IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 9/2021
[2021] NZSC 182

BETWEEN	TE WARENA TAUA, GEORGE HORI WINIKEREI TAUA, NGARAMA WALKER, HAMUERA TAUA AND MIRIAMA TAMAARIKI AS TRUSTEES OF TE KAWERAU IWI TRIBAL AUTHORITY First Appellants
	TE WARENA TAUA, GEORGE HORI WINIKEREI TAUA, NGARAMA WALKER, HAMUERA TAUA AND MIRIAMA TAMAARIKI AS TRUSTEES OF TE KAWERAU IWI SETTLEMENT TRUST Second Appellants
AND	TAHI ENTERPRISES LIMITED First Respondent
	DIANNE LEE Second Respondent

Hearing:	19 November 2021
Further memorandum:	25 November 2021
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	K J Crossland, M K Mahuika and J S Langston for Appellants M Heard and C Upton for Respondents
Judgment:	15 December 2021

JUDGMENT OF THE COURT

A The appeal is allowed to the extent that, by consent, the orders made in the High Court and the Court of Appeal

granting discovery of the register of iwi members are set aside and the other orders set out below at [16] are substituted.

B **Leave is reserved to the parties and any member of the iwi to apply to the High Court for modifications of these orders. The High Court may make such orders, including any additional or ancillary orders.**

C **There is no order as to costs in this Court. The costs orders made in the Court of Appeal on the appeal in that Court in favour of the respondents are set aside. The respondents must pay the appellants costs in that Court calculated for a standard appeal on a band A basis and usual disbursements. The costs orders made in the High Court stand.**

REASONS
(Given by Ellen France J)

Introduction

[1] This appeal concerns proceedings alleging breaches of contract, unjust enrichment and related claims brought by Tahi Enterprises Ltd (Tahi), the first respondent, and Ms Dianne Lee, the second respondent. Ms Lee is the sole shareholder and director of Tahi.[1] The claims relate to a joint venture agreement and other dealings between Tahi and members of Te Kawerau ā Maki (the iwi) during 2007 and 2008.

[2] Progress in the proceedings has stalled while the parties have sought to resolve issues about who is entitled to speak for whom. An earlier attempt to obtain representation orders was dismissed by Lang J.[2] The respondents, in the draft second amended statement of claim, had also advanced claims against fourth and fifth defendants. These were persons unable to be named. The respondents subsequently sought an order for disclosure of the names of the intended fourth and fifth defendants. The High Court ordered the disclosure of the names of iwi members over the age of

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1 Like the Court of Appeal, we refer to Tahi Enterprises Ltd (Tahi) and Ms Lee collectively as "Tahi" in respect of claims brought by both parties, and to Ms Lee alone in respect of claims in which she is the sole plaintiff.

2 *Tahi Enterprises Ltd v Taua* [2018] NZHC 516 [Representation order judgment].

18 when the joint venture agreement was entered into.[3] Those orders were upheld on appeal to the Court of Appeal.[4] The appellants were granted leave to appeal to this Court on whether the Court of Appeal was correct to dismiss the appeal.[5]

[3] In the judgment granting leave, this Court said that on the appeal it may be necessary "to consider whether the matter of representation orders first considered by Lang J should now be revisited; that is, whether representation orders may provide a more just and speedy means of resolving the real controversy between the parties than would discovery orders".[6] Counsel were asked to address that matter along with any other submissions they wished to advance.

[4] To put the issues on appeal in context, we need to say a little more about the background. We can be brief because, as we shall discuss, the parties have agreed on the orders necessary to resolve the appeal.

Background

[5] In the description of the pleadings which follows, we draw heavily on the discussion in the judgment of the Court of Appeal, which sets out the background in full.[7]

The pleadings

[6] Tahi's claims relevantly relate to a joint venture agreement entered into on 27 June 2007 (and a subsequent variation signed on 22 July 2008) by the iwi and Tahi, under which profits from future joint venture endeavours relating to settlement of the iwi's Treaty of Waitangi claims were to be shared as between the iwi and Tahi.[8] The signatories to the agreement were Ms Lee on behalf of Tahi, and Mr Te Warena Taua and Ms Piki Taylor on behalf of "Te Kawerau ā Maki". The agreement referred to

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3 *Tahi Enterprises Ltd v Taua* [2018] NZHC 3372 (Associate Judge Smith).

4 *Taua v Tahi Enterprises Ltd* [2020] NZCA 639 (Cooper, Gilbert and Courtney JJ) [CA judgment]. The Court dismissed a cross-appeal challenging the decision not to order disclosure of the names of iwi members who were minors at the time the joint venture agreement was entered into.

5 *Taua v Tahi Enterprises Ltd* [2021] NZSC 88.

6 At [1] (footnote omitted).

7 CA judgment, above n 4, at [2]–[40].

8 There are separate causes of action based on transactions involving Ms Lee and Mr Te Warena Taua in relation to a property in Māngere.

funding to be provided by Tahi in support of the iwi's Treaty of Waitangi claims and for repayments to Tahi of capital advanced upon receipt by the iwi of any cash settlement from the Crown. Tahi made various payments of some $1.3 million pursuant to the agreement. The anticipated settlement of the iwi's historical Treaty claims eventuated, and the claims were settled under Te Kawerau ā Maki Claims Settlement Act 2015 and Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. In 2016, the iwi parties purported to cancel the agreement (as varied). The funds advanced by Tahi were not repaid.

[7] Against this background, the first-named first defendant in the proceedings is Mr Te Warena Taua, who is described in the claim as the chairman and rangatira of Te Kawerau ā Maki and chairman of both Te Kawerau Iwi Tribal Authority (the Tribal Authority) and Te Kawerau Iwi Settlement Trust (the Settlement Trust), represented by the first and second appellants. The second-named first defendant is Ms Miriama Tamaariki as executor of the estate of Mrs Hariata Arapo Ewe. Mrs Ewe was a senior member of the iwi. Both Mr Te Warena Taua and Mrs Ewe were claimants on behalf of the iwi in the iwi's Waitangi Tribunal claims. For present purposes, the key allegation is that when Mr Te Warena Taua and Ms Taylor executed and subsequently breached the joint venture arrangements, they did so either as trustees or agents for the iwi.

[8] The trustees of the Tribal Authority and the trustees of the Settlement Trust are named in the claim as the second and third defendants respectively. The Tribal Authority is a charitable trust established for purposes which include the negotiation and settlement of the iwi's historical Treaty claims and the management of any settlement assets. The Settlement Trust was established in February 2014 with various purposes, including the receipt and administration of settlement assets received by the iwi as part of the settlement with the Crown of its historical Treaty claims.

[9] As noted, the relevant version of the statement of claim also advanced claims against fourth and fifth defendants who were persons unable to be named. The fourth defendants were described collectively as the "Contracting Iwi Members", defined as encompassing members of the iwi over 18 years old as at 27 June 2007, the date of

execution of the joint venture agreement. The fifth defendants were described as the "Benefitting Iwi Members", that is, "all members of the Iwi from time to time".

[10] This part of the pleading responded to the decision of the High Court declining to make orders that the trustees of the Settlement Trust represent the members of the iwi.[9] That application was unsuccessful because, relevantly, given the agency/trusteeship allegation, there was not identity of interest as between the trustees/principals and individual members. Tahi then sought to join all members of the iwi either as principals in an agency relationship, or as beneficiaries of a trust where the agents and/or trustees were Mr Te Warena Taua, Ms Taylor and Mrs Ewe. The discovery orders sought and obtained were accordingly required to identify the necessary additional defendants.

The decision under appeal

[11] The Court of Appeal upheld the orders for discovery on a different basis from that adopted by the High Court. The High Court had concluded that r 8.20 of the High Court Rules 2016, dealing with orders for particular discovery, did not apply. Instead, the High Court invoked the principle set out in *Norwich Pharmacal Co v Customs and Excise Commissioners* dealing with when a non-party may have an obligation to provide information before a proceeding.[10] By contrast, the Court of Appeal considered it was only necessary to apply the High Court Rules relating to disclosure. In particular, the Court said that r 8.8, which provides for tailored discovery where the interests of justice so require, applied in this case.

[12] In concluding that an order for tailored discovery was in the interests of justice, the Court identified a number of matters supporting that view. The Court noted that the names of the intended fourth and fifth defendants were necessary not to establish the basis of their potential liability, but so they could be brought to Court "to answer the already formulated claims".[11] If the claims were not "genuinely arguable, they

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9 Representation order judgment, above n 2.

10 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (HL). The relevant principle was described at 175 in this way: "if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers".

11 CA judgment, above n 4, at [59].

might be susceptible to being struck out".[12] But it would be wrong in the circumstances to use the rules relating to discovery to defeat the substantive claims effectively by a side wind. The Court was concerned that potential claims might not be pursued because the relevant parties could not be named. It was not appropriate to "put the respondents through a process requiring them to establish a good arguable case when, if the names of the intended defendants were known, exactly the same claims could be advanced".[13]

[13] Accordingly, the Court found that "the interests of justice can be served only if Tahi and Ms Lee are able to advance [the] claims and the fourth and fifth defendants are able to take such steps as may be appropriate in relation to them".[14]

The appeal

[14] Underlying the proceedings are some important general issues about modern day post-settlement tribal entities like the Settlement Trust and the relationship of those entities with iwi members. There are also potential issues about iwi representation in the civil jurisdiction. The parties' written submissions canvassed these and other matters, such as the correct approach to the making of discovery orders. However, as we have foreshadowed, it has not been necessary for us to address these issues.

[15] Having considered the written submissions, it seemed to us, as the leave panel had suggested and the respondents proposed, that representation orders may provide the best means of resolving the issues on the appeal. At the hearing, this indication was put to the parties to consider.

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12 At [59].
13 At [61].
14 At [65].

[16] We heard some argument about the issues. The parties subsequently advised the Court that agreement had been reached as to the making of a representation order. There was then some discussion about the form of the orders, with the result that after the hearing had concluded, the parties filed a memorandum stating that orders in the following terms[15] could be made by consent:

> 1 For the purposes of the orders made:
>
> 1.1 **Iwi** means Te Kawerau ā Maki Iwi, being the collective group composed of individuals who are descended from an ancestor of Te Kawerau ā Maki (as further defined in s 12 of Te Kawerau ā Maki Claims Settlement Act 2015);
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> 1.2 **Settlement Trust** means Te Kawerau Iwi Settlement Trust constituted by deed dated 21 February 2014; and
>
> 1.3 **Settlement Trust Trustees** means the present trustees of the Settlement Trust. The current trustees are as follows:
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> a Te Warena Warren Jack TAUA;
>
> b George Hori TAUA;
>
> c Ngarama WALKER;
>
> d Miriama TAMAARIKI;
>
> e Robin Kura TAUA-GORDON; and
>
> f Takutai Moana Gregory WETERE
>
> 2 Under [r 4.24 of the High Court Rules 2016], the second appellants/third defendants, Settlement Trust Trustees, are appointed to represent the members of the Iwi (**Iwi Members**) in this proceeding.
>
> 3 The Settlement Trust Trustees are joined to the proceedings as the fourth defendants as representatives for Iwi Members.
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> 4 The respondents'/plaintiffs' claim against Iwi Members is limited to the collective tribal estate of Iwi Members, and do not claim against their personal estates, except in so far as the individuals were directly involved in the transactions (for example the first defendants) or were directly unjustly enriched by payment of funds from Tahi.
>
> 5 The orders made in the High Court and the Court of Appeal granting discovery of the Register of Iwi Members are rescinded.
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> 6 As soon as practicable, but in any event no later than 8 February 2022, the Settlement Trust Trustees are to provide to Iwi Members a copy of

[15] We have made some minor stylistic changes.

this order, a summary of the proceedings (including the effect of this order) approved in advance by the High Court, and details of where the pleadings can be obtained, by utilising the Register of Iwi Members referred to in the Settlement Trust deed and also sending these documents to any other persons known to them who are Iwi Members but who have not yet been placed on the Register. The same information will also be put onto the website of the Settlement Trust (http://www.tekawerau.iwi.nz/).

7 Leave is reserved to the parties and any Iwi Member to apply to the High Court for modifications of these orders and the High Court may make such orders, including any additional or ancillary orders.

[17] We agree that these orders should be made.

[18] In this regard, we saw potential difficulties with addressing the issues through discovery when that would bring in multiple defendants serving only to add cost and complexity to the proceedings. Further, while there appeared to be nothing to prevent a fresh application for a representation order to be made in the High Court, that too would add both delay and cost to the parties.

[19] Further, the orders allay our concern to avoid the situation where pleaded issues requiring adjudication could not be pursued because of what appeared to us to be technical objections. Those objections seemed in any event unlikely to prevail, given the broad powers under r 1.6(2) of the High Court Rules, which states that where the Rules do not specifically provide for a situation, the court must dispose of the matter in the manner it thinks best calculated to meet the objectives of the Rules, namely, to secure the just, speedy and inexpensive determination of any proceeding or interlocutory application.[16] We are also concerned to ensure that, where the matter proceeds to judgment, those who should be bound by the judgment would be bound. A representation order will also have the benefit of ensuring that if there were differing defences as amongst the defendants, those differences would be heard.

[20] We add that we see issues such as whether someone in Mr Te Warena Taua's position could bind the iwi as a matter for trial, and a separate issue from the representation order question.

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16 High Court Rules 2016, r 1.2.

[21] Orders are accordingly made by consent in the terms set out above at [16]. On this basis, the appeal is allowed to the extent that, by consent, the orders made in the High Court and the Court of Appeal granting discovery of the Register of Iwi Members are set aside and the other orders set out above at [16] are substituted. Leave is reserved to the parties and any member of the iwi to apply to the High Court for modifications of these orders. The High Court may make such orders, including any additional or ancillary orders.

Costs

[22] The only remaining issue is as to costs.

[23] The appellants' position is that the costs orders made in favour of the respondents in relation to the discovery application in the High Court and the appellants' unsuccessful appeal in the Court of Appeal should be set aside. The appellants make the point that the respondents did not seek to appeal Lang J's decision not to make a representation order, and nor did they seek to make a fresh application in the High Court for a representation order. The appellants say they had justifiable concerns about the privacy issues involved in making the discovery orders sought and about whether the personal estate of iwi members remained "up for grabs".

[24] The appellants also seek costs in this Court on the basis that the way the respondents responded to the appeal was also unsuccessful.

[25] The respondents take the converse position; that is, they say there should be no change to the costs awards in relation to the discovery proceedings in the High Court and the Court of Appeal and they should be awarded costs in this Court. The respondents argue that any issue about the impact on iwi members' personal estates was clarified earlier in the proceedings.

[26] We see the honours as fairly evenly divided. While the respondents in pursuing discovery were following the approach identified by Lang J in terms of pleadings, we have determined discovery is not the appropriate route. Further, the appellants' concerns about the potential impact on the personal estate of iwi members had some

force. We take the view that the overall outcome, which, to the parties' great credit, they have cooperated to achieve, is best met in the following way.

[27] First, the costs award in the High Court in favour of the respondents on discovery should stand. Second, the costs orders in the Court of Appeal in favour of the respondents should be set aside and a costs award in favour of the appellants substituted. Finally, costs in this Court should lie where they fall.

[28] Accordingly, there is no order as to costs in this Court. The costs orders made in the Court of Appeal on the appeal in that Court in favour of the respondents are set aside. The respondents must pay the appellants costs in that Court calculated for a standard appeal on a band A basis and usual disbursements. The costs orders made in the High Court stand.

Solicitors:
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