IN THE SUPREME COURT OF NEW ZEALAND SC 54/2010

BETWEEN **ALAN PAREKURA TOROHINA HARONGA**
Appellant

AND **WAITANGI TRIBUNAL**
First Respondent

AND **THE ATTORNEY-GENERAL**
Second Respondent

AND **TE WHAKARAU, (FORMERLY TE POU A HAOKAI)**
Third Respondent

Hearing: 6 August 2010

Court: Elias CJ
Blanchard J
Tipping J

Appearances: B W F Brown QC and K S Feint for the Appellant
No appearance by or for the First Respondent
V L Hardy and C R W Linkhorn for the Second Respondent
T H Bennion for the Third Respondent

APPLICATION FOR LEAVE TO APPEAL

MR BROWN QC:

May it please Your Honours, Brown and Feint for the applicant

ELIAS CJ:

Yes, Mr Brown, thank you.

MS HARDY:

May it please the Court, Ms Hardy and Mr Linkhorn for the Crown.

ELIAS CJ:

Thank you, Ms Hardy and Mr Linkhorn.

MR BENNION:

May it please the Court, Mr Bennion for the third respondent.

ELIAS CJ:

Yes, Mr Bennion, thank you. Well, Mr Brown, we've read the submissions, there is a lot of material –

MR BROWN QC:

Yes, Your Honour.

ELIAS CJ:

– and it may be that you want to take us to things that you need to emphasise. But just thinking about where it's heading, because the only question for us is leave –

MR BROWN QC:

Yes.

ELIAS CJ

– am I right in thinking that the issue really is one of a right to be heard, which will effectively be denied if urgency isn't given to the –

MR BROWN QC:

Yes.

ELIAS CJ:

Yes.

MR BROWN QC:

That's exactly it, and it's at two levels, we say, an entitlement to be heard, or our fallback position is, if there is a discretion in relation to the special field of the resumption jurisdiction, then it is a trammelled discretion, not one that is completely untrammelled, and affected by the Tribunal's policy that applications for resumption are the subject of no different or separate criteria.

ELIAS CJ:

Can you just explain that a little bit more simply, the second?

MR BROWN QC:

Yes.

ELIAS CJ:

So, the first point is an issue of entitlement to be heard?

MR BROWN QC:

Yes, which is a matter of statutory interpretation, and I put that squarely at the forefront of our argument.

ELIAS CJ:

Yes.

MR BROWN QC:

If, having considered the legislation, as amended, adopting the *Fonterra* construction, as in Tipping J's judgment for *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC), in terms of purpose and context. If, notwithstanding our argument, you say, "Well, there is still a discretion here for the Tribunal about allocating a fixture for a resumption application in the case of a party who has been found to have a well-founded claim and from whom the land in question has clearly been taken away, a piece of the jigsaw going back", if there is still a discretion –

ELIAS CJ:

As a finding of Treaty breach in that taking?

MR BROWN QC:

Yes.

ELIAS CJ:

Yes.

MR BROWN QC:

Absolutely. Albeit it's an unusual one, because it's a 1961 breach, it's a –

ELIAS CJ:

Yes.

MR BROWN QC:

– very current breach.

ELIAS CJ:

Well, the Treaty obligations arguably are ongoing, Mr Brown.

MR BROWN QC:

Indeed.

ELIAS CJ:

Yes.

MR BROWN QC:

Indeed, but the sort of semi-silent justification for not returning the land to the persons from whom the land was taken in 1961 is that, well, back in time, the Māori Land Court issues, that there is other people who – if it was, we're starting again, if Mangatu Incorporation didn't have the land, perhaps therein should be considered as well, that is the –

ELIAS CJ:

Would their interests not be considered in the Court's determination whether to grant resumption, or does that follow?

MR BROWN QC:

Well, the Court, the Tribunal's decision, whether or not to grant resumption, is squarely the jurisdiction given to the Tribunal to decide –

ELIAS CJ:

Yes.

MR BROWN QC:

– which Māori land is to be returned, that's a Tribunal, not an Executive, decision, and that would be dealt with –

ELIAS CJ:

Yes.

MR BROWN QC:

– if the application for resumption could break through the, what I call the three cogs

ELIAS CJ:

Procedural barrier.

MR BROWN QC:

– that prevented it getting there. But, to deal with the, to come back to the discretion point, and I know that, and this is very much a secondary bow, in the sense that we place much weight on our entitlement argument, but if the Tribunal still has a discretion in those circumstances, then it's not an unfettered discretion, it just, it isn't entitled to treat an application for the hearing of a resumption application as just one of the many, that should be a factor of particular weight, and the Court of Appeal's decision in *Thames Valley EPD v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641, 652 (CA), albeit back in the late 70s, reflects the fact that discretions can involve factors that have to be given particular weight. And yet the Tribunal has this practice, which is cog 3 in our analysis, which is referred to in paragraph 20 of our written submission, that expressly says, in relation to the granting or the policy on remedies hearings, "For the avoidance of doubt, no different or separate set of criteria will be applied to the granting of a remedies hearing, whether remedies sought include binding recommendations relating to a particular end." And it is particularly –

ELIAS CJ:

Sorry, did you say paragraph 20 –

MR BROWN QC:

Paragraph 20 of our submission.

ELIAS CJ:

Oh, 20, I'm sorry, I had 23.

MR BROWN QC:

And it is a remarkable case, in the sense that even allowing for that, even allowing for that, Judge Clark, as we note at paragraph 28 of our submissions, said that the application was, "Very finely balanced and a difficult application to decide", that's when no weight is being given to the resumption dimension of the application. And he also said –

ELIAS CJ:

Sorry, the policy is taken from the directions quoted in the Court of Appeal judgment of Judge Wainwright, is that where that's taken from?

MR BROWN QC:

It's a document that the Crown have helpfully put in their bundle as tab 6 – no, I beg your pardon, it's in our bundle, under tab 6, which is, as it were, a generic memorandum and directions of the deputy chairperson concerning remedies applications, which was made in 2007.

ELIAS CJ:

So, this wasn't in relation to this cluster of claims?

MR BROWN QC:

No, its –

ELIAS CJ:

No.

TIPPING J:

It's a sort of practice note.

ELIAS CJ:

Yes.

MR BROWN QC:

Exactly, which then Judge Clark says, "I must", you know, "follow this." And of course, what Judge Clark and, I suspect, the Crown place emphasis on, is paragraph 7, you know, "I don't expect the factors will be definitive or exhaustive", "Another

factor is important," et cetera, et cetera, but six, six is not something you can just walk around, it is for the avoidance of doubt. At the bottom of page 4 in this, "No different or separate set of criteria will be applied for the granting of remedies hearing where the remedy is sought, including binding recommendations."

ELIAS CJ:

Well, where is that in this, what para –

MR BROWN QC:

Under tab 6, page 4.

ELIAS CJ:

Oh, 4.

MR BROWN QC:

Paragraph 6. I'm sorry, this is our bundle.

ELIAS CJ:

Oh, your bundle, sorry.

MR BROWN QC:

Sorry, I confused you initially.

ELIAS CJ:

Yes, yes.

MR BROWN QC:

I'm sorry about that.

TIPPING J:

They're really saying that the fact that it includes a claim for resumption makes no difference.

MR BROWN QC:

No difference at all, for the avoidance of doubt.

TIPPING J:

Which has the appearance, at least prima facie, of fettering a discretion in a particular class of case.

MR BROWN QC:

Absolutely.

TIPPING J:

In a negative sort of way.

MR BROWN QC:

That's right, it's a default, it's a…

TIPPING J:

Yes.

MR BROWN QC:

And all the more remarkable, because I've referred in paragraph 28 to Judge Clark saying that the application was finely balanced and difficult to decide on the basis of the approach he was taking under that. But he also said that but for the complicating factor, and I come to this in a separate point, but for the complicating factor of the offer by the Crown of this land in the settlement package, that Mangatu's application, "Would be very strong", they're the words that he used.

TIPPING J:

Well, the problem for me, and I just signal this for the benefit more of your opponents, Mr Brown, is – and I don't know how much there is in this – but it seems to me that the refusal of urgency here, at least potentially, rendered your claim nugatory.

MR BROWN QC:

More than potentially, the time –

TIPPING J:

Well, depending on what happened on these other fronts, the settlement negotiations, et cetera.

MR BROWN QC:

Yes.

TIPPING J:

But assuming that went the way that your clients are concerned about, and I make no judgment on merit –

MR BROWN QC:

No.

TIPPING J:

– your clients would be deprived of the opportunity of saying, "Well, this should come to us and no-one else."

MR BROWN QC:

That's right, precisely, and it seems like an emotional point, but joined back to where it was. This is piece coming back to mother ship, this isn't a case of saying, "Now, there's some land that should be –

TIPPING J:

But there are complications in it, of course, because there's, sort of, you've got other breaches –

MR BROWN QC:

Yes.

TIPPING J:

– hovering around, so to speak, but, reduced to its elegant simplicity, you're saying, "At least give us a go."

MR BROWN QC:

Exactly, and I say later that it is unpalatable, the idea of a race with Parliament, because Justice O'Regan in the *Te Arawa New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318; [2007] NZAR 569 (CA) case said that if there's a settlement deed that – no, if there's legislation that deems the Tribunal to have made a recommendation under 8HB then, you know, what Parliament says, goes, as Chief Justice Holt in 1701, "Parliament can do no wrong," even though he said,

"Sometimes I think it does things decidedly odd," and this would be an odd one, because you would have a – if – and my learned friend's submissions do go to this point, I wonder if that is where they will say it – but if the legislation is passed in December 2000 of this year, December 2010, which is that sort of prognostication, settlement deed November, legislation December, and if the reasoning of Justice O'Regan in *Te Arawa* is right, then any sort of illegality in the observance of the '89 Act is corrected by the legality of the legislation introducing the, or giving effect to, the settlement deed.

ELIAS CJ:

Is it part of your argument that a tribunal, such as Waitangi Tribunal, should just plough on with the applications it has to receive and not take account of the political background?

MR BROWN QC:

When you say, plough on, I, certainly it has a prioritisation policy, but I'm saying that in relation to the special category of resumption hearings, those where and it may, some, some don't like what I now say and the Court of Appeal definitely didn't, but that the idea that the Tribunal has a determination role, as opposed to a recommendation role, and it is curious that the word "determination" actually appears in the amendment to the functions of the Tribunal in section 5(ab) in relation to the schedule 1 compensation in the Crown Forest Assets Act, but in relation to that, in my submission, the Tribunal is, to use Your Honour's words, required to plough on. It can't say, well, it can't sort of *Fitzgerald v Muldoon* and say, look the inevitable's going to happen, legislation's going to be passed, that legislation may deem we to have made a section 8HB(1) recommendation, determination, call it what you will, becomes a binding recommendation. It has to deal with it. It can't anticipate it. I mean, it could be another year. We could get there.

TIPPING J:

But presumably, if you manage to get a hearing in time.

MR BROWN QC:

Yes.

TIPPING J:

All this other stuff, if I can be so colloquial Mr Brown, can be part of that hearing?

MR BROWN QC:

Yes.

TIPPING J:

They don't have to make, necessarily as I understand it, and this is where I may be wrong, they don't have to make a resumption order.

MR BROWN QC:

No, they don't have to make a resumption order, but the important argument, and I want to, I'm creeping back into my interpretation argument, is this, that there may, the word "may" that my learned friends place such great emphasis on in the Act is, in my submission, a "shall" in terms of the choices between the three options. When the Crown Forest Amendment, Crown Forest Assets Act, amended the Treaty of Waitangi Act and in section 38, it might be convenient to have –

ELIAS CJ:

Yes, should we go to that I think.

MR BROWN QC:

Yes, why don't we go to the, and it might be helpful to the Crown Forest Assets Act because it sets out the passages, this is under tab 1 of our bundle and it's part 4 at page 29 of the Act. They've made a number of important changes. The first one was the changes to the functions of the Tribunal and that's where it introduced (ab) into 5 and that was showing how tied at the hip the Crown Forest Assets Act and the Treaty of Waitangi Act are. (ab) talks about making recommendations or determinations "the Tribunal is required or empowered to make under the first schedule of the Crown Forest Assets Act." That's the compensation that is, goes to the Māori or group of Māori who are the beneficiaries of a recommendation under section 8HB(1)(a) and then section, and 38 says, "This part should be read together with and deemed part of the "75 Act," and then we come through on the next page to section 8HB(1) and the structure of this is it's three-fold. 8HB(1) is the decision to return the land to Māori ownership and I do actually in this context of Mangatu place emphasis on the word "return" and you'll note in that particular one, responding to the question that the Chief Justice asked me about who decides, you'll notice at the end of that it says, "The Tribunal shall identify the Māori or group of Māori to whom that land, or part of the land is to be returned." That's squarely a Tribunal function.

Then the alternative one is (b), claim well founded, but a recommendation for return to Māori ownership is not required. It goes to the Crown. And then (c), claim not well founded, recommend that it not be liable to return to Māori ownership.

Now, it starts with a "may", but in our submission, it's a "shall" as between the selection of the three. The Crown Forest, the compromise agreement was on the basis, the clause said that the Crown can go ahead with the cutting rights and the forest licences and the wording of the relevant clause in the agreement was, "The land is subject to Treaty claims, the parties jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest possible period," and that's very important in terms of the Waitangi Tribunal and its prioritisation.

When, from that agreement came the Act, the Act was the legacy of the compromise agreement and the Act was intended to provide, in section 8HB(1) that process for deciding within the shortest possible period, whether the licensed land, and it's licensed land that of course is referred to in section 8HB(1), would go to Māori or to the Crown.

TIPPING J:

The reference back Mr Brown in (b)(ii) to (a)(ii), you follow me, the reference back in little (b)(ii) –

MR BROWN QC:

Yes.

TIPPING J:

– to little (a)(ii).

MR BROWN QC:

Yes.

TIPPING J:

– is a value judgment as to whether the land should return to Māori ownership.

MR BROWN QC:

Yes.

TIPPING J:

So, that's part of the inquiry?

MR BROWN QC:

That's right, that's right.

TIPPING J:

And if it is to go back to Māori ownership, then the question of which Māori is also part of the inquiry, is that right?

MR BROWN QC:

Absolutely, that's right, that's right, none of which happens if you don't get to section 8HB.

TIPPING J:

You don't get a hearing.

MR BROWN QC:

If you don't get there and my learned friend's argument, as I understand it, is that the Tribunal has a discretion whether it embarks on 8HB(1). That is sufficiently unkind in their submissions to say that we acknowledge that, we concede that by our second argument that, well if there is a discretion, it's a fettered one, but our primary argument is, is reflecting the compromise agreement, this Act amended the Treaty of Waitangi Act, it inserted this which the Court of Appeal in *Whata-Wickliffe v Treaty of Waitangi Fisheries Commission* [2005] 1 NZLR 388 Muriwhenua called in the context of the SOE legislation, because of the parallel process for the SOE legislation, called the "special regime", and we say that there's a "shall", in terms of the choice of the three. There is another out –

ELIAS CJ:

I don't understand what you mean by "shall" sorry, I'm behind you.

MR BROWN QC:

Well, I'm saying that the word "may", when we look at section 8HB(1) –

ELIAS CJ:

Yes.

MR BROWN QC:

– the third line says, "The Tribunal may –

ELIAS CJ:

Yes.

MR BROWN QC:

– (a), (b), (c)," and that, I read that as the Tribunal may do one of the following three things, but it has to be one of them. My learned friends will tell you that the word "may" means, the Tribunal may, if it is sufficiently disposed to do so, do one of the three things, but it doesn't have to. Basically what's happened with Judge Clark he says, and for whatever reason, we'll stand back, we won't have that hearing, we won't make –

TIPPING J:

So the "may" includes doing nothing?

MR BROWN QC:

According to the Crown.

TIPPING J:

Is the submission against it?

MR BROWN QC:

Yes and indeed of course, the doing nothing has its own special provision in 8HE. If you come over to page 34, this is like the process of deciding not, just not to go ahead.

TIPPING J:

What's meant by "licensed land" in that?

MR BROWN QC:

"Licensed land" is a defined term and notably it's defined in the Crown Forest Assets Act, not the Treaty of Waitangi Act and it deals with the land that is forest land that is basically the subject of claims.

TIPPING J:

Right.

MR BROWN QC:

It's the land over which the Crown is granting the licences that has the cutting rights, because the whole, it is a beautiful structure in a way, the compromise agreement, it said the Crown gets the benefit of saying, there you, you companies, you have the cutting rights, it's subject to these aspects being determined as to ownership. In the meantime, all the rentals are paid into the Crown Forest Rental Trust, which was the subject of the litigation in the *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 case that came to this, came to the Court of Appeal and then the Supreme Court and those funds that are being channelled in the meantime to the Crown Forest Rental Trust will be used to fund the hearings for the resumption and that way the, in the shortest possible period, will all happen and sorry, Your Honour, you were going to interrupt.

ELIAS CJ:

No, because perhaps you haven't finished explaining.

MR BROWN QC:

And that is why the whole structure of this, the Crown Forest Assets Act contemplates an end point for resolution. If you come with me to –

ELIAS CJ:

Sorry, then I will interrupt, because I think the point I was going to make concerns 8HE –

MR BROWN QC:

Yes.

ELIAS CJ:

– that that is to deal with the fact that it was not known at the time of the enactment whether there would be claims in respect of some of the land.

MR BROWN QC:

Yes.

ELIAS CJ:

And so, I'm just wondering whether the existence of 8HE adds some strength to your submission that the "may" in 8HB doesn't apply where there is a claim, that it doesn't make it discretionary whether to entertain a claim.

MR BROWN QC:

That's right, I invoke 8HE and in particular the (1)(b) "no claim or all parties have informed the tribunal in writing their consent to the making of a recommendation", which manifestly hasn't happened here. That is supportive of what we say about, that, that 8HB is not a smorgasbord of which you can choose not to participate, you have to go to the table and choose and that section that I wanted to take you to, just to emphasise this temporal end point, are first of all, back on page 27, the Forest Rental Trust, because in 34(2) it said, "All licence fees payable under licence will show until such time as the Tribunal makes a recommendation in relation to 8HB or section 8HE be collected and paid into the account," that's until that time and of course, that's what, one of the issue in the *Latimer v Commissioner of Inland Revenue* tax case was, what happens to the surplus of funds that are left in the Trust.

And then over the page to 35, "Restrictions on sale of Crown forest land in the interim," and 35(2) says, "The Crown shall not sell, assign or otherwise dispose of a deal with any rights or interests in a Crown forestry licence, unless the Tribunal has made, in relation to the licensed land, a recommendation under 8HB(1)(b) or (c) or 8HE of the Act."

And the whole structure, in my submission, was that as reflected in the agreement was, we'll give this to the Tribunal, resumption applications will be dealt with, it's an interim process in the sense that it's intended to have a definite timeline and it will be completed and what we're finding of course, is that even in relation to someone - this isn't someone who, mind you, is starting afresh. We have a finding of the Tribunal, the two volumes in the Tūranga Tangata report, we have the chapter –

ELIAS CJ:

Yes, we don't have that before us.

MR BROWN QC:

No, but –

ELIAS CJ:

This, the underlying claim here was 274 was it, is that right? The first claim that claimed the resumption was in breach of the Treaty?

MR BROWN QC:

Yes, there is a sequence, it's always puzzling that the actual claim that is the subject of the report is 8(1)(4), but yes, there have been a succession. Indeed Mangatu filed its own, when it was apprehended and I don't want to get into pejorative material, when it was apprehended that the land would not come back to Mangatu under the arrangement, they filed their own claim saying, yes, resumption hearing and that has its own, it's in the 1200s it's up in the high numbers.

ELIAS CJ:

274, just correct me if my impression is wrong, 274 claimed breach of the Treaty in the taking of the land for erosion purposes and claimed, as relief, return to Mangatu, is that right?

MR BROWN QC:

May I?

ELIAS CJ:

Yes.

MR BROWN QC:

Yes my learned friend Ms Feint who was, has been through this, the whole process and was involved in the hearing before the Tribunal for urgency, says that is the case because 274 was then amended –

ELIAS CJ:

Yes.

MR BROWN QC:

– subsequent to –

ELIAS CJ:

Yes, no I understand that, I was just trying to get the sequence.

MR BROWN QC:

But the starting, absolutely, the starting point.

ELIAS CJ:

So, it was when it was appreciated that the settlement would not fulfil that claim for return to Mangatu that the, that the parties who would have succeeded as shareholders in Mangatu sought to have the resumption hearing?

MR BROWN QC:

Yes, absolutely.

ELIAS CJ:

Yes, I see.

MR BROWN QC:

And a remedies hearing because they have their -

ELIAS CJ:

Yes.

MR BROWN QC:

– finding as it were liability –

ELIAS CJ:

They have to have that, yes.

MR BROWN QC:

– that's in 814. Now, I've jumped around rather much and I'm very conscious of the time constraint so I say, that is the – I have really crept right into the statutory interpretation argument. I would simply say this. That the, we say that under that amendment, the Waitangi Tribunal was given new powers and responsibilities. The first one was to make that determination as to which of the three, or 8HE. Secondly, it was given the power to determine the compensation that is reflected in the section 5(1)(ab) of its functions and thirdly, and one might think naturally, it was tasked with the job of deciding to which Māori licensed land should be returned.

In the meantime, we've got section 34, 35, they're all tied to an end point. And I use that word "determination" deliberately, because that really was fundamental to the difference between our position and the position of the courts below and I do envoke Baragwanath J analysis in the *Attorney-General v Mair* [2009] NZCA 625 decision, which we quote in our submissions at paragraphs, paragraph 11, the decision is in the bundle, but it will be easier for you I suspect and he says in 102, "The settlement of the *Forests* case resulted in the addition of the procedures in relation to Crown forest land, which while expressed as recommendatory, are ultimately adjudicatory and the result is that the bundle of rights possessed by a claimant to Crown forest land with a sound case for the exercise of the judgment of the Tribunal is, or is very close to, a proprietary right that is justiciable for the Tribunal essentially as if it were a Court."

Now, I don't seek to engage you in the refinements of proprietary here, but that is the antithesis of clause 6 of the –

TIPPING J:

Well, you don't have to go that far, you just have to say that you've got a right to consideration by the Tribunal –

MR BROWN QC:

That's right.

TIPPING J:

– as to whether you have a resumption entitlement?

MR BROWN QC:

That's right, that's right.

ELIAS CJ:

You haven't invoked for this argument, the Bill of Rights Act, section 27, but is that, does that assist you?

MR BROWN QC:

On the rule of law that I come to in a moment, actually it would, here I'm actually just dealing with, just interpretation, because the argument we make here and why we say the quick decisions of the Courts below, the Court of Appeal and Clifford J, were

that their approach was that those amendments did not substantively, that's the word they chose, substantively change the jurisdiction of the Tribunal. Now, it's in the eye of the beholder perhaps what substantively means, but it's a curious word I would suggest against the statutory backdrop of the Crown Forest Assets Act.

ELIAS CJ:

Well, I suppose, particularly in relation to the sort of priorities in the, set by the Tribunal in that directions determination, because it's one thing if, it's one thing if the end game is going to be inevitably negotiation, then one can see that the Tribunal would defer to a process of negotiation, if it's underway.

MR BROWN QC:

Yes.

ELIAS CJ:

But it may be another thing in relation to a power to determine.

MR BROWN QC:

And it's interesting, just in terms of that proposition, the Act itself, what the Crown Forest Assets Act did in terms of a meaning, was to provide that the recommendation is interim in the first instance to allow for that three-month negotiation period and becomes final. Now, that's a negotiation, but it's a negotiation from a position of strength. You have your interim recommendation, and the Crown knows that will become final. In the Court of Appeal, and it is again, in my submission, surprising, they refer to that in support of their what I would call "minimalist" significance for this jurisdiction by saying that it only comes into play, they said, "If the Crown and claimants are unable to agree a means of implementing the interim recommendations." Now –

BLANCHARD J:

Can you remind me what the interim recommendation was?

ELIAS CJ:

There hasn't been one.

MR BROWN QC:

There hasn't been one.

ELIAS CJ:

No.

BLANCHARD J:

So, we've only got findings of fact on whether grievances are established?

ELIAS CJ:

No, no, there's finding of fact on Treaty breach –

BLANCHARD J:

Yes.

ELIAS CJ:

– but what Mr Brown is talking about is the process of resumption, which has first an interim recommendation, followed by a pause to permit some negotiation, and then it becomes final, if the parties are not able to agree.

MR BROWN QC:

That's in section –

ELIAS CJ:

So we're not at that stage.

TIPPING J:

Well, we haven't actually started down that track at all.

ELIAS CJ:

No.

MR BROWN QC:

Oh, no, absolutely not, but –

TIPPING J:

That's your essential grizzle.

MR BROWN QC:

That's right. Nicely described, Your Honour. But the point I'm making is I'm actually here being critical of the Court of Appeal, because I'm saying "substantively" seems to be a code word for, "Well, this is just a discretion," and the emphasis I place on binding recommendations they said, "Well, they only come into play if at the end, as it were –

TIPPING J:

I would have thought, with respect, that there was at least prima facie, and I'm not, don't want to be misunderstood here, –

MR BROWN QC:

No.

TIPPING J:

– at least on the face of it, a major difference between a non-binding recommendation and a recommendation that can ultimately become binding.

MR BROWN QC:

Absolutely. Well, that's our position, but they say it didn't change the jurisdiction substantively. And Baragwanath J in *Mair*, he, obiter, but dissenting in this context, a dissenting obiter, and, we would say, the *o Muriwhenua* case, which talks about the "special regime" or "Special field", I beg your pardon, "of mandatory powers given to the Tribunal." And so – but just to deal with Your Honour Justice Blanchard's point. This has a very strange pause in this case, because when the report was handed down it was the subject of a covering letter from the Tribunal, which is under our tab 8, explaining that the Tribunal wasn't going to make general recommendations, it wanted the parties to talk and discuss. And a major difference between my learned friends and myself is that we say, "Well, the Tribunal has not embarked on remedies," and my learned friends, I think, will say to you, "Well, they've embarked on remedies by not embarking on remedies," and the words are very clear in this second letter by then Judge Williams, "We've made no general recommendations in relation to possible settlements, prefer to leave it to the parties to construct settlements which represent their choices… given thoughts to relativities," and they say, "Always open to claimants or the Crown to seek further assistance from us if that is desired." But the Crown has not embarked – I mean, and Judge Clark actually, in support of his decision, said, "The Tribunal has," the Tribunal's decided, apparently, if you go to his judgment, which is under tab 5 of the

Crown's bundle. There are three bases that his decision is based on, all of which we attack. Under tab 5 –

ELIAS CJ:

Just before you get to that, can you just tell me, is there any statutory basis in the Treaty of Waitangi Act for a division between determination of Treaty breach and remedy?

MR BROWN QC:

I don't –

ELIAS CJ:

I can see that there is a practical way to proceed, but is there some statutory underpinning?

MR BROWN QC:

No, I don't believe so. The Tribunal has, you know, revises its approach from time to time, as is understood, because it's a Commission of Inquiry, and this case in particular was special because the beginning of that letter records that this was one of the first Tribunal inquiries to go on the fast track, the short packaged hearing, and it was done in about eight weeks, I think you'll find Judge Williams' letter says.

TIPPING J:

That's short, in this jurisprudence?

MR BROWN QC:

Well, I was in the –

ELIAS CJ:

I think you could accept that, yes.

MR BROWN QC:

As a participant in Y262, that took 10 years, Your Honour –

TIPPING J:

I take your point.

MR BROWN QC:

Yes. So –

ELIAS CJ:

It's not over yet.

MR BROWN QC:

Some might say it's just starting. But in the decision of Judge Clark he, and this is under tab 5, one of his views was – this is at page 9, heading before paragraph 52, "The Tribunal has already considered and made recommendations as to settlement." Then we get the second that one that we really focus in on, the heading before 55, "Negotiations have not broken down," because if you look at the last two sentences of 57 you see the circuit-breaker principle application. He said, "The point remains, the negotiation process has not stalled nor irreparably broken down. Thus the intervention of the Tribunal is not required." That's this three-cog situation where the Crown says, "We only negotiate with large natural groups." Mangatu's not a large natural group, in fact it's an incorporation –

ELIAS CJ:

But the claim is brought by an individual.

MR BROWN QC:

Yes, it is, but –

ELIAS CJ:

Seeking as a relief return to Mangatu.

MR BROWN QC:

Yes, that's right, and –

ELIAS CJ:

So, there's not an issue as to a natural claimant here.

MR BROWN QC:

No, but there is in relation to negotiations. Although the Waitangi Tribunal – the Act in section 6 says, "Any Māori, he or she –" the Tribunal's, the Crown's approach to negotiations is with what is called this large, natural groups, and even though what

Mangatu is, some 5000 shareholders, and it's an incorporation, it's ironic, sadly, that it is an incorporation, even though in our submissions record that Wi Pere had it formed under statute back in 1893 in order to keep the land intact, its very incorporated nature now seems to be an impediment to its being treated with, in terms of negotiations, as one of those ironies of history. But I say there are, and I'm jumping here, but the three cogs: Crown say, "We negotiate with large, natural groups, and we're still doing it"; Tribunal says, "Circuit-breaker policy, the Crown tells that negotiations are still on foot and haven't broken down, no need for us to intervene."

TIPPING J:

Are you really saying that the Crown's approach is inconsistent with your client's rights?

MR BROWN QC:

Absolutely. And in – there's one way, there's one way to break that dynamic –

ELIAS CJ:

Say what the circuit-breaker policy is?

MR BROWN QC:

The circuit-breaker policy is reflected in the last two sentences of paragraph 57 of Judge Clark's report. I think it's a phrase that Justice Clifford coined, but it has now worked its way into the –

ELIAS CJ:

Sometimes these labels are –

MR BROWN QC:

Are unhelpful.

ELIAS CJ:

– not very illuminating.

MR BROWN QC:

They're not illuminating, but this one is actually dramatically accurate, and you'll see he says in the last two sentences of paragraph 57, "The point remains, the negotiation process –"

ELIAS CJ:

Ah, I see.

MR BROWN QC:

"– has not stated nor irreparably broken down, thus the intervention of the Tribunal is not required in that sense." And the Court of Appeal said, "Well, if it had been an absolute circuit-breaker, then there'd be a problem," but of course it's not absolute, it's a factor. Well, we say it's a very important factor, as you can see by what he says. But, in terms of that dynamic, the inter-relationship between the Crown's policy with whom it will negotiate and the Tribunal's, if I can call it this "deference" or "standing back" while the Crown says negotiations are on foot. There would be one way to break that, and that would be to go to the Tribunal for a resumption hearing. But while paragraph 6 says, "To the avoidance of doubt it won't be treated any differently," that those three cogs are a set, and my client is stymied in terms of progressing. I'm sorry, Justice Blanchard, you were going to…

BLANCHARD J:

Yes, am I correct in understanding that if the application for what would ultimately be binding recommendations does get heard by the Tribunal, the wider group affected by the grievance in the 1880s or 1890s would have the opportunity of being heard and could, if they persuaded the Tribunal, have the recommendation made for the land to be vested in them?

MR BROWN QC:

Yes.

BLANCHARD J:

So that the Tribunal would be in a position to address both breaches?

MR BROWN QC:

Yes, and it would be a good long-term approach, because if they got the recommendation then they get the direction for payment of compensation by the

Crown. You see, if you get lured into this, let's get a settlement, you know, to speed and before the end of the year, and the like, and there's a deeming provision that says that 8HB is being provided, but what happens to the obligation to pay compensation? It doesn't, does it, evaporates, and that's very short sighted on the part of the third respondent. But, yes, they would, they would.

TIPPING J:

The power – just taking up on my brother's point – the power to consider to which Māori the land should be returned presumably must include an ability for Māori, other than the claimant, to suggest that it should be returned to them?

MR BROWN QC:

Yes, there could. I mean, you can understand, from the position of my client, when –

TIPPING J:

I'm only talking from the point of view of jurisdiction.

MR BROWN QC:

Yes.

TIPPING J:

Whether that would happen is entirely a different matter.

MR BROWN QC:

That's right. It's difficult, in my submission, to envisage it would happen here, when – it's like, you take a piece of the jigsaw away, the time comes –

TIPPING J:

Well, that doesn't need to be gone into.

MR BROWN QC:

No.

TIPPING J:

It's the ability to hear both sides of the equation, so to speak, –

MR BROWN QC:

Yes.

TIPPING J:

– that's, I think, the key to matter that's been raised.

MR BROWN QC:

I think you'll find my learned friends will say to you that's the very reason why, you know, that would slow everything down. They'd need to come, you know, it's, what a dreadful distraction, you know, we want to go ahead with the settlement. They will invoke that as a reason why it's not very desirable for –

ELIAS CJ:

Well, we have to concentrate on what is the correct approach in law for the Tribunal. If that is the Crown's position, it always has the ultimate weapon. It can come in over the top with legislation –

MR BROWN QC:

Indeed.

ELIAS CJ:

– if it has that confidence. But deciding what the Tribunal should be doing is a different matter.

MR BROWN QC:

Absolutely, that's the point I'm running. And if, you know, I say it's an unattractive submission and a spectacle of a race with Parliament may be demoralising, but is it not a sort of *Fitzgerald v Muldoon* situation where you say, well, the sun is going to fall, so why should we bother?

I think I've really developed my access to justice point, but I say that that policy of no different or separate criteria, that is built squarely on the foundation of the interpretation point.

TIPPING J:

It seems prima facie to be a debatable or contestable policy, because the jurisdictions are materially different.

MR BROWN QC:

Yes, that's right.

TIPPING J:

I mean, to say that the criteria are the same, albeit the underlying jurisdiction in one case is recommendatory only and in another case is adjudicative, in effect, at least, at first blush there's something a little bit –

MR BROWN QC:

Exactly, we're just at leave, I mean, these, in my submission, these are important issues.

TIPPING J:

Yes, I'm not expressing a conclusion at all. It's something that one would want to think about carefully.

MR BROWN QC:

I'm very conscious when you say it, that's why I said, "We're only at leave." I'm not – I'm saying these are arguable, these are seriously arguable propositions. And my learned friends say that, well, they don't, they're not of general public importance and they don't fit into the significant Treaty issue, and I'm surprised by that, because my learned friends' submissions at the same time, at paragraph 24 of the Crown submissions, having said that, in paragraph 10, that the case doesn't engage Treaty principles, doesn't amount to a significant issue, at paragraph 24 it is said that, "The interpretation of the Treaty of Waitangi Act 1975 is at the heart of evaluating the lawfulness of Judge Clark's decision." I can only say I agree. And that's where the Court of Appeal, and I know my learned friends will cite to you authorities that say, "This Court doesn't lightly give leave in sort of dual discretion cases," but we're anything but that here. This is a true issue of importance to actual interpretation and it's not right, as my learned friends do in footnote –

TIPPING J:

Well, at least for my part, Mr Brown, subject to hearing from the Crown, it seems to me that there are points here that are well away from the question of simply reviewing the exercise of the discretion.

MR BROWN QC:

Yes, and furthermore in –

ELIAS CJ:

Although there is that point as well, because –

TIPPING J:

There is that point as well.

ELIAS CJ:

– because the label, again, "discretion", is not a no-go zone if it's been exercised on wrong principle or on a mistake in assumption of law, and that ties back into your interpretation point.

TIPPING J:

Sorry, that's really what I meant, yes.

ELIAS CJ:

Yes.

MR BROWN QC:

That's right. I don't regard it as some impossible hurdle either. If it's tainted by irrelevant, erroneous interpretation of the law, then it doesn't take them very far. But they say on that, at footnote 27, they say, they talk about a comparable attempt to close an objection to judgment on the facts as being the statutory interpretation question. This is not an attempt to dress up some factual decision as statutory interpretation when it is not. This question of what the Treaty of Waitangi Act means in that part that was added by the Crown Forest Assets Act is that fundamental issue and, indeed, I harp back again to those words that Your Honour Justice Tipping used in *Fonterra* about context and purpose.

TIPPING J:

Well, leaving those aside, Mr Brown, it could be said that the Court of Appeal's statement that there is no "substantive", I think was the word they used, difference, is very much at the heart of this whole issue, and that I would have thought was a very important question.

MR BROWN QC:

That is at the heart. They used the adverb "substantive" but yes, absolutely. Well, finally, and if I can finish in this way. I've made the point about discretion. I say that if you go back to '89 and the compact that was made, just as Māori or FoMA or the Māori Council would not have expected Parliament to say, well we might legislate to deem a decision. They wouldn't expect Parliament to say, yes, we've got the – Crown to say, we've got the cutting rights but, and you're – it's the opportunity, if you can get to the Tribunal to get a ruling. The provision said, "In the shortest possible period," and that was what the Crown Forest Rental Trust, the whole process was about, was determination of that. And that is why the Court of Appeal's decision, they said that Judge Clark's decision was not one, to use their phraseology, "not properly directed," they said, "It was one that, properly directed as to the law, he was entitled to reach," and that's where we really take issue on the discretion. He was not entitled to reach the view that he did on those factors that he had taken into account.

And, finally, in the event that my learned friends then, because I see a decision, a recent decision, the Tribunal on urgency applications and the burden on the Tribunal, which is not inconsiderable, but Judge Clark in his decision said that, talked about the availability of a hearing for a meritorious case, "Whatever other pressures there were," he wasn't saying it would be ruled out. At page 11, paragraph 59 of his decision, which is under my learned friend's tab 5, he said, in the last four lines, "In my view, the Tribunal should not be slow to intervene in cases that warrant it." This "intervene", of course, is still using this sort of circuit-breaker philosophy, and then he says, "Mere arguments about disruption to process, scarce resources and diversion of time and attention will not succeed if a meritorious case requires the intervention of the Tribunal." So that, plus the evenly balanced, plus very strong case but for the complication of the offer by the Crown to the third respondent of the land, in my submission, his decision was not one that he was entitled to make, to use the Court of Appeal's conclusion, on this squarely in a discretionary mindset.

I've rushed through, but I'm very conscious that I've had more than the allocated time, so…

ELIAS CJ:

Thank you, it's been very helpful for us, Mr Brown.

MR BROWN QC:

Thank you, Your Honour. Could I just – my learned friends mention to me section 8HD, which actually makes directions for who shall be heard on a resumption application. The question that Your Honour Justice Tipping –

TIPPING J:

Well, and my brother.

MR BROWN QC:

Yes.

ELIAS CJ:

Sorry, which tab –

TIPPING J:

Where do we find that?

MR BROWN QC:

It's in the Crown Forest Assets Act. It's in both of them, of course, but it's under tab 1 at page – this was of course made at the time – page 33, section 8HD, "Right to be heard on question in relation to Crown forest land," and it specifies, "Where a question arises in relation to license land, the only persons entitled to be heard shall be claimant, Minister of Māori Affairs, any other minister," then (d), "Any Māori who satisfies the Tribunal he or she or any group of Māori has an interest in the inquiry, apart from any interest in common with the public." So, it both entitles the interested person and circumscribes the process so it doesn't become protracted or go off the rails.

BLANCHARD J:

Would a group of Māori include an incorporation?

MR BROWN QC:

Yes.

BLANCHARD J:

Certainly would include the shareholders of incorporations.

MR BROWN QC:

Yes. As Your Honours please.

ELIAS CJ:

Thank you. Yes, Ms Hardy.

MS HARDY:

May it please the Court, I plan to cover an overview of the Crown's position, the issue about the discretion. I also want to take the Court in some detail to the background facts, to understand the context in which the Crown is making its argument and to then look at some of the arguments about statutory interpretation raised by my friend.

The Court of Appeal recorded in its judgment that the applicant's key proposition was that the applicant is entitled to elect to apply for a resumption order. If he does so, then the Tribunal is obliged to hear his claim, and that's the point made in the judgment at paragraph 25 and reflects the applicant's submissions.

The key contention of the Crown is that in fact, and despite what my friend has canvassed this morning, this is an appeal challenging an exercise of discretion by a decision-maker, and it is about weight, and there is not a tenable argument in relation to the statutory interpretation that points otherwise. And that's accepting also Your Honour's point that of course a discretion could be interrogated if it were to be based on wrong assumptions. But the argument here is that that's not the case in this situation.

ELIAS CJ:

Just bearing in mind that we're only concerned with leave and with arguability, is it really the Crown's point that the points raised by Mr Brown don't raise matters of general public importance? Because they seem to touch on issues of institutional response of a body with obligations under legislation. So, the points you've outlined, you want to address to us, are really directed to the substantive argument that would be heard if leave is granted, and presumably you're saying it's so open and shut you shouldn't entertain it, is that right?

MS HARDY:

Well, what I'm saying is that I consider it's important to interrogate what the applicant is actually putting forward as their interpretation and, by doing that, I question

whether the portrayal of this case as one that does not relate to discretions and weight is correct, when one examines both the propositions put forward and their implications, and it's that that I wanted to explore, and to also run through some of the facts to adjust some of the summary that has been put forward earlier also.

TIPPING J:

Are you relying on both lack of public importance and on arguability, or only the latter?

MS HARDY:

A lack –

TIPPING J:

Because you haven't answered the Chief Justice's question in what you've just said.

MS HARDY:

Well, my answer is that the Crown's position is that this is not a matter of general importance, it is a discretion issue, and therefore –

TIPPING J:

So, the answer is, yes, you're arguing both?

MS HARDY:

Yes, and the statutory interpretation is not arguable, yes.

BLANCHARD J:

But the statutory interpretation would, if arguable, be a matter of public or general importance.

MS HARDY:

If it were sustainable that the statutory interpretation means that every claimant is entitled to a resumption hearing who seeks one, in other words it's not a matter of discretion, then that would clearly be something that would be appropriate for the Court's inquiry.

BLANCHARD J:

Right, so you've got to establish that that argument being made against you is not arguable.

MS HARDY:

Correct.

ELIAS CJ:

Is it necessary to put it on that basis? Because I had thought – perhaps I've misunderstood this – that the argument was that a claimant is not entitled to an urgent resumption hearing. I hadn't understood Judge Clark to have denied – it's parked, isn't it, it's there?

MS HARDY:

That's right, Your Honour, that's a better refinement of the point, that it's clear, and I'll take you to the statute in due course. But it is clear that any claim, and that can be a claim by a single Māori, any group, any claim, the Tribunal is required to investigate that under its statute. As Your Honours interrogated earlier, there's no distinction there in the statute as between inquiring into the underlying substance and looking at remedy. So, every single claimant – and they're called "Wai claimants" in this jurisdiction, W-A-I, for their numbers, numbering well over 2000. Every claimant is entitled, under the statute, to an inquiry by the Tribunal. And what's before the tribunal at the moment and what's at large in this case is the question of the timetabling and prioritising of –

TIPPING J:

Well, then, the sole issue then is whether or not they were right to refuse an urgent hearing, as opposed to refusing a hearing per se.

MS HARDY:

That's correct.

TIPPING J:

Well, the point there is they're saying that, "If you don't give us an urgent hearing we may be overtaken by what they say are collateral events."

MS HARDY:

That's also correct.

TIPPING J:

How do you answer that? Because that seems to me to be getting close to the heart of the urgency point.

MS HARDY:

Yes, the answer is that – and I'll take you to perhaps some context which might give the Tribunal's perspective on this context and not the Crown's – but the answer is that in every negotiation there are groups that contest and contest actively over redress, and they contest over mandate. And in every negotiation therefore, one could expect that a single claimant or some cluster of claimants might go to the Tribunal and ask for a remedy.

ELIAS CJ:

But what's the impediment to that? We're not in the negotiation, we're in the application to the Tribunal, which is properly constituted and which, instinctively, one thinks it has to determine, if asked.

MS HARDY:

Yes, and I accept that that's an instinctive response to the situation, and issues of fair hearing immediately occur. But in this situation –

TIPPING J:

But the hearing won't be very fair if the horse has already bolted.

MS HARDY:

Well, that's exactly the inquiry that the Tribunal made in making its assessment about whether to grant a hearing or not, and it considered that the point was very finely balanced, and you've been taken to that text. And it considered all of the issues, including the potential extinguishment of the claim, and it went through its reasoning as to why, even in that circumstance, the urgent hearing should not be granted.

TIPPING J:

But did it correctly direct itself? Mr Brown says, "Well, it may have done that, but on a false premise of law, in effect."

MS HARDY:

Well –

TIPPING J:

So that may be the useful focus. Because if it were not for a claim of misdirecting itself in law, then you would ordinarily respect a judgment of that sort of kind, certainly when it's been upheld by two lower Courts. But I think the real problem for you is that there appear to be some contestable issues of law here, and they seem to me at least to be of some general significance.

MS HARDY:

Well the contestable issue, the first is, I suppose Your Honour's point as to whether there is any argument here of an error of law on the part of the decision-maker which it would be proper to be corrected.

TIPPING J:

Well I for one, myself, find some difficulty in this general policy in the practice note from which the Judge directed himself, that the two are equated even though they are a significantly different jurisdiction. Now ultimately, that may be shown to be of no moment but at least, prima facie that seems contestable. That's just one of them.

MS HARDY:

Well perhaps if we turn to the practice note, which is the guidance that Judge Wainwright gave, and as my friend pointed out –

ELIAS CJ:

Where is it again, sorry?

MS HARDY:

That's in the applicant's authorities and at tab 6.

ELIAS CJ:

Thank you.

MS HARDY:

So again, just looking at that document, the Judge goes through the background there and notes at page 1, towards the bottom, that a permanent commission of inquiry faced with many claimants, almost all entitled to a hearing, must do this in order to avoid ad hoc decision-making that has produced guidelines, and the inevitable unfairness and inefficiency which results.

She says then, before going to the factors over the page, on page 3 concerning the granting of remedies hearings, the Judge stated, "It goes without saying that these claimants, the claimants second – "

ELIAS CJ:

Sorry, where are we, page 3?

MS HARDY:

Sorry, Your Honour, page 3 of that document.

ELIAS CJ:

Yes.

MS HARDY:

"It goes without saying that these claimants are also entitled to a hearing." These are applicants for remedies.

ELIAS CJ:

Whereabouts on page –

BLANCHARD J:

Where, I can't find this either?

MS HARDY:

Top of the page, on page 3, in the middle of that first paragraph.

ELIAS CJ:

Yes.

MS HARDY:

So there the Judge says, "It goes without saying that these claimants are also entitled to a hearing." For this reason I do not consider that argument about entitlement really advances our thinking much because all claimants have it, at least at a prima facie level. Then she says, "In terms of all of the criteria –"

ELIAS CJ:

Are these – this is in a different set of proceedings. Are these resumption cases?

MS HARDY:

There were a large number of applications for remedies, resumption and, if you like, orthodox remedies and the Court –

ELIAS CJ:

And so there's no distinction – of course she says so explicitly, no distinction.

MS HARDY:

Yes so she's working through a methodology for the Tribunal having consulted with claimant and Crown counsel about the approach.

ELIAS CJ:

In those cases?

MS HARDY:

Mmm, and so she then goes on with a range of criteria and makes the point at paragraph 7 that, "The factors will not prove to be definitive. A Tribunal might be persuaded that another factor is important. It's open to counsel to argue on the particular facts. Other factors should be taken into account." So, clearly, the prejudice that might be incurred by a claimant as to potential extinguishment of a right through settlement would be one of those important factors, and it was taken into account by Judge Clark.

ELIAS CJ:

Where's the part where she deals with the resumption hearings? Is that in this?

MS HARDY:

The point that you were taken to, Your Honours, beforehand, was paragraph 6 on page 4 which said, "For the avoidance of doubt." Is that –

ELIAS CJ:

I see.

TIPPING J:

That's the one I was drawing attention to which I was a little troubled by.

MS HARDY:

Yes, and the answer that the Crown has to that was that, there was a backdrop of looking at orthodox remedy applications and resumption applications and what the Tribunal is saying here is that if, for instance, you have a significant claim to a wāhi tapu, that, and as an individual or a small group you want that claim pursued with recommendations made for return of that property to you, then you're not required, or you're not treated any differently, you're not made a second-class citizen, if you like, compared with those who might have claims to Crown forest land.

So there is great scope in the criteria for discretion on the part of individual tribunals, but there is a guidance then, that you don't necessarily privilege Crown forest licensed land applicants.

TIPPING J:

You would have thought, Ms Hardy, that when a case is put before a tribunal of any kind and it can be shown that the relief sought would be rendered nugatory if expedition was not granted, you'd have to have a jolly good reason to say, "Well, too bad."

MS HARDY:

Absolutely, and my submission was that Judge Clark took a very close and careful look at all of the implications, the prejudices that fall one way, the prejudices that fall the other way. He weighed the interests of the negotiation group, Te Whakarau. He weighed the interests of the Incorporation. He saw, for instance, that the application that was made to the Tribunal, which was the Y274 application, was amended so that the application was on behalf of the iwi grouping and not the Incorporation.

ELIAS CJ:

But he did this – I mean those are factors one would expect to be made ultimately in the hearing. He does it in a truncated way in the preliminary determination whether they should have a hearing.

MS HARDY:

Yes, and the backdrop to that, I think it's well explained by the Tribunal itself, in the material that's now before the Court. If I could just take the Court to the final decision at tab 6, and that's of the Crown bundle, and I'm turning to page 4 of that. This is a decision of a Tribunal, including Judge Savage, Ms Morris and Sir Hirini Mead. Looking at the claim –

ELIAS CJ:

But this isn't in this bundle of claims, is it?

MS HARDY:

This is a claim that was the – is associated with the Mear decision that my friend referred to. So we're at tab 6 of the Crown bundle and this was a claim about a different settlement from this one.

ELIAS CJ:

Yes, yes.

MS HARDY:

But what it does is that, basically, the Tribunal had –

ELIAS CJ:

Sorry it's just that you said that the final decision or something like that and I thought it was in this case but it's not.

MS HARDY:

No.

TIPPING J:

Shouldn't we really be focussing on Judge Clark's decision, because that's the one that's impugned, and you've got to? And you may well succeed in saying, well, you know, you can't really impugn that. He looked at all the right things, he balanced

them and that's the conclusion he came to, but, isn't that really where this issue must begin and end from the point of view of whether or not the applicant for leave has shown there's enough basis to challenge that decision, despite its being upheld twice, for us to undertake the appeal.

MS HARDY:

I do want to go there but I also want to take the Court to some context to get there and then to look at the statutory interpretation issue because, as Your Honours have pointed out –

TIPPING J:

Yes I'm not disputing that but going to decisions in other cases, unless there's some major statement of principle that Judge Clark followed or something, it's not going to help much is it? I don't know. It just seems unusual.

MS HARDY:

Well, can I just flag very briefly, and I don't want to take the Court's time up. It's not for – it's to give some practical context to the operation of the Tribunal and then to look –

TIPPING J:

But they didn't put – he didn't put it on the operations of the Tribunal. He said, if any case requires urgent attention they will accommodate it. He didn't say that it was because of problems with listing in the Tribunal itself.

MS HARDY:

That's correct, so the decision here runs through the kind of contest that is commonplace in all negotiations in Tribunal settings and I link that to if, if what the applicant is saying is that there is no discretion here at all on the part of the Tribunal and that that is what the statute means then what I wanted to make clear was that that would mean that any claimant and under the Treaty of Waitangi Act –

ELIAS CJ:

Well it can't be, it can't be put on that basis. Of course ultimately someone has to make an evaluation. I must say I don't like this over-use of the word "discretion" because it suggests that everything is arbitrary, but there's an evaluation that has to be undertaken. So I think that can be accepted.

TIPPING J:

And people will have to accept that there are priorities. This case says this was crying out for priority because otherwise we're going to get gazumped.

MS HARDY:

Yes so accepting then that the Tribunal has a discretion here, because there must be cases where the cost of holding a hearing and dragging out of negotiations all of the interested parties to participate in that hearing, which is what would happen here, that the Mangatu Incorporation would have a hearing and all of the Te Whakarau would be required to entertain that hearing and participate in it so the question is exactly right, has the discretion to make that judgment been made in a conceivably lawful way –

ELIAS CJ:

One of the main issues there is this emphasis on the so-called circuit-breaker policy, that the Tribunal will only entertain applications if negotiations have broken down. Well this is not a negotiation case and the question is whether that's a misdirection or it's misunderstanding the law because it's the priority presumption, as Mr Brown says, the no priority for these cases, coupled with this so-called circuit-breaker policy.

MS HARDY:

Yes so the question is, has there been a lawful exercise of discretion here and the question is has there been, if you like, an unlawful fettering of that discretion because of a deference to the Crown's settlement policy and in my submission that assertion that what Judge Clark was doing, which was basically saying, or was being portrayed as the Judge saying, the door is shut on you Mangatu Incorporation simply because we're conscious that the Crown is in discussion with Te Whakarau. That, in my submission, is clearly not what Judge Clark is doing in the judgment and if one examines the text of the judgment that becomes apparent.

ELIAS CJ:

All right.

MS HARDY:

So if we turn to the judgment which as Your Honours have pointed out is key, and it's at tab 5 of the Crown bundle. The Judge goes through some background.

TIPPING J:

I for one, I'm sorry to keep intervening, but I can't see how you can make the submission you've just done in answer to the Chief Justice in the light of paragraphs 55, 56, and 57 of this judgment. That clearly this was a highly relevant fact in the approach of the Judge. And arguably, and all it has to be is arguably, erroneous or taking into account something that was not proper or was misunderstanding the circumstances of this case, arguably.

ELIAS CJ:

Or unreasonable too, which is where weight does come in but again, arguably, that's all we're concerned about here.

TIPPING J:

Clearly the Judge was influenced by this, thus the intervention of the Tribunal is not required in that sense. He's approached it as though you had to show why intervention was required not why an apparently urgent application should be denied urgency.

MS HARDY:

He's approached it, Your Honour, carefully as to whether urgency was warranted and he's weighed factors, a number of factors, which include the fact that it was the iwi grouping that went before the Tribunal and my friend mentioned a statement of claim failed by the Incorporation that was superseded by a subsequent statement of claim in 2001 which clearly stated that the claim including for the 1961 lands, was to – was being made by, it was Te Pou a Hookai at that time, now Te Whakarau, it was seeking the return of the land, including the 1961 land, to the iwi grouping. That the resumption application that is spoken of here was put to the Tribunal, that's the Tūranga Tribunal chaired by Judge Williams. The Court, the Tribunal said, and this is reflected in the Letter of Transmittal, but also fully articulated in Chapter 16 of the report, that it was not minded to make remedies, recommendations. It encouraged negotiations. It found in relation to the 1961 land that it was the iwi group that had suffered. It did not find that it was a well-founded claim of the Incorporation. Then there was a mandating process taking some time which the Crown accepted and the applicant here was one of the parties moving support for the mandated group, which is now Te Whakarau. The Crown and Te Whakarau –

ELIAS CJ:

Sorry, you may well be absolutely sound in what you're putting forward to us. How – but are these not matters that the Tribunal, if it had proceeded, would have been entitled to weigh in the determination of the application before it?

MS HARDY:

Well in my submission the Tribunal, at this juncture, and this is why I was taking the Tribunal – sorry, the Court, to the range of material that talks about –

ELIAS CJ:

But Judge Clark doesn't refer to that. Those aren't part of his reasons for not moving on to have the resumption hearing in which all these issues could be properly canvassed.

TIPPING J:

And indeed, if I might add, he discloses his hand very, very clearly in paragraph 60 where he says, if there wasn't the complication of an offer too, their application, that's the present applicant, for an urgent remedies hearing would be very strong. So that's the fulcrum on which his mind turned. Obviously he saw that as a complication that justified refusing what would otherwise be a very strong application for an urgent remedies hearing.

MS HARDY:

But it's extremely important, in my submission, to read the sentence which precedes that which says, and this is in terms of granting the application, it would undoubtedly have been the case if the Tribunal was faced with a situation in which the Mangatu Incorporation were the only group interested in the return of the Mangatu No 1 Block.

ELIAS CJ:

But that's a non-sequitur given the fact that the process permits others to be heard.

BLANCHARD J:

That's the point that's been troubling me. Isn't it arguable that it's more appropriate that the Tribunal should sort this out given that in the negotiations the smaller group, if I can call it that, are not separately represented, and indeed if I understand matters, the Crown is not prepared to negotiate with them.

MS HARDY:

Well the situation as to mandate is that there is a mandate for Te Whakarau and as I mentioned earlier the applicant participated in supporting and moving membership of that mandate. Justice Clifford and also the Tribunal under review did – was influenced by the fact that there was an existing mandate and there had been no withdrawal of that mandate by the Incorporation.

ELIAS CJ:

But that's for the purposes of negotiation. What is bothering me is whether – well to what extent it's appropriate, given the jurisdiction, the resumption jurisdiction, which doesn't necessarily look to negotiation except in terms of the interim period following a recommendation, whether it's appropriate for the Tribunal to look to that. One can see why the Tribunal might be in the habit of looking to that in connection with its recommendatory jurisdiction because ultimately the Crown decides, but this maybe different and the issue that is troubling me and one would have thought is worth giving leave to have properly explored is whether that distinction has been properly appreciated.

MS HARDY:

Well again going back to the – two responses I think to that. One comes out of the judgment of the Tribunal itself and perhaps the next step is to look at the statutory regime from the Crown perspective and analysis.

ELIAS CJ:

Right. Is there anything else you wanted to draw our attention to in Judge Clark's directions?

MS HARDY:

I can probably summarise it shortly in that what Judge Clark did was go through all of the range of the background, the Tūranga Tribunal's report itself and its recommendations and weighed the prejudice to the Incorporation, which was acknowledged, and that's covered in paragraph 60, against the competing prejudice to Te Whakarau. So that it's a balanced decision giving weight including weight to the fact that this is a resumption application. So in my submission there's nothing that the applicant can point to that's relevant to this decision that hasn't been addressed by Judge Clark.

ELIAS CJ:

We'll take the morning adjournment now, thank you.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.52 AM

ELIAS CJ:

Yes Ms Hardy.

MS HARDY:

Your Honours, I think I can conclude fairly shortly on the Crown's submissions. I wanted to cover two points. One, simply to return to the key statutory provisions and then to contemplate what kind of enquiry might the Court be embarking upon if it were to look at the question of the exercise of Judge Clark's discretion. First is to go to the provisions of the Treaty of Waitangi Act that are central, and that is at tab 2 of the applicant's authorities. Your Honours have already been taken to section 8HB. I wanted to focus there on the language that this of course is the section under which the resumption remedy can be considered by the Tribunal. It relates to a claim submitted under section 6, so that's the core jurisdictional provision of the Tribunal, that happens to relate to licensed land and the Tribunal may, again a discretion, if a claim is well founded and that the action taken under section 6(3) of this Act, to compensate or remove the prejudice that is identified, it may include in that recommendation, under section 6(3), this is over the page on page 29, a recommendation that the land be returned to Māori ownership. So the point that I wish to make here and to emphasise is that the section 8HB function operates entirely within the section 6(3) functioning of the Tribunal. And importantly here also the discretion is to consider a return to Māori ownership and not to previous title holders like the Mangatu Incorporation, so again it's broad. And if one turns to section 6(3), that language is very similar to the language of section 8HB where the Tribunal finds any claim submitted is well founded. It may, if it thinks fit, having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate or remove the prejudice, and again it's under that discretionary section that the section 8HB functions operate. So it –

ELIAS CJ:

With a different effect.

MS HARDY:

And with a different effect in that the binding nature of the recommendations kicks in following the 90-day interval period.

ELIAS CJ:

Mhm.

MS HARDY:

So the essence of this application, from the Crown's perspective, is that clearly there is a discretion here on the part of the Tribunal to organise the priority fixtures for urgent applications. There would have to be. So the question that the Court is concerned with is whether in the exercise of that discretion Judge Clark gave appropriate weight to the fact that the applicants here are seeking a resumption order. And in order to assess that the Court would ultimately need to consider –

ELIAS CJ:

Well he excluded the factor, that's what the directions required him to do in the other case, didn't they?

MS HARDY:

The directions simply say that all claims need to be considered without priority and then gave a range of other guidelines and when Judge Clark came to examine the issue he looked at the fact that here was an application for resumption that was going to be conceivably settled or extinguished. It was a claim for forest land against – for whom there was –

ELIAS CJ:

But what's that, what is that to do with him? That's the question really, isn't it? Is it appropriate to take that consideration into account?

MS HARDY:

The question of the potential extinguishment? In my submission that's absolutely critical to a question of a Tribunal working through a huge docket to determine what claim should have priority. Now if there were an injustice there that the Tribunal

perpetrated in exercising its discretion, so, for example, if the Incorporation had been excluded from the settlement that is about to happen, and that was potentially imminent, then both the timing of settlement legislation and its effect would be absolutely pertinent –

ELIAS CJ:

But it's excluded in the relief it is seeking.

MS HARDY:

What the settlement does is address the return of the Crown forest land to Te Whakarau, the iwi group –

ELIAS CJ:

Yes.

MS HARDY:

And it's important too that the proprietors, the members of the Incorporation, are also the participants in Te Whakarau, so they get the benefit of the land –

ELIAS CJ:

I understand all of that but I'm just still struggling with whether the Tribunal seized of the application is entitled to elide all these processes. Anyway I understand the point that you're making of course. Telescope is a process I suppose. *Fitzgerald v Muldoon* does come to mind.

MS HARDY:

Well, no, I think, with respect, the difficulty here is that in a particular jurisdiction, with great competition over resources and claims, and the Tribunal's attuned to that and in my submission what Judge Clark's decision does is carefully balance the interests of the Incorporation –

ELIAS CJ:

Well that's the issue.

MS HARDY:

– with the others.

ELIAS CJ:

That's the issue –

MS HARDY:

Yes.

ELIAS CJ:

– for the substantive hearing.

MS HARDY:

And I suppose that the point for leave is that it is about balance and discretion and in my view the issue here is not appropriate for an appeal because if one penetrates the decision of the Tribunal it's clear that it canvasses all of the relevant issues including the nature of the claim of the Incorporation and their relationship by whakapapa to the group in negotiation and they clearly say it would be an entirely different situation if the people who are part of the Incorporation were excluded from the benefits of settlement and that was something that was compelling in both the High Court and Court of Appeal decision. So they looked at prejudice and balance and they clearly were aware that the outcome of declining this hearing would, from the point of view of the Incorporation's claim, that that entity pursuing a fresh claim be, if you like, prejudicial to them. So, members of the Court, that really is the key point that reiterates the points made in the written submissions, which is, we're talking about a discretion here and an exercise and weight.

ELIAS CJ:

Thank you Ms Hardy. Mr Bennion.

MR BENNION:

Your Honour, I don't seek to take very much of the Court's time because, of course, everything has been canvassed and you'll understand the interest which I represent, a group involved in seeking a settlement now. So –

BLANCHARD J:

What stage has been reached now with that?

MR BENNION:

Well, we're at a stage of awaiting a draft deed, or a deed of settlement is being prepared. The latest letters from the Crown indicate that, I think from what my friends said is correct that, we would be looking for some legislation, perhaps introduced later this year. The advice from the Crown is that delay may result in changes in the Crown's resources and their ability to get, but more importantly, their ability to get legislation in front of the House in a timely fashion, and there might be some delay there but it's in the order of perhaps six to 12 months in the latest letter.

BLANCHARD J:

Well that's going to occur regardless is it?

MR BENNION:

No, the expectation is to get, that we'll have that legislation later this year at the moment, because a deed of settlement is being finalised.

TIPPING J:

But you're saying that if that can't be achieved, it might not be achieved for at least another year.

MR BENNION:

That's a possibility that we've told about. The matter's become somewhat complicated because of internal, within the Te Whakarau group there are five groups and they've just gone through their own internal allocation process with Crown assistance.

So, if I can just briefly set out the position as we understand it, this is a case, we believe, about how to lawfully manage the demand for urgent remedies hearings and that this is a case where a decision has been made which has some hard consequences for the applicant. The Tribunal's decision is to say, "We will park a remedies hearing for now and we understand that will have some hard consequences", and as Your Honour said, I think the question is they need a very good reason in this case to do that and we say, if you go to the decision itself, and if we're dealing with this discretion, a hearing is not needed by this Court because the discretion, it is simply untenable to say that the discretion was unlawfully exercised, and I can simply – I just want to draw attention to a couple of points from Judge

Clark's decision, which go back to the background of the decision, and fully explain what was being discussed. And I'm looking first at paragraph 52.

The Tribunal has heard the Mangatu afforestation claim. It went on to consider claims and he says at 52, "All of the claimants, with the exception of the applicant, organised themselves in reliance upon the Tribunal's report." Now, as you'll see from the report, in the first volume, this was a new hearing process that the Tribunal undertook. It's talked about in the letter opening the report. That was a process that had hearings of about eight weeks but, of course, about two years or more of extended conferencing before that to tease out all the groups that were to come before the Tribunal and go into hearing. That's the new process that's being discussed, and the Judge is saying, "well, everybody's going forward", and I look at page 12 and 13 of the Tūranga report –

ELIAS CJ:

We don't have it.

MR BENNION:

Yes, I understand that Your Honour. Does that mean that's – I understand it was to be available but does that mean it will be referred to or...

ELIAS CJ:

Well, we don't have it in front of us. I imagine we can get it. What are you wanting to take this to –

MR BENNION:

My simple point is that the Tribunal, it goes out of its way in chapter 2 of the report, to talk about each of the groups coming before it. Of course, the Mangatu Incorporation is not mentioned because it's not a claimant group over those intervening years of conferencing and the hearing, and says that, "There has been a high level of formal and informal co-operation. We do not underestimate for a moment the difficulties the claimants had to overcome in achieving the high level of collective action. It is our earnest hope that this willingness to co-operate and where appropriate to act collectively finds even fuller expression in negotiations with the Crown." So that, I say, is the background, part of the background to this discussion about all groups are moving forward in Judge Clark's decision.

I note then at paragraph 54 of the Judge's decision, the Judge specifically says, "Although its suggestions as to negotiations were general, it was open to the Tribunal to recommend a specific remedy for the Mangatu Incorporation. It did not do so." And the reason it did not do so is because the Mangatu Incorporation claim or the claim that sought the return of the land, the forest land, to the Mangatu Incorporation was specifically amended to remove that application, and you have that in the timeline that I've provided with my submissions to the Court, to remove that and seek the return of the forest simply, to Te Aitanga a Mahaki. So the Judge was correctly reflecting on a reason why the Tribunal didn't receive that application and didn't act on it because it was never before it.

ELIAS CJ:

Well that's not what, of course, is being said in paragraph 54. That may well be the background to it.

MR BENNION:

Yes it's the – the Judge is saying it didn't happen and that's the reason I would suggest it didn't happen because the claim had been amended to say it wasn't sought.

ELIAS CJ:

Well it didn't happen because the Tribunal was looking to negotiation. From what you've just read out that seems to be the reason it didn't happen. It didn't come up with recommendations for remedy.

MR BENNION:

Yes, but there was no application. There'd certainly – had there been an application to say, "We would like the land returned to the Mangatu Incorporation", there might have been some reflection on that but, of course, there wasn't because it wasn't there. But I take Your Honour's point that you could also point to the broader discussion of the Tribunal about all groups moving forward.

And then lastly, if I go to paragraph 50 of the Judge's decision, and in my submission the Judge has correctly recorded what is being sought here which is that the Mangatu Incorporation should receive the land because it was taken from the Mangatu Incorporation, and really that amount, simply, to claim that there's some special situation for shareholders or people from whom land has been recently taken,

and, of course, there is no hint of that at all in the Tribunal's report because the Mangatu Incorporation was not an active – or was subsumed under the iwi grouping in the Tribunal report – and, of course, in my submissions, absolutely no lawful basis for the Tribunal to treat groups from whom land may have been more recently taken differently from groups who had land taken in the more distant past.

Overall, it's just simply our submission that, because the Mangatu Incorporation chose not to present before this Tribunal, or before the Waitangi Tribunal, chose not to seek any particular remedy to itself, it's no surprise that the Tribunal report focuses on all of the iwi groups, which were the groups before, and makes all its discussions in that regard. And, it's no surprise then that, Judge Clark is reading that report and reflecting on it accurately in his decision. I think that's the brief point.

ELIAS CJ:

We don't have a statement of claim before us. I'm not sure how the appellant is described in the statement of claim. I'll ask Mr Brown that.

MR BENNION:

Yes. I would just point to the timeline of events which were attached to the submissions.

ELIAS CJ:

Yes.

MR BENNION:

Which set out briefly as we understand the sequence of events and we clearly – we say it's very clear that in 1992 resumption of the forest to the Incorporation was sought but that in 2001 that was amended to say resumption to Aitanga a Mahaki, the iwi, and then we go right through the hearing until 2008 and Mr Haronga's claim that – a fresh claim to say well, it doesn't look like it's coming back to the Incorporation and therefore he sought to intervene.

So in brief the submission is if you were to have a hearing for discretion for whether the decision is lawful you would be compelled to come to a conclusion that the matters had been relevantly balanced and that there was no, of course, the error of law test is a reasonably high one.

TIPPING J:

So it's unarguable?

MR BENNION:

Unarguable.

TIPPING J:

That's your client's stance?

MR BENNION:

Yes. Well untenable I think is the phrase that's also used.

TIPPING J:

Yes.

MR BENNION:

Thank you.

ELIAS CJ:

Thank you Mr Bennion. Yes Mr Brown, do you want to be heard in reply and also can you help in terms of the timeline, why 1489 is – is that the basis of the appellant's claim?

MR BROWN QC:

Yes Your Honour and the statement of claim I have the volume that was in the Court of Appeal which is section A, volume 1 and the first amended statement of claim dated the 17th of September 2009 is the claim being filed by Alan Haronga in his capacity as chairman, the proprietor of Mangatu Blocks Incorporated, defined as Mangatu Incorporation. And can I say I'm puzzled indeed by my learned friend's comments, he's just taken a seat about the claim as regards Mangatu. The chapter 15, which is in volume 2 of the report, is headed the "Mangatu Afforestation". It starts with a quote, as they tend too, from the Commissioner of Crown Lands in 1960 about the intention to establish a forest et cetera and it deals in the front page of 697 to 733 and the findings are that the owners didn't want to sell. The conduct and negotiation process was uneven. The Crown was far from scrupulous, fair, even-handed and honest and the Crown failed to act reasonably, with the utmost good faith, when it acquired Mangatu forest land from the Māori owners. Well the Māori owners they've

acquired it from are those from whom it acquired in 1961. So the idea, my learned friend is saying Mangatu Incorporation weren't involved and like the finding, and that's why it is –

ELIAS CJ:

So that's the basis on which you say there is a finding of breach in the taking of the land from Mangatu Incorporation?

MR BROWN QC:

Yes, the two paragraphs that end this chapter. It says, "We find therefore that the Crown failed to act reasonably and with the utmost good faith when it acquired the Mangatu forest lands from the Māori owners. The Crown breached principles of the Treaty of Waitangi accordingly." That's in the Mangatu afforestation chapter. So I know it's a little sort of trivial, sort of a jigsaw metaphor I used, but this is a 1961 breach. There maybe issues that when it comes, if it were to come back to the Waitangi Tribunal and a resumption hearing about considering the position of Māori way back in terms of what happened at the Māori Land Court, but that's a matter that can only be dealt with on the resumption hearing if it were able to be obtained, but the key to our application is the access point. Can we open the door? And really I have nothing more I wish to add.

ELIAS CJ:

We will grant leave in this matter. We'll put out a memorandum recording that. What, however, I would like to explore, or we would like to explore is we're minded simply to grant leave without refining the issues too much on the basis we've got responsible counsel, but we'd like to hear if that's an appropriate way to proceed or whether they could be refined somewhat. And secondly we need to discuss dates because there is urgency in attending to this matter.

TIPPING J:

Could I add that what I would have in mind, subject to counsel, would be leave simply in terms of "did Judge Clark correctly, or in accordance with law, exercise his powers in that judgment", as opposed to anything more specific than that, which would encompass all the points that you wanted to raise and I don't think would take the Crown by surprise.

MR BROWN QC:

No. Not like *Paki* but the earlier leave order, I remember an earlier one that you made in those terms. Yes.

ELIAS CJ:

Well perhaps on that point we'll just check with other counsel whether they have any other view of that. Ms Hardy?

MS HARDY:

No, that statement of the issues would cover the matter.

ELIAS CJ:

Mr Bennion?

MR BENNION:

Yes Your Honour, I do have a concern that comes through the submissions and came up earlier about whether the prime question is does the Tribunal, is it about the Tribunal's discretion, making that decision lawfully, is that the sole issue here?

BLANCHARD J:

It's about its decision. I don't know that we'd want to confine it to a discretion because that would be part of the argument.

MR BENNION:

Yes my concern is just I want to be clear that we're not discussing the broader point about what the word "may" means in section 8HB.

BLANCHARD J:

Yes we would be, I think.

MR BENNION:

That was my question.

TIPPING J:

I'm sure that would arise.

ELIAS CJ:

It's whether the decision is in accordance with law.

MR BENNION:

Well if it is that broad I, as long as I understand it in that matter, then it's not my preference but that's how the Court wishes to proceed.

ELIAS CJ:

All right, so the other point is dates of hearing. Mr Brown I think you indicated availability?

MR BROWN QC:

Yes I'm available right through until about the middle of October when we have another rather protracted tax avoidance case in Auckland.

ELIAS CJ:

My understanding is, and maybe the registrar can advise me, but my understanding is that we did have time available in the week of the 10th of October, has that been taken yet do you know? You would have to check. All right. Well you're available until the middle of October?

MR BROWN QC:

Yes, right through until the day after Labour Day.

ELIAS CJ:

Up until Labour Day?

MR BROWN QC:

Yes.

ELIAS CJ:

And after that?

MR BROWN QC:

I'm – the tax avoidance matter finishes I think on the 12th of November. One matter in the Wakatu, the Wakatu actual claim has been given urgency in the High Court on the 29th of November for a week. I must admit I wasn't particularly hoping to end up

with anything between those two because I have another matter – but I will take any day.

ELIAS CJ:

You'll take anything up until Labour Day –

MR BROWN QC:

Yes.

ELIAS CJ:

– and you'll take anything after?

MR BROWN QC:

Between the 12th of November and the 29th of November I would take anything, except on the 22nd and 23rd when there's an unseemly commercial trademark issue involving apparel, but then in the first two weeks of December I could do as well because Wakatu is only for one week.

ELIAS CJ:

All right.

MR BROWN QC:

Thank you Your Honour.

ELIAS CJ:

Other counsel, are you able to fit within those timeframes?

MS HARDY:

Yes, any dates that accommodate Mr Brown's commitments would suit the Crown.

ELIAS CJ:

Mr Bennion?

MR BENNION:

Yes Your Honour, similar position.

ELIAS CJ:

All right. There will be a leave judgment put out and we will simply direct in the leave judgment the date. Thank you, counsel, for your help.

COURT ADJOURNS: 12.19 PM