IN THE SUPREME COURT OF NEW ZEALAND SC 47/2015

[2015] NZSC Trans 19

BETWEEN **MITA MICHAEL RIRINUI**

Appellant

AND **LANDCORP FARMING LIMITED**

First Respondent

AND **THE ATTORNEY-GENERAL**

Second Respondent

AND **WHEYLAND FARMS LIMITED**

Interested Party

Hearing: 17-18 August 2015

Coram: Elias CJ
William Young J
Glazebrook J
Arnold J
O'Regan J

Appearances: M T Scholtens QC, A N Isac and J B Orpin for the Appellant
J E Hodder QC, B Gnanalingam and B J Maltby for the First Respondent
D J Goddard QC, J R Gough and S J Humphrey for the Second Respondent
A A Hopkinson for the Interested Party

CIVIL APPEAL

MS SCHOLTENS QC:

May it please the Court, I appear with my learned friends, Mr Isac and Mr Orpin, for the appellant.

ELIAS CJ:

Thank you, Ms Scholtens.

MR HODDER QC:

May it please the Court, I appear with my learned friends, Mr Gnanalingam and Ms Maltby for the first respondent, Landcorp.

ELIAS CJ:

Thank you, Mr Hodder.

MR GODDARD QC:

May it please the Court, I appear for the Attorney-General with my learned friends, Mr Gough and Mr Humphrey.

ELIAS CJ:

Thank you, Mr Goddard.

MR HOPKINSON:

May it please the Court, counsel's name is Hopkinson. I appear for Wheyland Farms, the interested party.

ELIAS CJ:

Thank you, Mr Hopkinson. Yes, Ms Scholtens.

MS SCHOLTENS QC:

Thank you, Your Honour. Can I begin with a little more paper for the Court? We have a supplementary bundle of authorities in response to some of the submissions of my learned friends and an extra two pages, which is an email exhibit, to go into volume 3. It will slot in there at page 744A, which is noted on there. It was in the record in the Court of Appeal and it has appeared to have assumed some relevance in this Court so we'd like –

ELIAS CJ:

What's the – yes, pass that in by all means. I see, 744A.

MS SCHOLTENS QC:
So that is at tab 108.

ELIAS CJ:
Sorry, what was that?

MS SCHOLTENS QC:
It slots in at tab 108 of volume 3. You are also receiving an outline of the submissions for the appellant.

ELIAS CJ:
Yes, thank you.

MS SCHOLTENS QC:
So Your Honours will see from the outline that I propose to deal with the issues of facts, the judgments in the lower Court, the submission that the contract is tainted by bad faith, the submission that we have a reviewable error that the iwi's claim has been settled, and submissions as to relief, both that you have a discretion to set aside the contract and that you should exercise that discretion.

And with the Court's leave, my learned friend, Mr Isac, will deal with the submissions relating to the powers of the shareholding Ministers to intervene in the decisions of Landcorp, and he'll do that at the end.

Your Honours, in the first affidavit of Mr Ririnui, who is the appellant on behalf of the iwi, Ngāti Whakahemo, and you'll find that at tab 11 of volume 2, he talks about the land that we're dealing with in these two days before this Court.

So at paragraph 11 and 12 on page 169 he talks about the farm as being part of the ancestral lands.

ELIAS CJ:
Sorry, what volume 2 that?

MS SCHOLTENS QC:

That's volume 2, Your Honour, tab 11, page 169, and this is the first affidavit that he prepared for the interim order application, which followed, you know, hot on the heels of the sale.

So at paragraph 11 he talks about the farm as being part of the ancestral lands of Ngāti Whakahemo. "The property is part of our papakāinga (our home). The wetlands and swamp areas which Whārere Farm was formed from was a crucial source of food for Ngāti Whakahemo over centuries, even after it was taken by the Crown in the early twentieth century. When I was a child I recall gathering food – wild birds and fresh water fish – from the area. As children we did not know that we no longer owned it. In terms of addressing the grievances of the past, we view this land as critical. It is also the last area of our ancestral lands in Crown control which can be used to provide redress for historical Treaty claims."

And then over on page 187, near the end of his affidavit, he repeats at paragraph 120, that it's his understanding that the farm represents the last Crown controlled land in the iwi's rohe which is available to address the Crown's breach of its Treaty obligations. And so it represents, therefore, he says, the final opportunity for Ngāti Whakahemo to have its ancestral land returned by the Crown in settlement of Wai 1471.

ELIAS CJ:
That – in the submissions for the respondents that's taken issue with. I don't remember seeing what evidence was put up but was there evidence from – is there evidence somewhere in here of other land answering that point about the unique significance of this land?

MS SCHOLTENS QC:
No, Your Honour, there isn't. There is simply the assertion from the Attorney and Office of Treaty Settlements that there is some other land within the area that could be used.

ELIAS CJ:
But no substantiation of that and you didn't –

MS SCHOLTENS QC:
No, no.

ELIAS CJ:
– seek it?

MS SCHOLTENS QC:
Nothing.

And then there's an important point that relates to this issue of the effective resumption. If the land passes from Landcorp into private hands, the stigma, this is Mr Ririnui talking, "Which attaches to the prospect of resumption of land by the Crown for to return to Māori is likely to prevent its return. This stigma as the Waitangi Tribunal has recognised is often not placed upon the Crown but on the claimant group. Ngāti Whakahemo do not wish to be seen in a hostile role within the society of which they form a part," and Mr Ririnui quotes there from the Tribunal's recommendations in Wai 45, Muriwhenua. And then he notes that in the 27 years since Parliament enacted the regime he is not aware of any case where the Crown has assumed ownership of SOE land once it's passed to private ownership, "Nor am I aware of any binding recommendations made by the Tribunal." Instead, settlements involving land subject to resumption claims have involved the allocation of other lands or cash. For the reasons set out already it is this land which is of great cultural and spiritual significance to our people.

So that, just to set the background here, Your Honours, because the reason why we're here is because of that we're dealing with this parcel of land. If it was any other parcel of land we would not be here. And the factual context is critical to the case for the appellant. We say the test for bad faith, for example, is context dependent and on the facts would be met, on several different tests would be met, whereas the Court of Appeal and my learned friends are arguing for a very clear bright line test. Whether a reviewable error arises is plainly going to be matter of context and fact and whether the Court has discretion to set aside the contract we will argue is a matter of context and discretion and not the bright line that the Crown is urging upon Your Honours, and whether in the circumstances the Court should do so is obviously a matter of discretion based on fact and it is the importance of the facts to our case that drives me to ask the Court to bear with me while I take Your Honours through a number of the exhibits, the documents in this case and the chronology. This should make what follows much quicker but it is so important to our case that I would ask that you bear with me while I do this.

So if I could ask Your Honours to take the case on appeal, volume 3, which is the exhibits and the Crown's chronology. Sorry, not the Crown, I forget who I'm acting for, the appellant's chronology. You will have seen first at tab 48 the outline map of where the farm is compared to where the trust –

WILLIAM YOUNG J:
Sorry, 451 did you say?

MS SCHOLTENS QC:
451, yes Sir, under tab 48, so where the farm is compared to where the trust is currently farming. The trust is a group of Ngāti Whakahemo members but not all of them.

Then if we could go to tab 53, sorry, tab 51, page 529. So just to indicate, this is the claim in the Waitangi Tribunal from 2008 over the land. Then at 53 –

ELIAS CJ:
Sorry, I haven't looked at this. What did you want to draw our attention to? Just identifying that this is the claim or is there anything in it?

MS SCHOLTENS QC:
I wanted – yes, it's to identify that this is where you will find it. I think that's all we need to see at this stage. Then at page, at tab –

ELIAS CJ:
Sorry, which is the – there are three blocks of land referred to, are all of those within the file or only some? Pukehina 1A, 1A2B and 1A2B and 1A2C?

MS SCHOLTENS QC:
Just let me – I'm not sure about that.

ELIAS CJ:
There is mention of this somewhere in the materials I've read so perhaps don't take time on it.

MS SCHOLTENS QC:

Yes I know that the Crown has one view.

ELIAS CJ:

Perhaps come back to it, Ms Scholtens.

MS SCHOLTENS QC:

All right, thank you Ma'am. So 53 you'll find that the –

ELIAS CJ:

So is the underlying complaint that this land was taken under the Public Works Act for one purpose?

MS SCHOLTENS QC:

It wasn't taken under the Public Works Act, Your Honour, it was taken –

ELIAS CJ:

Taken by proclamation.

MS SCHOLTENS QC:

Yes but –

ELIAS CJ:

But that probably was under the Public Works Act unless –

MS SCHOLTENS QC:

Yes, yes but the –

ELIAS CJ:

– but it doesn't say when.

MS SCHOLTENS QC:

And some of it was I think that there was, I think the factual background is quite complex and I don't want to misrepresent it but I'm aware that there was a purchase by the Crown or a setting off of debts owned as a result of the surveys that had to take place because of the three hearings before the Māori Land Court with the matter kept having to go back.

ELIAS CJ:

So this was an early taking, was it?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Okay, thank you.

MS SCHOLTENS QC:

Well it was –

ELIAS CJ:

The claim's a bit light on detail.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Right, that's fine, thank you.

MS SCHOLTENS QC:

So then we come to tab 53, page 545, which is where the – you'll see the Office of the Treaty Settlements are responding to an inquiry as to what's happening to the claim saying in the second paragraph that the historical claims have been settled through the Te Arawa Iwi and Hapū deed of settlement they refer to.

ELIAS CJ:

So who's this letter to?

MS SCHOLTENS QC:

It is to Maria Horne who is a member of Ngāti Whakahemo on the claims committee.

Then 55, this is where –

O'REGAN J:

Was there some response to this from your clients?

MS SCHOLTENS QC:

To which?

O'REGAN J:

Are you coming to the response to this?

MS SCHOLTENS QC:

Yes, this is it.

O'REGAN J:

Right, okay.

MS SCHOLTENS QC:

This is it at 55 where the lawyers for Ngāti Whakahemo respond and say, refer to that letter in paragraph 2 and then set out why they say that their claim has not been determined by the Act. So they set out the legal argument and at paragraph 11 and 12 you'll see that's a Ngāti Whakahemo claim customary rights from their ancestor, Maruahaira, and then there's a description about what happened with Maruahaira when he moved into the area, essentially by conquest, and that Ngāti Whakahemo, at paragraph 15, have continuously occupied the surrounding area.

ARNOLD J:

So this is the argument that the Crown now accepts is correct?

MS SCHOLTENS QC:

Yes, yes, Sir.

ARNOLD J:

Right.

MS SCHOLTENS QC:

So it's set out, and I think they do accept it's correct. What is relevant is how many times it had to be put before it was accepted it was correct. So that's a careful set-out statement of the submission in that letter, it's submitted.

So that was at 16 May. Then on the 28th of May, at tab 56, you'll see a further response from the Office of Treaty Settlements saying, "No, that's not the case," and attaching their previous letter that we've already seen.

So then, at the next tab, 57, on 17 June, solicitors write to the Minister of Treaty Negotiations and provides the various documents that show the claim and the correspondence and summarises the argument. So at paragraph 6 at the foot there it refers to the Act and makes it fairly clear that Ngāti Whakahemo are an iwi in their own right and not a hapū of Ngāti Pikiao, and at 12 and 13 he refers to the disappointment that the iwi are experiencing with the responses to date and that it insults their whakapapa and tikanga, and at 15 asks that, you know, "If you continue to allege that it's caught by the Act please provide some substantive reasoning," and then seeks a face-to-face meeting.

So the Minister replies, and that's the next tab, at 58, on the 16th of July, and he maintains the Crown's position. First of all he deals with the request for official information, which you haven't seen that letter, but over the page on 562, in relation to the claims, the Crown's view, settled by the deed of settlement, it's listed as a hapū and that is that.

Then three weeks after that, on the 5th of August, we see on the next tab, this is Landcorp are seeking, are advising that they're selling this land, the farm, and want to know if the Crown has any interest in it.

Then over the page on 12 September, page 565, Treaty Settlements replies to Landcorp, indicating that the property's not of potential interest and you'll see the last paragraph, "If possible we'd appreciate if Landcorp could advise Ngāti Whakaue and Ngāti Makino of your intentions with this property as a courtesy."

Then at tab 61, the next one, Landcorp management send the directors a board paper relating to the sale. They note on page 568 that the Office of Treaty Settlements have waived any interest in the farm.

And then on 62 you have the extract from the board meeting on 30th of October referring to the paper and the resolution to sell the farm by public tender.

Then over at 64 on the 18th of November, again this time solicitors write to Landcorp noting in the third paragraph, "The Ngāti Whakahemo historic claim is registered as Wai1471." This claims covers the land that now comprises Whārere Farm. "I have been instructed by my clients to write directly to you to register the trust in Ngāti Whakahemo in the farm and my clients have been in contact with Baileys." Note there is a section 27B memorial. As a result of that you'll see in an email on the next page 603, the letter – this is about the letter, you can see from page 604 it's the cover email that went with the letter and then at the foot of page 603, Steve Carden, the Chief Executive of Landcorp, "John, can you please take this up with OTS to find out the situation." And then there is for your information an advice pleas to OTS and then Paul, who is from OTS, Paul Jackson back to Landcorp, "I'm advise Ngāti Whakahemo have written to the Crown numerous times seeking to enter into an historical settlement with the Crown. The most recent correspondence is dated April 2013." Well, we know that is June. "Our responses and the Crown's position is they are a hapū of Ngāti Pikiao so their historical Treaty of Waitangi claims have been settled through the Te Arawa Settlement Act." Koning Webster, "No this is our advice. I suggest you treat the letter as it reads as an expression of interest in the property. No other action has been proposed by Koning Webster. If anything else develops we can consider further." So essentially saying treat it as an expression of interest, they haven't got any other interest in this, and this is the email or the advice which we focus on when it comes to reviewing the advice to Landcorp, the error, this email repeats to Landcorp the error. Just treat them as – well treat the letter as it reads. "And then if anything else develops we can consider further." I don't know what, of course, is intended to refer to.

So then there's a reply over on 66 from the Chief Executive. "We're advised by the Office of Treaty Settlements that your claims have been settled. Accordingly, we would hope that your client is in a position to take their interest in the property further and engage in the tender process along with other interested parties." So that's the response.

Then at 67 we have what is a reasonably – it's easy to overlook this email chain but it is quite important. So I want to start on page 615, the first email from Mr Te Aho who you will see in the first paragraph. So the email starts just about a quarter of the way down 615, Monday November 25 in the morning, and he says, "On Friday I was appointed to pursue the matters noted in the attached letter," and the attached letter is, you'll see, Mr Koning's letter relating to putting the position of the iwi to Landcorp.

So he's been appointed, he's not a member of Ngāti Whakahemo but is effectively employed as a consultant or a negotiator. So, "Pursue the matters noted. Mine is a strategic and negotiation matter," he says. Now the email is to various people within Minister's offices and he says, "I seek an urgent meeting this week, or next week, with your respective Ministers, Finance and Treaty Settlements and perhaps the Minister of State Owned Enterprises to, (1) discuss the commercial purchase of Landcorp's Whārere Farms which borders on the trust lands and were taken from the Riripeti Timi Waata and discuss how the Ngāti Whakahemo claim may be used to satisfy this purchase. I understand there's a view that the claims have been settled," and then he says, "Well that's not so." Then he says, "My instructions are clear, secure the land, this is going to be by an agreed process for a commercial price paid by the trust for the land. Separately but parallel the trust Ngāti Whakahemo Wai 1471, could offset the purchase price with the settlement of Wai 1471. The alternative is we seek resumption." So essentially he is saying we'll go for a commercial price and/or there maybe some offset available.

Then the next email on 614, two-thirds down, again on Monday early afternoon, from Amohaere at Parliament and I think she is with Bill English? Yes. So at the last paragraph, "Unfortunately The Honourable Mr English is out of the country from tomorrow afternoon so effectively can't meet on the short term."

Then the next email is from Mr Te Aho and it begins at the foot of 613 a bit later on, on the afternoon of Monday the 25th of November. Again to the same group of people which includes the Landcorp people, Justice, and says, "Limited availability of your Minister," at the bottom of the page, "Unfortunately with the close of tenders next Wednesday time is of the essence for us." Over the page on 614, so he's trying to negotiate there with Minister English's person. Then, "To meet with the relevant shareholder Ministers before a decision is made by the Landcorp Board," because he wants to be able to do that.

Then fourth paragraph down, "I reiterate that my land's trust iwi people are prepared to purchased back their land at a commercially agreed price. Unlike the suggestion from the Landcorp's CEO attached we do not intend to line up with others and leave it to chance as to whether or not we secure the land that was stolen from us and that borders us." So a resistance to engage in the tender process in the somewhat of a lottery that that might involve. "And so seeking that we can sit around the table and brainstorm solutions, the sooner the better."

Then, on page 613, fourth email is about a third of the page down, from Honourable English's secretary at 3.21, "I'll put this matter in front of the Honourable Bill English to seek his agreement for a clear signal to be sent to the relevant Ministers regarding Minister's expectations of a timely, fair, commercial and Treaty of Waitangi cognisant sale of the Landcorp-Whārere Farm. I will work with Lil to see what is possible, accepting that the proposal you have outlined has merit it is just a matter of appreciating that we are all under time/resource pressures and early notification of such matters would allow us much more opportunity to explore a range of innovative options and run them through our processes, including putting this matter on the radar of relevant Ministers, developing papers outlining the relevant options and then presenting recommendations for their approval." So you can see there's a bit of frustration that this is all happening so fast but, of course, from Mr Te Aho's point of view, he wants to get this done before the tenders close.

So then the fifth email is at the foot of 612, from Mr Te Aho, saying that he will, "Wait for your response to see what your response is after the Minister's had a look at options." So I think he gets that message, and he waits, we'll see, three days on the middle of page 612, the sixth email, on the 28th of November, he says, he refers to Mr Ririnui being, "Keen for a protocol to be provided by your offices or Landcorp which assures us that Landcorp will not proceed with completing the tender process. As I noted to you today, the Trust will purchase this land. The only point of negotiation is the mechanism for determining the price. But that's a simple matter. The issue around the Treaty settlement is simply about offsetting this price if we can. I would appreciate confirmation by 4.00 pm tomorrow." So working with pretty much anyone who will listen about doing a commercial deal.

Then the next one is over the page, 611, going backwards, 2nd of December from Mr Te Aho, noting that, "On Friday afternoon we agreed to leave matters till 12.00 pm today in order for you and Lil to discuss matters further and for you to update your Minister. I am keen for an update this afternoon please before 4.00 pm." Then he's saying he's going to be somewhere else. And then three paragraphs down, "The Honourable Mita Ririnui and the trustees are keen to get certainty today on whether or not Landcorp and its shareholding Ministers want the win/win outcome that we've been offering." And he's concerned because tenders close on Wednesday.

Then back on page 610…

ELIAS CJ:

Sorry, can you – I don't want to push you along too much because we all love facts, but perhaps you could speed it up a little bit going through this or at least tell us what you're wanting us to take from this.

MS SCHOLTENS QC:

Right, yes.

ELIAS CJ:

That, what, that Mr Te Aho was continuing to press for answers against the deadline of the tender –

MS SCHOLTENS QC:

Yes, and that –

ELIAS CJ:

– is that right?

MS SCHOLTENS QC:

– he was making it very clear that the tribe was keen on a commercial settlement, that it didn't depend on the claim that the Crown didn't accept existed, but, of course, he was doing it in a context where the claim also didn't appear – the Crown and Landcorp also didn't appear to have any appreciation for what the farm meant to the tribe. But what is important about this is that there were – every effort was made to persuade the Crown to do a deal with them.

ARNOLD J:

But didn't the deal that was contemplated depend on the Crown accepting the validity of the claim because part of the price was going to relate to the proceedings in the Waitangi Tribunal and settling those?

MS SCHOLTENS QC:

Well, no, that –

ELIAS CJ:

And, indeed, they need to stop the tender process because he wasn't going to compete with other commercial purchasers.

MS SCHOLTENS QC:

Mmm, yes.

ELIAS CJ:

So it did depend on intervention in support of the claim.

MS SCHOLTENS QC:

Yes. Yes, it – the commercial sale did not depend on any contribution from the Crown. The – as he says, it was that will be good if they could do that but they were still prepared to do a commercial deal. They just didn't want to have to compete and miss out, potentially miss out.

GLAZEBROOK J:

What was the capacity for them to do a commercial deal?

MS SCHOLTENS QC:

They, I think we – the evidence is, I think, they had access to, I think it was 13 million and this – through the bank and through their own resources – and then beyond that they had Ngāti Awa was prepared to work with them in a joint venture. That was the deal that they were putting together in March. This is with Ngāti Awa. And that fell over on the day, the last day, because the 23 million was perceived to be too high a price by Ngāti Awa, so that didn't mean that the tribe wasn't going to try and get the money some other way, it was just that they ran out of time then and it was sold.

ELIAS CJ:

Sorry, that was Arawa, was it, was going to be part of that?

MS SCHOLTENS QC:

Ngāti Awa, sorry.

ELIAS CJ:

Ngāti Awa, sorry, yes.

MS SCHOLTENS QC:

Ngāti Awa, mmm.

GLAZEBROOK J:

That was a bit later though, wasn't it?

MS SCHOLTENS QC:

Yes, that was later.

GLAZEBROOK J:

Yes, I thought that was a bit later.

MS SCHOLTENS QC:

Yes, but at this stage, I mean, at this stage they had some funds and they, you know, in terms of obtaining funds, well, they had the ability to do that one way or another. So it wasn't as if this was something that depended on the Crown putting in a contribution, but, I mean, from their perspective that would seem sensible because it would deal with their claim.

O'REGAN J:

So this correspondence was with the Crown, not with the Landcorp, is that right?

MS SCHOLTENS QC:

It's with both. You'll see that Landcorp's also…

O'REGAN J:

Well, who was he proposing to deal with, Mr Te Amo?

MS SCHOLTENS QC:

He wants the Ministers to – that's what – that's who he seems to be aiming it at.

O'REGAN J:

Well, shouldn't he have been talking to the owner of the land if he wanted to buy it?

MS SCHOLTENS QC:

Well, the Minister's staff seemed to be accepting that this was appropriate; they could work with this.

ARNOLD J:
But all the emails went to Mr Cardens at Landcorp anyway.

MS SCHOLTENS QC:
Yes, they did.

ARNOLD J:
So he knew what was going on.

MS SCHOLTENS QC:
Yes, and I think that's the point. He sent it to pretty much everybody who might have had some ability to assist.

GLAZEBROOK J:
Well, Landcorp had made its position clear, you say, based on the erroneous advice that there wasn't a valid Treaty claim.

MS SCHOLTENS QC:
Yes, well, that's what they – so –

GLAZEBROOK J:
They – so they could just join in the tender –

MS SCHOLTENS QC:
Yes, so these guys can just put in a bid like everybody else, yes.

So I think the rest of the email chain pretty much just indicates that – I think perhaps if we just note on 611, under the heading, "Commercial Purchase," so that's the difference. There's two different headings there. There's the use of the claims money and then there's the commercial purpose, and a commercial purchase, and this is from Minister English's secretary. So he repeats the view that, well, you don't have any outstanding claim. However, you know, go for it in terms of the tender process, and you'll see they've got a bit of a concession with Landcorp there. They'll accept the tender subject to confirmation of finance arrangements by 11 December but Landcorp can't agree to delay or stop the process. So and then after then it's just really a fairly angry email from Willie to the various supporters.

After that just to note from – I won't go to the evidence on this but you'll see in the chronology at item 16 that on the 29th of November, this is when Ngāti Makino writes to the Minister and asks that the tender be delayed to allow for discussions and their interest arose because they had negotiated in 2010, they'd – Whārere had been an asset that they were interested in but it wasn't available at that time because Landcorp needed it. So we have affidavits from the Crown that discuss that, that are referred to in the chronology.

Then at tab 68 the application for resumption is, for urgency is made on the 4th of December. Just note that note also on the 4th of December, that's when the tender period closed. On the 6th of December is when, according to Mr Pamment's evidence, Micro Farms were told that the tender would be cancelled and that's sometime before the decision was actually made by the board. If you will note that the 10th of December was when the urgency in respect of the application for resumption was made before the Waitangi Tribunal and on the 10th and 11th the Ministers and officials discussed the sale of Whārere with Landcorp and asked Landcorp to cancel the tender to provide Makino and neighbouring iwi with an opportunity to purchase the farm, and that's Ms Fletcher's evidence.

Then at tab 70 is the Landcorp board meeting minutes from 12 December and you will see there that item 3 is the sale of Whārere, there's an amount that has been redacted and then over the page, the board agreed that this decision came down to an exercise of judgment by the directors having regard to all the issues and what's in the best interests of Landcorp. And then made some resolutions which are noted there. You'll see C, "During the process and subsequently Makino sought redress for failure to include the property in their Treaty settlement. Shareholding Ministers, at the request of the Minister of the Treaty of Waitangi, required Landcorp to delay acceptance of any tender to allow Makino an opportunity to purchase the property," and you'll see there a delay acceptance of any tender because it had become an issue as to what Ngāti Whakahemo understand had happened.

ELIAS CJ:

Is there a document recording the request of the shareholding Ministers?

MS SCHOLTENS QC:

No there's no.

ELIAS CJ:

Is there a file note? Is there anything?

MS SCHOLTENS QC:

No.

ELIAS CJ:

Okay.

MS SCHOLTENS QC:

Then Landcorp's contacted Ngāti Makino and arranged a meeting.

ARNOLD J:

Just looking at this at 627 of this extract from the minutes, it's clear that the board considered that pausing the tender process, stopping it and offering, making the offer to Ngāti Makino, it's clearly that the board saw that as being consistent with its obligations under the State-Owned Enterprises Act, doesn't it, and indeed, it sought on confirmation of that in a press release?

MS SCHOLTENS QC:

Yes, yes. They were certainly – well how I read that is they were concerned to ensure it was consistent.

ELIAS CJ:

Well again, is there a press statement explaining why it is in accordance with the obligations under the State-Owned Enterprises Act from the Minister?

MS SCHOLTENS QC:

There is a – if you just turn over Your Honour will see what's headed, "The Agreed Test," this was actually the final press release that went out in the same terms but that does appear later but whether it – it just says that they've acted appropriately in good faith and in accordance with its obligations, that the Minister has recognised that.

ELIAS CJ:

I see. Dialogue with post-settlement iwi.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

It's not clear what – it's about the business opportunities available post-settlement.

MS SCHOLTENS QC:

Yes. And then it's – what they're offering to Ngāti Makino you'll see in 2B, another iwi as agreed by Ngāti Makino, the first right of refusal at the market price and then if that's not matched re-market or private treaty.

And then you'll see in G they make, they qualify this as a proposal to the shareholding Ministers and the Minister for Treaty of Waitangi negotiations and they give them five days to accept it.

ELIAS CJ:

Sorry, what do they have to accept? What is open for their acceptance?

MS SCHOLTENS QC:

That basically A, B, C, D and we don't know what E is and M.

ELIAS CJ:

Of this proposal? I see.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Yes, I see it.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

The board's proposal?

MS SCHOLTENS QC:

Yes. So after the five days have passed you have another board meeting which is recorded at the next tab, 71, and this one interesting but we don't have any evidence apart from this document, it starts at 10 o'clock in the morning and then it is adjourned to work on the press release and then that restarts at 5.30 pm at night. So you'll see at the top of page 630 the board commented on various aspects of the draft press release, emphasised it must be factually correct, concerned about implication of fault.

O'REGAN J:

What's the significance of this to the case?

MS SCHOLTENS QC:

That – I suppose – it's because that this is a – well all we have by way of evidence as to how this all came about is the relationships between the Ministers and the board and here we just have the, you know, you can see there's been a number of email traffic between officials and Ministers accepting the proposal and then we have a day to work on agreeing a press release, but – so it's relevant in terms of the relative closeness of the relationship between the Ministers and the board which comes through the papers, and just how this all came about.

GLAZEBROOK J:

And we don't have the email traffic referred to at paragraph 2?

MS SCHOLTENS QC:

No.

O'REGAN J:

And what's the significance of that?

MS SCHOLTENS QC:

The email traffic?

O'REGAN J:

No, of the closeness of the relationship.

MS SCHOLTENS QC:

Well, I think when we come to the argument about the relationship between the Ministers and their powers to direct or, yeah, powers to direct the shareholders, I think it's, it's not directly relevant, Sir, it's…

O'REGAN J:
Because there isn't any direction here, is there?

MS SCHOLTENS QC:
No.

O'REGAN J:
No.

MS SCHOLTENS QC:
No, there is – it seems to go the other way. There's a proposal from the board to the Ministers, but the evidence is that it was done at the request of the Ministers, and there will be further documents you'll see where the understanding, for example, of Mr Pamment, was that the Ministers were now deciding when the farm was going to be sold and who to.

O'REGAN J:,
Yes, but that was wrong, wasn't it, so –

MS SCHOLTENS QC:
Presumably –

O'REGAN J:
– does it matter?

MS SCHOLTENS QC:
– yes. So then the final press release is at tab 73 but it is the same in terms as the draft that was in the – attached to the minute.

So we know, and I'm just noting now from the chronology at number 24, that on the 18th of December the Minister met with various iwi representatives, that Ngāti Whakahemo was not invited but it found out about it and it fronted up as a result.

GLAZEBROOK J:
Have we got any notes of that meeting?

MS SCHOLTENS QC:
No. We've got evidence from Ms Fletcher for the Crown and Mr Ririnui but no notes.

Then on the 20th of December you'll – the – that item 27 on the chronology, the Waitangi Tribunal had a telephone conference relating to the iwi's urgent resumption application and the minute that subsequently came out, you'll see at tab 72, noted at paragraph 3, "Landcorp has cancelled the tender for the property in issue and this will give Makino and neighbouring iwi an opportunity to make a forma commercial offer." So the deputy chairperson then basically at B said, "Well, you know, now that they've decided to cancel the tender do you want to continue with your urgent resumption application and if so set out your grounds." So there's an assumption taken from that that the tender has been cancelled. No suggestion that there is a right that's time limited or when it might be.

Then if we go to 78, this is the – these are the notes of the meeting with Makino. These are – these were put in evidence by Ms Fletcher for the Crown.

GLAZEBROOK J:
I'm sorry, I'm not sure I'm on the right tab.

O'REGAN J:
78.

GLAZEBROOK J:
78?

MS SCHOLTENS QC:
Yes.

ELIAS CJ:
Page 645.

MS SCHOLTENS QC:

And you'll see, now Ngāti Makino are not represented here. It's Landcorp, Landcorp and members of Makino. At paragraph 14 on 647 note that they say they'd prefer to partner Ngāti Whakahemo rather than Ngāti Awa as the former had mana whenua interest in Wharere. But you'll see, "It was made clear that Ngāti Makino was the prime mover into would sort out appropriate assistance from other iwi. Landcorp need only deal with Ngāti Makino."

O'REGAN J:
Sorry, what paragraph is that?

MS SCHOLTENS QC:
That's paragraph 14.

GLAZEBROOK J:
Page 647.

MS SCHOLTENS QC:
So, yes – and at 24, "Landcorp could rely on Ngāti Makino to manage its potential partners."

And you'll see there a number of – like, for example, in paragraphs 18 and 19 there's some suggestion that Landcorp might be able to bridge a gap through debt and it would do some work on that, provide costings. And that's relevant just to show what Landcorp were prepared to discuss with Makino, because we maintain they ought to have offered us the same opportunity. We're not saying that means they needed to offer us bridging finance or whatever but that this is where they were taken with Makino. And I think it's clear in the end that there were – Makino dropped out because there wasn't any support certainly from the Crown for them.

Then tab 31, I'll just – sorry, item 31 on the chronology, which is a reference to the judgment and an affidavit, just to note that 24th of February is when Ngāti Makino met with Ngāti Whakahemo and no agreement was reached and Ngāti Whakahemo was not told about the right of first refusal or the February deadline at that meeting. Mr Ririnui talks about how, "Well, they wanted us to be," you know, "the junior partner and that wasn't acceptable to us." So that is why that did not happen.

So that's the 24th of February there was that meeting, and then on the 27th of February at item 32, and tab 79, an email with a letter behind it from solicitors for Ngāti Whakahemo to Landcorp seeking an undertaking. So this is, this becomes important in terms of the chronology. We know that Landcorp's not going – that we can't work with Makino, we've just learnt that, and Landcorp hasn't been prepared to deal with us so far. So here what we're saying is – and we've got this urgent resumption application before the Treaty, before the Tribunal, trying to get an acknowledgement of our Treaty claim. So this is a further letter to Landcorp on the 27th of February saying then, "The advice you've received from the Treaty Settlements Office is not right." It outlines the position again and at 8, "We note that Landcorp cancelled its tender for Whārere Farm late last year as a result of Ngāti Whakahemo's application to the Waitangi Tribunal." So that's the understanding we have here. The tender's been finished, because of the Tribunal. Now you should be talking to us. Now there's – you won't find any response to that statement. Nobody says that that's wrong.

Notwithstanding the urgent application and cancellation of the tender, we understand Landcorp's prepared to entertain offers from third parties and that it has or may shortly receive such offers. The sale of the farm to a third party would prejudice Ngāti Whakahemo's claim and the prospects of the land being returned, and then request the undertaking. And the undertaking is that won't enter into any agreement to sell without first giving 20 working days' notice, and they would like the undertaking by Thursday, 6 March at 5.00 pm otherwise they will be obliged to make an urgent application to the High Court for an injunction.

So, at this stage, they are aware that nobody is treating their claim seriously, that they don't believe they've got a claim. This is all very frustrating. They may have to go to the High Court to get that matter sorted out and they are seeking an undertaking that they'll get some notice before the land is put into third party hands, and they've asked for it by Thursday, 6 March, and Your Honours may recall that the sale is in fact done on the 4th of March, or 5th, thank you, 5th.

ELIAS CJ:
Is that when it was executed by the purchaser?

MS SCHOLTENS QC:
It was executed by the purchaser on the 4th.

ELIAS CJ:

I see, and then it –

MS SCHOLTENS QC:

Sent to – but sent to Landcorp but with a letter with a number of – a side letter with other conditions, and then they were accepted and one Landcorp's signature you signed it I think on the 4th, and the second one Mr Kennedy got it on the 5th, and then it went back accepting all those side conditions which we say that's when it, that's when the contract was concluded, in the middle of the day on the 5th.

ELIAS CJ:

Or perhaps the 7th.

MS SCHOLTENS QC:

Sorry?

ELIAS CJ:

Or perhaps the 7th?

MS SCHOLTENS QC:

On the 5th.

ELIAS CJ:

No, I'm sorry, I'm just slightly confused because it was signed at different times, wasn't it?

MS SCHOLTENS QC:

Yes, it was signed by – on the 4th, the 4th and the 5th, the final signature on the 5th.

ELIAS CJ:

Yes, on the 5th, thank you.

MS SCHOLTENS QC:

And with – and it wasn't – as well as the signatures, there were side conditions that had to be accepted.

ELIAS CJ:

Yes. So where are we?

MS SCHOLTENS QC:

We are on –

ELIAS CJ:

27th February, are we?

MS SCHOLTENS QC:

Yes, that was the 27th of February, and item 32. So over the page. This document 80, just a note that this is the solicitors for Micro, the subsequent purchaser, noticing how keen they are, noting how keen they are, and this is where I say in paragraph 3 on page 5, 656, it says, "We understand you've advised our client the final decision in this matter will be made by the Crown rather than the board." And they've been dealing with the Honourable Tony Ryall who I presume would have been the local MP as well as the Minister and has encouraged them to keep in touch with Landcorp.

ELIAS CJ:

So is that – are you going to take us to other material which substantiates that, that the decision will be made by the Crown –

MS SCHOLTENS QC:

No.

ELIAS CJ:

– rather than the board?

MS SCHOLTENS QC:

No, no, Your Honour. The decision was made by Landcorp as far as we can tell. It's just that for some reason the purchaser had a different understanding.

ELIAS CJ:

Well, mmm, all right.

O'REGAN J:

But if it's a wrong understanding it doesn't matter, does it?

ELIAS CJ:
But it may be an accurate understanding. It's just that the – what is required and what happened may be different. I don't know.

MS SCHOLTENS QC:
Well, we don't know either, Ma'am.

ELIAS CJ:
I mean, there's formal correctness and –

MS SCHOLTENS QC:
Yes, this is.

ELIAS CJ:
– there's what went on.

MS SCHOLTENS QC:
Yes, indeed. And if he'd had, we'd had more time, you know, between the beginning of this case and the middle and the end, well, there might be more evidence, but there isn't.

Just to note that at 4(b) they've noted the purchase price there. It is important to know that Ngāti Whakahemo never learned what the purchase price was until October when Mr Pamment, until, yes, well after the sale process in October, after the interim hearing, Mr Pamment made an affidavit and disclosed the sale process. Up until then we thought it was 23 million.

GLAZEBROOK J:
What – have we got the communication with the client that preceded this?

MS SCHOLTENS QC:
No.

GLAZEBROOK J:
And there was no evidence on the communication which preceded this?

MS SCHOLTENS QC:
No, nothing.

GLAZEBROOK J:
Well, does the understanding – the understanding presumably comes from whatever preceded this.

MS SCHOLTENS QC:
Yes.

GLAZEBROOK J:
Because why would it come from anything else?

MS SCHOLTENS QC:
Yes, well, we don't know what discussions the purchaser had with Landcorp and there's no documents that…

GLAZEBROOK J:
Well, we do know there was a discussion presumably.

MS SCHOLTENS QC:
Appears to have been, yes. I think it, I mean, Your Honour, the Chief Justice, I think, has perhaps put it as high as it can be which is we sort of don't really know what was going on in the background here but formally Landcorp called a –

ELIAS CJ:
Formally Landcorp doesn't seem to have needed any authority to do what it did and it entered into the agreement.

MS SCHOLTENS QC:
Yes, yes. And it appeared to stop the tender.

So then – so that's the 27th of February, and then also on the 27th of February in the evening, at tab 81, we have one of the significant emails in terms of the bad faith allegation, and this is from Mr Te Aho to Ms Houpapa, and she notes that – he notes, you know, "Our team's approved an injunction to be filed to stop the sale." So plenty

of pressure trying to be applied here. That's the route we're going to go down. Then he says, "Steven," that's Mr Carden, the Chief Executive, "has the attached letter," which we can see from another tab is the one from John Koning seeking the undertaking. "My people are committed to a commercial purchase. Unfortunately, from the meeting with Makino on Monday," that's the 24th of February, "they have my people as a minority player. They made it clear they will shut us out." So that obviously didn't work, and then he said, "And so I think that wise minds need to sit at a table for a without prejudice discussion, otherwise more needless costs are going to be incurred," and asking if they could, if he could meet on Tuesday, which would be the 4th of March, to see if an agreed way forward can be found.

So then the next, if you look at 82, you'll see that this is confirming that Ngāti Makino are withdrawing from the bidding, not able to put together a financial package.

Then the next page is again 27, you'll see the email from Mr Te Aho that we've just seen two tabs back at the foot of 663, and then Ms Houpapa is forwarding this to Steve Carden and noting, "We should discuss this evening or first thing tomorrow." So she's sent it off to Steve for a discussion, to Mr Carden.

Then the next day, the 28th of February, the board meeting at tab 84 relating to the sale beginning on 668. So there's a background paper sought to facilitate Ngāti Makino's bid to purchase the property, so they're now out. Ngāti Whakahemo has threatened injunction proceedings to prevent or delay the sale unless Landcorp give an undertaking. Legal advice is that Landcorp has good arguments to resist the issue of an injunction. So that's important because this is where they make the decision to sell and they are aware that we want an undertaking but their focus is on threatened injunction proceedings and good arguments to resist it.

Ngāti Awa are still interested but the board decides to go with the original bid on ethical grounds and the second paragraph from the foot on page 668, Ms Houpapa agreed with the proposed recommendation and expressed her disappointment that iwi were not able or were not prepared to meet the market. She advised that both herself and the Chief Executive proposed to meet with Ngāti Whakahemo to explain Landcorp's position. So everyone is aware that that's something that's going to happen and Mr Te Aho had asked for a meeting, and then it just notes that they did work hard to facilitate a sale to Ngāti Makino.

ARNOLD J:

Is the background paper in these documents?

MS SCHOLTENS QC:

No Sir.

ARNOLD J:

And I take it the advice isn't either? The legal advice?

MS SCHOLTENS QC:

No it's not.

ARNOLD J:

I'm just wondering why Crown Law have given them advice but presumably that would be on the validity of the claim, the Treaty claim?

MS SCHOLTENS QC:

One would expect so but, yes, again we don't know. So then on the resolutions were note the withdrawal agree to authorise the Chief Executive to enter into negotiations for the sale of Whārere for not less than 90 million with the highest bidder with settlement no later than 31, so that's the key decision to authorise the sale. Note the threatened injunction proceedings, Landcorp liaising with Crown Law and note Whakahemo's claim in the Waitangi Tribunal will be disclosed to the highest bidder along with the threatened injunction proceedings.

Now part of the background I always think – can't see anything about this but you'll note at the bottom, "Directors and Chief Executive remained on line to discuss the proposed composition of the board going forward," so that was because of the resignation of the Chair about this time.

O'REGAN J:

This decision to authorise the Chief Executive to enter into the sale isn't challenged, is it?

MS SCHOLTENS QC:

Isn't challenged? It's part of the decision to contract. This is, in effect, the decision to –

O'REGAN J:

But the focus of that is on events that happened after this, isn't it?

MS SCHOLTENS QC:

Yes, yes it is, because we would say that was not a – there was no actual contract or decision that bit until the contract was consummated because it's a, you know, agreement for sale of land, any party could walk away until they had the written contract.

O'REGAN J:

Well the Chief Executive couldn't have walked away, could he because he board approved all the terms and the price so it was really just a question of whether Micro agreed, wasn't it?

MS SCHOLTENS QC:

Yes although, yes, but Micro countersigned, counter – put some further terms in so presumably they could have if they'd wanted to.

ELIAS CJ:

And is there material or it's not in dispute that the purchaser was told about the threatened injunction proceedings and the Waitangi Tribunal claim –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– including the resumption hearing.

MS SCHOLTENS QC:

Yes there was, I think there's quite a bit of material about that and I think the, Mr Pamment's affidavit speaks about that as well.

ELIAS CJ:

Yes.

ARNOLD J:

That clause that was put into the contract, I think it was clause 21 or something –

MS SCHOLTENS QC:
Yes.

ARNOLD J:
– around about there to deal with the possibility of the transaction not being settled, was that, when was that put in there, was it in the original tender documents or it came in later?

MS SCHOLTENS QC:
My understanding is that it wasn't in that form in the original tender documents so it came in on the Monday or Tuesday when the Landcorp drafted up the contract for signing.

ARNOLD J:
So it came in at this time?

MS SCHOLTENS QC:
Yes at this time.

ARNOLD J:
I see.

MS SCHOLTENS QC:
Yes, so following this decision. So here we say just at, this is just of interest perhaps at 85 there's a – this actually happened before the board meeting, a message to Minister Finlayson to note that the board was meeting this afternoon and what it was going to be doing.

Then at 86, this is a note of the Chief Executive's call to Mr Pamment and just recording that to Phil McKenzie and John Kennedy-Good within Landcorp. It talked through the Ngāti Whakahemo issues and will meet tomorrow, and I think there's evidence that in fact they – he went up to the place that evening and discussed it with them.

Then 87, this is an exchange between the Chief Executive and Ms Houpapa in response to Mr Te Aho's request for a meeting. At the first one you'll see Carden has been thinking about the response so they've plainly discussed it and, "On reflection I think it's probably best that you contact their leadership and suggest a meeting with you and I in the Wellington office in Wellington on Friday. I suspect you can better position the meeting the right way and not set an expectation that we are meeting to negotiate." So plainly the concern that we might think that that's what it was about, didn't want to have that expectation.

And then up one, the email from Ms Houpapa, "I'll email Willie this evening when I get home," and then three, "You know these individuals better than I," this is Steven Carden, "but I suspect we're best to try and cut Willie out of the process," and then just a discussion about trying to set up a meeting next week.

Then 88, at the foot you see the email that you've seen before from the 27th of February from Mr Te Aho to Ms Houpapa and at the top Ms Houpapa's response. So this is the, this is an email which was obviously confusing to all the players. So the Landcorp board has met and decided not to extend the timeframe. At that stage we knew nothing about the 28th of February timeframe. The only timeframe that was in our minds and there's evidence to say this, was that of the undertaking that we had sought. And then she says, "Landcorp lawyers have been asked to respond to Koning Webster's letter accordingly," so here he was assuming that, well, Mr Te Aho says he assumed that he wasn't going to be given the undertaking. And, "We're still available to meet to discuss this situation if they would like. 7th of March is the earliest," and then, you know, she says, "Willie, you and I both know that wise minds around a table make for good outcomes. I'm sorry that in this case timeframes have conspired against us." So that is a confusing email, but there was an opportunity, of course, to clarify it and if we look first at the next, 89, which is Buddle Findlay's response to Koning Webster's request for an undertaking. This came through on Monday, the 3rd of March, although it's dated the 28th of February, and it doesn't actually refer to the undertaking at all but says, you know, Ngāti Whakahemo's adequately protected by the provisions of the resumption sections and should you make an application for interim relief ensure this letter is placed before it. So that's that letter.

Then –

ELIAS CJ:

Ms Scholtens, it's 11.30 so we'll take the adjournment, but how much longer do you think you're going to be one this? I mean, can we speed it up a little bit?

MS SCHOLTENS QC:

Yes. I will do my best.

ELIAS CJ:

Yes, all right, thank you, we'll take the 15 minute adjournment now.

COURT ADJOURNS: 11.31 AM
COURT RESUMES: 11.50 AM

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

Thank you, Ma'am. Document 90, page 681, is a document from Buddle Findlay, solicitors for Landcorp, to Cooney Lees & Morgan, solicitors for the Pamments and Micro Farming, and it just indicates that the issues discussed in relation to Ngāti Whakahemo are there as they forward the documents of sale and purchase. And this is on the Monday, around midday, following the decision on the Friday, and you'll note at the foot, "Grateful if Landcorp is willing to execute this agreement as soon as possible."

So then over the page, there's an update to S Carden and John Kennedy-Good. The agreement's gone through with correspondence re Ngāti Whakahemo as agreed.

Then don't need to both with the next document, some urgent OIA requests.

The next one, 93, is a response from Mr Te Aho to Ms Houpapa, "I accept the meeting time for Friday." "Understand Landcorp's now re-engaging with the highest bidders for Whārere Farms." Notes, you'll see, "My people are keen to do a commercial deal. Unfortunately, we have been shut out of the process through dealings with Ngāti Makino. We still want to acquire this land on commercial terms. Again, I am keen to find the most painless and bloodless way forward. Would you be able to organise an urgent conference call between," and so Mita and Jock from

Ngāti Whakahemo and, "Steven and yourself from Landcorp. Whenever you and Steven are available. A lot of goodwill was burned to create the opportunity to iwi acquisition. Want to make sure it's not wasted."

Then on tab 94 you will see this explains – it's explained in Mr Te Aho's affidavit as to why he ultimately put this into evidence after they discovered that they weren't – they hadn't been told the truth about the price or being offered an opportunity but at this stage you'll see at the foot, Mr Te Aho to Mr Ririnui, that, "We need to go straight to price now we've got Traci's involvement." There's a meeting with the bank referred to in the second, in the middle paragraph, and in the top email, Mr Te Aho to Traci Houpapa, "Please see below. We are serious. Buck's not stopped yet. I look forward to your response to the request for a conference call." So this is all on the 4th of March in the middle of the day, so it's clear that Mr Te Aho is talking about negotiating a sale here, very clear, and so if Ms Houpapa is thinking that that's not appropriate, well, she has an opportunity to say so.

The next tab, 95, text messages which you no doubt will have seen. Ms Houpapa's the first one. Talking about possible teleconference. Then at 96, tab 96, Bayleys have forwarded documents from the Pamments to Buddle Findlay and Landcorp. "The signed agreement is attached," this is in the middle of the page, "and he raises some points in his letter which seem reasonable," and the letter is over the page and you'll see at paragraph 2, "Request the following matters be drawn to the vendor's attention prior to execution by the vendor," and then there's matters that you might expect to be see to being dealt with within the document usually but in this case they seem to be happy enough to do it this way. So he's signed the agreement but he's got this list of requests.

Then at 97, still on Tuesday, in the afternoon, still keen to progress, says Mr Te Aho, and at the foot you'll see, "Please call me when you can. Ngāti Awa in. Just a question around stock." So Ngāti Awa have indicated that they'll, they'll, you know, talk about participating in putting together the bid, but he has a question around stock. Now we know that from – between this and the next document there were telephone calls which are referred to in the chronology and in the evidence at tab 54 –

ELIAS CJ:

Tab?

MS SCHOLTENS QC:

Sorry, not tab, Your Honour, item 54 in the chronology. There's a reference to telephone call, evidence of Mr Te Aho explains that he asked Ms Houpapa what the ballpark figure was that Ngāti Whakahemo needed to offer for Whārere. In response she said it would need to be in the vicinity of 23 million." And then he says, "She made no mention the land had been sold nor give any indication Landcorp was not interested in a commercial offer." And then he – there's a further telephone conversation noted at item 60. He calls – he texts her in order to answer Mr Pryor's question, just a question around stock. We'll see Mr Pryor's question shortly, and that was when effectively she indicated that the 23 million was without stock. Mr Pryor wanted to know whether stock were included in the figure.

So then we have on tab 98 Mr Te Aho reporting to his team and effectively you'll see, four paragraphs down, "For all intents and purposes Landcorp are going down the sale and purchase process. They're clear on our position and know what we're capable of. Despite their commitment to their process they accept that things can change." So – and "know what we're capable of" he assumes would mean, well, they know that they can get 13,000 out of the bank. That's information that he's provided. The Deputy Chair are to meet – and him are to – and CEO are to meet on Friday. "I am advised if our purchase price is 23 million we'll be in the ballpark." And some more discussions about that and how that will proceed.

Then 99, there's a response from solicitors for Ngāti Whakahemo to Buddle Findlay. This is because, as you'll recall, the leader didn't mention the undertaking so this again sets out the position and asks again, on page 706, you know, "We could get the matter dealt with promptly by the Tribunal. In the circumstances, we consider Landcorp's refusal to deter sale or provide an undertaking is in breach and please advise whether Landcorp's prepared to provide the undertaking." Otherwise they would need to seek interim relief.

Then over to 101. This is the letter to the Minister seeking an undertaking which went on Tuesday evening at 6.20 pm. 711 through to 713. Request for an undertaking's at paragraph 12. And again, they are asking for the undertaking before 5.00 pm on 6 March which was almost 48 hours.

Then 102, tab 102. So this is, Graham Pryor is the person who was acting for Ngāti Awa and Mr Te Aho is indicating, "Well I've confirmed that the 23 million is for the land and buildings only, stock belongs to the share milker," and that was what effectively Ms Houpapa told him. "If we can't do a commercial deal then that's fine as we will still progress the injunction and Tribunal remedies. We're looking at meet with Landcorp at 10.00 am in Rotorua. Be able to talk our proposed deal at 23 million or talk about our legal processes." So I think, yes, so they're talking there about the joint venture and the amount that they will need to pull together between the two of them.

Then at 103, so there's another reference to the discussions between Willie Te Aho and this time his uncle, Wira Gardiner, who is from Ngāti Awa, then had put him onto Graham Pryor.

Then at 104 you've got, you can see that the signed agreements come through and Landcorp are saying that they will sort that out and the contents of the letter as well.

105 just another reference to the figure of 23 million and that they're working towards assessing the investment but that they are serious. You'll see, you know, "See you in Rotorua this Friday morning at 9.00 am before the meeting with Landcorp."

At tab 106 you've got the signed agreement is forwarded on the 5th of March at 12.17 pm to Baileys by Buddle Findlay for Landcorp. So this is where – and they advise that, "Landcorp agrees to all the matters raised in paragraph 2 of Mr Kune's letter." So they've got a contract now and the deposit is payable, and note that the sale is confirmed to John Kennedy-Good who was one of the signatories. He gets a copy of this at 12.19 pm on the 5th of March.
A sale and purchase agreement follows and I won't take you to that at the moment.

Then at 108 you see at the foot of page 743, this is the second letter that's come in from Mr Koning to buddle Findlay that we've seen before and the response at the top, you know, "We're instructed by Landcorp to inform you that no undertakings will be given in relation to the sale of the farm." So that's 5th of March at 12.27 which was after this sale had been signed and sent by Buddle Findlay back to Baileys.

And then on the additional page, 744A, you'll see at the foot – this is the various officials responding to Koning Webster's letter to the Ministers seeking an

undertaking. So at the foot you'll see that Jane Fletcher is going to draft, run a draft past everybody and this includes John Kennedy-Good. The draft comes through at 1.02 pm includes to John Kennedy-Good and Mr Kennedy-Good responds at 1.28 pm saying he thinks the letter is spot on and there's nothing to add. And this is one hour and nine minutes after the signed contract and other matters had all been sent to the purchaser and the contract had been completed and Mr Kennedy-Good was one of the signatories on that contract So that the Minister's letter went out and you see the draft at 744D without any reference to the fact that the sale had taken place or was even in the pipeline.

So then 109, text messages. You'll see the bottom one from Mr Te Aho, "Price is a challenge. Ngāti Awa pulled out this arvo so we will need to talk actual milk solids as our banks have a view." So Ngāti Awa pulled out but they haven't yet given up but they need information and it's important that Ngāti Awa there evidence is that, "We pulled out because it was 23 million." If it had been 19 million they would certainly not have pulled out.

Then at tab 110 a series of emails this time the draft, the Crown is drafting a memorandum you'll see from page 748, to go into the Waitangi Tribunal and this time on the 6th of March John Kennedy-Good advises at tab 3 that yesterday Landcorp signed a sale and purchase agreement, now contractually bound, so paragraph 5 of the memo will need amending." And then he says again at 4, "Well I've just rechecked the date and it's in fact 4th of March not 5th of March as advised below," and of course that's all, notwithstanding that he signed it on the 5th so he really didn't need to change that at all – odd.

Then the next letter, the next tab 111 you'll see on page 750, is the Minister's letter in reply. "No, can't give the undertaking, no power, not able to." And this is the decision that is also challenged and that Mr Isac will speak to.

And there was some misunderstanding, we would say, in this penultimate paragraph. So, "We understand Ngāti Whakahemo was involved in the discussions," that's with Ngāti Makino, "and was invited but declined to be part of any purchase."

Then at tab 112 the Crown's memorandum, needn't go there. 113, now this is an email after Ms Houpapa calls Mr Te Aho with news of the sale. So you'll see he's still talking about the meeting tomorrow but the fourth paragraph, "Despite this right

through to your call this afternoon at 1.19 pm we have a team crunching numbers." So 1.19 on the 6th of March they were advised the deal was done. Now in there there's some references you'll see to 20 plus rather than 23 million but he mentions in the third paragraph he's made some minor edits and he explains in his affidavit why he does this, in order to preserve the confidentiality that she had asked of him.

And then perhaps finally can I point the Court to tab 114, which is the notes of the meeting that took place on the 7th of March. This is notes from Mr Ririnui and you'll see at the foot, "Uncle Horo considered 23 million well above the value of Whārere, 16 million more like it, and Steve," that's Steve Carden, "totally agree with that figure. Landcorp really surprised at the bid," and so – and the evidence of the people at that meeting from the appellant's perspective will say that that's – that the ruse that there was a $23 million price was continued at that meeting and there's no evidence to contradict that. But, of course, it was after the event.

ELIAS CJ:
The – sorry, I can't remember where it was but in one of the documents you took us to, I think for Ngāti Makino, there was a redacted blank where the amount being spoken about was then. Is there any evidence of what amount was being spoken of with Ngāti Makino?

MS SCHOLTENS QC:
No, no, Ma'am.

GLAZEBROOK J:
Perhaps page 648.

ELIAS CJ:
It's just a bit odd that it's redacted when we've got other figures.

MS SCHOLTENS QC:
A lot of the original documents were redacted, more than these ones –

ELIAS CJ:
I see.

MS SCHOLTENS QC:

– but came through later with –

ELIAS CJ:
Yes, I see.

MS SCHOLTENS QC:
All right, so now just with a quick check, I don't think I need to go any further but I just want to make sure. No. Thank you for your patience with that.

If I could just briefly go to the submissions at paragraphs 17 to 19, where we have the judgments of the lower Courts noted. Simply, just to draw the Court's attention to the fact that the bad faith evidence did emerge late in the play and so the amended – leave was sought to amend the statement of defence on the 6th of October and that was after the interim judgment and – and the interim judgment had dealt with the – legitimate expectation, sorry, legitimate expectation cause of action and so rather than asking the Court to reconsider the legitimate expectation cause of action together with the bad faith cause of action they, the, it was just the bad faith cause of action that was pursued because it seemed to be co-extensive. But in the Court of Appeal the Court simply said, "Well, it was declined in the High Court, dismissed in the High Court and so" – and they were just minded to dismiss it again rather than considering –

ELIAS CJ:
Sorry, what was dismissed?

MS SCHOLTENS QC:
The legitimate expectation ground –

ELIAS CJ:
I see.

MS SCHOLTENS QC:
– of review. I think my learned friends make some comment about that which may or may not have some import.

ELIAS CJ:
That's the legitimate expectation based on the – on what, the course of dealing?

MS SCHOLTENS QC:
Yes, pretty much, but it began with the email –

ELIAS CJ:
Yes.

MS SCHOLTENS QC:
– indicating, we say, that we had an opportunity to have a meeting to make a commercial offer. I think in the interim judgment the High Court found that there wasn't sufficient there to show a clear representation. Then subsequently the bad faith evidence came to our notice and so we pursued bad faith but did not ask the High Court to reconsider the legitimate expectation ground on the basis of the further information. We did ask the Court of Appeal to do that but they declined.

So I turn to bad faith and the submissions at page 9. The Court of Appeal rejected –

ELIAS CJ:
So I just have a – I'm starting to get a little confused because I should probably have gone back over it, but in the interim judgment in the High Court Justice Williams relied on the protocol in asking for reconsideration of whether it should apply.

MS SCHOLTENS QC:
Yes.

ELIAS CJ:
Where did that end up really, the emphasis on the protocol?

MS SCHOLTENS QC:
The Crown considered whether they wanted to apply the protocol to this land.

ELIAS CJ:
Yes. No, I understand that and it didn't –

MS SCHOLTENS QC:
It decided no.

ELIAS CJ:

– and it decided no, but –

MS SCHOLTENS QC:

So that was –

ELIAS CJ:

I suppose I still have, and perhaps it's a question for the respondents, I still have a question as to whether their characterisation of the protocol as non-binding is correct and if – whether what happened was reconsideration or kept faith with the protocol, because there doesn't seem to have been the sort of three month negotiation that was envisaged. So what happened following Justice Williams's direction didn't entail application of protocol. It was rather a preliminary question of whether the protocol should be looked at or should be invoked.

MS SCHOLTENS QC:

I think this is something perhaps that the Crown would better answer.

ELIAS CJ:

Well, I just don't know what your position is on it because it seems to have disappeared really –

MS SCHOLTENS QC:

Well –

ELIAS CJ:

– from your focus and –

MS SCHOLTENS QC:

Yes, it has.

ELIAS CJ:

– instead you talk about a bad faith cause of action but –

MS SCHOLTENS QC:

Mmm.

ELIAS CJ:

– it's a very odd notion, a bad faith cause of action. There's normally a cause of action –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– in which bad faith is an element.

MS SCHOLTENS QC:

Yes, and it is what it is, for us too, we say that the, it's the unlawful – it's the mistake. The error of law that our claim was settled, the tribe's claim was settled, it has – in effect it has been taken into account by Landcorp in determining to pass public land into third party private hands. If that – so it's that error of law itself. I mean, I think we accept that the Crown's gone through its protocol processes and decided whether, you know, we'd, we're not happy about it but decided that they don't think that they'll put this land in its land bank or whatever for now.

ELIAS CJ:

But they don't go through the form specified in the protocol in arriving at that, do they?

MS SCHOLTENS QC:

I can't tell you, Your Honour.

ELIAS CJ:

All right.

MS SCHOLTENS QC:

I understood that they did what they had to do but – and they decided that this was not land that they wanted to hang onto.

ELIAS CJ:

I thought they decided that this was not land that was required for land bank purposes but not, but they reached that conclusion, it doesn't seem to me clear that they reached that conclusion by going through the processes envisaged by the

protocol. It seems a more pre-emptory determination probably because of the view – oh, no, I suppose by that stage they know that it's not, it isn't covered by the –

MS SCHOLTENS QC:
Settlement.

ELIAS CJ:
– Pikiao settlement but it doesn't seem to go through the processes envisaged, anyway.

MS SCHOLTENS QC:
But that may well be slow but from our perspective we have just sort of accepted, if you like, that its Minister is entitled to determine what land he is going to put into a land bank.

ELIAS CJ:
But if there's a process – well, anyway, you're not arguing it.

MS SCHOLTENS QC:
Yes, no I'm not, I'm sorry.

ELIAS CJ:
All right, thank you.

MS SCHOLTENS QC:
So where we ended up with in the Court of Appeal, yes, so on the bad faith and accept Your Honour's point that it infects the decision rather than it doesn't stand by itself but just as a sort of topic we're sort of dealing with it that the contract itself is tainted by bad faith which is one reason why you can review the contract, and in the Court of Appeal the rejected – the Court rejected the grounds for, and we say, four errors and this is in paragraph 31 of the submissions, and 32(5), so, and I will be going through these errors. The first is that they say the relevant bad faith must be before the decision to contract is made, that is before the 28th. Secondly the test for bad faith, we say the test they found was too high. Third, they made some mistakes of facts as to timings of the contracting process and I won't take the Court through that but they've set out in our appendix A and the key point is that the main misrepresentations, the main, yes, misrepresentations, lies that were told happened

before the contract had been completed. And finally, the inference to be drawn from Ms Houpapa's silence before the Court.

So if I can start first and very briefly really that bad faith can arise after the formal decision to contract is taken. So we saw my learned friend's say that that board minute records the decision to enter into the contract and so everything that comes after that is not relevant unless it gives rise to some new cause. But we say that the decision on the 28th of February was to negotiate with Micro. Certainly, they were very clear about what sort of terms they had in mind but the process still involved the further clauses that you've seen in the contract, risks of interim orders, all those sorts of discussions, the changes to the clause 21 and 22, side letters about contractual terms and this was a contract for the sale of land and so until it was signed and returned either party could walk away and so we submit the decision was not consummated. It's not a decision until 12.17 pm on Wednesday the 5th of March so whatever happened before then can be taken into account.

O'REGAN J:
Well it's a decision, wasn't it? It's a decision to sell the farm, isn't it?

MS SCHOLTENS QC:
Yes.

O'REGAN J:
And then the agreement gives effect to the decision.

MS SCHOLTENS QC:
Yes.

O'REGAN J:
But the decision was already made earlier, wasn't it?

MS SCHOLTENS QC:
The decision, well, the decision to sell the farm on particular terms was really only made just before, just about the time that or at the time when the written –

O'REGAN J:
Well who made it?

MS SCHOLTENS QC:

Well it was an agreement, wasn't it, between two parties.

O'REGAN J:

Well, but you're talking about a decision being made at that point. Who was the decision maker?

MS SCHOLTENS QC:

The decision maker that we are reviewing is Landcorp and its decision to enter into an agreement.

ELIAS CJ:

Well what does decision add beyond the familiarity that in judicial review it's a most common –

MS SCHOLTENS QC:

It doesn't really add –

ELIAS CJ:

– thing to look –

MS SCHOLTENS QC:

It doesn't add anything.

ELIAS CJ:

But the supervisory jurisdiction isn't confined to something that can properly be characterised as a decision, is it, in your argument?

MS SCHOLTENS QC:

No not at all, it's actions, inactions, failures to act.

ELIAS CJ:

So you're relying on the agreement, the entering into of the agreement?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

That's the action by Landcorp that you are seeking to judicially review, is it?

MS SCHOLTENS QC:

Well it is a course of action, it is a course of conduct, isn't it, the results in that contract but, yes, if you're looking for a cut-off date judicial review normally recognises when the decision is made as in final.

ELIAS CJ:

Well it's when the Court became bound, isn't it?

MS SCHOLTENS QC:

Mmm, yes.

ELIAS CJ:

In your argument?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

I know that against you it will be said very, and is said –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– very forcibly that you do need to close on the decision of the board.

MS SCHOLTENS QC:

And the reason why we say, you go right up to that point that the contract is made is because we would have been able to come to the Court and seek an interim order to prevent that step taking place which would have had, you know, would have made everything that much more complicated and has, right up until that time, and it was the course of conduct coming from Landcorp via Ms Houpapa that gave us cause to

believe we didn't need to do that, we were still going to be able to make an offer. So in terms of –

ELIAS CJ:
So what's the detriment because of the case law looks to detriment. The detriment you rely on is the inability to seek an interim injunction, is that it?

MS SCHOLTENS QC:
Yes.

ELIAS CJ:
Is that the only detriment?

MS SCHOLTENS QC:
Well it's the last, it was the last thing open to us in this whole process, wasn't, it. We say, you know, had they recognised – had they not been labouring under this error of law that our claim had been settled then we may well have not experienced detriment at a number of steps along the way, for example, when Mr Te Aho was trying to get some traction with the Ministers to talk.

ELIAS CJ:
But what's the operative detriment that you're complaining of?

MS SCHOLTENS QC:
Loss of an ability to buy the farm or to bid for the farm.

ELIAS CJ:
To be considered.

MS SCHOLTENS QC:
Yes, well –

ELIAS CJ:
I'm just trying to encapsulate it.

MS SCHOLTENS QC:

Yes, it's the chance the Ngāti Makino had. We would like to be treated similarly to them. They had a chance to sit down and negotiate.

O'REGAN J:
But what is it, I mean, you were, your clients were saying, "We're happy to do a commercial deal."

MS SCHOLTENS QC:
Yes.

O'REGAN J:
But they didn't want to do a commercial deal that anybody else was entitled to be part of. Was that it?

MS SCHOLTENS QC:
They didn't want to bid and lose because of what the land meant to them.

GLAZEBROOK J:
And that was in the initial tender though.

MS SCHOLTENS QC:
Yes.

GLAZEBROOK J:
And then they weren't prepared to do the deal with Ngāti Makino because the only deal on offer was as a junior partner, not a lead or equal partner.

MS SCHOLTENS QC:
That's right.

GLAZEBROOK J:
Then they were looking at an equality deal with Ngāti Awa.

MS SCHOLTENS QC:
Yes.

GLAZEBROOK J:

And so were obviously prepared to do that equality deal, but –

MS SCHOLTENS QC:

And it had some terms which were acceptable to them too, yes, about –

O'REGAN J:

So what do they say they've been deprived of? The ability to bid with Ngāti Awa for the farm but they accept that they might have been turned down if they had bid, do they?

MS SCHOLTENS QC:

No, because they wanted to negotiate, they wanted to negotiate, or – rather than bid in.

O'REGAN J:

Well, do they – if they bid 15 million, do they accept that Landcorp would have said no?

MS SCHOLTENS QC:

Well, then, they may have bid more.

GLAZEBROOK J:

Well, don't you say that they should have had the Ngāti –

O'REGAN J:

So you're saying it's a one person option?

MS SCHOLTENS QC:

No. Well, I mean, Ngāti Makino got a right of first refusal.

GLAZEBROOK J:

We don't know what price.

O'REGAN J:

But that's not the same thing as just being able to bid until you get acceptance, is it? That's actually contemplating another sale to someone else.

MS SCHOLTENS QC:

Well, look, what they wanted was to have this land. I mean, they offered to the Pamments, after the Pamments bought the land, and it's in the – evidence is there, but if they could have a right of first refusal once their family, once they were selling it outside the family, I mean, they also asked for one of the five farming properties, but, you know, so they're prepared to wait, in this for the long haul, but the resumption system isn't going to work for them and unless they get to purchase it when it's on the market…

O'REGAN J:

Well, I'm just trying to get a clear understanding of what you say Landcorp's actions deprived them of. What did they contemplate they would have got if there hadn't been any what you say is untoward conduct by Landcorp or OTS?

MS SCHOLTENS QC:

Well, I think – I'd say that perhaps the best way of putting it is to be treated consistently with what, how Ngāti Makino was treated, so a right of first refusal at 19.035 million, which is what they had.

ELIAS CJ:

Well, we don't know whether Ngāti Makino had that.

ARNOLD J:

Well, no, no, the board minute records –

ELIAS CJ:

The board –

ARNOLD J:

– to give Ngāti Makino the right of first refusal to purchase at or above the market price as determined by the current tender process.

ELIAS CJ:

Right.

ARNOLD J:

So that's the board decision.

MS SCHOLTENS QC:

Yes.

ARNOLD J:

And that's what you're asking for?

MS SCHOLTENS QC:

Yes.

O'REGAN J:

So does that 19 million, what Justice Arnold said, that's the –

MS SCHOLTENS QC:

Yes. That would – yes.

O'REGAN J:

So you're saying what Ngāti Makino had was the chance to buy for 19 million?

MS SCHOLTENS QC:

Yes.

O'REGAN J:

But your –

GLAZEBROOK J:

Well, at or above the market price –

ARNOLD J:

That's what it says, yes.

GLAZEBROOK J:

– so we don't know what the actual price it was offered to Ngāti Makino was because it's redacted.

MS SCHOLTENS QC:

Yes. Well, it says a right of first refusal too so at or above the market.

GLAZEBROOK J:

But we don't know what the price was that was offered to Ngāti Makino –

MS SCHOLTENS QC:

No.

GLAZEBROOK J:

– because it's redacted?

MS SCHOLTENS QC:

No. We're assuming it was the 19.035.

O'REGAN J:

Which is a fair assumption given that the market had just determined that's what it was worth.

MS SCHOLTENS QC:

Yes, yes.

ELIAS CJ:

Well, perhaps that could be confirmed anyway.

WILLIAM YOUNG J:

And a right of first refusal would imply that?

MS SCHOLTENS QC:

Yes, that's right, yes.

ARNOLD J:

So you say that as at sometime in 2013 your people had an agreement from ANZ to lend 13 million?

MS SCHOLTENS QC:

Yes.

ARNOLD J:
So on that basis they needed to raise another six point something or other?

MS SCHOLTENS QC:
Yes, and you'll see when they're talking with Ngāti Awa there are reasons why Ngāti Awa works for them and their long-term objective is to own all the land themselves and that's because of what it means to them.

That's – I cannot underscore that too much, that this is about their links with this land.

O'REGAN J:
Does your client accept that Ngāti Makino also has some rights or some affiliation with the land?

MS SCHOLTENS QC:
I'm not sure whether they accept that or not, Sir. But I think everybody seems to accept that, that we have, that Ngāti – that we, the iwi, have the, Ngāti Whakahemo has the mana whenua, and the Crown has accepted that we have a valid claim.

ELIAS CJ:
Yes, sorry, we interrupted you. Where were you going next?

MS SCHOLTENS QC:
The second of the Court of Appeal's, we say the error was the test for bad faith and this begins at page 11 of the submissions.

So the Court of Appeal's test was at paragraph 78 of the judgment but it's set out in paragraph 39 of the submissions there, that the decision maker was motivated – "The plaintiff must prove the decision maker was motivated by ill will, dishonesty or fraud towards the plaintiff and also that it knew what it was doing was unlawful." And the Court of Appeal's view is that that second limb, that it knew what it was doing was unlawful, is a necessary requirement of bad faith.

ELIAS CJ:
Sorry, what para are you referring to?

MS SCHOLTENS QC:

What paragraph of the –

ELIAS CJ:
Of your submissions.

MS SCHOLTENS QC:
– Court of Appeal's?

ELIAS CJ:
Your submissions.

MS SCHOLTENS QC:
78, I've written down.

ELIAS CJ:
Your submissions.

MS SCHOLTENS QC:
Of my submissions? 39.

ELIAS CJ:
Thank you. I'm sorry, I thought you said 11.

MS SCHOLTENS QC:
So we've submitted that there's no universal test for bad faith in judicial review and that it was – but it's certainly wrong as a general proposition to say that bad faith necessarily involves the decision maker knowingly acting unlawfully.

In a footnote to the Court of Appeal judgment at 63 it cited seven review texts which it said were in support of this bipartite test for bad faith, and we submit that on analysis only one text, and that's *Taylor's Judicial Review*, comes close to supporting that proposed test, and Taylor really focuses only on the second part of the test, that it knew what it was doing was unlawful.

It cites *Roncarelli v Duplessis* [1959] SCR 121 as a proposition, and this, of course, is a claim for damages, not an application for judicial review, and none of the other

texts that are cited by the Court of Appeal suggest the decision maker must know that it is acting unlawfully.

So, of course, like most of the cited cases, including *Roncarelli*, most, the context is important. *Roncarelli* is damages, misfeasance, and the others don't support the two limb test.

ELIAS CJ:
Well, it was an improper, an early, improper purpose –

MS SCHOLTENS QC:
Mmm, yes.

ELIAS CJ:
– case, wasn't it?

MS SCHOLTENS QC:
Yes, it was.

ELIAS CJ:
So a breakthrough decision in its time but one would think that it was odd to see it cited really except as part of the history of –

MS SCHOLTENS QC:
Yes.

ELIAS CJ:
– of judicial review.

MS SCHOLTENS QC:
I think there is a real, real difficulty with bad faith and judicial review. It hasn't – it's not a common – it's not something you see commonly and it has been a label for all sorts of different behaviour, such as improper purpose. So in terms of finding a test for it, we submit that it is difficult to look at the texts and certainly to find support for a test that must have those two limbs.

GLAZEBROOK J:

Can I? I can't see how the bad faith has anything to do at all with not being given the same opportunity at Ngāti Makino.

MS SCHOLTENS QC:
The –

GLAZEBROOK J:
And you're saying that that was what was lost?

MS SCHOLTENS QC:
The bad faith though is about the actions of Landcorp that prevented us or made us believe that we didn't need to go to Court to seek an interim order, and if we had gone to Court to seek an interim order we don't think it's difficult to perceive a situation, particularly with what actually happened after the contract was signed where the Court might be prepared to sort out this issue of whether we've got a claim before the contractor is settled. So if we had that opportunity we think we would have been able to do what we want to do which was sit down and negotiate for the farm.

GLAZEBROOK J:
So there isn't a direct challenge to not being part of the Ngāti Makino, however that might have been worked out between the two iwi in terms of who took the lead?

MS SCHOLTENS QC:
No, no, we didn't sort of know what was going on when Landcorp had that discussions with Ngāti Makino until we were told, you know, we're not going to deal directly –

GLAZEBROOK J:
Well isn't the obvious challenge there was a mistake about our Treaty claim having been settled. Because there was that mistake about the Treaty claim having been settled we weren't given the opportunity that we would have been given quite clearly to do the same as Ngāti Makino whether, how they would have sorted out who took the lead or whether there would have been a lead in that case but that's not a challenge that's made and you're not challenging the protocol.

MS SCHOLTENS QC:

No we are challenging, we do raise that there was an error of law which infected the decisions that were made.

GLAZEBROOK J:
So the second one but you're not working on the protocol and any right that Ngāti Whakahemo might have had to be consulted because of their extant Treaty claim?

MS SCHOLTENS QC:
Whatever went on with Ngāti Makino had nothing to do with the protocol, so that was a very, that was a separate thing.

GLAZEBROOK J:
No, no, sorry, I was just checking. You said before that you're not challenging anything under the protocol in terms of your client?

MS SCHOLTENS QC:
No.

GLAZEBROOK J:
So the only challenge – but you are challenging, if I now understand the right of first refusal, is having been infected by the error of law?

MS SCHOLTENS QC:
That's one of the things.

GLAZEBROOK J:
Or error of fact I suppose it's –

MS SCHOLTENS QC:
Yes, what we've, I suppose we have, we've said there's an error of law in the –

ELIAS CJ:
It's a very strange use of error of law. I must say it seems much more like mistake of fact to me.

MS SCHOLTENS QC:
Well it was an error of law because they misunderstood the legislation.

ELIAS CJ:

Well, yes, it was a wrong understanding of the law but it was – everyone proceeded on the basis of the mistake in fact –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– that the claim had been settled.

MS SCHOLTENS QC:

Yes, well I think , you know, it does, it does perhaps fit more comfortably, it looks like a mistake of fact but it is also a mistake of law because every time you tried to, every time, you know, the argument was put, "This is what the law says," they would say, "No because here's your name on this page."

ELIAS CJ:

Well you're in much more controversial territory though if you're in mistake of fact because then we need to consider *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) and all of that.

MS SCHOLTENS QC:

That's right, yes.

GLAZEBROOK J:

Well the settlement was enshrined on law and the mistake of law I suppose you could say based on the mistake of fact was that it was part of that.

MS SCHOLTENS QC:

Well I mean my learned friend for Landcorp's argument is that Landcorp is under no obligation to get the law right when it decides to contract and presumably he would say even more so than not under an obligation to get the facts right. But we say this wasn't a simple decision to contract and the context is one in which Landcorp before they do what they were planning to do which was pass public land into private hands because they didn't need it anymore. They ought to have taken into account an iwi

that was putting its hand up saying, “Look this is, we really, this is really important to us, really, really important.”

So I think the test for bad faith is important because of the way the Court of Appeal has essentially found on the facts that there was, you know, misleading conduct but on the law said it didn't reach the standard.

ELIAS CJ:
Really what’s being put to you, I think, by Justice Glazebrook, is why is it material? I don't have too much difficulty I think in being concerned about the approach that the Court of Appeal has taken to bad faith or what’s required in this area, but we're still, I'm still struggling to see how material it was.

MS SCHOLTENS QC:
Well if you're talking simply about those few email exchanges.

MS SCHOLTENS QC:
Yes, and we are. That is all – in terms of how material it is if it had never happened, well, I don't want to start speculating but before we knew about it we were focused very much on the misunderstanding but once –it is important because it did prevent us from getting an opportunity to do something about this and we could have gone to Court for interim orders and would have if we hadn't had a meeting scheduled where we thought we were able to negotiate. So in terms of if the contract – if now we're stuck with the argument that, sorry, there’s a contract and you've got no rights and the Court can't do anything, which is what we're facing, well we say that there is, the contract was vitiated by bad faith but, yes, that's, again that's –

ELIAS CJ:
So does that mean when I asked you originally about detriment and we started off by saying the inability to go to Court and then I think you rather expanded it. We've contracted again, it's the loss of the inability to get an interim injunction –

MS SCHOLTENS QC:
In term –

ELIAS CJ:

– that is the detriment in terms that aspect of, leaving aside any objective basis for review of the actions anyway, but if we're just concentrating on the exchange of emails and the misleading impression they conveyed, the only detriment arising out of that was the inability to go to Court and get an interim injunction, is that right?

MS SCHOLTENS QC:
And I'd say one more thing and that was the ability to do what we thought we were being invited to do, which was sit down and negotiate, put our best price on the table before the land was sold.

WILLIAM YOUNG J:
Are there examples where contracts have been set aside for bad faith as opposed to the jurisdiction being discussed? What's the best case or clearest case?

MS SCHOLTENS QC:
Not for bad faith, not that we've found.

WILLIAM YOUNG J:
So there are no cases where the contract of a public agency has been set aside on the basis of that faith?

MS SCHOLTENS QC:
Now having said that we have cited some in our submissions, or have we?

ELIAS CJ:
It must be available, one would have thought, if it were bad faith to enter into the contract, if there was some ulterior and non-legitimate end being pursued by a public authority.

MS SCHOLTENS QC:
Yes.

ELIAS CJ:
Some ruinous contract perhaps –

MS SCHOLTENS QC:
Yes.

ELIAS CJ:

– or something like that, one would have thought that the supervisory jurisdiction would extend that file, but –

MS SCHOLTENS QC:

Mmm.

ELIAS CJ:

– this is not quite that sort of case, is it?

MS SCHOLTENS QC:

No, and –

WILLIAM YOUNG J:

So is there a case you think you can identify?

MS SCHOLTENS QC:

No, no, there's not, Sir. I have got – in the submissions we do refer to some authors.

WILLIAM YOUNG J:

You refer to a number of cases, of which I've looked through some, and I've looked through some of them, but I couldn't find a case where –

MS SCHOLTENS QC:

Yes. No, in terms of bad faith we've referred to some authorities in…

ELIAS CJ:

Where are those referred to again, I'm just wondering…

MS SCHOLTENS QC:

Paragraphs 136 to 138, and when I say "authorities" I mean…

ARNOLD J:

What about cases of tender processes that are not run properly and…

MS SCHOLTENS QC:

To process contracts, do you mean?

ARNOLD J:

Well, it could be, but if there is a tender process that is infected by impropriety in some way, what do the Courts do? Do they leave the successful tenderer holding the tender or do they intervene?

WILLIAM YOUNG J:

Probably a claim for damages for breach of the process contract, isn't it? Was that what *Pratt Contractors Ltd v Transit New Zealand* [2005] 2 NZLR 433 (PC) saw? I can't remember.

ARNOLD J:

Well, it might be, yes.

MS SCHOLTENS QC:

We've got –

ELIAS CJ:

Do we have Aronson and Groves in the materials we've been given?

ARNOLD J:

Yes, they're in there somewhere.

ELIAS CJ:

I meant to check that.

MS SCHOLTENS QC:

They've got – I have cited three cases – I'm sorry, just jumping around the submission – where other grounds for review have been made out. They've set aside contracts. But not, not where bad faith has been a – so those are cited in the submissions from – deal with them when I get to remedy. So 139 to 148, and then in New Zealand the 151.

ELIAS CJ:

Sorry, can you just point me to where I find the Aronson and Groves material?

MS SCHOLTENS QC:

Tab 22. Tab 22, volume 2.

ELIAS CJ:

Thank you.

MS SCHOLTENS QC:

Sorry, 20.

GLAZEBROOK J:

Is that of the respondent's submissions or…

MS SCHOLTENS QC:

Yes, these are from…

ELIAS CJ:

Sorry, whose?

O'REGAN J:

Tab 20, I think it is.

ELIAS CJ:

Respondent's submissions, is it? This is all about company law in the appellant's one.

GLAZEBROOK J:

Yes. No, that's what I've got as well.

ELIAS CJ:

Anyone know the reference?

MR ORPIN:

The respondent's volume 2, tab 20.

ELIAS CJ:

Sorry? It's volume?

MS SCHOLTENS QC:

Volume 2, yes.

MR GODDARD QC:

In volume 2 of the respondent's authorities under tab 20, Your Honour.

ELIAS CJ:

Thank you very much. 5.470? It doesn't seem to have 5.470 there. All right, it doesn't matter. That's the only excerpt that we have, is it?

MS SCHOLTENS QC:

I'm sorry, we're just looking – where are you looking?

ELIAS CJ:

Well, I'm looking at your footnote.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

235, which cites Aronson and Groves at para 5.470. You don't have that?

MS SCHOLTENS QC:

No, I'm sorry, Your Honour, we don't.

ELIAS CJ:

And so in referring to – in your answer to Justice Young, what are the cases you're relying on?

MS SCHOLTENS QC:

Now Justice Young asked about where bad faith is established so –

ELIAS CJ:

I was going to raise whether *Wheeler v Leicester City Council* [1985] AC 1054 (HL) was in this sort of territory because that was a licence, wasn't it? Well, it was a contract really, wasn't it?

MS SCHOLTENS QC:

Yes, well other cases where contracts have been set aside start – my submissions are 139 through to 151.

ELIAS CJ:

Yes, thanks.

MS SCHOLTENS QC:

So can I perhaps – I won't go through the test submissions in terms of bad faith, I think, just to indicate that it's clear from the cases that the test will depend on the context but we would say there is a good analogy with private law and in paragraph 44 referred to a article from Justice Kós writing extrajudicially and that article is at tab 23, where he talks about the – how the Courts control the exercise of contractual power when it is exercised arbitrarily, capriciously or in bad faith and he says that it's clear that we do this on a context-centric basis, the need to preserve sufficient flexibility and he notes that in this respect at least there is a direct analogy with public law. And so we would say although private law takes a context specific approach to bad faith there doesn't appear to be any suggestion that bad faith in contract necessarily involves knowingly wrongful conduct, it appears more to be equated with lack of honesty, et cetera. So we say if the context-centric approach is appropriate in private law it should be to, at least equally appropriate in public law. And so we say the real issue, we say, for the Court is at paragraph 47 is what bad faith as a ground of review requires in this context. And so we then go on to look at the context, factual context, what does it mean? Best of all the broad context being this, a state-owned enterprise selling Crown land, public land out of public ownership to private interest and refer to Professor Bailey's observations that such organisations doing such things ought to be, there's still important that they act in the public interest and, similarly, Justice Finn in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; 146 ALR 1. And at 51 I'd submit that these observations apply to Landcorp note section 41(c) of the Act which requires it to exhibit a sense of social responsibility in its statement of corporate intent which requires it to act honestly and with integrity.

Then the more specific context in this case is really four things. First, there's a proposed sale taking place in these circumstances, first, where Ngāti Whakahemo was asserting that it had an extant Treaty claim to the land. Secondly, that the Treaty Settlement Office advice was that the claim was settled and that was wrong

as a matter of law and fact and, third, Ngāti Whakahemo had indicated that it intended to go to Court to seek interim orders preventing the sale if it's concerns could not be resolved. So those are three important matters in context, and the fourth one which is particularly relevant is that the sale of the land would introduce a third party into the picture and perhaps the difficulties that having a contract in place might bring to the whole issue. So that's the context and we say at 54 that in these circumstances we submit that if Landcorp was going to push ahead with the sale of the farm to Micro, it was at least incumbent on it not to mislead the iwi about this fact. We certainly would have preferred if it had been more open and had indicated, "Yes, we are going down this track," but it did not say anything. And we say it's not acceptable for a public authority to mislead a party in the iwi's position, particularly when the effect of misleading will introduce third party interests which could be raised to limit the relief available. In this context, misleading conduct will be bad faith, we say. So that's our first – we say the first test is if it's misleading. In this context, it's bad, it – that qualifies as bad faith.

Would that be a convenient time, Ma'am?

ELIAS CJ:

Yes. How do you think you're going, Ms Scholtens?

MS SCHOLTENS QC:

I am – I always knew I would have a lot to cover, and I do have a lot to cover, but I will aim to be finished so that Mr Andrew can speak by about 2.45, three. That's going to be the – I'm not doing very well in terms of how much longer I've got but –

ELIAS CJ:

No, that's all right, and so the appellant's case, is that going to be completed today, the arguments?

MS SCHOLTENS QC:

That's the idea. We thought that we should be doing that.

ELIAS CJ:

Yes, all right, that's fine. Thank you. We'll take the adjournment now.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.18 PM

ELIAS CJ:
Yes, thank you, Ms Scholtens.

MS SCHOLTENS QC:
Your Honour, in terms of timing, I had a discussion with my learned friends and I think they are of the view that if we go till the end of the day today, that's – they will be taking all of tomorrow, and so if I would need, say, half an hour in reply would there be a prospect of the Court sitting late tomorrow or alternatively –

ELIAS CJ:
We can't sit late tomorrow –

MS SCHOLTENS QC:
– or alternatively perhaps today.

ELIAS CJ:
– I don't think. I'm speaking at the University. I just can't remember what time it is.

MS SCHOLTENS QC:
All right.

ELIAS CJ:
I'll have to check that.

MS SCHOLTENS QC:
Thank you, Your Honour.

ELIAS CJ:
So we may have to tip into Wednesday, if that's…

MS SCHOLTENS QC:
Your Honour, Madam Chief Justice asked about the area of the claim earlier this morning. To confirm that, the best explanation is really in the interim judgment at tab 6, paragraphs 65 to 78, where His Honour explains the claim and deals with the

submission made in the High Court that only a small part of the farm fell within the scope of it, and he explains that and the farm is clearly within the claim.

ELIAS CJ:
Sorry, at para 56, did you say?

MS SCHOLTENS QC:
65 to 78.

ELIAS CJ:
Thank you.

MS SCHOLTENS QC:
Then on the question of the detrimental prejudice that has been suffered by the iwi, if we look first at the error of law and second at bad faith, the materiality of the error, of the detriment suffered from the error of law, it's set out in paragraph 87 of the submissions. If I could ask you to have a look at that briefly. So that's in the submissions under the error of law heading, and in the outline it's paragraph 4.3. And this is where we set out that if Landcorp had known that we did have an extant claim, we say they would not have sold to Micro, and the evidence that we say supports this is listed over in the next page and into the following page.

So there's the evidence of Mr Pamment who said that he'd been told by Landcorp it wouldn't enter into an agreement if it thought Ngāti Whakahemo had a credible claim. (b), The fact that Landcorp took advice from OTS even though they knew that this land wasn't within the protocol, they still went back and said, you know, "This is what we've been told," so they were interested in the fact and status.

Then, thirdly, of course, the fact that the tender was cancelled for Makino and that opportunity given to them. Then at (d), Landcorp's board acted on the advice that and confirmation that there were no Treaty claims affecting the land.

And then at (e), after the tender was cancelled Landcorp had expressed willingness to assist Ngāti Makino with bridging finance or engage in some sort of longer term partnership, and we say if Landcorp had appreciated Ngāti Whakahemo's true status earlier, it would surely have treated it in a similar way.

And at (f), well, there's no evidence from Landcorp that it would have proceeded to sell even if it knew that the Treaty claim had not been settled.

And then at 88 we say in light of the Crown and Landcorp's treatment of Ngāti Makino, it seems highly likely that but for that error of law the Crown and Landcorp would have given Ngāti Whakahemo an opportunity to purchase Whārere along the same lines as they gave Ngāti Makino. If they appreciated that the claim was not settled, there would be no basis for treating it any differently.

So in terms of the detriment, we have the materiality of the error, Landcorp we say would not have sold if they had known about this error. What kind of opportunity would we have been given? Well, we say the best evidence is that that was offered to Makino. That's the best evidence of what we would have got if they hadn't been labouring under an error of law. And then – and, of course, Makino's claim had been settled.

And 1.3, the knowledge of the error, sorry, the third point here, is that the knowledge of the error came too late and Landcorp had entered into the contract of sale already. So that was a detriment.

And then if you turn to the bad faith, as a result of the conduct that we say constitutes bad faith, we were persuaded not to go to Court for interim orders. The effect of that was by the time the error of law was acknowledged by the Crown a contract was in place, whereas if we'd been able to go to Court and had got interim orders, likely would have accepted there'd been an error fairly shortly thereafter as is what happened and Landcorp would have been in a position to treat us as it treated Ngāti Makino. It wouldn't have been bound into a contract.

So in this way the bad faith is materially linked to the contract and the prejudice that was suffered. It induced the delay in going to Court and the contract came into existence in the meantime.

So that's just to summarise the detriment point.

So now I just return to the submissions in relation to bad faith and the test in particular, and I won't spend long on this. We are at paragraph 55 of the submissions, on page 14, and have just submitted that misleading conduct should be

sufficient for bad faith in the circumstances, but at 55 it's submitted in the alternative that if dishonesty is a necessary element of bad faith then it's appropriate not to do what the Court of Appeal did but – which was an objective test – but to adopt a combined subjective/objective test. So assess what the person in question actually knew, the subjective part, and then ask whether in light of that knowledge an honest person would have acted in the same way. So the objective element.

And then the submissions refer by analogy to the approach of accessory liability in equity for dishonest assistance, reference to the *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) case and the approach that's, effectively is the same approach as is taken in New Zealand under *Westpac New Zealand Ltd v MAP & Associates Ltd* [2010] NZCA 404, [2011] NZLR 90. And at 57 submit that it's appropriate to adopt the same approach in judicial review and say for two reasons. First, in judicial review the Court's task is to supervise the exercise of public power and in that context it's not open to decision makers to set their own standards of honesty, so should be objective standards. And, secondly, evidence in judicial review is usually given by affidavit without cross-examination and the Court must necessarily make an objective assessment. It's difficult to see how a plaintiff could ever establish the Court of Appeal's test for bad faith in those circumstances. It simply invites decision makers to do what Landcorp has done: file no evidence and argue that the plaintiff has not met an impossibly high test.

So that's dealing with what we say the test for bad faith is, and then turning to the application to the factual context, 3.3 of the outline and starting at 58. So we say whichever approach is applied, both misleading conduct or dishonesty, that qualifies. So the misleading conduct is referred to in paragraph 58 and then the dishonesty or the two-stage test at 59.

First, what did Ms Houpapa subjectively know, and we say it's clear, over on page 16, that she knew, under four headings: Landcorp would be selling to Micro for 19 million, was not contemplating a sale to anyone else; any communications needed to be handled carefully in order to avoid setting an expectation that Landcorp was prepared to sell to Ngāti Whakahemo; thirdly, that Ngāti Whakahemo believed that it still had an opportunity to purchase Whārere by making an offer at the 7 March meeting, and then a reference to the significant evidence which supports that; and, (d), that Ngāti Whakahemo intended to apply for interim orders to prevent the sale if it could not secure the land commercially.

And then the second part of the test, at 60, you know, what would an honest person have done with that, and we say an honest person would not have given a figure of 23 million. It would have been apparent to an honest person that not explaining the full context would lead Ngāti Whakahemo to believe that it had an opportunity to purchase. An honest person would have said no such opportunity existed or that least not support that expectation. And I'm quoting from Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan,* "Honest people do not intentionally deceive others to the detriment and properly assessed, her conduct was not only misleading but also dishonest," and so we say bad faith is established.

Now just briefly note at paragraphs 61 to 67, the submissions respond to suggestions in the Court of Appeal at paragraph 94, page 157, that Ms Houpapa was operating, possibly operating under a misguided or a misplaced hope and in the High Court final judgment at 82, page 126, that she may have been inducing a gazumping offer and we say the Court is only in this position of having to speculate as to what her intentions were or reasons were because of the failure to make an affidavit.

So in the submissions set out at some detail why those assumptions or views can't be right on the evidence but if I can turn to the matter concerning her silence at page 20 and here the Court – we say that it's clear bad faith is made out but if the Court entertains any doubts it will have to consider the fact of her silence and the absence of an affidavit is telling for two reasons. First, it's submitted that as a decision maker subject to supervisory jurisdiction Landcorp was under a duty to disclose all relevant material to the Court and it has failed to explain what occurred and so in that case the Court may draw appropriate adverse inferences, and I won't take the Court to the Fishing Industry Association cases but I mean it talks not only about the ability or necessity really to draw adverse inferences but this is in the context of encouraging decision makers to be open with the Court to, as Sir John Donaldson, Master of the Rolls, said in *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 (CA) that all cards should be face upwards on the table. This information was in the decision maker's hands and while we have pro forma affidavits on exactly the same terms from five of the board members and from other members of Landcorp who say they don't know anything about what Ms Houpapa might have said, we have nothing from the person who could have answered the questions, nothing from Ms Houpapa or Mr Darden on this point.

Now we note that the Court of Appeal, while it accepted that it was appropriate to draw an adverse inference in the circumstances it in fact drew a positive one. So it's 72 of the submission note that it found the appropriate inference was limited to a conclusion that Ms Houpapa acted irrationally and untruthfully and we submit that is not an inference drawn from silence and it's an assessment of whether her behaviour was rational and a representation true. It's made on the documentary evidence, and the fact that the Court considered her behaviour was irrational, ie, inexplicable illustrates that it called for an explanation.

WILLIAM YOUNG J:
Well, I mean she hasn't got a particular – she can't have a very good explanation for it.

MS SCHOLTENS QC:
Well that's why you would draw an adverse inference.

WILLIAM YOUNG J:
Why do you – a most – a plausible interpretation is that she was perhaps trying to avoid a discussion. Finally a call was made. She's asked a direct question which probably she should have said, "I can't tell you."

MS SCHOLTENS QC:
Mmm.

WILLIAM YOUNG J:
But she's come up with the figures 23 million. Now if she – to the extent to which that implied that there was a negotiation that was available, well, she was acting well outside anything that she was authorised to do, in fact flatly inconsistent with it. Is there anything that she could say much beyond that? I mean, I know, and whatever she was going to say she was going to look pretty silly.

MS SCHOLTENS QC:
Well, I think the assertion that Landcorp has to respond to is that this course of conduct was designed to keep it at arm's length while they got the contract signed and hopefully avoid having to deal with interim orders.

WILLIAM YOUNG J:

The meeting was going to be after the contract was signed.

MS SCHOLTENS QC:

Yes, well, that's – yes, as it turned out.

ELIAS CJ:

But there is evidence that these, in that email chain you took us to, that she was acting with – after consulting the CEO.

MS SCHOLTENS QC:

Mmm.

ELIAS CJ:

And he had asked her to try and sideline Mr Te Aho.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

When was that in – I can't remember when that was in –

MS SCHOLTENS QC:

It was after the board's decision to enter into the contract with Micro Farms –

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

– but before the contract was signed.

ELIAS CJ:

So where do we find that? This is when he was talking about having a meeting –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– with the principals but it might be better if Mr Te Aho wasn't there, is that right? I wasn't particularly noticing as you went through but…

MS SCHOLTENS QC:

87. 87, thank you. Yes, so the Chief Executive's email at the top there.

ELIAS CJ:

"Best to try and cut Willie out of the process," and earlier, "You can better position the meeting the right way and not set an expectation that we are meeting to negotiate."

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

"You can because the contact was made to you." So just not sure really what all of that means.

MS SCHOLTENS QC:

No, and again we've got no explanation.

ELIAS CJ:

But certainly the contact, the email contact, was forwarded on to him and –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– he's responding so he knows that this is all going on.

MS SCHOLTENS QC:

Yes, and the board has indicated, the board knows that Ms Houpapa and Mr Carden –

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

– are going to meet. They –

ELIAS CJ:
Yes.

MS SCHOLTENS QC:
– meet with them.

WILLIAM YOUNG J:
But with the riding instructions it's not to be a negotiation?

MS SCHOLTENS QC:
Yes. See, I mean, the simple point I wish to make –

WILLIAM YOUNG J:
I mean, so I know, and, I mean, this sort of raises an issue that can be addressed in many ways, but to what extent is what she says to be attributed to the board as a – in terms of the topic of its decision making and the public law function it was carrying out?

MS SCHOLTENS QC:
I think it must be. I mean, she has actual authority to liaise with Ngāti Whakahemo and she certainly has ostensible authority too.

WILLIAM YOUNG J:
Well, she wouldn't have ostensible authority. She's just a member of the board. She hasn't got any authority to commit Landcorp to anything.

MS SCHOLTENS QC:
Well, I think she's, she's setting up a meeting, I think she has authority to do what she's doing in that context.

WILLIAM YOUNG J:
But I'm talking about ostensible authority, responding to your comment about ostensible authority. I mean she's just a member of a board, a director, someone on the board of a corporation doesn't normally have ostensible authority to affect the way that corporation's legal relations with third parties are governed.

MS SCHOLTENS QC:

Well I think, yes, well she – perhaps I don't need to go further than she has actual authority in this situation. The board minute has authorised her to do this, well to do, not to do what she did but to liaise with Ngāti Whakahemo.

ELIAS CJ:

But he knows that this meeting that he wants to have set up is not going to, well, that it's not going to take place until the Friday. So to the extent that you're saying that she was – if she – everyone knows that it's not going to take place until Friday.

MS SCHOLTENS QC:

No the meeting isn't.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

Yes, that's right. But we didn't know there was going to be a sale.

ELIAS CJ:

So there’s not to be an expectation in the meantime that the meeting to negotiate but there isn't going to be anything to – well maybe it's not known that the agreement will be signed in that period, is that it?

MS SCHOLTENS QC:

No it's not, was certainly not known by us.

ELIAS CJ:

No, no, I meant by –

MS SCHOLTENS QC:

By her.

ELIAS CJ:

– and him.

MS SCHOLTENS QC:

Well he knows, he's doing the negotiating, part of it.

WILLIAM YOUNG J:

What, Mr?

MS SCHOLTENS QC:

Mr Carden did the initial –

WILLIAM YOUNG J:

But it's a funny sort of, I mean, it doesn't really look like a cunning plan to put your client off an interim injunction because it's really the final contact that you primarily rely on is almost accidental from the point of view of Landcorp, of Ms Houpapa.

MS SCHOLTENS QC:

The primary?

WILLIAM YOUNG J:

Well you rely on a phone call that Mr Te Aho made to her.

MS SCHOLTENS QC:

No, no we do more than that Sir.

WILLIAM YOUNG J:

I know you've got the earlier email that's slightly ambiguous but I don't –

MS SCHOLTENS QC:

But there are several – it's definitely not ambiguous. She is brought into this issue that this is going to be a negotiation on Friday and the sale price is 23 million. She's –

WILLIAM YOUNG J:

But isn't that, the 23 million is only mentioned in the telephone call, isn't it?

MS SCHOLTENS QC:

No it's confirmed in the emails that go to and from her.

WILLIAM YOUNG J:

I must have missed that, I'm sorry.

ELIAS CJ:

And the contemporaneous report –

WILLIAM YOUNG J:

No, so I'm not doubting what you said because it's certainly referred to in your reporting.

MS SCHOLTENS QC:

Yes but also in those emails. So it is a, we say it's a –

ELIAS CJ:

What did they think they would –

WILLIAM YOUNG J:

Sorry, where does 23 million mentioned in an email that crosses the line as it were? It's mentioned at 707 but that's from Mr Te Aho to his people.

MS SCHOLTENS QC:

I'm sorry you were right Sir, it doesn't cross the line between our people. It's mentioned in our email traffic between our people but not in email traffic that ends up in her –

WILLIAM YOUNG J:

So the worst thing apart from that that Ms Houpapa can be said to be responsible for is the email sent on the 1st of March. It's in the email chain at 689, it's actually, it's the originals of 677 but the first version of it.

MS SCHOLTENS QC:

Yes so that's the first one.

WILLIAM YOUNG J:

And I mean if that's still allowing, you couldn't really complain about it, could you?

MS SCHOLTENS QC:

Well it's what came after.

WILLIAM YOUNG J:

Yes, and that what came after is primarily the telephone conversation.

MS SCHOLTENS QC:

Yes and communications that indicated that they were working with the bank and their –

WILLIAM YOUNG J:

And she's not saying, "Well it's a waste of time."

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

I'm sorry, just looking again at the dates. Given 673, "We will accept December bid," what was there to talk about with the principals on Friday?

MS SCHOLTENS QC:

They had to talk through – I don't know Your Honour. It's only in these documents –

ELIAS CJ:

I'll ask Mr Hodder.

MS SCHOLTENS QC:

But they talked through the Ngāti Whakahemo issues and they, there were some amendments to the sale and purchase agreement and then there were some extra terms that they were concerned about. Perhaps, it seems from Landcorp's prospective the Friday meeting may have been to give us the bad news, not to negotiate with us.

ELIAS CJ:

To air their concerns?

MS SCHOLTENS QC:

That's what the –

ELIAS CJ:

To listen to their concerns?

MS SCHOLTENS QC:

Yes, well that's what it said earlier, yes. but it was very plain that, with Ms Houpapa that we understood we were given a chance to make a commercial offer. So in any event the submission that I'm making at this point is simply about drawing adverse inferences from the lack of information and an indication that Landcorp have not put all the cards on the table. These, this is judicial review, these matters were pleaded, there is evidence that supports the allegations that were made. Both Courts have found that Ms Houpapa behaved in a, acted irrationally and untruthfully. No one was, both Courts have tried to second guess why that might have been. If she'd made an affidavit they wouldn't have had to do that. And surely in judicial review, even if the news is bad, I guess, well you do run the risk, don't you, if you don't make the affidavit then that, inferences have to be adverse.

So I want to move off bad faith and onto the reviewable error of law that the claim had been settled which begins in the submissions at 22. And we made the submission here that but for, this is at 79, but for the Office of Treaty Settlements error, Landcorp would not have entered into a contract to sell Wharere to a third party. If it had known of the interest it is likely t would have given Ngāti Whakahemo an opportunity to purchase Wharere like the opportunity it gave Ngāti Makino. Now I think I took Your Honours just earlier this afternoon to paragraph 87 which sets out how we come to that submission and we say that the error tainted Landcorp's decision to sell, that was the source of the error, and it provides an independent ground for reviewing that decision to sell. Then we have summarised the lower Court judgments. At 84 we note it is only the 19 November advice that is an issue on this appeal. Other decisions are moot. But we say that this is justiciable for the reasons given above, and if I could just, if we could go to paragraph 28, which is on page 7, why we say this is justiciable. So Ngāti Whakahemo's interests are protected. Obviously it had an interest in ensuring the decisions that were made, understood the legal status of its claim, and it's appropriate for the law to recognise that interest through judicial review because, and it set out a number of reasons there. This is, I think, important because my learned friends argue that judicial review does not have this reach. So there is the attempt to secure return of land lost in breach of the Treaty, and that's an interest that is particularly worthy of protection by the Courts we say. It was of real value if the parties that understood the claim wasn't settled, it is

unlikely the land would have been sold to private interests. We would have likely got the same opportunity Ngāti Makino got. This opportunity to purchase is likely to be the only way that we will be able to secure the return of the iwi's traditional land. The Crown's ruled out using it to settle the Treaty claim. Resumption is not a realistic prospect. Tribunal's never made a contested – order for the return of land. There's Mr Ririnui's evidence and that point I think we referred to that earlier today. Then there's reference to a number of documents here. I won't take the Court back to them, I think we've already seen them, so it's an acknowledged error of law, and you've seen the various letters where Ngāti Whakahemo has tried to have its matter sorted out without success and with the Crown making no effort to engage with its analysis of the legal position under the Affiliate Act until after the judicial review proceedings were, in fact, issued. Now it accepts it.

Then at (e), this explains why we say section 9 is engaged in this situation because the Crown is the one that makes the assessment under its common law or prerogative powers, or section 9, that the principles of the Treaty are relevant. OTS was asked to and did give advice to Landcorp about the claim. It was given in the context of Landcorp's plan to sell. Was sufficiently connected with the Crown's ownership of Landcorp and the proposed sale of public lands into private hands to engage section 9 we say. In any event given the broad constitutional nature of section 9 it doesn't matter that the advice was not given under any particular provision of the SOE Act. The principles are also relevant with the Treaty to prerogative and to common law powers.

And then at (f), on page 9, we say, "OTS acted inconsistently with the principles of the Treaty of Waitangi in giving its advice to Landcorp." Refer to the duty to act reasonably and in good faith. Duty of active protection. "It has been held that good faith calls for an honest effort to ascertain the facts and to reach an honest conclusion." In the present case the Crown acted contrary to those obligations we say. Neither the office nor the Minister responded to the substance of the explanation by Ngāti Whakahemo's lawyer as to why the claim wasn't settled. No attempt to ascertain the status of the claim, instead just a short assertion that the claim was settled.

And then finally we say well this is a question of law too and it's the central constitutional role of the Court to rule on questions of law. Of course this question

has, everybody agrees what the answer is, but we're still looking at the impacts of the error on what followed or what took place at the time.

So turning, going back then to page 23 – no, we've been there sorry, that's not – the significance of the error then on page 25 at 89 there's a reference to some of the further outcomes of the error and we say it tainted all the subsequent decisions but at each step when Landcorp and the Crown were considering how to deal with Whārere and Ngāti Whakahemo their decisions were made on the incorrect basis that the claims were settled, and because of that belief it appeared that they perceived the iwi as something of a nuisance and this may explain their actions in keeping Whakahemo at arm's length, including, and then a list there of decisions against, we say, the iwi's interest. So the Crown didn't invite it to this meeting of representatives to discuss the concerns about Whārere. Nobody notified Whakahemo that Ngāti Makino and other iwi as agreed by Ngāti Makino had been given a right of first refusal, which right expired on 28 February. So they didn't know about the time limits. They didn't know that the tender had been simply postponed rather than cancelled, or suspended rather than cancelled. The Landcorp's decision not to deal with Ngāti Whakahemo during the period between cancellation and the 28th of February deadline, and in – compare it – compared with its actions to Ngāti Makino, and then the Crown meeting on 17 February with Landcorp and Ngāti Makino to discuss proposals for Ngāti Makino to purchase Whārere, and we haven't been further to that but that's affidavit of Ms Fletcher for the Crown.

In short, the error of law tainted everything that followed, culminating in the decision to sell, and not just the decision to sell, culminating into, in the removal of the land from public ownership.

Then at 91 of the submissions, referring to the error being adopted by Landcorp and tainted its contract. I think we have discussed that.

At 94, addressed the position relating to *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 (PC). The Crown argues that Landcorp's decision to sell was a commercial decision and that following *Mercury Energy* it can only be reviewed for fraud, corruption and bad faith. So this error of law is not a sufficient ground.

The submission there is quite simple really, that *Mercury Energy* doesn't go as far as my learned friends say it goes. They talk about all commercial decisions by SOEs, or *Mercury Energy* –

ELIAS CJ:
Well, that's really what the Court of Appeal had said so they're reinstating it if that's argued.

MS SCHOLTENS QC:
Yes, yes. And that's really – and they talk very much about contractual decisions in a particular, you know, context, so again context is really important, but other than that, I mean, the Privy Council referred – simply said the grounds for review, the *Wednesbury*, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA), grounds for review are available in principle but obviously there will be particular reasons why certain decisions by state-owned enterprises won't necessarily attract judicial review. No problem with any of that but we say this is a decision that can and should plainly attract the authority of the Court to supervise decision making by public bodies.

At 98, paragraph 98, we say why this is a proper question for the Court. So, first, it's not a commercial one, it doesn't require the Court to a second guess exercise of business judgement by the SOE. The status of the Treaty claim was something that Landcorp relied on OTS's advice. OTS itself was obliged to act in accordance with the principles of the Treaty. The question of whether the claim was or wasn't settled was one of a constitutional nature touching on the relationship between iwi and the Crown and we say ultimately the province of the Court, it's not Landcorp to determine. Review for error of law protects the aspirations of iwi. This is land which is of fundamental importance to it and at E we note that review for this type of error of law is not inconsistent with the successful business objective and note the section 4(1)(c) sense of social responsibility, et cetera. And it's proper for Landcorp to take into account the status of Ngāti Whakahemo's Treaty claim and indeed –

ARNOLD J:
I suppose it might have been under that particular provision in the sense of social responsibility that the board thought it appropriate to comply with the Minister's request and as it put it at the time, cancel the tender and give a first option to Ngāti Makino. I mean the only way one can fit that into the structure is if it was a good faith

assessment that this was part of exercising a sense of social responsibility in a particular context.

MS SCHOLTENS QC:
Yes, that could be the approach it took.

ARNOLD J:
Well can you think of any other way in which it would be consistent with the SOE Act to do what the board did?

ELIAS CJ:
Sorry, I missed the beginning of that, is that a section 4 question, your question?

ARNOLD J:
A section 4 question.

ELIAS CJ:
Yes, thank you.

MS SCHOLTENS QC:
I would be speculating but I would have thought, and there is some suggestion in the papers that working with Māori is part of Landcorp's business plan. So it's possible that they might see this, and they're talking about having a partnership with Ngāti Makino and, I don't know, farming the land for them.

ARNOLD J:
So along the term commercial objective rather than a social responsibility one?

MS SCHOLTENS QC:
Yes, yes, so it may have, I don't know, it comes within the commercial objective as opposed to the social objective but it is –

ARNOLD J:
Okay, thank you.

MS SCHOLTENS QC:

– possible for Landcorp to obviously make decisions that are not purely, that may not make sense purely commercially.

ARNOLD J:

Right.

MS SCHOLTENS QC:

So then I want to just turn to remedy at page 38. The Court has jurisdiction to set aside the contract. We've looking at a few paragraphs where I submit that the contract may be set aside where bad faith is established and I've referred to some writers who talk about that. But it does seem, you know, this is first principles. If contracts can be set aside at all then presumably they can be set aside for bad faith, I would submit, and at 139 the power to set aside is not limited to cases of bad faith. We argue that the Crown's sharp distinction between public law and private law isn't meaningful in this situation but the Crown's submission appears to be there is a Rubicon. Once there is a commercial contract that involves two parties then that, you've crossed the Rubicon, the judicial review cannot grant a remedy, it can't interfere with that. That appears to be the submission. And we say, we submit, no, the Court has a discretion and it's going to be a discretion that's obviously going to be exercised very carefully in the circumstances but we say there is a discretion. And we hope to persuade Your Honours that that is so with reference to a number of different areas.

At 142 we look at judicial review cases of exercises of contractual powers where you've got a decision not to contract, a decision to terminate a contract, decision to contract where the application for review is made before the authority formally enters into the contract and then at 143 submit there's no reason why the Court's powers to review and provide an effective remedy should cease once the contract is formally concluded, particularly where the contracting parties are on notice of a claim to public law interests of the appellant before they contract but decide to do so anyway. Of course this is that situation. Once a contract has been concluded the Court will have to consider the interests of the contractual counterparty. Their interests might mean that in the exercise of its remedial discretion the Court declines to grant relief, but the fact that the contract has been entered into should not automatically exclude review and remedy. If the contract is concluded but not substantially implemented, that's

one of the matters which we think we submit will go also to whether relief is appropriate, and that's the case here too.

Then there's a reference to the standard case of ultra vires and contracts not made in accordance with statutory required procedures. No problem setting those contracts aside so again the submission why should it be any different here. There's a reference to the judgment of His Honour Justice Collins in the *London & South Eastern Railway Ltd v British Transport Police Authority [*2009] EWHC 460 (Admin), which is at tab 7. We submit that provides a good example of setting aside the exercise of contractual powers and ask that the Court have a look at that. Then a number of other authorities on page 41 at 148, *R v Legal Aid Board, ex parte Donn & Co (a firm)* [1996] 3 All ER 1 (QB) is tab 14 in our authorities. The other two cases aren't, don't appear in the authorities.

At 149, just note that the UK, quite an interesting change there as a result of their participation in the EU and they have to have, they have the Public Contracts Regulations and they've had a form of these Regulations back since the early 1990s to comply with European Union law for awarding Government tenders, and they now provide that a concluded contract may not be set aside. The only remedy is a claim for damages. But there's got to be a notice, public notice of an intention to award a contract and a 10 day standstill period so if anybody wants to challenge the contract they have to do so within that 10 day standstill time and the Courts there have noted the effect of the Regulations is to turn third party rights which might otherwise simply be a factor going to the exercise of discretion into a bar to quashing the contract. So you've got to get in between, in the 10 days or otherwise you're barred. So that's the –

ELIAS CJ:
You say the latest version is 2015. What was the first?

MS SCHOLTENS QC:
I think it is, we did believe it was 1991, Your Honour.

ELIAS CJ:
Right.

MS SCHOLTENS QC:

I don't think the 10 day stand down was in it at that stage, that seemed to come in more recently that I can – I'll find that out and let you know tomorrow.

And I've noted in 150 where in Northern Ireland and Scotland where the standstill period is not observed, a concluded contract may be set aside in order to meet the European Union requirement to give an effective remedy.

And then of course in New Zealand, well we've had the *Minister of Education v De Luxe Motor Services (1972) Limited* [1990] 1 NZLR 27 and the *Diagnostic Medlab Limited v Auckland District Health Board* [2007] 2 NZLR 832 (HC).

ELIAS CJ:

I'm just trying to think of – are there *Webster* cases, in this area?

MS SCHOLTENS QC:

I'm trying to remember what they – I do –

ELIAS CJ:

No that's all right.

MS SCHOLTENS QC:

I'm not sure that they, yes, help us any. They're about, are they about the commercial decisions of being subject to review?

ELIAS CJ:

Well there were quite a few cases I think.

MS SCHOLTENS QC:

I'll check that too, Your Honour.

ELIAS CJ:

In the '80s.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Because England always was more austere –

MS SCHOLTENS QC:
Yes, that's right.

ELIAS CJ:
– about review in contractual areas.

MS SCHOLTENS QC:
Until they got Mercury Energy.

ELIAS CJ:
Well, yes, and I'm thinking of cases like *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 which of course we've never –

MS SCHOLTENS QC:
Yes, that's right, yes.

ELIAS CJ:
– been as strict about.

MS SCHOLTENS QC:
But I think here, you know, we submit that Landcorp can be seen as a public body not a private body, certainly in the special category but that doesn't take it beyond judicial review.

And then finally on page 43 we submit that there must be a remedy in this case and we submit that the contract should be set aside and Ngāti Whakahemo given an opportunity like Ngāti Makino did to purchase at the market rate. We accept that relief is discretionary at 156 and we note that against the prejudice that Ngāti Whakahemo has suffered the Court will need to consider the position of Micro.

O'REGAN J:
Are you looking for a chance to buy at 19 million or a chance to buy at today's market rate?

MS SCHOLTENS QC:

Well I think we'd obviously prefer today's market rate but I think we understand that, that if we're left with a19 million figure that's what we will be looking at.

O'REGAN J:
Well what are you asking for? What's the relief you're asking for? What order do you want the Court to make?

MS SCHOLTENS QC:
An order setting aside the contract and I think anticipate that that, given what we imagine you'll need to discuss in the course of coming to the remedy will indicate what's likely to happen next.

O'REGAN J:
So you're just asking us to set aside the contract and then leaving it to negotiation?

MS SCHOLTENS QC:
I think that's right, yes.

O'REGAN J:
Right.

MS SCHOLTENS QC:
So at 156A of the submissions as a reference to what Micro knew when it entered into the contract and the risks that it accepted, at clause 22 in particular, it's plain that it understood that if, that there was a possibility that agreement wouldn't be settled and if it wasn't settled they had a number of options and there is, they are set out in clause 22 and they speak for themselves.

Then at (b) this is a reference to the fact there was an interim judgment before Wheyland accepted nomination, that's perhaps neither here nor there. The funds it expended when it knew there was a very real risk, it elected to do so. It understood about, that there was a memorial, so there was always the possibility that in order for the Waitangi Tribunal –

O'REGAN J:
It was also told there was no claim so the memorial meant nothing, didn't it?

MS SCHOLTENS QC:

I –

O'REGAN J:

It was told that they didn't have a claim so why would it be worried about the memorial?

MS SCHOLTENS QC:

Yes, well that must be right, but the memorial was literally still on the title. Then Ngāti Whakahemo met with Micro's directors so that they, you'll see that there was evidence, and it's referred to there, of the sort of negotiations that Ngāti Whakahemo tried to carry out with Micro, which included effectively letting them farm the farms until their, until they wanted to sell them outside of family hands. And that would have given it an opportunity to avoid having the contract dealt with in the way that we're asking today. And we say there are no other factors that might warrant refusing relief and I'd ask if Your Honours would, with Your Honours' leave, if you'd hear from Mr Isac on the issues of the powers of the Ministers to direct State-Owned Enterprises. Unless there's anything I can assist –

GLAZEBROOK J:

We don't have anything to say that if the contract is set aside that your clients would be able to purchase. So why are we setting it aside on the basis that you have a chance to see whether you can?

MS SCHOLTENS QC:

I'm instructed to tell the Court that they can and there is, there is offers in the correspondence offer, when they found out, after the proceedings began, when they learnt what the real price was, that it was 19,000, they wrote to Landcorp and the Minister saying we can buy at that price but of course at that stage, nobody was interested in talking to us because they had a contract. So we can buy at that price.

GLAZEBROOK J:

Thank you.

ELIAS CJ:

Thank you Ms Scholtens.

MR ISAC:

May it please Your Honours, thank you. I'm just managing the paperwork which is a bit of an exercise in its own right. It is Your Honours will be aware I was going to address the Court in relation to the third ground of review, namely that the shareholding Ministers made an error of law when they determined that they had no power to intervene in the sale process concerning Wharere Farm. I'll be making four submissions in relation to that and just given time it may be helpful if rather than taking you through the written submissions I just really stick to the main issues. We can divert to the submissions if that's helpful but essentially the appellants say that the shareholding Minister could have intervened in one of three ways. Firstly, pursuant to section 7 of the SOE Act alternatively through what's variously referred to as the *Duomatic, Re Duomatic Ltd* [1969] 2 Ch 365, or the informed unanimous consent principle in company law, and alternatively through a constitutional amendment and my fourth submission will be that as a result of the misapprehension of the powers and intervention by the shareholding Ministers, they then failed to consider the more fundamental issue, should they intervene, and as a result of that Ngāti Whakahemo suffered real prejudice because had they chosen to do so there was still an opportunity for them to intervene before the agreement for sale and purchase came into existence.

In terms of factual and background I probably don't need to detain Your Honours at great length. It may be sufficient if I just identify the tabs in the third volume of the case which really set the scene. I think there are only really three critical communications. The first is volume 3 of the case at tab 89 and that's letter from Landcorp solicitors declining to provide or the initial indication that Landcorp could not provide the undertaking.

That then led, as Your Honours have probably seen, to a separate communication from Koning Webster, the solicitors for the iwi directly to the Minister for the Treaty of Waitangi negotiations and the shareholding Ministers which effectively renewed the same request for undertakings directly to the Ministers as shareholders and the response and perhaps I will take Your Honours to that. The response by the Ministers appears in the case volume 3 at tab 111 and –

WILLIAM YOUNG J:

Volume 3 at what tab?

MR ISAC:

Sorry Sir, it's tab 111 and page 750 of the bundle where The Honourable Chris Finlayson indicated that the shareholding Ministers shouldn't make the undertaking that the iwi sought, that's at the start of the second paragraph and then the third paragraph, "Intervening to provide an undertaking particularly when Landcorp have decided to, sorry, "declined to do so is clearly and consistent with the provisions of the Act." So that's the record, if you like, of the reasons for the decision that the Minister's reached.

So against that –

WILLIAM YOUNG J:

Your complaint is pretty tight on timing, isn't it?

MR ISAC:

It is Sir and I acknowledge that but not –

WILLIAM YOUNG J:

Isn't it a bit unrealistic because the request for the undertaking is given at – made about 6 o'clock at night, is that right?

MR ISAC:

That's correct Sir, about 6.20 pm, I think, the night before.

WILLIAM YOUNG J:

And the contract was finalised a bit after midday the next day.

MR ISAC:

That's right Sir.

WILLIAM YOUNG J:

So allowing times for two meals, a sleep and a chance to think about it, was there really time for the Ministers to intervene?

MR ISAC:

Sir, I really accept there wasn't a lot of time but if the question is, was there a sufficient period of time? In my submission there was. If you look Sir, at the bundle,

page 744A, that's under tab 108, and the reality, Sir, just to acknowledge your point that I think that you've made simply is that that letter isn't communicated until after the agreement for sale and purchase has come into existence. But at 744A which is I think the new page, Your Honours, that was provided today, you can see the internal email traffic between the various officials after the request for the undertakings was received and it begins on page 744B, really, at 8.15 am with an email by Ms Emily Richards for the SOE. So it's very clear that officials were onto it immediately and we simply don't have a record of when the decision is made and so that's not enormously helpful but what's reasonably clear from the exchange of the emails is not that there is some great debate going on about whether Ministers have a power and, if so, they should intervene but rather the focus is just on getting on with the reply and, in my submission, the likely inference to be drawn is that the answer is fairly obvious as early as 8.15 on the 5th of March. So perhaps just to round off the answer in my submission certainly not a lot of time but enough time to apply either for interim orders and enough time for Ministers to get on the telephone.

O'REGAN J:
But not to change the constitution.

MR ISAC:
Well, again Sir, how might that be affected, by way of a special resolution and if it were to be done in writing without the calling of a special meeting for that purpose, it could be done very rapidly –

ELIAS CJ:
Is that the way, you say constitutions are changed?

MR ISAC:
Ah –

ELIAS CJ:
Just ordinary Company Act stuff is it?

MR ISAC:
In my submission yes Ma'am. I mean that's one of the interesting issues which perhaps I, if that's the right opportunity, if I can come to section 7. So I'll put the next bundle to one side but I will probably be referring at various times to the Act and that

appears in the appellant's bundle of authorities which is the blue covered bundle under tab 1. Really I think the critical provisions, Your Honours, appears, and if you give me one moment, sorry, tab 2, page 40 to 3 of the bundle, top right-hand corner is paginated. There we have section 7, where the Crown wishes a State enterprise to provide goods or services the Crown and the State enterprise shall enter into an agreement under which the enterprise will provide the goods or services in return for the payment by the Crown for whole or part of the price thereof.

ELIAS CJ:

But what were the goods and services here?

MR ISAC:

Ma'am that's certainly an issue that my learned friend Mr Goddard raises. He says deferral of the sale of the property is not the supply of the service or a good but in my submission delaying the disposal of an asset is a service. A licence, an option, any of those matters would fall within the broad rubric of a good or service. I'm not in a position to assist the Court in relation to what the drafters thought of those three words "goods or services" but they look very similar to the goods and services tax legislation which takes a pretty broad compass Ma'am. So if the supply of land can be the supply of a good for tax purposes in my submission it's likely that the drafters of this legislation wouldn't have had an issue with that but in any event we're not necessarily having to go that far. We're simply saying if Landcorp needed to delay the sale of an asset which it felt no longer was commercial in its interests to hang onto, and there was an opportunity to us that might attach to delaying that disposal, it would have been a short delay because we were only looking at having the opportunity to make an offer and make a proposal but certainly that delay was a service for the purposes of section 7. Related to perhaps the second point, Ma'am, in answer to that question, Landcorp's own statement of corporate intent, it's not in the bundles but –

ELIAS CJ:

I was going to ask you that, if we have it.

MR ISAC:

I'll make it available Ma'am, I'm sorry, it's probably unhelpful for you not to have it but certainly the references provided, I think it's paragraph 106 of my written submissions –

ELIAS CJ:

What does it say? Is it set out in your 106?

MR ISAC:

It is, yes, it's page 29 of appellant's written submissions, paragraph 106. "As provided in section 7, the Crown wishes Landcorp to undertake activities or assume obligations which will have a negative effect, are a non-commercial, Landcorp will seek compensation. This includes compensation for retaining properties normally intended for sale but which might be required by the Crown. In that situation Landcorp Estates would seek redress for the full marketable value of any completed development unable to be sold due to such requirements."

ELIAS CJ:

Well what I'm interested in, well, maybe it's not something the parties are interested in is, is the protocol linked into this statement of corporate intent, is there a peg in the statement of corporate intent for the protocol?

MR ISAC:

My supposition, Ma'am, and it can only be that, is that the protocol looks very much like a section 7 agreement. In terms of the statement of corporate intent for Landcorp, there's certainly reference both in the 2013 and 2014 statements to the activities of the corporation and in that one of the activities noted, and this appears to be in keeping with her home, it's a section 14 but have the activities listed in the statement of corporate intent, Landcorp's 2013 statement provides that, "The business of activities of Landcorp over the next three years will be to optimise its farmland portfolio by selling non-strategic properties and land sought by iwi." So in my submission there might be some debate about whether or not section 7 only bites through a provision including the statement of corporate intent and in my submission it is not limited in that way but even if it were it seems clear that the statement applicable at the relevant time would have permitted the proposed activity, namely, deferral of a sale or at least looking at a sale to Whakahemo, Ma'am.

ARNOLD J:

Section 14 which deals with statements of corporate intent –

MR ISAC:

Yes.

ARNOLD J:
– and subsection 2(i) –

MR ISAC:
Yes Sir.

ARNOLD J:
– allows the statement of corporate intent to identify activities for which the board seeks compensation from the Crown whether or not the Crown has agreed to provide such compensation.

MR ISAC:
Yes.

ARNOLD J:
So it seems to contemplate that there might be things outside a section 7 agreement which nevertheless would not be conducted on a fully commercial basis and the state-owned enterprise is entitled to put that in a statement of corporate intent which the Ministers agree and then to seek compensation independently of section 7?

MR ISAC:
Yes Sir, I –

ARNOLD J:
Well it's just odd that because if it's section 7 there will be an agreement, won't there?

MR ISAC:
Well I'm not sure if there will be Sir, in fact while – I know that the section refers to an agreement and what I – it perhaps changes, it shows this section 7 works. We've got respondents who say, look, it just imposes some obligation to have a good faith in negotiation, there's no apparent compulsion in relation to the supply of the non-commercial activity. In response, Your Honours, it's my submission that section 7 works comfortably with the Act in this way. It does have a power of compulsion, the one thing that Ministers, the shareholding Ministers as members of the Government can ensure is that the Government's social objectives are met and where that requires access to SOE activities and assets they can direct it. What they can't do is

direct the SOE about what the price might be payable in relation to that. That is something which needs to be resolved and I think subsection or paragraph I of 14.2 Sir, it's interesting that it refers to compensation being sought from the Crown which has, in my submission, a retrospective connotation, not seeking an agreement in relation to payment but we've had to carry out an activity in respect of which we now seek compensation, and I think that's reinforced if you look at 13(1)(a) which defines the powers of the Ministers to determine what's in the statement of corporate intent and indeed the Ministers can direct anything to be included or omitted but not in relation to (i) and (j) and so in my submission that makes perfect sense of section 7 if it involves a requirement to supply the good or service with the ability of the SOE then to preserve its position in the statement having to be tabled in the house where it says, "Well we're being required to undertake this activity. We view it as non-commercial. We don't have an agreement yet with the Crown and the Minister will be accountable for that issue if in the house."

ARNOLD J:
Okay, thank you.

ELIAS CJ:
Again, perhaps it's not to you I should be directing this, but the protocol for Courts to replace a moratorium on sale of land that could be required for Treaty settlement purposes, how is that moratorium imposed?

MR ISAC:
That was in the form of a deed I think, Ma'am, it certainly –

GLAZEBROOK J:
Is that in the materials?

MR ISAC:
It is.

GLAZEBROOK J:
Is it the one just before the protocol?

MR ISAC:
It is, it is, tab 40.

ELIAS CJ:

Of what volume?

MR ISAC:

Sorry, volume 3.

GLAZEBROOK J:

So it's the agreement concerning Landcorp land protected from sale.

MR ISAC:

Yes.

GLAZEBROOK J:

And I'm assuming, I haven't had a quick flick, that this land is included in the total prohibition against sale?

MR ISAC:

It was, Ma'am, that's right.

GLAZEBROOK J:

It was.

ELIAS CJ:

And so this was a deed, an agreement entered into, what, between the shareholding Ministers pursuant to section 7 presumably?

MR ISAC:

Yes Ma'am, it certainly, the recitals refer to the SoE Act and in section 4 effectively at recital (b), I may be wrong but I don't believe there's any specific reference to the statutory underpinning for how this agreement came into existence, but it looks like a section 7 agreement.

ELIAS CJ:

Right, and then the protocol replaced it?

MR ISAC:

Yes. That's at tab 52. So perhaps I've moved around a little bit Your Honours in terms of the submissions I was proposing to make on section 7 but just to briefly recapitulate on the I think the key contest is between the appellants and the respondents. The Crown says, firstly, section 7 doesn't permit direction, it requires agreement, and I've dealt with some of that issue. Secondly, the Crown in particular says that deferral of a sale process isn't within the scope of section 7. It's not supply of a good or service and I think we probably covered that ground largely, Your Honours. Thirdly, the Crown says that whatever it is in section 7 it's not a mechanism to intervene in specific transactions or transactions involving particular people. It's just a high level social policy mechanism.

Perhaps just rounding off dealing finally with the intent of section 7, Your Honours, in my respectful submission the start and end point are the Parliamentary materials, for example, the passage of the Act which aren't dealt with in the written submissions by the respondents and the, probably the critical part, Your Honours, are firstly at tab 27 of the blue bundle at page 559. These are the remarks of The Right Honourable Geoffrey Palmer, the Minister who introduced the bill in the House and the relevant passage Your Honours actually begins right at the bottom of page 559. You'll see clause 7 and then it carries on over the page, "Allows for the Government to enter into agreements with the corporation to undertake in return for payment important social services that are not profitable in the commercial sense. That means that important social and public functions will continue to be carried out. It also means that Ministers in the Government will take the decisions on meeting the costs of social services and be answerable for those. The Government will decide how and when a function should be subsidised direct as the managers will have the job of carrying out functions sufficiently and profitably. Clause 7 will therefore have the effect of enhancing ministerial accountability for social functions.

In my submission that is reflective of a power of direction rather than simply an obligation for Government and an SOE to engage in good faith negotiations. But in my submission, the position is probably put really beyond doubt when the Select Committee reported back to the House following submissions and this appears at tab 29, Your Honours, page 570. The Honourable Fran Wilde, on this occasion, and the third paragraph on that page, page 570, the last sentence, the member for Parliament advised the House this, "There was a similar division of opinion among witnesses on clause 7 which provides for the Crown to enter into an

agreement with any state-owned enterprise that it wishes to provide goods and services that are considered to be non-commercial. Despite the urgings by some parties that it can be considered that it was essential that the Crown should, in some circumstances, be able to require specific activities from the enterprises that it owns to enable it to fill social needs.

And so that, in my submission, reflected the advice that the committee had received from the State Services Commission. I won't take Your Honours through it now but it appears under tab 28. It's very clear that the advice of officials to the committee was that section 7 in conjunction with, sorry, clause 7, in conjunction with what was then clause 12, it became section 13, permitted the Government or the shareholding Ministers to require the supply of the particular good or service.

Perhaps the only – I'm happy to address any queries that Your Honours have but perhaps the final point to be made in my submission under section 7 is a response to my learned friend Mr Goddard's submission that section 7, given the overarching policy in the scheme of the SOE Act is intended to operate at a high policy level only, a high level social policy, it doesn't bite, it doesn't give Minister's powers to require goods and services affecting particular transactions or people, and I think the short submission in response is that there's no restriction of that nature in the statutory language. It would be inconsistent with the comments of The Honourable Fran Wilde in the Select Committee who spoke about particular activities and, indeed, it's not difficult to envisage that Government social objectives might affect a particular piece of land or an intended SOE transaction. So where Government social objectives might relate to an unsettled Treaty claim, it would seem inevitable that that would involve an issue surrounding a particular piece of land, or pieces of land. There'd be no reason to suggest that Government in that situation couldn't operate at that level. It's simply a matter of fulfilling its objectives. And perhaps just related to that, there would certainly, in my submission, be no scope for an SOE to determine how the Government would deliver or achieve its social objective so it would be inappropriate for – well, it would be – it's not in keeping with the SOE Act for the restriction on section 7 in terms of a high policy objective to operate then leaving some broad discretion to SOEs to determine how then and in particular how that objective of that high level policy might be achieved.

ELIAS CJ:

Well, I'm just looking again at the moratorium agreement and its variations and it does refer to specific bits of land.

MR ISAC:
That does, yes, Ma'am, yes, thank you.

GLAZEBROOK J:
Yes, they kept taking bits of land out, specific bits of land out of the moratorium by agreement.

MR ISAC:
Yes.

ELIAS CJ:
And putting it back in.

GLAZEBROOK J:
And putting…

ELIAS CJ:
Putting some in too.

MR ISAC:
Yes, and –

ELIAS CJ:
Some of the variations put land in.

GLAZEBROOK J:
Mmm.

MR ISAC:
Mhm, and that makes perfect sense given the nature of the underlying issue being one of Treaty claims to land.

So those are the submissions I had intended to make on section 7, Your Honours. I have 10 minutes to cover a bit of territory in terms of in full unanimous consent and

constitutional amendment, but again just dealing firstly with, I will call it the Duomatic principle because it's less of a mouthful, Your Honours, but as Professor Watts has suggested it has a much longer and more distinguished pedigree than the *Duomatic* decision and perhaps should be renamed, but firstly dealing with the State-Owned Enterprises Act, in my submission there's no, clearly no explicit exclusion of *Duomatic* in the SOE Act and nor is it a necessary implication of the statutory language. The SOE Act isn't a code. In my submission it's really no more than a broad – it's a brief document and set up a broad policy for a shift in Government trading activity, which was radical at the time, as Your Honours will be aware, but it set up a process or a train and it left the gaps to be filled by other pieces of legislation, most notably the Companies Act 1955 which, and I won't take Your Honours to it, but the explanatory note to the Bill refers to the fact that all new SOEs, which included Landcorp, were to be incorporated under the '55 Act. What's significant about what's left out of the SOE Act becomes very evident when you ask the question, "Where in that Act, the SOE Act, does it provide Ministers to appoint the boards and where does it provide in the SOE Act for Ministers to remove directors?" There's no mention of it at all. The statutory language is quite odd. I think section 5(1) refers only to the members of the board, this is tab 2 again, Your Honours, 5(1), it's page 43 of the blue bundle, "The directors of a State Enterprise should be the persons who in the opinion of those appointing them," which is a really quite odd way of drafting it if it was intended to refer to the shareholding Ministers, "will assist the State Enterprise to achieve its principal objective." I raise that simply to illustrate that the SOE Act is wholly reliant on other legislation, particularly to govern and control the relationships between its shareholders and its board members and in particular the power to, if it arises, interfere in operational decisions insofar as a shareholder intervention might be concerned. Perhaps –

ELIAS CJ:

Sorry, the submission is that the whole question of shareholding and appointment of directions is dealt with under the Companies Act and the shareholding Ministers are the shareholders for that purpose?

MR ISAC:

Yes Ma'am, and just perhaps to build on the question of the gaps more than anything, the gaps that was left by the SoE Act, section 30 of the SoE Act, and this is at page 69, dealing specifically with exclusions in relation to the '93 Act which were not, or are not to apply to an SOE which is incorporated under that enactment. Again

I apologise, you don't have it in the bundle, but the original SoE Act had one or two additional exclusions. This is largely concerned only with the question of the name of an SOE which is largely reflected in the drafting at an earlier stage and then it was passed by the House in '86, but there were a couple of other parts of the Companies Act which were removed from the ambit of SOE enterprises, or corporations, and the significance, I think, is that the draft has clearly turned their mind to those bits of Companies law which didn't suit the new policy framework and excluded those bits that they thought would be inconsistent or undesirable.

So moving really I think to the heart of the debate, the respondent's principal contention relies on the wording of subsection (2) of section 5, and on its face I have to acknowledge it's in pretty emphatic language, "All decisions relating to the operation of the State enterprise shall be made by the board in accordance with the statement of corporate intent." I believe, my friend doesn't actually say, that reflects a rigid divide and a barrier which cannot be broken between the shareholders and the governance already in the board in relation to operational matters but in my submission 5(2) really only reflects the reading of section 128 of the Companies Act, and helpfully that's in another bundle, the respondents' first bundle –

GLAZEBROOK J:
Isn't it, can't it also just be read as saying you can't make a decision that's outside the statement of corporate intent?

MR ISAC:
Yes, it's certainly – yes, that's certainly a qualifier.

GLAZEBROOK J:
So not that all decisions have to be made but that you just when you're making decisions you've got to do so in accordance with the corporate intent?

MR ISAC:
Yes Ma'am. I agree with that. And leading on significantly is the, the next subsection (3) which says, "The board of a State enterprise shall be accountable to the shareholding Ministers in the manner set out in Part 3," but then goes on to say, "and in the rules of the State enterprise," and the rules of the State enterprise are defined in section 2, this is at page 40 of the bundle, as, "In relation to a State enterprise that is a company," the constitution of the company, so 5(3), in my

submission, has some significance. The word "accountable" is an odd word to use in the context of reference to the constitution. In my submission what Parliament had in mind was an acknowledgement that not only this Act but, because of the gaps, the constitutional documents of the SOE, the articles and member constitution under the '93 Act also had a role in determining what roles, what powers and what functions, if you like, the board and the Ministers might have, and that's then reinforced by section 6 which talks about the Ministers and says that they'll be accountable or responsible to the house for the performance of functions given to them under the Act or the rules of the State Enterprise, and in my respectful submission, and this is really a point that's made in an article that Your Honours have been provided in the supplementary bundle that came up today. It's a forthcoming editorial by Professor Watts in the *Company Law and Securities Bulletin* which is his response and view to the Court of Appeal's decision in this case and he generously provided it to counsel but stressed that he wanted me to make it clear he's had no involvement at all in this case. But what Professor Watts suggests is that really the SOE Act simply anticipated section 128 of the Companies Act which itself clearly acknowledges that constitutional amendment is a mechanism by which shareholders can if they wish undertake operation or management decisions. They're exposed to directors' duties. There's no doubt about it. They won't do it very often or flippantly but the mechanism is there.

So in my submission, based on the statutory framework, when one has regard to that, the gaps in the SOE Act, the fact that section 5(2) and 6 appear to largely reflect what we now have in 128, the fact that Landcorp is now incorporated under 128, it's my submission that there's nothing in the SOE Act to suggest that *Duomatic* is necessarily excluded from SOE activity.

Perhaps just to round off this point, Your Honours, I see the time, I'm going to be brief, the respondents, I think, also argue, but look, *Duomatic* can't have been contemplated by the drafters. It doesn't require any tabling of a decision or intervention and that cuts against the accountability framework which the Act produces. That doesn't arise under section 7 as we've seen because the statement of corporate intent is tabled so it's not an issue there. But in response to the question of the *Duomatic* decision, circumventing accountability, in my respectful submission, the SOE Act doesn't establish ministerial accountability for Ministers of SOEs. It just provides some additional mechanisms by which they have to table material in the House. Ministers are always accountable to the House for the activities of their

SOEs, whether they make management decisions for them or not. They're accountable in the House. They're accountable in the media and by way of recent illustration Solid Energy is an obvious example where, where there is accountability taking place outside of some particular mechanism or prescribed process in the SOE Act.

That's all I would say about –

ELIAS CJ:
Sorry, just on that, is it part of your argument that in the equation of or the approximation of state owned enterprises to companies with commercial objectives there'd actually be a gap in accountability if the respondent's argument is correct?

MR ISAC:
I'm not sure if I've –

ELIAS CJ:
Well, if the shareholding Ministers couldn't intervene?

MR ISAC:
I haven't articulated that way, Ma'am, but I –

ELIAS CJ:
Well, it might not be sound but I'm just thinking aloud.

MR ISAC:
Well in fact, Ma'am, I respectfully agree and, indeed, Justice Williams in the High Court considered that a power of intervention was in fact a benefit for shareholding Ministers as opposed to a detriment.

I suppose just dealing with it in a nutshell, the respondents' say, and it's there right and job to do so, that there's a bright line and Minister's can't cross it but that leads to some rather unattractive possibilities and, in my submission, unexpected outcomes when we have public assets worth billions of dollars which are being divested to corporations suggest that shareholding Ministers have less, yes, have less powers of supervision and control over the enterprise than a shareholder of an ordinary company. And as Professor Watts suggests, contrary to the respondents'

submission, the SOE Act appears to be directed at providing Ministers with greater powers of control and supervision, bolt-ons if you like to what exists under the Companies Act as oppose to a truncated or impoverished ability to exercise control.

GLAZEBROOK J:
The argument against you is also, however, the 93 Act is done away with, *Duomatic* principle.

MR ISAC:
Yes Ma'am, I'm just – I'll deal with that in a gallop I think. So I suppose a starting point must be the Royal Commission's report number 9, and I notice immediately that some members of the bench will be very familiar with that particular document, and I don't for a moment suggest that it wasn't the Royal Commission's view that the unanimous shareholder resolutions are a sense should be encouraged, indeed, codified within the Act. I think the more difficult question that is left is by the time that piece of legislation found its way through the House whether the Royal Commission's policy preference can be safety said to be part of the legislation that we have now. In my respectful submission there was quite a lot of pushback, both from the submitters from the business community about the loss of informal unanimous consents and then after the introductions of the House through submitters and through advice from officials, in my submission we have section 107 and 177(4) which are a partial codification of *Duomatic*. The critic impression is in partially codifying it can we safely take it that Parliament intended to exclude it in all other respects and in my respectful submission, that's not a safe conclusion. If the common law continues to perform a beneficial gap-filling role which is what *Duomatic* always has been then in my submission there is nothing in the context of the legislative drafting of the '93 Act to suggest that Parliament has, by necessarily implication, excluded it. And perhaps just to round off the point, Your Honours, in *Duomatic* as Professor Watts' has argued really just looks to substance over form and if under the '93 Act it's clear that the ultimate power to determine the division between management decisions and not is with the shareholders because they can amend the constitution to do that then it asks the question ultimately, is there any value in the formalism to say that they shouldn't be able to achieve that informally what they can do formally.

Constitutional amendment, Your Honours, I think I will just leave you to my written submissions. I acknowledge Your Honour Justice O'Regan, it's probably the more problematic and less attractive mechanism but it's there and if we're interested today

in whether the Ministers made an error when they made that assessment, in my submission they did because they could have amended the constitution.

And then finally, and this is a matter that my learned friend Ms Schoultens has dealt with in terms of relief. Here, the error was material in my submission because it occurred at a time when had the Ministers properly appreciated their powers there was an opportunity for them to intervene and just to defer the sale process sufficiently long for Ngāti Whakahemo to be given the opportunity that she had sought all along. And on that basis it goes, firstly, as a separate ground of review for which relief can be provided but, secondly –

ELIAS CJ:
So it's a standalone argument irrespective of whether an injunction would have been obtained?

MR ISAC:
Yes Ma'am because it occurred before the property was sold and regardless it's in relation perhaps to bad faith it becomes a further factor relevant to the exercise of the discretion.

Those are my submissions, Your Honour, I'm happy to answer any questions.

ELIAS CJ:
Any questions? No thank you Mr Isac.

Tomorrow the lecture I have to give is at 5.30. I'd rather not sit after five but we can, if other members of the Court are happy, to sit until five.

MR ISAC:
Thank you Ma'am.

ELIAS CJ:
Is that a problem?

MR HODDER QC:
As long as we get equal time the anti-forces are happy.

ELIAS CJ:

So a full day?

MR HODDER QC:

A full day is likely Ma'am.

ELIAS CJ:

Yes, equality abounds. Thank you, we'll take the adjournment now.

COURT ADJOURNS: 4.07 PM

COURT RESUMES ON TUESDAY 18 AUGUST 2015 AT 10.02 AM

ELIAS CJ:
Mr Hodder, are you next, is that the order?

MR HODDER QC:
I am Ma'am.

ELIAS CJ:
We should say to counsel that we decided that counsel shouldn't feel under any obligation to complete today, we will sit tomorrow if necessary to complete. Thank you.

MR HODDER QC:
That's helpful Your Honour, thank you. If the Court pleases, for these submissions for Landcorp I've prepared a couple of pages of notes which will kind of cover what I want to do by way of introduction, which I'd invite the Court to accept from the registrar. So what I propose to do, obviously subject to where the Court wants to go as well, is to work my way through this which provides introduction and provides also a lead in to the more substantive parts of the written synopsis which I will speak to obviously rather than read when we get to it. But the first page in paragraph 1 is, in effect, the overview of the issues that it is submitted that this Court as the final Court of appeal can and should provide clarity as suggested first the judicial reviewability of state-owned enterprises, that this remains very limited as stated by the Privy Council in *Mercury Energy*. Secondly, that the scope for ministerial interventions in their shareholder capacity an SOE's operational and commercial decisions, that there is no direct intervention power, and certainly not one that can override an SOE board's decision. Thirdly, the memorial resumption regime under the SoE Act, that this is the important, this spoke, an effectively legal protection for Treaty claimants in respect of specific pieces of land subject to their Treaty claim. Fourthly, the impact of judicial review on SOE's third party contracts, that such contracts cannot be set aside unless the third parties knowingly procured the SOEs knowing misuse of its power although the SOE's decision might be the subject of other relief such as declarations.

Fifthly, the focus of judicial review, that is that it's on the processes and to a limited extent the reasoning which led to a decision or other substantive exercise of public

power. Bad faith in the judicial review context. That it involves a knowing misuse of public powers, is really distinguishable from improper purposes as an irrelevant consideration. Is not readily inferred and does not require and may not be capable of further definition. Finally, the significance and potential litigation of refusing an undertaking that once an undertaking is explicitly sought and refused the potential plaintiff must assume that the potential defendant will proceed promptly to act.

Now that's in a summary the matters we say are matters which a final Court of appeal can and should pronounce on. In terms of the particular facts my learned friend Ms Scholtens commenced by saying that the factual circumstances here are unique and important. In our submission facts, of course, are important but the legal framework is equally framework and I want to spend some time on the legal framework.

So carrying on with this introduction at paragraph 2, there are a series of propositions which we submit are relevant but either uncontroversial or incontrovertible. So as a matter of private law, Landcorp as owner of the farm was entitled to make any commercial decision about the farm including its sale at the best market price. Landcorp had no private law obligation to sell or negotiate the possible sale of the farm to Ngāti Whakahemo, which I have abbreviated to "NW" in these notes. As an SOE and a party to the 2012 protocol, which I will come back to, Landcorp was expected to provide no less but no more than an opportunity, effectively right of first refusal to the Crown to purchase the farm the Treaty claimed for settlement purposes, and it did so. The protocol is expressly not legally binding but can be expected to be adhered to as an information sharing and de facto right of first refusal arrangement, which is of benefit to both parties.

ELIAS CJ:
Are you going to come back to that?

MR HODDER QC:
I am, I'm going to be spending some time on the protocol Ma'am and we can traverse aspects of it then.

ELIAS CJ:
Yes, thank you.

MR HODDER QC:

The protocol's terms create no rights in favour of non-parties nor any role for such non-parties. Ngāti Whakahemo had an opportunity to acquire the farm through the tender process but declined to engage in that process. As you heard yesterday it wanted an exclusive opportunity, not one that was in competition with others. Number 8, Ngāti Whakahemo has commenced a Treaty claim in the Waitangi Tribunal, that's Wai 1471. It has sought resumption orders in relation to the farm and it remains entitled to and intends to pursue its resumption application. Landcorp is not, itself, subject to the section 9 Treaty principles for reasons of the SoE Act, decision of the COA which is not pursued on this appeal. Landcorp has not created any legitimate expectation to delay the sale of the farm on which Ngāti Whakahemo relied. Again in the finding of the Court of Appeal not pursued in this appeal. Landcorp was entitled to and did, twice, decline to give the undertaking sought by Ngāti Whakahemo to delay the sale of the farm. And in a sense, if I can interpolate slightly, when listening, reading the submissions for the appellant, and listening to the submissions yesterday by my learned friend, there's a strong sense that what's really being sought to be challenged is the decision to decline an undertaking although it's never been dealt with directly, not approached that way, not pleaded or argued but in effect that's what the complaint is. Had an undertaking been given by Landcorp in March 2014 then all the things that Ngāti Whakahemo complains of, it says, would have gone away. But the very decision before that in the circumstance was not to give an undertaking. The very thing that's not challenged, and we say for good reason because it couldn't be challenged, was that decision and with respect to the arguments for the appellant everything else is an attempt to try and get around that central proposition.

Proposition 12, the Crown is not obliged to secure the farm for Treaty claimant settlement purposes including for Ngāti Whakahemo's Treaty claim and the Crown has, in fact, decided that it doesn't wish to secure the farm in relation to settlement of Ngāti Whakahemo's Treaty claim, that is after the reconsideration. The Crown has facilitated by request to Landcorp an opportunity for Ngāti Makino and other interested iwi to purchase the farm outside the tender process but while Ngāti Whakahemo was involved to some degree, that opportunity lapsed. And then the only material decision that Landcorp directors had considered and made and made in good faith was the 28 February 2014 board decision effectively to sell to Micro at Micro's tender price which was the highest received in the tender round.

Then in the last scenario, Landcorp proposed the sale terms agreed by Micro which signed and returned the formal sale document in the afternoon of the 4th of March and they included delay and exit provisions which related to Ngāti Whakahemo's resumption claim. And I should say that, I'll come back to this, but there weren't, it wasn't a counter-offer by Micro. Micro accepted the conditions provided by Buddle Findlay on behalf of Landcorp. They had some suggestions of other matters which were also accepted but they weren't conditions in any sense.

WILLIAM YOUNG J:
So do you say the contract was completed at 4.18 pm?

MR HODDER QC:
The contract was – well there's some point about that but the contract was –

WILLIAM YOUNG J:
In substance completed.

MR HODDER QC:
– in substance. The agreement was settled when it came back from Micro's solicitors and at that point it could have been enforced by Landcorp. So the fact is that after that Landcorp had one of its attorneys sign that evening and the other one signed the following morning.

And in our submission those matters I've just gone through are comprehensive and conclusive in relation to the settled legal framework and there is no foundation in that for a claim of misuse of public powers which of course is what is the purpose of judicial review.

So then what have we got? Well we can't frame a judicial review claim around those propositions or within those propositions so that has to be got around. So, firstly, Ngāti Whakahemo invokes matters from the board's decision and, indeed, after Micro's return of the signed sale document, namely, Ms Houpapa's 4 March 2014 telephone conversation which is around about 5.30 pm on that day and it is apparently contended that there's a retrospective tainting of the sale decision and we address those in the written submissions, and I will come back to that.

Secondly, it's contended that the OTS 19 November advice of the Crown's then position on Ngāti Whakahemo's Treaty claim and effective confirmation of its earlier advice, the Crown wasn't interested in the land, tainted Landcorp sale decision. There is an issue about whether that's a question of fact or a question of law. My submission to the Court is it's a question of fact, the only thing that Landcorp needed to know was whether or not the Crown was going to exercise what I've described as a right of first refusal under protocol and was told twice that it wouldn't. That was all that Landcorp needed to know.

Thirdly, there's the assertion of a previously unrecognised ministerial power to override and SOE board decision on an operational commercial matter, and we will submit that, was we say, in part 9, the written submissions is not the case. And infusing the appellant's submissions generally it's contingent that beyond and separate from its right to pursue its resumption claim, Ngāti Whakahemo had some kind of interest which requires the intended sale of the farm by Landcorp for commercial reasons to be subject to an exclusive opportunity for Ngāti Whakahemo to purchase or negotiate for the purchase of the farm. And in our respectful submission, there is no legal foundation for that general proposition or contention.

And finally, it's consented by the appellant that not only is the sale decision by Landcorp in contravention of public law requirements but also, notwithstanding the SOE Act provisions about resumption and, indeed, section 21 in preserving contracts, the consequence must be the setting aside of the contract entered into with Micro. So that's, in our submission, that's where the general context and to which this appeal falls.

On the final page of this note I've indicated a sort of a map of where I'm going before I get to the written submissions again and in part to bring out some background matters which, in my submission, are fundamental to the matter that is now before the Court. And it is in more or less chronological order to get through to the 28 February board decision and it starts with the Sate-Owned Enterprises Act. So the acronym ABA refers to the appellant's bundle of authorities. Later on we get to the RBA which is respondents' bundle of authorities.

Firstly, the explanatory note is in the blue appellant's bundle of authorities at tab 26. And as you will appreciate, what I propose to do is go to the explanatory note to the ministerial speeches and then go to the Act's provisions in support of what I am

submitting. It is slightly scary to think this is 30 years ago or thereabouts but it was at the time a radical and major piece of public policy change and it is, in our submission, extremely well set out, the reasons for it, in this explanatory note. So it starts off in paragraph 1, “The dual objectives are to facilitate and improve economic performance of state enterprises and to enhance their accountability.” And so we're talking about an era that has things like the Post Office which have now been largely forgotten but moving that into some different world.

Paragraph 2, “State enterprises undertake one-fifth of New Zealand’s investment to produce 12 percent of national income. Poor performance by those enterprises can seriously impede economic development and impose a burden upon Government finances. Conversely, good performance can contribute significantly to the attainment of Government objectives of more jobs and higher living standards.”

So that's the fundamental proposition, a seriously large chunk of New Zealand economy is being won by state enterprises. This is an attempt to improve the efficiency and the commercial operation of that entire sector. That's what paragraph 3 is explaining and it identifies that. “The review by the Government concluded that the shortfall in performance was caused by a number of factors including multiple and conflicting objectives including commercial and non-commercial, bureaucratic controls on managers with a heavy focus on imports, lack of managerial autonomy and over the page, legislative protection of the activity from competition and lack of managerial accountability.” And we submit that it's obvious that those are driving in the point where the Act goes that says you separate out, to a large extent, ownership and management which is what their policy is about.

Paragraph 4 refers back to an earlier December 1985 statement by the Government talking about responsibility for non-commercial functions being separated out. Subparagraph (b) of 4, “Managers of state enterprises will be given a principal objective of running them as successful business enterprises,” and so on. At the end of that paragraph 4, “The Government also concluded that the application of a policy to state enterprises required the establishment of a legal form consistent with their intention.” And that is a reference to these SOE's being companies and operating in the same way that companies are designed to do, with the basic balance of operations and organs that companies have.

Paragraph 7, “The Bill aims to strike a balance between the powers of Ministers to control the direction of policies pursued by the state enterprises and the need to ensure that boards are given the ability to manage operations commercially free from day-to-day political control over operations. Directors or state enterprises have a clear goal to run the state enterprises as successful businesses.” It couldn't be clearer as to what’s contemplated here.

Paragraph 9 is set out in our written submissions about the role of directors. “They are appointed from among people who in the opinion of Ministers can help the organisations to achieve their principle objective of operating as a successful business. Directors will be responsible for key decisions on the operations of state enterprises and within the agreed framework of the statement of corporate intent, directors will be free to manage the operations of the enterprise.” Again, that is fundamental in what we see in the Act when we come to it and in the way in which the SOE regime is designed to work and does work.

In terms of accountability, paragraph 10, “Directors will be given clear commercial performance objectives.” Paragraph 11, “Ministers will be the shareholders and accountable to the House for the performance of the state enterprises through the accountability and mechanisms set out in part 2 of the Bill.” And as we’ll come to, none of that includes the power to give directions on day-to-day operational matters.

Non-commercial activities, there was some discussion with the Court with my learned friend yesterday about section 7 and non-commercial activities. The basic proposition we say is clear enough here but if non-commercial activities are required to be undertaken by state enterprises it could be done without interfering with their commercial autonomy, there will be an agreement which enables them to be made good in relation to those.

On to paragraph 19 and 20.

ELIAS CJ:
That's about provision of products or services?

MR HODDER QC:
I'm sorry Ma'am?

ELIAS CJ:

Provision of products or services?

MR HODDER QC:

Yes, will I suppose the –

ELIAS CJ:

I mean all this background is pretty well known to us, Mr Hodder, so it really would help us if you honed in on the things that are particularly material in this case. I'm just pointing out to you that the non-commercial activities envisaged are the provision of products or services. How is what was in contemplation here, how does it come within that, are you making any point of this?

MR HODDER QC:

The point I, sorry to emphasise the point, Ma'am, but the separation of director's responsibilities from ministerial oversight on specific matters is what is emphasised here.

ELIAS CJ:

But I think we can all accept that.

MR HODDER QC:

But if that's accepted then there's much of the appellant's claim in relation to if the power of intervention falls away.

ELIAS CJ:

Well it depends what's meant by "commercial activities" and matters of that sort.

MR HODDER QC:

Well in terms of Landcorp –

ELIAS CJ:

And policy direction.

MR HODDER QC:

– Landcorp provides farming, undertakes farming operations and if it's, in the ordinary course of its business it will transfer its assets as it sees fit. So if it wants

some land, it doesn't have it, we'll buy it. If it doesn't want land it has, we'll sell it. If somehow it's been impeded in that process on a non-commercial basis –

ELIAS CJ:

Why do you say that buying and selling land is part of the commercial operations of Landcorp? I just have a query about that.

MR HODDER QC:

I think probably because of the analogy with any other organisation, the comparability with another private organisation as part of its ordinary business.

ELIAS CJ:

Then why –

O'REGAN J:

But it's a farmer not a land trader.

MR HODDER QC:

But at the scale it is it will always have at the periphery some requirement to change its assets, as it did indeed with Wharere. I mean if one does, has a small farm then one doesn't do much land trading, but Landcorp has got 150,000 hectares of land, or something in that order, so it's always going to be at the margins adjusting its holdings to try and make them as efficient as possible.

O'REGAN J:

Well is that so. I mean do we know that that's what it's done?

MR HODDER QC:

Well we know that in this case it wasn't prepared to sell Wharere back in three, four years before this happened because it regarded it as a strategic asset, then changed its mind because it couldn't fit it into clustering.

O'REGAN J:

If it was a strategic asset, selling it wouldn't be in the ordinary course of business, would it?

MR HODDER QC:

But Landcorp had changed its mind, that's why it sold it.

O'REGAN J:

So Landcorp determines its ordinary course of business. One day it would've been the sale of a strategic asset, which isn't in the ordinary course of business, and the next day it would have been part of its ordinary course of business. That seems a bit unlikely.

MR HODDER QC:

Well, with respect, I'd say that it's kind of reasonably normal for commercial operations. People review what is a strategic asset and what isn't.

O'REGAN J:

But selling your capital assets doesn't normally come within the ordinary course of business.

MR HODDER QC:

Well we'll see from the minutes of the board meeting et cetera that Landcorp was under an obligation to do as well as it could with its assets. It couldn't borrow, effectively, to buy assets, it's expected to fund it out of its own capital raising. It could only raise capital effectively by selling assets, so it was part of the way in which it operated.

ELIAS CJ:

And how does the moratorium and protocol fit in with that characterisation?

MR HODDER QC:

Well that was a special arrangement whereby recognising that Landcorp did have a need to sell assets from time to time, the Crown enters into an agreement which says it gets what I've described as right of first refusal. Now some land is put aside –

ELIAS CJ:

But on your argument isn't that totally outside the Crown's, or the shareholding Ministers legitimate interests?

MR HODDER QC:

No, but I'd say that was exactly what section 7 contemplates. These are agreements, they're not impositions or directions.

ELIAS CJ:

But they're agreements about policy aren't they? Policy directions?

MR HODDER QC:

I'm not sure I can –

ELIAS CJ:

I'm sorry, I haven't got the text of section 7 in front of me at the moment.

GLAZEBROOK J:

They might be agreements but I don't think it's envisaged that the state-owned enterprise could say I don't care what your social policy is, I'm not entering into an agreement. So if you're suggesting an agreement is actually different from a direction I don't think so under section 7 is it? It's just going to be an agreement whereby they provide those services to the extent they can be provided without impacting on the commerciality of the organisation which presumably means that the Crown's obliged to top up but I don't think, if the Crown offers to top up that the state-owned enterprise can say, oh no, I don't feel like doing that, or do you say they can? So you say it is a true agreement that Landcorp could have said, I don't care about whether you want a moratorium on sales, I'm not going to agree to it.

MR HODDER QC:

Well it's a nice question which I don't know one has to resolve in this case but section –

GLAZEBROOK J:

Well you might do because if section 7 contemplates an agreement which is effectively a direction, then what's the difference with a direction that's given?

MR HODDER QC:

Well the difference is, I mean, it starts with the use of semantics that –

GLAZEBROOK J:

Well it's semantic but if in fact section –

MR HODDER QC:

– captures a fundamental difference, doesn't it. Section 7 –

GLAZEBROOK J:

Well there might be if section 7 contemplates a true agreement where the SOE can say no. If it doesn't contemplate a true agreement whether you say, you can say no, then frankly it is a semantic difference and that's all.

MR HODDER QC:

The submission for us is that there is a difference between a Minister giving a unilateral direction and falling within section 7 where it talks about an agreement. The word "agreement" has to have some meaning. It means that both parties have signed off on it. Now in the real world it may be very sensible for SOEs to sign off on agreements with Ministers but it is not the same thing as a direction and so if that's the proposition against us we resist that.

ARNOLD J:

Just on this point though, section 14(2) paragraph (i), which was referred to yesterday, does appear to contemplate that the SOE might carry out activities for which it's entitled to compensation from the Crown in the absence of any prior agreement with the Crown.

MR HODDER QC:

Yes, it is an interesting provision. I'm not sure that it changes anything we're concerned with here.

ARNOLD J:

Well it does, doesn't it, because you're saying that the drivers are on the SOE are entirely commercial except in the context of section 7 and so on, but this provision suggests that there's another sort of aspect to it, that is that the SOE may do something on other than a commercial basis and seek compensation.

MR HODDER QC:

Well the proposition I suppose there is two ways in which Ministers can get involved broadly speaking under the Act. One is through an agreement under section 7, the other is by giving directions of the kind that have to be published and so on and so forth under part 3 of the Act including under section 14 and if there is a, something that's done by way of a direction that's lawful for the Minister under the SCI provisions, then there maybe scope for seeking compensation for those, which would be outside the scope of an agreement. So the, in effect, 14(2)(i) is contemplated those two possible routes to an intervention by the Minister that's within the scope of the Act but not of a kind that the appellant's contend for.

ELIAS CJ:

I'm still unclear about section 7 mirroring the clause 12 in the explanatory note is all about provision of goods or services. I just struggle to understand how the moratorium on sale of land fits within provision of goods and services and if it doesn't, doesn't that suggest that there is a division between the trading activities of an SOE in which the Ministers are required to step away, and the more fundamental question of disposal of its capital assets.

MR HODDER QC:

In our submission no because it would –

ELIAS CJ:

Holding onto land couldn't be a provision of a goods or services under section 7 could it?

MR HODDER QC:

My submission would be that goods or services is designed to cover all things that are done by an enterprise. Again it, if Your Honour's point is –

ELIAS CJ:

Well what is the good or service that's provided by, first, the moratorium and then the protocol requirement?

MR HODDER QC:

It's an operational aspect of the business. It isn't, I agree it doesn't necessarily fall comfortably as it being a good or a service, although it depends, as I think my

learned friend said yesterday, about services being fairly well widely defined in the tax legislation, so if the commercial operations are thought of being, producing as end products goods or services, and that's generally what they do do, the operations leading to produce that are likewise within the general scope of the immunity from Ministerial intervention except through orthodox courses which the SOE legislation contemplates. But, in effect, I think what Your Honour is putting to me is there's a third category, so there's SCI directions –

ELIAS CJ:
Yes.

MR HODDER QC:
– there are agreements under section 7 and there's something else, and the something else is not at all evident from any of the material in the legislation or in the preliminary works.

ELIAS CJ:
Well except the provision that you've just been, section 14(i) perhaps or if there is a division between the trading activities of the SOE and its fundamental business, I mean even under the Companies Act there's, is there still, a requirement that if you change the fundamental nature of your business you need shareholder approval.

MR HODDER QC:
Major transactions, yes.

WILLIAM YOUNG J:
I suppose if you're saying –

ELIAS CJ:
Yes, for a major transaction.

WILLIAM YOUNG J:
– I mean if you're a fishing company and you own a thousand fishing vessels, the sale of vessels may not be part of the core business of the company but a shipping company is likely to want to reconfigure its fleet from time to time and that's the analogy you're relying on –

MR HODDER QC:

Yes.

WILLIAM YOUNG J:

– which doesn't, it doesn't cause me quite the same difficulty as it does one or two of my colleagues.

ELIAS CJ:

Well it's against the background of this being a state owned enterprise, it was section 4 requirements I suppose. Anyway…

MR HODDER QC:

I think the policy response includes the proposition that the moment that the directors are expected to respond to those ministerial policy objectives then it is confusing the role that they have been invited to and expected to take under the SOE Act as explained in the explanatory note. So you go back to the very beginning. They were concerned about multiple and conflicting objectives which are causing trouble for the state enterprises. The proposition that you could go back beyond the end good and end service to the way in which they conducted their operations and say, that's all right, Ministers can interfere there, would be exactly the same evil or problem that's being addressed by the SOE Act as a whole. So in our submission, the SOE Act makes it clear that these are meant to be trading enterprises with respect to the words goods and services in section 7 probably could have been expressed more widely but they are meant to be trading enterprises. The role of Ministers is at a policy level with specific detailed and public powers of intervention in relation to the SCI, the requirement that the SCI directions have to be tabled in the House and published. And what is underpinning much of the appellant's argument in this area is the proposition that there can be some non-public intervention of a kind that says this isn't going to happen outside an agreement of the kind that is contemplated in section 7.

ELIAS CJ:

So what was the moratorium within the structure of the SOE Act? What power was used there?

MR HODDER QC:

I don't think the moratorium states a power being used.

ELIAS CJ:

Well what do you suggest was the power used, what could that have been used?

MR HODDER QC:

No, I suggest it was consistent with section 7 that what was required was to –

ELIAS CJ:

It was a direction?

MR HODDER QC:

Sorry?

ELIAS CJ:

It was a direction, was it?

MR HODDER QC:

No, it was a deed.

ELIAS CJ:

A deed. An agreement, sorry, yes.

MR HODDER QC:

Yes, it was an agreement.

ELIAS CJ:

Yes.

MR HODDER QC:

So the SOE was consistent with section 7 but insofar as there was going to be a constraint on Landcorp's ability to organise its affairs which was what was involved, it required an agreement and there was one.

O'REGAN J:

What were the goods or services?

MR HODDER QC:

Well that's again a proposition that depends how widely one can define services.

O'REGAN J:
Well I mean when the Act first came in it was used to fund things like the Post Office staying open in a small town –

MR HODDER QC:
Correct.

O'REGAN J:
– and selling postal services day-to-day, it wasn't talking about which Post Offices got sold, was it? It was actually about the day-to-day operations of running the business. It seems a bit of a stretch to say it also applies to how you deal with your capital assets.

MR HODDER QC:
There's no constraint on it. I suppose I, if we go one step further. In my submission, one just gives a generous interpretation of goods and services to cover the enterprise and its organisation, that's really what it's getting at, that's what the explanatory note tells us. If it's an agreement that doesn't have to rely on section 7 it's still in agreement and if it's in the best interests of the company the company will enter into it, but it isn't a direction by the Minister and we'll come to the moratorium or the –

GLAZEBROOK J:
It's relatively difficult to see a moratorium on sale of anything if everything is been necessarily in the best interests of the company. So if it isn't under section 7 there must have been a bit of an issue about them entering into it in the first place.

MR HODDER QC:
Well there's serious money changes hands in relation to the protected land agreement, I'll come to that shortly.

WILLIAM YOUNG J:
There was, what, 50 or 60 million, wasn't there?

MR HODDER QC:
Two tranches of that sum I think.

All right, well I will take the hint in relation to the explanatory note. In our submission it's the clearest statement about the policy that there could be which is the idea that state-owned enterprises are meant to cease being a failing, underperforming sector of the economy to something rather better and the way in which that's –

ELIAS CJ:
So this explanatory note, this was on the original, is this on the original Bill?

MR HODDER QC:
Correct.

ELIAS CJ:
And section 9 comes in after that or?

MR HODDER QC:
Section 9 is there.

ELIAS CJ:
Pardon?

MR HODDER QC:
That's section 9.

ELIAS CJ:
Is it that? Okay, but the resumptions provisions come in.

MR HODDER QC:
No, you're right.

GLAZEBROOK J:
Yes, there was a –

ELIAS CJ:
Section 9 comes in after the introduction?

MR HODDER QC:

Correct.

ELIAS CJ:

Yes, so the impact on Māori in respect of land was not actually in contemplation when this Bill was introduced but became understood and Parliament responded later.

MR HODDER QC:

In two stages I think –

ELIAS CJ:

Yes, I think –

MR HODDER QC:

So you can get the 1988 legislation which kind of contains the resumption memorial regime as well.

ELIAS CJ:

Yes, but even in terms of the original enactment, section 9 was introduced later.

MR HODDER QC:

That looks right in terms of the explanatory note it doesn't refer to section 9.

ELIAS CJ:

Yes.

MR HODDER QC:

And again, not sure that it changes this scenario from my perspective. If –

ELIAS CJ:

But it does mean that the Act as enacted changed and in particular a new policy was introduced about the Treaty of Waitangi.

MR HODDER QC:

Well the Crown was subjected to constraints in relation to Treaty principles. That's what section 9 does.

ELIAS CJ:

Yes, yes and then there was the litigation to work out what that meant and then the resumption.

MR HODDER QC:

And that's, we say extremely significant in this context –

ELIAS CJ:

Yes, except you say that the resumption provisions are, I don't know what you said, carefully –

MR HODDER QC:

Bespoke and –

ELIAS CJ:

Bespoke, bespoke.

MR HODDER QC:

– and conclusive.

ELIAS CJ:

But in fact it was simply a means of settling litigation and it wasn't the end of the story because of course there were the further responses that were required in relation to Forestry land and other assets later down the track which came in under the leave reserved in the Court of Appeal.

MR HODDER QC:

In terms of land, though, those amendments find their way into the section 27A to 27D regime complete –

ELIAS CJ:

Except in respect of Forestry land. Because of the different mechanism that was used.

MR HODDER QC:

Well sure, we're not dealing with Forestry land here so I don't think I want to –

ELIAS CJ:

No, no, no.

MR HODDER QC:

I'm not in a position to comment on that.

ELIAS CJ:

No, I'm just thinking about the sequence, thank you. As you say it's 30 years ago.

ARNOLD J:

There is one point you described the resumption scheme, if you like, as a bespoke response to a problem. At some point it may be necessary to – I meant he reality is the Crown has not really used that process and the underlying assumption was the claims would go through the Waitangi Tribunal and it would make resumption orders. In fact the Crown is preferred to negotiate solutions and deal with them in other ways and has really opposed the making of resumption orders and the protocol really is part of that other process and I guess an issue for the Court is whether it takes account of that reality that the Crown has really adopted another process rather –

ELIAS CJ:

Another bespoken process.

ARNOLD J:

– than the statutory one. Sorry?

ELIAS CJ:

Another bespoke.

ARNOLD J:

Another bespoke one, yes.

MR HODDER QC:

Well the first one is bespoken as spoken, it's tailored by the legislature. Inevitably any regime that's laid down by statute is going to encourage negotiation within the framework. The question is whether what happens within the framework the negotiation is in some way justiciable and our submission is essentially, although it's partly for the Crown to make submissions on, it's not. of course there'll be

discussions and negotiations but in the end that particular regime, the memorial resumption regime, is of fundamental importance. If –

GLAZEBROOK J:

So section 9 though, and what you could say is that the moratorium and after that the protocol was in order to fulfil the Crown functions under section 9, as it's to fulfil the Crown functions under section 9 it's a different process from the resumption regime in the statute but not inconsistent with it because of course you'll be entering into negotiations necessarily rather than resumptions – and so it's not inconsistent with the statute but consistent with section 9 and as such required by the statute to be complied with, it's been the choice of the Crown to use the protocol as the particular mechanism for its section 9 requirements, it's not for the Court to say they should do something else but it might be for the Court to say they should do what's said in the protocol.

MR HODDER QC:

Well, if I can deal with the part of it that comes to protocol. In terms of what Your Honour has just been saying it occurs to me that I haven't gone back to check whether the statements of corporate intent at the time of the original protected land agreement, or the entry into the protocol dealt with that. I rather suspect they would have because that's the way you would expect that to happen. That's what the statement of corporate intent contemplates.

ELIAS CJ:

Do we have the current statement of corporate intent?

MR HODDER QC:

Not in the evidence I don't think but it's one of those things that's on the website.

GLAZEBROOK J:

How do you say the statement of corporate intent would affect the obligations of the Crown under section 9? I sorry, I think I've missed the point.

MR HODDER QC:

If the Crown has two methods of intervention, which is my submission, one by way of directions of the statement of corporate intent and one under agreements under

section 7, then if the Crown wants to give effect to some aspects of influence by Treat principles under its directions, under the SCI then it can do so.

ELIAS CJ:
Just as a matter of mechanics, does this statement of corporate intent get passed by the shareholding Ministers?

MR HODDER QC:
They can direct changes to it.

ELIAS CJ:
I know they can direct changes to it but presumably that means that it gets passed by them?

MR HODDER QC:
I'm not sure what passed means?

ELIAS CJ:
Well is there a – is it sent over to them to have a look at to see if they want to make a direction?

MR HODDER QC:
Yes there's a discussion that takes place, we have a section 14 that starts off with a delivery of a draft –

ELIAS CJ:
Yes.

MR HODDER QC:
– effectively by the board to the –

ELIAS CJ:
Yes, thank you, yes, that's the answer.

MR HODDER QC:

– Crown and that specifies a whole series of propositions and then the board is to consider comments it receives back in response from the shareholding Ministers, that's section 14(4).

ELIAS CJ:

So it does seem to me that maybe the statement of corporate intent one would have thought might have some relevance, anyway…

GLAZEBROOK J:

I just wondered too whether you'd misunderstood my question but I don't know that, I wasn't asking about particular – what I was saying was that if the Crown has chosen by the protocol to fulfil its section 9 obligations why shouldn't the protocol be enforceable against the Crown, and I don't quite know what the statement of corporate intent has to do with that. I can understand what you might be saying in respect of individual directions that don't have anything to do with the protocol.

MR HODDER QC:

Well it's very sensible to go to the protocol on this point as we've kind of spent a lot of time talking about it without looking at it. If we can do that we can find that in volume 3. It might be better to start with the protected land agreement, so if we go to volume 3 of the case on appeal and to tab 50. It was a suggestion that this had been overtaken by and replaced by the protocol. That isn't the case, this protected land agreement still applies to certain categories of land which is why there are variations as recently as 2013 at the end of the materials that are under tab 50.

O'REGAN J:

So this is the moratorium deed, this document at 50?

MR HODDER QC:

Yes.

GLAZEBROOK J:

That might be the case but recital C of the protocol actually says it does replace it, or is that something else that it says it replaces it?

ELIAS CJ:

I see, it says, “With it expiring.”

MR HODDER QC:
The moratorium has come to an end in that sense. So what the agreement at tab 50 does is say there’s going to be a moratorium for four years from 2007.

ELIAS CJ:
What prompted this?

MR HODDER QC:
I don't know.

ELIAS CJ:
You don't know?

MR HODDER QC:
Sorry, I can take instructions but I don't know.

ELIAS CJ:
No, no, well perhaps Mr Goddard can tell us anyway, except it is about Landcorp land protected from sale. Was there three from litigation or something?

MR HODDER QC:
Sorry, Ma'am, I will have to take instructions, I have no recollection or knowledge of that.

So the preamble which paragraphs C, D, E and F of the preamble come back to the same sort of things we've been talking about. What is Landcorp’s primary business? It sells land from time to time to maintain an optimal portfolio, that is a normal commercial activity. Proposition D, it has land it wants to sell, the Crown wishes to protect from sale land which is sensitive to public policy issues. Landcorp prefer the Crown to purchase that land, the Crown doesn't want to do that. Both parties recognise that without financial recognition there will be an impact on Landcorp strategy, et cetera.

ELIAS CJ:
Sorry, what is the protected – the reference in the schedule, where do we find that?

MR HODDER QC:

Yes, there's a schedule on page 493 which sets out that this is covering about 13 and a half thousand hectares and remembering that Landcorp's total hectarage it's got under its control is maybe 10 times that.

ELIAS CJ:

So this is land already identified by Landcorp as land it wishes to sell which the Crown wishes to protect?

MR HODDER QC:

That's what it appears to be, yes.

ELIAS CJ:

So it's not a moratorium in respect of all land?

MR HODDER QC:

No.

ELIAS CJ:

And hence when it's supplanted by the protocol it's a process for identifying land and then clearing it?

MR HODDER QC:

It's all in clause 7 –

ELIAS CJ:

I see, sorry.

MR HODDER QC:

It's on page 486. I should just mention, in terms of our previous discussion, that on page 485 at paragraph (h) there is no doubt for the record the Landcorp board enters into this agreement in good faith and without direction from shareholding Ministers.

O'REGAN J:

That answers that.

MR HODDER QC:

So paragraph 4 talks about the agreed market value –

ELIAS CJ:

Wait, that's very interesting, really. Paragraph – sorry, so it is a moratorium on all properties and so it's not confined to those identified in schedule 1, is that right, from clause 7?

MR HODDER QC:

The next sentence goes on to say that it doesn't apply to some things.

ELIAS CJ:

Yes, but we're not too fussed about that land, Contact Energy's –

MR HODDER QC:

Well there's two elements to that. Any additional, so going back to (1)(c) any additional property owned by Landcorp currently being assessed for sale, and then paragraph 8 says, this protected land, which is the schedule 1 land, goes off into a separate subsidiary, Landcorp Holdings as opposed to Landcorp Farming which is the owner of the Wharere Farm for example.

ELIAS CJ:

Yes.

MR HODDER QC:

And then the money paid is in the clause 11.

ELIAS CJ:

But that's for land that the Crown has indicated it wishes to retain.

MR HODDER QC:

Yes.

ELIAS CJ:

That's the trigger for compensation but in the meantime Landcorp can't sell any land, is that what the effect of 7 is with the exception of this land that Contact Energy is interested in?

MR HODDER QC:

Well it's not just Contact Energy as I understand it. There are two exceptions in the second sentence at paragraph 7, one of them is about Contact, one of them is a more general –

ELIAS CJ:

What is it, sorry? Covered by (1)(c) or (d) is not required. Again if it's being cleared by land information as not requiring protection is protected land. Where's the – is it only Māori land effectively? That this moratorium is imposed to protect?

MR HODDER QC:

It doesn't put it in quite those terms but I think it was most certainly going to be the reality of it.

GLAZEBROOK J:

Can I just check, because I must say I haven't quite focused on – what they've done is set out in schedule 1 protected land and then everything else is protected except that it can be cleared for sale if it wanted to be sold –

MR HODDER QC:

Correct.

GLAZEBROOK J:

– so the process is that if you want to sell anything you go through whatever the process is under the moratorium, is that right?

MR HODDER QC:

I think so. Yes.

GLAZEBROOK J:

So it's a clear, okay.

MR HODDER QC:

It's a clearing process.

GLAZEBROOK J:

All right, yes.

MR HODDER QC:

The absolutely protected land is the schedule 1 land. The rest of it has to go through a clearing process.

GLAZEBROOK J:

Yes, yes.

MR HODDER QC:

For the period of the moratorium.

GLAZEBROOK J:

Thank you.

ELIAS CJ:

It doesn't indicate that land is being treated by the parties as tradable stock.

MR HODDER QC:

Well that's the very point of the recital.

WILLIAM YOUNG J:

It is sort of more under the protocol, isn't it?

MR HODDER QC:

Well it starts off at the proposition in the recitals that's that the reason that what Landcorp wants to do is to do that.

ELIAS CJ:

Yes, no, I understand that.

GLAZEBROOK J:

Well put simply (1)(c) and (d) because it assumes that there will be land that they want to sell and that it will be cleared for sale under a process so –

MR HODDER QC:

So this is a precautionary regime. One pledge of land, which is one group of properties which are the schedule 1 properties are clearly earmarked –

ELIAS CJ:

Well they've already been identified as lands that the Crown wants to retain –

MR HODDER QC:

Yes.

ELIAS CJ:

– and for which it's going to –

MR HODDER QC:

They have to pay.

ELIAS CJ:

– pay.

MR HODDER QC:

Yes, then the rest of them are going to go through this process, at least for the duration of the moratorium, to try and get these things sorted out.

ELIAS CJ:

And the in the meantime they can't be sold, the land can't be sold?

MR HODDER QC:

Not within the 12 months it takes to get a clearance.

ELIAS CJ:

Okay.

WILLIAM YOUNG J:

Does it matter, the moratorium, given that it's replaced by the protocol? In substance replaced by the protocol?

MR HODDER QC:

Well, if I can turn to the protocol, in our submission, no.

ELIAS CJ:

Well, the protocol will govern but the background is important because the background doesn't treat, doesn't have the shareholding Ministers indicating that Landcorp is free to treat, treat all land as it wishes to.

MR HODDER QC:
Well, Landcorp has agreed not to.

ELIAS CJ:
Well, I understand that form.

MR HODDER QC:
Well, it's consistent with the Act.

ELIAS CJ:
No, no, and you have to make the submission as to why there is no impediment without agreement but, anyway, I think I understand the argument.

MR HODDER QC:
If we turn to the protocol at tab 52, so this agreement is taking place as recital C says, upon the expiry of the moratorium, and I think what it's saying there is that the moratorium is expiring, not the protected land agreement is expiring. They wish to manage the process.

ELIAS CJ:
And this makes it quite clear it's about Treaty settlements, suggesting that –

MR HODDER QC:
Yes, absolutely. Well, this is –

ELIAS CJ:
– probably the moratorium was imposed also for that reason.

MR HODDER QC:
Well, the deed was signed by the Minister for the shareholding Ministers. That's on page 528.

ELIAS CJ:

That's the protected land agreement. This is with OTS. This is between OTS and Landcorp.

ELIAS CJ:

Yes. But if it is to replace the – I suppose it may not.

MR HODDER QC:

To replace the moratorium, not the whole agreement.

ELIAS CJ:

The moratorium might be wider, but perhaps Mr Goddard can give us the background to that.

MR HODDER QC:

Happy for him to do that. Recital D, the protocol is not legally binding but the parties are committing themselves to follow it, including a process of consultation. On page 537, some mechanism to achieve a workable compromise, and 1.2(c), the philosophy includes recognition of the operational and commercial objectives and imperatives of Landcorp. And 1.3, this is the basis for the ongoing relationship so there's open and free exchange of information on a "no surprises" basis, and that's what I'm referring to in my earlier submission that this is an information and exchange exercise.

Then paragraph 2, or clause 2, describes five categories of land in Landcorp's portfolio, and the ones that we've been mostly –

ELIAS CJ:

You should not – you'll probably come back to this, but you should not proceed on the basis that that submission, that this is just an exchange of information is accepted, particularly in light of the antecedent of the moratorium, which is why I think the moratorium history is relevant here, but you can come back to that.

MR HODDER QC:

Well, I think it's probably going to crop up as we go through this particular document –

ELIAS CJ:

Yes.

MR HODDER QC:

– because paragraph 2 differentiates between these five different categories of property and so although we don't have all the schedules in this particular version, and at 2.1(a) we are –

ELIAS CJ:

Sorry, what's the PLA?

MR HODDER QC:

Protected land agreement. The document we've just been looking at.

ELIAS CJ:

A protected land agreement, okay.

MR HODDER QC:

So those will include the schedule 1 properties we were looking at from the agreement back in a previous document. In our case, what we are talking about is schedule D, over the page on 538, "Landcorp properties located within areas where Treaty settlements have not been completed and which may be identified as being of potential interest for future Treaty settlements and are subject to section 27B of the SOE Act." And at page 543 we see that the Whārere Farm is listed as being one of those schedule D properties. So the focus here is on a schedule D property. And in terms of, I think the Chief Justice's point, at paragraph 3.1 on page 538, schedule A properties are held for use in Treaty settlements under the PLA and not otherwise available for sale by Landcorp –

ELIAS CJ:

Sorry, can you just pause? Schedule D –

MR HODDER QC:

Yes.

ELIAS CJ:

– is all North Island properties because the South Island presumably has been dealt with, subject, under the Treaty processes, subject to section 27B of the SOE Act. So you say that Whārere Farm –

MR HODDER QC:
Been memorialised, yes.

ELIAS CJ:
Yes, is under that.

MR HODDER QC:
And it's listed on –

ELIAS CJ:
So this doesn't specifically list it?

O'REGAN J:
It's actually listed at the bottom of the page.

MR HODDER QC:
Page 543.

ELIAS CJ:
Yes, I see, sorry. It's just deleted. I didn't look down there.

O'REGAN J:
But it's the only one listed, is it?

MR HODDER QC:
I think it's been redacted –

ELIAS CJ:
Well, the others have been deleted.

MR HODDER QC:
– probably. Everything else has been redacted.

O'REGAN J:
I see. Right, I see.

ELIAS CJ:
Is this a publically available document? I'm just wondering why it's redacted. Mr Goddard is shaking his head that it's not publically available.

MR HODDER QC:
Well it has a reference to confidentiality in the final clause so I suspect it isn't.

ELIAS CJ:
Right.

MR HODDER QC:
And if Mr Goddard says it's not then I'm not in a position to argue with him.

So to 3.1, Schedule 8 properties are held for use in Treaty settlements and have, as we saw before, there is a consideration that has been and has to be provided for this process. And then clause 6 takes us to, probably is identified as being of potential interest for future Treaty settlements, schedules D, including Whārere, and E. And then you have the process identified under 6.1 and following. It starts off by recognising that Landcorp's required to act in a commercial manner as if it were not Government owned, needs to adjust its property portfolio. An important ingredient for Landcorp in the last sentence is the ability to purchase more suitable property supported by the proceeds of sale which is precisely what is behind the Whārere sale in 2013.

So 6.2, "When Landcorp decides for strategic reasons to sell a property listed in schedule D or provide early warning. That's the first stage, early warning. Well I suppose the first stage is categorisation of schedule D. The second stage is early warning by Landcorp to OTS. Then the next stage is the advice or not of potential interest or not, that's the second part of 6.2. And yesterday I think the Chief Justice was raising the question whether that process was incomplete. As I understand it, it is a complete process in itself. If OTS decides it's not of potential interest it doesn't have to do anything else. The three month period comes in when it says it is of potential interest and that OTS has three months under 6.4, sorry. It says it's of potential interest, Landcorp gives a notice of intent to sell. From that notice OTS has

three months to come to the more final view on whether it wants a Treaty settlement, and then an agreement to buy has to follow that process.

O'REGAN J:
So OTS saying no, it's not of interest, is the end of –

MR HODDER QC:
That's the end of that, yes.

O'REGAN J:
That's all that has to happen, right.

ELIAS CJ:
Yes, I see.

MR HODDER QC:
Yes, the –

WILLIAM YOUNG J:
Or the OTS saying nothing within three months.

MR HODDER QC:
Yes.

ELIAS CJ:
Well –

MR HODDER QC:
There's nothing else to be done once – if, if the 6.2 no potential interest message goes back from OTS, that's the end of it. The protocol has no further application.

WILLIAM YOUNG J:
Or if nothing happens.

MR GODDARD QC:
Yes, sorry, yes.

WILLIAM YOUNG J:
Or in the absence of advice.

MR GODDARD QC:
If time lapses.

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
Yes. And so that's –

GLAZEBROOK J:
I don't think there's a, the time lapses are later.

WILLIAM YOUNG J:
6.5? On the expiration of three month period and the absence of advice, Landcorp then free to market as it sees fit.

GLAZEBROOK J:
But I think that's only because, once you've got the 6.4 process, but presumably if you didn't say it then that would be assumed it wasn't of interest.

MR HODDER QC:
Yes. That 6.4 date is driven off the notice to sell which follows –

GLAZEBROOK J:
Exactly, and then I think 6.5 takes that into account but no doubt if you, if they didn't do something within a reasonable period then it would be perfectly reasonable for Landcorp to continue.

MR HODDER QC:
So the submission for Landcorp is that this document is –

ELIAS CJ:
And anyway –

MR HODDER QC:

– is that this document is –

ELIAS CJ:

– it's not plausible.

MR HODDER QC:

Sorry Ma'am, sorry?

ELIAS CJ:

An aside. I'm just saying and anyway it's not enforceable in its own terms.

MR HODDER QC:

Correct. And it's confidential in its own terms. All of which, in our submission, make it an unlikely candidate to create legal rights for third parties which to some degree is under the argument that you've been hearing.

ELIAS CJ:

Well I don't know, public bodies are obliged to act evenly, not arbitrarily and reasonably, and if these public bodies have decided that this is a reasonable way to proceed, the fact that it's not publicly disclosed might not inhibit the Court taking a view that they should be hoist with their own petard.

MR HODDER QC:

In terms of clarity of –

ELIAS CJ:

Well, there are many cases in administrative law where public bodies obliged to exercise discretionary powers have decided to exercise them in accordance with particular protocols where the Courts have held them to that.

MR HODDER QC:

Yes, I think my recollection of most of those cases are public protocols or accessible protocols.

ELIAS CJ:

Yes, that's absolutely right. But if the Court is –

MR HODDER QC:

Because then there's a kind of an expectation issue that does arise here.

ELIAS CJ:

If the Court is being asked, and it's probably not being asked, to look at whether what happened here was reasonable on the part of public bodies, then it seems to me that it is quite appropriate for the Court to look at how those public bodies have said that they will exercise their powers.

MR HODDER QC:

The bite probably comes on at the point of mistake where, the Court was discussing this yesterday. So if a mistake is made under this protocol one of the issues that the Court has to decide is whether there's something in that. Now mistake hasn't been a word that's been used much because the appellants have rather elevated it to something different like bad faith. But from Landcorp's perspective what happens here is not a mistake at all. It is entitled to rely on what it's told by OTS as to whether the Crown is interested or not. So it's told twice that the Crown is not interested in this for Whārere purposes and it proceeds accordingly. In our submission, letting the Crown speak for itself in due course through my learned friend Mr Goddard, Landcorp is not under any mistake. It's been told what, there is no desire to use the right of first refusal under this exercise and it proceeds on that basis.

GLAZEBROOK J:

Just in terms of, it seems to me that it says it's not legally binding, whatever that means, but it does say both parties are committed to following the policies and procedures it defines and in accordance with your view of judicial review articulated there processes and what judicial review is designed to look at, and so I have difficulty – I understand the submission that the mistake has nothing to do with it, but I have difficulty in the proposition that says, well it really doesn't matter if there was an early warning and Landcorp said I don't care I'm going to carry on, or didn't give the opportunity for an early warning that there wasn't some reviewability of that decision. But it probably –

MR HODDER QC:

I'm not sure, I don't think I need to make that submission.

GLAZEBROOK J:

Well I think you were making that submission. You say it wasn't legally binding,. it doesn't create powers for third parties and because it's confidential you can't even look at it in terms of saying whether it's been complied with or not in deciding whether there's been any kind of breach or irrationality, unreasonable law, et cetera. But if you weren't making that submission then my point is not one that I –

MR HODDER QC:

The principal points I'm wishing to make about this are that in terms of Landcorp, the protocol was complied with. It was required to do what it did and it did it. It got response back from the Crown as to OTS, as to what it's position was, and my second point really, which is probably why I'm at a stage further than I needed to, and was picked up by Your Honour Justice Glazebrook, is that this is an unpromising candidate to create rights on third parties. So in other words if you're going to have rights created on third parties they don't know about it because it's a different document which is A, non-binding, and B, confidential. It is a long way removed from most areas where judicial law will bite, judicial review will bite.

O'REGAN J:

But in some way, picking up Justice Arnold's point, this is the practical way the Crown is dealing with the change in Treaty settlements process from a Tribunal one to a negotiation one where the memorial system doesn't really engage so it's a let's stop the sale to the third party happening in the first place, rather than saying, well let's allow it to happen –

MR HODDER QC:

Yes.

O'REGAN J:

– but resume it later.

MR HODDER QC:

There's no doubt that it supports the Crown in its negotiating stance but the proposition that the Crown's negotiating stance is reviewable is itself, I think, problematic and again a matter for the Crown submissions to address. Again that was a point dealt with by the Court of Appeal and not raised in the issues before this Court.

GLAZEBROOK J:

There's a difference between having a negotiating stance and having a procedural protocol which you say you're going to comply with and which is your means of complying a choice of complying with the section 9 obligations and being held to that, which doesn't meet the point in respect of, your point in respect of Landcorp is whether or not the Crown made a mistake.

MR HODDER QC:

Yes.

GLAZEBROOK J:

Whether or not the Crown was obliged under the protocol to, actually what's the term, to advise that it was –

MR HODDER QC:

Potential interests, yes.

GLAZEBROOK J:

– potential interests for future Treaty settlement, which arguably, if it had appreciated that the Treaty settlement claim had not been settled as it thought it had, it should have at least given the early warning system and then given the ability for the three month negotiation and thought period. From Landcorp's point of view, of course, it knew nothing about that and wasn't party to the mistake.

MR HODDER QC:

Yes.

GLAZEBROOK J:

Well it was party to the mistake, in fact, but it was entitled to rely on the Crown's advice for the –

MR HODDER QC:

Correct, that's our position.

GLAZEBROOK J:

– that there was.

MR HODDER QC:

Yes, there maybe more that the Crown has to say about this but as far as Landcorp is concerned, it hasn't done anything contrary to the protocol. It has relied on the output of the protocol which is the advice that it received, in effect, twice from OTS.

If there's nothing else on the protocol I was going to briefly just go back to where I, not quite where I was, but I've given you the references to in this, in my note at paragraph 24 to the Ministerial speeches which are making the same point. There's a passage in the very last of those extracts which underpins, this is at tab 30 of the appellant's bundle of authorities, the Minister the Right Honourable Geoffrey Palmer at page 575 of the volume.

O'REGAN J:

Which volume are we at sorry?

MR HODDER QC:

This is the blue one, yes. The very last page of it, in that whole bundle, which is page, I think, page 575, not quite two pages from the end under tab 30. Just, about half way down the page a few lines above where there was interjection by the Honourable Mr Birch, he says, "What Ministers do in relation to State-owned enterprises will be known, obvious, and available." And we say that was, indeed, the way in which the SOE Act was meant to work and, with respect, the arguments for the appellant take it in a different direction.

ELIAS CJ:

That's not Mr Birch is it?

MR HODDER QC:

Sorry?

ELIAS CJ:

Mr Birch says, "Garbage."

MR HODDER QC:

That's healthy Parliamentary debate but I'm two paragraphs above that.

ELIAS CJ:

Yes, so it's not, I thought you just said it was Mr Birch.

MR HODDER QC:

No, just above what Mr Birch says.

ELIAS CJ:

Sorry.

MR HODDER QC:

I don't adopt Mr Birch's position on that particular point. So the Act provisions, I think I do need to go back to the Act which is at tab 2 of the same bundle, because the structure is important in relation to the topics we're talking about, and I'm sorry to the Court, most members of the Court or all members of the Court no doubt have had to wrestle with this at various times but –

GLAZEBROOK J:

I'm very happy for you to take us –

ELIAS CJ:

Sorry, I'm slightly lost with where you are.

MR HODDER QC:

I'm at tab 2 in the same bundle we've just been looking at.

GLAZEBROOK J:

Tab 2 of the same bundle, thank you.

ELIAS CJ:

I'm very happy for you to take us to the Act, Mr Hodder.

MR HODDER QC:

Thank you. So the long title doesn't come as a surprise after the explanatory note to promote improved performance in respect of Government trading activities, specified principles governing the operation, authorise the formation of companies, establish requirements for their accountability. And in the definitions there are various company law related matters, the board, the company, the shareholder and the rules

are defined as the constitution. And then there is the statement of corporate intent which is identified in there.

Section 4, obviously well known. The principle objective of every state enterprise should be operated as a successful business and to that end to be (a) as profitable and efficient as comparable businesses that are not owned by the Crown, (b) a good employer and, (c) an organisation exhibiting a sense of social responsibility. Now I understand that the Privy Council says those don't have any hierarchy in them and the broadcasting assets, I can't remember but the general proposition is to operate as a successful business and 41A is providing the comparator of businesses that aren't owned by the Crown. In our submission that is a helpful comparator when we're looking at what it is that Landcorp did and didn't do and should and shouldn't have done.

Section 5 on directors is important. The directors are those who in the opinion of those appointing them, obviously Ministers, will assist the state enterprise to achieve its principle objective, ie, back to section 4(1). And then all decisions relating to the operation of a state enterprise during the buy off, pursuant to the authority of the board, of the state enterprise in accordance with the statement of corporate intent. Now there is a degree of subtly in the discussion with my learned friend, Mr Isac, yesterday. In our submission, it means what it says.

And then 3, the board, 5(3), the board of a state enterprise is accountable to the shareholding Ministers in the manner set out in part 3 and in the rules of the state enterprise.

ELIAS CJ:
What do you say operation is? You say it's anything the state enterprise does?

MR HODDER QC:
Yes. The whole point of state enterprises in this category, remembering that not all the states have turned into SOEs.

ELIAS CJ:
Similarly, trading in the long title, that's what it does.

MR HODDER QC:

So what was done with the SOE Act was to take not the whole of the state sector but to take a chunk of state activities which have trading aspects to them and put them into the SOE regime leaving behind a whole series of non-trading activities in the state. And so, yes, all the operations it was undertaking were designed to have this commercial focus to them.

Over the page section 9 is as we discussed briefly before. And section 13 is important for our purposes. Powers of shareholder Ministers in respect of new state enterprises. Shareholding Ministers may from time-to-time, by written notice to the board, direct the board – the company named in schedule 2 – to include in or omit from a statement of corporate intent for the company any provisions of a kind referred to in the first seven or eight parts of section 14(2) and made by written notice determining the amount of dividend payment, and any board to whom such a notice is given shall comply. And that follows consultation, subsection (2). Subsection (3), it was to be laid before the House. And that is the point of what The Right Honourable Geoffrey Palmer was saying in that parliamentary extract I took the Court to just a few moments ago. The idea about directions are that they are meant to be visible and therefore accountable.

Then section 14, we've been looking at aspects of section 14 earlier today. And the SCIs, it's an overview approach, what's been talked about in 2 is, subsection (2) is in respect of that financial year and each of the immediately following two financial years, so it's a forward planning document in part as is indicated by much of what's in the subparagraphs of subsection (2).

You've then got annual reports, half yearly reports, information before the House. 18.3 explains the board's not obliged by anything to provide information about individual customers or identifying individual customers. Again the idea that Ministers would be kept at a distance from the actual operational activities being engaged in by the state enterprises.

And then section 21 the Court will recall is referred to in our submissions. Savings of certain transactions, the failure by a state enterprise to comply with any provision contained in part 1 or any statement of corporate intent shall not affect the validity or enforceability of any deed, agreement, right or obligation entered into by a state enterprise. So there's strong –

GLAZEBROOK J:

I just wondered why you went to section 18(3) because the main one is section 18.1 where the Ministers can ask for any information they like and it just says you can't have individual employees or customers, which seems a normal sort of privacy provision, isn't it?

MR HODDER QC:

Yes I agree, 18(1) just gives them the right to seek information. I was simply pointing out to the extent that 18(3) takes out the ability to identify individuals, a kind of a Micro involvement, the kind that has been contemplated by appellant's submissions is not contemplated here.

ELIAS CJ:

Well it's an individual employee or individual customer seems to be a subset of Micro. I mean it's a Micro matter.

MR HODDER QC:

Yes, but a major point but it does, in my submission, is consistent with the idea that you don't drill down.

ELIAS CJ:

Yes but that's drilling down to an extraordinary level. So section 18.3 is quite a limited hands off really, isn't it?

GLAZEBROOK J:

I mean and surely you can ask about an asset that's worth 19 million and is going to be sold.

MR HODDER QC:

Yes.

GLAZEBROOK J:

That's relatively significant and not an individual customer in any terminology, isn't it, even in the context of a business as large as Landcorp?

MR HODDER QC:

Well it could although the submission in response is that it's probably not what's contemplated by the entire regime. That what it's meant to do is that Ministers focus on policy, the sale of a particular asset, that's more in the overall portfolio is not a matter of policy and –

GLAZEBROOK J:

Well it can ask what it likes under section 18(1) so it's obviously contemplated that the Ministers can actually, at least in the sense of asking for information, ask for whatever the Minister wishes to ask for. Presumably the Minister shouldn't be interested in matters that detail the, but you can tell that to a number of Ministers and I'm sure you get an answer that would say, well, I ask what I want and I –

ELIAS CJ:

And here's the part.

MR HODDER QC:

That may well be so and it's, I mean, it can probably be said that it's probably to have some minute detail to inform native policy at a higher level but the thrust of the submission is that the whole regime is designed for Ministers to operate at that higher policy level, not at the micro level. Whether it's the micro micro level or just above the micro micro level.

Section 21, we say is important because even if, as it says on its terms, even if the state-owned enterprise has filed to comply with its statement of corporate intent in some way, entering an agreement, that agreement is preserved. So the idea that contracts with state-owned enterprise are to be upheld rather than to be undermined by issues around compliance with SOE requirements is made very clear by section 21. That, of course, echoes –

GLAZEBROOK J:

Isn't that just an argument in terms of ultra vires? Those old arguments that said if you don't comply with the constitution and don't comply with the corporate intent, it's just that is an important provision, I presume you're coming back to that in terms of enforceability, because I don't see that –

MR HODDER QC:

Yes, it's in our written submissions.

GLAZEBROOK J:

– as being a provision that just says, well, whatever happens, you can't get out of a contract with an SOE. Because presumably a contract falls for frustration in any normal sense that it would normally fall from.

MR HODDER QC:

The SOE, or Landcorp is the company so in terms of the Companies Act it has the widest possible powers so it's very hard to get ultra vires in terms of buying or selling land.

GLAZEBROOK J:

I understand that but all I'm suggesting is that this is saying you can't go back and say because it isn't in accordance with the corporate intent it falls over, but does it say that if it's invalid for some other reason that it is nevertheless preserved. I would have thought that was relatively surprising. But I don't know, I'm not entirely sure what the submission on section 21, I'm just asking if you're coming back to it?

MR HODDER QC:

Well the submission might be surprising then because we would say that if something as serious as non-compliance with the statement of corporate intent isn't sufficient to knock over the agreement then things that are of a lesser matter certainly shouldn't be.

ELIAS CJ:

But on a *Mercury Energy* approach say it is an action that's *Wednesbury* unreasonable, is judicial reviewable, how is that excluded, how is that saved by section 21? It's not, is it?

MR HODDER QC:

Our submissions contain the proposition that the decision itself maybe the subject of some kind of judicial review but not the contract that emerges from it.

ELIAS CJ:

I understand that distinction you're making but in answer to the question, there's nothing in section 21 that extends to a different ground of invalidity other than failure to comply with the provisions of part 1 or statements of corporate intent?

MR HODDER QC:

Indeed – well the submission in response from me is that when you read this with the provisions that protect transactions under the Companies Act, which we'll come to in a second, sections 17 and 18 et cetera, you then have a comprehensive proposition that says those contracts survive. Whether the decisions can be challenged or criticised through judicial review is a separate issue.

ELIAS CJ:

Yes but there's nothing in section 21 that affects grounds of invalidity other than the two that are mentioned, potential grounds?

MR HODDER QC:

Expressly on their terms –

ELIAS CJ:

Yes.

MR HODDER QC:

– no. But then does take us to the, or would take us to the Companies Act.

GLAZEBROOK J:

If you were coming back to that point it's fine to come back to it.

MR HODDER QC:

Well I'll pick up, when I come in the written submissions when we deal with challenge to the contract itself. If I can just finish off with the SOE Act. If we move on to section 27, this is a precursor and part of the 1988 package, it follows the *Lands Case*, *New Zealand Māori Council v Attorney*-General [1987] 1 NZLR 641 (HC and CA), and the subsequent settlement.

ELIAS CJ:

Sorry, where are you?

MR HODDER QC:

I'm still in the SOE Act, this is page 62 of –

ELIAS CJ:

Yes, thank you.

MR HODDER QC:

The Court will be familiar with this. The submission in respect of any land or interest in land of a claim under section 6 of the Treaty of Waitangi Act does not prevent the transfer of that land by the Crown to a state enterprise or by a state enterprise to any other person. So that's in effect what's happened here. There has been a claim lodged by Ngāti Whakahemo, and that's the Wai 1471 claim, and there has been a transfer by state enterprise Landcorp to other person ie Micro. Expressly authorised by section 27 but subject to the regime that's set up under section 27A through to 27C. And as I said at the outset, that is what the backstop provision is in this context. And in terms of the structure of the Act it's an important part of the Act and it is, in our submission, not to be dismissed by saying there has never been a resumption order made as yet by the Tribunal. It's part of the statutory machinery.

ELIAS CJ:

In one of the cases before us, I don't know whether it was the *Water Case*, we had a lot of evidence and I think that inferentially this is before us here that the Waitangi Tribunal doesn't have the resources to hear hearings, to hear applications on an urgent basis.

MR HODDER QC:

I don't think I can help you on the resources issue.

ELIAS CJ:

No.

MR HODDER QC:

The, what we know from the material in this case is that –

ELIAS CJ:

And here it said that OTS doesn't have the resources to look at, to accelerate looking at negotiations.

MR HODDER QC:

Well, the only material we have here is that there was an application for an urgent hearing which the Tribunal in effect adjourned on hearing that there was going to be the clause for Ngāti Whakahemo purposes.

ELIAS CJ:

Yes.

MR HODDER QC:

Given that we were talking about the Companies Act provisions about validity of contracts it's probably sensible to go back to tab 1 in the same volume which has, actually it'd be better if you go to volume 1 of the respondent's white bundle of authorities, which has rather more of the Companies Act in it and clearly enough the State-Owned enterprise Act was meant to be built on the basis of a substratum of company law. The contemplation was that these companies, these enterprises would become incorporated and they would operate within the regime of the Companies Act with a very few minor exceptions plus the terms of the SOE Act itself, such things as SCIs. For our purposes this, the capacity and powers et cetera, which takes us to round section 16, 17 and 18, as I said, these are to be read with section 21 of the SOE Act in our submission. This sequence from sections 16 through to section 19, in effect, are designed to remove threats to contracts from, there's a word indoor management type issues, putting it in a very broad oversimplified way. So all of the things that Landcorp is involved in are authorised, in effect, by its capacity and powers under section 16 and the validity et cetera under section 17 and 18. So the point I'm making is simply that there is a strong statutory policy that contracts entered into by companies and contracts entered into by SOEs reinforced by section 21 are to be maintained rather than set aside for some kind of vires challenge.

Section 128, as the Court well knows, is the basic provision about the business and affairs of the company and being managed by or under the direction or supervision of the board of the company. And then the duties of the company to act in good faith and the best interests of the company. Again, all those are obligations which are expected of the directors, clearly contemplated by the way in which SOEs were set up, SOEs were set up as companies.

And then the last point here that I wanted to touch on briefly was section 177, if I've got it, which we don't have. So section 177 is a provision in relation to ratification. This really goes more to the *Duomatic* principle which my learned friend, Mr Goddard, will deal with in more detail, but as we say in the written submissions, and I'll come to this later, the general proposition is that there isn't scope for what's been loosely called the *Duomatic* principle following the 1993 Companies Act and in response to what my friend, Mr Isac, said yesterday, what the Law Commission said on this topic did survive into the Companies Act because it really stems from the constitutional nature of corporate, corporations and their relationships under the 1993 Act. The idea is that the rules of the company are in the constitution or they're in the Act. Now while there may be scope for ratification process, that's expressly dealt with in section 177 and that entire set of, or suite of, arrangements is all that is required.

GLAZEBROOK J:
Can you just give us – I actually noticed it wasn't there yesterday when I was looking through it and then forgot to look it up, and then I haven't got my iPad with me today to look it up on the –

MR HODDER QC:
Section 177?

GLAZEBROOK J:
Yes, what – just quickly, what does it provide?

MR GODDARD QC:
It's in the appellant's authorities, Your Honour.

GLAZEBROOK J:
Is it? Okay.

MR GODDARD QC:
Under tab 1.

O'REGAN J:
It's in which bundle? The blue one?

MR HODDER QC:

Page 35, the blue one.

GLAZEBROOK J:

Okay, thank you.

ELIAS CJ:

So where is it?

GLAZEBROOK J:

The appellant's authorities, the blue volume, volume 1.

MR HODDER QC:

Page 35, at section 177.

GLAZEBROOK J:

Yes, I thought seeing it was bigger than the other one, it shouldn't be there.

MR HODDER QC:

So did I.

GLAZEBROOK J:

So is it nothing in this section limits the ratification? So it's only – the argument is it's only ratification that's available, not effectively direction? Is that –

MR HODDER QC:

Yes.

GLAZEBROOK J:

That's the submission? Right.

MR HODDER QC:

And that, well, that ratification is expressly dealt with in the Act. It doesn't need to be dealt with by informal –

GLAZEBROOK J:

Well, I don't think it is –

MR HODDER QC:

– equitable rules.

GLAZEBROOK J:

– because I think it says that ratification remains but that submission is that direction doesn't under the *Duomatic* principle, because ratification, ratification is – that's dealt with in 177(1) to (3) seems slightly different, but 177(4) seems to preserve the prior law on ratification.

MR HODDER QC:

Yes, it provides a role for ratification. What the appellant's case involves is sort of a pre-emptive strike as it were.

GLAZEBROOK J:

Yes, so it's reasoning from the fact that it only preserves the law –

MR HODDER QC:

Correct.

GLAZEBROOK J:

– on ratification, that it doesn't preserve –

MR HODDER QC:

Correct.

GLAZEBROOK J:

– the other part of, or the other, or the *Duomatic* principle.

MR HODDER QC:

And the Law Commission's expressed statement of having considered –

GLAZEBROOK J:

Yes.

MR HODDER QC:

– and declined not to take up a unanimous shareholder assent provision.

I think I'm just about finished with the generic stuff. If I can briefly draw attention, although it's only a minor detail, I think, we've arranged for the registrar to have copies of the Cabinet manual which deals with state-owned enterprises. This of itself is not of huge significance but the Court has that extract. Then what I've been describing in terms of the way in which state enterprises work seems to be consistent with ways described in sections 3.45 to 3.48 of the Cabinet manual.

ELIAS CJ:
Sorry, we've got 3…

MR HODDER QC:
So you should have handed up to you, so it's the state-owned enterprises section begins at paragraph 3.45 which is the extract you've got and explains paragraph 3.46, precisely what goes on. The board takes full responsibility for running the business, accountable to the shareholding Ministers. The role of the shareholding Ministers is specified in terms of appointing directors, setting dividend levels, monitoring performance and agreeing to and presenting the SCI. Then it goes on at 3.48, ministerial direction in terms of the company's statement of corporate intent to the level of the dividend.

May the Court please, I think we're about 11.30.

ELIAS CJ:
What do you want us to take from this?

MR HODDER QC:
Just our submission is that the approach that we are submitting applies to the SOEs, that is to say the clear distinction between the high level of the policy involvement by Ministers and the operational responsibilities, the comprehensive operational responsibilities of directors is reinforced by the Cabinet manual acknowledgement as well.

ELIAS CJ:
Well, it doesn't purport to go beyond the legislation. So it's simply that – it's simply consistent with it.

MR HODDER QC:

No, but in the face of an argument that says there's a power to intervene in several ways, there's nothing at all to support that coming from…

ELIAS CJ:

Well, it only says that the powers include in this manual, but your main argument is that the statutory framework excludes other interference.

MR HODDER QC:

It is, yes. Indeed. So when we return I'm going to have to move quite quickly because I have to finish by about a quarter past 12 to make time for others in terms of this, so I will move quite quickly through a couple of aspects, but because of the constraint on time I'm not going to obviously –

ELIAS CJ:

Well, you should not feel constrained by time. That isn't an invitation to be other than responsible, Mr Hodder –

MR HODDER QC:

Yes.

ELIAS CJ:

– but we need to hear this case properly.

MR HODDER QC:

Right. Well, I will use due despatch in terms of getting through if I can.

ELIAS CJ:

Thank you. All right, we'll take the adjournment.

COURT ADJOURNS: 11.32 AM
COURT RESUMES: 11.53 AM

MR HODDER QC:

May it please the Court, I am about to descent into the facts, but I think the Chief Justice may have asked what brought about the protected land agreement, and I was instructed over the adjournment that if we went back to tab 50 of volume 3 of

the case on appeal which is the agreement at page 491. Clause 23 talks about the recent termination of a well advanced sales process for a property known as Whenuakite and I understand that was a subject of an injunction application which kind of caused a –

ELIAS CJ:
Yes.

MR HODDER QC:
– a certain amount of complications and that this agreement is an attempt to regularise rather than have ad hoc injunction type scenarios occurring.

Now in terms of my introductory note on paragraph 28, I was about to go to the tender process. The Court has been taken through much of that. The point that I really want to emphasise is that this was Landcorp's compliance with the protocol. So we're at tab 59 of volume 3. Mr McKenzie of Landcorp gets in touch with Mr Jackson OTS and says, "We're investigating the sale," and gives him the details of the title.

GLAZEBROOK J:
I'm sorry I've now just lost where you are?

MR HODDER QC:
I'm at tab 59 of volume 3 of the case.

GLAZEBROOK J:
Fifty-nine, thank you.

MR HODDER QC:
So tab 59 is the Landcorp advice. Tab 60 is the response from OTS saying the property is not a potential interest and, therefore, in terms of the protocol Landcorp was free to proceed and it duly did so on the basis of the board paper which is at tab 61. And that sets out the reasons, the commercial reasons why this was being done. In particular the third paragraph, it's isolated, it doesn't lend itself to being clustered with major operations that it has elsewhere, dairy operations elsewhere, and no longer holds strategic interest for Landcorp which is a change in the position that it adopted at an earlier stage.

Over the page we see that the sale of this property was signalled in the approve 2013/'14 business plan and included in the SCI, but notes there's a commitment made to fund Landcorp capital requirements via land sales as part of the 2013 SCI and approval is sought to sell this property And then records that OTS just waiting for the interest in the farms. Then the board then approves that and the minute of that is at tab 62. So the commercial –

ELIAS CJ:

That reference, sorry, I'm just looking at it, I haven't picked it up before, the requirement to offer back under section 40 of the Public Works Act. There was a document we looked at before which suggested that part of the Treaty grievance was a taking by proclamation. Presumably it is considered fair of this requirement also because of the settlement, the assumed settlement?

MR HODDER QC:

There's very little detail about what the –

ELIAS CJ:

Yes, no sorry –

MR HODDER QC:

– rest of the claim is so, no, I don't know.

ELIAS CJ:

– so that's just quite speculative.

MR HODDER QC:

No I don't know, sorry.

ELIAS CJ:

But there might be a legal claim based on section 40?

MR HODDER QC:

Which we haven't cited yet.

ELIAS CJ:

No.

MR HODDER QC:

So in our submission this was intended to be a commercial decision. It wasn't suitable for Landcorp's purposes in particular the clustering point. Landcorp needed to get capital for its other activities. It was going to seek a market price and it contemplated an arm's length transaction hence the public tender process.

The tender conditions are at tab 63. They make it clear that there is a section 27(a) memorial, well they refer to the title which has got the section 27(b) memorial on it and it provides for cancellation at the decision of the offerer party.

ELIAS CJ:

Why is the sale redacted from 4.4, the sale price?

MR HODDER QC:

I think at an earlier stage it was regarded as confidential and it was for some time.

ELIAS CJ:

Well is it still regarded as confidential?

MR HODDER QC:

Not now.

ELIAS CJ:

So what was the minimum then, if it's not confidential, what was the minimum?

MR HODDER QC:

Sorry, the minimum price? I'm not sure I know the minimum price, Ma'am.

ELIAS CJ:

It's just all of this talk about 23 million has us a little bit, or has me a little bit mystified where it came from. Was it something that –

MR HODDER QC:

I think 23 million was regarded as –

ELIAS CJ:
The outside?

MR HODDER QC:
– the upper level.

ELIAS CJ:
Yes.

MR HODDER QC:
I think Landcorp was quite pleased with the offer it got of 19 million from Micro and all the other offers were significantly below that and I can find out if it helps at all but I simply don't know what the gap on 4.4 board resolution is.

As I was mentioning, the tender provides as tenders often do, they can cancel the process.

GLAZEBROOK J:
Whereabouts is that?

MR HODDER QC:
That's on page 578 under tab 63, Ma'am.

GLAZEBROOK J:
I've got that, sorry, where's the clause for the cancellation?

MR HODDER QC:
Clause 2.1E and F.

GLAZEBROOK J:
Thank you.

MR HODDER QC:
And then what I mention in terms of the note at paragraph 29 is the Ngāti Makino sort of intervention. So the tender has a close off date of 4 December. It's launched sometime in October as far as we can tell from the chronology, but it has a closing

date of 4 December. And then at a late stage in this process Ngāti Makino gets involved and the background to that, and I've given the references in paragraph 29, are set out in Ms Smith's affidavit where she explains the previous engagement. Ngāti Makino, when it was settling its claim, had a real interest in the Whārere Farm but Landcorp was adamant that it was a strategic asset and wasn't going to sell it or give a right of first refusal over it, and that remained the case through until there was a settlement of Ngāti Makino's claim which also meant that because it was in full and final settlement it couldn't rely on a memorial. The Fletcher affidavit carries on and deals with more up to date matters and the upshot of that was that in late November of –

ELIAS CJ:
Does that mean – well, it may not mean, but does that mean that Ngāti Makino's claim was not specific to this land?

MR HODDER QC:
Doesn't seem to be. It would seem to be that one that was sought in the area and the affidavits don't take us particularly far. It certainly was featured in the discussions between them as described in Ms Smith's affidavit but we have no more detail than that as to exactly how deep or strong a connection Ngāti Makino was asserting in relation to this land.

But the Fletcher affidavit explains that there was advice given to Ngāti Makino by OTS that the property was coming up for sale and that then led to Ngāti Makino getting in touch with Ministers and Ministers getting in touch with Landcorp effectively and the end result is the board meetings you've been taken to which were at tabs 70 and 71 and indicate, insofar as board meetings can, that this wasn't a straightforward decision by the board but in the end the board comes to the view that it will cancel the tender process and provide a window which is to expire in effect in the end of February for there to be a discussion, Ngāti Makino and other iwi as agreed by Ngāti Makino. So it's very much a Ngāti Makino driven opportunity that had been created and that's explained by – effectively explained in the Minister's press release at tab 73 on the basis that had it been available, in effect, had it been available at the time that Ngāti Makino's settlement was completed then it would likely have formed part of it. Circumstances had changed because Landcorp's strategic view of it had changed and it was appropriate in these exceptional circumstances, that's the phrase

used in the press release by the Minister, that there be this opportunity, and this was a sort of a post-settlement sign of goodwill as far as the Crown was concerned.

There was a brief discussion yesterday about price. There is nothing that is completely specific on price in the discussions between Ngāti Makino and Landcorp but if the Court were to look at tab 74 you'll see that Ngāti Makino's view was that it wanted a first right to buy the transfer value. The value would be set by independent valuers as an arbitrator and I think, although it's not completely clear, that paragraph 3 at the bottom of that page is suggesting it should be as at September 2009 which goes back to the period when Ngāti Makino's Treaty settlement was going on. So it was going back some years at that point and no doubt that produced a somewhat lower price than Landcorp was interested in. Landcorp's view is set out at tab 76 in the letter of 31 January which focuses, as paragraph 3 ends, a fair market value having regard to the highest bid received by Landcorp, and at the bottom of the page, "We do not and cannot accept a methodology that does not have regard to current market conditions," and the second to last paragraph of that letter says that, "We will return to the market if you can't meet the market within the specified timeframe." So it seems fairly clear that Landcorp had in mind the price it had already received in the tender round, which we know was the Micro offer at just over 19 million.

ARNOLD J:
Well, they didn't disclose that in this letter but subsequently in the meeting they seem to have disclosed a range of prices.

MR HODDER QC:
Yes, that seems to be what's happened. Well, the note is not completely clear but that seems to be what's happened.

GLAZEBROOK J:
So are those figures in 78 still confidential, they're redacted there? Page 3 and 4.

MR HODDER QC:
They are redacted, I'm not sure if they are still confidential or not. If the Court is interested no doubt I could arrange to find them.

ELIAS CJ:

Well we are interested in clearing away any misconceptions of dealings not in utmost good faith. So I think we are interested in seeing what was being said without it being redacted and what was known without it being redacted.

MR HODDER QC:

Then I'm sure we can get the material, the redactions on pages 647 and 648. It might take a little time to get those to you but we will get them.

ARNOLD J:

The interesting thing about 647 is that Ngāti Makino accept that Ngāti Whakahemo have the mana whenua interest in the land.

MR HODDER QC:

Well they're contrasting that in part with Ngāti As well as.

ARNOLD J:

Yes.

MR HODDER QC:

What they don't say is whether they claim any mana whenua at all themselves.

ELIAS CJ:

Yes.

ARNOLD J:

No exactly.

MR HODDER QC:

So while we get that material that has just been discussed with the Chief Justice, in my submission it's pretty clear from the Landcorp letter, that Landcorp didn't see any reason why it wouldn't be selling at the price it was going to go through the tender process, it was simply giving an opportunity to Ngāti Makino and there really was the way in which the board's resolution was phrased, that that was really what it was, it wasn't looking to be, make itself into a concessionary process.

ELIAS CJ:

Well it was not though at the tender price, was it, the broad resolution, it was, again that was redacted I think, wasn't it?

MR HODDER QC:
It's at tab 62.

ELIAS CJ:
Sixty-two, sorry.

MR HODDER QC:
Yes, but by this stage the tender round having been completed. Sorry, 62 is the original tender price, that wasn't the point I –

ELIAS CJ:
I see, yes.

MR HODDER QC:
It's the one's in December where they pull the plug on the tender process.

ELIAS CJ:
Yes and I think there was a range there, wasn't there, or above or something or was it at the tender price or above that they were authorised to deal?

MR HODDER QC:
I'm just checking out those minutes. That's at tab 70 and 71. At the market price as determined by the current tender process is what is said on page 626 of tab 70.

So Ngāti Makino's situation was special and in our submission is distinguishable from the matter of Ngāti Whakahemo who already had a Treaty claim that had been fully recognised in the sense it had gone so far as settlement. There was the entity that had a mandate, that wasn't the case according to Mr Finlayson's affidavit for Ngāti Whakahemo. They have this unfortunately, from his point of view, circumstance that when it wanted to have Whārere Farm incorporated in its settlement discussions it wasn't available.

ELIAS CJ:

And, indeed, it had sought right of first refusal which Landcorp have not gone along with on the basis that that would be commercially –

MR HODDER QC:

Yes.

ELIAS CJ:

– not a good idea.

MR HODDER QC:

Landcorp is obviously quite adamant about that according to the affidavit, yes.

ELIAS CJ:

Yes.

MR HODDER QC:

Yes, it didn't have recourse to section 27(b) because it had finally settled its claims –

ELIAS CJ:

Yes.

MR HODDER QC:

– and this was a case where the Minister, or the Minister for Treaty negotiations no doubt spoke to the shareholding Ministers who made a request of Landcorp and Landcorp granted the request on the basis that we saw in the minutes but only as it clears with some discussion of both the positive and the negative side.

ELIAS CJ:

That request of the shareholding Ministers on your argument has no statutory, there's no statutory power but what do you say, that that's just –

MR HODDER QC:

The real world.

ELIAS CJ:

That's the real world.

MR HODDER QC:
Yes.

ELIAS CJ:
Yes.

MR HODDER QC:
Well it's discussed in those minutes, they're both here and in the February minutes, it's at tab 71 at page 629. The Chief Executive noted the outcomes. The positive side: creates goodwill from Ministers; sends a positive signal to Māori; and avoids possible occupation of farms. So those are matters that go to support that proposition. But on the negative side, which are also factors which have to be weighed: difficult to explain the change; risk that the commercial reputation is tarnished; and could create unwelcome precedent. In the commercial reputation for contracting there is something unattractive about going through a tender process and then pulling the plug on the process at a late stage and doing it once might be regarded as unfortunate; doing it twice would tend to create a rather bad commercial reputation, and that is one of the factors that applies here.

So yes, we would say that this was a matter where there was a request made by the shareholding Ministers which Landcorp could have refused but did not in the circumstances and it made that decision in the best interests of Landcorp, taking those into account. And it was clear, as the Court recalls, in insisting that the press release met its approval by saying it had done all it was required to do in terms of its obligations.

ARNOLD J:
And the probability is that if a request had been made by the Minister on behalf of Ngāti Whakahemo it too would have been granted.

MR HODDER QC:
It rather depends on the timing, one suspects. If it had been done before Ngāti Makino got in the process, probable. Afterwards, the, sort of the second, the second sort of opportunity would become more troublesome.

ARNOLD J:
Well, the board minutes record the tender as being cancelled, don't they?

MR HODDER QC:

That's true but they can't have – they were conscious of the fact that this exercise was one that had some risks associated with it in terms of commercial reputation. So that's – I don't know that any of us can go beyond speculation it might have happened had that happened, but the way that the minutes read, in our submission, is that it was a relatively narrow decision to go with the Ngāti Makino request. Having a second request at a later stage by somebody else might have been even more troublesome. We just, you know, it's a hypothetical in a sense.

O'REGAN J:

Well, it probably wouldn't have been at a later stage. It would have been at the same time, wouldn't it? If everything had gone properly here and OTS had identified Ngāti Whakahemo's claim right at the beginning, presumably it either would have been ahead of Makino in the queue or it would have at least been in the same spot as Makino.

MR HODDER QC:

That's a question of which time that is. If OTS had got it right the first time, there would never have been a tender.

O'REGAN J:

Mmm, yes, I suppose that's true.

MR HODDER QC:

Because that was back in September.

O'REGAN J:

Mmm.

MR HODDER QC:

The tender doesn't happen until late October.

O'REGAN J:

Yes.

MR HODDER QC:

And so then paragraph 30 is when Ngāti Whakahemo comes into visibility from Landcorp's perspective and it starts in tab 64 recording its interest. That gets referred to OTS.

ELIAS CJ:
So that is before the board resolution?

MR HODDER QC:
It's before they cancel the tender process.

ELIAS CJ:
Yes.

MR HODDER QC:
Yes. Although no doubt at one stage the board would be forgiven for thinking that it had sort of two iwi with one opportunity in the sense it was understood that Ngāti Whakahemo would be involved with Ngāti Makino, but it didn't turn out that way.

ELIAS CJ:
Mmm, and they didn't have any direct dealings for the Ngāti Whakahemo?

MR HODDER QC:
I thought there was a meeting that was attended –

ELIAS CJ:
Was there?

MR HODDER QC:
– by all parties –

ELIAS CJ:
All right.

MR HODDER QC:
– in this –

GLAZEBROOK J:

I think wasn't the – was that the one where they said they weren't invited but turned up anyway or…

MR HODDER QC:

Yes, yes. So the document at tab 65 is clearly one of the causes of action, as it were, in the judicial review claim. This is the advice in response to the Ngāti Whakahemo approach where the Crown's position is stated as being that their – they don't have a claim because their claim has been settled. Now, again, as far as Landcorp is concerned that is effectively a reaffirmation of the earlier advice that the Crown has no interest in exercising rights under the protocol. Even the protocol opportunity had passed, this is reiterating the point that the Crown didn't have any interest in the land.

GLAZEBROOK J:

Are we – am I remembering correctly that the letters that said they did have an interest and explaining why were copied to Landcorp, or at least some people in Landcorp?

MR HODDER QC:

At a later stage, I thought.

GLAZEBROOK J:

Was that later?

MR HODDER QC:

I thought so.

ELIAS CJ:

Well, the 18 November letter, is that what you mean?

GLAZEBROOK J:

Yes, it was the more –

MR HODDER QC:

That's to Landcorp.

GLAZEBROOK J:

– detailed reasoning as to why they had a claim, I thought some of those earlier ones were copied to Landcorp. I'm not suggesting there was necessarily any reason for Landcorp to doubt the OTS advice but…

MR HODDER QC:

Well I haven't focused on that, I had an impression that the first time Ngāti Whakahemo came into Landcorp's line of sight was the letter we're just talking about at tab 64.

ELIAS CJ:

That refers to Wai 1471, do we have 1471 in the material?

MR HODDER QC:

Yes, it's right at the beginning of the document.

ELIAS CJ:

Of the bundle?

MR HODDER QC:

At one level it's a satisfyingly brief pleading.

ELIAS CJ:

Where is it?

MR HODDER QC:

Tab 51.

ELIAS CJ:

Tab 51, because that's referred to in the letter. This is ,yes, that's right, this is where it's talked about proclamation.

MR HODDER QC:

It doesn't mention Landcorp anywhere in the pleading.

ELIAS CJ:

No, but the letter of 18 November refers to the claim and 1471 –

MR HODDER QC:

Yes.

ELIAS CJ:

– and says that it covers the land now comprising –

MR HODDER QC:

Correct.

ELIAS CJ:

– the Whārere Farm. Yes, thank you.

MR HODDER QC:

So as I say, it's the document at 65 which is what the appellant places weight on.

ELIAS CJ:

Sorry, can you remind me, what's the acreage or hectarage of –

MR HODDER QC:

Four hundred and four hectares.

ELIAS CJ:

Four hundred and four?

MR HODDER QC:

Yes.

ELIAS CJ:

And the land taken by proclamation according to this is about 2000 acres?

MR HODDER QC:

Yes, is going to be rather more than 404.

ELIAS CJ:

Yes, but not much more, is it?

MR HODDER QC:

It's a little bit more. So that response to the reliance on document at 65 is simply that it's no more than an affirmation of what was already being said by OTS to Landcorp that it wasn't interested in, that is to say, the Crown wasn't interested, that was the Crown's position at that stage. It wasn't inaccurate it was, may have been caused by a mistake on the Crown's part but that was the position conveyed to Landcorp which Landcorp proceeded on the basis of.

Then there is invitation to tender which is rejected by Ngāti Whakahemo at tab 67. There's an email chain, you were taken through much of it but this features Mr Te Aho and the approach that they take there is set out in that email that's the last of the chain but the first in the sequence on page 608, looking for a guaranteed opportunity to purchase the stolen Whārere land and over on page 609 down towards the bottom under the heading of, "Whānau," some reference to possible occupations. "No engagement with anyone now, no surrender, Mita, Jock**,** no tender. We need to head to the tribunal and Courts now, we're not Joe Public we are the Treaty partner." So they were not interested in taking part in the tender process.

So we know there were the discussions unsuccessfully between Ngāti Whakahemo and Ngāti Makino. In the end these things come to a head in late February which is the end of the window that the Landcorp board had provided for and at that time there is both Ngāti Makino exiting and the day before the meeting on the 27th of February we have Ngāti Whakahemo writing to say that at tab 79 that they want an undertaking, at page 653. And the undertaking is sought by Thursday the 6th of March at 5.00 pm otherwise an urgent application to the High Court for an injunction preventing the sale of the farm pending the hearing and final determination of Wai 1471. So that was an injunction tied to the resumption claim and the Treaty claim whereas at various stages I understood that the appellant's current position is it wants something outside the Treaty claim.

Also on the 27th we have the first contact, appears to be the first contact, by Mr Te Aho with Ms Houpapa and that is on tab 83 where he explains in his email at the bottom of the page, they've approved an injunction being filed to stop the sale of Whārere lands. We're down to affidavits wanting to –

WILLIAM YOUNG J:

What evidence is there in terms of detail as to how imminent injunction proceedings were?

MR HODDER QC:

Well, the suggestion is they were ready to go whenever they needed to.

WILLIAM YOUNG J:

Yes, but that's, as it were, the threat.

MR HODDER QC:

Yes.

WILLIAM YOUNG J:

Was that backed up by the solicitors?

MR HODDER QC:

Well, the solicitors' letter asks for that date of the 6th, return by the 6th. There were various other requests of people, including of the Crown, by this list as for Ngāti Whakahemo at this stage. So there's a – the prospect of litigation and of injunctions, undertakings, occurs. On a number of occasions there it actually gets given effect to. So that's the position. Ngāti Makino is gone. Ngāti Whakahemo has come back into play, both with the threat of litigation and a request for an undertaking and also there's a contact made with Ms Houpapa the day before the board meets. The board then meets, and that's the minutes are at tab 84, on the 28th of February. Now and as the Court knows we regard this as being the decision which has to be focused on because this is the decision which is the considered decision by decision-maker or body within Landcorp as to what it's going to do. So there's this –

ELIAS CJ:

But why do you say it's necessary to focus on decision?

MR HODDER QC:

Well…

ELIAS CJ:

I mean, obviously it's important but why are you pinpointing this particular step?

MR HODDER QC:

Well, as the Court will note in my written submissions, everything that follows is detailed. The terms of a decision, the thinking, reasoned, considered decision, this is the one that matters, and so what –

ELIAS CJ:

But it stays operative so one would have thought that any actions taken pursuant to it you read into the decision. I'm just – I didn't find it terribly easy to understand in your written submissions why there was this emphasis on this, this continues to be the reasons for the entering into the agreement, but why is it not possible to attack the entering into the agreement?

MR HODDER QC:

Well, it comes back to the – that's why I raised the question of the role of judicial review. If judicial review is designed to produce good decisions by public, by bodies exercising public powers –

ELIAS CJ:

Well, good conduct.

MR HODDER QC:

Well, good conduct.

ELIAS CJ:

I just feel it's such a technical approach to say one has to look for a decision. Anyway –

MR HODDER QC:

Across –

ELIAS CJ:

– I don't want to interrupt the –

MR HODDER QC:

No, no, it's a –

ELIAS CJ:

– flow of the reasons here.

MR HODDER QC:

It's a quite fundamental point because we do take the proposition that in this circumstance there is a distinction between making a decision which may to may not have been influenced by matters that would amount to a misuse of power, nothing is alleged in relation to this apart from perhaps in the OTS mistake, and what happens afterwards, which is giving effect to a board decision. It is a purely mechanical process. There is no reasoning to be corrupted.

ELIAS CJ:

But there was action to be corrupted perhaps.

MR HODDER QC:

The only actions were those which were…

ELIAS CJ:

Well, the position was – there was still an – the sale was not complete. Surely at any stage until the sale is complete, if Landcorp is amenable to judicial review, a claim can be brought. Maybe afterwards.

MR HODDER QC:

And afterwards. That's –

ELIAS CJ:

And afterwards, yes.

MR HODDER QC:

That's really the point.

ELIAS CJ:

Yes.

MR HODDER QC:

If the decision, and this is the decision, if this is what the problem is but if this decision didn't occur there is nothing to review. It's only because of this decision that you get to the sale.

ELIAS CJ:

Well I understand it's part of all of that but I don't understand why the entering into the agreement is also something that can't be judicially reviewed and why you keep taking us back to – I mean, the reasons and the factors that bore on the entering into the agreement may well be captured in this decision but I'm just trying to, I'm just wondering whether it's a very technical view of judicial review that you always have to look for a power of decision making?

MR HODDER QC:

I'm sorry if it gets categorised as technical but it does seem to be the focus of most judicial review that it's a decision.

ELIAS CJ:

That's because of the language of the Judicature Amendment Act but it doesn't indicate the scope of judicial review.

MR HODDER QC:

Well the submission that we've made and you've seen is that judicial review is mostly concerned with decision making.

ELIAS CJ:

Well it is mostly.

MR HODDER QC:

I accept that there are some exceptional supervisory jurisdictions –

ELIAS CJ:

Yes.

MR HODDER QC:

– which go beyond decision making.

ELIAS CJ:

Statutory powers of decision making, yes.

MR HODDER QC:

But even outside statutory powers you're going to have powers of decision making that might be described as non-statutory but they are about decisions otherwise there is nothing that really creates a sufficient interest for the Court to be involved or very rarely and this is one of those cases.

So the distinction that we contend for is a decision which has gone, has a whole series of influences on it versus what happens afterwards. What happens afterwards is that the sale and purchase agreement is settled by Landcorp solicitors sent to the purchaser, the purchaser accepts it, sends it back again, signed, and then two attorneys within Landcorp sign it. There's no decision making and there's no major exercise there.

ELIAS CJ:
But if after this board resolution OTS had rung up and said, "Look, terribly sorry but we've made a mistake here and this is a matter of interest to us," clearly, this would have been reconsidered. So really all I'm saying is, until the deed is done the corporate body, Landcorp, is still exercising some authority which is amenable to judicial review.

MR HODDER QC:
Well this respite is maybe both technical and linear but it seems to be that if you have the scenario Your Honour's putting that some new information comes to light and then in the light of that information there would be a decision to either to do nothing or to do something. It's that decision that's the focus of attention, not the one that was made back on the 28th of February.

ELIAS CJ:
Yes, but there is further information that is exchanged, this is the argument for the appellants, in that. Ms Houpapa enters into discussions and suggests that there will be a meeting on the Friday at which they will listen to the concerns of Ngāti Whakahemo.

So why isn't that also a supervening matter that means that we don't have to have a snapshot as at the date of this board decision which is really what I'm taking that you're arguing?

MR HODDER QC:

Well I'm probably back in my technical territory because there is no decision involved in any of that.

ELIAS CJ:

Well why is one, why do you allow yourself open to the possibility that there could be a reconsideration if fresh information came from the Office of Treaty Settlement but not a reconsideration depending on the contact between the appellants and Landcorp.

MR HODDER QC:

But there's no information coming to Landcorp in what we're describing.1

ELIAS CJ:

What, that they want to talk?

MR HODDER QC:

Yes.

ELIAS CJ:

And an indication from Landcorp that they will talk?

MR HODDER QC:

That's referred to in the minutes of their board meeting. They know that Ngāti Whakahemo is interested in fact though it's sought an injunction. They know that they want to have a talk because they authorised Ms Houpapa to go and talk to them. There's no new information about that.

ELIAS CJ:

All right.

MR HODDER QC:

And what she tells them, there's not information that gets back to the board or anybody else, and the evidence from those who actually signed the agreement is they had no discussions with Ms Houpapa before they signed it.

ELIAS CJ:

I understand all of that.

MR HODDER QC:

That then in effect almost gets to the substantive issues that we address in our written submissions. The one point I did want to emphasise though is, while we're in this volume 3, if we go to tab 96, this is –

GLAZEBROOK J:

Sorry, volume 2?

MR HODDER QC:

Volume 3.

GLAZEBROOK J:

At volume 3.

MR HODDER QC:

Yes, volume 3. At tab 96 there's, in effect, it's the cover email from Cooney Lees Morgan acting for Micro, and on page 699 is the Cooney Lees Morgan letter and it says, "Please now find attached the agreement for sale duly signed by the purchasers in the unaltered form presented by Buddle Findlay yesterday." It's noted that the agreement has been changed and the Court's aware of the new clauses 21 and 22. "Be that as it may, our client is agreeable to proceed on the basis of the current form of agreement but requests the following matters be drawn to the vendor's attention." So just, I think I said this earlier, there is – this is not a condition precedent. They've already signed it and said, "We're happy to be bound by it but we've got some points we just want you to think about," and at –

GLAZEBROOK J:

Well, aren't they suggesting they're amendments? I mean, they might have signed it but they're saying these are our counter-offer on amendments.

MR HODDER QC:

Well, there's two propositions. Your Honour's right on both of them but the important part from a legal perspective is they've signed it and said they're prepared to be bound by it. "Our client is agreeable to proceed on the basis of the current form of agreement." They've got some sensible suggestions and those are duly accepted by Landcorp but there's no doubt in our submission that on the basis of this

correspondence if Landcorp had said, "No," and just signed up on the basis of the existing agreement, there would have been a contract, or formal contract, for the purposes of the Property Law Act.

GLAZEBROOK J:
Well, maybe.

MR HODDER QC:
In terms of written submissions, we have a long section or three sections on bad faith. There's probably not a great deal to be said that hasn't been said there. The reason we're talking about bad faith is because the phrase is used in, firstly, *Wednesbury* and secondly in *Mercury Energy*, and in both those cases, well, one's quoting the other, the concept of bad faith is used effectively as an irrelevant consideration. That's why it's regarded as being problematic from a public law perspective, that if you're exercising a power in bad faith you're taking into account something irrelevant and that's why it features in there, and there's nothing in the case law that suggests elevation of bad faith is some standalone head. It is simply that if the power is being exercised for bad faith reasons then they're not the right reasons. It's an irrelevant consideration, and in our circumstance this is partly why I have my technical approach to the decision on 28 February. There was simply no question of that having any effect on the decision, the substantive decision made to sell the property.

ELIAS CJ:
I understand that that's why you're emphasising the 28 February decision.

MR HODDER QC:
And I suppose our submission is that we can, we should be entitled to do that –

ELIAS CJ:
You would say –

MR HODDER QC:
– because nothing happens.

ELIAS CJ:
– you get there anyway.

MR HODDER QC:
Nothing happens after that –

ELIAS CJ:
Yes.

MR HODDER QC:
– that's material. But two things are going on here. One is nothing materially is happening in terms of the reason why the board should reconsider its decision, and, secondly, there's a dialogue going on about undertakings on which it's clearly provided through the solicitors' exchange of channels of correspondence that the undertaking is refused twice.

So the general proposition that we have advanced is that there has to be knowing misuse of powers for this to bite at all and we say that approach is supported by the authorities. The Court of Appeal is cited, we've gone to those on page 13 of our written submissions and explained how Aronson and Blake as well as De Smith will make it clear that what you're talking about is something that is prior intentional improper purpose, if one is talking about that.

ELIAS CJ:
Just on these facts, you say that the board authorised Ms Houpapa to meet with Ngāti Whakahemo but that was simply to explain Landcorp's position. The email at 675 from Mr Carden, which also seems to have gone to Mr Kenney-Good from the heading, I'm not sure where the chain is, but indicates that the meeting that's being set up is to listen to their concerns which is not really the same as the board had authorised. So if that instruction had been carried out by Ms Houpapa you can understand how the appellants would have the impression that there is going to be discussion about their position before anything irrecoverable is done. That isn't really what the board had contemplated. I'd just like any comments you have on that.

MR HODDER QC:
In a sense I'd submit to the contrary. The Board says, "Please meet with Ngāti Whakahemo to explain Landcorp's position." At tab 87 on page 675, the first email from Mr Carden says, "Best you contact them and we need to position the meeting the right way and not set an expectation we're meeting to negotiate."

ELIAS CJ:

Yes.

MR HODDER QC:

That's entirely consistent with the board's resolution.

ELIAS CJ:

Yes.

MR HODDER QC:

And then later on he says who you should approach in the top email and says, "And perhaps you might put it in the way that we're looking to set up a meeting with them to listen to their concerns and we will be in touch with them directly."

ELIAS CJ:

Yes, well he's alive to the fact that it would be wrong to leave the impression that they're coming to negotiate, that's the first email.

MR HODDER QC:

Yes.

ELIAS CJ:

He then says, "Well put it on the basis we're coming to listen to their concerns," whether that would give the impression that there is actually something of substance to be discussed is really the question that is being put and against that background perhaps its understandable that Ms Houpapa may give the wrong impression.

The point that – I'd like some comment on that but, in any event, the point is you say nothing changed from the board resolution but on the appellant's argument what changed was that there seemed to be an indication that there would be discussions and that exchange of emails indicates how some confusion, at least, might have been produced.

MR HODDER QC:

Yes I can, I mean Your Honour's right, there could be some confusion not least because it seems as if Ngāti Whakahemo didn't know what was being talked about by timeframes.

ELIAS CJ:

Yes, exactly, yes.

MR HODDER QC:

But that's sort of one of those misunderstandings that can arise –

ELIAS CJ:

Yes.

MR HODDER QC:

– as opposed to any that take us into the territory of bad faith. So the timeframes that Ms Houpapa was talking about when she says, "Timeframes have defeated us," she knew what she was talking about and she wasn't wrong. The timeframes had defeated them because the period had passed, the board had made its decision, work was obviously going to go on towards getting the agreement settled.

ELIAS CJ:

But they weren't told, "We have decided to enter into an agreement with the highest tenderer," as they could well have been told. They were told, "We'll meet with you next Friday and we'll listen to your concerns."

MR HODDER QC:

Yes, although Ms Houpapa's 1 March email, in our submission, is in fact, sets the scene for that in a way that's perfectly acceptable were it not for the fact that the timeframes thing is not understood. But at the same time one can't, in our submission, ignore the fact that there is this parallel dialogue going on about undertakings. Now that's not a meaningless dialogue, presumably it's been written for a purpose by Ngāti Whakahemo's lawyers. So they asked for an undertaking and it's refused. There's no proposition –

ELIAS CJ:

But it's refused against the background of a meeting being set up for Friday, that's the problem. And that's why I say taking a – I'm not persuaded that a snapshot view at the time the board decides matters is appropriate.

MR HODDER QC:

It follows from what Your Honour is just putting to me that it was meaningless for there to be a refusal of the undertaking. In our submission, that doesn't seem right.

ELIAS CJ:

Well the undertaking was in wider terms.

O'REGAN J:

Well, no, but couldn't it – the implication was we're not giving you an undertaking we'll talk to you instead –

MR HODDER QC:

There's no suggestion –

O'REGAN J:

– and when you've talked to you then we will work out whether we're going to give an undertaking or not. I mean there's two things going on, one is saying no to an undertaking and the other is saying but we will meet with you which implies there's some point to it which in fact there wasn't. And the two conversations are not being, you know, brought into the same framework.

MR HODDER QC:

Well our submission is, you'll note in the written submissions is once a party is entering into a kind of a lawyer's dialogue about undertakings it's blindingly obvious what happens if you don't give the undertaking.

O'REGAN J:

Well not when its Chair or Deputy Chair is saying, "We're prepared to engage with you and we're setting up a meeting."

MR HODDER QC:

But it's in the context of her apologetic email of the the1st of March saying, "I'm sorry, if you want to meet we will but in fact timeframes have defeated us."

GLAZEBROOK J:
Well but that was in –

O'REGAN J:
Well what timeframes? I mean the timeframes were completely self-imposed timeframes, nobody had, there was no deadline, it was something which Landcorp decided to do while it was carrying on this parallel conversation with Ngāti Whakahemo. There was no timeframe defeating them at all, they just chose to sell.

MR HODDER QC:
Well they'd already done that by the time she sends the email.

O'REGAN J:
Yes, but they didn't have to. They weren't going to lose the sale. There was absolutely no reason why they couldn't have waited until they'd met with Ngāti Whakahemo. I mean, what would the downside have been of waiting a week before they went back to the obviously very willing buyer?

MR HODDER QC:
Well theoretically they could have done that, they didn't. The fact that they didn't I'm not sure is the subject of any challenge.

O'REGAN J:
No it's not, what is subject to challenge is that they were talking out of both sides of their mouth at the same time and that's just not the sort of conduct that SOEs should be engaging in.

MR HODDER QC:
Well that's the criticism but the proposition that we advance is that there was a formal line of communication going on about whether or not there is to be an undertaking and the consequence of not getting an undertaking is clear enough once you've got lawyers involved in the correspondence.

O'REGAN J:
But not when you then mislead the other side into thinking there's no consequence of not giving an undertaking.

ELIAS CJ:
Until Friday anyway.

MR HODDER QC:
So there's nothing in what she says in that respect with what Ms Houpapa says that says, I mean, there's a whole lot of stuff being said to her saying, "We want to negotiate." All she's saying is, "We'll meet with you."

O'REGAN J:
All she's really doing is saying, "I'm going to fob you off so you don't file an injunction application."

MR HODDER QC:
Well, now, that's –

O'REGAN J:
And if that isn't what she did, she should have come to Court and explained why or what she did.

MR HODDER QC:
If we go back to her email on tab 88, which is the one, March one, which –

ELIAS CJ:
I think it's Mr Carden too who perhaps needs to, given the fact that he knows the agreement's being concluded, on 673, that needs to provide an explanation. Sorry, 88.

MR HODDER QC:
So the point that I'm responding to Justice O'Regan, there are these two channels going on. The formal channel is clear that there's a simple refusal of the undertakings twice by Buddle Findlay. At tab 88 at page 677, which is the 1 March email, even if they didn't know what the timeframe was it's perfectly clear, in our submission, that this email is saying it's too late, "We've met and decided not to extend the timeframe. The lawyers are going to respond to Koning Wester's letter accordingly," and they did, saying no undertaking. So the two things are linked rather than contradictory. We –

ELIAS CJ:

But that's a response to the letter seeking the undertaking which was in, you know, in wide terms the undertaking.

MR HODDER QC:

Well, the undertaking was not to sell the property?

ELIAS CJ:

Yes.

MR HODDER QC:

And this is saying, "No, we can't do that. We're not going to extend the timeframe."

ELIAS CJ:

Yes.

MR HODDER QC:

"The board has met and decided not to extend the timeframe."

ELIAS CJ:

Yes.

MR HODDER QC:

That's as plain as it can be, in our submission. And then, "We're still available to meet with Mita and Jock to discuss the situation if they would like." It's a courtesy. "Unfortunately, we can't till the 7th of March," ie, we're not going to rush about this, and then, "Willie, you and I know that wise minds around a table make for good outcomes. I'm sorry that in this case timeframes have conspired against us."

O'REGAN J:

Yes, but the timeframe was the timeframe for Makino to do another deal. That timeframe expired. That didn't mean they were then going to sell to someone else. The fact that the Makino timeframe wasn't being extended didn't mean there was going to be a sale to a third party and there was no reason for Ngāti Whakahemo to think that it did mean that.

WILLIAM YOUNG J:

Well, I suppose it depends on what you mean by defeated it.

O'REGAN J:

Yes.

WILLIAM YOUNG J:

If defeated – if you read it as meaning has defeated the –

O'REGAN J:

What it says is, "You've no longer got any status within the Makino arrangements that you thought you had," but it doesn't say, "and therefore because we're not selling to Makino or some consortium including Makino therefore we're immediately going to sell to a third party and put it beyond your reach." It doesn't say that at all.

MR HODDER QC:

Well, it doesn't –

O'REGAN J:

It just says, "You think you're part of a process but that process is over."

MR HODDER QC:

But I'm not sure that it's quite so clear that what Mr Te Aho is talking about is the Ngāti Makino process, and, in fact, I think we heard yesterday that Ngāti Makino was unaware of the, sorry, Ngāti Whakahemo was unaware of the timeframes at all so it didn't understand what timeframes meant. That's unfortunate although it's hardly a major criticism there of Landcorp.

O'REGAN J:

Yes, but she doesn't say, "We're going to sell to a third party." She just says the Makino things' over, forget it.

MR HODDER QC:

But he understands exactly that. His correspondence after, his internal emails, say they're moving to deal with the highest bidder. He knows that.

O'REGAN J:

Yes, but not before Friday, the 7th when they're going to meet with Ngāti Whakahemo.

MR HODDER QC:
Well, he – he does recognise that at various points including after a discussion –

O'REGAN J:
Look, if you want us to accept this explanation you've got to have some evidence.

MR HODDER QC:
Why not –

O'REGAN J:
I mean, Ms Houpapa could have explained all of this to us and she didn't –

MR HODDER QC:
I am fully –

O'REGAN J:
And we have to just take that at face value that she didn't because she couldn't.

MR HODDER QC:
But I'm not obviously trying to gainsay the fact that we don't have any evidence from her or Mr Carden on this topic. What I am saying is that in terms of this email, there's a perfectly straightforward email that gave no indication about the idea that this was going to be a negotiation. It was apologetic on the grounds that it was too late to do something. The board had made a decision. It wasn't a decision that was going to be helpful to Ngāti Whakahemo.

O'REGAN J:
Well, if that's what she meant, she should have come and told us that that's what she meant. It doesn't say that.

MR HODDER QC:
Well…

O'REGAN J:

And as you said, it's confusing. At best, that's the best you can say, it's confusing.

MR HODDER QC:

Well, it's –

O'REGAN J:

Probably more accurately it's misleading.

MR HODDER QC:

It's confusing only because Ngāti Whakahemo didn't it seems understand what timeframes we're talking about. But if from –

O'REGAN J:

Well, why would they if no one had told them about it?

MR HODDER QC:

Well, that's unfortunate, so that's a sort of a – it's a confused email.

O'REGAN J:

Well, it was your timeframe. It was Landcorp's timeframe.

MR HODDER QC:

Well, Landcorp, from Landcorp's point of view, no doubt it and all its board members knew that what it had done is given a window for this interruption to the tender process to be, to come through. It hadn't happened. And so in effect Ms Houpapa is, presumably assumes that Ngāti Whakahemo is in the loop more than it was, so there is a degree of misunderstanding, I accept that.

O'REGAN J:

Well, again, you're asking us to assume that, that she assumed that, but how do we know because she hasn't told us?

MR HODDER QC:

So that's the sequence of events of that takes us through that. The expiry on the 28th, the decision of the board on the – sorry, the expiry of the window on the 28th, the decision of the board on the 28th. That's clearly what she's referring to in terms of the

timeframe, that it's passed. So the point about this email is, in our submission, there's nothing, there's nothing objectionable to it. It may have caused confusion but that isn't itself of a matter of –

O'REGAN J:

Well, it may have been calculated to cause confusion and it succeeded. Basically, she fobbed them off until after the agreement was signed. That's what happened. She said, "Sorry, we can't meet you until the 7th," knowing full well the agreement would be signed on the 4th or 5th. That's what happened, and that, you know, you just can't dress that up any other way. That was what it was calculated to do and that's what it did.

MR HODDER QC:

I can't take it very far on that basis. There's no direct evidence that there was a fobbing off exercise. There's a series of discussions going on with various delays.

GLAZEBROOK J:

Well, why wouldn't you try and fob someone off who you thought was going to file an injunction and derail a sale that you wanted to take place –

MR HODDER QC:

Well, it's –

GLAZEBROOK J:

– thinking that that person, and it's not necessarily but thinking that that group had no reason to want that land because they said their Treaty claim had been settled and, in any event, hadn't shown interest in entering into the various opportunities that it had, including the initial tender to tender for it. Now all of those were mistaken assumptions but one can understand why you might want to fob someone off, can't you?

MR HODDER QC:

Well, we can understand –

GLAZEBROOK J:

And if that was the instruction that was given to her, in any event, that she was to explain this and smooth it over but to make sure that she didn't give the impression

there would be negotiation but certainly she was supposed to keep them smoothed down in the meantime, wasn't she?

MR HODDER QC:
Well, that last part is the part that is – there's nothing that directly deals with that.

GLAZEBROOK J:
Well –

MR HODDER QC:
What she says is that –

GLAZEBROOK J:
– why else would she be contacting them? Why have any contact with them if she wasn't supposed to smooth it over?

WILLIAM YOUNG J:
To preserve good relations, I guess, for the future.

MR HODDER QC:
Yes, the –

WILLIAM YOUNG J:
I mean, if nothing had happened beyond her email and the meeting on Friday, the 7th, it would have been difficult to mount the sort of case you're facing now.

GLAZEBROOK J:
It might be difficult to mount the case but you would certainly be very, very annoyed if you'd been fobbed off until a meeting on Friday to be told nothing could take place when actually you could have just been told, "Look, sorry, it's too late. We've entered into the agreement."

MR HODDER QC:
Well, I think my response remains that much of the propositions that the Court is putting to me rely on sort of putting to one side the legal or the lawyers' correspondence. In our submission it's inappropriate. She starts off by saying, "The Landcorp lawyer's been asked to respond to your lawyer's letter."

GLAZEBROOK J:

Well, there's often negotiations that go on between clients that lawyers actually know nothing about and which are often counterproductive to whatever's going on between lawyers. It's just a fact of commercial life.

MR HODDER QC:

Well…

GLAZEBROOK J:

Clients talk to each other all the time and lawyers, say, have a different stance because – and that's not improper in any way.

MR HODDER QC:

Agreed, agreed, that happens on a without prejudice basis all the time but the formal position is set out in the lawyers' correspondence. "Will you give us an undertaking?" and, "Can we please have the undertaking by the 6th?" and three days before that the answer is, "No, we won't give you an undertaking." Now that, in our submission, can't just be put to one side.

GLAZEBROOK J:

Well, but the response to that is because we don't get an undertaking we've got to get our ducks in a row and get the money out, which is why they were – because obviously the idea was we won't get an undertaking so what that means we've got to get our ducks in a row, we've got to get the money, hence the enquiry about the price.

MR HODDER QC:

But the complaint is about not so much the money, it's the complaint about the fact that the sale went ahead when they might have got an injunction if they were –

GLAZEBROOK J:

No, I understand that, but just if you're looking at what the sequence was. That seems to have been what was taken from that, "We can't get an undertaking. That means we've really got to put our money where our mouth is. So now we need to know what the price would be that we could get it and make sure that we get this sale."

MR HODDER QC:

The flame of the correspondence is certainly that there's a degree of cross-purposes involved in that process and that Mr Te Aho in his internal correspondence is indicating that either they're going to have to get themselves a commercial deal sorted out very quickly or they're going to have to rely on their Court rights. Even after he has the telephone conversation with Ms Houpapa he is saying to his internal team in the emails, "We're going to meet on Friday. Either we're going to be talking about a deal or we're going to be talking about how we're going to go to Court and pursue our resumption application." He recognises their options.

O'REGAN J:

But one thing he didn't say was, "We're not going to be talking about anything because they'll have already signed an agreement."

MR HODDER QC:

But it will –

O'REGAN J:

That's not a possibility he contemplate because he's been misled by her into thinking that won't happen.

MR HODDER QC:

Well, in a sense he does talk about those as being options, "Either we're going to talk about a deal or we're going to be talking about our legal process."

O'REGAN J:

Yes, but the legal process is – there is no legal process once the land has been sold.

MR HODDER QC:

But his legal process includes the resumption application.

GLAZEBROOK J:

However, that's well down the track. That's not what they're talking about there.

O'REGAN J:

He was contemplating either they were going to be told, "Yes, we'll talk to you," or, "No, we won't," in which case he could have then have injuncted. And that's what she wanted him to think.

MR HODDER QC:

Now tab 98 is one of Mr Te Aho's emails. It's shortly after he has the conversation with Ms Houpapa on the 4th of March, which is the key conversation.

ELIAS CJ:

Sorry, what was it? 98, was it?

MR HODDER QC:

Tab 98. So in the third paragraph, "Landcorp board met on Friday. They confirmed they would now go back to the highest bidder." Ngāti are the second highest bidder. For all intents and purposes, are going down the sale and purchase process. "Clear in our position." Despite that commitment to their process, they note, accept that things can change. And then he goes on it has some difficulties.

GLAZEBROOK J:

Hence the, "We've got to get our ducks in a row and get our funding"?

MR HODDER QC:

Yep, yep. There's no doubt at this stage he is still thinking that there is a possibility of doing a commercial deal. But what he also knows is that Landcorp is dealing with the sale and purchase process. He doesn't know the timing on that. His lawyers have asked for an undertaking that will prevent that happening too quickly and it's been refused.

O'REGAN J:

If she was being up front with him, she would have said, "I'm sorry, it's been sold, but we'll meet with you to talk about some sort of future business opportunities if you want to." But she didn't say that. She held out the possibility and he obviously thought she was holding out the possibility that even though they were now going back to the tender process there was a chance for Ngāti Whakahemo to get involved.

MR HODDER QC:

I accept that was the case from the 4th when she talks about the $23 million. That was undoubtedly unwise and unhelpful.

O'REGAN J:
Well, why did she say $23 million?

MR HODDER QC:
Well, she's asked a direct question, "What's the ballpark?" She doesn't want to disclose the actual price, it's confidential, so she gives a ballpark answer.

ELIAS CJ:
Well, no, she –

O'REGAN J:
Well, again, that's your just giving evidence on her behalf; she doesn't say that.

MR HODDER QC:
Well, I'm just stating what we know from the, the evidence is there. There was a purchase price of $19 million. She gave $23 million.

O'REGAN J:
Yes, well, that's not in the ballpark. It's about 25% higher.

GLAZEBROOK J:
But giving any price, if she'd said $10, it still wouldn't have meant it was for sale. So it was misleading to suggest that there was any price at which they could have purchased it.

MR HODDER QC:
There's no doubt it was an unwise step to take.

GLAZEBROOK J:
Well, it was just dishonest. It was not for sale at any price to these people by that stage.

MR HODDER QC:

Well, I think it's appropriate to mention that what Landcorp did do after this exercise was to see whether they could facilitate a back-to-back deal with the purchaser. That might have required more money. In fact, that didn't work out but the Ngāti Whakahemo were grateful to Landcorp for arranging the possibility.

ELIAS CJ:
Why did they do that? Because they realised a mistake had been made, was that why?

MR HODDER QC:
I don't think that –

WILLIAM YOUNG J:
They sometimes say they want to avoid occupations, they want to maintain good relations.

ELIAS CJ:
But did they do it because by that stage they knew that there'd been a mistake made?

MR HODDER QC:
I'm not sure that they would have thought there was a mistake being made. I think they were simply –

ELIAS CJ:
Well, no, that –

MR HODDER QC:
– trying to be helpful.

ELIAS CJ:
– that the claim hadn't been settled, because that's the basis it's been put all the way through. Was that known –

MR HODDER QC:
I don't know that that was –

ELIAS CJ:

– when the back-to-back deal was done?

MR HODDER QC:

– that that was clear. The fact that the Crown's position was wrong wasn't established until much later in the litigation.

ELIAS CJ:

I see. Oh, yes –

GLAZEBROOK J:

Have we got timing of that anywhere, sorry?

MR HODDER QC:

The timing for the Crown's…

GLAZEBROOK J:

No, no, for this back-to-back deal.

MR HODDER QC:

It's in the discussions that take place, I think, on the 7th.

GLAZEBROOK J:

Yes, I know I've seen –

MR HODDER QC:

If we go to tab –

GLAZEBROOK J:

– it somewhere but I just can't remember.

MR HODDER QC:

– tab 115.

GLAZEBROOK J:

Maybe it's in the affidavits, is it?

MR HODDER QC:

Well, if we go to tab 115 I'll – there's an email from Mr Te Aho in the afternoon of the 7th of March after the meeting to Ms Houpapa, and he explains, sort of somewhat philosophically in the fourth paragraph, "We may lose in the High Court and have our urgency application in the Waitangi Tribunal dismissed but will eventually win in the Waitangi Tribunal. It's just a matter of time." And then he says, lower down, he – he says his kumara vine had been in action, and then, the bottom of the page, last two paragraphs thank you to Mr Carden, "For our request to meet with the purchasers and confirming that the purchasers are willing to meet with us. We are thankful for the opportunity." And so the back-to-back discussion takes place as a consequence of the discussion on the 7th.

ELIAS CJ:

Mr Hodder, sorry, can you just remind me where the letter seeking the undertaking is to be found?

MR HODDER QC:

There are two letters that seek an undertaking.

ELIAS CJ:

Yes.

MR HODDER QC:

The first one of those is on the 27th of February.

ELIAS CJ:

Yes.

MR HODDER QC:

That is at tab 79.

ELIAS CJ:

Thank you, that will do. That's fine. I just wanted – I've flagged so many pages that I couldn't find it.

MR HODDER QC:

And then that is declined by Buddle Findlay on the 3rd. they then come back, as you know, for a second request for an undertaking, but it's acknowledged in the almost contemporaneous letter to the Minister that the first is in fact a refusal. In fact, the letter to the Minister says three times that Landcorp has refused an undertaking. So, with respect, there's nothing in the point that it wasn't clear to everybody that the undertaking had been refused in the first Buddle Findlay letter.

Now we're approaching 1 o'clock and I think I'm going to have to rely on my written submissions in terms of the bad faith. It goes through and includes the point about inferences that had been raised with me by Justice O'Regan and Justice Glazebrook. Our position remains in there that there is no inevitable inference to be taken. The inference is one that is the best that can be done on all the evidence that's before the Court, and as the Court of Appeal and the High Court considered you didn't – one could take inferences which were not the extreme inferences which the appellant contends for and there is, particularly in the absence of any evidence that Ms Houpapa was, had any reason to or any intention to cause harm to Ngāti Whakahemo, there is simply no evidence to support that. Now, it will be set against us that then why is there evidence before the Court? I can't change that. There isn't.

On the other matters, it may be that I should make myself available for questions on the rest of it but I think the general understanding between myself and Mr Goddard was that he would start after lunch.

The only other question I –

ELIAS CJ:
Well, perhaps you could review the matter over lunch and if there's anything that you particularly want to develop in your written submissions, particularly after hearing the questions –

WILLIAM YOUNG J:
Are we seeing if they are available tomorrow? I mean, we've indicated we would just go tomorrow but is there a…

ELIAS CJ:
Well, I have assumed that counsel are available tomorrow.

MR HODDER QC:

Yes.

ELIAS CJ:

I understood the difficult with this case was on Thursday. Is that right?

WILLIAM YOUNG J:

We've got another case anyway.

ELIAS CJ:

Yes, we have, yes.

MR HODDER QC:

Well, the only other point I was going to make is that on my theory or our theory that the 1st of March email is benign or neutral. Then the focus goes on the 4th of March telephone conversation, the $23 million, which is clearly unhelpful in the circumstances. But there is also the question about, well, what would have happened if Ms Houpapa had been completely full and fulsome on that occasion? She'd said on that point, this is 5.30 on the evening of Wednesday, the board has resolved to sell it. The agreement has been signed by the purchasers. Possibly she would have known, or whether she didn't I think know, that one of the Landcorp executives had already signed it and no undertaking was going to be given. What – the question is what difference would that have been? It was too late at that stage. Unless one assumes there was a plan to delay it until that first conversation, then really it doesn't make a lot of difference what she said. It was too late if the concern is that there was a contract in place between the parties.

If the Court please, I'll talk to my learned friend, Mr Goddard, about whether he wants to start immediately or whether there's anything else that the Court wants to ask me on the written submissions after lunch, but there's – but one of these cases that has a lot of facts and a lot of time can be spent on it.

ELIAS CJ:

Yes. Thank you. Yes, we'll take the lunch adjournment now, thank you.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.20 PM

ELIAS CJ:

Mr Hodder.

MR HODDER QC:

Thank you, Ma'am, we've handed up through the registrar the document we were talking about this morning which is the notes of a meeting between Ngāti Makino and Landcorp. This is a document that is volume 3, tab 78, of the case on appeal, and the redactions that were there are those that can now be seen in paragraphs 15 and following, and so you'll see that the price that was being talked about by Landcorp was 19 to 19 and a half, and Ngāti Makino through I think their consultant valuer, Mr Dickson, had a range that incorporated that, referred to in paragraph 16, and over the page the redacted numbers were about the gap that Ngāti Makino had identified and which at paragraph 22 Landcorp looked to see whether it could do something to help, or undertook to do that.

ELIAS CJ:

So 23 million comes from nowhere?

MR HODDER QC:

Mmm, it seems –

ELIAS CJ:

Yes.

MR HODDER QC:

Yes, it's a completely unwise response to a question about a ballpark and there's nothing to gainsay that proposition. However, I do feel I need to say something further in defence of the general proposition of bad faith, or to resist the proposition of bad faith. There are a couple of documents that I would like to refer to that I didn't refer to before lunch, and if I could start with the document at tab 83 of volume 3. This is the, at the top of the email chain, that is the latest email is what Ms Houpapa passes on to Mr Carden, but below that in this bottom half of page 663 you'll this is Mr Te Aho's 27 February email to Ms Houpapa, and in addition to referring to the fact they've approved an injunction he actually attaches the letter. If you go over the page, you'll see he's actually attaching the Koning Webster lawyers' email chain and the letter itself, and so, in our submission, there is a linkage between what's going on

between the lawyers and what's going on in terms of the discussion that Mr Te Aho is part of.

Turning next to tab 93, this is Mr Te Aho again on the 4th of March at 11.15 in the morning, remembering it's in the afternoon sometime between five and six that there is the telephone conversation where the 23 million gets raised, and at this point he says in the email on the 4th of March, 11.15, he understands –

ELIAS CJ:
Sorry, 96, is it? Sorry, 93.

MR HODDER QC:
Yes, it's 93.

ELIAS CJ:
Yes.

MR HODDER QC:
Page 689. "I understand, which was clear from your email, that Landcorp is now re-engaging with the highest bidders for Whārere Farms." And then after the telephone conference where the 23 million is raised, and I alluded to this before lunch, at tab 102, page 715, an internal email. It's with Mr Pryor, I think, who's one of those he's in touch with, and you'll see also Mr Koning copied in on some of these emails, including this one. But in the last sentence, "We are looking to meet with Landcorp at 10.00 am on Friday in Rotorua. It will be either to talk to our proposed deal at 23 million or to talk about our legal process." Now, clearly they still have in mind there was some possibility of a deal but they also recognise there's a possibility there wouldn't be a deal on the table at that point and to talk about legal process.

And, somewhat conspicuously in the middle of this process, this was an email sent at 7 o'clock on that Tuesday, the 4th, at 6 o'clock Koning Webster are sending its second request for an undertaking from Landcorp and a couple of minutes later sending a letter to the Ministers seeking an undertaking. So this sequence on the 4th of March, let's say 5.30ish, from the conversation where the 23 million is mentioned, at 6 o'clock Koning Webster's looking for undertakings from people and at 7 o'clock Mr Te Aho is sending this note to one of his associates saying, "We're

either going to be talking about a deal or we're going to be talking about legal process when we meet with Landcorp on Friday." And in terms of –

ELIAS CJ:

Well, that is what would have been on the table if it hadn't been pre-empted, wouldn't it? I mean, that's what had been foreshadowed so that's really what would have been discussed. "Can we do a deal at 23 million or do we have to go to Court?" And that's also foreshadowed in the earlier email you took us to where it's talking about avoiding costs and so on.

MR HODDER QC:

Yes, I think there must be two ways of reading it. I must say I rather read it as being the possibility that they might get to that meeting and there was nothing to talk about on the commercial deal.

ELIAS CJ:

Well, they might be – well, they might be told that they couldn't do a deal.

MR HODDER QC:

Which is – yes. That events have conspired again, as it were, that the deal was no longer available by that, by the time they got to that. I don't think we say anything different in relation to those. So the general approach that Landcorp urges on this Court is the same one as commended itself to the Court of Appeal. The discussion in the Court of Appeal's judgment runs from paragraphs 89 to 98. The Court, I'm sure, will have already looked at the Court of Appeal's judgment. It's slightly different but to the same effect as the analysis undertaken by Justice Williams in his final judgment in the High Court and it stops short of making an inference of knowing dishonesty in this context. And the only thing that I think that I refer to in the written submissions on this point that I would emphasise is in our paragraph 6.31 of the written submissions we refer to Heydon's text, the Australian text on *Cross on Evidence*, which has quite an extensive discussion of what in Australia is called the rule in *Jones v Dunkel* (1959) 101 CLR 298. I appreciate that in *Ithaca* members of the Court pointed out there wasn't a rule. It was a principle of approach, but there is a lengthy discussion and at page or paragraph 12.15 on – that's page 412 of the bundle, there's a helpful discussion, in our submission, that points out that –

ELIAS CJ:

Sorry, which bundle? The…

MR HODDER QC:

So if one has our bundle of authorities, second volume, the white one, at tab 25, and the numbered page 412 using the bottom pagination, it's the paragraph commencing, "Secondly, permits an inference that the unintended evidence would not have helped the party, entitles a trier of fact to take that into account in deciding whether to accept any particular evidence which relates to the matter on which the absent witness could have spoken, entitles the trier of fact more readily to draw any inference fairly to be drawn from the other evidence by reason of the opponent being able to prove the contrary had the party chosen to give or call evidence. "But the rule does not permit an inference that the untendered evidence would in fact have been damaging to the party not tendering it. The rule does not create any admission, unlike deliberately false evidence. The rule cannot be employed to fill gaps in the evidence or to convert conjecture and suspicion into inference. Nor does the rule prevent any inference favourable to the party who has just failed to call the witness from being drawn: other evidence may justify the drawing of the inference." And we submit that that is an appropriate analysis and it's consistent with the way –

GLAZEBROOK J:

I'm not sure what it means. It doesn't permit an inference that the untendered evidence would have been damaging to the party not tendering it. I don't see why that's the case and I don't even know what it means, because if it allows you to draw an inverse – an inference that's adverse to the party, well, it will be damaging and that's presumably why they didn't front up in the first place, if you decide that's why they didn't front up. I mean, I can understand the conjecture and suspicion –

MR HODDER QC:

Yes.

GLAZEBROOK J:

– but there might be times where it's absolutely, the inference can almost be drawn from the written material and the fact that you don't turn up to explain it might actually convert it into something else, mightn't it?

MR HODDER QC:

I'm conscious that Your Honour addressed in the *Ithaca (Custodians) Limited v Perry Corporation* [2004] 1 NZLR 731 (CA) judgment itself. As I understand it what this is getting at, and what I rather thought was implicit or explicit in *Ithaca* as well, is that on its own it doesn't do very much. What it does is reinforce other evidence.

GLAZEBROOK J:

Oh, if that's all –

MR HODDER QC:

I think that's all –

GLAZEBROOK J:

– if that's all you think that means, yes.

MR HODDER QC:

I think that's all that's being said.

GLAZEBROOK J:

I understand.

MR HODDER QC:

Obviously for my purposes I'm not emphasising the sentences that follow that –

GLAZEBROOK J:

Yes.

MR HODDER QC:

– about elevating the suspicion into a finding, particularly a finding of one which is morally reprehensible as opposed to one that's simply careless or foolish.

GLAZEBROOK J:

Okay, I understand the point.

MR HODDER QC:

In terms of that then the Court of Appeal commenced this discussion in turn by giving some weight to a point which I didn't mention earlier which is the point recorded in

the minutes of the 28th of February board meeting that Ms Houpapa was recorded as being disappointed it wasn't possible to do some kind of arrangement in terms of iwi acquisition on this particular farm and in our submission that again is consistent with the way in which it's set out in the Heydon text.

So in terms of bad faith written submissions there, I'm happy to respond to any points that the Court wishes to raise. On the other matters, the OTS advice, I've dealt with that to a large extent. In terms of setting aside any agreement and Ministerial shareholder intervention, I'm playing second fiddle as it were, even though going first to my learned friend Mr Goddard on most of those issues. But if there are any other questions on what I've covered I'm happy to try and respond to those at this point.

ARNOLD J:
Did you want to say anything about clause 6.5 in the statement of corporate intent because that was something that Mr Isac relied on yesterday which deals with these sort of Treaty arrangements and compensation that Landcorp might seek from the Crown where it holds land. I think it's at page 29 of the appellant's submissions at paragraph 106 the particular clause is recorded.

MR HODDER QC:
Sorry I'm just looking at my notes as to what I took down my learned friend as having said. I think I've got him saying, he said he thought the protocol looked like a section 7 agreement.

ARNOLD J:
That's right.

MR HODDER QC:
And depending on how one regards the phrase "goods or services" it's either a section 7 agreement or it's an agreement outside section 7 but there's nothing legitimate about an agreement outside section 7 provided the Landcorp board of directors are satisfied it's in the best interests of the company. But I'm not sure I've answered Your Honour's question.

ARNOLD J:
Well not it's just that the statement of corporate intent clearly does contemplate that there are going to be arrangements between effectively the Ministers and Landcorp

about how land that's important to settlement or to Māori is going to be dealt with. So it's, I mean although you've focused on this being a commercial decision, there is this overlay that is reflected in the statement of corporate intent.

MR HODDER QC:
I rather thought when I recall, when I was listening to my learned friend yesterday that this part of statement of corporate intent is not much more than a summary of what's in the protected land agreement and in the protocol which has various mechanisms of dealing with this fact. There's no doubt that compared to a purely private organisation getting involved in land to be held back when you want to sell it, it's got some kind of overlay which has got a public policy component to –

ARNOLD J:
Right.

MR HODDER QC:
– that's accepted. But whether it goes, whether this is designed to go any further than what's already been agreed to in both the PLA and in the protocol, that wasn't clear to me and still isn't clear to me and it would be an appropriate thing to have in an SCI. Having not gone back and looked at the full context of this paragraph I'm not sure I can take it much further.

ARNOLD J:
I don't think there is any additional context about it, that I've noticed anyway.

MR HODDER QC:
This language is very similar to some of the prefatory language in both the PLA and in the deed that, a sort of a stamen about Landcorp's entitlement to act profitably and recognising that some things that will be done will impair that, or on the face of it, might impair that and therefore there has to be some recompense. So I would see these as parallel or complimentary as opposed to any kind of contradiction.

ARNOLD J:
Thank you.

ELIAS CJ:
Thank you Mr Hodder.

MR HODDER QC:
May it please the Court.

ELIAS CJ:
I'll attempt to carry my house with me like a snail.

ELIAS CJ:
Better than a tortoise.

MR GODDARD QC:
I've been called many things but not often a tortoise Your Honour. I have for the Court, perhaps just while I sort out my papers, my usual little two page road map and a few additional authorities which may, I think, assist in responding to some of the questions that have arisen in the course of the argument so far. And I want to being perhaps just by saying a few words about the protocol to assist, I hope, the Court but I want to preface those comments with the observation that, of course, this appeal is not challenging either the original decision that was made by officials under the protocol not to seek to acquire Whārere because that challenge was rejected in the Court of Appeal and there has been no appeal to this Court from it. Nor is there a challenge to the subsequent reconsideration on a de novo basis by Minister for Treaty Settlements of whether Whārere should be acquired under the protocol, the Minister's affidavit explaining the reconsideration process that he went though before deciding that the farm was not of interested under the protocol, and the detailed decision paper prepared by officials to assist the Minister, which is under tab 130 of volume 3, though I don't propose to go to it, set out in considerable detail the analysis that was undertaken and that led to a conclusion informed by a correct understanding of the status of Ngāti Whakahemo's claim that this farm ought not to be acquired under the protocol. So that decision was remade with a correct appreciation of the circumstances, there's been no challenge to that, and the challenge to the original decision which was dismissed on, in particular, the ground that it was part of a broader decision on whether or not to proceed with a Treaty settlement, that it was a preliminary to a decision that was not reviewable, is not the subject of an appeal to this Court.

So the protocol is enormously interesting and I think it is helpful to understand a little bit about its background and I'm going to comment on that briefly, but I hope not to

spend too much time on it because there is no live challenge before this Court to either the original decision under the protocol, or the reconsideration.

ELIAS CJ:

Can I just take you, sorry, to that 130, that document at tab 130 –

MR GODDARD QC:

Yes.

ELIAS CJ:

– because I haven't looked at it before, and accepting your stricture that it's –

MR GODDARD QC:

Irrelevant?

ELIAS CJ:

Well, it may not be –

GLAZEBROOK J:

Well, I want to ask you something about that as well.

ELIAS CJ:

It may not be entirely irrelevant, but, anyway, it may be background or something.

MR GODDARD QC:

Yes.

ELIAS CJ:

I see in the executive – I see, this is only an executive summary and it may be that it's more developed, but at 5 it says, "The whole farm's not of interest," and then the consideration that part of a farm might be of interest, but 10 hectares doesn't seem huge, but is – would be too uncertain and would require trade-offs to be made in the work programme. Is that explained in the rest of this document?

MR GODDARD QC:

Yes, there's much more detail in the rest of the document and it's discussed in more –

ELIAS CJ:

Just give me the reference and I'll –

MR GODDARD QC:

Certainly, Your Honour.

ELIAS CJ:

You don't need to take time on it.

MR GODDARD QC:

So that begins on page 855, stage 4 of the analysis. It's a very structured analysis that's been undertaken consistent with the normal land banking process. "Is part of Whārere Farm (up to 10 hectares) of potential interest?" And that's partly because around nine hectares was originally part of the Pukehina Block which was the primary focus of the claim, although it was clarified the High Court interim judgment that the claim had a broader scope and extended to the other block on which the bulk of the farm was situated. So that was the prompt was, well, this is the land of particular concern because there's a little over nine hectares of land included in the farm that came –

ELIAS CJ:

Is that explanation that you've just referred to, was that in the interim judgment or the final judgment?

MR GODDARD QC:

The interim judgment.

ELIAS CJ:

Yes, thank you.

MR GODDARD QC:

So officials and the Minister had the benefit of that.

ELIAS CJ:

Were aware of that, yes.

MR GODDARD QC:

And they understood that there was an interest claimed in the whole of the area of the farm but it was also understood that there was a particularly strong association with the land that came –

ELIAS CJ:

The Pukehina Block.

MR GODDARD QC:

– from the Pukehina Block, all of which had been awarded by the Native Land Court to Whakahemo.

ELIAS CJ:

Yes.

MR GODDARD QC:

And this is also discussed in the Minister's affidavit which I think, from memory, is in volume 2 under tab 12 but I abandoned that back in my seat so if that was important I'd need to go and rescue it.

ELIAS CJ:

So the reasons which are referred to in the executive summary that it would extend the timeframes under the protocol and there would be operational costs of survey and subdivision?

MR GODDARD QC:

Yes, and the Minister actually expands on this in his affidavit and identifies the significant value even of a 10 hectare block and the large proportion that it would represent of the likely value of any settlement and identifies a concern about effectively committing all or the vast bulk of the value of any settlement to a settlement process before that process had even begun, before there was anyone with a mandate who can negotiate for Whakahemo before the necessary investigations have been –

ELIAS CJ:

But that can't be a complete answer because that would mean that people whose settlement negotiations are clearly not yet off the ground would never be able to be brought within this process.

MR GODDARD QC:
It's not a decisive consideration but the Minister identifies as one of the factors he's taken into account along with a number of others.

WILLIAM YOUNG J:
Just so I – if the Minister gives a notice of, gives notice that land is of potential interest, that –

MR GODDARD QC:
Officials in practice but yes.

WILLIAM YOUNG J:
Yes. That then puts in play what effectively is an acquisition process by the Crown?

MR GODDARD QC:
Yes, and if agreement can be reached on a commercial price for the land then an acquisition takes place, but that – and that's another factor that the Minister refers to as well is the amount that has already been spent from the funding available for funding acquisitions of land for Treaty settlements and the implications. I mean, a full purchase would have been twice the amount of money left in the kitty for the year, but even a partial purchase was a material amount.

ELIAS CJ:
But there is a – a purchase is further down the track under the protocol, isn't it?

MR GODDARD QC:
Not much.

WILLIAM YOUNG J:
It's triggered.

MR GODDARD QC:
Only a matter of months, Your Honour.

GLAZEBROOK J:

Well, but it – that's what I was going to say to you, because in fact you say it's of potential interest, if it might be of potential interest, if they had recognised that it was of potential interest I would have thought that they would have given that notice then had the three-month period for negotiation and for undertaking this sort of assessment that's already been done. Then it may have been again that they decided that while they weren't going to purchase the whole block or even part of it that they may give them some money in full and final settlement of whatever it was to enable them to undertake a commercial purchase.

MR GODDARD QC:

That would require the completion of the Treaty settlement process to provide some money which would require a claim to be investigated, a mandating process so that you know who you're negotiating with, which is also not quick, and then undertaking of negotiations, so you're talking about a process typically of some years to investigate the claim. Bear in mind, Your Honour, that that there is an unsettled claim is our common ground, but the background to the claim has not yet been the subject of anything more than the most preliminary consideration by historians retained by the Crown and by Whakahemo, and that normally in order to carry out an informed Treaty settlement process that produces an appropriately focused recognition of what breaches there have been, an apology and redress that is focused on the wrongs, especially in the area of cultural redress but also economic redress, all of that is not something that can happen overnight and one of the things that the Minister had to consider was the work involved, the timeframes for that, what it would mean to park some land at this stage in anticipation that that might produce a settlement and that this might be ultimately agreed by whoever is mandated and the Crown to be included in that settlement, and these factors are explained in the Minister's affidavit and there is no challenge to that analysis. And so what was said at one stage, I think by Your Honour, Justice O'Regan, was, well, if the mistake about the status of the claim had been recognised earlier there would have been no tender. In fact, the evidence rather suggests to the contrary, Your Honour, because when a proper analysis was undertaken under the protocol a conclusion was reached that acquiring all or some of this farm was not of potential interest for a Treaty settlement. So what we have is –

O'REGAN J:

Well, that isn't really what was being contended for, was it? I mean, what's been contended for is the opportunity to buy it, not the opportunity to have the Crown give it to them as redress.

MR GODDARD QC:

Well, I think that's shifted over time and the relationship between the desire to acquire the farm and the Treaty settlement process was more or less close at different points in time. Again, the opportunity to acquire the land commercially by participating in the tender was, of course, there and if there was genuinely no linkage at all between the Treaty settlement aspirations of Whakahemo and the desire to make a commercial acquisition then it's hard to understand why the process wasn't at least participated in, either alone or in conjunction with Ngāti Awa.

GLAZEBROOK J:

Well, wasn't that explained as being participating in a process and losing in respect of land that had particular significance to you might be seen as effectively not putting enough value on the land and therefore not a proper process to be involved with?

MR GODDARD QC:

That's certainly –

GLAZEBROOK J:

Different from Ngāti Awa who was just buying it for money.

MR GODDARD QC:

That's certainly suggested. It – one might think that having the chance of succeeding and a risk of losing was more productive than the certainty of losing by not participating, but these are not matters that we're here to debate and I'm not here to criticise that decision, simply to observe that that opportunity was there, and I'm going to come to just a couple of letters in a moment when I get off the protocol and come back to what is being challenged. But, critically, when this was done properly and there's no suggestion at all that it wasn't done properly after the interim judgment the same conclusion was reached, that this land, in whole and in part, was not of possible interest, potential interest, sorry, to use the correct phrase for a Treaty settlement, and therefore ought not to be acquired under the protocol.

WILLIAM YOUNG J:

I think the suggestion may be that in a more diffuse way circumstances might have panned out differently if Landcorp understood that there was a non-settled claim in relation to the land.

MR GODDARD QC:

Yes, I think that is the argument, and that's part of the challenge that is before this Court that I'm going to turn to in a moment. But I did want to deal with that. I also thought that it might be helpful, given that I've had a crash course in the history of the moratorium and the protocol, just to touch on a few points to assist the Court in relation to its background and it's amazing. But as my friend, Mr Hodder, indicated it had its origins in 2007 when Landcorp was undertaking sales of a number of properties and injunctive relief was sought by Hauraki Māori interests in relation to two of those properties, Whenuakite, which was 2700 hectares in the Coromandel Peninsula, and Rangiputa which is nine hectares, a much smaller farm on the Karikari Peninsula in the far north and although it's small it's according to the paper I have in front of me desirable coastal land with good views with high amenity value. And those properties are, once this issue acquire a certain salience as a result of the proceedings, were assessed by officials as having wider national interest considerations including, according to the material I have in front of me, and I'm giving evidence from the Bar in response to the question by way of background only, conservation, recreational, ecological and biodiversity value, heritage value and historical ownership considerations, cultural significance of the land to groups other than the Crown, potential value to the community if retained in Crown ownership, location of the land in relation to iconic scenery, and other national interest considerations specific to that piece of land. So it wasn't confined to, although it was certainly –

ELIAS CJ:

It came out of.

MR GODDARD QC:

– prompted by concerns raised by Māori about the disposal of this land and that perhaps explains the reference to broader policy factors in the original moratorium agreement – the protected land agreement. And that then resulted in those tenders being cancelled for those two farms while 18 others proceeded because land was so far down the track that it would be commercially difficult to withdraw. There was a

pause during which what was described as a policy review was carried out which included considering the possibility of Landcorp ceasing to be an SOE and becoming another sort of entity, the land going back to the Crown, a range of other possibilities, and I'll come back to the land going back to the Crown because there's a specific mechanism for that, for some, such land to be resumed by the Crown in the SOE act which is important in this context. It hasn't been focused on so far.

But an agreement being entered into and the possibility also of a direction under section 13 because Landcorp is a new SOE, and I'm going to have to come back to that distinction, but the power of a direction doesn't exist in relation to all SOEs, it does in relation to Landcorp. Options were considered including explicitly, and the ultimate conclusion that was reached by the Crown was that the Crown's preference was to attempt to reach an agreement with Landcorp in relation to the protection of certain land, but that if an agreement could not be reached then the power of direction might be exercised. As it's transpired it was possible to reach an agreement with the company that the board saw as consistent with their duties under the Companies Act and the SOE Act, and of course they are both sets of duties, and we see those, the obligation to act in the best interests of the company being expressly referred to in the minutes of the board meetings for example, in relation to the Makino proposal. An agreement was reached as a result of which no direction needed to be given, and I'll come back to this relationship between agreements and directions when I look at a couple of provisions of the SOE Act. I don't want to re-traverse everything that my friend Mr Hodder has gone through but there are, I think, one or two things I can usefully add. So those were the possibilities that were considered. An agreement was entered into and that was some years later. Superseded so far as land disposals are concerned by the protocol which has been applied and in respect of the application of which there is no challenge.

So that's what, in my submission, except by way of background, this appeal is not about. Let me turn to two things that from the Crown's perspective it is about because I'm not going to address the first issue on which leave was granted, the bad faith issue, that's an issue for Landcorp. Attempting to say that because it's operational of course it's for the SOE and not for the Crown but the Crown's interest is really in the legal framework that governs the operations of SOEs and the decisions made by officials and by Ministers.

In my little road map I identify the events that lie at the heart of the two matters that I m going to be addressing. First of all, the challenge to what is described as the OTS advice on 19 November and I just want to pause briefly to set this in context. I've asked the Court, I'll do this very fast, five minutes at most, volume 3 of the case on appeal, tab 64, this is the letter from the solicitors for Ngāti Whakahemo that triggered the email that is the subject of the first challenge. After setting out who his clients are, Mr Koning, refers to the historical claim, Wai 1471. Says that that covers the land that now comprises Whārere Farm and there's been some confusion about that, that's now accepted as correct. Then, "I've been instructed by my clients to write directly to you to register the interest of the Trust in Ngāti Whakahemo and Whārere Farm. My clients have already been in contact with Bayleys," the estate agents in Tauranga, "I note there's a section 27B memorial." So there's no request here for any special consideration. It's just registering the interest in the land and drawing Landcorp's attention to that. That, under tab 65, is sent on by Landcorp to OTS saying, "For your information and advice please," and what comes back is a record of recent dealings, including the Crown view, now acknowledged to be incorrect, that Whakahemo's claims were settled by the Te Arawa Settlement Act, and then the observation at the end of that email, "I suggest you treat the letter as it reads, as an expression of interest in the property. No other action has been proposed by Koning Webster." Now that's right, nothing else was being requested, nothing else was required, and consistent with that, under tab 66, Landcorp writes back recording the incorrect information that was given by OTS and saying in the last paragraph, "Accordingly we hope your clients are in a position to take their interest," the interest that they were registering remember, "in the property further and engage in a tender process along with other interested parties."

So as a context within which a reviewable error of law could occur in circumstances where nothing was being asked for, no special decision, no special treatment being requested, perhaps not the most fertile ground but obviously we'll need to look at the downstream consequences it's said to have had. The other exchange that is challenged, so far as the Crown is concerned, is the request to Ministers to intervene in the sale process. That request is under tab 101 and as my learned friend Ms Scholtens observed, Mr Koning, who seems to keep evening hours wrote at 6.20 pm to the three Ministers and if we look at that letter, after setting out very helpfully the background to all the issues, over on page 713 of the bundle, in paragraph 12, there is a request, so this is what was refused, so it's worth just pausing to look at what's been asked for, "In order to preserve Ngāti Whakahemo's interest under

Wai 1471 and its interest in the Farms, our client requests an undertaking from the shareholding Ministers and the Minister for Treaty Negotiations, that Landcorp will not enter into any agreement to sell the Whārere Farms without first giving Ngāti Whakahemo 20 working days' notice of its intention to do so." So an undertaking from Ministers that Landcorp won't enter into a particular contract.

And 13, "As Landcorp has signalled, it intends to dispose of the farms and has refused to provide the undertaking sought," and it's perhaps worth just pausing to note that it was very clear on 4 March that that undertaking had been refused, as my friend said. "Our client has been placed in a position where it may be obliged to make an application for interim relief. We therefore request that you provide your response to our client's request for undertakings before 5.00 pm on 6 March 2014." So Ministers were being asked to come back by 5 o'clock on the 6th of March 2014. That was the request, with an undertaking that Landcorp would not enter into certain contracts.

The response from Ministers is under tab 111. It was sent, if we look at the email at the foot of bundle, page 749, at 10.44 am on the 6th of March, well before the deadline and, as we know, well after a contract had been executed. And what is said over the page in the letter, in the letter dated 6th March, the Attorney-General says that he's responding on behalf of all the Ministers and, second paragraph, "Shareholding Ministers cannot make the undertaking you seek. The powers of Landcorp's shareholding Ministers are set out in the State-Owned Enterprises Act. The Act is designed so these powers are exercised at a high level, (eg, relating to the statement of corporate intent or the state-owned enterprises' objectives) or in a light-handed way. The Courts have also confirmed the Act is part of a light-handed regulatory regime that cannot countenance heavy-handed ministerial or parliamentary control of the trading activity. Intervening to provide an undertaking, particularly when Landcorp have declined to do so, is clearly inconsistent with the provisions of the Act." Then there's a discussion of Ministers considering it appropriate to promote the concept of a delay with Landcorp in order to provide Ngāti Makino and other iwi with an opportunity to purchase.

Now just pausing there, two things. First of all, the view that's set out in the second paragraph is not a novel one that's been developed for the purpose of responding to this inquiry. It represents orthodox Crown understanding of the operation of the Act for almost 30 years now, and it's also in my submission correct and I'll need to deal

with that in a moment. But that is the long-standing understanding through both National and Labour administrations of the scope of Ministers' powers in relation to new state-owned enterprises.

The other point I want to make is one that I think I rather undercooked in the written submissions but it's one that the Court of Appeal put some emphasis on. The Court emphasised, in paragraph 48 of their judgment, that they pressed counsel for the appellants, that's Ngāti Whakahemo, about what was being reviewed and what was confirmed, consistent with the pleadings, was that what was being reviewed was the decision made on 6 March. That's what is pleaded as having been unlawful and it's what counsel confirmed was the focus of this limb of the challenge. But as the –

O'REGAN J:
The decision recorded in this letter, you mean?

MR GODDARD QC:
Yes, the decision recorded in this letter on 6 March. That's what's pleaded as having been unlawful and that is what was confirmed to the Court as being the focus of this challenge. But, of course, the Court of Appeal was quite right to say that on 6 March the horse had bolted. There was nothing Ministers could do. The Court said whatever powers shareholders might have, they can't unravel a contract that's already been entered into, and the appellants in this Court say, "Yes, we accept that but there was a window earlier." But let's rewind. The fact that an incorrect, they say, decision was made on 6 March can't have caused the problem they complain about, which is a contract being entered into on 5 March. What the appellants say in their submissions to this Court is, "Well, hang on, there was a window after the request was made at 6.20 pm on the night of the 4th and before the second signature was attached around lunchtime on the 5th when Ministers could have done something." But there would be a reviewable error which caused the prejudice that's complained of only if it was a reviewable error to fail to intervene before lunchtime on the 5th. Unless Ministers acted unlawfully, unless Minister did something reviewable by lunchtime on the 5th March, nothing they did after that can have caused entry into the contact and can, as a matter of simple logic, chronology, lead to the setting aside of something that had already happened. It's not pleaded that Ministers acted unlawfully by failing to give an undertaking and intervene before lunchtime on the 5th. That's not what they've been asked for. They've been asked to respond by close of day on the 6th. And whatever else one might say about the appellant's argument,

what I think can be said with confidence is that no conceivable basis has been identified for suggesting that Ministers acted outside their powers, acted unlawfully, in failing to do something before lunchtime on the 5th. No basis suggested for such an argument and there could be none.

So there's just a complete disconnect on this limb of the case between the unlawful act, a decision made on the 6th, and the detriment asserted and relief sought unravelling a contract entered into on the 5th. I'll come back to some of the really interesting legal issues that that argument raises. In my written submissions I was seduced by them almost to the exclusion of this simple practical point, a problem I run into from time to time, but it seems to me that what I got to through a number of absolutely fascinating, in my submission, correct legal steps can actually be dealt with much more simply on a practical basis, and not for the first time.

So what I want to do now is make a few observations about the State-Owned Enterprises Act and the scheme of that Act with a view to explaining why this long-standing understanding of the scope of Ministers' powers is in fact correct, and to do this we need to have out the appellant's bundle of authorities, the blue one.

ELIAS CJ:
Sorry, what – you said – I had recorded you as saying the Court of Appeal at paragraph 48 said something about this simpler argument which you had insufficiently –

MR GODDARD QC:
I was doing that number from –

ELIAS CJ:
– pressed but I don't think it is 48.

MR GODDARD QC:
I probably got that wrong.

ELIAS CJ:
That's all right.

MR GODDARD QC:

It is 48.

ELIAS CJ:
Is it?

MR GODDARD QC:
"Justice Williams' conclusion shareholding Ministers could have stepped in and imposed a decision on the board appears to assume a continuous failure by Ministers of an obligation to intervene at any stage, but the trust correctly sought review of an affirmative decision, the Minister's refusal on 6 March 2014," and that interim order – so that's – the Court's making the point that what was challenged in the pleadings, and confirmed to be challenged in argument, was a decision made on the 6th. So that's – and the appellants are critical of that. They say, no, no, no, the Court of Appeal was confused because there was this window of opportunity to intervene, but the Court actually, in my respectful submission, had it right. They were pointing out that what was challenged in the pleadings, what was the focus of the argument, was that the Ministers got it wrong on the 6th, but that didn't cause any problems. To –

ELIAS CJ:
So and you had said that the Court pressed them and obtained the answer but, again, it's a bit elliptical just from 48. Are you –

MR GODDARD QC:
Yes…

ELIAS CJ:
Are you referring to the pleadings here?

MR GODDARD QC:
I am referring to the pleadings. The pleadings, my recollection is that this was also the subject of an exchange and I had thought that that was reflected in the judgment. Your Honour's quite right, it's not. But certainly the point was strongly emphasised, you know, what are you seeking to review here? What you're seeking –

ELIAS CJ:

Can we – nobody has taken us to the pleadings. Can you just, in the light of the argument we've heard, it might be useful just to have a quick look.

MR GODDARD QC:

Absolutely Your Honour. So the final version of the statement of claim was the fourth amended statement of claim which is under tab 3 and this cause of action begins on page 28 of the bundle. Second cause of action, judicial review of the decision by the Ministers not to offer an undertaking. And what you'll see at 53 immediately, a judicial review of the decision by the Ministers on 6 March 2014 not to offer, so that bounces straight off that and then 54 spells that out in more detail. "The Ministers are wrong as a matter of law to determine they could not make the undertakings sought…" There's no allegation at all of an obligation to intervene before lunchtime on the 5th and it's absolutely impossible to imagine where that could come from in circumstances where they hadn't even been asked to.

GLAZEBROOK J:

And actually in practical terms it might be thought slightly impractical for them to be, intervene in that short period in any event. Even had they the power to do so.

MR GODDARD QC:

And Justice O'Regan made that point in relation to amendment of the constitution and coming from –

GLAZEBROOK J:

Well that would certainly be impractical.

MR GODDARD QC:

– an experienced and efficient commercial lawyer in a former life that seems to me, with respect, entirely right. But even to form, you know, novel views about the reach of section 7, or about the application of *Duomatic*, seek some advice on whether you could do this, and do it, would be ambitious and there was no reason for Ministers to think they were required to do this in half a day. They hadn't been asked to.

GLAZEBROOK J:

But even if they did think they had the power to actually decide whether they should exercise it or not, one would have thought might take a bit longer than that.

MR GODDARD QC:

One might well have thought. One always hopes that Ministers will seek advice before doing things of this nature, and reasonably often that does, in fact, happen, and responsive, of course, as the Crown's advisers, Crown Law counsel always are to request for urgent advice, it just takes time to consider –

ARNOLD J:

The problem is Ngāti Whakahemo didn't know the timeframe. You've said there was no request before the 5th but there was no reason for them to make a request.

MR GODDARD QC:

No, but there was no reason for Ministers to think there was any greater urgency either. There's no suggestion –

ARNOLD J:

The pleading talks about taking other steps. It talks about giving an undertaking or taking other steps to protect the position. Now do you say that if the Minister had been advised that the process of negotiation was pretty much completed and this contract was going to be executed finally the following day, there was still nothing they could have done?

MR GODDARD QC:

I do say that but I don't need to say that in order for this practical answer which is that there's no allegation that Ministers knew that or were aware that there was any greater urgency than that identified by Whakahemo.

GLAZEBROOK J:

Well I'm not sure about that because certainly the purchasers thought that the Crown had given the go ahead after talking to Landcorp.

MR GODDARD QC:

But there's absolutely no evidence to suggest that's right and that appears to be a misapprehension when that happened and Your Honour saw that –

GLAZEBROOK J:

Well they discussed it with Landcorp who said we have to wait for the Crown to sign it off?

MR GODDARD QC:

No, there's no evidence that Landcorp every said that to the purchasers.

GLAZEBROOK J:

Well it's a fairly clear inference. Why would the purchasers have got that idea from a conversation?

MR GODDARD QC:

When the purchasers approached the Crown to check whether that was right, that was immediately clarified as wrong, so again it is what the Crown understood to be happening. There's no suggestion the Crown was in that misconceived loop, even if other people were Your Honour. So again just coming back to the question of - judicial review is sought of what the Ministers did on the 6th, plainly too late. There's no application for –

GLAZEBROOK J:

Can I just say that there seems to be a lot missing in this and if people are taking inferences from the things missing it would have actually been better if email chains and those matters had actually been in the – been before the Court.

MR GODDARD QC:

Yes there are pieces of the puzzle that, as analysis has intensified, it would be nice to have, I absolutely accept that Your Honour.

GLAZEBROOK J:

Because when they're not there then, as we know with juries and everybody, there is a tendency to try and fill the gaps and work out what the – so it isn't helpful to have gaps in material.

MR GODDARD QC:

But again, and I think that's absolutely right in respect to some issues but not, in my respectful submission, on this issue because the complaint –

GLAZEBROOK J:

Oh, no –

MR GODDARD QC:

– actually is crystal clear that an error was made on the 6th and that it can't have caused any of the prejudice alleged. There is no allegation that Ministers acted unlawfully in failing to take other steps, ought to have taken, by lunchtime on the 5th and it's just impossible to –

ARNOLD J:

Well it doesn't contain in the timeframe but it does, the pleading does refer to taking any other steps.

MR GODDARD QC:

But you'd have to then establish that, in order to succeed on this and get the relief sought, that those other steps ought in law to have been taken before lunchtime on the 5th otherwise it's academic.

WILLIAM YOUNG J:

And in the absence of those steps having been taken there was nothing wrong with Landcorp proceeding with the sale.

MR GODDARD QC:

Exactly Your Honour. So this cause of action, the second cause of action, just on the facts does not, in my respectful submission, get off the ground. I've got lots of really interesting legal answers why it's wrong, reasons why it's wrong as well, but there is a very simple one.

ELIAS CJ:

There is, however, a bit of a history that we haven't gone into, sorry, I'm now looking at the statement of claim, but all of that correspondence in 2012/2013 about the view that the Minister and OTS were taking that the claim had been settled, was never really, its' all pretty conclusory and then Ngāti Whakahemo only discovers that the land is for sale when it sees a sign up no the – so it hasn't got anywhere in terms of saying we're not settled. It's right up against the wire itself. One would have thought that at least there could have been a double check as to whether this claim was settled.

MR GODDARD QC:

That's a different complaint again.

ELIAS CJ:

I know. But it is part of the, it's part of the background

MR GODDARD QC:

There's no doubt but that the Crown officials and therefore the Crown misunderstood the effect of the Te Arawa Settlement Act and I think there is a good argument that that's a mistake of fact but I have proceeded on the basis that we needed to answer the complaint at its highest, which is that it's a mistake of law, and endeavour to explain why even if there was a mistake of law in making that mistake it didn't have any reviewable consequences downstream. So there was this error and it certainly affected the initial decision under the protocol but not, of course, the reconsidered decision. It also may, although it's not the reason given in the Minister's letter, have been part of the backdrop to that response, but the view that Ministers took was that what they were being asked to do, which was to give an undertaking, was not something which as a matter of law they could do, and it's challenged. There was an argument –

ELIAS CJ:

No, sorry, my point is that whether it was reasonable for some steps to be taken has to be assessed against the context of what preceded it and there is clearly flagged a contention that OTS has got it wrong and this claim is not settled. They'd been to the Waitangi Tribunal, they've only been fobbed off there because of the pause in the negotiations. That comes next. I'm just going off the statement of claim which is actually a very useful document and then – so that takes you up until December/January and then you're into this Ngāti Makino pulling out, then it's all on, and surely if faced with a request to the Ministers at that stage with that background one might have thought that there would have been an attempt to say, "This is all happening now, what's happening, is it going and if so, are we sure we've got this correct?"

MR GODDARD QC:

The – I mean, certainly the background is relevant to what could be expected when Whakahemo engaged and certainly again I've proceeded in my submissions and the Courts below proceeded on the basis that the incorrect understanding of law was still operative at this time and indeed is alleged to be the further error of law in relation to the scope of Ministers' powers. But that doesn't get past – I mean, and there are some other reasons why I think the case as advanced cannot succeed, but it still

doesn't really address the practical issue that if what is criticised is a decision made on 6 March, it's practically irrelevant, and that even with all that background I don't think one could argue, Your Honour, what that meant was that it was unlawful to fail to do something by lunchtime on the 5th.

ELIAS CJ:

Well, there's also the other communications, the informal communications to the officers of the shareholding Ministers that are going on at the same time, so it's not as if this letter comes out of the blue.

MR GODDARD QC:

No, but the question still is for Ministers response to it, which is what's challenged –

ELIAS CJ:

Yes.

MR GODDARD QC:

– to be a reviewable error which can lead to the relief sought, there must have been some reviewable error at a time early enough to have made a practical difference. That's not actually what's alleged and, importantly, it's very hard to see how even factoring all that backdrop into it it could be said to be unlawful, which is the relevant test when we're looking at juridical review, for Ministers to fail to do something by lunchtime on the 5th. That's –

ELIAS CJ:

Well, what about –

MR GODDARD QC:

– the practical problem.

ELIAS CJ:

What about picking up the telephone to Landcorp and saying, "What's your timeframe here?" Against the background also of this lapsed application for an urgent resumption hearing, it's not as if –

MR GODDARD QC:

I don't think it had lapsed at that stage.

ELIAS CJ:
Had it not?

MR GODDARD QC:
I think it was adjourned, and one of the things I've got a little note from my learned junior to tell the Court is actually where that's up to because it was adjourned and then it was brought back on at a later stage –

ELIAS CJ:
Yes, well –

MR GODDARD QC:
– and it was –

ELIAS CJ:
– if this pleading is correct, the Crown had sought an extension of time to respond to the urgency application until midday, 4 March.

MR GODDARD QC:
Yes, but again, I just – all I'm –

ELIAS CJ:
Well, it's just as was said, the timeframes made it impossible perhaps.

MR GODDARD QC:
Yes. It's plain that what happened was, in a number of respects, a muddle and that things could have gone better. But the question for the Court is not whether the outcome is the ideal one. The question is whether in getting to where we are now there's been a reviewable error by anyone, and that also has to be approached on the orthodox basis that the errors that fall for consideration by the Court are those that are identified in the pleadings –

ELIAS CJ:
I entirely accept that –

MR GODDARD QC:

– and that the evidence responds to, because if there had been a complaint that Ministers had acted too slowly then, of course, there would be evidence responding to that. There is no allegation that Ministers ought to have done something by lunchtime on the 5th, and if there had been then, of course, the Crown would have provided evidence explaining what steps were taken, in what times and why the timeframe was reasonable, but I don't think that any of the criticisms that can be drawn from a failure to respond to allegations that are made are available in response to allegations, in relation to allegations, that have not been made because the call to answer them simply is not there.

ELIAS CJ:

I understand that and I understand that it has to fit within the legal framework, but I am floundering still notwithstanding the material that's been put in front of us because it does seem to me that there's material that we don't really have. There are gaps in it. I mean, it sounds as if the Crown was in Court in the Waitangi Tribunal right at this point. We don't have any explanation of that.

MR GODDARD QC:

There is some discussion of what was happening in relation to all those steps in the large number –

ELIAS CJ:

In the affidavits –

MR GODDARD QC:

– of affidavits –

ELIAS CJ:

– which we haven't been –

MR GODDARD QC:

– from officials –

ELIAS CJ:

Yes, I see, all right.

MR GODDARD QC:

– and those, you haven't been taken to those by anyone, Your Honour –

ELIAS CJ:

No.

MR GODDARD QC:

– because no one, the appellants or the respondents, has seen them as relevant –

ELIAS CJ:

Yes.

MR GODDARD QC:

– to the issues that were pleaded, that were decided below and that in respect of which leave was granted here.

ELIAS CJ:

No, but you're making a submission to us that the Crown realistically could not respond. There's nothing it could have done when it got this communication.

MR GODDARD QC:

No, that's not what I was saying, Your Honour. What I was saying was that no one's suggesting that the Crown acted unlawfully in failing to do something faster. That's different. I'm not saying it's impossible. What I'm –

ELIAS CJ:

Well, it may have acted unreasonably in not doing something.

MR GODDARD QC:

Faster? There would have to be –

ELIAS CJ:

Well, it might have – it just depends on the context really.

MR GODDARD QC:

But it's not – but again, with the greatest respect, it's simply not alleged that it acted unreasonably in failing to do something by lunchtime on the 5th.

ELIAS CJ:

Well, it's being said against the appellants that they should have gone to Court as soon as they got the letter.

MR GODDARD QC:

That, that I think is part of the response to the suggestion that there was some confusion about the correspondence and, again, that's my friend's –

ELIAS CJ:

Yes.

MR GODDARD QC:

– argument.

ELIAS CJ:

I understand that.

MR GODDARD QC:

What I am here to address is whether there was a reviewable error by officials or by Ministers and there is no allegation at all that in failing to do something by the middle of the 5th of March Ministers committed a reviewable error. There's no allegation of undue delay. There's no allegation that they were aware of any factor that should have required them to act by that time and in the absence of such an allegation the second cause of action just has no practical purchase.

I'm going to – so the SOE Act, appellant's authorities.

Could I just ask what hours the Court is going to sit today in light of the indication that we can run into tomorrow? What does Your Honour want to do?

ELIAS CJ:

Shall we go on till 4.30? 4.30 today? Carry on till 4.30.

MR GODDARD QC:

Straight run or does –

ELIAS CJ:

Yes.

MR GODDARD QC:

– Your Honour want to take –

ELIAS CJ:

No.

MR GODDARD QC:

So my learned friend, Mr Hodder, took the Court to the explanatory note and some of the Hansard. I won't go to it but I would ask the Court to read the whole of paragraph 9 of the explanatory note, including the last sentence, which my friend skipped over, which says, "Ministers and control agencies will no longer have the powers to exercise detailed control over operational decisions," which is kind of the punch line, I think, and that's reflected in the scheme of the Act which is what I want to now go to, which is under tab 2. And I can – just want to draw the Court's attention to a couple of things that were not addressed and the first is to just note that part 2 of the Act, which begins on page 44 of the bundle, is concerned with formation and ownership of new state enterprises and that the power of direction in section 13 of the Act was confined to new state enterprises which were the state enterprises listed in schedule 2. There were, when the Act was first passed, five state enterprises that were in schedule 1 but not schedule 2, and they included Air New Zealand, Petrocorp, Tourist Hotel Corporation and there are a couple of others that escape my memory now. But importantly the powers of direction in section 13(1), directing in relation to certain matters to be included in or omitted from the statement of corporate intent, and directions in relation to dividends, did not extend to those five existing state enterprises, Shipping Corporation is another one, it's reaching back to the 1980s and the state owned all sorts of surprising things, and what my friend's argument based on section 7, which applies to all state enterprises, amending the constitution, and *Duomatic* necessarily requires is that in relation to all state enterprises there was a broad power to give directions not circumscribed in the way that section 13 limits what the subject directions can be. That applied to all state enterprises. Now it's a little bit surprising I think to suggest that far from Parliament conferring additional powers of direction in relation to new state enterprises in section 13(1), not otherwise available, what Parliament was doing was picking a couple of subjects out for direction in relation to new state enterprises while leaving the general provisions of this Act and general company law to operate in relation to

all state enterprises. That's not right in my submission. When we read this is the scheme of the legislation against the backdrop of sections 5 and 7, against the careful conferral of powers of direction on some things but not others, in relation to some SOEs but not others, in section 13, what we see is a scheme of direction power which, to use a phrase that I used and that this Court accepted in *Quake Outcasts*, covers the field. This power of direction in the statutory schedule was clearly intended to be comprehensive and the idea that you could give directions outside the scope of these two matters, and without laying a copy of the notice before the House of Representatives, is to do precisely the end run around a detailed power in a statute that was rejected by the English Courts in *Attorney-General v De Keyser's Royal Hotel Limited* [1920] AC 508, [1920]UKHL 1, and that this Court emphasised will not be appropriate where it covers the field in *Quake Outcasts*.

ELIAS CJ:

Because it would have the effect of evading the accountability mechanism in the Act.

MR GODDARD QC:

It would do two things. First of all it would mean that far from – well, it would raise the question of what this provision was doing at all. If you have a general power to give directions in relation to a wide range of issues under section 7 or through the constitution or by virtue of the *Duomatic* principle, why bother to provide for a power or direction at all and second, Your Honour is right, why regulate it? Why carefully prescribe what it does and doesn't extend to and require that it be done in a particular way. Before giving notices under this section, subsection (2) Ministers shall have regard to part 1 and consult the board. So again why, and then afterwards give a notice. So we've got a highly structured direction power available in relation to some but not all SOEs and the idea that you can direct on a huge range of other issues without those preliminary requirements or the subsequent accountability obligation just seems a bit odd. Just to deal with –

ELIAS CJ:

Sorry, I'm just a little bit behind in terms of, maybe it's the references to the post office and things like that, but are you saying that Landcorp is –

MR GODDARD QC:

It's a new SOE.

ELIAS CJ:

It's, it is a new SOE.

MR GODDARD QC:

It is a new SOE so –

ELIAS CJ:

But Landcorp Farms, or something, is in schedule 1, or is that the schedule –

MR GODDARD QC:

Schedule 1 is all SOEs.

ELIAS CJ:

Yes.

MR GODDARD QC:

And schedule 2 is new SOEs.

ELIAS CJ:

Oh, schedule 2 is new ones.

MR GODDARD QC:

So it's in both.

ELIAS CJ:

I see.

MR GODDARD QC:

But if you go back to the enactment of this legislation I think it's probably around a third, perhaps a little more, of the SOEs were not new SOEs and it seems to me that the suggestion that there was a wider power, you know, wide power of direction in relation to Air New Zealand, in relation to Petrocorp, in relation to the Shipping Corporation, which were at the most commercial and most likely to be disposed of end of the spectrum, is implausible. So when you look both at the scope of application of section 13 and the safeguards that I think is pretty clear.

The relationship between section 7 and section 13 is perhaps worth just picking up in this context as well. The Court asked, well can you require an agreement to be entered into under section 7. The answer, in my submission, is no but the way that section 7 and 13 and 14(2)(i) dovetail together is that one of the things that can be done in relation to new state enterprises, but not the old ones, under 13(1), is to give a direction to a new state enterprise to include a provision of the kind referred to in paragraphs (a) to (h) of 14(2) and (b) of 14(2)(b), is the nature and scope of the activities to be undertaken. So coming back to Justice O'Regan's comment about post offices that are uneconomic. One of the things that can be done in relation to new SOEs is to give a section 13 direction that all these post offices, existing post offices remain open and continue to provide goods and services to their communities. That direction can be given under 13 if necessary. There's then a negotiation under section 7 and if agreement is not reached then potentially that could trigger a statement under 14(2)(i) which is clearly intended both to put some pressure on Ministers to do a deal and to form part of the accountability mechanism when, if agreements are not reached on subsidising those post offices but post offices being directed to keep all these post offices open, and performance is poor, they're not achieving their target rate of return, then the board can say, look, we've sought compensation for this, it hasn't yet been agreed, but we've been made to do it by virtue of this table direction and that's why we are doing this otherwise un-commercial thing. So it all dovetails in that way.

The other point that I think is worth making is that I think Your Honour the Chief Justice was right to ask my learned friend Mr Hodder whether an agreement not to sell a property really could be a section 7 agreement. It's hard to understand agreement not to sell something as the provision of goods or services, and it's no accident that the Goods and Services Tax Act contains very elaborate, broad and indeed artificial definitions of the concepts of goods and services to catch all sorts of things that wouldn't otherwise normally be understood as goods or services. And the use of these phrases I think needs to be contrasted with express references to assets elsewhere in the Act where a more general term is sought or express references to land. So with respect to my friend I'm not sure that it's right to describe it as a section 7 agreement but of course section 7 is not, as my friend said, not an exhaustive statement of the full range of agreements that can be entered into between the Crown and a state-owned enterprise. So it requires an agreement to be negotiated in good faith, where the Crown wants a state enterprise to provide goods or services on an un-commercial basis, but of course if there are other things that the

Crown wants to do with a state-owned enterprise it can contract for it. For example, if the Crown has transferred land to a state-owned enterprise, and it wants it back, it can go to the state enterprise and say, we would like to buy this back from you, and that can be negotiated. That's not a section 7 agreement but it's a perfectly acceptable agreement. Ministers will consider what is in the public interest in negotiating that. The directors of the SOE are required to consider what's in the best interests of the company under the Companies Act and to have regard to the SOE Act framework as well in deciding whether or not to sell at the offered price, and if agreement is not reached there's no obligation to do so, and it's because there's no obligation to do so, and because Ministers can't say, you must sell this to us, that we see, for example, provision I foreshadowed before, section 27D. now this isn't part of the memorial regime and it gets a bit less attention as a result. If we look at section 27D, which is on page 65 of the bundle, "Resumption of Wāhi Tapu", what happens if the Crown has transferred land to a state-owned enterprise and it identifies subsequently that that land is wāhi tapu and would like to reacquire it in order to include it in a Treaty settlement? Can Ministers make the decision to sell the land on behalf of the state enterprise, under *Duomatic*, as my friends appear to argue? Can they change the constitution to give themselves the power to make the decision to sell the land? Can they require it under section 7? The answer is "no" to all of those and instead there's a formal process that is contemplated if an agreement can't be reached. Of course, the Crown can go to a state-owned enterprise, can say, "We're going to give you $5 million for this land. We want to buy it to include it in a settlement because it's of special significance to an iwi with whom we're negotiating." If the board says, "Nah," then 27D kicks in and what actually is required is a very formal process in which, on the advice of Ministers, as always, the Governor-General by notice in the *Gazette* under section 24 or by Order in Council under – sorry, no, the Governor-General may by Order in Council declare that the land shall be resumed by the Crown on a date specified in that Order in Council, and that's no longer liable to resumption, and then the state enterprise must transfer the land and the Crown makes a payment set by reference to the Public Works Act.

ELIAS CJ:

But if it proves that this sort of course would have been appropriate or will be appropriate, it will be too late because the land's no longer held by a state enterprise.

MR GODDARD QC:

In which case it will still be subject to the memorial and the resumption regime will continue to apply but this mechanism will no longer be available, that's right. So this is an additional mechanism on top of the resumption on the recommendation of the Tribunal mechanism which the Crown configure, and the reason I'm going to it is not to suggest that it's going to be available in this case but –

ELIAS CJ:

No, no, no, but I'm just indicating that the availability of this mechanism also underscores what's lost –

MR GODDARD QC:

Yes.

ELIAS CJ:

– is the land passes into third party ownership.

MR GODDARD QC:

And, at that point, this option ceases to be available –

ELIAS CJ:

Mmm.

MR GODDARD QC:

– but the memorial regime continues to operate. What I wanted to emphasise by reference to this is that even in that context of a significant Treaty overlay where land is wāhi tapu and where it's required to be returned to a particular tribe, and we see the mechanism for that being discussed down in subsection (4), it is still not the case that Ministers can just reach in by some mechanism of their own and haul the land out or compel the SOE to do a deal. What has to happen is the much more formal process, if agreement can't be reached, of an Order in Council, and again that's completely inimical to the suggestion that to respond to the Treaty context there is some additional power of direction available which might not otherwise be available.

ELIAS CJ:

Would the protocol cover land to be held for this purpose?

MR GODDARD QC:

The…

ELIAS CJ:

It's just that see one of the reasons that's given by the Minister in the reconsideration is the costs of subdivision and the bother of subdivision. That all gets avoided if this mechanism under section 27D is used. Does the protocol…

MR GODDARD QC:

I think the protocol is perfectly general.

ELIAS CJ:

Yes.

MR GODDARD QC:

And what –

ELIAS CJ:

It doesn't necessarily envisage…

MR GODDARD QC:

It doesn't envisage an Order in Council. The protocol is absolutely directed towards a co-operative, practical relationship which avoids the need for formal remedies.

ELIAS CJ:

But it doesn't inexorably take you to return of the – or – yes, return of the land to iwi, does it?

MR GODDARD QC:

No.

ELIAS CJ:

No.

MR GODDARD QC:

Whereas this does. If you –

ELIAS CJ:

Yes, if you get to that stage, just as –

MR GODDARD QC:

If you exercise a 27D power then subsection (4) says upon its resumption the land shall be dealt with in accordance with an agreement made between the Crown and the relevant tribe or, if they fail to agree, in accordance with a recommendation of the Tribunal, whereas the whole point of the protocol is to anticipate resolutions to some extent.

ELIAS CJ:

Although it does permit – well, this was really the issue. I don't think I quite followed the answer when you and Justice Young were talking about the consequences. It doesn't – it does permit land banking by the Crown but the Crown has to compensate the SOE. Is that the…

WILLIAM YOUNG J:

It's the land.

MR GODDARD QC:

Under the protocol?

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

It acquires the land, doesn't it?

MR GODDARD QC:

Yes, it acquires the land.

ELIAS CJ:

Yes, but that's a – that is a holding mechanism, not a – it doesn't require a determination that the land will be required.

MR GODDARD QC:
No.

ELIAS CJ:
Is there a – yes, what happens to the land if it's not required? Does it go back to the SOE? Is there a provision there?

MR GODDARD QC:
It would be the Crown's land because it would have purchased it and the Crown can decide how best to deal with it, and I don't think there's any hardwired –

ELIAS CJ:
Yes.

MR GODDARD QC:
– in that scenario.

ELIAS CJ:
Thank you.

MR GODDARD QC:
And the point that was made about, I've just made about 27D, that if there was some backdrop power to make decisions for the SOE or to direct it, you wouldn't need that provision, is also the point that I would make in relation to section 18, "Other information". There was some discussion between Your Honours and my learned friend, Mr Hodder, about section 18 and the limits on what could be asked for. But, again, what I want to highlight is actually that if this was a plain vanilla company with a single shareholder exercising all the powers, and particularly all the powers that were available under the Companies Act 1955, which was the relevant Act when the SOE Act was first enacted, then you wouldn't need 18(1) because the sole shareholder could require that any information be given to them. So again, the fact that this machinery is here reflects the fact that the whole Act is premised on shareholders keeping their distance and not exercising any powers other than those expressly conferred by the Act or transparently through the constitution. That's why we see 18 and that's why we see 27D. And, again, I make submissions like this slightly terrified that I'll open some Pandora's Box of interesting issues and it will eat

the next half hour, but the SOE case in large measure would not have been necessary. The broadcasting assets case would not have been necessary if there was a broad power of direction or decision-making held by Ministers even when assets had gone to a state enterprise.

ELIAS CJ:

Well, that's really what the Privy Council decided in the broadcasting assets case.

ARNOLD J:

Well, they talk about the ability of Ministers to exercise indirect control –

MR GODDARD QC:

Exactly, Your Honour.

ARNOLD J:

– over the – well –

MR GODDARD QC:

Through –

ARNOLD J:

I mean, this case sort of establishes that in a – well, I don't know that they're limiting it, are they, to particular mechanisms?

MR GODDARD QC:

They list the mechanisms and say, "Look, this is how indirect control is exercised," and if Their Lordships had thought that control could be exercised directly, never mind indirectly, by making decisions under *Duomatic*, that would have been a very important part of Their Lordships' reasoning. They would have said, "No, no, don't worry because the Crown still has effective control over these assets." Didn't. Didn't say you can do it through – said there are these tools which enable a measure of indirect control to be exercised and that is sufficient and, look, there's still an obligation to retain the shares that are… So the picture that Their Lordships painted didn't include the sort of decision-making or direction power that the appellants content for, and if it had existed it would have been an enormously important part of the answer to the appellant's case. It's not that Their Lordships missed something. In my respectful submission, they understood very well the scheme of the Act, that

there were some powers of control, there weren't others, but those powers that were there were sufficient to answer the concerns.

ARNOLD J:

But weren't Their Lordships also recognising what this case seems to demonstrate? That is, that Ministers did have the ability to request certain things and in this case it was a, effectively an opportunity for Ngāti Makino to bid, and the Board identifies as one of the positive things that Landcorp about acceding to that request that it maintained relationships with the Ministers, and it did seem to me that underlying what the Privy Council was saying was a recognition that there was likely to be that kind of indirect control or interaction, if you like.

MR GODDARD QC:

Yes, the – I think that's right. I think that as well as the formal powers that Ministers have and can ultimately exercise, there's always the ability to seek to use the power of persuasion to make requests and explore whether either with or without compensation some sort of accommodation of broader public interests can be achieved. But, again, that was not what Ministers were asked to do here. They were asked to give a very specific undertaking. That's what they declined to do and it's that refusal that's challenged. And I know that –

ARNOLD J:

Yes, well, it's all –

MR GODDARD QC:

– the pleading has that broader phrase but the Ministers weren't asked to do anything else and I can't – there's no argument that a failure to do something else was unlawful again.

ARNOLD J:

No. If one takes, goes back to an earlier stage in the process and looks at the other element of the case, which is that there was a failure to give Ngāti Whakahemo the same opportunity that Ngāti Makino had had, doesn't this, doesn't what the Privy Council says and what you've accepted about the ability to influence or request the Board to do something then have some bite because with the right information there's every likelihood that the Ministers would have made the request.

MR GODDARD QC:

The fact that something can be done does not, of course, mean that's it's unlawful to fail to do it.

ARNOLD J:

But I'll accept if you're – it may be unreasonable though, mightn't it?

MR GODDARD QC:

But that's not the case –

ARNOLD J:

I mean –

MR GODDARD QC:

– that we've been asked to answer, and again if there had been a suggestion that some other step should have been taken at some earlier time, then – and that had been squarely pleaded, that would have been answered by evidence and then the Court could deal with it on the evidence, but, with respect, simply not in a position –

GLAZEBROOK J:

But –

MR GODDARD QC:

– to speculate about the other things that might have happened and what evidence there might then be before the Court.

GLAZEBROOK J:

I think what is put against you by it squarely in the submissions is that had the mistake not been made then inevitably, or almost inevitably, the same opportunity as was given to Ngāti Makino recognising that there may have been some issue of precedence and how that was going to be worked through would have been given or would have been requested on the part of the Ngāti Whakahemo as well.

MR GODDARD QC:

The submissions have certainly evolved in that direction but if one looks at what was challenged by way of judicial review it was a very specific failure to give the undertaking requested. That's –

GLAZEBROOK J:

No, no, I can – sorry, I can understand that about the undertaking and this part but I think Justice Arnold was trying to take you back, further back, in terms of the process, although I may have misunderstood.

ARNOLD J:

That's what I was saying –

MR GODDARD QC:

So then we come to the 19 November –

ARNOLD J:

Yes, exactly.

MR GODDARD QC:

– and I'm going to come to that but again what is said is first of all that that's reviewable in and of itself and, with respect, that can't be right for reasons I'll come to. It's not the case that every time that Crown law gives legal advice that with the benefit of hindsight turns out to be incorrect Crown law has acted unlawfully. You can make a mistake of law in giving advice without acting unlawfully in a way that's reviewable. What's critical is who does what in the light of that advice and is that decision reviewable and that depends on context. I'll come to all of that. But what is then said to drop out of that is Landcorp's decision to contract. There's no intermediate inaction by the Crown alleged to be unlawful which is said to be reviewable. So I can understand how that argument could have been run but, again, it's simply not the case that has been advanced in the pleadings or in the Courts below against –

ELIAS CJ:

So was there only one cause of action against –

MR GODDARD QC:

No, there were two causes –

ELIAS CJ:

– the Ministers?

MR GODDARD QC:

– of action against the Ministers and officials. If I go back to the pleadings…

ELIAS CJ:

Because it was not just not to offer an undertaking. It was not to take any other steps to protect the interests.

MR GODDARD QC:

That's a little bit tricky, that, to follow, that one, because if we look at what is sought in 53, it's judicial review of the decision by Ministers on 6 March.

ELIAS CJ:

But the consequence of that must be either they should have offered an undertaking, or if you –

MR GODDARD QC:

On the 6th of March?

ELIAS CJ:

– it goes –

MR GODDARD QC:

Then that's pointless.

ELIAS CJ:

Or, or take other steps to protect.

MR GODDARD QC:

What's said is they were wrong in law to think they couldn't take other steps but what is challenged is the failure to offer the undertaking.

ELIAS CJ:

Well, not in the heading.

MR GODDARD QC:

No, and again one of the –

ELIAS CJ:

Or to – and in (b), decision not to offer an undertaking or take any other steps to protect –

MR GODDARD QC:

That's been –

ELIAS CJ:

– interests.

MR GODDARD QC:

– abandoned, of course. That's no longer pursued, the argument that that was a breach of section 9 by Ministers.

ELIAS CJ:

Yes.

MR GODDARD QC:

So again, I wanted to make that –

ELIAS CJ:

Yes.

MR GODDARD QC:

– point, that there was an argument over positive obligation of some kind under section 9 to give the undertaking or take some other steps but that's not live any more. So, again, the focus does need to be on –

ELIAS CJ:

Yes, well, all right, but it's not make the undertaking sought or taken any other steps to protect?

MR GODDARD QC:

Well, that's the error of law but in 53 what's said to be being reviewed is the decision. But I'm happy also to deal with the argument about other steps because again the question comes back to the point that none of it would matter unless there was, it was a failure, the failure by Ministers to take some other steps by lunchtime on the 5th

was unlawful, was itself reviewable, and the appellants simply haven't assumed the burden of showing that by that point in time, the only point in time that's relevant, Ministers had an obligation to do something. Even if the argument was the Minister had an obligation to do something by 5.00 pm on the 6th, that's practically irrelevant in this case.

ELIAS CJ:

Well, does that mean that they could seek to amend this pleading to make it by the 5th?

MR GODDARD QC:

Well, then I'd want to call evidence from Ministers about the practicalities involved in responding to emails that turn up at 6.20 pm in an office by lunchtime the next day, so I think it's a bit late for that amendment, Your Honour. I'd oppose that –

ELIAS CJ:

Yes.

MR GODDARD QC:

– very strongly.

ELIAS CJ:

So I'm just asking you whether really it just comes down to that, that they've –

MR GODDARD QC:

On that complaint, it's really that the complaint about Ministers not doing something in response to the letter sent on the night of the 4th is currently framed in terms of not making the wrong decision, a decision that's wrong in law effectively on the 6th, too late. It's theoretically possible that it could have been pleaded as an argument that Ministers acted unlawfully in failing to do something by lunchtime on the 5th. That's a theoretical possibility but I think that to come home on that would be extraordinarily difficult just because of the tight timeframe and to show that Ministers have not acted unreasonably by failing to do something by that timeframe when they hadn't been asked to I think would not be hard, if that were the case that was being advanced.

ELIAS CJ:

Unless they knew that the, and there's no evidence of that, that the sale was proceeding?

MR GODDARD QC:

No allegation or evidence. In fact, somewhere in my friend's submissions they say, they talk about how on the 6th, later on the 6th, the Crown by now in the picture files a memorandum in the Tribunal telling it what's happened.

ELIAS CJ:

Yes.

MR GODDARD QC:

So the allegation is that the Crown didn't know. Well, that's the appellant's case and that's my –

ELIAS CJ:

If it really comes down to this timing thing, the communication with – I want to look back at – well, don't take the time now but the communication with Mr English's office, what was known at that stage. Anyway, never mind at the moment. You carry on.

MR GODDARD QC:

So the other point I just wanted to make is amongst the pile of paper that I've inflicted on the Court with my note is an extract from the Crown Entities Act and the reason I have done that is simply given that one always hopes for a measure of coherence in the law and to draw the Court's attention to the directions regime in relation to Crown entities, and in particular Crown agents which are closer into the core Crown than state enterprises. So obviously you've got Crown, you've got Government departments where you've got ministerial responsibility, the ability of Ministers to exercise a high degree of control formally constrained only in relation to individual employee decisions in section 32 of the State Sector Act. Then you push out to the next layer, and you've got Crown agents, and then you've got autonomous Crown entities and so on, but if we look at the Crown Entities Act, part 3, which begins on page 49 of this extract, and I've provided interpretation provisions and description of the different Crown entities but I don't think I've got time to go through all of that. There's a heading, "Directions to statutory entities and Crown entity companies," and

in 103, for example, "Power to direct Crown agents to give effect to Government policy." Responsible –

GLAZEBROOK J:
Sorry, I've just lost you just at the moment. Page?

MR GODDARD QC:
Sorry, Your Honour. I'm on page 49.

GLAZEBROOK J:
49, thank you.

MR GODDARD QC:
In part 3. There's a power to direct Crown agents to give effect to Government policy. Then in 104 a power to direct autonomous Crown entities that are a little bit further out to have regard to Government policy, and then 105 says, and you can't give directions to an ICE, to an independent Crown entity or Crown entity company, unless it's expressly provided for in another Act. And then if we turn over to section 110, perhaps, "Obligation to give effect to direction." That's whole of Government directions under 107. I won't spend time on those.

Then if one looks at section 113, which is on page 52, subsection (1), "This Act does not authorise a Minister to direct a Crown entity, or a member, employee, or office holder of a Crown entity, (b) requiring the performance or non-performance of a particular act, or the bringing about of a particular result, in respect of a particular person or persons." So in relation to even Crown agents, which are much more central in terms of the layers of public entity, it would not be possible to give a direction requiring the Crown agent to sell a parcel of land to a particular person or to refrain from selling a particular parcel of land.

On the approach to the SOE Act that I have suggested, which is a confined power of direction under section 13, there is, as one would expect, a more limited power of ministerial control in relation to SOEs than Crown agents. On my friend's case, via various back door routes, there's actually a more extensive power of control and that's pretty surprising, that conclusion.

Let me move on, then, and I'm having the same problem with time that all counsel I think have encountered in this matter, to item 4 of my road map. I'm now half way through the first page, but I have covered some stuff in anticipation in answer to Your Honour's questions. Judicial review of SOE decisions, and I think it's important to step back and ask what the purpose of judicial review is here, as Their Lordships did in *Mercury Energy* and as the Court of Appeal did in *Lab Tests*. What had really gone wrong in the High Court there was that the Judge had identified certain public law requirements, which are often applied to decision-makers, and had applied them to this entity without first stepping back and saying, "But do these requirements fit with the statutory scheme?" And the essence of the Court of Appeal's decision was to say, "Well, we've got to work out what the public law obligations of the decision-maker are and ensure that they mesh with the statutory framework within which it operates before we can work out whether or not they've been breached, and it cannot be the case that the procedural requirements identified by the High Court apply here because they go beyond, and in some important respects are inconsistent with, the framework for making decisions.

So there's *Mercury Energy* says, in 4 point – that judicial review is concerned with ensuring that public power are lawfully exercised and that, in my submission, is right.

So the starting point must be, well, what's the nature of the decision that's being challenged and what are the public law requirements that apply to that decision? That was the analysis undertaken by the Privy Council in *Mercury Energy*. It was the analysis undertaken in *Lab Tests*, and I won't go to them given the time, but there's, with respect, a very helpful ground up analysis in *Lab Tests* of, you know, what does this statutory framework require of these decision-makers when they come to enter into a contract? In certain respects they are expected to act commercially. They are free to do contracts by private tender so there's no obligation to run a competitive process, and so on. And that's exactly what needs to be done here.

Your Honour, the Chief Justice, asked about *Webster* –

ELIAS CJ:
Where do you find *Lab Tests*, the Court of Appeal decision? It's in your authorities, is it?

MR GODDARD QC:

Lab Tests is in my authorities under tab 10, and I've got it highlighted because of a great deal of optimism that I would have time to go through it. I don't think it's probably the best place for me to go to now –

ELIAS CJ:

That's all right, you don't need to.

MR GODDARD QC:

– but it's in tab 10. *Mercury Energy*, of course, in my friend's casebook under tab 9, and it's a really good example of stepping back and saying, "But what are we doing here when we're being asked to review this entity? We're being asked to ensure that it acts lawfully, that it complies with the public law obligations that apply to it." So what public law obligations apply to an SOE?

ELIAS CJ:

Well, you could just say what obligations and then you wouldn't buy into a very –

MR GODDARD QC:

But I don't think you can judicially review a state-owned enterprise for committing a tort, for example, so I think you do actually need to ask, "Is there a public element?"

ELIAS CJ:

You can review domestic bodies for not – for unlawfulness.

MR GODDARD QC:

If they – if the power they're exercising has the necessary public –

ELIAS CJ:

You can – yes –

MR GODDARD QC:

– element.

ELIAS CJ:

You can review bodies with contractual origins.

MR GODDARD QC:

Well, I think it's necessary to pay careful attention there to whether what you're arguing about is an implied term in a contract or whether it's really judicial review because that can have an impact on remedies. But…

ELIAS CJ:
Anyway, that's a sort of a –

MR GODDARD QC:
Anyway, it's –

ELIAS CJ:
– wide-ranging academic debate.

MR GODDARD QC:
It is. But I thought that Your Honour's questions to my learned friend, Ms Scholtens, yesterday drove me to reread the *Webster* cases –

ELIAS CJ:
Yes.

MR GODDARD QC:
– overnight. Now provided *Webster* number 2, because although it was concerned not with entry into a contract but rather with –

ELIAS CJ:
Enforcement of…

MR GODDARD QC:
– the exercise of a power –

ELIAS CJ:
Yes.

MR GODDARD QC:
– to increase a fee and then when that was refused to cancel it –-

ELIAS CJ:

Cancelling, mmm.

MR GODDARD QC:

– what was said both in number 1, the strike-out decision, and again by the Court on appeal from the substantive decision of Justice Tompkins, was that the Harbour Board was carrying out statutory functions and the Court had no doubt, Their Honours said, but that they were subject to judicial review in the exercise of these contractual powers which had a statutory foundation. And the reason I provided that is that I think that it links neatly into the inquiry carried out in *Mercury Energy* and the inquiry that I'm urging on the Court here, and for that purpose I think we just need to look at the decision or the judgment of the President and we can go straight to page 131, and line 12, part-way through setting out the background from the previous decision, His Honour said, "I have no –

ELIAS CJ:

Sorry, I haven't found it. A hundred and?

MR GODDARD QC:

131.

ELIAS CJ:

Thank you.

MR GODDARD QC:

Sorry.

ELIAS CJ:

Yes, at line 12. Thank you.

MR GODDARD QC:

Line 12. "I've no doubt in connection with the exercise of contractual rights a statutory body can be in a different position from a private citizen." Yes, but why? And it's the answer. "For instance, as to the entering into or cancellation of a contract, the statute expressly or implicitly may require certain considerations to be taken into account or may exclude others. If so, statutory powers of decision will be involved," and then, at the foot of that paragraph, "Apart from any other express or implied restraint the requirement of good faith is invariable." And then after

mentioning some of the statutory provisions in relation to granting licences, at line 33, "The fact that in carrying out that function the Board has chosen to grant licences in the form of contracts does not make its decision to grant such a licence and to prescribe the fee any the less an exercise of a statutory power of decision." And then the next two lines, the important ones, "And here the whole dispute turns on whether the Board has acted in accordance with the express or implied requirements of the Act in arriving at the fee." So if you search out what's different in a public body exercising contractual powers or entering into a contract, it is the statutory framework.

ELIAS CJ:

But it need not be statutory. That's really the point I'm raising with you. It may have to – it can be conferred by any other constitutive provision.

MR GODDARD QC:

But then it is necessary to ask is this the sort of power that is subject to some form of public law requirement –

ELIAS CJ:

Supervisory jurisdiction?

MR GODDARD QC:

Yes, well, the supervisory jurisdiction drops out of the existence of an obligation. What one is supervising is the lawfulness of the exercise of the power.

ELIAS CJ:

Yes.

MR GODDARD QC:

So there must be a requirement that it be exercised in a particular way, and that has to be found somewhere. That's the point I'm trying to make.

ELIAS CJ:

Yes, well, I accept that. I'm just saying be careful, it does not have to have a statutory basis.

MR GODDARD QC:

No, absolutely it doesn't. I accept that.

ELIAS CJ:

Yes.

MR GODDARD QC:

And I, what – and, for example, *Dunne & Anderton v Canwest TVWorks Limited*, which remains one of my favourite cases, illustrates that, or – and I think that's –

ELIAS CJ:

Nagle and Field and –

MR GODDARD QC:

Yes.

ELIAS CJ:

If one wants to go back.

MR GODDARD QC:

Phipps v Royal Australasian College of Surgeons [2000] 2 NZLR 513.

ELIAS CJ:

Yes.

MR GODDARD QC:

One can multiply the examples.

ELIAS CJ:

Yes.

MR GODDARD QC:

But what – the supervisory jurisdiction is a jurisdiction to supervise the lawful exercise of powers.

ELIAS CJ:

Yes.

MR GODDARD QC:

And so what one must find somewhere is an obligation to exercise the power in a particular way, and –

ELIAS CJ:

Or not arbitrarily.

MR GODDARD QC:

Yes, but one still needs to say why is there an obligation not to exercise this power arbitrarily because purely private –

ELIAS CJ:

Because arbitrary power, the law sets itself against.

WILLIAM YOUNG J:

But some powers can be exercised arbitrarily.

ELIAS CJ:

Well –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

I mean, I can refuse to allow my neighbour to cross my property.

ELIAS CJ:

Yes, but, you know, you're into that pickle sort of area and we're not into that here.

MR GODDARD QC:

But that's where we have to say –

ELIAS CJ:

And even there it's contestable and one day no doubt the Courts will have to review all of that. But –

MR GODDARD QC:

It remains the case that if I ask Your Honour for a loan to tide me over for a week or so, Your Honour's answer can be completely arbitrary and it can be driven by whatever factors Your Honour may think appropriate, and if Your Honour refuses me a loan because you don't like the colour of the tie I'm wearing today –

ELIAS CJ:

I think you can put a ring around the fact that I would deny you a loan.

MR GODDARD QC:

There is nothing I could do about that in the Courts.

ELIAS CJ:

No.

MR GODDARD QC:

And so we have to ask – and the same applies to most companies. If I rock up and ask them to sell me some of their land, they can refuse me, a private company, as arbitrarily as they like and for whatever reason. They really could refuse to sell me some property because they don't like my –

WILLIAM YOUNG J:

Well, "We don't deal with lawyers."

MR GODDARD QC:

Yes, "We don't deal with lawyers. We don't like people with," I was going to say "brown hair" but it's probably not so brown any more, whatever their problem with my hair colour might be. Red obviously was not something nature ever blessed me with in order to be discriminated against. So what is it about Landcorp that means it can't behave like that? Because everyone accepts that the supervisory jurisdiction is to some extent engaged it's important to pay attention to the origins of that constraint because that sheds light, as the Court of Appeal explained in *Lab Tests*, on what the constraint is, and it is the SOE Act framework. It's the fact that it is a state enterprise and that it is required by the SOE Act to operate in accordance with certain principles set out in part 1 to make decisions in particular ways having regard, for example, to a statement of corporate intent. But that is – so there is a framework but it's a framework that in the making of a particular decision to enter into a particular

transaction does not, for example, import obligations of natural justice. You don't have to run any particular sort of process before you sell an asset. It doesn't impose an obligation not to enter into transactions subject to a mistake of fact or a mistake of law. If Landcorp enters into a commercial transaction acting under a mistake of law then its rights in relation to that will depend on private law, Contractual Mistakes Act, which includes certain legal mistakes and whether that code in relation to the consequences of mistakes is triggered, but it doesn't act unlawfully. It doesn't act in breach of any obligation, express or implied in the statutory framework or derived from it which would result in that decision being reviewable, and that's an important part of the framework that led Their Lordships to describe quite narrowly, but more broadly than the Court of Appeal had, the sphere of review that's likely to be available in relation to particular contracting decisions by an SOE.

This is also important, this argument, in terms of section 21 of the State-Owned Enterprises Act, and the Court asked my learned friend, Mr Hodder, a few questions about that and he said he was going to come back to it but then I think time was not his friend. But if we look at section 21 of the SOE Act, back in the appellant's blue bundle under tab 2 at page 53, section 21, "Saving of certain transactions." "A failure by a state enterprise to comply with any provision contained in part 1 or in any statement of corporate intent shall not affect the validity or enforceability of any deed, agreement, entered into or incurred by a state enterprise." So what we have here is a pretty clear statement that non-compliance with part 1 and the SCI, the sources of the public law overlay on the conduct of these companies, does not invalidate transactions. It is, as my friend suggested, a form of indoor management rule. It says the constraints on SOE decision-making imposed by this Act are internal constrains to be policed through a range of accountability mechanisms set out in this Act, and there may be a range of consequences if they are not complied with but one of those consequences will not be that a contract entered into with a third party is invalid or unenforceable.

So when we go round that loop of identifying the source of obligations on SOEs to act differently in certain respects from private companies, and we source those here in this statutory framework that applies to them, what we see is that non-compliance is an internal matter like for an ordinary company failure to comply with a restriction on activities in the constitution and it doesn't flow through to invalidity of the contract.

If a state enterprise was obviously plainly in breach of section 4(1) in entering into a particular transaction, then there are a range of consequences that could follow for its directors and many of those are the same consequences that would've applied to a DHB that entered into imprudent contract under the, I forget which acronym, legislation was enforced, the PHD Act, at the time but one thing that wouldn't drop out of it is that the contract could be challenged for that non-compliance. Now of course none of that precludes, and this is the point Your Honour made, none of that precludes raising ordinary private law arguments that it was procured by fraud.

ELIAS CJ:
For all public, all public law?

MR GODDARD QC:
Well I don't think there are any public law requirements that apply to the contracting process that are not sourced from part 1 in the Statement of Corporate Intent in relation to an SOE.

ELIAS CJ:
Well are they sourced from it or are they, because they are state-owned enterprises, which is really rather what – I don't read *Mercury Energy* as being so grounded in the statutory framework as you're suggesting.

MR GODDARD QC:
In my submission it is and that's consistent with the way –

ELIAS CJ:
Well where is that set?

MR GODDARD QC:
Well it's a very detailed reviewed of the statutory framework that leads to the conclusion that review is available and that's consistent with the approach of Justice Cooke, The President *In Webster* which says we need to find an express or implied restriction and I think a lot of – I think the constraints identified are properly seen as implicit in the statutory framework but if a breach of an express requirement of the statutory framework doesn't result invalidation of a contract, it seems to me to follow necessarily that breach of the implied obligations that drop out of being subject to that statutory framework.

ELIAS CJ:

Unless you're right, well I thought you were saying this was a rule of indoor management, a modern manifestation of it that it's really about the vires questions.

MR GODDARD QC:

Well, and that's something that I was going to come to but the seconds are ticking away against me and I really do want to come to the advice because I think that from a practical perspective that might actually be more important but let me – I've really covered my 4, I think. Let me just jump ahead extremely fast to 7 on my road map – oh 6 first. I've really covered my argument that no public law obligation is breached by a state enterprise entering into a commercial contract under a mistake of law and fact and this is really my argument that there's no express or implied required that a state enterprise refrain from making mistakes of law or fact in making its contracting decisions, no more than that it run a fair process with everyone in the world having an opportunity to bid. It just doesn't fit with the statutory framework under which they operate.

If that's right then the supervisory jurisdiction is not engaged but if I am wrong on that and we come to the agreement for sale and purchase then first of all 7.1, what are the consequences for a public body, using that word in its broadest sense, of failure to comply with statutory requirements? Well one consequence can be that the body lacks capacity. That was the conclusion of the English Courts in the swaps litigation for example, that the local authority simply didn't have capacity to enter into these interest rate swaps, so there were no contracts. Now that didn't involve judicial review powers setting aside otherwise valid contracts, that simply involved an orthodox conclusion at the intersection of public and private law for many centuries, that the powers of a statutory corporation are determined by the Act which confers those powers and it cannot act outside them and that was essentially Justice Asher's approach at first instance in lab tests that was held on appeal.

So that's one possibility but another possibility and again I'm not going to have time to go there, I probably just start from my 7.2, it is said that Landcorp acted under a mistake caused by the Crown, a mistake of law or fact, it doesn't matter too much but of course there's no suggestion the Contractual Mistakes Act applies here and no application by a party to the contract for relief under that Act.

And then we come to another possibility, it may be the case that an entity has the capacity to enter into a contract but that failure to comply with a statutory requirement in entering into the contract means that it's an illegal contract and this was the analysis of the Court of Appeal in the *K D Swan Family Trust v Universal College of Learning* CA255/02 23 which Your Honour Justice Glazebrook sat on in the Court of Appeal many moons ago when I was a much younger barrister appearing before you in the Court of Appeal and that case had got into a bit of a muddle that first instance in terms of whether we were talking about capacity or unlawfulness and what the Court of Appeal said in my respectful submission correctly, was there is no doubt about the capacity of this tertiary institution, it has full capacity and powers like our company here but the question is whether failure to comply with the statutory requirement that the Secretary of Education's consent be obtained to certain transactions would render the transaction an illegal contract and that actually divided the Court. Justice Keith thought that the other accountability mechanisms that were available in respect of non-compliance with this were sufficient and that the consequence of illegality was not intended by the legislature but the majority, Your Honour Justice Glazebrook and Justice Blanchard held that because the requirement was imposed to protect the public interest to ensure that tertiary institutions didn't dispose of certain critical assets or enter into certain other transactions, it was appropriate for illegality to be the consequence and in reaching that conclusion the majority in the Court of Appeal differed from the majority in a very similar High Court of Australia case and one of the things Your Honour said about that, as well of course as pointing out some differences in the statutory framework, was that the Court's natural reluctance to conclude that a contract is illegal is reduced in New Zealand because of the Illegal Contracts Act which provides a mechanism for adjusting the rights of the parties where a contract is illegal. It can be validated if there's no public policy concern in relation to that particular contract or there can be compensation or restitution, a whole range of adjustments of the party's rights and interests can be effected.

Now in my submission that is the right way of thinking about the contract law consequences of failure by a public entity to comply with statutory requirements when entering into a contract. There is not -

ELIAS CJ:

That it can only be overturned if it's illegal?

MR GODDARD QC:

They can say does the entity have capacity, yes/no and then if one looks at the analysis which is all about whether the policy of the statutes prohibits entry into such contracts and requires that they be invalid if entered into in breach of it, then yes that in my submission is the right analytical framework and to then have a further overlay in which, not on the application of the public entity, but potentially on the application of the other party to the contract or some third party, there can be a further unravelling of the contract. It seems partly repetitive of the illegality analysis but also in part to cut across it in important ways and in rather unsatisfactory ways because of who can invoke it.

ELIAS CJ:

I would doubt very much whether the legislative history of the Illegal Contracts Act supports that conclusion, that it occupies the field in terms of validity.

WILLIAM YOUNG J:

It can't occupy the field.

MR GODDARD QC:

No.

WILLIAM YOUNG J:

It may occupy the field.

ELIAS CJ:

Well it does occupy a bit of the field but –

MR GODDARD QC:

I was really going to say that I thought that it would be ambitious for me to argue that, well I think there are good arguments that the remedies available in judicial review proceedings do not include setting aside an otherwise valid contract, that you can only set aside an otherwise valid contract if the contract is vulnerable to attack on a ground that is recognised as part of the law of contract for setting it aside but it would be odd if a third party could challenge a contract in circumstances where the entity could not. Your Honour Justice Young raised this question at the, I've read the transcript from the leave hearing, said well, you know, if you sought specific performance against Landcorp what could they say and it seems odd that there could

be grounds for setting aside their contract that they could not invoke in a defence to contract proceedings because it's not a recognised common law but I don't think the Court needs to go as far as saying never and is most unlikely to. I have never, often over the years, managed to persuade –

ELIAS CJ:
Well I'm not sure that we'd say anything.

MR GODDARD QC:
No.

ELIAS CJ:
Because it's such a – I don't think it's necessary in this case. It might be an attractive argument or a glittering argument.

MR GODDARD QC:
It seems in principle desirable to try to achieve a measure of coherence between the operation of law frameworks for entering into contracts and the private law that governs the consequence of invalidity.

ELIAS CJ:
Well then you should have asked for the case to be set down for a couple of weeks I think if that's what you wanted us to do.

ARNOLD J:
Can I raise something about this that just troubles me a bit. When the SOE Act was amended to introduce the resumption provisions, what seems to have been anticipated was that cases would go through the Tribunal and then you would have the resumption process and for a number of reasons the Crown has historically taken the view that it has opposed resumption orders and really what's happened is that we've got a parallel process and that's reflected in the protocol, the negotiations and the sort of considerations set out in that decision paper of the Minister's. Now if you're right about the scope of section 21, from the point of view of somebody in the position of the appellants, you're left in a very undesirable position because let's say they have a perfectly legitimate claim and let's say neither the Minister – and the Minister does not adhere to his or her obligations in terms of the protocol and what one would normally expect to happen. And so there is a contract governing the land.

You say well that's the end of it really, it's a contract got to be performed. You go along to the Tribunal and you're met by the Crown arguing vociferously that there should not be a resumption order even if the treaty breach is proved. It seems to me that, you know, when you stand back and look at that as a scheme, it's a little bit unattractive and to me that influences, bearing in mind that the resumption provisions are in the same Act, it leads me to ask you the question well can you interpret section 21 against the background of the resumption provisions? Do they affect the way you should look at it?

MR GODDARD QC:
My answer to that is going to be quite a long one to embark on at 4.30 and it may be better to come back to it in the morning if that's all right.

ARNOLD J:
Yes that's fine.

MR GODDARD QC:
But just by way of trailer the answer is yes the resumption provisions are relevant because of course the memorial regime ensures that the right of resumption continues beyond that sale. So far from increasing concerns about giving effect to the contract to the sale, they underscore the fact that a remedy remains available and although it's certainly right to say that the Crown has opposed the particular applications for resumption that have been made to date, I don't think it can be safely assumed either that the Crown will unthinkingly oppose all such applications or that the Tribunal, even if they're opposed, will invariably be persuaded by the Crown's advocacy and in the sort of scenario that Your Honour describes where things have gone spectacularly wrong and there was a compelling case which ought to have been acted on by the Crown, one would think that the case in relation to a particular parcel of land and there are no other appropriate, you know, blocks of land available as redress, one would think that the case for resumption would be –

ARNOLD J:
The trouble is we have a sort of legal regime, something that's contemplated to work in a particular way but at a practical level there's a different regime that really produces the answers.

MR GODDARD QC:

And I need to come back to that when I deal with the error of law issue really because what I want to deal with there is the relationship between the practical steps that the Crown takes to try to resolve treaty claims in good faith and the legal obligation, for example in section 9, not to act inconsistently with the principles, which in my submission does not require entry into anything like the protocol, does not require a treaty settlement process like the one that exists or particular settlements and that therefore cannot require particular steps to be taken under it but that's the big answer.

ELIAS CJ:

But that big answer surely is the answer that the Crown lost in the *New Zealand Māori Council* case because it said that section 9 didn't require any steps to be taken by the Crown, that it only prevents actions which were inconsistent.

MR GODDARD QC:

Yes.

ELIAS CJ:

Sorry I'm just not quite understanding.

MR GODDARD QC:

So all that section 9 does is prevent actions that are inconsistent. So where there are a range of parts –

ELIAS CJ:

Oh I see, yes, yes I see.

MR GODDARD QC:

- for giving effect to treaty obligations, it doesn't require one rather than another to be taken.

ELIAS CJ:

Yes.

GLAZEBROOK J:

But when the Crown has chosen a particular path, which it has chosen, which is what I was discussing with Mr Hodder, surely it should be required to stick to it.

MR GODDARD QC:

And that is also part of the bigger answer because what that path involves is a settlement process with the final decision not being reviewable for very good reasons. It seems to me that there would be a legal and logical inconsistency in being able to review preliminary steps along the way and there's some case law to support that proposition but that's also not a 30 second issue.

ELIAS CJ:

All right Mr Goddard, how long will you require tomorrow?

MR GODDARD QC:

I think what I really need to deal with is the 19 November communication. So that's really item 5 and a little bit more on the power of intervention. Would half an hour be acceptable to the Court?

ELIAS CJ:

Absolutely. I just really want to -

MR GODDARD QC:

Or 40 minutes if I talk at a sensible pace.

ELIAS CJ:

Yes let's say an hour. Mr Hopkinson, we will want to hear from you, so would you expect to be what, about half an hour?

MR HOPKINSON:

Yes Ma'am.

MR GODDARD QC:

Yes thank you.

COURT ADJOURNS: 4.37 PM

COURT RESUMES ON WEDNESDAY 19 AUGUST 2015 AT 10.02 AM

ELIAS CJ:
Mr Hodder?

MR HODDER QC:
Yes I just mention to the Court that Mr Barker who appeared below is joining me for today's session.

ELIAS CJ:
That's fine, thank you, yes Mr Barker.

MR GODDARD QC:
I did want to go backwards and just pick up two things from yesterday, two small things and then one larger one. The small things are there were some questions about the timing of the Crown's knowledge of the sale and I just wanted to note that there's a very detailed chronology prepared by my industrial junior counsel attached to my submissions and on page 4 of that, the events of the 6th of March are set out and they confirm that the advice from Landcorp that Landcorp had re-engaged with the highest bidder and had entered into a contract was provided by email by Mr Kennedy-Good to Ms Fletcher of the Office of Treaty Settlements on the morning of the 6th, at the time that she was in fact meeting with the Minister to give him the draft letter which he signed in front of her, that's dealt with in her affidavit. So the Minister's decision was made without knowledge of the recommenced process or that a sale had taken place and that's recognised in paragraph 13 of the appellant's submissions where they talk about the Crown later that day, now in the loop, filing the memorandum in the Waitangi Tribunal.

ELIAS CJ:
And do we have that?

MR GODDARD QC:
The?

ELIAS CJ:
The memorandum filed in the Waitangi Tribunal, just give me the reference if we have it or just tell me.

MR GODDARD QC:

Yes I think we do, it's under tab – well there's certainly a reference to it under tab 112. Let me just check if that is the thing itself. Yes it is Your Honour. There's an email to the usual rather large list of recipients of any document filed in the Tribunal and then the memorandum which notes in paragraph 5 that counsel have been advised the Landcorp has entered into an agreement for sale and purchase of the farm with the highest bidder in the tender process.

O'REGAN J:

We seem to have a lot of chronologies. Is there any magic that?

MR GODDARD QC:

Yes I know.

O'REGAN J:

Why are they all different?

MR GODDARD QC:

I am also slightly bemused by that Your Honour.

ELIAS CJ:

I think it's the reason probably, I don't know, maybe other Judges have been more assiduous but it's why I haven't read them.

MR GODDARD QC:

I have to confess –

ELIAS CJ:

Yet, I should say, I know they're there.

MR GODDARD QC:

It's unhelpful and I was struck by the fact that there were three and there should have been ideally one and at most if there was a problem with a first one which couldn't be agreed to and so I've made a mental note not to let that happen again in an appeal in which I am involved but there is one of those abundances of riches which is actually not riches at all.

GLAZEBROOK J:
Well even if something can't be agreed it's still helpful to have it in one document to say this is not an agreed -

MR GODDARD QC:
Absolutely.

GLAZEBROOK J:
Because it can only be certain bits that won't be agreed rather than the whole thing one would've thought.

MR GODDARD QC:
That must be right and again really what should happen appellants should, in good time, provide a draft chronology for comment and the endeavour should be made to do that and no that wasn't proposed, it wasn't requested, no one did it, so I think the fault is shared equally among all players in this matter.

GLAZEBROOK J:
It usually is.

MR GODDARD QC:
And as I said I made a mental note when I realised that there were three with subtle differences about what was in and out that that shouldn't happen again. So that's that point. The second point I thought the Court was asking some questions yesterday about what happened with the urgency application in the Tribunal and again just by way of background, the Tribunal dismissed the application for an urgent hearing of the relief application, the resumption application, because there was no finding of a well founded claim by the Tribunal first, which is a prerequisite for the Tribunal to embark on the relief stage. Judicial review was sought of that decision by Mr Ririnui but partway through the hearing when, and I wasn't involved in this, that when the position became clear that the problem was with an urgent hearing of the resumption application because there had been a substantive finding but that it was open to the applicants to seek urgent hearing of the substantive application. The application for judicial review was dismissed and consent orders which expressly contemplated.

ELIAS CJ:

And no application for urgent hearing of the substantive claim has been made, is that right?

MR GODDARD QC:

My friends should know that since they're counsel in it, is that correct, yes?

MR ISAC:

Not at this stage Ma'am. The appellant considered that this process should run its course first.

ELIAS CJ:

Yes I understand, thank you.

MR GODDARD QC:

So then we come to the larger question from yesterday. I was asked some questions by the Court and particular from Justice Glazebrook and Justice Arnold about the reviewability of decisions made under or in connection with the protocol. I want to begin emphasising that this is an issue that the Court doesn't need to decide in this case because there is no live challenge to any decision under or in connection with the protocol. The two Crown actions that are challenged are the email of 19 November and the letter declining an undertaking on 6 March but of course it was back on 12 September that a decision had been made by officials that the property was not of potential interest for a treaty settlement.

So at the time of those two actions no one was acting or thought they were acting in connection with the protocol. There's no challenge live before this Court to the 12 September decision and there's never been a challenge to the subsequent reconsideration under the protocol. So in my submission this is an issue which if it was live would need to be addressed with some care in both written submissions, which no one has done, and orally but just again by way of background, if that issue were live it would need to be addressed in context and it seems to me that the starting point would be that the trigger is the existence of a claim before the Waitangi Tribunal Wai 1471. It's hard to imagine a scenario in which it would not be lawful for the Crown, where a claim has been made in the Tribunal, to proceed on the basis that that claim should be heard by the Tribunal, that it should be fully enquired into, that a report should be issued and that decisions on response to the claim should be

made with the benefit of the Tribunal's report. After all, that's the statutory framework that is the starting point for consideration of a Treaty settlement.

O'REGAN J:
Well, yes, but it's not the one that's customarily followed now, is it?

MR GODDARD QC:
So…

O'REGAN J:
So doesn't that mean OTS has to adapt to the fact that hardly anybody goes through the Tribunal now? The protocol is in fact – particularly if resumption applications can't be dealt with in the absence of a substantive ruling about the claim, doesn't that mean the protocol has effectively ousted the resumption process as the real way of protecting Māori claimants?

MR GODDARD QC:
No, Your Honour. That process remains available and rather, as I say, it's important to see that as the backdrop, it's always available to the parties and –

O'REGAN J:
Well, it's available in 15 years' time when the Tribunal has the resources to deal with it.

MR GODDARD QC:
It – you know, urgency applications can be made and granted in an appropriate case and it's a matter for the Tribunal to decide those.

O'REGAN J:
Yes but not if you haven't got a substantial claim, a substantial ruling already. The problem is the resumption applications are made in these sale situations and it's the cart before the horse. The whole process of the resumption procedure assumed the Tribunal would deal with the substantive claim and then the resumption would be a remedies hearing after the substantial claim had been dealt with.

MR GODDARD QC:

And the fact that there can be a delay and that during that the property may have been, or has already been transferred to an SOE so it's no longer under direct Crown control and maybe on-transferred, was, of course, precisely the concern that prompted the SOE case back in 1987 and in which –

ELIAS CJ:

Well, there was concern about transfer to the SOEs full stop –

MR GODDARD QC:

Yes.

ELIAS CJ:

– as well. It wasn't really but on-sale was important but so too was the fact that it would be put in a commercial operation.

MR GODDARD QC:

Absolutely, Your Honour.

ELIAS CJ:

Yes.

MR GODDARD QC:

Although there was a particular emphasis, I think, on the risk that it could pass completely out of the direct or indirect influence of the Crown. But Your Honour's exactly right. It was the section 23 power transferring large quantities of land into state-owned enterprises which would both hold them and also be free to deal with it, and the argument that the Court of Appeal accepted in that case was that before exercising the section 23 power under the State-Owned Enterprises Act the requirements of section 9 needed to be satisfied, and what section 9 required in that case was the development of a system for identifying and protecting potential claims in respect of such land. That was the content of the section 9 obligation in that context.

ELIAS CJ:

Yes.

MR GODDARD QC:

And what was then done to respond to that was twofold. There's the land part and the water part. Don't need to do the water part today but that has been canvassed on other occasions. In relation to land, the system that was developed to respond to that section 9 duty was the system of memorials and resumption as a right, which would mean that even if the land was transferred to an SOE and even if it went further, there was an effective remedy, and I don't think that this issue, were it live, could properly be determined on the basis that the statutory remedy is not a meaningful remedy. It is available. It – there is nothing to prevent appropriate claims being dealt with urgently. There's nothing to prevent the Tribunal in an appropriate case making recommendations to the Crown about interim arrangements pending an urgent hearing, and we saw that, for example, in *Broadcasting* followed by a finding that where a report was to come it would be a failure to take into account relevant considerations not to wait for it where it was going to happen within a reasonable timeframe.

So there are a range of mechanisms for addressing concerns of this kind within the formal framework in a way which, in most cases at least, will fulfil the Crown's obligations under section 9 of the State-Owned Enterprises Act.

ELIAS CJ:

The statutory scheme really was just a compromise of the litigation which is why I query really the suggestion that this is a carefully – an integral part of the statute. I suppose really what is being put to you is that the Crown could have come up with other protective mechanisms and it has. It's come up with the direct negotiation against the protocol arrangement.

MR GODDARD QC:

In – yes. The protocol is –

ELIAS CJ:

I mean, it's not either/or, obviously.

MR GODDARD QC:

No.

ELIAS CJ:

And having opted for that system should – is it right to shut people out of it?

MR GODDARD QC:

Well, first I think – well, a number of steps in responding to that, I think, Your Honour. The first is that the system that exists, and that's enshrined in primary legislation, is the memorial one, it's the resumption one. But it's also, of course, open to the Court and iwi to try to find faster, more efficient ways of resolving Treaty grievances and the modern Treaty settlement process is just such an initiative, but it's important again to bear in mind what it is. It's a process of negotiation which may or may not succeed. In fact, first of all, of course, a processing mandate, finding someone you can negotiate with who has sufficient support from the relevant iwi, then negotiation, and, if that's successful, agreement, agreements which are invariably in modern practice, for the last 20 years or so, contingent on legislation and given effect in large measure, though not complete measure, through primary legislation, and what that means is that each Treaty settlement is a bespoke process and it's a policy process that also involves a significant amount of policy judgement and political judgement. The Courts have consistently accepted for that reason, because of its policy and political element, and because it has no impact unless and until primary legislation is introduced and passed, that it's not appropriate to intervene by way of judicial review in a decision to –

GLAZEBROOK J:

Well, I wouldn't count on that necessarily as being something that is actually the policy of the Courts, because Courts have intervened on other occasions. I'm just thinking of the *Water* cases that were just before, supposedly primary legislation was going to be –

MR GODDARD QC:

The *Water* case was after the relevant primary legislation had been passed, Your Honour.

GLAZEBROOK J:

Sorry, fishing.

MR GODDARD QC:

Yes, and –

GLAZEBROOK J:

I mean, obviously there are limits but a statement that Courts won't intervene in a process because there might be or will be legislation at the end of it and because it's a negotiation process goes far too far.

MR GODDARD QC:

And that's why I think, I hope I began by saying it's – I did say the Courts won't intervene. It's hard to imagine a situation in which that would be appropriate.

GLAZEBROOK J:

Well, I don't actually have terribly much difficulty imagining a situation that…

ELIAS CJ:

The point is that the Crown has set up a system and it's observation of the system that the Courts are likely to be interested in rather than the substantive outcome which, as you say, is a matter for the parties to negotiate. But even things like the process for setting up the mandate, that's a system the Crown has adopted and if it were not equally available, for example, it's perfectly possible that the Courts would say, well, you have to provide that opportunity.

MR GODDARD QC:

I'm torn between the desire to respond substantively and the awareness that we're a long way now, I think, from this case.

ELIAS CJ:

Yes, that's probably right.

MR GODDARD QC:

But it seems to me that the point at which intervention may be appropriate is a matter of significant judgement at the boundaries of where judicial review should lie and where the relationships between statutory processes like the Tribunal process, executive decision making, Parliament and the Courts all intersect, and certainly the Courts have been cautious in their approach to that boundary so far.

Another one of the decisions that I handed out yesterday was *Milroy v Attorney-General* [2003] NZCA 97 (11 June 2003), [2005] NZAR 562 which was a decision of a full Court of the Court of Appeal, including two of the leading public

lawyers of recent times in New Zealand, Justice Keith and Justice McGrath and that Court had no difficulty in concluding unanimously that it was not possible to seek judicial review of advice of officials given to a Minister in connection with entry into a treaty settlement for two reasons, first, that the advice was a mere preliminary.

ELIAS CJ:

But I'm not really referring to that. I'm referring to the fact that if there is a process, it's not a statutory process but it's one that the Crown has adopted and applied and made available to iwi generally, if the Crown deviates from that process it may be that the Courts will say that you can't because, you know, this may not be a statutory process but it's the way you've chosen to exercise your discretion in these matters and we'll hold you to it. I mean that's what we do with school boards. I mean that's probably become more statutory but before there were statutory process, if people had adopted processes for dealing with matters affecting rights and interests and these are matters affecting rights and interests, then the procedure you adopt has to be fair to everybody.

MR GODDARD QC:

And as a general principle it would be impossible to take issue with that but what the Courts have been very sensitive to in this context is that rights and interests are not affected by a treaty settlement unless and until that settlement is given effect by primary legislation and for example in *Milroy v Attorney-General* the Court unanimously rejected the attempt to distinguish between reviewability of steps in the lead up to a settlement based on how close to the legislative phase those steps were. Now obviously in a case where that arose it would be open to the Court and certainly to this Court which is not bound by the decision of the Court of Appeal, to revisit that boundary but there are good reasons why the Courts have been cautious in this space.

ELIAS CJ:

Well I just flag that I think *Milroy* is a very different case but as you rightly said we're probably getting off track.

MR GODDARD QC:

And it was, as I say, an attempt to draw the line sufficiently far back from the point at which legislation would be past or a bill introduced was emphatically rejected by the

Court in that case as unacceptable blurring of the lines. Now that could be re-opened but it should wait I think for a case where it's live.

ELIAS CJ:
Well it may well not be but this is getting in at the ground floor level, it's not at the point where you're ready to put a settlement to parliament.

MR GODDARD QC:
But that brings a spotlight onto the question of whether, as Your Honour said, rights or even interests are affected by a preliminary decision of this kind.

ELIAS CJ:
But they are potentially affected.

MR GODDARD QC:
It seems to me that what would need to be argued is that a power was being exercised and in connection with an SOE in a manner which was inconsistent with section 9. That would be the issue that would need to be addressed. So rather than simply saying there's a process that hasn't been followed, one would need to step right back to the section 9 context and say, "In this context is there action that's inconsistent with the principles of the Treaty because it will have a material adverse effect on the ability of the Crown.

ELIAS CJ:
Well I think it may be both really Mr Goddard but we probably can't take it much further. There are general administrative law principles and section 9 comes in with added emphasis perhaps because this is a treaty context.

MR GODDARD QC:
I did want to touch on *Milroy* anyway because much as those of us who give advice rather than make decisions in this life like to imagine that we are important *Milroy* very firmly put us in our place after dealing with the –

GLAZEBROOK J:
Whereabouts is it?

MR GODDARD QC:

In the material from yesterday Your Honour. So if we look for example and if that's disappeared I'm sure I can provide Your Honour with another copy.

GLAZEBROOK J:
Oh no it just had got caught up thank you.

MR GODDARD QC:
And I don't want to spend too long on this but at paragraph 12 for example, the Court notes that counsel was driven to accept provision of advice and issue does not affect the rights of any persons or even have the potential to do so, it's the resulting legislation and executive Acts in accordance with it that will have that impact and then over at 14, third line, the advice of officials is a mere preliminary having no legal effect and there's a reference to another one of the Māori Council cases in which similar observations were made.

So there are two quite distinct grounds of decision in *Milroy*, one that mere advice doesn't have the necessary effect on rights or interests to ground an application for review and second, that that was unacceptably close to the legislative process.

ELIAS CJ:
Well there was a concluded agreement in *Milroy* and the question was whether it should be submitted for parliamentary implementation.

MR GODDARD QC:
There was an objection from other claimants from Tuhoe.

ELIAS CJ:
Yes.

MR GODDARD QC:
And the question was the extent to which assets which were the subject of an agreement should be withdrawn from that agreement in order to hold them available for a potential future settlement with Tuhoe.

ELIAS CJ:
Yes.

MR GODDARD QC:

So it's actually quite similar Your Honour to the sort of issue we're concerned with here. It was a decision on whether to withdraw assets in order to settle with certain iwi rather than let them get away forever in another process and officials were giving advice and there were challenges on perfectly orthodox administrative law grounds relevant and irrelevant considerations to the giving on that advice and it was held that that advice first of all had no effect, unless and until it was acted on, that the relevant decision or exercise of power came later in the process and that that would have to be the focus of any application for review but second, that that was a type of decision or exercise of power that was not amenable to review.

ELIAS CJ:

Because it's too close to the legislative process?

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes.

MR GODDARD QC:

But there were those two distinct elements to the decision.

ELIAS CJ:

I see, I understand that argument.

MR GODDARD QC:

And as I say I think the analogy –

GLAZEBROOK J:

Well I'm not sure about the advice of officials as preliminary because in many cases the advice of officials will be looked at where there is no legislation that is coming outside because the advice of officials will be what's been acted on perhaps wrongly in a decision by a Minister. So it's not that advice is irrelevant.

MR GODDARD QC:

No I wasn't saying it was irrelevant Your Honour, what I was saying was that the advice as such is not what's reviewable.

GLAZEBROOK J:
No, no I understand that.

MR GODDARD QC:
The scenario that Your Honour gives, of course the decision of the Minister exercising a power, statutory or otherwise, will be reviewable and if the Minister has acted on an incorrect view of the law and it's an issue on which the Minister has an obligation to correctly inform herself or himself of the law, then there will be a reviewable error but that's where the focus should lie and that probably -

ELIAS CJ:
Milroy applied *Te Runanga o Wharekauri Inc v Attorney General* [1993] 2 NZLR 301 (CA) didn't it? It was in that sort of ballpark. It was the Court stepping back from brinksmanship with the legislature because enactment of this settlement was imminent.

MR GODDARD QC:
It was twofold but of course the concern being expressed by appellants in that case, by the applications that was –

ELIAS CJ:
I understand that, it was -

MR GODDARD QC:
– the loss of access to assets for a future –

ELIAS CJ:
Yes I know.

MR GODDARD QC:
– possible settlement with them. So it had two faces. That was one of the concerns, *Wharekauri* was certainly quoted at length and was applied in relation to interfering with the legislative process.

ELIAS CJ:

Well they said it was indistinguishable from *Wharekauri*.

MR GODDARD QC:

Yes but then what needed to be done was to address the attempt to avoid the impact of *Wharekauri* and the challenge to ministerial decisions by saying no, no we are challenging earlier advice by officials on perfectly orthodox administrative law grounds, to echo Your Honour's phrase and that was rejected for two quite distinct reasons, one, that you couldn't draw that line.

ELIAS CJ:

What paragraphs are you relying on?

MR GODDARD QC:

So in particular paragraph, the background is helpfully described, particularly in paragraph 4, and then paragraph, perhaps at the top of page 565 there's a quote from Council's argument, "In the present case the issue, the subject of challenge, is not directly the Minister's decision, although the argument is that that was tainted as a result of what occurred but the officials advice, the process was derailed at that stage and the emphasis to the challenge was to the advice by officials to the Minister." And at 9 refers to five specific matters identified as defects and then at paragraph 10, about five lines down, "There being no statutory power of decision counsel was asked to identify the common law prerogative writ being sought," contended there's, "At law a duty on officials to advise according to law, which duty is enforceable by mandamus or alternatively declaration. He submitted further the appellants' case should be seen as a conventional attack on orthodox judicial review grounds on the process leading up to the Minister's involvement and her decision making." And that's rejected for – in 11, sorry, "In reality the argument outlined represents an attempt to draw the Court into an examination of the accuracy and completeness of the advice of officials in the course of formulation of Government policy even though no rights are affected by the advice." Take the Courts into the heart of policy formation process –

ELIAS CJ:

And counsel accepted that rights weren't affected by the advice, and was –

MR GODDARD QC:

Was driven –

ELIAS CJ:

– was left with the fact that it – essentially, they were going to be challenging the projected legislation which is why the Court says *Wharekauri* is indistinguishable, but –

MR GODDARD QC:

But then separately at 14 there's the passage I refer to. Asking about *Wharekauri* and the point Your Honour makes, that, "The circumstances of the case in which those remarks are made are indistinguishable," and then the response to the argument about it being officials is, "The advice of officials is a mere preliminary having no legal effect."

GLAZEBROOK J:

But where's the advice here though, under the protocol, because what had to happen under the protocol is – but it probably – we probably shouldn't be getting into this debate because the protocol has not been challenged, but I do struggle to see the advice portion of this. I mean, I understand –

ELIAS CJ:

Well, particularly as it has to be advice –

MR GODDARD QC:

I was –

ELIAS CJ:

– preparatory to the introduction of legislation. We're a mile away from that.

MR GODDARD QC:

I think that's an argument that would have to be had –

ELIAS CJ:

Or are you saying that any – I suppose you are. You're putting it as highly as saying that anything to do with the settlement process that the Crown is observing is preparatory to legislation –

MR GODDARD QC:

Yes.

ELIAS CJ:

– and is covered. Well, that is –

MR GODDARD QC:

Because it can have –

ELIAS CJ:

– a very greedy submission, I think, Mr Goddard.

MR GODDARD QC:

Because it can have no effect unless and until primary legislation is introduced and passed.

ELIAS CJ:

What about natural justice?

MR GODDARD QC:

The – I think in the abstract that question is almost impossible to answer –

ELIAS CJ:

Yes.

MR GODDARD QC:

– with respect. I would need to –

ELIAS CJ:

But I would have thought that this case is about that. It's about hearing something and determining whether there is any proper basis for this land being land banked pending the determination.

MR GODDARD QC:

That, of course, is not – that idea that there was an inadequate inquiry before the decision –

ELIAS CJ:

Is not before us.

MR GODDARD QC:

– is not before this Court.

ELIAS CJ:

All right, let's move on.

MR GODDARD QC:

And I think it's much better that an issue of that sensitivity and complexity be dealt with in a case where it's live, in my respectful submission.

ELIAS CJ:

Yes.

GLAZEBROOK J:

No, that's why I said no point in continuing the debate at this stage.

MR GODDARD QC:

So let me come back then to my road map and item 5 on the road map. The so-called advice to Landcorp of 19 November 2013. First, again, the point that no relief is now sought in respect of this communication. Second, the point I made yesterday that a Crown lawyer, or official, I should have said, advising another official or agency, doesn't act unlawfully merely because the advice they give is wrong in law. The advice they give is not reviewable for error of law because there's no decision or exercise of power affecting any person's rights or interests. I refer to *Milroy* again. But rather this is the point Your Honour Justice Glazebrook made to me, 5.3, of course, if a decision is made or a power is exercised on the basis of that –

GLAZEBROOK J:

Well, a decision here was made not to land bank, wasn't it, or –

MR GODDARD QC:

But that –

GLAZEBROOK J:

– to, not to say that it was of potential interest?

MR GODDARD QC:

But that's back in September. That's got nothing to do with this 19 November email.

GLAZEBROOK J:

All right. I'm probably on the wrong email. Do we – can I just –

ARNOLD J:

On this –

GLAZEBROOK J:

We looked at it yesterday, didn't we?

MR GODDARD QC:

Let's go to it, Your Honour, because it is, I think, it's impossible to overstate the importance of the rather mundane context in which this email was sent. So it's under tab 65, and again if we rewind to 64, so volume 3, sorry, case on appeal, volume 3, tab 64. We've got the letter from Koning Webster Lawyers sent to Landcorp that after setting out very briefly –

GLAZEBROOK J:

65, is it?

MR GODDARD QC:

Tab 64 is the letter that prompts this, and that's the letter from Koning Webster setting out who his clients, Mr Koning's clients, are, mentioning Wai 1471 and that it comprises Whārere Farm, and then saying, "I've been instructed by my clients to write directly to you to register the interest of the Trust and Ngāti Whakahemo, in Whārere Farm. My clients have already been in contact with Bayleys," the agents.

And then over the page, we see an email in which Landcorp forwards that on to OTS saying, "For your information and advice please."

So what was called for? The email which is the only communication now challenged, from officials, because the Ministers… Says, "I am advised they have written

numerous times. Our responses and the Crown's position is that Ngāti Whakahemo are a hapū of Ngāti Pikiao, so their historical Treaty claims have been settled through the Te Arawa legislation," and a reference to the post-settlement governance entity. "Koning Webster know this is our advice." We also now all know it's wrong.

O'REGAN J:

Did anyone from OTS actually engage with Mr Koning, is it? And did anyone give him a ring and say, "Why do you think you've got a claim?" Because, on the face of it, if it had been settled, you would have been expected that the settlement legislation would have expunged the Wai 1471 claim. So the fact they still had one surely should have triggered someone in OTS or Crown Law to think, "Well, hang on, maybe there is something in this."

MR GODDARD QC:

And there were detailed letters at an earlier stage, and my friends took the Court to some of those in April and I think even in June of that year, as my learned friend Ms Scholtens pointed out, setting out –

ELIAS CJ:

Was the claim filed after the settlement with Pikiao?

MR GODDARD QC:

I don't know but can quickly –

ELIAS CJ:

Because I think Justice O'Regan is right. One would normally expect that settlement legislation would discontinue the…

MR GODDARD QC:

It was filed in – it's dated January 2008 and it was during the settlement process so it was too late, I am told by my learned junior, for it to be embraced within the settlement. The legislation passed in 2008 to give effect to the Te Arawa settlement so the deed – I'd have to go back and check the dates but I imagine that would probably have been in 2007 on normal timeframes.

O'REGAN J:

But it was pretty heroic advice to say there is no claim when in fact there was one filed in the Tribunal that hadn't been dealt with yet. How did the Crown know there wasn't a claim?

MR GODDARD QC:

That was no unsettled claim. Was the advice… There's no question but that it was wrong. I'm not here to carry –

O'REGAN J:

But given the importance of this process surely someone should have engaged with Mr Koning to say, "Why do you think you've got a claim?"

MR GODDARD QC:

Well, again, Your Honour says given the importance of this process, I can see the force of that if we were talking about the decision under the protocol –

O'REGAN J:

Well, the –

MR GODDARD QC:

– but this is just a –

O'REGAN J:

Given that this was the time, as you were talking about before, as in *Milroy*, the land was going forever out of the Crown's hands, out of a Crown entity's hands, and so it was very important that before that happened everything got squared off.

MR GODDARD QC:

Well, in this letter there was no suggestion of any action other than an intention to participate in the sale process. If there had been a request for some sort of parallel process or a further letter saying, "You've made," you know, "It's particularly important that the Crown withdraw this from sale," then that might have triggered, and we're speculating to an extent, further inquiries. But that's why I took a run-up to this from the letter because obviously what is an appropriate level of inquiry depends on what you're being asked to do and –

ARNOLD J:

What was the –

GLAZEBROOK J:

Yes, although later they do stop this –

ARNOLD J:

That's right.

GLAZEBROOK J:

– the tender process.

ARNOLD J:

What if OTS had written back in response to the letter and said, "Yes, there is an extant claim on the land," in other words, "We've now gone properly through the," whatever it was, "May 13 letter from the lawyers and we accept that they're right and that there is a valid claim," so that's what the November email had said.

MR GODDARD QC:

So suppose that the whole question even of the protocol had been re-opened at this stage.

ARNOLD J:

No, no I'm not even asking you to assume that, all I want is for you to accept that OTS had given the proper advice in this November email. Now in those circumstances when the opportunity was provided to Ngāti Makino one might have expected Ngāti Whakahemo to put their hands up and say hold it, we have an extent claim. If the Minister, in those circumstances, had said, "Oh well we are going to give that opportunity to Ngāti Makino, we are not going to give it to Ngāti Whakahemo, you would say that there would be no ability to challenge that.

MR GODDARD QC:

I suppose I'd say two things, first, that again we're some way from our facts now but second that –

ARNOLD J:

No what we're doing is we're exploring the implications of your position.

MR GODDARD QC:

Yes absolutely and I'm quite fond of hypothetical scenarios so I can't complain too much. So in that situation you would have to look at what power, if any, was being exercised by a Minister and/or Landcorp in making the decision about who to negotiate with and again it seems to me that it would be breaking novel ground to review a decision by a Minister not to make a request that someone consider something. I can't think offhand of any case in which a mere exhortation still less the failure to exhort has been the subject of a successful judicial review application. It's plainly not the exercise of any statutory power. I doubt very much that it can be described as the exercise of power in any real way.

GLAZEBROOK J:

Wouldn't it be a breach of section 9 because taking the principles of the Treaty in its wider sense and actually possibly in its narrower sense at the very least consultation is required in those circumstances under section 9 and if you were providing an opportunity to one and denying it to another, at the very least you would have to hear the other side wouldn't you and actually maybe just under normal orthodox judicial review principles, leave aside the Treaty.

MR GODDARD QC:

So under section 9 there would be an important preliminary question about whether that section which says, "Nothing under this Act may be inconsistent with the Treaty" is engaged. There's no certainly no formal exercise of any power under the Act. There is a step taken in the context of a relationship.

GLAZEBROOK J:

I think you lost that a bit under water, didn't you?

MR GODDARD QC:

Certainly that bright line is no longer there post-water and the question is just how far the Court's decision goes because what was clearly the case was that rights attached to shares were being exercised through the sale of them. You're not even talking about the exercise of rights in picking up the telephone and making a request. You're in an area of not just soft law but soft conduct if you like and just how far section 9 extends to that I think is something that would need to be explored quite carefully.

I'd also still make the same submission that I made in response to Your Honour Justice Arnold that the reviewability of not picking up the telephone to encourage someone to do something would I think raise some interesting issues about the scope of judicial review but then there would also be the broader –

ELIAS CJ:

That's simply an indication of how easy it would have been to fix this. It's not that the absence of a phone call would have been judicially reviewed. It's the absence of provision of opportunity.

MR GODDARD QC:

And the question then becomes is the absence of that opportunity the result of any unlawful act by any relevant actor.

ARNOLD J:

It's certainly the result of an irrational act. In other words if you accept the premises there would be no rational reason to offer that opportunity to Ngāti Makino and refuse it to –

WILLIAM YOUNG J:

Well there might be because there's a particular context in Ngāti Makino that they'd previously sort of been told they couldn't have it because it was strategic.

MR GODDARD QC:

Yes. It was particularly embarrassing for Ministers and for Landcorp to have told Makino that this land was strategic for Landcorp and was not even available for negotiation, no question of a right of first refusal and then find it on the market a couple of years later. So there was a very particular about face which triggered a particular concern to behave in an honourable way.

ARNOLD J:

But in a Treaty context even Makino accepted that Whakahemo had the mana whenua

MR GODDARD QC:

I have notes to myself about this but I thought time was a bit tight. Certainly Whakahemo has mana whenua in respect of this farm. I don't think Makino were acknowledging that it was to the exclusion of Makino, I think it's a joint assertion of mana whenua and I think one of the reasons that the purchase process broke down was the difficulty of decision who would lead, which was a mix of both mana whenua and commercial issues as I read the papers. And the Treaty claim says that what's claimed is a non-exclusive interest in the areas that are the subject of the claims. So some at least of it was, as is so often the case, the subject of overlapping interests of different iwi.

ARNOLD J:

But nevertheless, the logic of your argument is putting aside the merits of whether there was in fact or would be a rational basis to draw a distinction between the two groups. The logic of your argument is that even if there was no rational basis for giving an opportunity to one and not to another, then that is just the way it is. The Court can't intervene.

MR GODDARD QC:

Yes but there are some things that because they do not involve the exercise of power in any meaningful sense or because they are so intimately connected with a process that is not appropriate for review cannot be the subject of judicial intervention and that's because, in the words of Professor Boermel in relation to section 36, you know, it doesn't cure everything. So section 9 is not going to cure baldness, judicial review is not going to cure baldness, you know, it doesn't matter how much time I spend before this Court I'm still not going to get my hair back. So it reaches a long way but it doesn't solve everything.

ARNOLD J:

But this is against the background, of course, that whatever you say about the resumption process, the reality is that the best opportunity these people had to acquire that land was to buy it in a commercial deal.

MR GODDARD QC:

And there was an opportunity to do that. this letter, that we're talking about a response to, wrote to register an interest and said, "We've been in touch with real estate agent", something that people normally do because they're going to participate in a commercial process. There was no request to stop the commercial process.

There was no indication of anything other than an expression of interest and that's why I come back to the important of context in asking whether this letter, this email under tab 65 is unlawful.

ARNOLD J:

The trouble is the special opportunity that was offered to others occurred after this.

MR GODDARD QC:

And there is no application for judicial review of a failure to provide some separate opportunity at a later date to Whakahemo and again if that was the application before the Court then we'd have the benefit of evidence directed to that issue and written submissions and considered, rather than spontaneous oral submissions on it. So there are a lot of ways that one can frame the concern. I think Your Honour put to me, you know, sorting this, you know, something has gone wrong and it could have been sorted easily, Your Honour The Chief Justice's point, but the Courts and the Court process is not well suited to a free for all in which you try to work out with the benefit of hindsight what's gone wrong at some point in a nine month long process and fix it because inevitably what is put in evidence, what documents we have, what argument is prepared, focuses on the particular complaint that's been made and the particular complaint that I was responding to here is the complaint that this email was a reviewable decision or exercise of power. In my submission it simply isn't. I accept –

ELIAS CJ:

I'm sorry can I just ask you a couple of just quick factual matters arising out of this. It says here that Koning Webster know this is our advice. Is that suggesting that there's been a communication between OTS and Koning Webster?

MR GODDARD QC:

There have in the past in connection with the -

ELIAS CJ:

The claim, the claim lodged with the Waitangi Tribunal?

MR GODDARD QC:

Yes and Your Honour was taken by my friend to the letter expressing frustration at having been – had no substantive response.

ELIAS CJ:
Yes.

MR GODDARD QC:
And saying, “Can we have some reasons please.”

ELIAS CJ:
Yes.

MR GODDARD QC:
“Our claim is not a Te Aroha claim, our claim is based on descendents from Maruahira and we’re not settled and we don’t understand why you keep saying this.” And absolutely understand that frustration. They were right.

ELIAS CJ:
No that’s all right, it’s in that context.

O’REGAN J:
But that is a context for this thought that OTS knew that there was a dispute about that and yet they just blithely said, “There is a Waitangi Tribunal claim but effectively you can ignore it.” That’s what they were saying.

WILLIAM YOUNG J:
To be precise they're saying, “Our position is.”

MR GODDARD QC:
Yeah they're saying, “Our position is.”

ELIAS CJ:
But they don’t say – it’s not very accurate because instead of saying, “We thing we have a – there is a defence to that claim”, they’re saying – well they don’t answer it in terms of the claim, do they?

MR GODDARD QC:
And that’s because that’s not what's being put forward here. This is a letter which says, “Here’s the background, we want to register our interest.” Landcorp say what's

happening. All officials are doing is saying, “The position we’ve taken in the past is that it’s settled but look this letter is just an expression of interest, we suggest you treat it as what it says.” So there's no call to revisit the advice.

ELIAS CJ:

No but at this point you can see that Ngāti Whakahemo realises that the only way it’s going to overcome this position taken by OTS is through the Waitangi Tribunal process because OTS is refusing to engage with them. So -

MR GODDARD QC:

I don’t think that drops out of this exchange. This exchange is very much -

ELIAS CJ:

Well this exchange in the context of what has preceded it.

MR GODDARD QC:

Well there's no -

ELIAS CJ:

Well how else are they going to get OTS to engage with them? They’ve tried to and it hasn’t happened.

MR GODDARD QC:

They're not asking OTS to engage with them here.

ELIAS CJ:

No, no but I’m just talking about how are they going to resolve the question of whether they do have a valid claim? There's no option except through the Tribunal.

MR GODDARD QC:

There are two possibilities, one is through the Tribunal and the other would have been a declaratory judgement application in relation to the interpretation of the Te Aroha legislation. That would’ve been a perfectly orthodox way of doing that quite urgently I would have thought because it was an issue of statutory interpretation in the light of some, you know, factual background that would have been reasonable uncontested. So it was just accepted by the Crown there was no declaration sought.

So this is not addressed to OTS this enquiry. It reaches OTS indirectly through Landcorp. It's a letter to Landcorp saying, "We want to register our interest in the property." And it's flicked onto OTS. OTS is asked, "What do you make of this?" And OTS says, "This is what our position has been and I suggest you treat the letter as what it appears to be, an expression of interest and that's why what you get under 66 is a letter going back from Landcorp to the solicitors for the Trust for Whakahemo saying, "This is what we've been told and we hope your clients are in a position to take the interest in the property further and engage in the tender process.

So it's a pretty unexceptional exchange about registering interest in a property and there's no – it can't, I think, sensibly be suggested that there was any duty to conduct enquiries into the substantive merits of the claim in connection with this exchange, whatever the position might have been at other times.

GLAZEBROOK J:
But what about the 25th, this exchange in the next, the 67, which looks as though it was copies to Ministry of Justice, I don't know, presumably OTS? It was primarily to the Ministers but it set out quite clearly in that exchange what's wanted and around the same time.

MR GODDARD QC:
I have to say that it's not – yes, so I'm not clear which bits of this were sent to whom at all points but certainly earlier –

GLAZEBROOK J:
Well if you look at 615 we've got -

MR GODDARD QC:
Yes a communication.

GLAZEBROOK J:
Sent to the Minister, "Lillian Anderson", I don't know who she is but she's at Justice.

MR GODDARD QC:
And Mohare who is an advisor of Mr English's office and she, not he -

GLAZEBROOK J:

Kevin Kelly and Patsy Reddy, I don't know. Again OTS link I think.

MR GODDARD QC:
Yes Patsy Reddy is a negotiator who has been involved.

O'REGAN J:
Kevin Kelly is the director of OTS isn't he?

MR GODDARD QC:
Sorry?

O'REGAN J:
Kevin Kelly is the director of OTS isn't he?

MR GODDARD QC:
I think that would have been right at that time yes.

GLAZEBROOK J:
So definitely it went to OTS not very long after that 18 November and if anybody was under any illusions as to what they wanted it was fairly clear from this email, wasn't it?

MR GODDARD QC:
Yes what's sought is the two pronged discussion of commercial purchase of the farm and discussion of how the claim might be used to satisfy the purchase but again the challenge before the Court is not a challenge to the decision not, by Ministers, not to take that request further. What is said is that there is an error of law on 19 November and then we leap straight to the Landcorp decision which is said to have been made on the basis of that.

GLAZEBROOK J:
I know.

MR GODDARD QC:
So again the space we are in is not the one that raises the issue I think that Your Honour is asking about.

GLAZEBROOK J:

Although it is raised in the submissions, the inability to have the same opportunity as Ngāti Makino.

MR GODDARD QC:

That's what's said as a possible outcome of it having been got right but a refusal -

GLAZEBROOK J:

I would have thought a probable outcome myself in that I doubt the Minister would have, having made the request for Ngāti Makino, at least to have informed Ngāti Whakahemo of that and the terms of it and some arrangement made for them both to have that opportunity.

MR GODDARD QC:

And of course it was –

GLAZEBROOK J:

And likely granted by Landcorp as Mr Hodder said, depending upon when the request was made if it was at the same time then likely -

MR GODDARD QC:

And certainly on a number of occasions we see officials in the context of the Makino discussion, expressing an opinion that the outcome be an arrangement in which both Makino and Whakahemo are engaged and Ms Fletcher in her affidavit I think refers to that. Certainly in the notes of the meeting with Makino there's a reference to OTS expressing a preference for it to be a Makino/Whakahemo joint acquisition. So again I think it's wrong to suggest that no opportunity was created for that. Whether it was structured ideally is another question. That's why again I say it's difficult to get into the grounds of speculation because it's not a black or white issue, it's not as if Whakahemo were completed out of that, it was if the Crown was not recognising that they had a legitimately interest in participating in those conversations, it's a question of exactly how it was structured. And I do want to emphasise that. I want to emphasise that it's not as if the Crown completely ignored the mana whenua interests of Whakahemo in this land or ignored its expression of a real interest in participating in the discussions. So again was it done in exactly the right way? With the benefit of hindsight might the emphasis have been different? We can speculate about those things but it's not quite as -

GLAZEBROOK J:

And they were given the opportunity in terms of the tender with the financing.

MR GODDARD QC:

Yes so some – at the, yes so it's not as if there was a complete inflexibility in response to their concerns and Your Honour's seen that in the email chain.

ELIAS CJ:

Mr Goddard, can I just ask you just very briefly which, because I'm just going back to the statement of claim and I'm a little confused about which causes of action are live.

MR GODDARD QC:

I –

ELIAS CJ:

It's never really been explained and I know that the –

MR GODDARD QC:

It is confusing. I go through it in detail in my written submissions –

ELIAS CJ:

Yes, that's right.

MR GODDARD QC:

– what is and isn't live.

ELIAS CJ:

I know that breach of legitimate expectation is not, but is the first cause of action live?

MR GODDARD QC:

So the first cause of action, judicial review of the decision by Landcorp to enter into an agreement for the sale and purchase, that was advanced first of all, and there's A at the foot of page 10, on the grounds –

ELIAS CJ:

Yes.

MR GODDARD QC:

– that Landcorp breached section 9, that's not pursued. And then B, over the page, top of page 26 of the bundle –

ELIAS CJ:

That's not pursued.

MR GODDARD QC:

– legitimate expectation, not pursued. C, bad faith, that is pursued.

ELIAS CJ:

Yes.

MR GODDARD QC:

So that one's live.

ELIAS CJ:

Yes.

MR GODDARD QC:

That's the part of –

ELIAS CJ:

Yes.

MR GODDARD QC:

– the first cause of action that's live in relation to the challenge to Landcorp's decision. Then we move onto the second cause of action, which is judicial review of the decision by Ministers not to offer an undertaking or take other steps, and that's described in 53 as an application for judicial review of the decision by Ministers. Your Honour pointed out to me that there are references, for example, in 54 to Ministers being wrong as a matter of law to determine they could not make undertakings or take any other steps.

ELIAS CJ:

Yes.

MR GODDARD QC:

And just while we've got this here, I was going to, when I came to this later, and later's not going to happen so I should do it now, note that, of course, the request was to give a very concrete undertaking, and although there are references to taking other steps, no submissions is made by the appellants that there was some other particular step which should have been taken by midday on the 5th, failure to take which was unlawful. So it's just not –

ELIAS CJ:

Well, you've made that submission, I think.

MR GODDARD QC:

Yes. And then the third cause of action, which is the one I've just been addressing –

ELIAS CJ:

Yes.

MR GODDARD QC:

– judicial review of the decision by OTS that Whārere Farm was not of potential interest for a future Treaty settlement and OTS advice to Landcorp that Wai 1471 was settled. What we see in 57 is judicial review of (a) the decision by OTS, communicated on 12 September, and (b) OTS advice to Landcorp on 19 November that it was settled.

And then there's the error of law argument which is set out and as that's common ground that that –

GLAZEBROOK J:

So you say A is not at issue?

MR GODDARD QC:

A has not been pursued.

GLAZEBROOK J:

That's right.

MR GODDARD QC:
So it just B. We're just looking at judicial review of OTS's advice to Landcorp given on 19 November, and what is said is in 63, that Whakahemo have been prejudiced by the error of law because, at 63.2, Landcorp and the Crown would not have continued to deal with Whakahemo during the process leading up to the sale on the basis that Wai 1471 had been settled.

But then when we look at the relief that's sought there's a declaration that the – about potential interest that's no longer live. (a) is no longer live. Then (b) a declaration that OTS' advice to Landcorp that Wai 1471 was settled was wrong as a matter of law, that it was wrong as a matter of law was conceded at an early stage in the litigation and in my submission the right response to an email stating an incorrect view on the law is not to issue a – when it's acknowledged it's wrong is not to issue a declaration.

And then we get a declaration that the decisions as well as the agreement for sale and purchase are invalid. So that's where we get in –

ELIAS CJ:
Yes.

MR GODDARD QC:
So there's an, a – but again, that's not – that was sought. That's not referred to so far as the "decision" on 19 November is concerned in the application for leave to appeal. What is still very much at the forefront of the case is the request for an order that the agreement for sale and purchase is invalid, and that's actually, in my submission, the right question. The question is whether the agreement for sale and purchase can be set aside on the basis that Landcorp's decision to enter into it was affected by an error of law. And there's a factual inquiry, a question about that, but I've not sought to pursue that because rather I have focused on the fact, items 6 and 7 in my road map, that no relevant public law obligation is breached where a state enterprise enters into a contract operating under a mistake of law, and had there been more time I was going to embark on some hypothetical scenarios proving that –

ELIAS CJ:
Good idea not to.

MR GODDARD QC:

– you know, about advice being sought from solicitors on a question of GST law or resource management law as a result of which a state enterprise enters into a contract and it seems to me that to suggest that you could judicially review the contracting decision if the advice was wrong and the contract was entered into under a mistake would be a surprising decision, and there were some other things. I think – yes, I won't go down that path.

Now I think I should just briefly touch on item 8 in my road map, the power of intervention. I've dealt with the chronology issue already. At point 1, no power to direct under section 7 of the SOE Act, I dealt with yesterday, made the point that section 13 is effectively a code in relation to the directions that can be given to a new SOE but not old SOEs, and that the interplay between section 7, 13 and 14 I think is reasonably clear once you look at the ability to direct new SOEs under 13 in relation to activities to be undertaken and then the need, if it's a non-commercial activity, to negotiate under section 7, and in my submission the obligation, there is an obligation on the part of both the Minister and the state-owned enterprise to negotiate in good faith but not an obligation to agree and if agreement can't be reached then either the activity may not be undertaken in the absence of a direction under section 13 or, if there is a direction under section 13, it may be undertaken and we may get a section 14(2)(i) concern flagged in –

GLAZEBROOK J:

Didn't we go through all this yesterday?

MR GODDARD QC:

Yes, that's why I'm not going to repeat it, just context.

GLAZEBROOK J:

You just were repeating it though.

MR GODDARD QC:

Yes. No power to direct in reliance on *Duomatic*. I wonder if I can just take five minutes on that. The breadth of the *Duomatic* principle under the 1955 Act is accepted by the Crown and I touch on that in my submissions, and that means that at the time the State-Owned Enterprises Act was enacted it was for other companies alive and well, but there are two reasons why that power wasn't available to Ministers

in this case. The first is that it's inconsistent with the SOE Act, and I dealt with that yesterday. The second is that the *Duomatic* principle didn't survive the enactment of the 1993 Companies Act. My learned friend, Mr Isac, acknowledged that certainly it was the policy of the Law Commission and its proposals that there be no unanimous shareholder consent power of a general kind modified slightly in report number 16 to permit unanimous assent of entitled persons in respect of some decisions but not others.

The other very important aspect of policy in the Law Commission's recommendations which was carried through to the 1993 Act was that company law should be more accessible and that the powers and duties of the participants in the company process should be set out in legislation rather than in a mix of legislation and case law. That's why, for example, it's not in the casebook, I'm afraid, but my battered copy of report number 9, at paragraph 20, sets out, "The Law Commission has prepared this report on the premise that a good system of company law should," and then two bullet points, "Clearly identify the duties and powers within the corporate structure in an Act designed for use by directors and shareholders and not just lawyers and accountants," and, third, "Provide for better accessibility to company law by setting up the Act as the statement of first recourse in identifying rights and duties within the company," and if we go to the Companies Act 1993 in the respondents' authorities under tab 1, we see that theme picked up in the long title to the Act on page 24 of the Act, oh page 12 of the bundle, the long title, paragraph C, "An Act to reform the law relating to companies in particular C, to define the relationships between companies and their directors, shareholders and creditors." The goal of this Act was to state how the relationships worked, state how decisions were made.

I won't go through all the provisions that my friend went through but if we just jump quickly to the provisions which are concerned with powers of shareholders which is a logical place to start in asking whether shareholders can exercise powers by informal unanimous assent. It's page 39 of the bundle, page 87 of the Act. We see an immediate problem with a traditional Duomatic principle in section 104(1). "Powers reserved to the shareholders of a company by this Act may be exercised only" and that "only" is important, "(a) at a meeting of shareholders or (b) by a resolution." A little difficult to suggest that the power to dispense with those formalities can be implied into Act that says that the powers can be exercised only in these ways.

And then we come to subsection (2), “Powers reserved to the shareholders of the company by the constitution of the company law.” We’re not talking about those here but in any event they may subject to the constitution be exercised at a meeting or by resolution and then after explaining how powers are exercised by ordinary and special resolution we get 107 which is concerned with unanimous asset to certain types of action, notwithstanding section 52, the distribution provision but subject to a section 108 Solvency Act test related provision, “If all entitled persons have agreed or concur certain specific steps may be taken” and if we look for example at subsection (4) we see that for the purposes of this section no agreement or concurrence is valid or enforceable unless the agreement or concurrence is in writing.

So we’ve got an Act that sets out to state relationships and duties, to set out excessively the powers that are available to the exercise by shareholders that talks about certain powers being exercised only in particular ways. It then has an override in relation to unanimous assent to certain types of action but not others and then we’ve got 177 to which my friend went in relation to ratification. Very difficult to suggest, in my submission, as Professor Watts does, that when one reads the Act as a whole, in light of its legislative history that there is some other way of exercising shareholder powers that sits outside that regime. Professor Watts is right to say that there are good practical reasons for permitting unanimous asset but those reasons were not seen as compelling by the Law Commission and the Law Commission’s scheme has survived in this respect unaffected by the incursions that it suffered on some other dimensions in the legislation. I could say more and I do in the written submissions but that’s just the highlights.

Changing the constitution can't be the case that that power can be used to circumvent the restrictions of ministerial involvement set out in the Act. The elementary point that Ministers can't exercise their powers which is inconsistent with the scheme of the Act and I deal with that in section 15 of my written submissions and then I deal in section 16 of the written submissions with the reasons why relief wouldn’t be appropriate in any event.

Unless the Court has questions I’ve gone a good quarter hour longer than even Your Honour The Chief Justice’s gloomy take on what my half hour really meant.

ELIAS CJ:

Yes well it wasn’t entirely your fault.

MR GODDARD QC:
Unless I can assist the Court further.

ELIAS CJ:
No thank you Mr Goddard. Yes Mr Hopkinson.

MR HOPKINSON:
May it please Your Honours, I will refer to both Wheyland Farms and Micro Farms as the purchase throughout the submissions as I did in my written submissions. At the outset I'd like to thank the Court for the opportunity you've given to the purchase to participate in this and to be heard today.

The primary submission the purchaser wishes to make in this case is that the sale and purchase agreement should not be set aside. So even if this Court finds that one or more of the grounds for review or grounds for appeal succeed, the purchase submits that the sale and purchase agreement should not be set aside and in support of that primary submission I wish to make three key points. The first is that the purchaser is an innocent party. It's an innocent party that entered into a binding commercial contract with a state enterprise. The second key point I wish to make is that if the sale and purchase agreement is set aside the purchaser will suffer significant prejudice. Something in the order of $1.4 million in loss. And the third key point I wish to emphasise in support of that primary submission, is that the purchaser submits it would be unjust in the circumstances of this case to set aside the sale and purchase agreement.

So turning to the first of those key points, the purchase says it's an innocent party. It participated in the tender process in good faith. It entered into the sale and purchase agreement in good faith. It became aware of the sale of Whārere Farm through a public advertisement, it sought legal advice, it sought accounting advice, it spoke with its bank managers and arranged finance so that it could put what it thought would be the best commercial offer forward in the tender process and it transpired that its offer was the best commercial offer but as we all know Landcorp cancelled the tender process and told the purchaser that that was so Landcorp could negotiate with Ngāti Makino and another local iwi group with a view to selling the farm to one of those groups.

The purchase was extremely disappointed by this turn of events but in any case on the 28th of February Landcorp contacted the purchaser and said that the negotiations had resulted in a sale to local iwi.

ELIAS CJ:
Sorry what date?

MR HOPKINSON:
28th of February 2014 and said that the Board at Landcorp had decided to offer the farm to the purchaser for its tender price if the purchaser was still prepared to pay that and the purchaser was. So a sale and purchase agreement was sent to the purchaser three days later and the purchaser signed that sale and purchase agreement in its unaltered form and agreed to be bound by that contract that had been provided by Landcorp and returned that to Landcorp on the 4th of March around 4.00 pm.

The purchaser says it entered into that sale and purchase agreement in good faith, being unaware of the issues or any of the acts or dealings between Ngāti Whakahemo that the appellants now complain of. Obviously the signing of the sale and purchase agreement by the purchaser was prior to the communication between Ms Houpapa and Mr Te Aho that the appellants rely on. So not only was it not aware, the purchaser was not aware of that communication, it hadn't even taken place when it signed the sale and purchase agreement. The purchaser wasn't aware of any of the dealings between Ngāti Whakahemo and Ngāti Makino which Ngāti Whakahemo now raises as issues in terms of feeling marginalised during the negotiation process. The purchaser didn't take advantage of any of these events. The price it contracted to pay under the contract was the same price it put forward in the open contested tender process and as at 5 March it thought it had a legally binding contract with a state enterprise to purchase Whārere Farm for $19 million and shortly after 5 March it paid the $1.9 million deposit and then began with necessary hast to set up the very large dairy farming operation that was required because under the sale and purchase agreement it was due to settle in three months time, on the 31st of May and this is a large farm, 404 hectares, so a reasonable amount of expenditure was required, something in the order of $3 million and this brings me to the next point which is the issue of prejudice. The largest component of expenditure the purchaser put in to setting up the diary farm was on the herd, 1500 cow herd, and the purchaser says that if the sale and purchase agreement is set

aside it's likely to suffer significant financial losses in the order of $1.4 million and the primary component or the largest component of those financial losses will be losses expected on the sale of the herd and those are estimated or were estimated to be in the order of $750,000. Now that estimate was made in August 2014 and I think it's clear to everyone that in the last 12 months the dairy sector has experienced a significant decline and as a result that estimate of loss of $750,000 has to be seen as very conservative.

Another large component of the potential loss for the purchaser if the agreement is set aside and they have to leave the farm, is the exposure to Fonterra under the milk supply contract for liquidated damages. That's going to be in the order of $500,000. There's a clear formula under the Fonterra milk supply contract for calculating liquidated damages in the event that a supplier such as the purchaser cancels or terminates the agreement early.

ELIAS CJ:
That would be if the contract wasn't taken over presumably, would it be?

MR HOPKINSON:
The contract for sale and purchase of the farm?

ELIAS CJ:
No, no, no the contract to supply to milk to Fonterra?

MR HOPKINSON:
As I understand it, Your Honour, there would have to be a new contract between whoever took over the farm.

ELIAS CJ:
Yes but your client wouldn't become liable unless there wasn't a new contract presumably?

MR HOPKINSON:
We don't know that. It's – our submission is that it will be exposed to liquidated damages. Fonterra, in its discretion, might agree not to pursue that and Fonterra might agree –

ELIAS CJ:

Is there evidence of this before us?

MR HOPKINSON:

Of the contract?

ELIAS CJ:

Yes.

MR HOPKINSON:

Yes.

ELIAS CJ:

You don't need to take us to it just refer us to the –

MR HOPKINSON:

Yes the Fonterra supply –

ELIAS CJ:

Oh it's referred to in your submissions.

MR HOPKINSON:

Yes.

ELIAS CJ:

Yes that's right.

MR HOPKINSON:

And I've annexed a separate copy of Mr Pamment's affidavit.

ELIAS CJ:

Yes.

MR HOPKINSON:

Which one of the exhibits to that is the milk supply contract but it's also in volume 3.

ELIAS CJ:

Yes thank you.

MR HOPKINSON:

And the obligation or the liability for liquidated damages arises under clause 2.7. Other components of that $1.4 million loss are an estimated $40,000 loss on the sale of the farm equipment that the purchaser acquired to set up the dairy farm and $30,000 in lost accounting and legal fees for purchasing the farms. Needless to say $1.4 million will be a significant loss to the purchaser.

And this brings me – it's not just a matter of financial loss, the purchaser is not some multinational or large dairy farming conglomerate, it's a family business, it's operated by Doug and Trish Pamment who have been sitting in the Court throughout this hearing, they have worked over 40 years from the bottom of the dairy industry, worked their way up, purchased a herd, purchased a farm and ultimately the purchase of the Whārere Farm for $19 million is the culmination of 40 years of hard work for them. Now if they lose the farm, apart from the huge amount of financial stress that will arise from potential losses of $1.4 million, there will be a personal impact on them and on their eight staff. They engaged eight staff to work on the farm when they took it over and some of those staff members brought family with them. So there will be an impact beyond purely financial prejudice.

As I understand it the appellants don't dispute the purchasers' claims in relation to potential financial losses but what the appellants say is that the Court should simply disregard that prejudice on the basis that the purchaser knew the risks when it signed the sale and purchase agreement but with respect that's not accepted.

The purchaser was aware of a very different risks than the risks that are currently a potential outcome of this case. The risks that the purchaser was aware of was the risk that at some stage in the future Ngāti Whakahemo's Treaty of Waitangi claim might succeed and an order for resumption might then be made.

ARNOLD J:

Well it was also aware of the risk that the contract might not settle, clause 22 deals with that.

MR HOPKINSON:

Yes it does Sir but that risk in clause 22 relates to the Treaty of Waitangi claim and the application for resumption because clause 22, the intervening event clause relates to a Court order or injunction in relation to the claim and the claim is defined in clause 21.1(c) of the contract as being the Treaty of Waitangi claim by Ngāti Whakahemo, Wai 1471, and the associated application for resumption. So the purchaser says that that's the risk it took on and it was told by Landcorp that that risk was very low.

ELIAS CJ:
Is this the advice that's been taken away from the documents filed in the affidavit?

MR HOPKINSON:
Sorry Ma'am?

ELIAS CJ:
Well there was some legal advice that was apparently incorrectly annexed to the original affidavit. Was that concerning that?

MR HOPKINSON:
That was part of it but it's before the Court in terms of Mr Pamment's affidavit that Landcorp told him that the risk was very low and that was – so the risk was relatively narrow compared to what the risk is currently and the advice that the purchaser received was that that risk was low and that's a matter of open evidence before Your Honours.

ELIAS CJ:
Risk of resumption was low?

MR HOPKINSON:
Which is one of the issues that the Court has been raising with the other counsel.

MR HOPKINSON:
But the risk now that is potentially an outcome of this hearing is that quite apart from that Treaty of Waitangi process, the statutory process, there's a risk that this Court might set aside the sale and purchase agreement so that Ngāti Whakahemo has an opportunity to commercially purchase the farm and that is not a risk that the

purchaser contemplated at the time he entered into the sale and purchase agreement and it says it couldn't reasonably have contemplated.

And this brings me to my final point which is that the purchaser says that it would be fundamentally unjust in this case to set aside the agreement because it seems, as I said a moment ago, that the primary relief sought by the appellant is that the contract for sale and purchase is set aside so that they have an opportunity to commercial purchase Whārere Farm but the purchaser's response to that is, they had exactly the same opportunity as we did but they failed to avail themselves of that opportunity. Ngāti Whakahemo were aware of the tender process but they didn't put in a tender bid. Landcorp wrote, in a letter in November 2013 inviting Ngāti Whakahemo to participate in the tender process but they didn't participate. There's another document which follows that letter, it's at tab 67 of volume 3 at page 611 and near the top or one-third of the way down that page there's a heading, "Commercial purchase of Whārere Farm." This is an email from Ms Haukama from the Minister of Finance's office responding to Mr Te Aho's email of 2 December and she says, "Notwithstanding the settlement issues noted above, we do invite Ngāti Whakahemo to participate in the current tender process in relation to this property." Neither Landcorp nor the Minister of Finance wrote to my client inviting it to participate in the tender process, it did it of its own volition but the following line, the following sentence rather says, "In recognition of the time limit placed on your ability to pull together the funding Landcorp have agreed to accept a tender from Ngāti Whakahemo prior to 4 December subject to the confirmation of finance arrangements if those finance arrangements are confirmed by 11 December. No such arrangement or offer was given to purchaser. It had to get all of its ducks in a row as it were, it had to make sure all of its financing arrangements were in place so that the offer it put forward on the 4th of December was the best commercial offer it could put forward.

Despite these communications Ngāti Whakahemo did not put in a tender offer. It then – there was then the three months or so between the cancellation of the tender process on 28 February. During that period Ngāti Whakahemo did not put in a commercial offer. Ngāti Whakahemo says that's because to some extent it was left out of the process but it did have some involvement and it is submitted there was an opportunity at that stage for it to put in a commercial offer but, again, it didn't, and yet now it seems to be the case that Ngāti Whakahemo are saying, "Eighteen months after the tender process concluded we ask the Court to set aside the sale and purchase agreement so that we can purchase this farm for the same price as the

successful tenderer," and it's submitted that that would be fundamentally unjust, particularly in circumstances where the purchaser is an innocent third party and stands to lose significant amounts if the agreement is set aside.

Those were the key points I wished to emphasise on behalf of the purchaser, Your Honours.

GLAZEBROOK J:
Mr Hopkinson, you're presumably relying on the statement of claim but in fact there was nothing in there that suggested the agreement should be set aside, just that settlement should be delayed.

MR HOPKINSON:
Yes, yes.

GLAZEBROOK J:
And so your submission, presumably, is in light of that it was perfectly reasonable to continue with the expenditure and to assume that there would be a longish period, longer or shorter but it's certainly usually longer, in which your clients could have farmed the farm and therefore perfectly reasonable to have incurred the sort of expenditure that they have.

MR HOPKINSON:
Absolutely –

GLAZEBROOK J:
Is that –

MR HOPKINSON:
– Your Honour, and because all the contemporaneous documents when they entered into the sale and purchase agreement, including Ngāti Whakahemo's lawyer's letter, Mr Koning's letter of 27 February, all referred to this Treaty of Waitangi claim and the resumption mechanism. That was the focus. And the purchaser's view, apart from the fact they'd assessed that risk to be low based on the advice it received, those remedies were going to remain available irrespective of settlement, and so it expected, worse case scenario, it was going to be farming this farm for some time and though – the Treaty of Waitangi claim and resumption would not be a bar to

settlement. And then when the statement of claim first, when the claim first began, as Your Honour said, it related to preserving or preventing settlement pending the outcome of the Treaty of Waitangi claim and resumption.

ELIAS CJ:
So that's a reference to the first – we've been looking at the amended statement but you say in the first –

MR HOPKINSON:
Yes, yes.

ELIAS CJ:
– there was no reference to other than delay of settlement?

MR HOPKINSON:
That's correct, Ma'am.

ELIAS CJ:
Yes.

MR HOPKINSON:
In that period immediately between signing the sale and purchase agreement and 31 May which is –

GLAZEBROOK J:
Well, even in the last one there's nothing saying the agreement should be set aside. It's just delaying settlement.

ELIAS CJ:
I think there is.

GLAZEBROOK J:
Is there?

ELIAS CJ:
Well, that's my recollection but I might be wrong. I thought there was.

GLAZEBROOK J:

There is an invalidity declaration, I suppose.

MR HOPKINSON:

But it's understood that the claim has evolved over time to the point where before this Court the primary relief is that the agreement's set aside so that effectively Ngāti Whakahemo can be substituted as the purchaser at the same price as my client is contracted to pay Landcorp.

ELIAS CJ:

Yes, thank you, Mr Hopkinson.

MR HOPKINSON:

Thank you.

ELIAS CJ:

All right, we'll take the morning adjournment now and hear from the appellants in response, thank you.

COURT ADJOURNS: 11.33 AM
COURT RESUMES: 11.55 AM

ELIAS CJ:

Yes, Ms Scholtens.

MS SCHOLTENS QC:

Thank you, Ma'am. I think Madam Registrar has handed out a three page reply which I will speak to. Before I do that, just in response to my learned friend, Mr Hopkinson, for the purchasers, can I note that in terms of timing, the statement of claim pleaded the declarations that you see in the current statement of claim, that the sale and purchase should be declared invalid and claiming certiorari from April of last year. So it was not in the original March statement of claim but it was in the first amended version in April. As at March it was simply seeking –

ELIAS CJ:

What was the date of the filing of the first one?

MS SCHOLTENS QC:

7th of March, Your Honour.

ELIAS CJ:

And so the amended statement of claim was?

MS SCHOLTENS QC:

It was in April.

ELIAS CJ:

April.

MS SCHOLTENS QC:

I don't have the date.

ELIAS CJ:

Do we have the first statement of claim in the bundle?

MS SCHOLTENS QC:

Not in the bundle.

ELIAS CJ:

It doesn't matter but, yes, all right.

MS SCHOLTENS QC:

I could – we could make it available if Your Honour wanted.

ELIAS CJ:

No, I think it's fine. I mean, if you accept that there isn't an application to declare the agreement for sale and purchase in the first –

MS SCHOLTENS QC:

That –

ELIAS CJ:

– statement of claim.

MS SCHOLTENS QC:

We do accept that.

ELIAS CJ:

But it came in April?

MS SCHOLTENS QC:

It came in in April.

ELIAS CJ:

And is it the April one we've got or is –

MS SCHOLTENS QC:

No, you have one –

ELIAS CJ:

There's a second one, isn't there?

MS SCHOLTENS QC:

It's fourth, I think, Ma'am.

ELIAS CJ:

Okay.

MS SCHOLTENS QC:

It's once the bad faith came to light.

ELIAS CJ:

That's right, yes.

MS SCHOLTENS QC:

So from April the pleading was sought the declaration of invalidity. It is May, 23rd of May, that you'll note that the Fonterra contract was signed. From the 26th of May, the interim judgment, it was certainly plain that the sale and purchase agreement might be set aside because that was what His Honour, Justice Williams, indicated he was, may well be minded to do in that interim judgment. And, of course, there have been interim orders preventing settlement which are still extant.

ELIAS CJ:

What was the date of the first interim order?

MS SCHOLTENS QC:

Ah…

ELIAS CJ:

It doesn't matter. I can –

MS SCHOLTENS QC:

Effectively 7th, from 7th of March, the Court didn't have to make orders then. They made an application for – they ordered an urgent hearing before settlement.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

And so it was only once, I think it, in the first, the interim judgment His Honour extended interim orders preventing settlement and they have been extended up until and through this Court up until now. So the contract has not yet settled.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

And the appellant's submissions in relation to the meaning of clause 22 in the contract are set out in our written submissions and I refer to them briefly and we still maintain that that's what clause 22 refers to and means.

So turning to the written outline and beginning first with bad faith, we submit that the sale and purchase agreement clearly came into existence on the 5th of March and not on the 4th of March as Landcorp now suggests and note there the standard practice and common understanding of parties that they won't be contractually bound until both have signed, and here, at 1.3, what we have, and it is plain on the documents, I submit, that an unsigned agreement was forwarded by Landcorp to Micro's solicitors on the 3rd of March for consideration and signature if acceptable, but it hadn't been signed by Landcorp. They were forwarding it there, and then the offer came back to

Landcorp from Micro when they sent the signed agreement under cover of a side letter, which noted the other requests that you've seen. So that was the offer. And the letter also said that a deposit would be paid once the agreement had been signed by the vendor. And we say this was the first offer capable of acceptance, and then communication of the acceptance was 12.17 pm on the next day, the 5th of March. That is when the contract arose.

Then I was asked about Ngāti Whakahemo's willingness to purchase and point 2, the evidence in that respect, the emails to the Minister and Landcorp which I think my learned friend took Your Honour to, took the Court to, just before the break where Mr Te Aho was writing to everybody who would listen but particularly the Ministers to see whether he could get some sitting round the table a commercial deal or a deal that involved resolving the Treaty settlement.

Then you have the internal emails the Court will remember relating to funding and to involvement of Ngāti Awa in a potential a potential settlement, and then the letters to the Ministers and Landcorp after Ngāti Whakahemo found out what the price had been, the true price, had been. That's one letter that I don't think the Court has been taken to. Can I refer to that? It is at volume 3, tab 127.

GLAZEBROOK J:
Is that right? Oh, tab 127, sorry.

MS SCHOLTENS QC:
Yes. Sorry, 123, is it? Sorry, tab 123, the letter dated 2 September. You'll see it's from Mr Ririnui and it is to both shareholding Ministers, the Minister of Treaty Negotiations and the Chief Executive of Landcorp. This is – the litigation has now, is now on foot. He refers to the background, that it's seeking to engage on commercial terms, no progress. Now he's learnt that the price was 19.025 and says, "Now that the price is public knowledge we write again to reiterate our strong desire to purchase the farm on commercial terms and for the avoidance of doubt, and subject to contract, our people are in a position to match the price which was offered by Wheyland Farms and hereby offers to do so." So that – and he refers to the discussions he has had with the Pamment family over the page as well.

That's the offer, and the response to that letter from the Ministers and Landcorp is at 127 and 128. So essentially from Landcorp's perspective, at 127, well, they've got a

binding agreement so it's not appropriate for them to enter into commercial discussions, and at 128, the Crown's view, this was after the interim judgment of His Honour, Justice Williams, the Crown's view here you'll see in third paragraph, Landcorp's separate from, not part of the Crown, it's to Landcorp you need to make your offer. He refers to Justice Williams' findings that the Crown is appealing. So at the foot he says, "The Crown, as you know, is appealing both of these findings." That's the shareholding Ministers have the power to intervene in a decision of Landcorp and the power to – and the Court has the power to invalidate third party contracts. So given that, basically, he says, "As a consequence, Ministers are unable to make any decision in relation to your offer at this point, and are unable to do so until the appeals have been disposed of. In the meantime I suggest that you discuss the matters with Landcorp itself." So this is separate from the Minister's Treaty protocol process which is also completed about this time, he is responding on this commercial offer to say, "Well, you know, the contract stands in our way and we're appealing the decisions of the High Court on those two points.

ELIAS CJ:

Is there any – I'm just looking at page 830, reference in the last bullet point to Treaty settlement policy – is that policy anything that's written or further explained on the material we have?

MS SCHOLTENS QC:

Yes, I think it is. Only to the extent, I guess, that the Minister is applying the policy in his, in the way he's dealt with the protocol. But the policy –

ELIAS CJ:

There's no written statement of policy?

MS SCHOLTENS QC:

No, nothing written. I mean, he just says that they've got so much to spend and so many, certain priorities and…

ELIAS CJ:

Right.

MS SCHOLTENS QC:

Yes, the Minister's explanation is really in that document that I think my friend took you to, which is the last document, 130, the paper that went to the Minister, and then there was a letter from the Minister as well. I'm not sure where that ended up.

Then at point 3, just, there was a question off me as to whether Ngāti Whakahemo was ready to seek interim orders if needed, and there is quite a bit of evidence about that. Mr Ririnui says that they gave consideration to applying for orders on 4 March but in light of Ms Houpapa's advice decided they'd file only after the meeting if it did not look likely that the meeting would lead to a sale. So they were hoping that this would not be necessary. Then the statement of claim, the application for interim orders, and very substantial affidavits were filed on the 7th of March following that meeting, it was early in the morning. Mr Ririnui's first affidavit and the affidavit of Mr Jared were filed, Mr Jared's was unsworn and sworn on the Monday, I understand, and they had quite considerable annexures to those affidavits. Then there was a telephone conference that afternoon before His Honour Justice Dobson and he put out a minute which is in the case on appeal at volume 1 which indicates that there will be an urgent fixture before the farm is due to be settled and directing that the proceedings be served on the Pamments and Mr – there's an email in the bundle which confirms that affidavits were being drafted on the 27th of February. And at that stage of course the concern was to get the Court to, either through the Court or the Waitangi Tribunal, to clarify that the, Ngāti Whakahemo did have a claim and get that point recognised.

So then under the headline, "The error or law," being the error of law or fact, whatever you want to call it, but the error that infected the decisions that followed, we say it was material. Landcorp hasn't disputed or challenged the fact that it would not have sold Wharere to Micro Farms if it knew that Ngāti Whakahemo's claim was not settled, as that's been something that's been asserted in the Courts and there is no, there's no evidence to the contrary.

On that, under the "Error of Law" heading, my learned friend, Mr Goddard, referred to the correspondence at tabs 64, 65, 66, that's the letter from Koning Webster to Landcorp saying, "We're interested and we have an outstanding claim," and then Landcorp finds out from the Crown whether that's true or not and the Crown says, "Oh, they're always saying that and, you know, you needn't worry about it at the moment. Just treat them as indicating an interest," and he says that was an

unexceptional exchange and it is very important that it was followed immediately by more exchanges, and it's not as if Ngāti Whakahemo have sat on their rights. They have tried to get this issue sorted out and, of course, what they did was they engaged somebody to act for them, Mr Te Aho, and then he started to work the system in every way he knew how, sending his emails to the Ministers, to people in the Treaty office. The later ones went to Landcorp. And in the end, as you'll see from those emails that my friend took you to, the Minister's secretary repeated, the Minister of Finance's secretary repeated the same error that had been told them before, in the same language, "You don't have a claim and this is why you don't have a claim," and despite on the other side whether they might have some sort of ability for a commercial purpose, a commercial sale, there was obviously some willingness to engage on that but they ran out of time, and so I guess they didn't think that we were any – that the iwi warranted any particularly different treatment and, you know, again, I say that we had nuisance value, but it went nowhere.

But it was certainly – those communications, everything that happened up until the contract was signed, was within the pleading and I could point Your Honours perhaps to paragraphs 62 and 63 that shows that it wasn't just talking about a particular decision to, that contains an error. We're talking about the advice by the expert body who's supposed to know these things advising Landcorp who then is going to act on that advice. So yes, essentially we are reviewing Landcorp's decision but the fact that the advice is erroneous is, has been the subject of target as well.

Then the Minister's failure to intervene or take any other steps, on this point the Crown's pleading timing point in relation to the Minister's decision to intervene we submit is wrong. What matters is not that he didn't have very long to respond, what matters is the materiality of the failure, and that shouldn't be judged at the point in time when the decision not to intervene was communicated but when the failure prejudiced the appellant, and the Crown's error was material at the time when the officials decided the Ministers had no power to intervene and began work drafting a response in those terms instead of exploring whether Landcorp would be prepared to delay the sale, either at the Minister's request or direction, because they knew why Ngāti Whakahemo was seeking this, this undertaking, this direction, and they – the evidence is that officials embarked on that path as early as 8.15 am on the 5th of March, and the draft response prepared by officials was materially identical to the final letter that went out. And the Crown, of course, unlike Ngāti Whakahemo, was on notice of how urgent the situation was. Now my learned friend said, well,

they didn't know about the sale until the 6th of March. That's true they didn't know that it had gone through but they knew that it was on foot and I've listed the evidence there, so Ms Fletcher's affidavits, the key ones, they knew that Ngāti Whakahemo asserted that OTS was wrong and that the claim was unsettled. Given her role for the Crown in dealing with Ngāti Whakahemo's application for resumption, Ms Fletcher must have known that the Crown has opposed urgency in the Tribunal on the basis the tender process had been cancelled, which would give Ngāti Markino and other neighbouring iwi an opportunity to purchase Whārere, so she would've known that. She knew that Ngāti Markino had not had any formal discussions with Ngāti Whakahemo about purchasing Whārere until 25 February.

She knew on 27 February that Ngāti Whakahemo were seeking undertakings from Landcorp to delay the sale and she knew on the 28th of February that Landcorp's board had that day resolved to enter into negotiations to sell the land to non-iwi interests and you might recall the email that we looked at that also went to the Attorney-General Minister of Treaties negotiation office.

So we say that the Crown had limited but in the circumstances sufficient time to act and at least request Landcorp to pause the sale process. So we say they got the law wrong as to what they could do but as the pleading isn't limited to that, there were other things that they might've been able to do and the Crown until counsel's oral argument has never defended the case on the basis there was insufficient time for it to intervene or that doing so would have been futile, although that appears to be what the Court of Appeal thought.

Irrespective of whether the Crown had the power to direct Landcorp, it had the power to request Landcorp to delay the sale. It didn't do so or it seemed consider doing so and the pleading put this in issue. And then it is submitted that section 7, not 13, is the source of the power of direction for non-commercial activities. The Crown's interpretation renders section 7 meaningless. Ministers could just direct under section 13 and it ignores the distinction between non-commercial activities covered by sections 7 and 14(2)(i) and the scope of the commercial activities to be undertaken in accordance with the statement of corporate intent under 14(2)(b). Otherwise Ministers could simply direct state-owned enterprises under section 13 to undertake any non-commercial activities. In the Crown's view, we submit, is also inconsistent with the parliamentary materials. Mr Isac took you to those.

Then in terms of remedy, the Crown has offered no policy justification to support its argument that the Court's remedial took kit in judicial review does not include a power to set aside a concluded contract. The policy supporting this limitation must be to protect certainty of contract and rights of contractual counterparties but those interests are adequately protected, we submit, by the Court's discretion to refuse a remedy in judicial review and of course this is in the context where it's clear the Courts have the power to intervene in a decision to award a contract or a decision to cancel a contract or many different sorts of issues relating to contracts. We say that this remedy must be available and there's no reason to carve it off and silo it as something that simply can't be touched.

Then section 21 which my learned friends referred to and is not referred to in our submissions, but the legislative background is included in the supplementary bundle of authorities, the green bundle, that we handed up at the beginning. So I'll just refer briefly to those, without taking the Court to them. We submit of course that it does not bar relief. The legislative history indicates that it was amended and narrowed in the course of select committee process because there were concerns that it might be seeking to either oust judicial review or take a very broad view of, yes what the Courts could – take a very narrow view of what the Courts could and couldn't consider. But it's clear from the final wording of the clause and the reports of the legislation advisory committee, that it was not intended to oust the Court's review jurisdiction. So there is still the ability of the Courts to review on the standard processes. It was only intended to apply to part 1 in the statement of corporate intent, not other provisions of the Act or the implication of judicial review is based on common law requirements. It is a form of indoor management.

Then on the – responding to the discussion we had on the UK public contract regulations, just done a little more research and can confirm that the earliest regulations appear to be the Public Supply Contract Regulations in 1991 and the Public Works Contracts Regulations 1991. The major subsequent regulations were in 1995, 2006 and 2015. The 10 day stand down period, so this is when the Courts have to wait for 10 days, give notice and then wait to see if anybody has got a challenge before a contract can be entered into. It was introduced in the Public Contracts Regulations for the UK in 2006 and it followed the European Court of Justice's decision in an Alcatel case and I've given the citation for that. it was a case that the European Court of Justice indicated that member states were required to ensure that a contracting authority's decision to award a contract could be set aside

in all cases, even if a contract had been awarded and this was the UK's approach to dealing with that.

And at point 11 the Court, it is submitted, should exercise its discretion to set aside the contract given the obligations on the Crown and Landcorp to treat Ngāti Whakahemo with utmost good faith and to treat like and like. The iwi anticipates that if the contract is set aside it will be afforded an opportunity to purchase Whārere as Ngāti Makino were.

And just can I finally say that my learned friend, Mr Hodder, described what has happened as unfortunate and it's a little disappointing that that's as far as anybody has been prepared to go. Unfortunately but the legal context precludes a remedy. From Ngāti Whakahemo's perspective it is more than unfortunate. They have been dealt with in a pre-emptry way. They have not been afforded really simply – what you would expect, simple courtesy from the decision makers involved here at times. The failure to properly recognise its rights, can I say was turned around very quickly once those proceedings were issued. So 7th of March, those proceedings went into Court, the Crown in its statement of defence accepted that there was an unresolved, unsettled claim and we know from the Minister's reconsideration of the protocol that it's accepted while he is yet to investigate it properly but he accepts that there is some merit to the claim but the primary difficulty here is that we have a concluded contract and yet we would have been before the Court to get that matter that seemed so simple to sort out before the Court, if somebody had said, "Look this is what's going to happen now" and we'd been afforded the opportunity to get into – and to get before a Court and have what essentially was a very simple matter sorted out at that time and then hopefully the parties would stand back and say, "Well, you know, perhaps there is something different we can do here."

So Ngāti Whakahemo is very grateful of the opportunity to stand before the Supreme Court and to bring this grievance to the Supreme Court. We thank you for the hearing and unless you have anything further, that is all I have.

ELIAS CJ:

No, no questions thank you Ms Scholtens. Thank you very much counsel for your considerable help and I'm conscious that it's the Court's questions that have made the hearing go into the third day but it's been of great assistance to us.

COURT ADJOURNS:12.26 PM