IN THE SUPREME COURT OF NEW ZEALAND SC 47/2015

[2015] NZSC Trans 15

BETWEEN **MITA MICHAEL RIRINUI**

Appellant

AND **LANDCORP FARMING LIMITED**

First Respondent

AND **THE ATTORNEY-GENERAL**

Second Respondent

Hearing:	26 May 2015
Coram:	Elias CJ William Young J Glazebrook J Arnold J
Appearances:	M T Scholtens QC, A N Isac and J B Orpin for the Appellant S A Barker and B Gnanalingam for the First Respondent J R Gough and S J Humphrey for the Second Respondent

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APPLICATION FOR LEAVE TO APPEAL

MS SCHOLTENS QC:

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

ELIAS CJ:

Thank you Ms Scholtens.

MR BARKER:

May it please the Court, Mr Barker with Mr Gnanalingam for Landcorp Farming.

ELIAS CJ:

Thank you Mr Barker and Mr Gnanalingam.

MR GOUGH:

May it please the Court, Mr Gough with Mr Humphrey for the Attorney-General.

ELIAS CJ:

That you Mr Gough and Mr Humphrey. Now have counsel, Ms Scholtens, conferred about time allocation?

MS SCHOLTENS QC:

Yes we have Ma'am and I aim to have up to an hour to begin with and then my learned friends will take the next hour and a half including the break between them and then if there is a need for a reply there should be 15 minutes left before four.

ELIAS CJ:

All right, thank you. Yes Ms Scholtens.

MS SCHOLTENS QC:

Now it please the Court, I have a brief roadmap or summary of the submissions which includes the response to my learned friend's key and to the matter raised in the minute of yesterday.

ELIAS CJ:

Yes, thank you. Madam Registrar can you distribute?

MS SCHOLTENS QC:

So Your Honours will see that I propose, subject to what Your Honours would like to cover, to deal with the three grounds of appeal briefly under those headings to include the response to the Crown or Landcorp as the case may be. So we've got the bad faith ground, the justiciability of the Office of Treaty Settlements advice as the second ground and then the third ground, which is largely covered, and what comes before the shareholding Minister's power to intervene. Then I propose to deal with the effect of the Minister's protocol reconsideration on the relief that is sought

which I understand the Court is interested in, and then very briefly with the interim orders position.

ELIAS CJ:
Yes, thank you.

MS SCHOLTENS QC:
So if I could begin then with the first ground the bad faith. The core of the leave submissions are at paragraphs 13 to 19 of the submissions and the focus is on the submission that the Court of Appeal applied the wrong test to the facts.

In response to the Landcorp submissions we say this, they say the issue is one fact so not one this Court would properly deal with and that the appeal would be academic because even if there was bad faith Landcorp is not obliged to negotiate with Whakahemo. In response to the first one, the key facts are not in dispute and that was acknowledged by the Court of Appeal at paragraph 85 of their judgment. The issue is what is the test to be applied to those facts, so we say if you apply the correct test – we wish to say – then bad faith is established on those undisputed facts.

WILLIAM YOUNG J:
Well, the bad faith, you say, consists of putting your client off the course of applying for an interim injunction?

MS SCHOLTENS QC:
Yes, leading them to believe that they were in negotiations in relation to the sale.

WILLIAM YOUNG J:
And the purpose is to defer so that an interim injunction would not be sought prior to sale?

MS SCHOLTENS QC:
Yes. To ensure they didn't injunct the sale before it was all signed and sealed, or seek to injunct the sale

WILLIAM YOUNG J:
That they're not prepared to grant an undertaking as to damages?

MS SCHOLTENS QC:

Were not in a position to be able to grant an undertaking as to damages.

WILLIAM YOUNG J:

So an undertaking as to damages would not have been available in March?

MS SCHOLTENS QC:

No.

WILLIAM YOUNG J:

Were they in a position to apply for an interim injunction then, without giving an undertaking?

MS SCHOLTENS QC:

I, it hasn't exercised me, Sir, but I certainly would have – I mean, the position would have been different and I'm just trying to put myself back then, what sort of damages we might have been talking about compared to what Landcorp is talking about now, but the position presumably would have been the same.

WILLIAM YOUNG J:

Thank you.

MS SCHOLTENS QC:

So, then, the second of the concerns, that it would be academic because Landcorp's not obliged to negotiate, it's submitted that when judicially reviewing a contracting decision or a process the plaintiff will necessarily not have an entitlement to negotiate a contract, because if they had that entitlement they'd be in private law remedies –

ELIAS CJ:

But they're within a process at that stage, the authorities are based on their coming within some process…

MS SCHOLTENS QC:

Like a tender process contract –

ELIAS CJ:

Like a tender.

MS SCHOLTENS QC:

– the process contract that you have once a tender is under way –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

What's the best case on this that doesn't involve process contract?

MS SCHOLTENS QC:

Best case as to…

WILLIAM YOUNG J:

As to your ability to challenge a contract on the basis of bad faith by one of the contracting parties towards you.

MS SCHOLTENS QC:

If you'll just give –

WILLIAM YOUNG J:

A sells something to B, C says, "But A told me a lie." So what's the best case for saying that C has a right to challenge the contract between A and B?

MS SCHOLTENS QC:

We're looking at a judicial review situation –

WILLIAM YOUNG J:

Yes, I understand that, I understand that it's a state owned enterprise.

MS SCHOLTENS QC:

So I guess the cases are perhaps the *Lab Tests Auckland Limited v ADHC* [2009] 1 NZLR 776 (CA), which involved –

WILLIAM YOUNG J:

Right.

MS SCHOLTENS QC:

– conflict of interest and the availability of information.

WILLIAM YOUNG J:

And so that was dealt with in detail in the High Court judgment, I take it, in *Lab Tests*, not so much in the Court of Appeal?

MS SCHOLTENS QC:

I believe in the Court of Appeal as well, they looked at this scope of the test.

WILLIAM YOUNG J:

Right.

MS SCHOLTENS QC:

And I know that I had more to say about that – yes, I did. I mean, the Court of Appeal and, I think, my learned Justice Arnold was one of the authors of the judgment that referred very much to the context, the statutory context being very important, but that the basis for review was not sort of limited to the sort of *Mercury Energy* type thing, so perhaps it's a different context from the question that you're asking me. So we also argue that the appeal is not futile, that the Court will not refuse relief simply because the same decision might be made again, that's sort of just standard administrative law. If the contract is set aside there could well be a different result, it doesn't necessarily have to be the same one again. For example, the Crown in *Landcorp* may consider in light of Whakahemo's unsettled Treaty claim and Landcorp's bad faith, that it should talk directly with Whakahemo first, as they did with Makino, or if the Court find that Ministers have the power to intervene they may choose to do so, as they did for Makino.

GLAZEBROOK J:

Can I just check, is there an ability to give an undertaking as to damages, is there a realistic ability for your clients to negotiate a commercial settlement, or was there at the time a realistic ability to negotiate a commercial settlement?

MS SCHOLTENS QC:

I think things moved, I think the evidence will show, during this time that we're looking at, from how able Ngāti Whakahemo was to enter into a sale process, or a sale –

GLAZEBROOK J:

What about at the time that you're looking at the particular bad faith at the beginning of March, what was the answer then?

MS SCHOLTENS QC:

Yes, at that stage, yes, they may well have been able to secure the deal. They were trying to get together 23 million, which is what they'd been told would be ball park.

GLAZEBROOK J:

But earlier that wasn't the case –

MS SCHOLTENS QC:

No.

GLAZEBROOK J:

– because neither of the parties could go it alone in the earlier period or at the time, or indeed at the time of the tender.

MS SCHOLTENS QC:

No but there wasn't, there was certainly financing implications then but there were also other reasons why things didn't proceed –

GLAZEBROOK J:

No, I understand that –

MS SCHOLTENS QC:

– at an earlier date, yes, but there were financing reasons. But to answer your first question about the undertaking, the reason really is that a trust is funding this case and it is a trust, it certainly can pay security, for costs et cetera, but when it comes to the damages in relation to the Crown and to Landcorp's position, the beneficiaries of the trust are not co-existent with Ngāti Whakahemo and the trust does not feel that it can commit trust resources in that way. It doesn't feel it has the ability to do that.

GLAZEBROOK J:

And I understand there's certainly a difference between being able to fund a purchase of an asset that you can have security on and fund damages but it was a question so thank you. And was there evidence on that in the Courts below or is –

MS SCHOLTENS QC:
I believe so.

GLAZEBROOK J:
Certainly there were comments in the judgments on that but I'm just not entirely sure because we don't have the evidence what…

MS SCHOLTENS QC:
In terms of ability to fund a sale, I think there was evidence about that. Yes, there was. But in terms of an undertaking as to damages I don't think that ever came up.

GLAZEBROOK J:
No, I was asking about the funding of the sale. Of the purchase.

MS SCHOLTENS QC:
And I think you'll see in perhaps I think it's the first judgment of the High Court the discussions about the Whakahemo attempt to put together a joint venture and they were talking about perhaps 10 million coming from Ngāti Whakahemo and then later on when the, Ngāti Whakahemo was trying to pull together sufficient funds to make an offer, which they thought they'd be able to do on the 7th of March, they'd been talking to Ngāti Awa about a $23 million price and Ngāti Awa pulled out. They said, "No, it's too much for that asset." And there was evidence that there were discussions between Ms Houpapa and the representative for Ngāti Whakahemo about they had to go and talk to their bank and they needed to talk milk solids. So there was definitely a genuine attempt, it was making some progress to meet that $23 million figure that had been given to them.

So can I turn then to the second ground, the justiciability of the advice from Office of Treaty Settlements to Landcorp that there was no claim, that it had been settled. So the submissions there are contained in paragraphs 20 to 23. And that key point that we make is that the Court of Appeal dealt with the first decision, that was the decision advising under the protocol, that there was no claim or that they were not, that OTS was not interested in this property, but didn't deal with the second of the related decisions when the Crown told Landcorp that no, Ngāti Whakahemo did not have an unsettled claim, as they were saying to Landcorp, and giving reasons why. And the

Court of Appeal found that the error of law, which everyone accepted was an error of law, wasn't material to –

ELIAS CJ:

That's the interpretation of the Settlement Act?

MS SCHOLTENS QC:

Yes, yes, that's right, so the Crown said settled by that Act and Ngāti Whakahemo said, "No, we're not, because of our direct descendants are outside of that Act," and that was accepted by the Crown once they came to file a statement of defence in this proceeding, but not until then. And so we say that this is an error of law that does go to a matter of substance, essentially we point to His Honour Justice Williams' approach in the first decision, and the whole context of what happened through from September through till March was in a framework where the Crown thought that there was no unsettled grievance. They told Landcorp, so Landcorp were of the view that these people were essentially just being a nuisance, and no one was really communicating with Ngāti Whakahemo at all, they were simply saying, "You don't have any rights," and that really went on – because that's what they thought, "You don't have any rights here," so they weren't treated as if they had any interest at all in this land, which was of core importance to them, it was a very significant piece of land for lots of different reasons, but primarily for the historical reasons, and also it was right next door to where they are now, it's –

ARNOLD J:

Is the farm squarely within the Treaty claim, the existing Treaty claim?

MS SCHOLTENS QC:

There's some suggestion that it's only a little bit – no, yes, it is solely within the Treaty claim, it is.

ARNOLD J:

All right. Because there was certainly a suggestion in the pleadings that it wasn't.

ELIAS CJ:

It's within the area of the Treaty claim, but there's some suggestion that only –

MS SCHOLTENS QC:

One block.

ELIAS CJ:

– one block was perhaps subject to Treaty breach in its acquisition, was that right?

MS SCHOLTENS QC:

That's, it's as I understand it too, but –

ELIAS CJ:

Well, check.

MS SCHOLTENS QC:

I'm sorry Your – may I?

ELIAS CJ:

Yes, of course.

MS SCHOLTENS QC:

Yes, it was the Native Land Court that awarded the block that Your Honour's thinking of, but their claim is broader than that, the historical claim is broader than that.

ELIAS CJ:

Yes, but Ngāti Whakahemo was admitted to that particular block by the Native Land Court, so that connection is pretty well –

MS SCHOLTENS QC:

Yes, yes, it is.

ELIAS CJ:

– established, is that the position?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Thank you.

GLAZEBROOK J:

But that's just – how much of the farm is that?

MS SCHOLTENS QC:

I don't, can't tell you exactly, it is referred to somewhere. It's a small part.

ELIAS CJ:

I'm still a little unclear on the basis of the legal complaint accepting that there was an error of law. What OTS did was provide advice, admittedly under a framework of providing formal advice.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

You say that Ngāti Whakahemo had standing to challenge that advice because in effect it was a determination of status?

MS SCHOLTENS QC:

When –

ELIAS CJ:

I'm just trying to work out –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– why there's a public law issue here.

MS SCHOLTENS QC:

Yes, it was a determination of status. When OTS wrote or replied to Landcorp and said, "Ngāti Whakahemo have no claim," that meant for all intents and purposes Landcorp could proceed to divest itself of some very important, a very important parcel of land to Ngāti Whakahemo, and it did have a clam to it. But nobody proceeded, nobody worked on that basis when they were making their decisions.

ELIAS CJ:

Well of course what is said against you is that the communication, which appears to have been wrong, was a thing writ in water. It had no effect. That drives you to make, I suppose, the sort of argument that was made to us in the *Quake Outcasts* case, that in the statutory and soft law context of the protocol, and the clearing mechanism, and under the shadow of section 9 and so on, that advice was of sufficient significance to attract a public law remedy if wrong. Is that right? I still –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– don't quite follow the argument.

MS SCHOLTENS QC:

Yes. I would put it this way. Ngāti Whakahemo were raising their rights with Landcorp in the middle of a tender process and saying you should be dealing with us. They believed that they were, and it's been accepted, you know, Ngāti Whenua of the land, and Landcorp obviously took this responsibly and went back to the Office of Treaty Settlements and said, "Well what's the story?" And they said, "No, you don't have to worry about it." That was an exercise of – it was an exercise of public power made under statute by officials who only operate under statute, and it was an error, it was an error of law. It affected Ngāti Whakahemo because it was about us. It determined how we were going to be treated in that situation and that fed through right up until the contract was finally signed because Landcorp thought we were just a nuisance, we were being a nuisance, they wanted to hold us at, you know, at arm's length until they got their contract signed then, you know, they relaxed a bit and told us, well, it's all happened, it's all over.

ARNOLD J:

When you say the advice that OTS gave was advice given under statute, are you meaning by that the SOE Act or some other statute?

MS SCHOLTENS QC:

Well, yes, the SOE Act. Perhaps it is difficult to point to a statute that governs officials responding to queries from an SOE.

ARNOLD J:

Well, it was certainly done under the protocol.

MS SCHOLTENS QC:

Yes. Well, by that stage the protocol, they'd already dealt with the protocol, this was a second enquiry. Protocol just said, "There aren't any relevant claims, you can go ahead and sell the land," and then this, which is what the Court of Appeal dealt with –

ELIAS CJ:

But that was wrong advice too.

MS SCHOLTENS QC:

That was wrong, yes. And then there was particular – because we put our hand up and Landcorp then went back to OTS and said, "Well, what about Ngāti Whakahemo," "No, no, that's been settled." So I think, I must say I sort of, when you're dealing with officials and a state-owned enterprise which only does things through the exercise of its statutory powers –

WILLIAM YOUNG J:

No, it doesn't, it carries out its functions pursuant, essentially, to the Companies Act 1993 and it's stated as a natural – as a legal person.

MS SCHOLTENS QC:

Yes, but it's selling land owned by the public, in this case, I think this is a decision that it's making, as much under the State-Owned Enterprises Act 1986 as under the Companies Act. There's still – I mean, I think those are matters of detail because I think you can still find a public power here, even if you can't, even if I can't point to a particular, certainly not a single statutory power that governs it, you've still got officials exercising public powers, and sure judicial review is about ensuring that, I mean, if somebody's rights are affected in the way that Ngāti Whakahemo's were, and they were rights, then if they made an error –

ELIAS CJ:

Well, what were the rights?

MS SCHOLTENS QC:

Well, they had Treaty rights, they had a right to, a Treaty right to claim this land, and that was the rights that were being discussed between OTS and Landcorp and between the Ministers and Landcorp.

ARNOLD J:

It certainly impacted on their interests, because if the proper advice had been given one has to assume that Landcorp would have acted on it, and why make the enquiry if it's not significant to you?

MS SCHOLTENS QC:

Yes.

ARNOLD J:

So in that sense –

MS SCHOLTENS QC:

Yes.

ARNOLD J:

– there was an adverse impact.

MS SCHOLTENS QC:

Yes, thank you, Your Honour, I do, adopt that too, "interest" is perhaps a better phrase than "rights"…1

ELIAS CJ:

Well, "interests" also brings in arguably section 27 of the New Zealand Bill of Rights Act 1990.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

That's not been raised here.

MS SCHOLTENS QC:

No, it hasn't, no.

ELIAS CJ:

You're not complaining of, you're not complaining – I suppose in a way the bad faith argument might raise it.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Because – yes, I see, okay.

GLAZEBROOK J:

But hadn't the true position been to the Office of Treaty Settlements and to the Minister? That's one of the complaints in the statement of claim, isn't it, that neither of those bodies actually engaged –

MS SCHOLTENS QC:

No.

GLAZEBROOK J:

– until the proceedings were issued –

MS SCHOLTENS QC:

That's right.

GLAZEBROOK J:

– with the actual legal basis of the error.

MS SCHOLTENS QC:

Yes. Yes, and there's a –

GLAZEBROOK J:

But there had in that sense been a right to be heard.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

It's just that it was wasn't listened to, which…

MS SCHOLTENS QC:

Well, that's true –

GLAZEBROOK J:

That's the complaint.

MS SCHOLTENS QC:

– they tried to make their position clear but they got nothing in response, so, just a very –

ELIAS CJ:

And they weren't heard because of the mistake that they had no interest because it had been settled under the legislation.

MS SCHOLTENS QC:

That's right, yes, yes. And the argument that it hadn't been did not seem to find any favour at all or – nobody engaged with that argument, although it was put to them.

So just perhaps staying with the outline, the justiciability in response to the Crown's opposition, "the Court has no power to set aside the contract," and then, "Even if the remedy's available the error of law doesn't invalidate Landcorp's decision to contract, the error of law's not an available ground of review," and, "Ngāti Whakahemo's rights or interests are affected," so we've covered some of this.

WILLIAM YOUNG J:

Can we pause there. I had a bit of a look at *Lab Tests* where in the High Court the Judge held that the ultra vires doctrine applied and that a statutory exemption didn't apply because the unsuccessful third party contractor was implicated. But are there any cases where a contract has been set aside against a third party who's not implicated?

MS SCHOLTENS QC:

The *De Luxe Motor Services (1972) Ltd v Education Board of the District of Wellington* HC Wellington CP38/88, 21 June 1989 school bus case is cited in the submissions in support of the application, I've lost it now. On page 9 at footnote 64, which is dealing with the –

ELIAS CJ:

Sorry, what are we looking at?

MS SCHOLTENS QC:

The submissions in support of the application for leave from the application. Page 9, you'll see paragraph 29 is referring to the jurisdiction to set aside the contract and footnote 64 examples of the jurisdiction. So we've got *De Luxe Motors* is the second case cited. That is one where the, it's about a review of school bus contracts and in the High Court Justice Ellis set aside the decisions to – after a tender round, to contract with certain school bus contractors, and then on appeal the Court of Appeal found that the case had miscarried because the successful contractors, the successful tenderers, weren't before it, so it referred the matter back to the High Court. But I submit that it's implicit in that Court of Appeal's decision that the High Court must have had an ability to set aside the contracts or it would have said so.

WILLIAM YOUNG J:

I don't want to be a doubting Thomas, but where does that ability arise from?

MS SCHOLTENS QC:

The invalidity in the process.

GLAZEBROOK J:

Is that because there's a lack of capacity?

MS SCHOLTENS QC:

No, no, ah –

GLAZEBROOK J:

Well it might be there's a breach of some kind of obligation but would the third party be implicated in that breach of the obligation if the third party had no notice, constructive or otherwise, of it?

MS SCHOLTENS QC:

Well they certainly didn't in the school bus tendering case, it was simply a process issue.

GLAZEBROOK J:

But that may have been because there was a lack of capacity because the process hadn't been followed properly. And if there's a lack of capacity then effectively there is no ability to contract isn't there? Ie there isn't a contract in the first place because there was a lack of capacity on one side to contract.

MS SCHOLTENS QC:

Is, wouldn't, is Your Honour saying that wouldn't apply with bad faith for example or a legal error, there would still be a lack of capacity?

GLAZEBROOK J:

Well the cases might suggest that's the case but that's going further down the track –

MS SCHOLTENS QC:

Yes, I'm just having trouble with the concept of capacity.

GLAZEBROOK J:

– but that would be the lack of capacity, wouldn't it, in those cases?

WILLIAM YOUNG J:

Yes, a purchaser here sues Landcorp for specific performance or damages, what's Landcorp's answer?

MS SCHOLTENS QC:

Well, I mean in this particular –

WILLIAM YOUNG J:

They say the Minister got the rule wrong?

MS SCHOLTENS QC:

Well that's what seems to have happened in the past but in this particular case –

WILLIAM YOUNG J:

Sorry, pause there. I was actually being ironic. It wouldn't seem to me that it would be an answer for Landcorp in response to a claim by the purchaser, to say we don't have to pay because somewhere else someone else made a mistake, the Minister made a mistake.

ELIAS CJ:

Well the, Landcorp may be liable to be third party.

WILLIAM YOUNG J:

Yes, but that means the contract's not set aside.

ELIAS CJ:

Well, not necessarily.

WILLIAM YOUNG J:

No, sorry, but you might say, well, Landcorp's not to perform the contract and is therefore in breach of contract because the third party's rights against Landcorp depend upon the persistence of the contract, the validity of the contract. It's a sort of, there's an amorphous quality to the case that, I suppose, unsettles my black letter law mind.

MS SCHOLTENS QC:

It's certainly not straightforward in any sense, black letter or, you know, in a judicial review sense it's not, it's not easy, partly because you've got a mix of central government and SOE, partly because you've got my client, with its expectations, throughout this process it was surprised around every corner that it was treated a certain way, but that doesn't mean that it doesn't fit into standard administrative law principles. And I don't know if Your Honour has a concern or is aware, there is a clause that's referred to in the High Court judgment between Landcorp and the third party as to what will happen if, in the event Landcorp's unable to proceed with the sale, so it was something that they contracted for.

GLAZEBROOK J:

I thought that was just an interim rental arrangement, or have I misunderstood that as we don't have the contracts?

MS SCHOLTENS QC:

It was, yes, it was an interim arrangement and it would –

GLAZEBROOK J:

But there is an assumption that there will be ability to settle, it just may be delayed, isn't it, and in the meantime there's a rental arrangement that enables the purchaser –

MS SCHOLTENS QC:

That's right.

GLAZEBROOK J:

And I understand that that costs, has a certain cost for Landcorp?

MS SCHOLTENS QC:

Mmm, but the purchaser can also give notice that it won't proceed and, I believe, so can Landcorp.

ARNOLD J:

Yes, I must say –

ELIAS CJ:

Under that clause?

ARNOLD J:

– I thought that was the position, and if that happens there's no claim against Landcorp.

MS SCHOLTENS QC:

That's right.

WILLIAM YOUNG J:

So that's if they cancel, isn't it? Have we – the condition's set out somewhere isn't it?

MS SCHOLTENS QC:
In the first, in the first judgment…

WILLIAM YOUNG J:
It's the interim judgment.

MS SCHOLTENS QC:
Yes, the interim judgment –

ARNOLD J:
The interim judgment.

MS SCHOLTENS QC:
– I think, or is it the final? It's in the interim judgment at paragraph 51. Yes, 22.4 is cancellation.

ARNOLD J:
So a competing interest is defined as to include an injunction or Court order relating to the claim. What's the claim?

MS SCHOLTENS QC:
So which…

ARNOLD J:
In clause 22.1 it says if at any time up until settlement any of these things happen – and that's defined as "the competing interest" – and then 22.4 says, "If the vendor has not been able to resolve the competing interest then either party can cancel the agreement." Now "competing interest" includes an injunction or Court order relating to "the" claim, so what is "the claim", is it your client's claim or…

MS SCHOLTENS QC:
I understand it's the claim for resumption in the Waitangi Tribunal.

ARNOLD J:
Right.

ELIAS CJ:

The Court order relating to the clients is quite broad?

MS SCHOLTENS QC:

Yes.

WILLIAM YOUNG J:

That would prevent registration when the memorandum is transferred.

ELIAS CJ:

Well the injunction or Court order would be required to prevent registration because the claim itself doesn't. so this is a Treaty prompted clause?

MS SCHOLTENS QC:

It looks – I don't know. I don't know Your Honour. I'm sorry.

ELIAS CJ:

Does anyone have the agreement for sale and purchase in Court?

MR BARKER:

Your Honour, if I could assist the Court. Clause 21 specifically defines Wai 1471 as "the claim". That's the Ngāti Whakahemo Waitangi Tribunal claim.

ELIAS CJ:

Yes.

MR BARKER:

So "the claim" is a reference to Ms Scholten's clients' Tribunal claim.

ELIAS CJ:

Yes, thank you.

MR BARKER:

It's in the evidence but not, obviously not in form Your Honour.

ELIAS CJ:

Well one would have thought that was pretty significant, that the actual claim for resumption was envisaged in this contract to be a possible impediment to settlement? Anyway, perhaps we should go on.

MS SCHOLTENS QC:
I'm sorry, I was looking for a definition of the claim but…

ELIAS CJ:
The claim is –

GLAZEBROOK J:
So clause 21 I think Mr Barker said, and it was a reference to the resumption claim, was it 141 or whatever the number is.

ELIAS CJ:
Sorry, what is it?

MR BARKER:
1471.

GLAZEBROOK J:
Yes, 1471.

MS SCHOLTENS QC:
Yes it is. Yes. So I was dealing with the judgments at footnote 64 so there are others –

WILLIAM YOUNG J:
I think you look at, the *De Luxe* case I have it records a concession by counsel for the Board, the decision was reviewable, complaints about the non-joinder of the successful tenderer, and then the President of the Court of Appeal saying given those, the least we say about that this the better, and so on. I don't think there's any acceptance there of a jurisprudence under which a contract with a third party could be set aside. I mean it simply, wouldn't that slip back to the High Court.

MS SCHOLTENS QC:
My submission would be it wouldn't have done that if it thought that couldn't happen.

WILLIAM YOUNG J:
Well –

MS SCHOLTENS QC:
Because it had happened, that's what the High Court had done.

GLAZEBROOK J:
There may have been an issue as to whether the third parties knew of the issues and in which case if they knew of the issues then there's going to be much more of an ability to set aside a contract than if they didn't know about them, but as nobody had heard from them, then presumably there was nothing upon which to pronounce –

MS SCHOLTENS QC:
Well I agree with that but it doesn't mean there's not an ability to set aside a contract in an appropriate –

WILLIAM YOUNG J:
Of course it doesn't mean it's not. What I'm actually looking for is authority of an affirmative nature that supports the proposition that a contract can be set aside, and what it all means. What does it mean to the other contracting parties.

MS SCHOLTENS QC:
Right.

ELIAS CJ:
Well clause 22 maybe some help on that. Anyway I think that's – we're really just trying to explore the parameters of the argument for the purposes of leave. It's interesting – I mean it's easy to get hooked into the bigger picture.

MS SCHOLTENS QC:
Yes, and I am sorry, I've had quite a lot of information to get on top of in a short period of time.

ELIAS CJ:
Yes.

MS SCHOLTENS QC:

But I know those cases, I could deal with them further in response, just focusing on what Your Honour is concerned about, I'll see if I can do that.

So, at paragraph 8 of the outline we say that there are two bases on which the Court can set aside the contract: first, that it was tainted by the error of law, which was the approach adopted in the High Court by the interim judgment, and we just point to such decision as, I mean, *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA), where the Minister's decision was tainted by errors in a report but the report wasn't critical, it was a precondition to a valid ministerial decision, and of course there are lots of cases like that where there are errors in the course of the decision-making process. Here Landcorp made a decision that it was free to enter into a sale, that there were no Treaty claims that were relevant, and so it went ahead and did that. And it was also, had in mind – and it knew that, well, it took the view that if there were Treaty claims that would be relevant, and the evidence is that it wouldn't have proceeded if it had known. So that error of law or that error about the status of the, of Ngāti Whakahemo, was very much part of the decision to negotiate with the, Micro Farms. And then at B we submit that even if the focus is limited to Landcorp's decision to contract and not going back to OTS – it was just what I said actually, that Landcorp made a material error of law itself and that judicial review of the SOE contracting processes, this is something that we want to be able to argue if Your Honours give leave, is not so limited that an error of law like this, with a significant impact on –

GLAZEBROOK J:

So what was that error of law? The same at the OTS error of law? And, if so, was it ever specifically asked to make that assessment itself?

MS SCHOLTENS QC:

Well, it was –

GLAZEBROOK J:

Because I didn't understand it to have been, but I might…

MS SCHOLTENS QC:

It certainly was explained to it that it did have a Treaty claim, but it chose to –

GLAZEBROOK J:

When was that? Sorry.

MS SCHOLTENS QC:

Pardon?

GLAZEBROOK J:

When as that?

MS SCHOLTENS QC:

During the tendering process, I believe.

GLAZEBROOK J:

And the basis for that – well, okay, so…

MS SCHOLTENS QC:

Yes, which prompted them to then, Landcorp then to ask OTS what the position was, and then for OTS to reply, "No, there's no claim outstanding."

GLAZEBROOK J:

I thought it was just an assertion of a Treaty claim and then – but would it explain the basis of the Treaty claim, was it? I know they knew about the resumption –

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

– Waitangi claim – well, they obviously did because they put it in the contract.

MS SCHOLTENS QC:

Sorry.

GLAZEBROOK J:

Actually, a chronology would be quite useful here, wouldn't it?

MS SCHOLTENS QC:

I'm sorry. The Crown had the detailed information. Certainly the, what Ngāti Whakahemo said to Landcorp was not the full explained story about how the Settlement Act was being misinterpreted.

GLAZEBROOK J:

That's what I'd thought, but they certainly knew about – when was the, when did they, when was the resumption urgent application filed?

MS SCHOLTENS QC:

It was during this time. I have a date. 5 December.

GLAZEBROOK J:

Thank you.

MS SCHOLTENS QC:

So then perhaps to paragraph 9, the third point that's made, the legitimate interest in ensuring that Landcorp administers correctly understood whether it's Treaty claim was settle, "And Minister's treated the status of the Whakahemo's Treaty claim as directly relevant to the decisions they were making whether to sell the land in the first instance; whether to negotiate with Whakahemo (as well as Makino) when the tender was cancelled; whether to negotiate or even meet with Whakahemo once Makino walked away. All those decisions had a direct and material bearing on whether core trial land lost to Whakahemo was returned to it. Whakahemo has a proper interest in ensuring that those public decision-makers acted on the correct legal basis."

I understood their interests and the Courts, I submit, "Should protect that, and this is especially the case when Landcorp and Ministers would not substantively respond to Whakahemo's repeated explanation for why its Treaty clam was not settled."

There is a sort of a hint of a lack of good faith that is, has an umbrella over this, and obviously that's not something that one can say anybody did with any knowledge because they genuinely thought that the claim had been settled. But the lack of communication with Ngāti Whakahemo, the lack of engagement over that argument, they missed each other every step of the way, and that has had the impact of Ngāti Whakahemo feeling as though they have, you know, a whole new and

particular grievance. Had somebody looked at their argument a bit earlier then we wouldn't be here.

In terms of the third ground of appeal, the Ministers' powers to intervene, that raises all those questions about *Duomatic* and whether it survives the State Owned Enterprises Act et cetera. The Crown's response is effectively the same as to the second ground, to the extent that we're talking about remedy, so I don't need to do anymore with that unless the Court would like me to.

Then I'll turn to the effect of the protocol decision on relief. So this is after the first judgment from the Court of Appeal, the Minister went and had another look at whether he would intervene and seek the land for settlement purposes. And we submit that the fact of the re-consideration does not preclude setting aside the contract. That Landcorp's bad faith, the Office of Treaty Settlements' error of law, and the shareholding Minister's errors of law all had two real practical consequences for Whakahemo and as a result, Whakahemo lost the opportunity to secure three turn of core trial land, either first, as a part of a Treaty settlement, or secondly, outside that process, for example by directly acquiring it from Landcorp, type of opportunity given to Makino, which the evidence shows included the possibility of Landcorp assisting Makino with funding. So just, there are all sorts of potentials under (b). Whakahemo brought this litigation to protect both options. As a result of the Minister's protocol reconsideration (a) is no longer an option.

ELIAS CJ:
Does that mean that you accept that the land is not reasonably available for Treaty settlement purposes?

MS SCHOLTENS QC:
Certainly at the moment that's the case, yes.

ELIAS CJ:
Because he Crown did put, as I understand, put some information before you on that, following the first, the interim –

MS SCHOLTENS QC:
Yes, it is part of that process, I'm sorry, I'm not…

ELIAS CJ:

Well, I'm just wondering what the basis is for your saying that as part of the Treaty settlement is not an option?

MS SCHOLTENS QC:

Essentially because of the Minister's decision, which was not to –

ELIAS CJ:

Which you're not seeking to challenge?

MS SCHOLTENS QC:

No, no. So there are a number of reasons why the Minister decided that he didn't want this land taken out of Landcorp's operational bank and put into the land bank, and we're not challenging those and so we no longer see this as part of a Treaty settlement, at least in the short term.

ELIAS CJ:

Well, are you still pursuing your resumption claim?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

So it's not in the land bank for the purposes of Treaty settlement.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

And are they still seeking an urgent settlement?

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

And are they still seeking an urgent hearing of the resumption matter?

MS SCHOLTENS QC:

I don't know.

ELIAS CJ:

I think you were turned down –

GLAZEBROOK J:

I think that's –

ELIAS CJ:

– by the Waitangi Tribunal.

MS SCHOLTENS QC:

Yes, I think that was right. Yes.

GLAZEBROOK J:

Has it already been turned down?

MS SCHOLTENS QC:

Yes, it was.

ELIAS CJ:

And that was in part because of these proceedings, was it?

MS SCHOLTENS QC:

I'm sorry, I don't know, and it doesn't look like there's – I'm sure the Crown will be able to help you on that.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

I'm sorry. But that to one side, my client wants the opportunity to negotiate to buy, if it can, this property. It's in a position to be able to do that but it needs that opportunity to be provided to it.

So this option, we say, was overlooked in the Courts below, and to date has not resulted in the return of the land because prior to the litigation Landcorp and the Crown maintained the claim was settled and could be set to one side as irrelevant. As a result, no one will engage with Whakahemo. And secondly, since the High Court's interim judgment Landcorp and the Crown have declined to discuss the possibility with Whakahemo. After delivery of the High Court's interim judgment Whakahemo wrote to both respondents and sought to find a way to buy the land, including requesting a meeting, and offering to match the price paid by Micro Farms. Minister Finlayson replied that in light of its appeal to the Court of Appeal the Crown was unable – and this is in the evidence, Your Honour – was, "Unable to make any decisions 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 matter with Landcorp itself." And the for its part Landcorp declined to meet with Whakahemo because the land remained, "Subject to a binding agreement for sale and purchase with Micro Farms." So notably neither the Minister nor Landcorp rejected Whakahemo's approach outright, they simply said it was premature and had the High Court or Court of Appeal set aside the contract option B could have been considered, and that's what we seek from this Court, and we say it's appropriate to set aside the contract for the reasons set out there in paragraph 16.

Now, Your Honours, I don't have anything further to say about interim orders or the provision of an undertaking other than what's in the outline. So unless I can assist or try to assist further…

ELIAS CJ:
No, thank you, Ms Scholtens.

MS SCHOLTENS QC:
Thank you.

ELIAS CJ:
Yes, Mr Barker.

MR BARKER:
I'll just start by outlining what I propose to address. The primary focus of my submissions will be on the bad faith issue, just to drill down on some of the points that are set out in the submissions in opposition to leave. On the second point, on

the error issue, we'll adopt the Crown's position. I can certainly assist with any factual issues. I have some familiarity with that. There's just one factual point raised by my learned friend in the context of discussing the second error point, and that was to characterise Landcorp's attitude towards Ngāti Whakahemo as being a nuisance and I would just want to put that to bed. Following the cancellation of the tender in December of 2013, following the Minister's request to reconsider, Landcorp gave Ngāti Makino, and other iwi, which in fact included Ngāti Whakahemo, a two month period within which to put together a deal, so there is no sense in which it could properly have characterised its attitude as that of a nuisance. I'll deal briefly with the intervention by the Minister's point but –

ELIAS CJ:

Well I think really though the inference is pretty irresistible, that it was a nuisance, that it had, if its claims had been settled. I think that really that's the point that was being made. But if you think that someone has no claim, and they're persisting in saying that they are, they're simply a nuisance. So I don't think it was really to characterise your clients as being irritable or something of that sense.

MR BARKER:

I didn't want the Court to have the impression, to be left with the impression that Landcorp had a pejorative attitude broadly towards Ngāti Whakahemo, that was all.

ELIAS CJ:

Yes.

MR BARKER:

And in relation to the interim orders, I'll just deal briefly with that at this point. My instructions as of shortly before the hearing were that if leave were to be granted then Landcorp would take a relatively neutral position on entering orders without detracting fundamentally from its position today, namely that the appeal has no prospects, and in any event by virtue of the memorial that reminds on the title under section 27B, there is no respect in which Ngāti Whakahemo's broader rights are rendered nugatory by a sale of the farm, which it really –

ELIAS CJ:

Well they're not rendered nugatory but the, well it's probably more for the Crown than for you, the fact that a protocol arrangement was entered into with OTS and

Landcorp indicates that it was seen that there are some roadblocks that arise that it's as well to clear away. So it's not to say that there isn't the option of going to the Waitangi Tribunal and seeking resumption but that clearly wasn't thought to be something that precluded trying to respond more positively to claims.

MR BARKER:
Indeed. I think that's, yes, the negotiation option which is obviously the preferred option with the current Minister and previous Ministers in terms of settling claims is undoubtedly a background to the protocol and the agreement that proceeded it in 2007 to like effect.

Picking up the submissions on bad faith, and I'm really just speaking to the point that in the written submissions that were lodged last week. The first point is that the, consistent with the approach the Court of Appeal took, the only justiciable decision of Landcorp was the resolution of the Board of Landcorp in the afternoon of the 28th of February 2014 to sell and consideration of its actions up to that point only is relevant for the purposes of review and therefore the matters on which Ngāti Whakahemo rely post date that and therefore are not able to be taken into consideration and the Court of Appeal ruled that comprehensively and that remains Landcorp's position.

GLAZEBROOK J:
Say an offer had come in for 23 million, after the resolution but before the singing of the contract, would…

MR BARKER:
If an offer had been received I imagine that it, the proper thing for the recipient of the offer would have been to refer it to the Board. But no offer was in fact made –

GLAZEBROOK J:
No, I understand that.

MR BARKER:
– and, picking up a point that Your Honour Justice Glazebrook put to my learned friend in questions earlier, the evidence is that Ngāti Whakahemo didn't have the money to settle, even if an offer had, able to been advanced in that period. Mr Willie Te Aho writes after being informed of the completion of the sale that the question of

whether or not they could have met the purchase price is moot – I can give you the case on appeal –

ELIAS CJ:
Well, we don't have it.

MR BARKER:
No, I understand that.

ELIAS CJ:
Yes.

MR BARKER:
But for the purpose of the transcript I can give that reference if it's of assistance. But that is in the evidence, he acknowledges it's moot, so –

GLAZEBROOK J:
What does that mean though because –

MR BARKER:
Well, what it means –

GLAZEBROOK J:
– all he's saying is it's irrelevant because –

MR BARKER:
No, well…

GLAZEBROOK J:
– we didn't have that opportunity, isn't he, or do you take something more from that?

MR BARKER:
Oh, absolutely took something more from that in the sense that the emails between the Ngāti Whakahemo group and those sent to Landcorp in the aftermath of the announcement of the settlement were to the effect that they were working out if they could raise the money. So the inference that is, that I would invite be drawn from that

email from Mr Te Aho to Ms Houpapa, is that they were not there, they didn't have 23, didn't necessarily even have the 19.25 that Micro had offered.

WILLIAM YOUNG J:
If there's a sort of contextual issue, what's happened to the value of dairy farms since March last year?

MR BARKER:
Mr McKenzie dealt with that in an affidavit he swore late last year, Sir, and that is that undoubtedly the drop in the milk powder price since the contract was signed could have a bearing, but he would put it no higher than that, I think the view being that those who invest in dairy take a long-term view of prospects and therefore one couldn't be certain whether the price would have moved necessarily downwards since then.

So picking up the second point in relation to bad faith, which really drives off the Court of Appeal decision, we say there is no factual basis for the argument that Ngāti Whakahemo was misled to its detriment so as to jeopardise the integrity of the contracting process. And the first point I make there is one that's picked up by the Court of Appeal in paragraph 98 of this judgment, and that is that the, on the Thursday preceding the Board resolution to sell Mr Ririnui's solicitors wrote to Landcorp threatening an injunction if undertakings weren't given, and my firm replied around midday on Monday the 3rd of March, referencing section 27B memorial on the title and indicating that if urgent interim relief was sought that it was to be done on notice and that we were available to deal with it. No undertakings were offered, and the letter the next day from Koning Webster acknowledged that and complained about the fact that Landcorp hadn't offered it. So to the extent if one puts Mr Ririnui's, Ngāti Whakahemo's case, at its highest, it is on bad faith that –and I think one of Your Honours put this question to Ms Scholtens – that it delayed any application for an injunction whilst Landcorp put the contract to bed. Well, my response to that, by reference to that letter and Mr Koning's response to it the following day, is that it was clear from midday on the Monday the 3rd of March that Landcorp was not offering undertakings, regardless of what Ms Houpapa may or may not have said to Mr Te Aho in the ensuing couple of days. The contract was returned signed by Micro before 5.00 pm on the 4th of March, the conversations between Ms Houpapa and Mr Te Aho took place not earlier than after 5.00 pm that day, Landcorp signed the agreement – well, the second of signatories signed the following day, and

we say in any event that the conversations that Mr Houpapa had with Mr Te Aho had absolutely no bearing on Ngāti Whakahemo's actions, and that is again recorded in the same 6 March email that Mr Te Aho sent to Ms Houpapa that I referred to before, namely that whether or not the farm was sold they were just going to continue in their attempts to secure the farm through the Courts and through the Waitangi Tribunal, so we say that if there were bad faith, which of course is denied, it had absolutely no bearing on any figure that Ngāti Whakahemo was doing. I've already picked up the point that there's no evidence that there was an ability to pay, and we would say that in a private law setting, and which of course I acknowledge this is not, this would not even amount to an invitation to treat, but even if it did it doesn't get Ngāti Whakahemo anywhere, and by that I mean the conversation between Ms Houpapa and Mr Te Aho.

In relation to the primary ground on which leave was sought that the test was wrong, we say that in fact the Court of Appeal took the right approach and, by reference to English authority that we cited in our Court of Appeal submissions, that in order to equate to bad faith in a judicial review setting there needs to be something of the order of vindictiveness and an abuse of power contrary to the public good, and we say that the conversation between Ms Houpapa and Mr Te Aho falls well short of that. And I've noted also that Graham Taylor in his judicial review book, the only case that he cites in his passage on bad faith is a case Ngāti Kuri Trust Board, which involved corrupt actions by the principal culprit, as described, and again, however one characterises Ms Houpapa's conversations, they fell well short of corruption, and so we say that, just recapping on that, that the Court of Appeal applied the right test.

ELIAS CJ:

I really query whether that is not pitching it too highly in terms of public law principles, because my understanding of good faith in this context, for example, it's said that unreasonableness as a ground, when Lord Greene explained it in the *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 case was, really shaded into bad faith because it is an assessment of abuse of power which may be its use for improper purpose or because it's so unreasonable that it can't be explained in any other way. So I'm just not quite sure whether that is so very clear.

MR BARKER:

Well, certainly none of the cases that are referred to in fact articulate a test. I think the, from recollection, Justice Whata in a case, *Van Heron v ACC* (14:13:47), which we cited I think at first instance, does go some way towards it, and the Court of Appeal didn't, the bad faith issue was not appealed to the Court of Appeal, so he refers to a standard of obliquity, but certainly we say, and consistent with the Court of Appeal's approach, that a very high, a high standard is required to meet, to, for conduct to fall within the category of bad faith in the JR setting. I haven't had the benefit that Your Honour has of, the familiarity with Lord Greene, I'm afraid.

ELIAS CJ:

Well, it's ancient law really, isn't it.

MR BARKER:

And, finally, we say that in any event no rights of Ngāti Whakahemo have been adversely affected, as we've discussed, the rights under Wai 1471 are unaffected, the 27B memorial remains on the title for the moment.

ARNOLD J:

Are you arguing that the Court can't really take into account what appears to be the reality, and that is that negotiated arrangements are much favoured over resumption orders, and certainly the Crown has pretty vigorously opposed resumption orders? You're inviting us to say, well, that is legally available, but if one were to draw the conclusion that, yes, it is legally available but the preferred practical alternative is a negotiated solution, you're saying that that really is irrelevant for these purposes?

MR BARKER:

Well, we're certainly saying that the backstop, that the only actual rights that Ngāti Whakahemo has arise in relation to Wai 1471 –

ARNOLD J:

Right.

MR BARKER:

– because it can have no rights in relation to the protocol. The protocol between OTS, between the Ministers and Landcorp –

ARNOLD J:

Well…

MR BARKER:

– is a non-legally binding protocol, and picking up I think on a question that one of Your Honours may have put to Ms Scholtens about what would have arisen if Landcorp had boxed on the view that we take, is that, it being a non-legally binding protocol, if Landcorp had been so bold as to ignore the OTS advice, OTS would not have, that OTS wanted to acquire it, there was nothing that OTS could have done. Therefore, if we're right on that then certainly Ngāti Whakahemo doesn't have any rights arising from that protocol between those two parties.

ARNOLD J:

Well, it may not have a right in the sense that you're using the term, but it's certainly got an interest, and the fact that Landcorp made the enquiry of OTS tends to suggest that if it had received an affirmative answer that would have affected Landcorp's behaviour.

MR BARKER:

I don't doubt that that is in fact the case, I'm saying, I'm hypothesising as to –

ARNOLD J:

Right, but you –

MR BARKER:

– just to test the nature of the protocol between them, I'm not suggesting for a moment Landcorp would have ignored an advice, unquestionably that is the case.

ARNOLD J:

No, I understand. You really are inviting us to look at this in an entirely formal way, as a matter of strict legal rights, and not in terms of what I would describe as sort of practical interests based on the experience of the way the protocol worked, the way Landcorp worked, and so on.

MR BARKER:

That is in fact the case, based, and again this is a point that's in the written submissions, that is that SOE Acts are only reviewable if they affect adversely the right to third parties without affording any redress, and we say that nothing –

ELIAS CJ:

Sorry, say that again?

MR BARKER:

If the active SOEs are only reviewable judicially, if they affect adversely the rights of third parties without affording any redress. Now we say, as we did at first instance and in the Court of Appeal and, indeed, in relation to bad faith, both Justice Williams and the Court of Appeal agreed that Ngāti Whakahemo has no rights vis-à-vis Landcorp in relation to this farm, and therefore its actions in relation to the sale of the farm are not reviewable because they have, there are no rights to be adversely affected, other than those that arise from Wai 1471. I mean, I understand Your Honour Justice Arnold's point about interest in a practical sense and unquestionably, as I mentioned earlier, as I would understand it, 90% of Treaty claims are settled, and that is the Crown's preferred process by which to resolve them. But what I'm saying is that from Landcorp's perspective and in the context of the protocol, no rights in a legal sense arise and no review, there is nothing in the nature of a right that falls within reviewability.

ARNOLD J:

Thank you.

MR BARKER:

So we say in relation to, in concluding on that, that there's no basis to disturb the Court of Appeal's findings, and we say that, again picking up the point that I heard Ms Scholtens address, that the exercise of reviewing this would in any event be academic, because even if Ngāti Whakahemo were entirely successful in establishing in this Court that there were bad faith and the Court set aside the contract, it doesn't get them the farm. And, you know, I'll gratefully adopt the point that Justice Harrison made to my learned friend, Mr Isac, in the course of discussion on the interim orders, and that is litigation is not about teaching people lessons, but even if it were I think that those involved in the discussions have certainly in a very

public way learnt about the risks of having these sorts of conversations beyond that…

ELIAS CJ:

I'm not so sure that, whether it gets them the farm is though the right way to look at it, because if it gives them the opportunity to have their interest considered fairly that's a public law concern.

MR BARKER:

But their interests – I understand Your Honour's point – but their interests were considered, they were reconsidered by the Minister, who said that, who reconfirmed the earlier decision, and in so doing indicated that his assessment, or his officials' assessment, at that stage, which was August/September last year, was that if Ngāti Whakahemo were to receive a settlement it would be of the order of approximately one-fortieth of the value of the farm.

GLAZEBROOK J:

Although that's no longer pursued –

MR BARKER:

Indeed.

GLAZEBROOK J:

– so the only thing pursued now is the private treaty issue, so the opportunity to enter into a private treaty with Landcorp.

MR BARKER:

And essentially, if I could characterise that as this is a essentially a private law claim masquerading as a public law claim, to get a right of first refusal ahead of everybody else…

GLAZEBROOK J:

Well, not necessarily, because it could just be that you get the opportunity to put the highest price on the table.

MR BARKER:

Indeed, indeed.

GLAZEBROOK J:

But you would say, “Well, there’s no evidence that they would,” because you said earlier there was no evidence in fact, evidence to suggest that they couldn't put a higher price on the table or indeed even the price that is on the table now in terms of the contract?

MR BARKER:

That was certainly the case as at 6 March, Ma'am, 6 March last year I should say.

GLAZEBROOK J:

There is however the ability for Landcorp under that clause to get out of the contract, because I was going to ask you about the third party rights, but in fact that's been dealt with in the contract in the sense that if the competing claim can’t be settled then there is the ability to get out of the contract for Landcorp –

MR BARKER:

There is.

GLAZEBROOK J:

– and therefore Micro’s interest aren’t, they were always subject to that right of Landcorp to get out of the contract.

MR BARKER:

Of either party, that's correct, Ma'am.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

Sorry, only entitled if there’s an injunction?

MR BARKER:

That's right. It’s a form of prophylactic drafting we typically use for mortgagee sale contracts, Sir, and that's, and so, to give one a longer than normal settlement period in case caveats and injunctions arise –

GLAZEBROOK J:
Yes.

MR BARKER:
– and it was sensibly, as it turns out, decided to insert it into this contract, particularly because of the threatening correspondence on behalf of Ngāti Whakahemo. It is an entitlement on the part of both to walk away from the contract with no claim against the other; that is not to say that that's what in fact would happen on this, come the 31st of May.

WILLIAM YOUNG J:
Well, not at this very minute, is it?

MR BARKER:
30th of May –

WILLIAM YOUNG J:
Yes.

MR BARKER:
– is the deadline, Sir, that's correct. And Micro currently, or another of the payment –

WILLIAM YOUNG J:
Nominee.

MR BARKER:
– companies is currently leasing and operate a fully operational dairy farm there.

With regard to the intervention by shareholding Ministers, I won't take long on that. I'll happily adopt on the *Duomatic* point the Crown's submission, which is that whilst the question of the application of *Duomatic* principle in the, post the 1993 Companies Act enactment, may be a matter of general or public importance, it certainly, this is not the case for it. We simply take the position that the CA's decision in relation to *Duomatic* not applying in the context of the SOE Act, the framework and the division of responsibilities and powers is the correct one, and there is no benefit in revisiting that obvious statutory interpretation question. I don't intend to say anything more on

that unless Your Honours have any questions, and as I indicated before in relation to interim orders then of course the position is neutral.

WILLIAM YOUNG J:
But do you want an undertaking as to damages or not?

MR BARKER:
Well, yes, yes, absolutely, Sir, if leave is granted and interim orders are, further interim orders are granted by this Court, then we ask that they be supported by an appropriate undertaking, if necessary supported by security, depending upon the entity that offers it.

Unless I can assist Your Honours further, those are my submissions.

ELIAS CJ:
Thank you, Mr Barker. Yes, Mr Gough.

MR GOUGH:
Thank you, Your Honour. I should first say – excuse my voice – first off that we actually did bring our chronology attached to our Court of Appeal submissions if that would help Your Honours. It is our chronology from our submissions in the Court but –

ELIAS CJ:
Well, is it accepted do you know?

MR GOUGH:
I'm not sure, I just, Your Honour mentioned it earlier. So perhaps we could talk in the break and if it is we could hand it up after that.

ELIAS CJ:
Yes.

MR GOUGH:
So the Attorney-General opposes the grant of leave in respect of, as you all know, the second and third grounds, and I think perhaps I should commence, given some of the exchanges that have happened to this point, with a bit of an overview of our, why

we oppose leave on this, and I think the first point is the interests at stake, and it's the Crown's submission that there is no Treaty interest remaining in this case, one, because of the ultimate protections that were discussed in relation to the memorial, so Wai 1471, is still a live claim, it's before the Tribunal, and can be heard, found, well-founded, and then proceed to the remedies of resumption. That as Your Honours have already said to my friends, may not be the whole hog, so to speak. As Justice Arnold mentioned, there is the practical, perhaps better practical situation, of direct Treaty negotiations. But in relation to that, as my friend Mr Barker said, that matters seems, the Minister has already said, "Yes, we will, we do accept now that your claim is not settled –

ARNOLD J:

What I was talking about when I talked about direct negotiations was direct negotiations with the vendor about the purchaser of the block.

MR GOUGH:

Yes, I was just going to get there. The first point is that the Minister and Crown accepts the claim is not settled now. Secondly, the Minister said, "Yes, we will negotiate with you on your Treaty claim at some time in the future but, thirdly, that farm will not become part of your Treaty settlement, for various reasons." And, as my friend Ms Scholtens said, that's not something, that reconsideration is not something that –

ARNOLD J:

But doesn't that just emphasise how important the opportunity to negotiate to acquire it is?

MR GOUGH:

Well, that is, in my response, no, Sir. It is part of a much broader Treaty settlement negotiation process of which the protocol was the first part. Now I must apologise, the submissions we received from our friends had dropped the protocol side of the Treaty argument and, indeed, the position that there was a Treaty problem here, so our submissions in response were prepared on that basis, but I can address that point. And the protocol, as my friends have said, are non –

GLAZEBROOK J:

But I don't think the question was on the protocol was it?

MR GOUGH:

Well –

GLAZEBROOK J:

It was on the direct ability to negotiate with Landcorp.

MR GOUGH:

Yes, but it's the first – if I may, Your Honour – it's the first part of the point here. Because when the Ministers, when OTS and the Ministers enter into Treaty negotiations, there is a lot involved, and the first thing of course is what is going to be offered as redress. There's land, there's money, there are co-management arrangements, there's a whole lot of stuff. Now this protocol is in relation to land, the beginning of it. I understand, and I think there's evidence from the High Court, that the basis or the genesis of the protocol was that there had been some problems between Landcorp and OTS in the past, Landcorp's a very large landholder, and it's land that the Crown would like to get its hands on in order to settle. So at times land was sold when the Crown might have been able to offer it or use it, so the protocol was set up, as I understand it in the evidence, to redress that problem, in fact it was the second or third arrangement between those organisations.

ELIAS CJ:

It sounds though, from what you're saying, that the, if one thinks of the Treaty of Waitangi Tribunal procedure on the one hand and the Crown's policy of direct negotiation and settlement on the other, that the protocol is an extremely important part of the second. I know it's probably not an issue in this case, but I would have thought that it's almost in the area of soft law that the Courts will supervise, if it is performing the sort of important gate-keeping function that I think you're indicating.

MR GOUGH:

I won't agree with Your Honour in relation to its of practical important, but I wouldn't go so far to say that it's part of even soft law, and the reason which I – and there are a few steps to this so bear with me – but the reason is because it is one of a number of decisions that might ultimately lend to some land, if any land, because it just might be cash, ending up in the hand of someone through a other group, through a Treaty settlement. There are a number of intervening, there's a whole negotiation to go, there's a mandate for the group to get, the group itself has to accept that offer, there's a lot to do, and I think, and certainly to date it's been well accepted and it's

common ground, that the offer of Treaty settlement redress and the Crown's decision even to enter into a Treaty settlement redress with a particular group, is something that is a political policy process, it is not something that to date the Courts have been, and there's the reason mainly that it is a political solution to a number of old grievances through negotiation, direct negotiation, that is discussed and accepted or not by other side. So our point is that the protocol's one part of that and you can't just pick that one part up because it doesn't make sense if the decision is a whole, of which it has many variables on both sides of the equation, the Crown and the iwi concerned, it's not something that can be just beyond the political process in that respect. So –

ELIAS CJ:

Well, I can understand that you can't pick out one particular part of it like that, but if the practical effect of the sorting to be undertaken between OTS and Landcorp is that some land will be released and therefore not available for Treaty settlement, I can see how there may be some need for those who are affected to be heard on that, because there's no formal process otherwise.

MR GOUGH:

I probably can't take that point further. I think you're agreeing with me that the whole process – but what I will say about that is that in this case if the land is still subject to a memorial and it can still, the resumption process is still there, and so parties have that option, the Crown can stop negotiating, the iwi can stop negotiating, if they really want that farm.

ELIAS CJ:

Well, the Waitangi Tribunal will have to be judicially reviewed to grant an urgent hearing in this case. Well, you'd say it doesn't have to be urgent because the memorial stays.

MR GOUGH:

It's still there.

ELIAS CJ:

Yes.

MR GOUGH:

So, the iwi party to these negotiations can decide they really want that farm and that option is open. So, and what we're saying here is that in relation to the Treaty settlement then, or the ultimate redress and the protection of that, is ultimately there, even after the negotiations haven't been successful, in order to get that farm back. So in relation to judicial review and the interests at stake, we say that there's nothing in this that means that there's some soft, even soft law, in that Treaty negotiation process from beginning to end that has those decisions, unless that means that the Court needs to have a look or can have a look, or if it makes sense for the Court to have a look, given that the whole process is something that will ultimately be decided on a political basis between the Treaty partners.

GLAZEBROOK J:

Well, that's not – if there are decisions being made and they're being made on irrational grounds or they're being made on bad faith or corruptly, of course the Court can look at those decisions.

MR GOUGH:

Well, this is a decision that the…

GLAZEBROOK J:

So you can't, you can't dub something –

MR GOUGH:

I know – I agree, Your Honour, I agree.

GLAZEBROOK J:

– a political process. Just about everything that's done by the Minister is elated to a political process, it doesn't mean to say it's not reviewable.

MR GOUGH:

I agree with Your Honour. Well, I probably didn't mean to go that far. What I was meaning here was the decision of whether or not to put redress on the table is ultimately part of the political decision.

GLAZEBROOK J:

But that's not even being suggested by the would-be appellants now. They accept that the reconsideration has stopped that being put on the table at this stage. So I still don't understand why you want to go, take us through it.

MR GOUGH:

I was asked –

ELIAS CJ:

I think you were asked.

MR GOUGH:

I was asked by Justice –

ELIAS CJ:

All right.

GLAZEBROOK J:

No, no, I don't think – well, I didn't think that Justice Arnold was asking you that. He was asking you, saying about the opportunity to have a commercial negotiation with Landcorp, which is all that's on the table.

MR GOUGH:

Well, no, Ma'am, I think if – and please correct me – I think what I was being asked was the importance of the direct Treaty negotiation process.

ARNOLD J:

No, no, I, what I was talking about, as I explained, was the opportunity to have a direct negotiation with the vendor of the land, Landcorp, to purchase it.

MR GOUGH:

Sorry, I understood, I thought you were asking about the direct Treaty negotiation as opposed to resumption, I'm sorry, Sir.

ARNOLD J:

No, no, not at all. And so, because, and the reason for the question is that's the only avenue that remains live in the litigation and, as I understood the argument,

Landcorp had enquired about whether the applicants had an interest, it was told that they didn't, and therefore it went ahead with another process. If it had got the correct answer, the argument is, Landcorp would have done something different and engaged in a direct negotiation.

MR GOUGH:

I don't, I'm not sure, Sir, whether the evidence does actually say that, and so if we're in the realms of looking at evidence then…

GLAZEBROOK J:

Well, I think Mr Barker conceded that was the case just now.

MR GOUGH:

When it was first, when Landcorp first asked OTS the question, it was at that point under the protocol and the protocol was asking whether or not the land was needed –

ARNOLD J:

Yes, initially it was, yes.

MR GOUGH:

Then of course Landcorp did enquire about whether or, they'd heard from Ngāti Whakahemo and enquired about that and OTS said, "No, no, it's all settled." Ngāti Whakahemo continued to say they weren't. Obviously at that time OTS's view was that Ngāti Whakahemo were wrong. That same communication on the 19th of November, OTS actually says to Landcorp, "I think you should treat them as an interested, like an expression of interest," so from that point there was the – from that point it was suggested that it might be a commercial purchaser, and then lots of –

GLAZEBROOK J:

I'm sorry, can you jut repeat what you said then?

MR GOUGH:

The 19 November communication – so the first communication –

GLAZEBROOK J:

Well, you have to remember we haven't seen any of these communication.

MR GOUGH:

Sorry, yes. The first communication under the protocol was that OTS said, "We don't want the land. There are no Treaty settlements that would justify our need to –

GLAZEBROOK J:

And so when was that?

MR GOUGH:

That was in September 2013. The letter or email that largely features in the submissions between the two of us today is one on I think the 19th of November that same year, where in the interim Ngāti Whakahemo had written to Landcorp and said, "We the farm is for sale, we've got a Treaty claim," and Landcorp went to OTS and said, "Well, who is this group? You've said you don't want the land for a Treaty settlement." The response was that group was Ngāti Whakahemo, "They're settled." Now it's common ground that's an error. But that email also said, "So treat them as, treat it as an expression of interest." So from that point on, you know, the idea of a commercial engagement and purchase was there.

So, anyway, having put away, I suppose, the idea of the Treaty interest, it's there, what the Crown says is that there is no other interest that is protected by the law of judicial review in the commercial acquisition. Now I know that the applicant will see it differently because of the connection they have with the land and certainly the way they –

GLAZEBROOK J:

Which was obviously something that was of importance to the Crown in asking that Landcorp defer, stop the tender process and defer it for two months so that…

MR GOUGH:

Well, that's another matter of evidence. That situation was quite different, it was about Ngāti Makino, who also have interest in the land, they wanted to acquire the land also, prior to their Treaty settlement, this is in the High Court evidence –

GLAZEBROOK J:

No, well, that's not prior to it, because wasn't it post their Treaty settlement?

MR GOUGH:

They wanted to acquire it prior to their Treaty settlement.

GLAZEBROOK J:

Oh, so they had wanted it, yes.

MR GOUGH:

At that point Landcorp's strategic direction was that that farm was central, it would never be sold, and the Crown passed on to that iwi that it was never going to be available and it shouldn't even have an RFR. So the intervention, well, the suggestion, was to cease the process, was in order to, the Minister's asked for an opportunity, he only asked Landcorp, they didn't direct, they can't direct, they asked Landcorp to cease that process in order to try and redress this problem. Landcorp did. The evidence also, and there's an affidavit in the evidence from an OTS senior manager that the communication was also that, "Ngāti Whakahemo thinks its claim is not settled, we don't agree, but they are interested and will, may be pursuing the Wai 1471 claim which obviously if it doesn't settle can still go to resumption, so we want you to talk to them as well." Sorry to keep mentioning evidence, but the further evidence from that is that – and I can't go beyond that because I think there was, it was complicated, the way things happened, but there were meetings at which, or one, at least one or two meetings at which Ngāti Whakahemo was involved with Makino and Ngāti Awa and others. So that did happen.

But again, I struggle, we struggle, to see what would be the interest that is protected in terms of administrative law beyond the Treaty ones that we say are protected, and certainly in relation to the Treaty, direct Treaty settlement point, which I – sorry, Sir – in relation to that that's moot now because the Minister has reconsidered and there's an affidavit from him that sets out all the grounds on which that happened. So putting that to one side –

ELIAS CJ:

Again, we don't have that.

MR GOUGH:

Actually, we do have comments. That's the, we didn't think that was entirely relevant because of my friend's concession –

ELIAS CJ:

Yes, I think that's right, it's not –

MR GOUGH:

– but we do have that if Your Honours…

ELIAS CJ:

No, I don't think we do need it, because of the concession that's been made.

MR GOUGH:

So putting that there and having the ultimate protection of Wai 1471 by the resumption process and, I suppose, the procedures that may need to be adopted to get there, what's the interest that remains to have a commercial negotiation? And that's the thing that we really question here and consider that, probably say "boldly" in our submissions, can't succeed.

GLAZEBROOK J:

Sorry, what did you say? I didn't catch that.

MR GOUGH:

I was saying that we boldly say in our submissions that that, the remaining, the rump of the, the remaining interest, is while we can accept that the claimants, the applicants, don't see this from the view of the law, that remaining interest is just to commercially negotiate a purchase.

GLAZEBROOK J:

Well, it's not totally commercially a commercial process, is it, given the background in terms of Treaty breaches but also the background in terms of the special place that land has in Māori society? So it's not a commercial issue, it's not money in the sense of merely money, and it's not substitutable land in the normal case that it would be for a commercial entity, is it?

MR GOUGH:

Oh, I see –

GLAZEBROOK J:

And it does have that whole background of the Treaty and of tikanga in terms of the land and culture and the, and I hate the analogy, but the partnership issue, and the state-owned enterprises may well not be the state but they are nevertheless part of the state structure to some degree at least.

MR GOUGH:

Well, firstly, I see Your Honour's point and that is why, just why I said – I know the applicants won't see it this way but what I'm –

GLAZEBROOK J:

Well, the Crown shouldn't be seeing it that way either, should they, in terms of their Treaty obligations?

MR GOUGH:

Well, just, the point there though is that the system that we've got and what the Crown must do see it through the Treaty process that we have. Now –

GLAZEBROOK J:

But that doesn't mean that the Treaty can't permeate other aspects of the law, does it?

MR GOUGH:

No, it doesn't, but –

GLAZEBROOK J:

I mean, there obviously is the Treaty process –

MR GOUGH:

Well, that's –

GLAZEBROOK J:

– and the Crown does have an obligation to see that through, but that doesn't, that doesn't exclude the fact that there might be other obligations that arise, does it?

MR GOUGH:

I suppose, well, that's the question, I suppose, isn't it? That background, in my submission, is looked after by the Treaty settlements process and the knowledge, and that background, the Crown's direct negotiations or the Crown's need to deal with applications for the Tribunal. And while we can accept and understand those wider contexts in, outside of that process, the question still remains whether that is a process to which there is any right or any interest that can't be looked after under that Treaty process, whether that remains. And our submission is that it doesn't and that you don't need to go there to do that.

GLAZEBROOK J:

But Landcorp itself saw that it would have not necessarily an obligation but certainly it responsibly would have acted – and I think that was conceded today – differently. Now it mightn't have acted to any great effect if there wasn't an ability to purchase.

MR GOUGH:

But, Ma'am, well, we don't know why Landcorp would have done that. I mean, this is another matter if we don't know. I mean, it may have been because they wanted to be good corporate citizens and get on well with OTS or other – we just don't know. I mean, let's not –

WILLIAM YOUNG J:

Just pause there. Would, if Landcorp had been told, "Yes, the claim hasn't been settled but, no, we don't want the land," would it have acted any differently?

MR GOUGH:

Well, I don't know, Sir.

WILLIAM YOUNG J:

But why would it have acted differently?

MR GOUGH:

Well, it may have acted differently, it may not, but I can't even tell you why it might have acted differently. There might have been commercial reasons, there might have been reasons to do with its relationship with Ministers, it might have been a Treaty – you know, what I'm saying there, Sir, I just don't think that we can grab at that. I think the fundamental point is still whether or not there is something outside of

the – what is there, does the, do the applicants in this case have a right to seek a commercial purchase beyond what they otherwise have above and beyond other people owing to their Treaty claim? And my suggestion is, no, they don't. People can have attachments to land for lots of reasons, it's not just this one. I'm not done playing it by any means, I'm just, just to put the argument where it is. And the other thing, of course, is that the Crown has accepted that Wai 1471 is not settled, but Wai 1471 hasn't been heard yet, so it's – and I'm not suggesting that the claim is not a valid claim, but it hasn't been heard, we don't know the boundaries of it. Your Honours were asking about the land and what the boundaries are, well, the claim is currently over a certain amount, the High Court accepted that it may be amended to cover the rest because of course the claims, while the deadline's passed, can be amended, all those things haven't been determined yet in the Tribunal either. So what I'm saying there is that that connection to the land is claimed, where would the line be drawn to say that there's an interest that we can come and ask for a review of in relation to having missed out on whether or not to become part of a commercial purchase? And, as I say, the evidence has suggested anyway that there were opportunities to participate in the tender process, anyway. So I don't know whether I've carried on too long on that point, but that's certainly one of the questions that we have and we don't see where – not all interest are protectable in this Court and in judicial review, and we think this is not one, it's basically, from the perspective of the law, this is a, this is the same as anyone who's lining up for a commercial purchase, although I acknowledge the view of the applicants and, of course, the other process that we have to work out those matters.

So in that regard, for that reason, that's why we say in our submissions quite strongly that we don't think you can review the advice in a letter, and for all those reasons I have just given. And I've realised it's now 2.50 and Your Honours wanted to break at 2.45.

ELIAS CJ:

Yes, we'll take an adjournment now for 15 minutes.

MR GOUGH:

I'll pick that up when I come back.

ELIAS CJ:

Thank you.

COURT ADJOURNS:2.50 PM
COURT RESUMES: 3.17 PM

ELIAS CJ:
Thank you, Mr Gough.

MR BARKER:
Your Honour –

ELIAS CJ:
Yes.

MR BARKER:
– before Mr Gough gets started, I wonder if I might seek a, what I hope is a minor indulgence? I gave what on reflection was an incomplete answer to Justice Glazebrook in the context of a question. My recollection – and Justice Glazebrook will correct me if I've mischaracterised the question – was would Landcorp have acted differently in relation to the advice from OTS and I said, I think very quickly, yes, it would have acted differently. I just wanted to clarify that that was just specifically by reference to the protocol and not, didn't go any further than that, and it would be obviously a matter of speculation as to what it would have done, other than by reference to that document. Thank you. Are there any questions?

ELIAS CJ:
On the protocol?

MR BARKER:
Yes, because –

ELIAS CJ:
It would have not made the land available for sale?

MR BARKER:
Well, it depends, because Justice Young's question highlighted the significance of it, because I think he asked Mr Gough what would have happened if OTS had advised the Minister that the claim wasn't settled –

ELIAS CJ:

Yes.

MR BARKER:

– but that the land wasn't required. In that circumstance, Landcorp wouldn't have changed, in terms of the protocol, I'm speaking specifically to that document.

ELIAS CJ:

Well, is there evidence on that? What you're saying is there was evidence addressed to the first point, that they wouldn't have put the land up for sale if advised that there was an extant claim?

MR BARKER:

No, no. I don't think that there is evidence – and I appreciate the Court doesn't have, this Court doesn't have the benefit of the evidence. So my answer was, informed speculation based upon the relationship between OTS and Landcorp, with specific reference to the protocol –

ELIAS CJ:

Yes.

MR BARKER:

– which dictates, it sets out very clearly what happens. There is a three-month window. For example, if OTS says it does, it is interested in the land for Treaty settlement purposes, it has a three-month window within which to negotiate for its purchase.

ELIAS CJ:

Yes.

MR BARKER:

But, as I say, I was just concerned my –

ELIAS CJ:

That's OTS –

MR BARKER:

Yes.

ELIAS CJ:

– purchasing it –

MR BARKER:

Purchase it.

ELIAS CJ:

– from Landcorp?

MR BARKER:

At market value.

ELIAS CJ:

Yes.

MR BARKER:

And that is the purport of the protocol for land, schedule D land that, in respect of which OTS expresses an interest in acquiring. So I hope that clarifies –

GLAZEBROOK J:

Yes. So it's not totally speculation is it though, because when the Crown actually said you need time to deal with Ngāti Makino, then that was actually accommodated by Landcorp, so…

MR BARKER:

Yes, outside of the terms of the protocol in circumstances –

GLAZEBROOK J:

Yes, so it's not entirely speculation –

MR BARKER:

No.

GLAZEBROOK J:

– to say that Landcorp may have acted differently –

MR BARKER:

No.

GLAZEBROOK J:

– not necessarily would have acted differently –

MR BARKER:

That's right.

GLAZEBROOK J:

– had there been a different indication in terms of Ngāti Whakahemo?

MR BARKER:

Whakahemo's, yes.

GLAZEBROOK J:

Whakahemo.

MR BARKER:

That's right. Yes, the circumstances, Mr Gough's explained the circumstances in relation to Ngāti Makino's interest in the land, and so that does assist in supporting my answer as being not merely speculation. Anyway, I'm grateful for that. Thank you.

ELIAS CJ:

Yes, thank you.

MR GOUGH:

Thank you. And perhaps I should just clarify also that the protocol asks OTS to advise Landcorp whether or not it requires the land or may require the land for a future settlement. The question about whether it doesn't ask to inform Landcorp whether they're extant claims or not, that's part of the thinking that OTS puts behind its advice to Landcorp.

ELIAS CJ:
Yes, I see.

MR GOUGH:
Thank you. So, just my final point in relation to the second ground in addition to what we've already discussed and in our submissions is simply the fact that the applicant doesn't seek, doesn't actually in fact seek any direct or real remedy against the Crown in relation to the advice that was provided in the letter, and we would say that's of no benefit or purpose anyway, given that it's common ground that the information in the letter was incorrect and that, among other things, the Crown has determined to enter into a future settlement with Ngāti Whakahemo, and the – oh, yes, that's on that.

So unless Your Honours have any further questions about that OTS error ground, I'll move to the third ground. Thank you.

This ground relates to the decision by shareholding Ministers, shareholders of Landcorp, not to intervene in order to direct Landcorp's Board not to sell the farm. The argument in the submissions in this Court is that Ministers have a discretionary power to intervene, and the decision not to intervene was based upon an error of law that they didn't have the power to do so. So the way the argument goes from the applicants, we think, is that the shareholders, they say, "In an SOE we have the power to make management decisions above each of the *Duomatic* principle and formal unanimous assent." Ministers proceeded as though they didn't have that power, that was an error, and that must mean they're asking that the decision to intervene or not to intervene should be perhaps set aside and that Landcorp shouldn't have decided to enter a contract and that the contract itself should then be invalidated. And we say, as we do in more detail in our written submissions, that we think that faces a number of hurdles.

The first one is, in our submission, the Ministers, or the shareholding Ministers of state-owned enterprises, cannot intervene using *Duomatic* in the way submitted by the applicants. Now we set this out in paragraph 28 of our written submissions and I don't think I need to go into detail unless you'd like me to there. But, in short, we would think that the operation of that principle would be inconsistent with the scheme policy in design of the SOE Act and it would undermine it, particularly for the way that legislation sets out the respect roles of the Board and the Ministers and the

obligations of Ministers to report to Parliament and the obligations of the Board to report to Ministers the specific things, the specific ways in which Ministers under that Act can direct, and would effectively mean that Ministers would be effectively accountable for every commercial decision made by an SEO simply because they might have intervened to modify or prevent something, and we think that contradicts core policy in a way that is pretty clear.

Again, like in the second ground, there's no relief sought or, we would say, meaningfully available in relation to this Ministers' decision, and we can't see what relief would be granted now, now that that decision not to intervene has been made. Clearly, the ground is a stepping stone to the decision by Landcorp to enter into the contract rather than something for which relief against the Crown will serve any purpose.

GLAZEBROOK J:
Is a declaration not sought? I'm sorry, I don't have the pleadings immediately.

MR GOUGH:
Not – no, not in this Court.

GLAZEBROOK J:
What do you mean, "not in this Court"?

MR GOUGH:
Well, I don't believe that it's a relief sought.

GLAZEBROOK J:
In the pleadings?

MR GOUGH:
In the pleadings or in the notice of appeal. I'll just check with Mr Humphrey. That's correct, thank you.

The third point is that, unlike the claim in the second ground, the error by Ministers in this ground isn't, there isn't any question of a tainting the decision by Landcorp to enter into the contract. We go through this at paragraph 30. It's, in our view, a leap between the fact that Ministers didn't intervene and the claim the Landcorp shouldn't

have ended the contract. Even if the Court were to find that Ministers could have intervened or should have, it doesn't follow that Landcorp's decision is tainted by that, it was a separate unrelated decision. So we say at 32 in summary on that that point that the validity and lawfulness of Landcorp's decision to enter the contract doesn't depend on the Ministers' prior decision that they couldn't intervene. And so the Ministers' decision not to intervene, we would argue, doesn't find, you know, doesn't found a basis for a challenge to the lawfulness of the Landcorp decision. And for the same reasons that we've discussed at length in relation to the second ground, we would say that the Ministers' decision not to intervene didn't affect the rights and interests, as we discussed and in the manner earlier, and that's set out also, the paragraphs 19 to 22 of our written submissions. We do accept that the extent of shareholding Ministers' powers in relation to commercial decision-making of SOEs is important; we don't think it arises in this case however. And, similarly, in relation to the scope of the *Duomatic* principle and whether or not it survives the 1993 Act is also something that will fall to be heard one day, but again we say that that is not something that falls for decision in this case.

So, Your Honour, unless there are any further questions, there is, other minor detailed matters are covered in the submissions, that would be, I suggest, all from me. Thank you.

ELIAS CJ:

Thank you, Mr Gough. Yes, Ms Scholtens.

MS SCHOLTENS QC:

May it please the Court, I think I have four points. The first, just on the last point that Mr Gough raised, in the pleadings we have sought a declaration that the Ministers did have a power to offer the undertaking that was sought or take other steps to protect the interests. Now that's not in the relief sought in our notice of appeal, but it's really background, I guess, if you are going to come to the remedy that we're seeking you will be looking at the lawfulness of the steps that led to it. So I'm not sure that –

ELIAS CJ:

But are you seeking a declaration?

MS SCHOLTENS QC:
No.

ELIAS CJ:
No, I see. So the pleadings did seek it –

MS SCHOLTENS QC:
Yes.

ELIAS CJ:
– but you're not now pursuing that.

MS SCHOLTENS QC:
There's, certainly the notice of appeal doesn't specifically ask for one. I may need to – it's too late for that, isn't it – I know the notice of appeal is, I know the leave sought, the judgment sought, yes, simply said, "The setting aside," and I guess as one of the steps on the way to get to that point we would be asking you to look at the lawfulness of, under those three grounds, of an appeal, the lawfulness of those three steps that were taken; that includes the Ministers' decision that they had no power to intervene.

My learned friend, Mr Gough, also said there was no question of taint in relation to this causes of action, but you will see I think the submissions make clear that the position is again it was the same error, the Ministers thought they had no power to intervene, whether or not there was a proper claim. So the claim issue tainted this decision, and this was the context in which they were asked to get involved.

Now turning to another point, the process by which Landcorp dealt with Ngāti Makino, I'd just draw the Court's attention to the interim decision where His Honour sets out that process and, in particular, could you note that – he deals with it at paragraph 37 to about 46 – and the key points are that Landcorp would only deal with Ngāti Whakahemo *[sic]*, that's was the evidence of the Landcorp witnesses, and they left it to Ngāti Whakahemo *[sic]* to deal with other iwi if they saw fit. That was not necessarily what the Crown had intended, but that is what Landcorp thought the Crown meant. So they wouldn't deal with –

ELIAS CJ:
Well, the request was, from the Minister, to discuss with Ngāti Makino, wasn't it?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

And so Landcorp took the view, as Justice Williams refers to, that the lead –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– contact for them was Ngāti Makino?

MS SCHOLTENS QC:

Makino, yes. Thank you, Ma'am. And so they did not deal directly at all with Ngāti Whakahemo. The talks that were, with Ngāti Whakahemo, were four days before the expiry of the timeframe and, as the Judge found, Ngāti Whakahemo did not know about the timeframe, so that was the sort of context they were in, and of course those talks failed in part, as His Honour says, because of the question over who was to take the lead role when Ngāti Whakahemo considered itself mana whenua, and that was agreed. So those talks didn't go anywhere.

The next point is, I think my learned friend, Mr Barker, mentioned an email that is in the evidence and was sent before the contract was signed, recording that it was going to be difficult to meet the amount. But there is, that is in the context of the view that 23 million was what they needed to meet, and evidence was also put before the Court from Ngāti Awa, from Mr Pryor, who was involved in discussions with Ngāti Whakahemo and, as I said before, they couldn't justify the 23 million but when they heard later that the farm had gone for considerably less, well, they were disappointed and they thought they may well not have withdrawn from the negotiations if they'd known that the ballpark was somewhat less.

That is all I have, Your Honours, unless you have anything further.

ELIAS CJ:

No, thank you.

MS SCHOLTENS QC:

Thank you very much.

ELIAS CJ:

Thank you, counsel. We will reserve our decision in this matter.

COURT ADJOURNS: 3.35 PM