conclusion in circumstances where neither Ministers nor Landcorp have had the opportunity to explain whether different considerations apply to Ngāti Whakahemo than to Ngāti Mākino.

[184] It may also be that, if a direct challenge had been made to a decision not to replicate the Ngāti Mākino arrangement for Ngāti Whakahemo, the Minister could have been directed to consider doing this when the matter was referred back to him by the High Court.

[185] These are significant issues because the basis on which Ministers are said to have acted unreasonably in relation to Ngāti Whakahemo is that they acted in a manner that was not consistent with their treatment of Ngāti Mākino. It was not

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155 This is described by Elias CJ and Arnold J above at [6].
156 Above at [37].
157 Above at [90].

suggested that there would otherwise have been an obligation to intervene in the sale process on Ngāti Whakahemo's behalf.

[186] Elias CJ and Arnold J propose relief in the form of a declaration that the decision of the Ministers not to intervene in the sale process for Whārere on behalf of Ngāti Whakahemo in the way they did on behalf of Ngāti Mākino was based on a material error as to Ngāti Whakahemo's position and so was a wrongful exercise of public power.[158] There is no dispute that any decision that was made was based on a material error about the status of Ngāti Whakahemo's claim, so a declaration to that effect is uncontroversial and given the Crown's acceptance of the position, uncontradicted. The conclusion that this material error meant that it was a wrongful exercise of public power is perhaps more controversial. I accept of course that a decision to exercise a public power based on a material error will thereby be a wrongful exercise of that power. My hesitation in this case is that, as I see it, Ngāti Whakahemo did not ask for the same treatment as Ngāti Mākino, so it can be questioned whether Ministers ever directed their minds to that possibility and therefore exercised a public power of that kind. I do not see Ngāti Whakahemo's claim as putting in issue the decision, if there was one, not to treat Ngāti Whakahemo in the same way as Ngāti Mākino. Ngāti Whakahemo asked the Ministers for more direct intervention in Landcorp's decision making and the Ministers' refusal to intervene in the manner requested by Ngāti Whakahemo reflected the independent status of Landcorp as a state-owned enterprise and the statutory position that the management of Landcorp is entrusted to its board.[159]

[187] I agree that a declaration in the terms proposed by Elias CJ and Arnold J would be appropriate if the claim directly challenged a decision not to treat Ngāti Whakahemo in the same way as Ngāti Mākino was treated. But I do not see that declaration as appropriate given my doubt that that is the case.

[188] For the reasons I have given, I would not grant the injunctive relief proposed by Elias CJ and Arnold J.[160] That relief is predicated on an assumption that, if Ngāti

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158 Above at [110] and [138].
159 Above at [156]–[168].
160 Above at [142].

Whakahemo decides to buy Whārere, the contract between Landcorp and Wheyland Farms Ltd (Wheyland) would be set aside.

[189] Elias CJ and Arnold J conclude that it is appropriate to make an order that could lead to the setting aside of the agreement for sale and purchase between Landcorp and Wheyland. This is on the basis that Wheyland effectively took the risk that the agreement could be set aside, given what is provided for in cls 21 and 22 of the agreement for sale and purchase.[161] Elias CJ and Arnold J refer to the evidence given by Mr Pamment in his affidavit in support of Wheyland's application to intervene in the proceedings to the effect that Wheyland believed that, if the land was sold as a result of the operation of the s 27B memorial, Wheyland's capital investment would still pay off and it would be able to increase production substantially.[162] I do not see this as justifying a conclusion that Wheyland took the risk of the agreement being set aside on the basis proposed by Elias CJ and Arnold J.

[190] Wheyland's assessment of its risk was based on the same error that founded Elias CJ and Arnold J's decision that the Ministers had acted unlawfully, namely the incorrect advice from OTS that Ngāti Whakahemo's claim was already settled. As Ms Scholtens put it in argument before us, Ngāti Whakahemo was treated as something of a nuisance, because all those involved in the transaction thought that it was making a claim to Whārere that had no proper basis. The risk to Wheyland on this basis would therefore have been perceived as minimal.

[191] The fact that Wheyland thought that, in the unlikely event of a memorial under s 27B of the SOE Act being activated and the farm being resumed, it could still make money seems to me to be irrelevant to the present situation. In the case of a resumption the price paid under s 27C would be the market value at the time the resumption occurred. As Elias CJ and Arnold J pointed out in their judgment, no resumption order has ever been made, so this may have been considered a minor risk.[163] But, even if one were made, it would obviously take some years to be concluded and Wheyland would have anticipated that the purchase price would reflect the increased value created by Wheyland during its tenure. I see this as a

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161 These clauses are set out in the judgment of Elias CJ and Arnold J at [33].
162 Above at [136].
163 Above at [44].

different risk from the risk of the present agreement being cancelled by Landcorp and Wheyland being entitled to a refund of its deposit in accordance with cl 22.5 of the agreement for sale and purchase.[164]

[192] I see Wheyland's interests as those of an innocent third party and the consequences to it of the contract being set aside as potentially significant. I would therefore not support an order in the form proposed by Elias CJ and Arnold J, even if I had agreed with their analysis to the effect that there was a decision by Ministers not to request a replication of the Ngāti Mākino arrangement in respect of which judicial review should be granted. For the same reason I do not support such an order in relation to the decision of Landcorp to enter into the agreement for sale and purchase of Whārere to Micro.

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[164] The recent downturn in the dairy industry may well have adversely affected the value of Whārere.

**WILLIAM YOUNG J**

**Overview**

[193] The approach favoured by Elias CJ and Arnold J proceeds on the basis that:

(a) On 12 September 2013, the Office of Treaty Settlements (OTS) advised Landcorp Farming Ltd (Landcorp) that Whārere was not of potential interest for a future Treaty settlement. This statement was based on the erroneous belief that Ngāti Whakahemo's Treaty of Waitangi claim was settled.

(b) The decision by shareholding Ministers on 2 December 2013 not to intervene in favour of Ngāti Whakahemo was affected by the same mistake.

(c) The actions and non-actions of the Ministers are reviewable.

(d) The decisions by Landcorp as to the sales process and eventual sale of the farm are susceptible to judicial review.

(e) The errors of OTS and the Ministers mean that those decisions were erroneous.

(f) The appropriate remedies encompass interference with the contract between Landcorp and Wheyland Farms Ltd (Wheyland).[165]

[194] If Ngāti Whakahemo had applied for review (or perhaps a declaratory judgment) in December 2013, it could have obtained a ruling that its Treaty claims were still alive. Going perhaps a little further than Elias CJ and Arnold J, I am inclined to think that the OTS assessment would have warranted proceedings under the Declaratory Judgments Act 1908 and would, in that practical sense, have been reviewable. I also accept that the non-intervention decision of the Ministers (which

[165] For ease of discussion I will refer to Wheyland as the purchaser.

was infected by OTS's mistake) was susceptible to review and would support the making of declaration broadly along the lines of that proposed.[166] I also see the claim in relation to non-intervention by the Ministers in March 2014 as unsustainable for the reasons given by Elias CJ and Arnold J.[167] To this extent I agree with Elias CJ and Arnold J. As well, I agree with their conclusion as to the bad faith claim. Where I differ from them is primarily in relation to the steps in their reasoning identified in [193](d), (e) and (f).

[195] I propose to explain my reasoning primarily under three headings:

(a) A comment on the susceptibility of state-owned enterprises to judicial review.

(b) The public (or otherwise) character of the decisions made by Landcorp.

(c) Section 21 of the State-Owned Enterprises Act 1986.

**A comment on the susceptibility of state-owned enterprises to judicial review**

*The scheme of the State-Owned Enterprises Act 1986*

[196] The State-Owned Enterprises Act 1986 (the SOE Act) was enacted to enable the devolution to limited liability companies of functions and assets previously vested in the Crown. Its long title records that its object is:

> to promote improved performance in respect of Government trading activities and, to this end, to—

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166 The declaration I favour would be more narrow. I see no reason to reconsider the position adopted by the High Court and Court of Appeal and not challenged in argument that the mistake made was one of law (compare [54] above). I would therefore support a declaration that the decisions of the relevant Ministers were made under a material mistake of law. I do not see the reference in the declaration to the intervention on behalf of Ngāti Mākino as helpful as it could be taken to imply, contrary to the text of the reasons of Elias CJ and Arnold J (see [97]), that the Court is of the view that the Ministers ought to have intervened in the same way as they intervened on behalf of Ngāti Mākino. To the three possibilities canvassed in [97], I would add a fourth, namely that if properly appraised of the position as to Ngāti Whakahemo's claim, the Ministers might still have decided to intervene only on behalf Ngāti Mākino. I do not understand the majority to have concluded that such an outcome would necessarily have been substantively unreasonable.

167 At [78]–[82].

(a) specify principles governing the operation of State enterprises; and

(b) authorise the formation of companies to carry on certain Government activities and control the ownership thereof; and

(c) establish requirements about the accountability of State enterprises, and the responsibility of Ministers.

[197] Part 1 of the Act provides for the principles according to which state-owned enterprises operate. These are specified in s 4:

**4 Principal objective to be successful business**

(1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be—

(a) as profitable and efficient as comparable businesses that are not owned by the Crown; and

(b) a good employer; and

(c) an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

…

[198] Section 5(2) requires the board of a state-owned enterprise to make decisions which are in accordance with its statement of corporate intent, which is provided for by s 14. The board of a state-owned enterprise is accountable to its shareholdings ministers who in turn are responsible to the House of Representatives in relation to their functions.[168] Non-commercial activities are specifically provided for by s 7 (which is not engaged in the present case).

[199] Under pt 2, there is provision for shareholding Ministers to give directions as to the content of statements of corporate intent.[169] They may also determine the dividend to be paid.[170]

[200] Part 3 provides for the preparation and finalisation of statements of corporate intent,[171] the provision of reports to shareholding Ministers and the reporting to the

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168 State-Owned Enterprises Act 1986, ss 5(3) and 6.
169 Section 13(1)(a).
170 Section 13(1)(b).

House of Representatives by responsible Ministers.[172] A state-owned enterprise must supply information requested by shareholding Ministers and be audited by the Auditor-General.[173]

[201] Part 4 contains a miscellany of provisions, some of which require examination.

[202] Section 21 provides:

> **21 Saving of certain transactions**
>
> A failure by a State enterprise to comply with any provision contained in Part 1 or in any statement of corporate intent shall not affect the validity or enforceability of any deed, agreement, right, or obligation entered into, obtained, or incurred by a State enterprise or any subsidiary of a State enterprise.

It is via pt 1 and statements of corporate intent that state-owned enterprises are subject to what might be regarded as the public law constraints which affect their decision-making and operations that do not apply to private individuals and companies. I will return to s 21 later in these reasons.

[203] Section 27 is in these terms:

> **27 Maori land claims**
>
> The submission in respect of any land or interest in land of a claim under section 6 of the Treaty of Waitangi Act 1975 does not prevent the transfer of that land or of any interest in that land or of that interest in land—
>
> (a) by the Crown to a State enterprise; or
>
> (b) by a State enterprise to any other person.

[204] This section is complemented by ss 27A–27D which provide for the memorialisation and resumption procedures in respect of such land. Under these provisions, a memorial must be noted on the certificate of title of land transferred by the Crown to a state-owned enterprise, as follows:[174]

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171 Section 14.
172 Sections 15, 16 and 17.
173 Sections 18 and 19.
174 Section 27A.

> Subject to section 27B of the State-Owned Enterprises Act 1986 (which provides for the resumption of land on the recommendation of the Waitangi Tribunal and which does not provide for third parties, such as the owner of the land, to be heard in relation to the making of any such recommendation).

The Waitangi Tribunal's powers to require resumption are set out in ss 8A–8H of the Treaty of Waitangi Act 1975. The procedure is discussed in the reasons of Elias CJ and Arnold J at [44].

[205] Finally, I note that the Ombudsmen Act 1975 and the Official Information Act 1982 apply to state-owned enterprises.[175]

[206] What comes out of this is that a state-owned enterprise is to some extent subject to what might be regarded as public sector disciplines. So a state-owned enterprise is not "just" a private company. On the other hand, the clear purpose of the SOE Act is that, when acting commercially, and not subject to transparently imposed non-commercial directives, a state-owned enterprise will behave in the same way, with the same freedoms and subject to the same constraints as other firms.

*Mercury Energy*

[207] *Mercury Energy* is the leading case on judicial review in relation to state-owned enterprises.[176] In issue were supply termination decisions made by Electricorp (the only electricity wholesaler at the time) in relation to the Auckland Electric Power Board, an electricity retailer which later became Mercury Energy.

[208] In the Court of Appeal the argument was that the impugned decisions of Electricorp could be reviewed for non-compliance with s 4 of the SOE Act.[177] There was an associated and far from plausible claim for breach of statutory duty. In dismissing these claims, Richardson J observed:[178]

> The decision to terminate was a commercial decision by a company incorporated under the Companies Act 1955. The commercial operations of

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175 By virtue of the State-Owned Enterprises Act, s 2 and sch 1; Ombudsmen Act 1975, s 2 and sch 1; and Official Information Act 1982, s 2 and sch 1.

176 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) [*Mercury Energy* (PC)].

177 *Auckland Electric Power Board v Electricity Corporation of New Zealand* [1994] 1 NZLR 551 (CA).

178 At 560.

> an organisation do not become subject to judicial review simply because the organisation is recognised by statute or owes its existence to a specific statute or a general statute such as the Companies Act (*New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699, 707).
>
> To attract judicial review the impugned action must amount to the exercise of a particular statutory power. … The argument for the board, founded as it is on s 4(1)(c) of the SOE Act, must be that s 4(1)(c) confers the right to make a decision affecting the rights of the board. But the source of the authority to terminate the contract was Electricorp's right to conduct its affairs in the same way as other companies incorporated under the Companies Act. The common law of contract is the source of Electricorp's power or right to terminate a contract on reasonable notice … The decision was taken pursuant to this power, not in the exercise of a statutory power or right.
>
> Section 4(1) does not confer a power in any true sense. It states the principal objective of an SOE. It is not directed to specific acts or omissions of an SOE, but with its overall performance. And all that in meeting the principal objective of operating as a successful business. Finally, paras (a), (b) and (c) are not independent of one another. The answer to whether an SOE is satisfying s 4 does not rest on whether para (c) is satisfied, let alone whether on one occasion an SOE acted in a manner which might prompt concern. Rather it turns on an assessment of whether, having regard to all the considerations referred to in s 4(1), the SOE is operating as a successful business. The balancing of social responsibility and profitability and that broad overall balancing are inherently unsuitable for judicial decision. The assessment is appropriately made periodically through the accountability provided for in the statute. SOEs are accountable to ministers and through them to Parliament for meeting responsibilities reposed in them under the statute.

The focus on whether there had been the exercise of a statutory power of decision, while no doubt a response to the argument presented, was misplaced as was conceded by counsel for Electricorp in the Privy Council.[179] That said, I see considerable force in the points Richardson J made.

[209] The Privy Council had no difficulty in accepting that the actions of Electricorp were reviewable:[180]

> A state-owned enterprise is a public body; its shares are held by ministers who are responsible to the House of Representatives and accountable to the electorate. The Corporation carries on its business in the interests of the public. Decisions made in the public interest by the Corporation, a body established by statute, may adversely affect the rights and liabilities of private individuals without affording them any redress. Their Lordships take the view that in these circumstances the decisions of the Corporation are in

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179 *Mercury Energy* (PC), above n 176, at 388.
180 At 388.

> principle amenable to judicial review both under the [Judicature Amendment Act 1972] as amended and under the common law.

The Board then went on to say:[181]

> It does not follow that Mercury is entitled to proceed with its claim for judicial review in the present case. Judicial review involves interference by the Court with a decision made by a person or body empowered by Parliament or the governing law to reach that decision in the public interest. A litigant may only invoke interference by the Court with such a decision if the litigant pleads plausible allegations which, if substantiated at the trial, will demonstrate that the decision was not reached in accordance with law.

And a little later:[182]

> The express statutory duty of the Corporation is to pursue its principal objective of operating as a successful business, by becoming profitable and efficient, by being a good employer and by exhibiting a sense of social responsibility. It was for the Corporation to determine whether its principal objective would best be served by allowing the contractual arrangements to continue or by terminating the contractual arrangements. …
>
> It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith. Increases in prices whether by state-owned or private monopolies or by powerful traders may be subjected to voluntary or common law or legislative control or may be uncontrolled. Where a state-owned enterprise is concerned, the shareholding ministers may exercise powers to ensure directly or indirectly that there are no price increases which the ministers regard as excessive. Retribution for excessive prices is liable to be exacted on the directors of the state-owned enterprises at the hands of the ministers. Retribution is liable to be exacted on the ministers at the hands of the House of Representatives and on the elected members of the House of Representatives at the hands of the electorate. Industrial disputes over prices and other related matters can only be solved by industry or by government interference and not by judicial interference in the absence of a breach of the law.

In dismissing the appeal, the Board concluded with these comments:[183]

> The causes of action based on breach of statutory duty, abuse of a monopoly position and administrative impropriety are only relevant if the causes of action based on contract are rejected. If the causes of action based on contract are rejected, the other causes of action will only constitute attempts to obtain, by the declaration sought, specific performance of a non-existing contract. *The exploitation and extension of remedies such as judicial review beyond their proper sphere should not be encouraged.*

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181 At 388.
182 At 390–391.
183 At 391 (emphasis added).

[210] The view of the Privy Council appears to have been that:

(a) a state-owned enterprise is a public body and, for this reason, its actions are susceptible to judicial review if they affect the rights and liabilities of private individuals;

(b) judicial review is only available if the decision in issue was not reached in accordance with the law; and

(c) given the structure of the SOE Act, including the requirement for state-owned enterprises to operate as successful businesses, it was unlikely that a judicial review application in respect of a commercial decision by a state-owned enterprise would ever be successful in the absence of fraud, corruption, or bad faith.

[211] There is some commonality in the approaches of the Court of Appeal and the Privy Council in relation to the scope (or otherwise) for judicial review of the actions of a state-owned enterprise for non-conformity with the objectives set out in s 4(1). The Court of Appeal approached the case on the basis that actions referable to those objectives were non-justiciable in the sense of not being subject to judicial review. The Privy Council's approach, while expressed differently, was essentially to the same effect; decisions as to the conduct of a state-owned enterprise by reference to the s 4 objectives were for the directors, with accountability to be via Ministers and the legislature rather than in the form of judicial review.

[212] The Privy Council judgment is brief and, for that reason, somewhat conclusory. By way of example, although the Board spoke not merely of the exercise of contractual powers but also the entering into of contracts, s 21 was not mentioned. More generally, I am not attracted to the outcome that judicial review is generally available in relation to the actions of state-owned enterprises but only on narrow grounds.

[213] The Privy Council's approach rests on the premises that (a) a state-owned enterprise is public body and (b) for this reason all actions which affect "the rights

and liabilities of private individuals"[184] are sufficiently public in character to warrant review. Given that the Privy Council envisaged judicial review in respect of commercial activities (albeit on limited grounds) it must have had a broad conception of the type of activities which might affect such rights and liabilities. I confess to thinking that a better approach – and one which is more consistent with the general judicial review principles – is to adopt a more restricted approach to whether, or not, the actions of a state-owned enterprise are sufficiently public in character to warrant review even where such review is confined to narrow grounds.

[214] Let us say A, a state-owned enterprise, acquires widgets from B in a transaction which results from a bribe paid by B to A's procurement manager. A would, of course, have a right of action against B and criminal offences will have been committed. But if A and B are private firms, C, another widget seller, would have no claim against either or both of A and B even though it missed out on a sale. I cannot see why C should have a claim (by way of judicial review) if A is a state-owned enterprise. I would be of the same view even if it is B and not A which is the state-owned enterprise. Allowing for judicial review of such transactions, even if the grounds are narrow, creates the potential for gaming litigation by trade competitors and subjects state-owned enterprises to risks – and thus a competitive disadvantage – which comparable firms do not face. Given the available criminal and civil remedies, I do not see judicial review as necessary or appropriate. In saying that, I accept that in cases concerned with tendering by public bodies, the *Mercury Energy* approach has been cited with approval.[185] I have, however, yet to see a judicial explanation of policy reasons which would make judicial review appropriate in my widget example.

[215] I therefore have distinct reservations whether the bad faith claim in relation to the conduct of Ms Houpapa can be justified simply on the basis of the *Mercury Energy* case. As it turns out, however, I am content to adopt the approach taken by Elias CJ and Arnold J on that issue.

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184 *Mercury Energy* (PC), above n 176, at 388.

185 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776; *R (Menai Collect Ltd) v Department for Constitutional Affairs* [2006] EWHC 724 (Admin); and *R (Gamesa Energy UK Ltd v The National Assembly for Wales* [2006] EWHC 2167 (Admin).

**The public (or otherwise) character of the decisions made by Landcorp**

*A preliminary comment*

[216] It is not easy to define the characteristics which will result in a particular decision being sufficiently public in nature as to warrant judicial review.[186] Obviously the public or otherwise status of the decision-maker is often a very important consideration, as is the nature of the power which was exercised. Other considerations may also be material. In this case, however, the issue arises in such particular statutory and factual contexts that it can be fairly assessed without reference to the very substantial jurisprudence which has developed.

*The statutory context*

[217] In deciding whether a decision is of a sufficiently public character to justify judicial review, the courts should promote, and not frustrate, the purposes and policies of the relevant legislation. In the case of decisions made by state-owned enterprises, these include the s 4 objective that a state-owned enterprise be "as profitable and efficient as comparable businesses that are not owned by the Crown". Allowing judicial review of this sale would, in the future, place Landcorp at a disadvantage compared to other corporate dairy farmers who may enter into land transactions without judicial review risks being factored in. Although s 4 is addressed to state-owned enterprises (in the sense that it stipulates what is the principal objective of each state-owned enterprise) and not directly to the courts, I do not see it as the role of the courts to adopt an approach to judicial review which renders impossible or impedes the achievement of that objective.

[218] As I will explain, I think that s 21 provides a discrete answer to the appeal, which is why I deal with it separately later in these reasons. At a more general level, however, it also is indicative of a legislative policy which tells against permitting judicial review of contracting decisions.

[219] The general statutory context is thus not particularly conducive to an argument that judicial review should be available in relation to contracting decisions

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[186] See Mark Elliott "Judicial Review's Scope, Foundation and Purposes: Joining the Dots" [2012] NZ L Rev 75 at 81–93.

of state-owned enterprises. As well, when decisions to sell memorialised land are in issue, the legislative provisions in relation to the resumption process are also material. The policy is that state-owned enterprises may sell memorialised land and the quid pro quo for Maori was the creation of a resumption remedy. Adopting the approach that a Treaty grievance in respect of land to be sold gives the sale sufficiently public character to justify judicial review has the potential to cut across this policy. More particularly, s 27 provides that a Waitangi Tribunal claim to land held by a state-owned enterprise "does not prevent the transfer of that land".

[220] I know that the appellant would say that, in this case, the agreement for sale would not have been entered into but for the mistake by OTS, so the basis for stopping the transfer is not the claim but rather the erroneous assessment by OTS which affected down-stream decision-making. But similar arguments will be able to be developed in virtually any case in which a state-owned enterprise proposes to sell land which is subject to a claim. By way of examples only, I can foresee arguments along the lines that (a) if only the state-owned enterprise had fully understood the nature and significance of the claim, there would have been no sale; (b) there had been a breach of the rules of natural justice in relation to the decision to sell the land; or (c) in light of the compelling nature of the claim the decision to sell it was unreasonable. I see such arguments, along with the appellant's argument in the present case, as risking inconsistency with s 27, a risk which is enhanced if allowing judicial review is justified expressly or by implication on the basis that the resumption remedy is inadequate.

*The factual context*

[221] As far as the Treaty obligations of the Crown are concerned, all that matters to Landcorp is the Crown's position. So it is not the function of Landcorp to form, independently of OTS, its own view in respect of the validity or otherwise of Treaty claims or what land should be set-aside in respect of such claims. In this case, Landcorp acted on the basis of the advice it received from OTS. In essence, it ascertained what the Crown position was and acted accordingly.

[222] This is not to suggest that Landcorp, as vendor of land, was necessarily oblivious to the possible significance of Treaty claims. As Elias CJ and Arnold J have recorded, the sale and purchase made elaborate provision in relation to the possibility that claims might be made.[187] In the minute of the board referred to by Elias CJ and Arnold J, there is a reference to the possibility of a land occupation.[188] A land occupation affecting the transfer of possession of the farm and its operation would have been of concern to Landcorp. As well, a later successful resumption application would have the potential to affect the ability of Landcorp to sell other memorialised land.

[223] Against this background, it would not have been surprising if Landcorp had given some consideration to the viability of Ngāti Whakahemo's claim and perhaps it did. Indeed, Mr Pamment of Wheyland said that he was told by Landcorp's Mr McKenzie in February 2014 that OTS had indicated that it had no interest in the farm for Treaty settlement purposes. Mr Pamment also said that Mr McKenzie:

> … [T]old us that Landcorp had done its own due diligence before offering the property for sale by tender and they were satisfied that Ngāti Whakahemo's claim had no substance.

Mr Pamment further said that Mr McKenzie later told him that Landcorp would not have proceeded with the sale of the farm if it had thought that Ngāti Whakahemo had a credible Treaty claim.

[224] I have some reservations about the significance of Mr Pamment's evidence. It must have been based on his recollection some months after the events of the remarks in question. The words he attributed to Mr McKenzie are not without ambiguity particularly when looked at in light of what we know about the relationship between the Crown generally (including OTS and the relevant Ministers) and Landcorp. In terms of the Treaty settlement process, Landcorp's role was, as I have noted, to ascertain the view of the Crown and to act on that view. In this context, "due diligence" may have meant no more than engaging in the Protocol process and later with Ministers and only proceeding with the sale once clearance to do so had been given. There is no direct evidence of an independent assessment by

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187 Above at [33]–[34].
188 Above at [68].

Landcorp of the strength of the Ngāti Whakahemo claim; this in a context in which, if there had been such an assessment, I would have expected that there would be an associated document trail.

[225] In the end, I do not think it matters whether Landcorp directly engaged with the merits of the Ngāti Whakahemo claim. If it did not – which I think is probable – this supports my view of Landcorp's limited involvement with the Treaty component of the sale process. If there was such an assessment, I would see it as referable to its own commercial interests and not one carried out on behalf of the Crown in respect of the Crown's Treaty obligations.

*A conclusion*

[226] What is said to give the case a public law character is the impact of the process on the Treaty obligations of the Crown towards Ngāti Whakahemo.

[227] I consider that the statutory context points strongly against a public categorisation of a decision by a state-owned enterprise to enter into a contract, and that this is particularly so where the contract relates to the sale of memorialised land.

[228] As well, when the facts are examined, I think it becomes plain that the relevant public obligations in relation to the Treaty were recognised on all sides as being the responsibility of the Crown as was the relevant decision-making associated with those obligations.

[229] From all of this it follows – at least to my way of thinking – that Landcorp's decision-making was not of a sufficiently public character to warrant judicial review.

**Section 21 of the State-Owned Enterprises Act 1986**

[230] I have already referred to s 21. Its legislative history is reviewed by Elias CJ and Arnold J.[189] As they note, cl 20 of the State-Owned Enterprises Bill 1986 (71-1), provided:

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[189] Above at [114]–[117].

> Nothing in this Act shall affect the validity or enforceability of any act, omission, contract, deed, right or obligation carried out, entered into, obtained, or incurred by a State enterprise in breach of any of the provisions of this Act.

They also record the view of Professor Taggart that the amendment:[190]

> … shows that Parliament did not intend to exclude the Court's review powers in relation to compliance with Part I. On the contrary, the possibility of Court review was recognised and deliberately left open.

I have no difficulty with this view of s 21. It is perfectly clear on its wording that it applies only to protect contracts entered into by state-owned enterprises.

[231] Given the legislative history, I do not accept that s 21 is intended only to operate between the parties to a contract so as to prevent pt 1 arguments being raised either by the state-owned enterprise or a contracting party. The original cl 20, if enacted, would have been of general application and would thus have encompassed (and precluded) amongst many other things, third party challenges to contracts entered into by state-owned enterprises. Section 21, as enacted, is confined to excluding challenges to contracts but there is no reason to suppose that it is restricted to challenges of the kind suggested by Elias CJ and Arnold J.[191] Indeed, there are good policy reasons for not so confining it. Allowing contracts entered into by a state-owned enterprise to be challenged on grounds which are not available in relation to contracts entered into by other traders has the potential to put state-owned enterprises at a competitive disadvantage in a way which is not consistent with the policy underlying s 4(1)(a).[192] Against that background, s 21 can be seen as a compromise, only excluding judicial review in relation to contracts.

[232] I also do not accept that it is correct to dismiss the application of s 21 on the basis that the present judicial review proceedings are not founded on inconsistency with pt 1 of the SOE Act or the statement of corporate intent. It is pt 1 of the SOE Act and the statement of corporate intent which establish the principles governing the operations of a particular state-owned enterprise. There is the s 4(1)(c) objective to exhibit "a sense of social responsibility". It is s 9 which provides that nothing in

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190 Above at [115].
191 Above at [117].
192 This was an important theme in *Lab Tests*, above n 185.

the SOE Act permits the Crown to act inconsistently with the principles of the Treaty of Waitangi. Both provisions appear in pt 1. As Elias CJ and Arnold J note, the relevant statement of corporate intent refers to the arrangements between the Crown and Landcorp as to the sale of land in which Maori are interested and this statement of corporate intent features in their reasons at [98](a).

[233] Given the overall policy of the SOE Act, I do not think it right to read down s 21 and to avoid its application on the basis of public law obligations which are said to be outside of pt 1 and the statement of corporate intent even though they cover the same ground. I doubt if it would have occurred to those responsible for the drafting of s 21 that it could be avoided so simply.

[234] I accordingly see s 21 as an answer to the challenge to the contract with Wheyland.

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