IN THE SUPREME COURT OF NEW ZEALAND SC 135/2017

BETWEEN **NGĀTI WHĀTUA ŌRĀKEI TRUST**
Appellants

AND **ATTORNEY-GENERAL**
First Respondent

NGĀTI PAOA IWI TRUST
Second Respondent - Abiding

MARUTŪĀHU RŌPU LIMITED PARTNERSHIP
Third Respondent

NGĀI TE RANGI SETTLEMENT TRUST
NGĀTI KURI TRUST BOARD
Interveners

Hearing: 14-15 May 2018

Coram: Elias CJ
William Young J
O'Regan J
Ellen France J
Arnold J

Appearances: J E Hodder QC, J W J Graham and R M A Jones for the Appellant
D J Goddard QC and D A Ward for the First Respondent
P F Majurey for the Third Respondent
P A Joseph and T D Smith for the Interveners

CIVIL APPEAL

MR HODDER QC:

May it please the Court. Mr Hodder appearing with my learned friends Mr Graham and Ms Jones for the appellant.

ELIAS CJ:

Thank you Mr Hodder.

MR GODDARD QC:

May it please the Court. I appear with my learned friend Mr Ward for the Attorney-General.

ELIAS CJ:

Thank you Mr Goddard.

MR MAJUREY:

May it please the Court. Majurey for the third respondent.

ELIAS CJ:

Thank you Mr Majurey.

MR JOSEPH:

May it please the Court. Philip Joseph, Your Honours. My friend Mr Tim Smith and I represent the Interveners in these proceedings, Ngāti Kuri and Ngāi Te Rangi.

ELIAS CJ:

Thank you Mr Joseph. You are aware that we will decide later whether we need to hear from you orally in this matter, as we usually do with Interveners. Thank you. Yes Mr Hodder.

MR HODDER QC:

Thank you Your Honour. I want to say that I don't propose to hand up anything else by way of a roadmap. I have one additional case that I should have put in the submissions earlier on which I'll hand up when we get to it, but the roadmap is that I will try to a large extent to follow the scheme of our written submissions which of course the Court has had now for a little while. But I do want to commence by focusing on what we say are the matters of public and general importance that the Court has granted leave for this appeal to take place on. We have identified those we hope in our submissions early on, but principally that is the relationships between the Crown and iwi, particularly in a post-settlement context, and the relationships between the institutions of Government, that's what we say at paragraphs 1.6 and 1.7, and associated with that is the balance that is required between the principles firstly of access to the Courts, and secondly freedom for the legislature to operate in a way that it must.

So this litigation from the appellant's perspective is about access to the Courts, or at least restoring or confirming the importance of that element in the balance, compared to the way in which the Court of Appeal in the judgment below saw that, and it may not be unhelpful, and I apologise if this tends to go towards sort of rhetoric, but it may be worthwhile saying something about the heritage of the laws of New Zealand because this case does rather interestingly touch on aspects of that. So if I can briefly mention the Treaty, including Article 3, and the rights and privileges of British subjects, which goes towards the question of access. Tikanga principles, which the Court appreciates from the pleadings are an issue here, particularly ahi kā and mana whenua. Imperial legislation is at issue here because as we'll see in a moment both –

ELIAS CJ:

Sorry, what sort of legislation?

MR HODDER QC:

Imperial. Because both Magna Carta and the Bill of Rights have that kind of a, at least a subsidiary cast reference point in there, that maybe worthwhile just mentioning that aspect of it. It comes across in two forms. One is the importance of it in general terms, I haven't provided the Court with it, but the Court have access to it, but in the very first report to the Law Commission, back in what seems a long time ago, on imperial legislation enforced in New Zealand, written by Sir Kenneth Keith, there is a useful introduction to what became the Imperial Laws Application Act, making the point that our law in part grows from and contains within its body of legislation dating back to the 13th century, particularly the Magna Carta of the 13th century and the Bill of Rights from the 17th century. It goes on to say those documents are critical features of our history and contribute to our political and constitutional principles and systems.

Now that was revealed, or confirmed, in *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC), which is mentioned particularly in the Intervener's submissions, where it may be recalled that the Chief Justice Sir Richard Wild said that reference to the Bill of Rights in that case was a graphic demonstration of the depth of our legal heritage. Now modern legislation covers, includes for relevant purposes the Bill of Rights, section 27, access to the Courts for rights or interested recognised by law to be determined, and more recently the Parliamentary Privilege Act 2014, which refers to the principle of comity in the context of a particular form of Parliamentary privilege, and last but not least the common law principles developed by the Courts in relation to access to justice and non-interference with Parliamentary freedoms.

Now it's the first of those common law principles that I wish to start with and if it's convenient I refer the Court to the first bundle of the appellant's authorities, that's volume 1, at tab 12, *R (on the application of UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)* [2017] UKSC 51, [2017] 4 All ER 903. That is a decision of the United Kingdom Supreme Court from 2017, and the Court sat with seven members, and was concerned about fees which might affect access to

employment institutions in terms of the employment regime, that is the context for it. There is a summary of the general point that I'm about to make in the headnote, the first proposition at the bottom of the first page of the headnote and onto the second page, but concluding with the proposition, "That the right of access to justice, administered promptly and fairly, had long been recognised and could only be curtailed by clear and express statutory words." Now that's developed in the leading judgment delivered by Lord Reed for the Court, starting at around paragraph 66. The Court will notice that the Lord Chancellor's responded, so it may be that the Court felt the need to emphasise what it was saying, but there's a long passage that goes from paragraph 66 to somewhere near paragraph 80 or thereabouts, under the heading, "The constitutional right of access to the courts." So 66 commences with the sentence, "The constitutional right of access to the courts is inherent in the rule of law." And then paragraph 68 on the next page goes on to explain that, "At the heart of the concept of the rule of law is the idea that society is governed by law." Now this Court doesn't need to be told those matters. This is simply a recent, an extended elaboration of the proposition.

One of the points made towards the end of paragraph 68 is that people must have, in principle, unimpeded access to the courts. Without that, laws are liable to become a dead letter et cetera, and that becomes an issue as to whether the law gets lost somewhere if you don't have access to the courts.

On the next page, at paragraph 74, there is reference to Magna Carta, which is what I mentioned a minute or two ago, and in relation to what was Chapter 29 of the 1297 version, or Chapter 40 of the original 1215 version, the point being that treated by the Court as, "A guarantee of access to courts which administer justice promptly and fairly."

Then for legal historians there's a reference to Coke and to Blackstone, and then it goes on to refer to more modern authorities in paragraphs 76 and following. So the general points not in doubt, there's the the general principle of access to the Courts, and nobody wants to labour that to any great extent. That point that's perhaps more relevant, or at least is relevant for my

purposes, comes in paragraph 80 where the Court says, “Even where a statutory power authorises an intrusion upon the right of access… it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question,” and it refers across to the quote particularly of, on paragraph 82 across the page from the *Ex p Leech* case [*R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198]. The relevance of that for our purposes is that we submit that the same caution is appropriate when the Courts make a rule that has an intrusion to the access to the Courts, it’s not just where the statute does it, and that’s the issue we’re concerned with here. So if you can use the shorthand of the *Milroy v Attorney-General* [2005] NZAR 562 (CA) principle then the question is, is a *Milroy* principle limited to what is reasonably necessary to fulfil the objective of its purpose, and that’s, we say, one of the issues that the Court will be addressing in the course of these arguments and in its consideration of the matter.

ELIAS CJ:

But you’d say the same about executive rules and policies, would you?

MR HODDER QC:

Yes.

ELIAS CJ:

Mmm.

MR HODDER QC:

If one has, one started with the proposition that there are rights or interests recognised by law which are at issue –

ELIAS CJ:

And those you’ll come onto pinpoint for us in the context of this case?

MR HODDER QC:

Yes. Well I’ll attempt to do so, yes.

ELIAS CJ:

Yes.

MR HODDER QC:

So that is the position that sets out the broad proposition of access to the Courts, and we say that's the fundamental starting point. There are, of course, limits and the first of those comes in the case under the next tab, which is the *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) decision, the Privy Council decision from 1994. A judgment given by Lord Browne-Wilkinson, and on page 6 of the judgment, towards the bottom, we find the heading, "Article 9," referring to the Bill of Rights 1688, about line 45 and following, and the well-known reference to freedom of speech in Parliament, and then over the page, at the top of page 7, His Lordship goes on to explain, "In addition to art 9 itself, there is a long line of authority which supports a wider principle, of which art 9 is merely one manifestation, viz, that the Courts and Parliament are both astute to recognise their respective constitutional roles. So far as the Courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges," and then goes on to set out some authority that supports that. Again, no doubt about that, but the focus of it is on what is being protected, what's being protected are the legislative functions and the established principles for Parliament within its four walls. That's the target of the protection.

In, for what is a useful summary, if I can then invite the Court to look at our second volume, at tab 34 there is a reprint from the very recent, earlier this year edition of *De Smith's Judicial Review*, and we've printed extracts from it, with the hands of Lord Woolf and Professor Jeffrey Jowell to the fore. So the first extract is at page 20, paragraphs 1-034, it deals with the question of justiciability, which of course is central to what the Court is hearing today and tomorrow morning. Again, nothing that this Court is not familiar with, but the questions marks, or the qualifications come in towards the end of paragraph 1-034. "There are certain decisions which courts cannot or should

not easily engage. Courts are limited (a) by their constitutional role and (b) by their institutional capacity." Then there's lengthy footnotes at 106 and 107 citing *Khaira v Shergill* [2014] UKSC 33, [2015] AC 359 case, talking about two categories of non-justiciability, the first where the issue is beyond the constitutional competence assigned to the Courts. "Cases in this category are rare, and rightly so, for they may result in a denial of justice which could only exceptionally be justified either at common law or under ECHR. The paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament." The second category is based on a constitutional limits of the Court's competence as against those of Parliament.

ELIAS CJ:
Sorry, where are you at?

MR HODDER QC:
I'm reading from footnote 106. The second footnotes goes on to refer to matters that might be non-justiciability if there are, "Claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law." The subject matter is simply not suitable for it and then goes on to give some examples of that.

The second extract from *De Smith's* to which I will draw attention is at page 123 and paragraph 3-018, it comes a few pages further in, which is one of the places where you find the language of no-go area.

ELIAS CJ:
Sorry, what paragraph?

MR HODDER QC:
Paragraph 3-018 with the heading, "Public functions outside the court's jurisdiction." So, "Despite the expansion of judicial review there are situations in which the court has no jurisdiction. Matters falling into those 'forbidden areas' or 'Alsatia" include the following categories in which, as a matter of law, the court may not embark on an inquiry into a claim beyond satisfying itself

that the case does truly fall within the relevant no-go area. Challenges to decisions relating to the internal procedures of the United Kingdom Parliament," refers to the Bill of Rights 1689, "and exclusive cognisance or jurisdiction," of that body, and then goes on in the next page, "For the purposes of Parliamentary privilege, a distinction is drawn between the 'core or essential business' of Parliament that are part of its proceedings (and therefore immune from challenge) and 'an activity which is an incident of the administration of Parliament' which is not." And again we submit that when one approaches what we call the *Milroy* principle, the focus should be on those core essential business of Parliament, as opposed to that more widely cast.

The second exception given by De Smith comes close to where we are now. (b) Challenges to the validity of provisions contained in Acts of Parliament," which we're not concerned with, "… or seeking to require or prevent a bill to be laid before Parliament." And footnote 77 refers to the *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1490 (Admin); [2008] ACD 70, case is a case if I can hand up to the registrar. It's also a footnote referred to in the earlier discussion from *De Smith* that I referred to, but I mentioned it as an example of what the purpose of the exercise is. Now I should have included this in the original submissions, but it's useful in a couple of respects. So this was a challenge on the basis that the British Government had promised a referendum in relation to a new European treaty, and it introduced legislation which provided for that. Then there was one or two hiccups, including some –

ELIAS CJ:
It's not the old *Wheeler* case is it?

MR HODDER QC:
No, this is a new *Wheeler*. This is about Europe rather than rugby clubs.

ELIAS CJ:
Yes, that's right.

MR HODDER QC:

So there was a treaty which was going to be acknowledged in the, there was provision for a referendum in the first Bill and that was a promise made by the British Government. The proposed treaty suffered some upsets in other countries by referenda there, it got defeated in other parts, and so there was a new treaty, the Lisbon Treaty was prepared, and the legislation that the British Government introduced for that did not contain provision for a referendum, and this was challenged saying that, well the judgment expectations was going to be a referendum, and new legislation didn't have it, and it was in difficult territory because what it was saying was that the British Government should either introduce their legislation for a referendum, or it should amend the existing one to add provision for a referendum.

Now that was the way the case was framed, and if one turns to paragraph 23, we see the point I've just been making towards the last half a dozen lines. Mr Singh as counsel for the applicants made clear that he, "He sought no more than to require the Executive to introduce into Parliament a Bill (or to move an amendment to an existing Bill) providing for a referendum. Now that's a very substantial "no more than" given what we know about the general principles, but that was what the case was about, but it gave the opportunity for the Court to consider that and why it wasn't a credible claim.

So if we turn to paragraph 41 we find the language the Court uses under the heading, "Can a promise of this kind give rise to an enforceable legitimate expectation." It makes the point in the second sentence, "The subject matter nature and context of a promise of this kind place it in the realm of politics, not of the courts, and the question whether the government should be held to such a promise is a political rather than a legal matter." That is reasonably clear cut. The same point is made in paragraph 43, over the page. About half way through there's a reference to the *Begbie* decision, about legitimate expectations, and the Court says, "In our view a promise to hold a referendum lies so deep in the macropolitical field the court should not enter the relevant area at all." So that's, again, reinforcing that this is a political or macropolitical field.

ELIAS CJ:

It does depend on the subject matter, though, as they say, doesn't it? I'm just trying to think across categories and although I haven't checked it, it does appear to me that in some of the Canadian cases concerning indigenous right, for example, or quasi-indigenous rights, in the case of the *Manitoba Metis*. That case was founded on a promise. Now in Canada they're not as enamoured of legitimate expectations as the British are, but it was certainly something that was justiciable. I may have the…

MR HODDER QC:

Yes, yes.

ELIAS CJ:

So this was a case about a foreign treaty and whether it could be pursued, but the Court does make the point that it is, how one reacts is going to depend on the subject matter.

MR HODDER QC:

That must be right, that it depends upon the subject matter.

ELIAS CJ:

Yes.

MR HODDER QC:

For my purposes legitimate expectation perhaps not so important as the fact that the Court is saying, we won't go into the political world, and then they say why they won't go there, and when they say why they don't go there is towards the bottom of the page at paragraph 46, where they quote from another case, quoting *Prebble* to refer to two principles on which the law of Parliamentary privilege is based, this is at the very bottom of the page. "The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers," and those are, we submit, the relevant principles that we're concerned about when

we're looking at an exception to the general access to the justice point, and obviously the submission is that neither of those are really engaged here.

So over the page it stated, "Requires the judiciary not to interfere with or to criticise the proceedings of the legislature." And as the Court will appreciate the appellant accepts the proposition, it says what it's seeking is outside that. Then goes on to make the same point on 47, with reference to a quotation from *Smedley*. "Clearly be a breach of the constitutional conventions for this court, or any court, to express a view… concerning the decision to lay this draft Order in Council before Parliament or concerning the wisdom or otherwise of Parliament approving the draft." And the word "wisdom" is one that's used in the [*Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA)] *Sealords* case, which is one that we'll get to in a minute.

Then in terms of why they see this as being covered by Parliamentary privilege, is paragraph 49. "In our judgment, it is clear that the introduction of a Bill into Parliament forms part of the proceedings within Parliament." Why, because it's governed by standing orders and it's governed by a member of Parliament in their capacity as such. Then the bottom point, the bottom of the paragraph makes the point that, "A declaration… would necessarily involve some indication… that the defendants were under a public law duty to introduce a Bill into Parliament to provide for a referendum. The practical effect of a declaration would be the same as a mandatory order."

And in various ways we see echoes here of the *Sealords* decision itself, which as I say I'll come to, but in our submission it's a useful indication of what the purpose is, which is legislative freedom of operation, and what's trying to be avoided, which is the realm of politics, and again I stress that those are matters that aren't matters which the appellant seeks to pursue, and that's what it's doing. And one of the issues, as the Court knows from our submissions, is what the scope of the *Milroy* principle is, whether it's the four walls of Parliament plus introduction, or whether it's something more, and it's

the something more which the *Milroy* principle says there is, and which is really the focus of the submissions for the appellant.

So Ngāti Whātuai mean Orākei is here because it contends that its rights and interests, protected or recognised by law, are in issue, and it also says that they will continue to be in issue. That is because the Crown –

ELIAS CJ:
So what are the rights and interests protected by law that you're relying on?

MR HODDER QC:
I'll come to that in more detail when we get to the statement of claim. Broadly two things. One is a right not to have its mana whenua disregarded, and secondly the more specific right of not to have land in the rohe transferred without processes having been gone through which are referred to in the pleadings. But it's important that that course of conduct is at the heart of the concerns for the appellant. It's not just the transfer of these properties that is of concern, and that's what triggered the litigation, unquestionably. But in the process of getting there the course of conduct that's been involved, involves a disregard of the mana whenua which Ngāti Whātua contends for, and for present purposes we're assuming is provable.

And as we'll come to the way in which the Crown has framed its case is to ignore the disregard aspect of focus on the transfer point, saying the transfer is only going to be by way of legislation, end of story, there is nothing here to see. The Courts are rightly not part of the process, and our submission is that that creates, or that rather, in itself, disregards two issues. Firstly, things have already happened and gone wrong, there has already been a disregard of the rights that are asserted in relation to the land in question, and secondly, there is an ongoing issue that these rights that are asserted by Ngāti Whātua, they need to be clarified and tested, and the short form of that is that having entered into the settlement arrangements that it has, and its understanding of the general law, Ngāti Whātua seeks to find out whether what it contends for in relation to both those points, but in particular the disregard point, is the law

of New Zealand or not, and two Courts below said no, you can't find that out. This is not available to you. You do not have access to the Courts to get an answer to that question, and that is the essence of, a major point of difference between the Crown and the appellant.

WILLIAM YOUNG J:

Just so I understand. What is the basis – sorry. Were it not for the proposal to transfer the land, the pieces of land, what would be the legal basis for the, a sort of a freestanding claim to have mana whenua respected? I understand there's a statutory context, or whatever, then that may be material to a power or decision, but is there a freestanding right to –

MR HODDER QC:

That's a fundamental aspect of the relationship between the Crown and the iwi, which arise from both the settlement arrangements and from tikanga.

ELIAS CJ:

And from the Treaty potentially –

MR HODDER QC:

I should have said that what the deed provision and incorporated in the Act say is that the Crown looks forwards to a relationship based on the principles of the Treaty. So, the deed and the Act and the pleading are asserted to create that basis. It says the Crown has effectively committed itself to the principles of the Treaty in this relationship, ignoring mana whenua is inconsistent with that. The relationship has been, the relationship terms had been breached at that point.

WILLIAM YOUNG J:

Totally ignoring mana whenua is a strong form of it because I imagine the Crown would say, deny that it is, but just in terms of the situation devoid of the proposed transfers, what would the basis of the claim be? Say there was simply an ongoing dispute or debate about what might happen, how these

claims might be settled, would your clients be entitled to come to the Court and say we have a right not to have our mana whenua infringed?

MR HODDER QC:
Yes, the proposition is that there are rights of consultation and accommodation incorporated in that relationship.

WILLIAM YOUNG J:
So that's based on the Treaty and then what the –

MR HODDER QC:
That's right, and it also draws on the Canadian jurisprudence which I'm going to come to.

WILLIAM YOUNG J:
Is there any particular statutory context here that's material?

ELIAS CJ:
Declaratory Judgments Act?

MR HODDER QC:
Well essentially –

ELIAS CJ:
Well you're being asked about –

WILLIAM YOUNG J:
Is there a particular statutory context as well?

MR HODDER QC:
Well there are, there's a settlement legislation itself, the specific settlement legislation which incorporates the settlement deed between the Crown and Ngāti Whātua. More generally there is the Declaratory Judgements Act, as the Chief Justice mentioned, and then there's the general law around it.

ELIAS CJ:

It takes you back to rights though as section 27 of the Bill of Rights Act takes you to rights.

MR HODDER QC:

Or interests.

ELIAS CJ:

Rights or interests, yes, exactly. Rights or interests recognised by law?

MR HODDER QC:

Recognised by law is the phrase in the statute.

ELIAS CJ:

Yes.

MR HODDER QC:

And so we say that tikanga, mana whenua and the various manifestations when pleaded are rights recognised by law. That's really the issue we haven't been able to get to because the Courts below had said, you can't come to court on these topics.

ELIAS CJ:

I suppose one of the contextual matters, and accepting the points that you make, the statutes are enacted for a purpose and so you get people with the Treaty of Waitangi Act 1975 you get behind to the Treaty, I suppose that the text of the Treaty itself in terms of its implicit recognition of territorial interests is important.

MR HODDER QC:

Yes, we would accept that. It underpins, I imagine, everything else we're talking about. The legal issue we have here is that Ngāti Whātua's starting position is it has land in the area. That land is gone on the basis of Treaty breaches which are acknowledged in the settlement deed, in the legislative

deed. Now there's a question mark about land that the Crown owns and is wishing to transfer for the purposes of Treaty settlements to other iwi, and that raises the question of mana whenua.

ELIAS CJ:
Yes. Can I ask you, because it's not clear in my mind, there was the land that was sold in 1842, was it?

MR HODDER QC:
1840.

ELIAS CJ:
1840, the land that was sold in 1840, and there's the other land that you're claiming is the right of first refusal which has been overtaken. Was that, that was wider was it?

MR HODDER QC:
Yes, if I can perhaps refer the Court to the pleadings, which make that clear. So the pleadings are to be found in volume 1 at tab 14 of the case on appeal. My apologies, 17.

ARNOLD J:
The second amendment is 17 I think.

MR HODDER QC:
Volume 1 of the case on appeal, tab 17, my learned friend is right and I'm grateful. If one turns to the back two pages, this is pages 99 and 100 of the volume, then 1840 is the transfer of land, this is the land that was made available to enable the development of the Auckland urban area in 1840, and that's on page 100, and then back a page, what's called the "2006 RFR Land" that's the wider area of first refusal which was originally agreed, or originally understood to be available before the Waitangi Tribunal issued a report that said there was a process problem and other iwi needed to be involved. So it

includes, as the Court can see, in the northern top of the RFR land, is the transfer land, but it's a much wider area of the Auckland isthmus.

O'REGAN J:
Did the Tribunal distinguish between the two in its report?

MR HODDER QC:
No, we distinguished it for the purposes of the pleading.

O'REGAN J:
Right.

MR HODDER QC:
I don't believe there's a distinction in the Tribunal report.

O'REGAN J:
Was there any distinction made in the collective arrangement about the RFR?

MR HODDER QC:
No, but I mean the collective arrangement has an even wider area that's subject to a RFR.

ELIAS CJ:
Oh, that's the other question. I was going to ask you what's the area subject to the RFR…

MR HODDER QC:
There's a wider, there's a map somewhere which is… a much wider area – the jury put in a series of maps which I haven't got my fingers on at the moment, but it's a much wider area from Muriwai down to much further south.

ELLEN FRANCE J:
The map that's from Mr McEnteer's exhibit, is that, just so I'm clear what we're talking about, if you go to volume 4 of the exhibits volume, tab 48.

So volume 4, tab 48, we've got the two maps there, and the bigger one on the back.

MR HODDER QC:
Yes, those are clearer maps of what's in the statement of claim. So the –

O'REGAN J:
But they don't show the wider area?

MR HODDER QC:
The wider area is wider still.

ELIAS CJ:
I see, yes.

MR HODDER QC:
So it covers a much greater area of Auckland, not just that very narrow bit of the isthmus.

ELLEN FRANCE J:
Oh, because it goes right up and down doesn't it?

ELIAS CJ:
Yes, down to the Raupatu line I think.

MR HODDER QC:
Yes, my learned friend Mr Goddard, has helpfully pointed me to volume 2 at tab 34, and at page 289 there is a map which covers a much wider area of which the isthmus is a relatively small part.

ELIAS CJ:
Yes thank you. So the Waitangi Tribunal Orākei process report, I've forgotten what it's called, but it was, it challenged the second map you showed us, the right of first refusal map.

MR HODDER QC:

Yes, that was a matter of concern.

ELIAS CJ:

So that then comes open.

MR HODDER QC:

That comes out of the settlement with Ngāti Whātua.

ELIAS CJ:

But is there anything in the Orākei report that indicates any – does it deal with overlapping claims in the area of purchase?

MR HODDER QC:

Well the –

ELIAS CJ:

As opposed to the right of first refusal area.

MR HODDER QC:

Well two points. It's not quite a direct answer, I don't think, but it may be as far as I can go. So firstly the Tribunal was concerned that the Crown had been dealing with Ngāti Whātua, not with other iwi in the area, and that meant there was a process problem.

ELIAS CJ:

Yes.

MR HODDER QC:

And there was a first move advantage it thought was inappropriate. The second was it took the view that the Crown didn't have to resolve overlapping claims area issues.

ELIAS CJ:

No, I know.

MR HODDER QC:

So having done that it didn't need to say anything else about those matters, and it doesn't, I don't think they specifically address what might or might not be subject to a right of first refusal.

ELIAS CJ:

I see. Thank you. Just because I've interrupted you, there is other litigation wending through the Courts. Is it in relation to the Tamaki isthmus, this is the, is it Tamaoho?

MR HODDER QC:

I'm conscious, I think that it's working its way through. I haven't, that's Ngāti Te Ata who refer to the south west, is the way I understand it.

ELIAS CJ:

Perhaps within the wider collective.

MR HODDER QC:

Yes, they may will be at the bottom –

ELIAS CJ:

So we have to know something about what that case is, somebody is going to have to tell something about that, because we don't want to walk into that if we don't need to. We just need to be a bit careful about it. There's a reference to it, I think, in Mr Goddard's submissions in a footnote or something.

MR HODDER QC:

Yes, that's right. Although not for that particular point, that's for a different point.

ELIAS CJ:

I know but I would just like to know what the claim's about so that we're mindful of that in what we're being asked to do here.

MR HODDER QC:

Well I might leave that to him in the sense I haven't studied that claim for that purpose.

ELIAS CJ:

Yes, no that's fine, I just want to flag it, thank you. I'm sorry to have interrupted you.

O'REGAN J:

Can I just come back to the collective. So the broader, broader area, is there anything there where there was an acknowledgement of the mana whenua of particular iwi in particular areas of that broader area, in particular of Ngāti Whātua Orākei in this area?

MR HODDER QC:

Not explicitly.

ELIAS CJ:

Because by that stage the Crown is taking the policy decision that overlapping claims aren't for it to resolve. Is that the reason?

MR HODDER QC:

In terms of that settlement, yes, and under that, it has its own procedures, internal and in terms of the Act how that works. What's going on here, of course, is the land is being taken outside those procedures. The initial attempt was to do so by way of an Order in Council, an Order that the Minister was entitled to make, which is where the judicial review started, and then when the judicial review had got a certain amount of distance, then the Crown, or the Minister, took the view that it would only be done by legislation, which was no doubt a way, it was hoped the judicial review would go away.

ELIAS CJ:

But in your submissions you say that the Minister in initially proposing to deal with the matter by way of agreement for sale and purchase, was acting under statutory powers. What statutory powers?

MR HODDER QC:

It's the statutory power to take land out of the wider collective RFR area. So all the land.

ELIAS CJ:

No, I don't mean that. That's the subsequent agreement, isn't it, the clause 21 or whatever it is.

MR HODDER QC:

That's the collective agreement.

ELIAS CJ:

I mean, I think in your submissions you say that when you brought the proceedings it was because the Minister was proposing to transfer land, and you brought these on the basis of his decision to transfer the land.

MR HODDER QC:

By means of an order which would remove the land from the collective regime.

ELIAS CJ:

Well what's the power he was exercising there, do you say?

MR HODDER QC:

It's the specific power under the collective Act. I can track it down if I can do that a bit later.

ELIAS CJ:

Okay, well just come to it at some stage, because it wasn't clear from the submissions. Thank you.

MR HODDER QC:

Yes.

O'REGAN J:

The point I was just trying to extract in relation to the collective arrangement is there was, the arrangement envisaged that land would be removed from the RFR area, if it was necessary to, for the Crown to provide it as redress to another iwi, and I'm just trying to reconcile the position Ngāti Whātua is taking now with the fact that it signed up to that arrangement, that seemed to contemplate exactly what occurred here.

MR HODDER QC:

Ngāti Whātua's position is it contemplated that land within the RFR area would be available to those who were within the collective arrangements, and land can be made available under those arrangements, and it would participate. What it didn't say, what it says it didn't sign up to was that the land could be taken out so it'd have no participation. Now it's true that there is a power to do that, but the contemplation that that would be used would be subject to general judicial due principles which is what triggered the original statement of claim. That is to say the relevant considerations to use that power would include mana whenua.

O'REGAN J:

But if it was seeking some exclusivity in relation to the 1840 purchased land, wouldn't the collective deed have provided for that?

MR HODDER QC:

Well it, there's a historical –

O'REGAN J:

Given that their starting position was they had an exclusive RFR.

MR HODDER QC:

Yes.

O'REGAN J:

They conceded to a non-exclusive RFR with the ability to remove land out.

MR HODDER QC:

That's right.

O'REGAN J:

Wouldn't, if they had sought exclusivity over the 1840 land, wouldn't that have been the place to deal with it? To actually flag that so that it couldn't be removed?

MR HODDER QC:

If the Crown could have been persuaded to it, yes, but clearly –

O'REGAN J:

Well did they ask for that?

MR HODDER QC:

Indeed, that's what they started off with, or they had it, effectively, in the original arrangement in the Waitangi Tribunal process report. So what happened then is a compromise, the original RFR from the 2006 arrangement is gone and replaced by the collective RFR. So two aspects of that which may or may not completely answer Your Honour's question, but the first is that within that there are processes and expectations which, if it stays within the regime, that wider collective RFR regime will apply. Your Honour rightly says there was also provision to take it out. The question is, what were relevant considerations when it comes to that, is the only relevant consideration that the Minister wants some land to settle with another iwi, or is it relevant to take into account that there are also mana whenua issues which have not been exterminated, they've simply been suppressed, as it were, for the purposes of the collective arrangement.

O'REGAN J:

But the whole basis of the collective arrangement was the dispute about the interests of other iwi in the wider areas. So, if a mana whenua that gave an exclusive right with purchase was being asserted, surely it would have been stated in that document?

MR HODDER QC:

That's a question of interpretation of the collective statute and all the background that went into it. The position that certainly that Ngāti Whātua takes, and as is made, advanced in the Court of Appeal, was that it certainly never understood that it was giving away mana whenua in that underlying sense that it had gone forever, and so if there was to be land taken out from the collective RFR, that it's mana whenua was simply irrelevant.

ELIAS CJ:

The Minister's correspondence does refer to if it's appropriate or the word appropriate is used, which presumably you invest with some wide contextual significance, not simply that if the Crown wants to, or something like that, is it?

MR HODDER QC:

Yes, it is the point I was making to Justice O'Regan's question, that it isn't an open-ended, we say it wouldn't be an open-ended discretion to take land out. It would have to be for a purpose and having regard to relevant considerations, of which the purpose of settling with other iwi would only be one, and that's compatible with the assertions that Ngāti Whātua has. So Justice O'Regan's point is the same point in the sense that applied to the High Court Judge, that surely the right of first refusal was Ngāti Whātua and it thought it achieved in 2006 must have been somehow extinguished by virtue of the collective arrangements, and the inability to achieve what was originally thought was going to be achieved in 2006, and our response is no. For the purposes of the collective RFR the mana whenua was pulled for the purposes of things going on within that process and outside that the mana whenua wasn't affected, and that should've been a consideration for the Minister in using the statutory power. So, the Minister then having, that having been the

way in which the litigation developed, the Minister then came to the view that there would be no transfer other than by a legislation, and that brings us to the present point.

O'REGAN J:
Is it Ngāti Whātua's case that the Minister should have acknowledged that in relation to the 1840 land at least their mana whenua is exclusive and no other iwi or hapū has any mana whenua?

MR HODDER QC:
It should have gone through the processes but –

O'REGAN J:
But is that what Ngāti Whātua's claim is, that it has exclusive rights in that area, and that nobody else should ever be able to receive land in that, inside that area?

MR HODDER QC:
Subject to the processes that it sets out in parts of it rights, it can consent to it and what the Crown is obliged to do is consult seriously and accommodate where possible on the premise that there is exclusive or principal mana whenua in the area, primary mana whenua in the area.

ELIAS CJ:
Can I just ask, it would not be – you've relinquished, you don't have a right of first refusal in any of that area –

MR HODDER QC:
Under statute –

ELIAS CJ:
And you've exercised, you've got your redress. The real objection is to the Crown providing land within what you say is the rohe of Ngāti Whātua as

Treaty settlement. You would have no objection to the Crown selling land within that and providing the money to another iwi as redress?

MR HODDER QC:
Not an issue that's been specifically raised so far.

O'REGAN J:
Well the Crown couldn't sell it because it would be subject to the other RFR though wouldn't it. It's a cat chasing its tail.

ELIAS CJ:
Yes, but if that wasn't an impediment, the problem that your clients have is with the Crown making reparation out of land within their rohe to another iwi.

MR HODDER QC:
Yes.

ELIAS CJ:
Thank you.

MR HODDER QC:
If it's convenient what I was going to do was explain just briefly the basis for some of those procedural aspects before I turn to the statement of claim structure and terms. Can I invite the Court to go back to volume 1 of our bundle of authorities and to tab 10. So the Court will find there *Haida Nation v British Columbia* 2004 SCC 73, [2004] 3 SCR 51, one of the many cases that there has been in Canada in this area. The headnote on the first page provides a summary of what the issue was. The British Columbia Government was issuing a licence in relation to trees. That was challenged by Haida Nation. The Judge at first instance found the Government had a moral but not a legal duty to negotiate with Haida. The Court of Appeal declared that both the Government and the private company had a duty to consult with and accommodate Haida with respect to harvesting timber. The

Supreme Court finds that it's right in relation to the Government but not in relation to the private company. That's the end result of the case.

For my purposes, it is a description of the consultation and accommodation which we say is also a feature of what happens here, and in terms of the source of it, if one turns to page 522 of the judgment, paragraph 16, there's the beginning of a discussion of the source of a duty to consult and accommodate. Makes the point there that it is found that in the honour of the Crown. That point is also emphasised in paragraphs 19 and 20, and at the end of 20 says that the ultimate issue is implication of a duty to consult and if appropriate accommodate. The discussion then carries on. You might like paragraph 25 which sets out the historical context for the expectation, or the honour of the Crown. And then 32 summarises that. "The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution." In our language, post-settlement context. There's then a discussion about when the duty arises, which is paragraphs 35 and 36 and following, and then a new heading at paragraph 39 on page 531 describing, "The Scope and Content of the Duty to Consult and Accommodate." Then at paragraph 40 there's a quotation of the Court's earlier decision in *Delgamuukw v. British Columbia* [1997] 3 SCR. 1010. It talks about a range, varies with the circumstances of the cases, and towards the end of the quote mentioning that in some cases, "May even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

On page 534 there's a discussion of consultation, includes reference to paragraph 46 to the New Zealand Ministry of Justice's *Guide for Consultation with Māori* from 1997. Then at paragraph 47 at the bottom of that page, "When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate."

ELIAS CJ:

Sorry, where's that because we don't have the numbers.

MR HODDER QC:

Paragraph 47 on page 534. The numbers are always in the middle of the page in the way it has been reproduced.

ELIAS CJ:

Yes, thank you.

MR HODDER QC:

That carries over to the next page, at paragraph 48, "This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal 'consent' spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take."

It then goes on to say in 49, "This flows from the meaning of 'accommodate'… defined as to 'adapt, harmonize, reconcile…" et cetera, "… settlement or compromise." Then goes on at 50 to say, "The Court's decisions confirm this vision of accommodation." So the proposition that one goes from an honour of the Crown to a duty to consult in good faith to accommodate where consultation shows that's appropriate given the existing rights, is the sequence of analysis and belief, as it were, that underpins an important aspect of the statement of claim, which I now propose to turn to.

ELIAS CJ:

It is, of course, under section 35 of the Constitution in Canada, so you have to develop the linkages here.

MR HODDER QC:

Yes, I understand that there is scope to argue these differences, and there may well be those sorts of issues for the matter at a trial, an argument there,

but we haven't got to that point. We're still being told that you can't get there because this is within the principle.

ELIAS CJ:

Except that's a matter of law. The linkage is a matter of law. It's part of the foundation that you're urging on us. I'm not saying you don't get there but you better bring it home Mr Hodder.

MR HODDER QC:

Indeed, so I can then turn to the statement of claim and explain how this is designed to operate. That was at tab 17 of volume 1 of the pleadings. So in terms of Ngāti Whātua's position at paragraph 1 it identifies itself. At paragraph 5 explains that it was an established hapū as at February 1840. Paragraph 9, it says that through ahi kā has mana whenua in the central Auckland region, and particularly in the areas in paragraphs 11 and 14 which are respectively the 2006 RFR land and the 1840 transfer land. Paragraph 7, the Crown breached the Treaty of Waitangi by alienating lands. Paragraph 8, Ngāti Whātua has continuously maintained ahi kā and then paragraph 13 refers to the 2011 deed incorporating the agreed historical account. That then leads on to paragraph 14, then the Settlement Act, that Ngāti Whātua is part of is referred to at paragraph 16. The collective is then dealt with in paragraphs 17, 18 and through to 20.

So, against that we have then land from the 2006 land, or the 1840 transfer land, in Crown ownership, and the question then arises as to what happens to that, and that's to say outside the scope of the collective arrangements, which is what we are concerned with. And the Minister's evidence in court was that there had been a Cabinet agreement in July 2015 that up to 17 properties might be transferred to Ngāti Paoa. In the end the decision focused down on two of them, and it's in August 2015 that the first of those decisions is made that there will be, and this is on paragraph 21 of the pleading, preliminary decision to transfer the two particular properties at Ngāti Paoa, were to receive, and then that transformed itself by May 2016 into a decision to offer land that would be made available subject to settlement legislation, and then

in July there was a reference that there were no overlapping claims that prevent further work on reaching such an agreement with Ngāti Paoa. Then paragraph 21, point 6, spells out the Marutūāhu decision and the lands involved with that. That takes us through until paragraph 21.

That then brings us to the pleading that comes towards the heart of the claim, paragraph 22, it's pleaded that the Crown is required to exercise any powers to make those decisions, and I should say those decisions include disregarding the mana whenua which Ngāti Whātua asserts.

ELIAS CJ:
The source of those powers?

MR HODDER QC:
The Crown's powers?

ELIAS CJ:
Yes.

MR HODDER QC:
The Crown asserts the power of ownership.

WILLIAM YOUNG J:
Is it also under the Settlement Act, the collective Settlement Act?

MR HODDER QC:
Well it has the power of the Settlement Act to take land out of the settlement of the, this is the collective Settlement Act that has the statutory power to take land out of the collective arrangements.

WILLIAM YOUNG J:
So, is the power that the Minister proposed to exercise one that was premised on an exercise of the power under the collective Settlement Act?

MR HODDER QC:

Originally, and then it's transferred to the proposition that it's a matter of general powers that the Crown has, it would use, it would transfer by virtue of the deed and legislation to give effect to the deed, that the very transfer would take place by the statute, it would be a statutory power in the statute we haven't yet seen.

WILLIAM YOUNG J:

Yes, I understand that. So that's the sort of, those are the revised decisions.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

So, the earlier decisions were based, premised on the collective Settlement Act?

MR HODDER QC:

Well there were two stages. They had to come out of the Settlement Act and then be transferred.

WILLIAM YOUNG J:

Yes, okay.

ELIAS CJ:

So, is there anything recording these decisions that you refer to? It just seems to be common ground that the Minister did make those decisions –

MR HODDER QC:

There was a series of correspondence –

ELIAS CJ:

– and he refers to them in the correspondence, but there's no memorandum or what was decided that you're relying on?

MR HODDER QC:

No, the letters, they speak for themselves, they're the ones referred to in the Minister's affidavit in particular.

ELIAS CJ:

Yes, yes.

MR HODDER QC:

So no, I don't understand there's any issue between us on that, that's what –

O'REGAN J:

So, the decision that was being challenged was the decision to take them out of the RFR?

MR HODDER QC:

Initially, yes.

O'REGAN J:

And also the consequential decision to transfer them to another iwi?

MR HODDER QC:

Yes. And inherent in both of those, a point that I wish to emphasise, is that you don't get to either of those decisions until you said the mana whenua that Ngāti Whātua claims, and the way it's pleaded, it doesn't exist. If you did accept it exists you wouldn't make those decisions or at least not until you'd got through a process of consultation and accommodation which hasn't been –

O'REGAN J:

Well wouldn't you though if the collective arrangement allowed that to happen, despite Ngāti Whātua having mana whenua?

MR HODDER QC:

There'd be two issues there. One would be whether there's an issue that affects other members of the collective, or the collective as a whole, that really

hasn't been an issue for present purposes. This issue is really about if the land comes out then what Ngāti Whātua describe as it's sort of its radical root mana whenua becomes relevant and that is the foundation for much of the pleading.

O'REGAN J:
But I mean just as a matter of contract, putting to one side any other consideration, Ngāti Whātua appears to have agreed that any land in the wider RFR area could be made available for other settlements.

MR HODDER QC:
That's a matter of interpretation of what it agreed to which is an issue that would have to be resolved at a trial. That's not Ngāti Whātua's view of what it agreed to.

O'REGAN J:
But that's a contractual issue rather than a public law issue, isn't it?

MR HODDER QC:
Well it's a matter of interpreting what the arrangement was, and again the context of it, Ngāti Whātua will argue, that it didn't agree to that. What it agreed to was, it agreed that within its whole mana whenua it would contribute with other iwi's mana whenua into the collective arrangements without destroying its own mana whenua, and so that underlying mana whenua would remain outside those arrangements.

So 22 is the basis that, or the bases that are asserted for the Ngāti Whātua claim, that any decisions about, and this is transferring outside the collective arrangements is implicit in all this, for the purposes of Treaty settlements, in accordance with tikanga, i.e. mana whenua, primary mana whenua, and accordance with the commitment in clause 3.10 of the deed to repair and maintain a relationship based on mutual trust, co-operation and respect for the Treaty of Waitangi. Same thing in section 7 of the Settlement Act. Acknowledgement of the ahi kā in a manner which doesn't erode the

mana whenua of Ngāti Whātua, and consistently with the Treaty and its principles, and consistency with the United Nations Declaration on he Rights of Indigenous Peoples.

Then over at 22.8 we set out the particular tikanga principles that are relied upon. Perhaps the better-known ones are ahi kā and mana whenua, the take tuku, the gifting of land, and tuku whenua, the gifting of land with the expectation that when it's not required it comes back, the residual right aspect of tikanga. Then at 23, what the Crown needed to do was to fully inform itself of all the matters after full and proper consideration with Ngāti Whātua; acknowledgement of ahi kā and 23.3, where possibly, accommodating the mana whenua, accommodation of course coming from the concepts in Canada which I've referred to, which we will be contending do come across, notwithstanding the different constitutional arrangements there and here. That accommodation carries on for the rest of that exercise. 24 pleads that the decisions, both the original decisions and the later ones, are not in accordance with those provisions and they do erode the mana whenua of Ngāti Whātua and the value of the acknowledgements and apologies in the Settlement Act. There's a risk of that continuing at paragraph 25. Reference then to the fact that this is a wider issue. Paragraphs 26, 27 and 28 is an illustration of the overlapping claims policy, that is that when there are overlapping claims the Crown doesn't seek to determine them. It doesn't, it just stays away from those issues.

ARNOLD J:

Does the Crown make any preliminary assessment of merit or does it simply proceed on the basis of claims made in applying the overlapping –

MR HODDER QC:

The evidence is it's a very hands-off process. If the parties don't resolve it the Crown won't resolve it. If the parties have a view about it the Crown will go along with that. I should say if the parties have a shared about something, the Crown will go along with it, but if not the Crown won't try and determine relative priorities or –

ARNOLD J:

But there's not even a sort of preliminary do you get a foot in the gate type of analysis or assessment?

MR HODDER QC:

As a matter of practicality there probably is, but it's not explicit.

ELIAS CJ:

It's probably the Waitangi Tribunal process gets you in the gate, isn't it?

MR HODDER QC:

Not all processes will come from the Tribunal in this area. They'll all start, sort of, just simply start with negotiations, but, for example, if you're Ngāi Tahu then it's unlikely you'll get your foot in the door in relation to something going on in Tāmaki Makaurau. So to that extent, yes, beyond that it's a bit of a troublesome area, somewhere north of Taupo in terms of how far one goes into that. And the issues that the Court really has here are listed in that, so in very broad terms you have tribes, iwi based around the isthmus. You have interveners, you've got iwi based around the Tauranga area, and you've got iwi in between, and there are issues going on in relation to both directions, about land which can be made available for settlement, and so the Crown says, we don't get involved in any of that, we don't –

ELIAS CJ:

You haven't taken us to that policy, it's referred to I think in the Crown submissions, but there is a statement of the policy in the Red Book, isn't there?

MR HODDER QC:

Yes.

ELIAS CJ:

So is that what you say the Crown is working to?

MR HODDER QC:

Yes.

ELIAS CJ:

Because there is also authority that policies and manuals and things like that are within the area of soft law that the Courts must supervise or may supervise. So I would have thought taking us to that statement of principle is quite important.

MR HODDER QC:

I'm happy to do that in a moment, or if I could do it a little later, but again there's no issue about that as far as I understand it. It's not in dispute.

ELLEN FRANCE J:

Sorry, just in terms of the process though, the Minister did ask, in relation to the particular properties, whether there was anything Ngāti Whātua wanted to raise in relation to the particular properties.

MR HODDER QC:

Yes, and the general proposition that applies, there's nothing to distinguish those properties from the rest of the properties –

ELLEN FRANCE J:

No, no, I understand that, I just wanted – it is clear there was, at least, an opportunity offered.

MR HODDER QC:

Well there'd been prior communication of the position of Ngāti Whātua to the Minister, so the Minister knew what Ngāti Whātua's position was. Asking about the two specific properties was really a question of, is there something different about those two properties from the rest of the land in the area, so there was nothing else to say, simply a reiteration of the basic point.

ELIAS CJ:

So are you saying that that was taken to be an enquiry as to a specific connection with the particular land?

MR HODDER QC:

Yes. But there is nothing that distinguishes that land from the rest of the land that the Crown owns in those areas. So paragraph 30, there is the challenge to the policy, as it were, at paragraph 30. It doesn't refer to or address any of those matters. Then 31 sets out the matters affirmatively, about rights and obligations, that they reflect obviously what was in paragraphs 22 and 21. So the review conduct picks up the original decisions and the revised decisions in paragraph 32, and paragraph 33 is the application of the claims policy itself, the challenge to that, and then the grounds of review identified as illegality by misdirection of law being the paragraphs 22 and 23 matters, and mandatory relevant considerations being 22, 23 and 31. Then there are a series of declarations that I'll come back to at a later stage in the submissions if that is convenient to the Court.

Now the Crown pleading denies the key provisions, or it says if we have to plead to them we deny them. It's not just a matter of we don't have to plead, there is a denial, so as Ngāti Whātua has it at the moment, it has made the claims in the Courts set out in 21, 22 and 31, and the Crown says they don't exist, you're wrong. The Crown also says you can't come to Court and get that tested and it's been upheld by the High Court and the Court of Appeal but we are here to suggest that they have not answered that correctly.

So if I can then move into the line of cases that incorporates *Milroy* and others briefly. The Court, I appreciate, will be aware of that from our submissions, but it's appropriate that I say something about those. So again if the Court has our volume 1, starting at tab 5, again the Court will appreciate it from our written submissions that the basic proposition is that the appellant accepts the position as set out in *Sealords* and it says that subsequent cases have not dealt with rights and therefore don't directly govern this, which is a way of distinguishing other cases, and the position we're at now really comes down

to the question of what is meant by either the proceedings of Parliament or the legislative process, and there is scope for a wider or narrower view, and in this Court we are urging a narrower view to keep the qualification to access to the Courts as limited as possible.

So at tab 5 of our volume 1 bundle, we have the *Eastgate v Rozzoli* (1990) 20 NSWLR 188 (NSWCA) decision from the New South Wales Court of Appeal in 1990. The reason for mentioning this is simply because in the *Sealords* case the President for the Court of Appeal said there was a useful discussion of the issues by Justice, the President Justice Kirby. That discussion concludes at pages 198 and 199.

ELIAS CJ:
What did he actually say, because it was, I haven't looked at it for a long time, but it was, it was interesting, or something, wasn't it? It was not quite an approval of what Kirby J said, and indeed one would have thought, but anyway, never mind.

MR HODDER QC:
The particular word was "valuable".

ELIAS CJ:
Yes.

MR HODDER QC:
A valuable review of authorities and discussion.

ELIAS CJ:
Yes.

MR HODDER QC:
So both a valuable review and a valuable discussion, that looked fairly approving.

ELIAS CJ:

Yes, it's a long time ago.

MR HODDER QC:

We'll come to that when we look at *Sealords* in a moment. But as far as *Eastgate* is concerned, at the bottom of, after a lengthy discussion of various Australian cases, which the Court I suspect doesn't need to get engaged with, the summary starts at the bottom of page 198, paragraph margin G. The first proposition is about constitutional position in relation to other jurisdictions, but paragraph 2 is directly relevant. "The power to issue injunctions and to make declarations in relation to the deliberative stages of proceedings in Parliament will virtually always be refused out of the necessity to permit Parliament to conclude its deliberations." So it focuses there on "deliberation" and again the appellant has no issue around that. Then the summary of this comes just at the end of marginal note C where the President says, "It is in this way that the Courts of Australia have achieved an appropriate balance between… (a) the fulfilment of their role as guardians of the rule of law… and (b) the respect which is conventionally accorded to a separate branch of Government with its own ancient rights and privileges reflected in the Bill of Rights of 1689," which raises the question which I don't wish to get involved in, as to whether it's 1689 or 1688 because in *Sealords* it's called 1688 and so likewise in *Prebble*, but I understand there's, I think the proponent's claim is a more purist view is actually 1689.

ELIAS CJ:

Yes, the revolution was 1688 though I think. The Bill of Rights Act was –

WILLIAM YOUNG J:

That depends on whether it's Gregorian or Julian.

ELIAS CJ:

Does it?

WILLIAM YOUNG J:

Yes it does. If it's one it's 1688, if it's the other it's 1689. And it was a Julian calendar at the time I think.

MR HODDER QC:

Tab 6 has *Sealords* under it. *Sealords* explains at page 303 that it's about, as the Court I imagine well knows, fishing claims. There was a deed dated September 1992 executed after a banquet at the Beehive and then at about line 48, "The present appellants are representatives of iwi or groups of Māori opposed to the deed." At the bottom of the page it explains that Justice Heron in the High Court declined applications of the plaintiffs for interim relief, and the application of the Crown for striking out. Now that interim relief must have been directed to the transformation of the deed into a Bill, but it's not specific in this judgment what that was.

The well-known discussion commences on page 307. The first point about line 31 where the Crown have made a suggestion that the deed was being brought to political purposes, and the President said, "It would certainly be wrong for the Court to grant a declaration for political purposes." And again no issue around that. Then down to line 48, the new paragraph, "A prominent feature of the deed is… *Crown to Introduce Amending Legislation*." And it is that, after the President explains that it's not quite an agreement although it's legally binding in itself, goes on at the very bottom of the page, "There is an established principle of non-interference by the Courts in Parliamentary proceedings."

A couple of semantic issues in that sentence. One is comity versus non-interference. For my purposes I'm talking of non-interference but meaning comity to mean the same thing and in terms of Parliamentary proceedings, there is an issue of there being Parliamentary proceedings and legislative processes, at least in Canada there's a concept of legislative processes that begin with the idea that there's a problem, and then it's indivisible through to the Royal Assent, whereas our submission is that there's a narrower view of

Parliamentary proceedings that arise from Article 9 of the Bill of Rights, it's the four walls of Parliament plus a decision to introduce legislation.

The President goes on to say, "It's exact scope and qualifications are open to debate, as is its exact basis." We don't need to be concerned about the issue of practice or principle because it's not in dispute. At line 7 there's a reference to *Eastgate* as being a valuable review of authorities and discussions by President Kirby. Then at about line 12, "However," that principle, "be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill into Parliament." And I will stop and stress this in a moment, but the appellant does not disagree with that, that must be right. It goes on to say the proper time for challenging an Act is after it's been enacted, and then goes on to refer to a then recent decision of the High Court of Australia in *Nationwide News* and says that what's non-interference with the introduction of a Bill is the corollary of the freedom of expression in relation to public and political affairs. That idea of freedom of expression, freedom of deliberation, is what underpins, we say, this line of jurisprudence. It then goes on to refer to the Bill of Rights 1688 and, "It is impossible to suppose that a Minister may be judicially prevented from presenting to a representative assembly a measure for consideration." Again, no dispute. Then goes on to say, that would extent to attempts to dictate by way of declaration, at about line 29, again no dispute. Then at the bottom of that paragraph, "Public policy requires that the rep chamber of the Parliament should be free to determine what it will or will not allow to be put before it. Correspondingly Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite the House to consider." Then finally there's reference at line 50 to the deed itself being a compact of a political kind and so a challenge to the terms are a challenge to a political compact. Then over the page, 309 starting at line 11, "Parliament is free to enact legislation on the lines envisaged… whether or not it would be wise to do so and whether there is a sufficient 'mandate'… are political questions for political judgement. The Court is not concerned with such questions." Now we've extracted the points from that in

our written submissions, I won't repeat them, but our proposition is that nothing that Ngāti Whātua seeks is inconsistent with any of that.

So we then move to the *Milroy* decision at tab 8 in this volume. A decision of a five-member Bench of the Court of Appeal in 2003 also involving a deed in relation to Treaty settlements. The relevant discussion for our purposes starts at paragraph –

ELIAS CJ:
In the submissions it's referred to as, it has a 2005, and it was one of things that puzzled me, but it was 2003, yes.

MR HODDER QC:
It was. There are two unfortunate typographical errors which I take responsibility for. One is that one, which is –

ELIAS CJ:
I think it's perpetuated by the Crown too, it's in some of the other submissions anyway, a reference to 2005.

MR GODDARD QC:
It was reported in the 2005 –

ELIAS CJ:
Oh was it.

O'REGAN J:
It's reported in 2005.

ELIAS CJ:
That's pretty slow isn't it. Thank you.

MR HODDER QC:
The second typographical error or error of description is my description of the judgment of Justice Pelletier in *Mikisew Cree First Nation v Canada (Governor*

General in Council) 2017 SCC file number 37441, May 2017, as being a minority judgment, it was a minority reasoning to the same result. The Court was unanimous but his reasoning is quite different, is what we rely on. So back to *Milroy*, delivered in 2003, and reported in 2005, paragraph 12 on page 565, refers to counsel being driven to accept that the provision of the advice that had been given in relation to this didn't affect the rights of any person or even have the potential to do so. And the word "rights" is important for the purposes of our argument, because we say there are rights, and that's what distinguishes our case from this case.

It then goes on to say, "It is the resulting legislation… that will have the impact. Counsel acknowledged that the advice 'in a sense, drives the legislative process.'" And that's in one sense the indivisibility argument as it's described in the Canadian authority. Points are reiterated in paragraph 14 after paragraph 13 sets out extracts from *Sealords*, so at paragraph 14, "The advice of officials is a mere preliminary having no legal effect… The formulation of Government policy preparatory to the introduction of legislation is not to be fettered by judicial review." Now again most of that can be agreed with, but mostly that's because it will be in the realm of politics, it won't involve any legal rights. It's also one of the reasons why what Ngāti Whātua seeks won't be driving some major hole through Government processes in general. It's only where rights and interests that are recognised by law are involved that these, there might be an issue. So then paragraph 15, the Court rejects a test advanced by counsel for the appellant in that case of remoteness, and the point made in paragraph 16 is both vague and unsupported by authority. "It would blur the boundaries between the role of the executive Government and that of the Courts. It would invite curial review of research, advice and opinion for which no objective justiciable guidelines are available." And again inherent in all of paragraph 16 is there are no rights available because rights are, in a word, defined by reference to a legal yardstick. Then a more general point at paragraph 17, "The formulation of legislative proposals is part of the business of Government." Then the point of rights comes back into the middle of paragraph 18, third sentence –

ELIAS CJ:

That may well have been conceded in argument in that case, that there were no rights, but they seem very similar rights, or interests, to the ones that you're advancing here.

MR HODDER QC:

Well Your Honour is right, they don't, counsel looked as if they were subjected to a certain amount of grilling and encouraged to retreat on certain positions, but it's hard to tell from the judgment whether they were asserting rights in that way or not, but certainly the –

ELIAS CJ:

The point is it wasn't argued that there were rights, so you still need to convince us that there were, but you say there are and that therefore *Milroy* is not an authority that assists.

MR HODDER QC:

That's right, and *Milroy* makes the point again in paragraph 18, "But where the action challenged does not itself affect the rights of any persons and is undertaken in the course of policy formulation… the Courts will not intervene." So those are the –

ELLEN FRANCE J:

I thought the point being made there was that, not that there weren't any rights at all, but that the rights that there were, were being affected by the legislation.

MR HODDER QC:

Yes, and that's an issue which comes with, it's sort of a related but differential point. So, when there are rights which are immediately affected and will be extinguished, there will be no rights left, then that, and that comes, would be an example, as we say in the submissions, to say the *Comalco (NZ) Ltd v Attorney-General* [2003] NZAR 1 (HC-1986) decision or the *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) decision, and it may have been the case here, but once this legislation has gone through whatever rights are

involved have been extinguished forever. But that's not our case. Our case is that there are rights which are ongoing rights –

WILLIAM YOUNG J:
The rights in relation to the properties in question would be extinguished forever.

MR HODDER QC:
Correct.

WILLIAM YOUNG J:
So if it's possible, and it's not possible to prevent the legislature revoking a whole bundle of rights, why is it possible to permit the legislature to prohibit the legislature from selecting out and cancelling some of those rights?

MR HODDER QC:
In the end there's a point at which Parliament can do that. We don't dispute that. If Parliament says, we don't care what rights you've got, we're going to transfer this property from this person to this person, then sovereignty says that that can't be interfered with.

WILLIAM YOUNG J:
Well isn't, it's probably not the way the Minister would have dressed it up, but isn't that in essence what was behind the shift from the proposed decision to the amended decision?

MR HODDER QC:
Yes, undoubtedly.

WILLIAM YOUNG J:
We don't want to expose the correctness of the legal view we're taking to analysis, we are therefore going to settle any dispute as to what can be done, by doing it by legislation.

MR HODDER QC:

Undoubtedly, and that would –

WILLIAM YOUNG J:

And what's wrong with that as a matter of law?

MR HODDER QC:

It doesn't deal with two things, we say. It doesn't deal with what happens up to that point, three things actually. The first is at what point do you have a decision to legislate which is sufficient to bring it within the realm of the non-interference principle. The Treaty is somewhat different. Treaty processes are somewhat different to others because you have a series of decisions made by Ministers along the way, and you don't get a settled piece of legislation until quite late in the process, after all the consultation has gone on.

WILLIAM YOUNG J:

You're not suggesting that the Court should sort of run, provide a running commentary as the policy evolves or develops?

MR HODDER QC:

No, what I'm suggesting is that the interference, non-interference principle would start with a firm decision to introduce a settled, a specific piece of legislation. A running commentary would involve all those political issues, which don't arise.

WILLIAM YOUNG J:

But if there is a decision to, do you say that point has not been reached yet?

MR HODDER QC:

We do. The Minister has said there will be legislation but the whole – well we don't know what's going on precisely, it's been taking some time, and no doubt it's been possibly paused while this litigation is going on, but we can –

WILLIAM YOUNG J:

But if there's no legislation your rights are unaffected.

MR HODDER QC:

We say until there's a Bill been formulated that's ready to go and decision made to put it in, yes. That's the decision that the President was talking about in *Sealords*.

ELIAS CJ:

Your argument is that this is a case about a question of status and continuing status.

MR HODDER QC:

Yes. Well, whether we call it status is, I imagine Your Honour is using the word "status" to comprehend what I would call as rights and interests in what we set out in the statement of claim.

ELIAS CJ:

Yes, but where there are different, some rights and interests go to status, which is a continuing concept, you know, rights of children, rights of citizens, things like that, others concern, I'm just responding to the question that was put to you, I suppose, about selling the property and what affect it has. In some cases that might not bite on any continuing interest but your interests, as I understand your argument, continue to be affected.

MR HODDER QC:

Correct. So, the proposition is that, I said there were three things that really arise out of Justice Young's questions. One of them is when you measure the decision from, and we say you need to have something settled and specific rather than a relatively broad idea it will be legislation because, particularly in this context, it's always going to be legislation, that's sort of the established pattern. Related to that is the question of how far, there are ongoing rights, that is to say the point the Chief Justice is making, that what we say is that there are rights not to be disregarded in relation, generally and in relation to

the lands that are within the rohe continue, they're not extinguished by whatever this legislation is going to be, at least there's no suggestion of that so far, and a later point is that already, by the time we get to any decision of the kind we're talking about, there already has been a disregard problem. You don't get to that decision until you've already disregarded the interests that Ngāti Whātua asserts, and rights it asserts. So in that way the proposition is that even if the Government succeeds in introducing and having Parliament enact legislation that transfers, for example, these two properties to Ngāti Paoa from the Crown ownership, that doesn't change any of the issues that Ngāti Whātua has and wishes to have resolved. They're compounded by the fact it's happened, and that compounds the frustration that it can't get a decision on whether it has the rights it believes it has, or it doesn't, because it doesn't get there on the grounds of what is said to be the reasoning of *Milroy*. But for our purposes the point about *Milroy* is that broadly it's following *Sealords*, but it's also talking about policy areas beforehand, excluding where rights are affected, which in our sense takes it just into the realm of politics, devoid of rights for our purposes, and therefore it's distinguishable.

ELIAS CJ:

You haven't, in your submissions, taken us to the – or you haven't made any argument about the special character of legislation in this area. I notice that in the Red Book it's acknowledged that it's a whole package. Parliament can accept it or reject it, has that right, but it's not one that is treated as ordinary legislation to be debated clause by clause because it's seen as a settlement.

MR HODDER QC:

Well we say that's a reason for taking a narrow view about the scope of the non-interference principle, because it is different. The end result is the same. If Parliament passes legislation which incorporates a settlement that takes away land that Ngāti Whātua says it shouldn't, then the statute prevails, we don't dispute that.

ELIAS CJ:

No.

MR HODDER QC:

But what I was saying a moment or two ago is that when one is thinking about the processes, that it is relevant to note that the processes for a Treaty Settlement Act are going to be different to the processes of an ordinary Act. So the select committee process is less useful and there's a whole lot of negotiating going on before you get to the final deed, which the Red Book says will be signed off by Cabinet decision, and we say that's probably the relevant decision that triggers what *Sealords* is talking about.

ELIAS CJ:

So that, you say, and I'm just trying to find the submission, submission is that this, it's a reason to treat the no-go area more narrowly?

MR HODDER QC:

Yes.

O'REGAN J:

Presumably *Sealords* was a case of this kind. Was that an all or nothing statute?

MR HODDER QC:

Yes, I think so.

O'REGAN J:

I mean it was a negotiated arrangement before the statute, the Bill went into Parliament, wasn't it?

MR HODDER QC:

Yes, and the feature of those again is that they extinguish rights comprehensively, so there's nothing left, there's no ongoing.

ELIAS CJ:

The right there, though, was the section 88 Fisheries Act right, was it?

MR HODDER QC:

Yes, attributable, and that was superseded completely by –

ELIAS CJ:

I mean it wasn't this sort of right that was in issue, I don't think. It might have been but…

MR HODDER QC:

I'm pretty sure it settled all rights, all claims.

ELIAS CJ:

Well it did but –

MR HODDER QC:

The rights would have been section 88 which in turn led into general customary rights.

ELIAS CJ:

Yes, led into any Māori fishing right, yes.

MR HODDER QC:

Now I was about to come to *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 (CA) and I see we're getting close to the adjournment time. That has a particular interest because two members of this Court were involved in that decision, but I'm going to gently submit that it's also in the same category as the others and therefore doesn't bind us in the case we have in front of the Court.

ELIAS CJ:

Shall we take the adjournment.

MR HODDER QC:
That's convenient, Your Honour, yes.

ELIAS CJ:
We'll take the adjournment now thank you.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.47 AM

MR HODDER QC:
I want to respond to two matters I didn't completely cover off before the break, before I go back to *New Zealand Māori Council*. The Chief Justice in particular mentioned the Red Book. There are two aspects of that that I probably should draw the Court's attention to, this is in volume 5 of the case on appeal at tab 62. So tab 62, volume 5, and the first reference is to page 2108. There's a passage that I think the Chief Justice referred to is where there's a discussion of overlapping claims or shared interests, and the third paragraph sets out the Crown's position, "The Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. These groups are able to negotiate their own settlements with the Crown. Nor is it intended that the Crown will resolve the question of which claimant group has the predominant interest in a general area. That is a matter that can only be resolved by those groups themselves."

So what that says, is one of the points, criticism of the policy, is that these are inter-iwi issues, whereas as far as the appellant is concerned, they're actually a Crown-facing issue for the reasons that are set out in the pleading and in our arguments. So that's where you find the reference to overlapping claims. In terms of the process we were talking about just before the adjournment, if you go back to page 2072.

ELIAS CJ:
Sorry, I thought I was referring to something that was a bit lengthier than that, but maybe I was looking at it electronically. Anyway, that's fine.

MR HODDER QC:

I'm not sure I can assist Your Honour on that for the moment. Page 2072 is on the left-hand column under the heading, "How the Crown operates in negotiations. "All major decisions in the negotiations process are made by Cabinet or by relevant Ministers acting under authority delegated," and then for instance, "Cabinet approves Deeds of Settlement before they are signed on behalf of the Crown." So in terms of the decision that we're talking about, we say that's the decision at which there is a, to use the word again, settling of the legislation that's being introduced, as opposed to a more general concept which we say doesn't trigger the principle for our purposes.

Somewhat, perhaps a separate point, but the Chief Justice I think was asking me where is the, do you have any visible legal means of support for your proposition of the rights here, and the answer is in part the Treaty, which I think the Chief Justice was suggesting to me. One of the things we would refer to is the Cabinet manual, which is at the very end of our volume 2, and I mention it only because in the preface written by Sir Kenneth Keith on page 2 it says that one of the sources of the constitution is the Treaty of Waitangi. So that's tab 41, page 2 under the heading, "Other major sources of the constitution," and towards the bottom of the page, the Treaty of Waitangi. So customary law, tikanga, the Treaty of Waitangi, its principles and the implications of the settlement deed and act are the legal means of support that we are advancing for what we find in the pleading.

Now I was at *New Zealand Māori Council* which is at tab 11 of the volume 1 of our authorities and as I mentioned His Honour Justice Young and Justice O'Regan were members of the Court, delivered by Justice O'Regan, and for my purposes the discussion that's of relevance is on page 332, paragraph 51. The passages on page 332 refer to both the *Comalco* decision and to the *Waitara Leaseholders Association Inc v New Plymouth District Council* [2007] NZSC 44 decision including the refusal of leave of this Court. But the point that's being made here, in our submission, is no more than, and no less than, that Parliament is entitled to rewrite existing legal arrangements. Again, that's not an issue. So what, for example, is being said

in *Waitara Leaseholders* is therefore it must be legitimate to ask Parliament to rewrite existing legal arrangements, and again there's no issue about that.

In *Comalco* Justice Heron was saying in this Court, and the Court of Appeal agreed with his judgment, that when Parliament rewrites legal arrangements, that is what has the legal impact. But the situation of either rights already breached, or ongoing rights that will remain intact and need to be clarified and established, doesn't arise in either of those circumstances. And beyond that we say there's nothing in *New Zealand Māori Council* that does anything other than what we've just been discussing.

So the end result of those cases we say is that you have, if one wants to conceptualise it, is overlapping circles. One circle is existing legal arrangements, and the other circle is an area where there is Parliamentary freedom, or Parliamentary privileges, and they intersect, they overlap to a degree, and what we're really arguing about is the extent and the basis for that overlap, and in our submission it's narrow and the purpose of it is in relation to freedoms and the issues where there are rights involved in something that causes the overlap, as it were, to shrink.

Now section 5 of our submissions, that at page 17 of our written submissions, we address the question of what are Parliamentary proceedings, and I'm not sure if it assists the Court if I go through that, I'm happy to answer questions, but there's not much else I want to say beyond that, but those cases we referred to indicate, as I've already been saying, that the purpose of Parliamentary privileges and the recognition of restraint by the Courts, is to enable Parliament to carry on its role and its role requires it to be free to receive proposals for change of legal arrangements, and to deliberate on those without any inhibition from the Courts. Again, not an issue, and so when one talks about proceedings of or in Parliament, in our submission we're talking about the four walls that is referred to in the *Prebble* decision, plus the decision to introduce legislation, and we say that decision must be related to settled and specific legislation, rather than a broad indication.

What we do on page 18 of the written synopsis is to then proceed to address the idea that perhaps there's something called the legislative process, which is slightly wider, and on the bottom of that page, the third line of paragraph 5.13 there's another typo. It should say "In a sense, drives the legislative process," for which I apologise, just before footnote 73. So, the legislative process phrase we find in *Milroy*, that then leads us to, in our submissions, to look at *Mikisew Cree*. Now *Mikisew Cree* is in our volume 1 at tab 17, and it's an interesting decision and helpful, we say, in terms of framing some issues. So tab 17, we have the judgment of the Federal Court of Appeal. The presiding Judge, Justice Pelletier gives a separate concurring judgment but for different reasons, and the context of it is set out in paragraphs, towards the end of paragraph 1. The argument is that there had been a duty to consult Mikisew Cree in relation to two omnibus Bills. Those omnibus Bills are described in paragraph 5 on the facing page with the happy titles of the Jobs, Growth and Long-Term Prosperity Act and the other one was the Jobs and Growth Act. As they say, who can be against those, but in any event they were proposed and enacted and they also repealed the Canadian Environmental Assessment Act, and there was then a replacement Act for that, and there were amendments to the Fisheries Act, the Species at Risk Act and the Navigable Waters Protection Act, and at paragraph 6 we see Mikisew Cree's concern that they reduced the types of projects that were subject to federal and environmental assessment et cetera, which reduced the opportunity for First Nations to voice their concerns about proposals.

Going back to paragraph 2, the issue that's identified in the first sentence is, "This case raises an issue that has not yet been dealt with by any appeal court: does the Crown have an obligation to consult when contemplating changes to legislation that may adversely impact treaty rights, and if so, to what extent?" The Judge at first instance issues orders which constrain what is to be done. The majority in the, majority reasoning in the, Justice Pelletier's reasoning both say that was wrong and they set that aside and allow the appeal, but in terms of the reasoning that the majority reason provides, we can perhaps pick that up from paragraphs 23. There's been a discussion about what the process should be, and they're talking there about broadly

what's a judicially reviewable kind of a claim, was an identifiable decision in respect of which a remedy is sought. "Second, that the impugned decision or order be made by a 'federal board, commission or other tribunal.'" They don't actually decide that, although the indications appear to be that they were of the view that it wasn't. But if we go onto paragraph 26, at the end of the paragraph on the top of page 17, they effectively state the point that's been argued by the Government that, "To the extent, therefore, that Ministers and the Governor in Council were acting in their legislative capacity in developing the two omnibus Bills, as argued by the appellants, judicial review would clearly not be available." That leads on to a discussion which in particular involves paragraph 28. "The respondent argues that Ministers are not acting as Members of Parliament." And the Court on page 18 goes on to describe the Acts, and then says towards the end, "Nowhere, however, do these Acts refer even implicitly to their role as policy-makers or to the development of legislation." That role for policy-making and developing legislation, "Flows from the Constitution itself and from our system of Parliamentary democracy," it doesn't come from statute. 29 goes on to say, "The respondent proposes that a distinction be drawn between Ministers acting as policy-makers and Ministers acting as legislators." And the Court says, no, at the end of the paragraph, "The legislative process is a fluid exercise involving many players, both at the political and at the Government official level. It would be artificial to parse out the elements of a Minister's functions associated to either its executive or legislative functions."

So at this point we've gone to an extension, if ones take it in terms of a proximity analysis, which the Court in *Milroy* says you shouldn't. We could've extended backwards quite a long way by saying that the Minister's functions can't be separated out into executive and legislative functions, and so paragraph 30 the Judge says, "The power that the Ministers exercised in the entire course of the law-making process was legislative in nature." That's a wider concept than proceedings in Parliament, we kind of extended it into the executive branch. And so paragraph 31 reinforces the point that says, and I'm going to come back to it but for the moment, I'm saying, "Making policy

choices and adopting laws are explicitly recognised as functions of the legislative branch."

Then the Canadians call what I think we call the non-interference principle, is the doctrine of separation of powers, and discussion of that is on page 24, starting at paragraph 40. Paragraph 40, again referring to the novel questions, "There is a clear tension in the case law between the doctrine of the separation of powers and the duty to consult that has been developed as a result of the enactment of section 35 of the Constitution." Then there's a discussion about aspects of that, which we don't need to be concerned about, but at paragraph 49 there's reference to an Alberta Court of Appeal decision, this is on page 29, *Tsuu T'ina Nation*, and the quote from that judgment is at the top of page 30. "Even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions." That was the Alberta Court of Appeal. The Federal Court of Appeal in this judgment says we don't agree with that and comes to the view at paragraph 54 on page 32, "That the dichotomy between the Executive and Parliament that the respondent seeks to draw… is devoid of any merit." That's the second sentence on paragraph 54.

Paragraph 60 is some practical reasons for why that would be right as well, so paragraph 60 the Judge says, "For all the foregoing reasons, that the legislative process, from its very inception where policy options are discussed and developed to the actual enactment of a Bill following its adoption by both Houses and the granting of royal assent by the Governor General, is a matter solely within the purview of Parliament. Imposing a duty to consult at any stage of the process, as a legal requirement, would not only be impractical and cumbersome… would fetter Ministers and other Members of Parliament… comprising the sovereignty of Parliament."

The other judgment by Justice Pelletier takes a different approach. At paragraph 70 on page 19, the second sentence notes,

"The Attorney-General's position is that the legislative process is indivisible," which is a shorthand way of describing what the previous judgment was describing. After dealing with the question of was this a judicial review type action coming to a conclusion that it was at paragraph 80 on page 44, at page 45 Justice Pelletier comes onto the separation of powers doctrine and says, paragraph 84, "Two questions. Does the duty to consult arise? If it does arise, how is it to be given effect? If there is a right, it is not beyond the ingenuity of the Courts to craft an appropriate remedy." 85, "The Mikisew Cree have been careful to limit the duty to consult to the policy development stage… have not directly challenged the validity of the amendments."

Over onto page 46, having discussed various permutations, at the end of 87 His Honour says that the previous discussion highlights, "The point that the argument that the legislative process is indivisible, from policy development to vice-regal approval, may be problematic in other circumstances." But the circumstances that His Honour is concerned with here is general legislation equivalent to our Resource Management Act or something of that kind. He says because it applies to the whole of Canada the duty to consult doesn't arise, but what he's indicating is that if the duty to consult, if the matter had only affected the specific rights of Mikisew Cree and their territory, then there would have been a duty to consult and a remedy would have been found, and that's why I described it as minority reasoning. It rejects necessarily the indivisible argument that finds favour with the majority of the Courts reasoning. Now that judgment was given leave for appeal. That's under tab 18 to the Supreme Court of Canada. The argument has been heard and judgment has been reserved but not delivered to the best of our knowledge as at this morning.

The other Canadian case we've provided to the Court which I want to give a brief mention to, is in volume 2 of our bundle, at tab 19, *British Columbia Teachers' Federation v R* 2015 BCCA 184. It's a very lengthy judgment and there's a dissenting judgment by Justice Donald, and the relevant part of that for our purposes is at page 85 of the judgment. At paragraph 289 describes pre-legislative consultation and goes on to explain that consultation refers to

an employment context in *Wells v Newfoundland* and quotes from that, and on the second page, 86, talks about the fact that the changes to, "Employment terms by the legislature is, in most circumstances, the final step in an agenda of the executive branch; the same executive branch that both develops policy and has a constitutional obligation to consult or negotiate with collective representatives."

The next few paragraphs that carry on through to paragraph 294 just elaborate on the point that consultation may be required where there's an obligation to do so, concluding with the proposition on page 88 at the end of 294, unconvinced that, "Imposing an obligation on Government to respect the freedoms granted under s. 2(d) would prevent the pursuit of Government policy." That was a minority or dissenting judgment.

Perhaps one of the small delights of preparing for this case is to discover the case in the next tab, which is tab 20, *British Columbia Teachers' Federation v R* 2016 SCC 49, [2016] 2 SCR 407, where the matter goes to the Supreme Court of Canada, and on page 409 the entire judgment of the Court is contained in five lines where it says, "the majority of the Court would allow the appeal, substantially for the reasons of Justice Donald." So in terms of brevity that is probably hard to beat. So the score is 7-2 as far as that's concerned, two Judges would have dissented for the reasons given by the other Judges, but Justice Donald, whose passages I took you to, was upheld by the Supreme Court of Canada.

ELIAS CJ:
That would be a way of getting through the work.

MR HODDER QC:
That's one way of getting through the work, Your Honour is entirely right. So all of that is really taking me to the point that says there's nothing in there, or in the discussion we've given of the way the legislative process works in New Zealand that says that a wide view, that says everything from the beginning of policy development, for example, is completely immune from

discussion, or from consideration by the Courts, where rights are concerned, or where rights or interests recognised by law are concerned, which is our position here, and that, we say, justifies a narrow approach to the scope of the non-interference principle. That's the position we've set out in our written submissions, and among other things we then at page 22 of those written submissions have some regard to the decision of His Honour Justice Williams in the *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 case, which is at tab 23 of volume 2 of our authorities, and the points we set out in our written submissions, but they are a position where declarations that were sought were originally were described as being executory in nature, and that's set out in paragraph 37 of the judgment, and originally they were asking for things that needed to be done. They were relatively intrusive in their nature. At paragraph 37 and 38 the Court notes that they were problematic but they have been amended. Then coming to jurisdiction, paragraph 40, it notes that the Crown's objection is in relation to justiciability. That discussion, for our purposes, commences at paragraph 53. There's reference to *Milroy* at paragraph 54, to the *New Zealand Māori Council* at paragraph 56 and 57. Paragraph 57 comes back to the point about the scope of the declarations, the amended focus shifted from orders and declarations intended to have the effect of prohibiting the Crown from entering into an unacceptable settlement… to more passive declaratory language," as to consistencies. Then 59 says, that distinguishes it from *Comalco*. Paragraph 60, again the declarations here didn't go that far, they focus on consistency between the deed and the Act on the one hand, and the deed on the other. Stepped back from an attempt to have the Court order the Crown to amend the Ngāi Toa Deed of Settlement." Then 61, "In my view, this relief, if justified on the merits, does not cross the line scribed by the Court of the Appeal in the *Milroy* and *Crown Forest Assets* cases. It does not attempt to intervene in the legislative process, leaving it to the Executive to decide what, if anything, it should do with such declarations if made." We agree. " There are additional considerations. Unlike the way the case appears to have been pitched in *Milroy*, there are rights at issue here. If Taranaki Whānui is correct in the assertions made, then they have rights and interests under the Settlement Deed and Act that are, or may be, justiciable. There is a

satisfactory legal yardstick." And, "Provided they are careful not to cross the boundary into the domain of Parliament or the Executive's role in advancing legislation, it would be wrong in principle and dangerous in practice for the Courts to leave the Crown to 'acquit itself as best it may' as the 'sole arbiter of its own justice,' where the controversy raises justiciable issues of statutory or deed interpretation or indeed of customary law if properly pleaded." Now that captures what it is Ngāti Whātua is seeking to do. It's to plead, hopefully properly, issues of statutory or deed interpretation, and customary law, all with a foundation in the Treaty, that go to questions of rights and are justiciable.

His Honour also had, as we say in our written submissions, some pertinent comments to make about layers of interest in Māori custom, at paragraph 95 towards the end of the judgment, which they don't necessarily directly relate to the specific issues but they provide sort of some of the reasoning or the explanation as to why this matter is so important as far as the appellant is concerned. So, in the last page of the judgment in the casebook we have a heading "Mana" above paragraph 94. It acknowledges the difficult position that Taranaki Whānui has, being the first out of the blocks. It notes the terrible choice about, later in the paragraph, "Risking losing years of progress in negotiations… or sign the deed and hope to resolve the cross-claim issues later." It goes on to say in 95, about half-way through, "The problem with statutory acknowledgements and deeds of recognition in the modern era is that they do not reflect the sophisticated hierarchy of interests provided for by Māori custom. They have the effect of flattening out interests as if all are equal, just as the Native Land Court did 150 years ago. In short, modern RMA-based acknowledgements dumb down tikanga Māori," et cetera. Now that is not exactly our point but it's consistent with the concerns that we have, that the Crown's approach has not recognised a hierarchy of interest in relation to the land in question, and beyond that the decision of the Courts below is that that can't be tested judicially either, and that, we say, is not what the law provides for or requires.

So the submissions go on to discuss the idea of whether everything is fixed by a decision that comes later. So we pass legislation, does that mean that

every single aspect of the process that led up to the legislation being introduced is immunised against any challenge whatsoever. That appears to be the proposition that was accepted by the Court of Appeal in *Attorney-General v Ririnui* [2015] NZCA 160, as we discuss on our page 24, but that, as we understand it, was not accepted in the judgment which the majority of the Court acceded to in *Ririnui* and there is a telling footnote which says, that contrasts with the Court of Appeal's position which isn't adopted in that form.

So our submission set out in the written submissions is that preliminary conduct is distinct and in our case there is an ongoing expectation that as far as preliminary conduct is concerned it will include consultation and accommodation of the kind pleaded. That is a matter, we say, that has to go to trial and, along with the evidence that backs it up. In a matter of legal terms it's a novel and developing area of law.

Paragraph 5.46 of our written submissions we make the point that what is demonstrated is that immunity does not extend beyond policy, political, fiscal and similar considerations, being the language used in *Ririnui*, and of course omitted from that list is the idea of rights or interest recognised by law. So *Ririnui* is concerned with important errors of fact, but there's no reason why the same logic doesn't apply to important errors of law involving iwi rights, and in particular ongoing rights of the kind that are asserted by Ngāti Whātua.

We then go on to discuss general Government policies, I don't know this is in dispute, the idea that a general policy is reviewable by way of judicial review. We cite the *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL) case from now what seems some time ago.

ELIAS CJ:
Sorry, what paragraph are you at?

MR HODDER QC:

I'm still on page, just leaving page 25, and I've been referring to paragraph 5.46 and I just mentioned we discussed *Gillick* at 5.49. Over the page at paragraph 5.50 we mention *Peters v Davison* [1999] 2 NZLR 164 (CA) in terms of the reviewability of public entities, whether they're making a specific decision or not. The exercise of public power. And conclude at paragraph 5.51, there's nothing in *Milroy* or the other cases we've looked at that says that's the basis on which one can't challenge a general policy as Ngāti Whātua wishes to do in so far as the overlapping claims policy of the Crown is involved in this situation.

So that takes me to the summary, and we have set out in paragraph 5.52 the propositions that we say are relatively straightforward from what we've been traversing. While I don't understand that a number of these are an issue, it's worthwhile perhaps following the logic of them. Firstly, Parliament can consider and enact any legislation, including that which affects existing legal arrangements or entitlements. That's Parliamentary sovereignty. No dispute about that from the appellant. "A similarly fundamental point is that individuals and entities have access to the courts to determine legal issues." That's' the basic proposition that we saw in *UNISON* and the various authorities that *UNISON* collects. "Such determinations may have informational utility for the executive and/or legislative branches of Government." That follows both from *Port Nicholson* and from the *Ngāti Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659 (CA) extract from Justice Blanchard that we've set out earlier in our submissions. "Under the judicial review and declaratory jurisdiction, such issues are not limited to specific decisions and may extend to legal aspects of general Government policies." Again I stress "legal aspects", not in the realm of politics.

Thirdly, "The principle of access to the Courts is not involved where issues are not "legal", but policy or fiscal. The great bulk of Government policy issues are policy and/or fiscal without involving legal issues." So the in terrorem argument that says what you're looking for would somehow bring policy development to a halt is, we say, unfounded.

Fourthly, “Nor is the principle of access to the courts involved where there is no dispute about the existing law. (For example, in *Comalco* and *Westco Lagan* the policy decision was to legislate away any existing contractual entitlements.)” it didn’t know what they were, they were going to go. In our circumstances the Crown, in its pleading, denies what Ngāti Whātua alleges, but says we’re going to legislate away whatever it is.

WILLIAM YOUNG J:
But that can't be problematical can it? Can’t the legislature say, can’t a Government say the legal position is uncertain, we’re going to resolve that uncertainty with legislation. I don’t see what –

MR HODDER QC:
I’m not suggesting it can’t be done, I’m just saying that it’s a different principle at that point.

WILLIAM YOUNG J:
But isn’t it the same as *Westco Lagan*. I mean what’s the difference between saying we’re completely in the wrong here but we’re going to legislate anyway from saying well there may be such a debate but we’re going to legislate and make it clear.

MR HODDER QC:
The essential point is more tied to the fact that there is ongoing issue there rather than the dispute. So where there’s, this is really going the other way to Your Honour’s question. So if there’s no argument about the law, then the issue doesn’t arise. It’s not, it becomes a moot point, but in our circumstances what we’re saying is that there is a dispute about the law. You tie that with the fact that it’s an ongoing issue and you finish up with an exception to the non-interference principle. If it’s drawn widely, the principle.

So section 5, proposition 5, once we’re within the scope of Parliamentary proceedings, access to the Courts is constrained by the non-interference principle. There will be no prevention or criticism of the introduction,

consideration or enactment by legislation, of legislation, irrespective of whether it may affect existing entitlements. But the key issue for present purposes is when does one start before introduction and we say it's a decision to introduce legislation of the kind that Cabinet makes at the end of the Treaty settlement process.

Proposition 6, "The non-interference principle extends beyond the 'Four walls of Parliament' to include Ministerial decisions to introduce (or not introduce) specific legislation." Those ones we say are relatively straightforward, but it's the seventh one which we have at the bottom of page 27, which is where it becomes necessary to take a view about whether it's a narrow or broad exception. So we say in paragraphs 5.53, 5.54, that there is no reason to extend the principle widely because that serves to protect the executive branch of Government, and to reduce access to the Courts with no good reason, recalling that the point of protecting, or the point of the judicial restraint, is to enable Parliament to operate freely, but there's no issue of Parliament operating freely where we're protecting the executive branch of Government when it's failing to appreciate legal rights or interests that are established by law. And all that, we say, follows out of *Port Nicholson* and elsewhere.

So the proposition 7 we contend for is a narrow view, that is to say, "The non-interference principle does not extend to litigation claims which do not seek the Court's prevention or criticism of the drafting introduction," et cetera, "of intended specific legislation, and which do involve rights or interests which would not be extinguished by such legislation." And that, we say, captures the position we have here. So we understand the dispute between the parties to be really around proposition 7, that's the main proposition.

O'REGAN J:

What would you say if the legislation was actually before the House? Would you say that this part of the process leading up to it was still justiciable or not?

MR HODDER QC:

If there was a failure to exercise a process right through we'd say that could be independently carried on, it wouldn't be a criticism of the legislation's merits, it would be a statement of indication of the position it was beforehand, acknowledging –

O'REGAN J:

But it would affect the debate in Parliament, wouldn't it, if the Courts were expressing concern about them.

MR HODDER QC:

That's obviously a realistic possibility, that's what encouraged Justice Simon France in the *Te Ohu Kaimoana Trustee v Attorney-General* [2016] NZHC 1789, [2016] NZAR 1169 decision to issue a stay. A stay is sort of a different proposition to saying it's non-justiciable. That may be a kind of a more immediate issue. Although there are issues around that because there is a level of uncertainty. I appeared for the plaintiff in that case and the legislation that was before Parliament was expected to be passed later that week, is still there, and so the issue about what one does and how long it's kind of tied up for is difficult. Sorry, but to the idea that a stay might be there if there's an immediate Parliamentary issue, the answer would have to be yes, but, or yes it's a possibility, that's a matter of assessing all the circumstances, but to say that it's non-justiciable –

O'REGAN J:

So you'd say that if the problem arose that the stay would be a better solution than the Court filing a case, or striking the case out.

MR HODDER QC:

Insofar as a risk of – yes, is the short answer, but a stay is only one of the options a Court has. One is the framing of the declaration itself. So the question what would the declaration say, and the kind of declaration that as I read it the President was concerned about in *Sealords*, was one of those declarations that the Crown is obliged to follow in the sense that the Crown

wasn't bound then by injunctions and prerogative remedies, but the declaration, there was a convention that would follow the declarations, and that I understand is what the President was saying in *Sealords* when he said, "To dictate by way of declaration." So as long as it's not a dictatorial declaration there might not be an issue of the kind that Justice O'Regan is raising.

That brings me to the question of declaratory relief and what declarations might be raised. It may be convenient for the Court to turn back to our statement of claim, which was in volume 1 of the bundle, tab 17. So the declarations that are sought are at the end of the pleading after paragraph 36, and the Court will see they run from (a) to (f) in the form of this particular pleading, which was the second amended statement of claim. Firstly a declaration about Ngāti Whātu Orākei having ahi kā and mana whenua in relation to the relevant land. Secondly, a declaration that when applying its overlapping claims policy to any land within the area the Crown must act in accordance with tikanga, and in particular the Ngāti Whātua tikanga. Thirdly, a declaration about Crown development and making of offers to include land, must be made in accordance with tikanga. Fourthly, a more general point which picks up on the more lengthy pleadings in that declaration about how to comply with tikanga would involve the following aspects, what the Crown should do, and then (e) and (f) are specific to the particular properties that were being transferred. So the first four are generic and the second two are –

WILLIAM YOUNG J:
Do we take them out, do we take (e) and (f) out?

MR HODDER QC:
For present purposes, if we got to the stage where the Court's satisfied there has been a decision, then you would take them out. But our submission to you is you haven't got to a decision yet. That follows after a decision. That is to say a decision to introduce a settled form of legislation to Parliament. So no we're not acknowledging that you can take (e) and (f) out, but they're certainly more problematic than (a) to (d).

What we did in our written submissions for this Court is really in response to the proposition from the Court of Appeal, where the Court of Appeal said, the only purpose of these declarations is really to criticise the Government, I'm putting it rather crudely but that's the essence of the reasoning that was advanced towards the end of the judgment of the Court of Appeal below, and it's really in that way that we have tried to accentuate the affirmative to show that it can be done another way, and that's what we find on our page 29 at paragraph 6.6. I'm hopeful that it comes closer to what is being sought. But I stress that, as we did in the submissions, that starting with the declarations is the wrong way around. The declarations will follow from the arguments and the findings that the Court makes. We certainly aspire to those but if the evidence or arguments comes out somewhat differently, then they'll have to be reshaped, and so that's relief that is consequential on the findings, not the way it says relief is somehow too broad therefore the statement of claim has to be dismissed as being untenable. So what we have in 6.6 in paragraph (A) is the focus on the relationship. "There is a current and ongoing relationship between the Crown and Ngāti Whātua Ōrākei which reflects reciprocal commitments to act towards each other consistently with principles of the Treaty of Waitangi, and includes an obligation in law that the Crown respect Ngāti Whātu Orākei tikanga where Crown conduct may or will have particular impact on the customary rights or interests of Ngāti Whātua Orākei."

So our submission is that that is a legitimate topic and a legitimate declaration that we are right to be asked of and answered by the Court. It's based on a relationship. It is asserting that there are obligations in law of the kind that are pleaded, and we said it fits well within the exception to *Milroy* and it's what was being discussed and contemplated in *Port Nicholson*.

(B) is an elaboration of that. It says, "that such respect for Ngāti Whātua Orākei tikanga includes the Crown recognising that: (i) Ngāti Whātua Orākei has ahi kā and mana whenua… (ii) … full and good faith endeavours to consult with Ngāti Whātua Orākei and to accommodate… (iii) it is inconsistent with Ngāti Whātua Orākei tikanga principles… transferred to other iwi

otherwise than… with the approval of Ngāti Whātua Orākei." And then (iv) deals with the overlapping claims policy. Now again I don't say we adopt everything else, but in terms of the real concerns for Ngāti Whātua and the position it's got itself in, or the position the Government has put it in to be more precise, it has unable to establish whether these are valid propositions or not, and in our submission they are matters suitable for judicial determination. They are about legal matters. They are not trying to dictate to Parliament what it should do, and the form of the proceeding in which they are in, the judicial review proceedings, is also adequate for that. It will be an unusual judicial review proceeding but there are exceptions of the general rules about judicial review. Indeed there are authorities, at least in the High Court, where judicial review has been combined with private law claims in a single statement of claim. The Court will deal with that in some management way to work out that a fair process is established. So we don't accept that the judicial review proceeding is, I think "wrecked beyond repair" is the metaphor that's used by our friends in the submissions for the Crown.

O'REGAN J:

But you're not really challenging, the key decision that was foundation of the original claim is not going to be the subject of a declaration now under this relief, is it?

MR HODDER QC:

Under (A) and (B), no, but that's because I'm using (A) and (B) to replace the previous generic propositions. (e) and (f), as my answer to Justice Young, was, no, they would remain until there was an appropriate decision to introduce the legislation, which we say hasn't happened yet because of the nature of the process, and that decision arises with the final Cabinet decision to approve the deed, and as far as we know there is no deed yet.

ELLEN FRANCE J:

If there was a decision of that order, wouldn't some of (B) be inconsistent with that, so particularly (B)(iii)?

MR HODDER QC:

The implication and probably the implication of everything that's done is always (subject to Parliament exercising legislative power). This is directed to the Crown and its respect on the relationship, it's not direct to Parliament as such. So we must be entitled to have the Crown and its relationship recognised in this way.

ELLEN FRANCE J:

Well that's why I focus on (B)(iii) because that's dealing with the method of transfer, and if the method of transfer is legislation, that…

MR HODDER QC:

But only when it's by legislation. So we can't predict in advance. So let's assume –

ELLEN FRANCE J:

No, well my question is on the hypothesis that you've got that decision that you were talking about.

MR HODDER QC:

We would still say that still is valid because (B)(iii) doesn't prejudge whether the transfer is going to be by legislation or otherwise. If it's otherwise we say (B)(iii) is perfectly valid as a general proposition. If it's by legislation by definition sovereignty negates the proposition in that case. Which is why I say implicitly it's subject to any legislation (closed brackets is at the end of it) which might be more complete. But the basic proposition is that if you postulate the original process where the Crown had in mind using a power under the statute to take the land out of the collective RFR arrangements, (B)(iii) would apply, and as this is meant to be forward-looking over a long relationship, we say there's no reason to take (B)(iii) out. So if I can conveniently summarise what I'm trying to say.

O'REGAN J:

Sorry, so are you, would you say that with this claim before the Court, assuming it's not struck out, there would be an obligation on the Minister not to introduce legislation that would affect the transfer of these properties?

MR HODDER QC:

No. No. That decision, it's the very decision that is protected by *Sealords*, but that is what is protected, no more than that.

O'REGAN J:

Well as a matter of comity in allowing the Court to make a decision and not effectively supersede it by introduce of a Bill.

MR HODDER QC:

Yes I think we're saying, I hope we're saying the same thing.

O'REGAN J:

I mean if so are you saying there is nothing to restrain the Minister at the moment from introducing a Bill and for Parliament from passing it? This proceeding, even if a declaration were made, still wouldn't do that?

MR HODDER QC:

Correct. The Courts may give us all the declarations we've sought, and the Minister is entitled to go to Parliament because Parliament is entitled to consider any proposition, it's the because that's important, and say, irrespective of all that, here is legislation that extinguishes whatever these rights are, or transfers the properties that are involved. And so elaborating on Your Honour's proposition, if tomorrow the Minister says I'm now making a decision to introduce legislation based on a deed which we haven't seen but let's assume it's been signed this afternoon, then that decision is one that we say is covered by the *Sealords* principle. But up to this point nothing is.

O'REGAN J:

I thought the material attached to Mr Majurey's submission, that press release, talked about the Minister had made a decision. Is that not right, did I misunderstand it?

MR HODDER QC:

My logic is that based on the Red Book is that there has to be a deed, there has to be a Cabinet policy decision and then it goes into the House and it's the point after the deed is made, at the point the deed is signed it becomes difficult. The moment we don't know about a deed being signed, there's no evidence of that that we've heard of.

So the points of departure between ourselves and particularly the Crown really go around the argument that our focus is on a course of conduct which, as I said at the outset, includes those two elements, a disregard element and a transfer element, and the Court will see and will hear, no doubt, from my learned friend in an elaboration of his written submissions, but they really amount to the fact that because the transfer maybe only by legislation in this case, the issues about disregard don't matter, that is the major point of distinction between us. I hope it's clear that the disregard conduct is of great significance in a post-settlement context. As our draft declarations (A) and (B) on page 29 set out, the issue here is about the relationship between Ngāti Whātua and the Crown, but it's not limited to the position of Ngāti Whātua, particularly any iwi that has settled. The forms of these deeds and Acts are somewhat, some of them are about a relationship based on the principles the Treaty and the question is, do they have any legal force. Now they won't have legal force that overrides the power of Parliament to legislate, that's accepted. The question is, do they have any legal force outside that. At the moment we simply don't know, and the effect of the decision below is we can't find out, and that's the main reason why we say the principle that's being relied on, the principle which is asserted in the strike-out motion at the outset, the principle that's upheld in the Court of Appeal, is that this is all really because of non-interference and because legislation is definitive. In our submission it doesn't operate that way.

ELIAS CJ:

I'm just trying to think re expressions of the gravamen of the case really, what it is, because it does seem that your transactional focus may have distracted attention from it. It just seemed to me that the problem, from your perspective, is that if there is a right that Ngāti Whātua has to an exclusive rohe and to Crown acknowledgement of that, and that's a matter that has to be determined, couldn't be assumed, then if that is the right the decisions that are going to be made will be taken on a basis that there is no such right simply as a matter of Government policy through the overlapping claims policy.

MR HODDER QC:

I'm trying to follow how a right could be established by a Government decision that is a policy.

ELIAS CJ:

Well isn't that –

MR HODDER QC:

The policy may be wrong.

ELIAS CJ:

There is no – well accepting that, but if there is no ability to challenge the policy, which is another way of looking at it through this litigation, then the legislation or the decisions that are to be made may proceed on an entirely wrong basis.

MR HODDER QC:

I think that's our case.

ELIAS CJ:

Yes, that's what I mean. I'm just trying to get away from the more transactional focus.

MR HODDER QC:

And like many other things in law, that transactional focus is probably historical because the immediate issue was the idea that these lands were specifically in sight and were going to be transferred. But the underlying proposition that they represent is the disregard of the rights that Ngāti Whātua pleads. They are a manifestation of it but they aren't the limit of it and they are simply one example of it. That's the essence of the claim here.

ELIAS CJ:

Yes, and in part, subject to what he says in answer to Mr Goddard's submission that this is a revolution, or Mr Majurey's, in the way the case is being put, because the underlying gravamen is constant.

MR HODDER QC:

Yes, and the underlying thing is more specific in the very first decision that gets overtaken a bit more in the later decisions, but no we have not seen the changes as being revolutionary, they were just necessary actions to the fact that the Crown had changed its position from using administrative means to using legislative means. So unless I can assist the Court further those are the submissions for the appellant in support of the appeal.

ELIAS CJ:

Yes, thank you Mr Hodder. Now Mr Joseph, we would like to hear from you, but quite briefly and it probably is convenient to hear from you before we heard from the Crown so that Mr Goddard can respond, and Mr Majurey can respond, and I was hoping that you'd be able to address us before lunch.

MR JOSEPH:

Thank you Your Honour.

ELIAS CJ:

Or should I say complete what you have to say before lunch.

MR JOSEPH:

Well may it please the Court. I had intended, I had actually prepared a 30 minute presentation, I was going to take Your Honours through the deep-seated grievances held by these intervening iwis. I don't think that's probably necessary, if I can just refer you to the affidavits which have been prepared by the respective Trust chairs of the iwi. That's in the case on appeal, tabs 96 and 97, which outlines the grievances there.

Essentially the intervening iwi support the appellant's case. They wish to seek access to the Courts simply to have their underlying mana whenua rights, their primary mana whenua rights recognised, and they take issue with the Crown's overlapping claims policy, for the reasons which my friend Mr Hodder has outlined. Now the Crown does make an important concession actually in its submissions with regard to the Intervener's submissions, and I'll just take Your Honours to that. At 6.52 of the written submissions of the Crown where it is stated, "It is common ground that questions in relation to mana whenua can be determined by the courts in properly constituted proceedings where there is a live dispute about mana whenua rights. The Crown has never argued in these proceedings that questions in relation to the existence and nature of customary rights and customary interests in land cannot be determined by the Courts."

The problem is then that the Crown says, yes they can, we can actually go to court to seek clarification of these mana whenua rights, but it cannot allege that there'd been any errors in the Treaty settlements process from the time that, in fact, negotiations are entered into, and this is the ever regressive sort of reach of the *Milroy* principle. Once legislation is to be introduced at some point down the track then somehow this blanket abdication of the Court's jurisdiction occurs, and so I would like to go straight to the *Milroy* principle. These submissions, well supplements shall we say, written submissions, because I wasn't around when those were prepared, so the oral submissions are slightly different, but might I suggest that our submissions are that this principle is too artificial in its application any longer for it to be a credible principle and there is actually a way around this, but if I might take

Your Honours briefly why this principle does not, in our respectful opinion, withstand scrutiny and then we might move perhaps to what could be a resolution of the problem.

ELIAS CJ:

What are you saying is the *Milroy* principle that you're going to shoot down?

MR JOSEPH:

Well the mantra, and it's nothing less than that, is it's everything that is preparatory to the introduction of legislation is caught by the principle of non-interference and legislative process, and the artificial application of the principle is actually taking the legislative process and extending it back in time over years to insulate from judicial scrutiny anything that happens in the course of those Treaty negotiations. So that is the *Milroy* principle and I think, or we believe rather that it is actually flawed on two counts. Addressing the first count, it is based on untenable reasoning about the need for rights to be affected. Now this departs from my friend Mr Hodder's submission where he is at pains to establish that there are ongoing rights, which can actually be the subject of a declaration. We would go further and say that for purely declaratory relief to follow, to issue, it is not necessary to point to any rights at all as being affected, and if I could just, this is summarising at 100 miles an hour Your Honours my submissions, but if I can take you to, well first of all the *Milroy* principle takes us back 100 years, in our law. It takes us back to the *R v Electricity Commissioners* [1924] 1 KB 171 (CA) case. That is in the Interveners' bundle of authorities at tab 30, and there remember at that time in 1924 the scope of the prerogative determined the scope of judicial review, and I think Your Honours will recall the iconic dictum of Lord Justice Atkin as he then was when he said, there must be a decision affecting rights for the prerogative writs it's to issue, and that determined the scope of judicial review for many years. But of course that proposition was laid down at a time when the Courts hadn't discovered their own declaratory relief by way of declaration and declarations are not so confined to decisions affecting rights, and I'll just mention two decisions in passing if I might, to make that point. The *Regina v Secretary of State for Employment, ex parte Equal Opportunities Commission*

[1995] 1 AC 1 decision, that's a 1995 decision of the House of Lords, and in that case, this is ample authority for the fact that rights need not be an issue for purely declaratory relief. In that case a Minister's letter was held to be judicially reviewable, a Minister's letter. There was no decision, no rights affected. In fact the Equal Opportunities Commission alleged that UK legislation was discriminatory to then EEC laws, this was before it morphed into the EU, and the Minister then wrote back saying that no, the legislative thresholds in the legislation complied completely with the EEC law and then the Commission sought judicial review successfully of that letter, and in fact the Commission alleged that there was a decision, the letter was the decision, and Their Lordships said, no, there's no decision here, but still it was judicially reviewable.

Now I needn't take you through the second decision, it's *Peters v Davison*, because my friend Mr Hodder has done that. It concerned a commission of inquiry of course, and a commission of inquiry does not affect rights. A report of a commission of inquiry makes findings and recommendations. And there's actually enough in that decision, I might just hesitate for a moment, the joint judgment referred to a Privy Council decision from New Zealand, that was in *Re Erebus No 2*, also involving a Royal Commission, and I'll just quote what Their Lordships said, and I do apologise for not taking you there as time won't permit it, but Their Lordships stated, "Findings made by Commissioners are in the end only expressions of opinion." But that did not immunise it from judicial review or indeed purely declaratory relief. So that's the first objection to *Milroy*.

The second objection is its unmanageable reach, and this is, our view is that it really does public law a disservice. It places beyond judicial oversight a crucially important executive process, a public process par excellence, that is the Treaty settlements process. So *Milroy* becomes, in effect, a principle of non-interference in the executive process. We're talking about Treaty settlement negotiations which commence with the mandate issued, and they might crank on for years before even a deed of settlement is reached. Now to say that that's all part of a legislative process is entirely artificial while dealing

with the legislative process. If we're sensible about this, the legislative process has two book ends. It begins with the introduction of a Bill. When the clerk of the House stands up at the beginning of a sitting day and reads the short title of a Bill, that's its formal introduction, and it ends when it comes out the other side and is spirited across Wellington for the Governor-General's assent, the Royal Assent, then it becomes law, section 16 of the Constitution Act says so. So they are the book ends which determine when the start and finish parts of the legislative process concerns with.

Let's then move on very quickly to how we might actually reconcile this area of the law and we would do this by pointing to this solution. A distinction should be drawn between the principle of non-interference in legislative process, and the principle of comity. As we'll see in the principle against non-interference, that is very narrow in its temporal application. When a Bill is introduced or when it comes out the other end. And this protects, of course, scrutiny of anything that actually occurs in that legislative process, and in our bundle of authorities we have actually, at tab 29 we've provided chapter 5 of the standing orders of the House setting out the very detailed procedures for legislation, and those procedures are all covered by the non-interference principle.

The principle of comity has a different application. The whole point is to move away from the bludgeoning and blunt effect of that mantra that *Milroy* is reciting, that everything preparatory thereto is covered. So the principle of comity. This requires Courts to exercise restraint so as to preserve Parliament's legislative freedom, its autonomy, that's its purpose, and so it will apply to cover the *Sealords* principle, no attempt can be made to use the Courts' process to restrain the Minister from introducing anything in the House that the Minister wants the House to consider, and the mirror image of that is that no Court will entertain a remedy to compel a Minister to introduce anything into the House. These matters are constrained by the comity principle. Now in support of these principles being separate and different, and they bite at different times in the process, the principle of comity before the legislative process starts, may I refer Your Honours to the *Kaimoana*

decision which my friend Mr Hodder took Your Honours, where there, and I just apologise, it's at the appellant's bundle of authorities at tab 31, but at paragraph 14 His Honour Justice Simon France actually said this, "On several occasions the Court of Appeal has confirmed that the comity principle means a Court cannot seek to prohibit the introduce of legislation," and then cites the *Sealords* case, *Westco Lagan* and the FOMA case from 2007.

So this indicates that in fact the comity principle is a stand-alone principle and if I can just refer in passing to section 4, subsection (2) paragraph (b) of the Parliamentary Privilege Act. The principle of comity is a common law principle, but now has dual statutory definition. It has dual statutory definition under the Parliamentary Privileges Act for the purposes of assisting the interpretation of that Act, but the actual definition it gives to the principle of comity is of general application, and it defines the principle of comity without reference to a principle of non-interference in legislative process, no reference for that. It defines "comity" in terms of preserving the independence of the legislative and judicial branches, crucial, and also the need to maintain mutual respect and restraint as between the organs, one owed to the other. So they're the dual limbs, independence and mutual respect and restraint. No reference to the legislative process.

So giving the principles of comity and non-interference separate application, we believe makes the law manageable in its reach. So decisions to introduce legislation, covered. So too the legislative process, covered from judicial scrutiny. Now we concede here that the principle of comity might even have conceivably broader application. It is a flexible principle to be worked out on a case by case basis. That is needs must. It may be that a Court has to respond to something in order to preserve the legislative independence and autonomy –

ELIAS CJ:

Is the principle of comity, where is it derived? I know you've referred to those relatively recent New Zealand decisions, but seminal where?

MR JOSEPH:

Sorry, it's essentially a common law principle and I think in the Crown's submissions there's reference to the *British Railways Board v Pickin* [1974] AC 765 (HL) case from the 1970s. That's the principle of comity Your Honour.

ELIAS CJ:

I suppose it is.

MR JOSEPH:

It is, it's the need to respect the other's independence of function and operation, that's the principle of comity, but it now has dual statutory recognition at least under the Parliamentary Privilege Act.

ELIAS CJ:

Yes, leave that aside for the moment, I'm just interested in its provenance as a principle.

MR JOSEPH:

Thank you, Your Honour, I appreciate the suggestion. When we're talking about the relationship of the legislative and judicial branches we're going to the nub of the constitution, and really it's based upon a relationship of interdependence and reciprocity, and mutual respect and restraint. That is the principle which has driven the constitution.

ELIAS CJ:

No, I understand that, but I'm just thinking of a label, but you say *Pickin* is as good as it gets?

MR JOSEPH:

House of Lords Your Honour.

ELIAS CJ:

Well, but I don't think, well I don't know that it actually says that, but anyway, yes, carry on, thank you.

MR JOSEPH:
Well, I just mentioned that because the Crown cites *Pickin* as in support of the principle of comity if I don't…

ELIAS CJ:
Yes, it does.

MR JOSEPH:
So what I'm suggesting is that the principle of comity is a flexible but manageable restraint on the jurisdiction of the Courts and when they should walk away from that jurisdiction, and it is superior in its application to a blunt rule which says everything that occurs in the Treaty settlements process from the time of the mandate given is beyond judicial oversight. Now that in a rule of law country is not an attractive proposition. It's not.

So just to conclude then, the interveners would seek access to the Courts for the declaration of their primary mana whenua rights because they take issue with the Crown's policy which refuses to recognise those rights in treating all iwi who have some interests in the rohe to be treated equally and they want access or they ask for access to the Courts, and I suppose that the question might be asked, it's a very interesting one and I don't know if I have the answer, Your Honours, the purpose of a declaration would be to inform, not to embarrass. You know, just to get a purely declaratory judgment of the Court saying that these are the existing mana whenua rights of this iwi. And I suppose a declaration by the Court recognising these mana whenua rights could be treated as akin to a mandatory relevant consideration because we still are talking about a political process here moving towards a Treaty settlement involving the Crown and iwi, and if it were treated according to standard orthodox administrative law principles then that would place a legal duty, a legal duty upon the Minister, or the officials advising the Minister, genuinely to factor in that declaration as to existing mana whenua rights, but

beyond that the Courts could not go perhaps. It would have to be shown that in fact the Minister had genuinely considered it but there might be three, four, five, several factors to be factored into the exercise of discretion, only one of which being the statutory, the Court's declaration. So the final Treaty decision might actually go in the other direction and not recognise perhaps the existing mana whenua rights recognised in the declaration, but at least it has given judicial input into that process without unduly restraining the political process that is involved in Treaty settlements decisions.

And finally, because I know that time is a relevant factor here, and I'll just refer in passing to the *Port Nicholson Block* decision which my friend, Mr Hodder, addressed. We say that this approach is consistent with that in the *Port Nicholson Block* case. There, there was no attempt at the end of the day to interfere in the legislative process. There was a declaration as to rights and whether or not there might be overlapping mana whenua rights but there was no attempt to interfere in the legislative process.

And I think finally I might say this, that, and it's as much hypothetically as I would say by way of submission, from the *Kaimoana* case a stay was issued there because it was seen that the declaration that was sought would somehow intrude upon the legislation before the House. Well, we would contend or argue that in fact even where legislation is before the House that the Court still retains jurisdiction to issue purely declaratory relief outlining or affirming these existing mana whenua rights without going further to interfere with what is happening within the House, so it would not trigger the non-interference principle, if there was no attempt to interfere, it's simply a declaration as to rights.

I suppose what I'm suggesting here finally is that it would provide some compromise in what is currently, as I see it or as we see it, an unacceptable situation where there are iwi grievances, deeply held iwi grievances, but they cannot bring those before the Courts, and that's all we'd ask for is that they have the opportunity to air their grievances even if in fact the Courts didn't find for them. That is the judicial process. Thank you, Your Honours.

ELIAS CJ:

Thank you very much. We'll take the lunch adjournment now.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.15 PM

ELIAS CJ:

Mr Joseph, I'm conscious that we rushed you through. If over lunchtime was there anything that you thought that you didn't have a chance to say?

MR JOSEPH:

I managed to touch on matters I would have elaborated on.

ELIAS CJ:

Good.

MR JOSEPH:

What I would like to have spent more time on, Your Honour, is in the possible reconciliation of the two contesting public interest: the public interest in the Court declaring the law and the other great public interest in maintaining respect for Parliament, at least in the process, and I wanted to tie the principle of comity and the separate principle of non-intervention to those great ends. And I think there's a lot to be gained if we could actually, if it could be looked at in more detail about how the two principles could marry in more effectively than simply having a one judicial abdication of jurisdiction over matters in the Treaty settlements process.

ELIAS CJ:

Yes. Well, I think you do cover the difference between the two, and your point that the two are reconcilable is probably not something that we're going to need to elaborate on in this context I would have thought. But was there something in particular you wanted to say about it? If so, come to the lectern.

MR JOSEPH:

I would probably – I've sort of spent my ammunition on that one possibly, just in light of that comment, Your Honour. But I suppose to finish off on it's, somehow one feels a very deep sense of frustration going to grievance that so many iwi, not only the ones in the Interveners here but other iwi in Court, their representatives are here, because of the deep sense of grievance, so something has to be addressed. I suppose that would be the point I'd leave with the Court.

ELIAS CJ:
I think that is a point you made and I think it's one that we do appreciate, and that's really why Mr Hodder started with access to the Courts.

MR JOSEPH:
Yes, thank you, Your Honour.

ELIAS CJ:
Thank you, Mr Joseph. Yes, Mr Goddard.

MR GODDARD QC:
Your Honour. I want to begin by descending from the abstract to the concrete and just focusing on what decisions have been made by the Minister. The Court asks some questions about what record there is of that, and the importance of that I think was confirmed by some of my learned friend Mr Hodder's submissions about the relief he sought and the possibility that something might happen non-legislatively and the precautionary nature of a new declaration B(iii) to preclude that.

So it would be helpful to bring things down to earth a little, if I may, by turning first of all to the Minister, the then-Minister's affidavit, which is in volume 2 of the case on appeal under tab 36. Mr Finlayson, then Minister for Treaty of Waitangi negotiations and the Minister who made the decisions, on my learned friend's version at least, prompt for the proceedings, in my submission really the heart of it as pleaded. At paragraph 3 of the affidavit Mr Finlayson refers to the proceedings regarding the Crown's offer to propose legislation

authorising the Crown to transfer two properties to Ngāti Paoa as exclusive commercial redress and one property to Marutūahu collective as cultural redress with an opportunity to purchase a further nine properties as commercial redress. The then-Minister said at 4, "These offers were made in the course of negotiating with the settling groups' respective mandated representatives and are dependent on the parties reaching an agreement on the respective settlements." 5, "None of these proposals would occur without legislation to give them effect."

The affidavit sets out the background to the, "Recent decisions that there are no overlapping claims that prevent further work on reaching an agreement with Ngāti Paoa (such an agreement to be implemented by legislation), to maintain my redress offer to Ngāti Paoa about the content of proposed legislation, and maintain a similar redress offer to Marutūāhu."

Then there's a discussion of how Treaty settlements operate generally. Some background to the relevant hapū and rōpū involved in those negotiations and the observation at 10 that hapū and iwi interests in Tāmaki Makaurau are complex.

11, the decision, the revised Ngāti Paoa decision as it's described in the pleading that the then-Minister made on 8 July 2016, was a decision that, "There were no overlapping claims that prevent further work on reaching an agreement with Ngāti Paoa that would be implemented by legislation," and those last words are omitted in I think in my friend's submissions and I think also in the pleading. I'll come back to that. But what the Minister decided was that there were no overlapping claims that prevented work on reaching an agreement to be implemented by legislation. "I therefore decided to offer to Ngāti Paoa that the proposed settlement legislation include a statutory right for it to purchase the two properties. 12, This section sets out some background to those decisions." That is then set out.

Mr Finlayson said at 14, "In Crown practice, the language of 'resolution'". So there was a Cabinet decision in July 2015 to transfer up to 17 properties.

One of the conditions was the resolution of overlapping claims to the Crown's satisfaction, and that language doesn't require the complete removal of such disputes. As the Minister observed, Treaty settlements between one group and the Crown seldom resolve centuries-old issues between iwi. Rather, the Minister has to be satisfied that the overlapping claims issues have been resolved or addressed to the point that the redress may proceed. The majority of overlapping claims were resolved by mutual agreement. However, Ngāti Whātua Ōrākei objected to the transfer of the two properties. "Considered the points Ngāti Whātua Ōrākei raised with officials and with me directly about those properties." So there has been engagement, to pick up one of the questions of the Court to my learned friend. I do not consider that the objections to the transfer are correct, for reasons which would be dealt with if the matter proceeded to a substantive hearing.

But, in any event, what happened? Well, Mr Finlayson wrote to Ngāti Whātua Ōrākei with his preliminary decision, invited further information and proceedings were commenced shortly after that. And this is the point at which the Minister revisited the decision that he made, as Your Honour, Justice Young, rightly anticipated in questions to my learned friend. "Given Ngāti Whātua Ōrākei's continued concern, I decided the Crown should not transfer the properties prior to settlement."

20, "Should an agreement be reached with Ngāti Paoa, I intend to refer the question of whether to legislate to enable the Crown to proceed with a Treaty settlement that includes this particular redress to Parliament: The transfer will not occur without legislative authorisation."

So this wasn't a strategy. This was a decision that it wasn't appropriate to press on against the backdrop of this dispute and exercise executive powers without legislative endorsement that might be the subject of a protracted challenge in the Courts but rather to say, "Well, let's, against this uncertainty," Your Honour Justice Young's point again, "against this dispute which the Crown is not in a position to resolve refer to Parliament the question of whether there should be a settlement which incorporates this redress."

ELIAS CJ:

Why do you say “which the Crown is not able to resolve”?

MR GODDARD QC:

Because the Crown proceeds in the Treaty settlement space on the basis, as the Minister said back at 14, that when trying to settle with one group it’s unlikely that differences, often long-standing differences about interests, can be resolved in a satisfactory way by the Crown and unsatisfactory that the Crown should attempt to do so. That in itself would involve the Crown inserting itself into questions of tikanga in which it does not obviously have a role. But it’s perfectly proper to go to Parliament and say Parliament can, if it thinks fit, legislate for this form of redress to be provided by way of Treaty settlement. Parliament has processes for hearing from affected parties. They can bring their grievances to Parliament. If Parliament considers that it’s not appropriate to legislate, it won't, and I’ll come back to that point later. Parliament can hold such hearings as it thinks fit, the ordinary select committee process, and this Court has considered at least one case where Treaty settlement legislation underwent a material change following a select committee process – I’m thinking of the Wakatū settlement legislation and the exception that was inserted at the select committee stage and which this Court interpreted as permitting the proceedings to continue. So, groups can come along, say, “Our interests are not properly protected by this legislation,” and there is then a process by which legislation can, following negotiation with the settling iwi, because of course settlements are not unilateral decisions by the Crown, be accommodated in legislation. And that's exactly what the Minister decided should happen here, that the issues should be decided in the political space against the backdrop of competing claims which the Minister didn’t consider that it was appropriate or practical for him to seek to resolve.

ELIAS CJ:

That may be entirely appropriate in terms of settlements, but in terms of claims of right why not the option of permitting the right to be established?

MR GODDARD QC:

That turns very much on what one means by the right.

ELIAS CJ:

Yes.

MR GODDARD QC:

And Your Honour attempted I think, I'm afraid, with only limited success, to ask my learned friend to clarify what rights precisely were being asserted here. There's an ambiguity in the assertion of existing rights in the appellant's case in its pleading and in its submissions. Are we talking about in effect customary rights in relation to land, mana whenua rights, or are we talking about rights – and this is certainly how the claim is pleaded – in relation to the process to be followed in developing legislation and in relation to the content of that legislation. I'll come back to that later because it's an important part of my argument but in a nutshell what the Crown says is if there is a live dispute in relation to customary rights, mana whenua rights, in relation to land, a dispute that will normally arise as between iwi rather than iwi and Crown, then it may well be appropriate in appropriately constit

uted proceedings for the Court to determine that they're legal rights, in particular customary rights are legal rights like any others. And those may need to be asserted against the Crown, they may be asserted against other iwi where they're in issue. But what the Crown says is that there are no rights enforceable in the Courts in relation to the process to be followed in developing legislation or in relation to the content of that legislation. And to the extent that it's rights of that kind that are being asserted here, it's not the case that the Courts below ducked giving an answer to the claim, they answered it, and they said there are no such rights enforceable through the Courts that are recognised by New Zealand law, and in my submission that's the right answer and I'll go to why. But one needs to be absolutely clear about what rights are in issue.

ELIAS CJ:

Well, I'm not disagreeing with that, but the right that I'm interested in is the more general right that Mr Hodder addressed us on, which is who has mana whenua in this area.

MR GODDARD QC:

And what the Crown says – and is really the point His Honour Justice Young made in the question to my learned friend – the Crown has not purported to reach a final view on that but –

ELIAS CJ:

I know, I don't disagree with that, but should it have, if it's cutting across them, that's the problem.

MR GODDARD QC:

And that all depends on what the Crown is trying to do.

ELIAS CJ:

Yes.

MR GODDARD QC:

There are certain steps the Crown might try to take in the exercise of public powers which might require it to identify who has mana whenua and who should be the party with whom some sort of engagement takes place. But when it comes to proposing legislation, the Executive can properly prepare and submit to Parliament a proposal that cuts across clear rights, or that cuts across uncertain rights, and thats His Honour Justice Young's point, that it's no less proper for the Executive to propose legislation that cuts across distinct property rights, for example, merely because they're contested. The Crown can say, suppose that I have a dispute with my neighbour in relation to the boundary of some farmland, and there's a desire to legislate to let a railroad go through it, a 19th century example. Parliament can legislate for the

railroad to go through and for compensation to be paid to the owner without clarifying who that owner is, just as much as it could if it was perfectly clear that I am not my neighbour with the owner of the land. I'll come back to all of this in more detail but as a sort of trailer for the submission that's the point. Your Honour is not happy with the trailer?

ELIAS CJ:
No, but get onto the main show.

MR GODDARD QC:
Perhaps I should address Your Honour's concern now so at least I understand it as I develop the argument.

ELIAS CJ:
Well I'm not sure that I understand the trailer, so perhaps develop it. Carry on.

MR GODDARD QC:
I'll do that. So back to the Minister's affidavit for now, 21, "Officials Ngāti Whātua Orākei of my revised decision on 2 June 2016." And the letters that my learned friend Mr Hodder referred to which set out the decisions, essentially in the language used in this affidavit including the important rider about proposals to be implemented by legislation are contained in the case on appeal. So the power of the final decision, for example, is in volume 5 of the case on appeal, under tab 79. Writing on the 8th of July 2016 to the Chair and Deputy Chair of the Ngāti Whātua Orākei Trust. It said final decision. Preliminary decision, you raised several concerns with me, and I provided you with opportunity to provide more information. Papers were filed. Then in the middle, "On 21 May 2016 I revised my preliminary decision. I decided the Crown would not sell the properties. Rather, it would be for Parliament to authorise any transfer and proposed," if the Court wanted to grant a declaration, this is grammatically flawed, I couldn't oppose it. "Proposed that settlement legislation would provide that Ngāti Paoa be given a right to purchase the properties at settlement date." Given they won't be, "Alienated

from the Crown prior to settlement date and unless Parliament permits it, I consider I am able to proceed to a final decision on the revised redress proposal."

This proposal was intimately linked to the idea that the argument was going to be put to Parliament. The final decision relates simply to the offer of redress Ngāti Paoa may or may not accept. "I have decided that there are no overlapping claims that prevent further work on reaching an agreement with Ngāti Paoa, to be implemented by legislation. I intend proposing that settlement legislation would constitute a right to purchase the properties at settlement date. I have instructed officials to continue negotiations with Ngāti Paoa and to continue parallel drafting of legislation."

My friend's submissions say in section 1 there's no draft legislation underway, that's not right, and I'll go to some of the evidence on that. But again I just make the point that this decision is a decision about what to incorporate in a legislative proposal to be decided by Parliament in the context of Treaty negotiations and parallel drafting of legislation.

Coming back to the Minister's affidavit, if the Court will forgive me saying "Minister" rather than "former Minister", it will save everyone a few minutes. Marutūāhu redress. Ngāti Whātua Orākei also objected to the Marutūāhu redress.

ELIAS CJ:
Sorry I shut it, so where is it again?

MR GODDARD QC:
I'm sorry Your Honour. It's in volume 2, the blue one, tab 36, page 4 of the affidavit 303 of the case on appeal.

ELIAS CJ:
Thank you.

MR GODDARD QC:

And again what the Minister says is, at paragraph 23, "I have considered the points they have raised," that's Ngāti Whātua Orākei, "have raised about those properties following an overlapping claims process undertaken by officials, and meeting face to face with Ngāti Whātua Orākei to discuss their concerns. I have decided that the proposed use of the disputed Marutūāhu redress properties should also be dependent on Parliament determining whether to pass settlement legislation that provides for such redress. I advised Ngāti Whātua Orākei of my preliminary decision," and final decision. It then goes on to provide some background on the decision, about Treaty settlement practice, explains the structure of negotiations, then at 28 and following the different types of redress, financial, commercial and cultural, and what the classification of the properties that are referred to in the pleadings are, that's at 31.

32, "A challenge that the Crown faces with financial and commercial redress is providing redress, within a negotiated settlement as a whole, that: 32.1 enables the claimant group's sense of grievance to be resolved; 32.2 contributes to the economic and social development of the group; 32.3 is fair between claimant groups and in relation to settled groups; and 32.4 takes of New Zealand's ability to pay, considering all the other demands on public spending."

33, "These factors shape the Crown's negotiating position, and the extent and nature of redress offered in the course of negotiations."

Then we come to overlapping claims. It makes the point that in negotiating a settlement the Crown is often faced with overlapping claims from other groups that claim interests, within the settling group's geographic area of interest, and in the course of settlement negotiations the Crown and the claimant group attempt to manage any issues arising from overlapping claims. The preference my learned friend referred to about disagreements about redress between a claimant group and neighbouring groups being settled by

mutual agreement, and that largely happened in relation to the Paoa claim, as the Minister said earlier.

“However,” seven lines down, “if the groups are unable to agree, the Crown may have to decide whether it is satisfied that the overlapping claims have been addressed to the point that I am willing to include the redress in any settlement. In reaching such a decision on whether to offer a particular property as redress, the Crown is guided, among other things, by three general principles: 35.1 its wish to reach a fair and appropriate settlement with the claimant group in negotiations; 35.2 its wish to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims; and the Crown's wish to ensure the redress offered to the claimant group in negotiations strikes a balance between the Crown's obligations to that group and its ongoing obligations and relationships with overlapping settled groups.”

Fiscal matters referred to again at 36. 37, “The Treaty settlement process is not intended to, and does not, establish or definitively recognise claimant group boundaries according to tikanga. Settlements may,” and I emphasise the “may”, “recognise areas of interest, but iwi and/ or settling groups may have overlapping areas of interest. Most settlements are entered into with "large natural groups" that are not necessarily the same as, or are often a confederation of, traditional groupings. Redress is provided to the post-settlement entity selected by the large natural group. Further, the settlement process does not create or confirm any exclusive status, such as exclusive mana whenua or ahi kā. Such matters can only be decided between claimant groups themselves.” It’s a matter of tikanga not executive fiat.

38, “The vesting of a particular site as redress should not be seen as a signal that the Crown is making such a determination. Rather, it is simply a recognition that the Crown accepts that a claimant group has a level of interest that the Crown considers makes the particular grant of redress appropriate in light of all other circumstances.”

39, “Where a settlement involves the transfer of Crown-owned property to the claimant group, the Crown's practice generally is to transfer property that is in the claimant's area of interest and not property that is outside that area of interest,” generally, and as the Minister goes on to note, “The Crown has sometimes made exceptions to this approach.”

40, “In my experience, assessing which redress to use is often a highly political and intensely negotiated aspect of the Treaty settlement process. Treaty negotiations are difficult and quintessentially political processes requiring compromises on all sides. Among other things, proposals have to take into account the location and value of the properties, whether they are being sought for commercial or cultural redress,” there’s obviously a heightened level of sensitivity in relation to cultural redress of property as opposed to commercial, “and the balance of the settlement packages available to each group.”

41, an important point, “This is particularly challenging in an area such as Tāmaki Makaurau where there are multiple overlapping claims and interests and a shortage of Crown properties available for use as commercial redress.”

Then the point about legislative drafting, which I do want to underscore, my primary submission is that it’s not the relevant touchstone, but if it were it’s well underway here, and there’s no doubt but that to grant relief in relation to this process, half of a parallel process, is to interfere with the whole.

42, “Once the Crown and the claimant group have reached high level agreement, the details of the settlement are worked out during the drafting of a deed of settlement. 43, That is the stage that the Ngāti Paoa and Marutūāhu collective settlements have reached.” Perhaps it might help to update the Court, the position with Ngāti Paoa is that Ngāti Paoa negotiators have initialled a deed of settlement, but ratification has not yet begun, and the position with Marutūāhu is that there are ongoing discussions not related to these proceedings which mean that the deed has not yet been initialled.”

But then 44 is important. "Drafting of legislation to give effect to the deed occurs in parallel with the deed drafting. This enables both parties to check that the draft legislation covers and give effect to everything agreed in the deed and, vice versa, that the deed is expressed in a way that can itself be given legislative effect. At this stage, in my experience, policy officials and legislative drafters often work closely together," and a background to the use of parallel drafting and why that's adopted. The last couple of lines of the page, "While the terms of settlement are fore the Crown and the claimant group to agree, it is up to Parliament to ultimately decide whether those terms should be given the force of law. The settlement and any property transfers for which it provides become effective if and only if it is approved by legislation enacted by Parliament."

And there's a little more detail provided in the affidavit of Ms Anderson under tab 39, I won't go through all of it. Ms Anderson, then Director of the Office of Treaty Settlements, and on the first page of her affidavit, page 332 of the bundle, the heading, "Parallel drafting," above paragraph 6, "The affidavit of Christopher Francis Finlayson describes the parallel drafting process," has read the Minister's affidavit, confirm it correctly describes that process, "Modern Treaty settlements are given effect through legislation. The use of parallel drafting reflects this, has the practical advantage of speeding up the settlement process and avoids unintended disconnects." Then the heading, "Drafting for Ngāti Paoa and Marutūahu settlement," "As set out at paragraph [43] of Minister Finlayson's affidavit, the Ngāti Paoa and Marutūahu settlements have each reached the parallel drafting stage. Drafting for the Marutūahu and Ngāti Paoa settlement legislation is now well advanced. The PCO has provided a draft Marutūahu bill which officials from OTS and other agencies continues to review. The draft bill is near to completion, having been discussed with Marutūahu on several occasions. PCO has also provided a draft bill for the Ngāti Paoa settlement. Officials and PCO are continuing to work on the Ngāti Paoa draft bill. This is typical of this stage of the process and has been the process with all iwi since parallel drafting came into practice," and then some next steps and –

ELIAS CJ:

It rather does indicate though that this is all negotiated, doesn't it? I mean, parallel drafting is to ensure that the agreement is properly implement.

MR GODDARD QC:

And that its implementable and that the parties are in agreement on how it would work.

ELIAS CJ:

Yes, but it's a party-driven process.

MR GODDARD QC:

That will then be submitted to Parliament –

ELIAS CJ:

To Parliament.

MR GODDARD QC:

– to decide whether it should happen or not.

ELIAS CJ:

Yes.

MR GODDARD QC:

And that's the point at which other affected interests have an opportunity to participate in the Parliamentary process, in the same way as with any other legislation.

ELIAS CJ:

Right. So you gave the illustration of Wakatū but of course that was intra-claimant disputes, but your saying that the process admits everybody into the legislative, a select committee process?

MR GODDARD QC:

Yes. And that was a case of what I think began life as an omnibus bill in relation to Te Tau Ihu and then was split into a number of different Acts following what was intra-claimant discussion when you were doing the omnibus thing but involves separate interests once you were focused on the Bills that were split off to become separate Acts.

ELIAS CJ:

Yes, I'm thinking about your example of the exception though.

MR GODDARD QC:

Yes.

ELIAS CJ:

Which, it was much more specific.

MR GODDARD QC:

Again, it's by no means unprecedented for cross-claimants to make submissions at the select committee stage or, you know, after introduction of the Bill, and for further negotiations to take place in the light of that, which result in agreed modification of the redress as between the Crown and claimant group to accommodate that concern which then feeds into an amendment, whether in the select committee report or by way, I suppose, of a supplementary order paper, depending on the stage reached.

ELIAS CJ:

Is it not useful in that process where there may be rights in issue to know whether they have been established or not?

MR GODDARD QC:

That will depend on the particular case I suppose.

ELIAS CJ:

Well, of course.

MR GODDARD QC:

But it's open to Parliament to decide whether it considers that that will assist it or whether it wishes to proceed. And what would be quite wrong would be to stop a process reaching Parliament and Parliament having the ability to make that decision as a result of intervening earlier, in my submission.

ELIAS CJ:

I just wonder how far you take this. This is in the context of a Treaty settlement but one could almost make this argument in respect of any policy development likely to end in legislation.

MR GODDARD QC:

And the principles are also applicable there in my taking of land that's not, Māori land, that's not affected by any customary interests today, for example. There might well be differences about ownership. It would be for Parliament to decide whether that was a factor which ought to lead to additional inquiries being made or to decline to proceed with the legislation, which is always open to it if it considers that an unresolved difference is a problem. Perhaps one difference in the Treaty space is that even after a bill has been introduced it's open to Parliament, and we'll see a reference to this in some of the case law, to refer the matter to the Tribunal if there's a concern about consistency between Treaty principles and what is proposed.

ELIAS CJ:

But the Tribunal doesn't determine rights.

MR GODDARD QC:

No, it determines consistent with Treaty principles which is inevitably informed by rights because as Your Honour pointed out to my learned friend there is a flavour, well, there's more than a flavour, the concept of respect for rights is a strand of the Treaty.

ELIAS CJ:

But in legal arrangements determining what is right according to law or custom, it is a different process for that.

MR GODDARD QC:

Yes.

ELIAS CJ:

And it's really the Māori Appellate Court probably ultimately that has to look at that.

MR GODDARD QC:

Yes, but the question then becomes is it necessary for those rights to be determined or would it be helpful for those rights to be determined before legislation proceeds, and my submission is that it's not a matter – well, my first submission is that actually there is no live dispute in appropriately constituted proceedings about underlying rights before the Courts. This is not –

ELIAS CJ:

Yes, I understand that argument.

MR GODDARD QC:

But – and beyond that I think we're in hypothetical territory which is quite difficult, and I am concerned that a lot of the submissions made by my friends are very abstract and not firmly anchored to the facts of this case, so what I'm trying to do, bring us back to the prosaic facts.

ELIAS CJ:

Well, except the Court of Appeal decision is pretty abstract, well, it's pretty definite, it's pretty concrete, but it applies in a lot of different circumstances that haven't necessarily been ventilated.

MR GODDARD QC:

But that's the beauty, of course, of the common law method is that every decision needs to be understood according to the facts of the case before the Court.

ELIAS CJ:

Well, it seems pretty over the top, you know, over the top of everything. I don't mean "over the top". Anyway, yes, I understand.

MR GODDARD QC:

Well, it's hard to avoid general propositions about our constitutional arrangements in a case of this kind but ultimately what we're interested in –

ELIAS CJ:

Well, then we have to be concerned about other possibilities and so we have to be concerned about hypotheticals.

MR GODDARD QC:

Well, that's what I was going to say that that's why I think it's helpful to narrow down the focus of any decision to the particular decisions made and the particular grounds on which those decisions are challenged and to ask whether that challenge to these decisions is of a kind that the Courts can and should entertain.

WILLIAM YOUNG J:

Are you troubled – I mean, if the challenge to the decisions was put to one side, are you – you presumably still want the proceedings struck out?

MR GODDARD QC:

Yes, because at that point –

WILLIAM YOUNG J:

Why?

MR GODDARD QC:

It would be hypothetical. It wouldn't relate to any immediate –

WILLIAM YOUNG J:

Well, no, it would relate to the future.

MR GODDARD QC:

But to what in the future because there isn't –

WILLIAM YOUNG J:

Are there no other possible overlapping claim issues that might arise in the future?

MR GODDARD QC:

In relation to future Treaty settlements?

WILLIAM YOUNG J:

Yes, with –

MR GODDARD QC:

With other?

WILLIAM YOUNG J:

With other groups.

MR GODDARD QC:

I imagine that overlapping claim issues will continue to be a feature.

WILLIAM YOUNG J:

So might it not be significant for that?

MR GODDARD QC:

No, because what the Court can say in my submission as a general proposition is that where there are overlapping claims but where there is a proposal to allocate particular redress if Parliament approves that, then there

is never a barrier to proceeding with the Parliamentary process, and the preliminary steps taken by the Executive to bring that proposal to Parliament, because the Executive considers that it's in the public interest for that proposal to be considered by Parliament, are not reviewable. I think you can say that as a general matter.

WILLIAM YOUNG J:

Is the assumption we should act on that any future settlement arrangements within any of the areas concerned, would be affected by legislation?

MR GODDARD QC:

I am trying to think of the best way to put that. The vast majority of settlements are affected by legislation, as the Minister explains. There are circumstances where property is transferred early in anticipation of a settlement prior to the enactment of legislation, and I certainly can't say to this Court that it's inconceivable that that will happen. What I am saying is that the Court should deal with that as and when it arises with an actual concrete example.

ARNOLD J:

Can I just follow up because this has been troubling me too. There must be other contexts outside the statutory, the passing of legislation, where the overlapping claims policy would be relevant, for example there must be situations where a particular Minister has a power, for example, to make arrangements that are in the nature of co-management arrangements and things like that, and I assume that that type of decision would be informed by this overlapping claims' policy in circumstances where different parties, different iwi or hapū have an interest.

MR GODDARD QC:

I'm not sure that assumption is right, Your Honour, but I'd want to seek instructions on that overnight, I think, to be confident in my answer to it. The overlapping claims policy that the Court has been taken to is part of the broader framework for resolution of Treaty claims in settlements of the form

that are currently pursued, and while it's certainly the case that co-management regimes of that kind may be provided for or empower provisions included in the legislation, which gives effect to settlements, whether such arrangements are ever put in place absent legislation providing for the settlement, I simply don't know. I'm not aware of any but that could be the product of my ignorance rather than of their non-existence so I should find out. But again if that happens it seems to me that the particular statutory power that was being exercised, and the factors relevant to the exercise of that power, would be an essential limit in the consideration of any judicial review application or declaration. So I would again sound a note of caution about suggesting that this proceeding, which is not about that, can helpfully shed light on that issue.

ARNOLD J:

Well the statement of claim is about, in part, the overlapping claims policy, which produced these particular decisions, but if you put the decisions to one side, you're still left with a challenge to the underlying policy that it doesn't properly reflect.

MR GODDARD QC:

Not only in a very narrow way, so if I take Your Honour to, for example, my friend's submissions in this Court on page 29 where the current proposed relief is set out, we only reach the overlapping claims policy at (B)(iv) and the relief sought is tied to the transfers, "Insofar as the Crown considers that its overlapping claims policy may be relevant to any such proposed transfer, that policy is inconsistent with Ngāti Whātua Orākei tikanga." So appropriately –

ELIAS CJ:

But that's not right because 6.6(B)(i) inevitably tackles the Crown's overlapping claims policy. So it's prevented by the overlapping claims policy. To say that Ngāti Whātua Orākei has ahi kā and mana whenua in relation to those lands.

MR GODDARD QC:

Again, it comes back to the question Your Honour asked me earlier, I think maybe the context in which the Crown needs to form a view on that, of course there may, is this one, no it's not.

ELIAS CJ:

One of the things that will have to be confronted is the fact that the Crown, by transferring land to another iwi grouping, has recognised their interest in the land.

MR GODDARD QC:

The point that the Minister makes is that first of all that Treaty settlements are not constitutive of mana whenua or ahi kā, they can't be, that exists –

ELIAS CJ:

No, but do they impact on them.

MR GODDARD QC:

And again the answer given by the Minister is that they're not determinative of anything, and indeed the property may be provided as commercial redress, in particular outside a claimant group's area of interest.

ELIAS CJ:

Well if it's provided as commercial redress, what is the impediment, as I said to Mr Hodder, in the Crown providing the funds for another group to purchase the commercial properties that it requires. Why is it so important for the Crown to transfer named property by legislation, which is of course not what was originally proposed here?

MR GODDARD QC:

And that really goes back to the question of what redress can be negotiated, what is acceptable also to the other party as a form of redress, and the point made in the Minister's affidavit about in part structuring a redress to provide an economic base. Your Honour is quite right, the theory in relation to

commercial properties, money is an equivalent for property, but particularly in a fast-moving property market like Auckland, the risk that a claimant would face practically is that you have a conversation about an amount of money meant to provide the ability to buy a commercial property, and by the time the legislation wends its way through Parliament, the property that would provide that opportunity is, in fact, unaffordable at that cost. So this is a concrete way of saying, here is part of an economic base that you will get.

ELIAS CJ:

But the cases that have come before the Courts generally have not entailed, except where there's been some particular cultural reason, have not entailed named properties being transferred. Instead there has been – well if you think of *Ririnui v Landcorp* for example, that was under a settlement, and it was an offer that was made by Landcorp.

MR GODDARD QC:

No, there was no settlement legislation –

ELIAS CJ:

Wasn't there?

MR GODDARD QC:

– at the time in relation to –

ELIAS CJ:

But there was to be.

MR GODDARD QC:

Well –

ELIAS CJ:

There would have been settlement legislation here because that's the path that was followed, but…

MR GODDARD QC:

And that's all we're concerned with here, in my submission, that's all the Court should deal with is the situation, and the Minister made a very conscious choice that some of the other issues Your Honour is exploring with me now are complex and difficult, and that the Crown's obligation to proceed to develop a settlement with the second and third and fourth comers after Ngāti Whātua Orākei, who have their settlement, in a timely way, meant that the Minister shouldn't go down a path which risked significant delay to legitimate claims to a Treaty settlement of Ngāti Paoa and the Marutūāhu rōpū, and so the Minister was bound to say well I think it's in the public interest to proceed, notwithstanding the overlapping claims, and it's in particular it's in the public interest to put this to Parliament and see if Parliament will authorise this, and that's the type of decision that, in my submission, is not properly the subject of a review, and a policy that contemplates that, to come back to Your Honour Justice Arnold's point, again is not properly the subject of a review, to the extent that the policy extends beyond making a decision to be reflected in legislation. Perhaps questions of review could arise but that's not this case and we don't need to get bogged down in answering it.

ARNOLD J:

What about the point that on this view of what constitutes the legislative process you are reaching back quite a long way in time before the introduction of any legislation and it may, in fact, be quite a number of years but when the policy is first developed and implemented in a variety of contexts and ultimately some legislation later on.

MR GODDARD QC:

Some legislative proposals do take years to develop, but if what you're working on is a legislative proposal then that identifies the function that the Executive is performing, and one has to ask what level of supervision by the Courts is appropriate in relation to that function, and it's that function on approach discussed by the Court of Appeal in *Milroy* that in my submission is the right approach, and I'll come to the reasoning for that when I come to the cases.

ARNOLD J:

How do you interfere in the function if you declare existing rights?

MR GODDARD QC:

If you declare rights in relation to the process of preparing legislation, which is what's sought here, obviously you interfere in that process. If you make declarations in relation to certain steps that must be taken before making a particular substantive proposal for legislation, you obviously interfere in the process, that's what's sought here. That comes back to my distinction about what we mean by existing rights. That term is used in an extremely ambiguous way by the appellants and whether that's the product of confusion or clever advocacy doesn't really matter. The point remains that it's a distinction that's essential to draw, and if there really was a dispute about mana whenua and, a claim to exclusive mana whenua in a particular area in Auckland, you would be looking at a very different proceeding from this one, originally commenced with just the Attorney as the defendant. The others added on their application. Many other claimants to interests in the Tāmaki Makaurau area. I won't go to it. My learned friend Mr Majurey may tomorrow, but we see the complexity of those interests reflected in the collective redress deed and legislation, and that's described in Mr McEnteer's affidavit, but just for example, and I'm going, actually I won't go to it, let me just dive into one page of it. So in volume 2, which the Court may still have to hand, tab 34, it's a very helpful description of what was agreed. But if we just pause to look at the collective maunga redress, provided for in the collective deed, which is summarised at page 12 of the affidavit, page 287 of the case on appeal. What we see is the collective deed provided at 2.3, and I'm at paragraph 41, that the legislation will, "On the terms provided by section 43 of the draft bill," parallel drafting again, "direct the Registrar-General to record on any computer freehold register for each maunga that the iwi and hapū of Ngāti Mana Whenua o Tāmaki Makaurau specified for that maunga in table 1 of part 3 of the property redress schedule have spiritual, ancestral, cultural, customary and historical interests in the maunga." Then we have the tables here including, for example, in relation to Maungawhau which is within the 1840 transfer land.

ELIAS CJ:

But these aren't in dispute. Ngāti Whātua agrees to this.

MR GODDARD QC:

Yes.

ELIAS CJ:

And it's in a different category. It's one of interests relating to management in particular of these maunga.

MR GODDARD QC:

Yes. I'm just trying to remember the point of departure for that, which was Your Honour Justice Arnold's question.

ARNOLD J:

I think your answer, I may interpret it, but I think what you're accepting is that the Courts may well be entitled to determine rights of particular hapū or iwi in particular areas in accordance with effectively customary law. Is that right?

MR GODDARD QC:

Yes, Your Honour, that's very helpful. So suppose what one had was a statutory power to appoint a committee to manage a particular site having regard to mana whenua. It seems to me that a power of that kind would require the decision-maker, whether a Minister or whatever, to turn their minds to who had mana whenua and one could imagine a dispute of that kind coming before the Courts, or there might be other issues about division, and we've seen some examples of division of the proceeds of a settlement. The central North Island forests arbitration process, which has been the subject of litigation, or the dispute between Ngāti Wāhiao and Ngāti Whakaue in relation to the geothermal lands which was the subject of a decision by the Court of Appeal and this Court declined leave. It was the challenge to the arbitral award.

So we do see those issues being litigated and in an appropriate case where that's an issue and we have the right parties there is no barrier to the Court determining those questions of customary interest, but my submission here is the much more modest one that in the context of a proposal to provide Treaty redress to a particular iwi or hapū, if Parliament consider that it is appropriate to do so, it is not necessary for the Executive to take a view on who's right or who's wrong in the overlapping claims and it's not necessary for the Courts to resolve that, and in particular, and most importantly, whatever the rights and wrongs of the claims to mana whenua in respect of particular lands those rights do not extend to rights in relation to the process for preparing legislative proposals or rights in relation to the substance of that legislation.

ARNOLD J:

Yes, okay. Just one final thing, if the right asserted is a right arising out of the settlement that the particular grouping, iwi, and the Crown agree, or the Crown agrees that it will treat the iwi consistently with the principles of the Treaty, the requirements of the Treaty, is that a claim that in appropriate circumstances would be justiciable by the Court?

MR GODDARD QC:

It's…

ARNOLD J:

If the allegation was that the Crown had breached its obligations in that respect under the settlement agreement.

MR GODDARD QC:

If the allegation was that the Crown was preparing proposals for legislation –

ARNOLD J:

I know. I know what you're saying.

MR GODDARD QC:

– which would be inconsistent with that, then in my submission that would not be justiciable.

ARNOLD J:

No.

MR GODDARD QC:

And that's, in my submission, enough to deal with this case.

ARNOLD J:

I'm interested in understanding whether the Crown says an issue of that sort would or would not be justiciable.

MR GODDARD QC:

Well, this –

ARNOLD J:

Accepting the qualification about the appropriate setting.

MR GODDARD QC:

In New Zealand Courts have on a number of occasions in important cases held that, for example, a provision like section 9 of the State-Owned Enterprises Act 1986 which says nothing in this Act permits conduct, you know, inconsistent with the Treaty, said that's justiciable. Of course it is.

ELIAS CJ:

It wasn't conceded.

MR GODDARD QC:

No, but –

ELIAS CJ:

Sorry, go on.

MR GODDARD QC:

Here today I don't think that could be seriously or sensibly disputed, Your Honour, and I'm trying to be both serious and sensible. It's a struggle some days but I'm trying. And so I absolutely accept that that's the effect of section 9 and to be fair I accepted that for the Crown, for example, in relation to the mixed ownership model litigation in relation to Mighty River Power where it was common ground that if a statutory power was being exercised under the State-Owned Enterprises Act then that was reviewable but one of the questions was whether the relevant power was a power under that Act or was derived from a different source which might not be subject to that constraint. So if one has a statutory hook for application of the principles of the Treaty and there's a claim that action has been taken in a context to which that statutory provision applies that is inconsistent with those principles, yes.

O'REGAN J:

Or if it has a contractual one, presumably.

MR GODDARD QC:

Or if there's a contractual right, yes.

O'REGAN J:

From settlement, the –

MR GODDARD QC:

Again, one would have to ask is it actually a contract, and that gets back to a point I want to come to later, referring some of the authority on what it means for the Crown to say in a contract, for example, "We will introduce legislation with the effect of X," or conversely we won't legislate to do X, and the Courts have consistently said well that may be a political contract but it's not enforceable as a contract, and it can't fetter effectively the process of democracy and the ability of people of New Zealand to vote in a different Government, a different Parliament and a different Government, and have it change its policy on that. Democracy is not curtailed by contracts.

WILLIAM YOUNG J:

How do these proceedings stop legislature and the parties doing what they want to do in terms of these buildings, these properties?

MR GODDARD QC:

There's a –

WILLIAM YOUNG J:

Is there an extinct undertaking?

MR GODDARD QC:

No, the undertaking that was given in relation to notice of initialling that notice has been given, although – so that's spent. I think the Crown has also confirmed to, in fact the Crown has confirmed to Ngāti Whātua Orākei, that no transfer will take place unless and until authorised by legislation. But there are no other outstanding undertakings.

WILLIAM YOUNG J:

So there's no, what stops the settlements in issue being executed and approved by statute?

MR GODDARD QC:

Nothing prevents that but then we get into questions of comity and the point I make –

WILLIAM YOUNG J:

No, so, I was going to go on a little bit. So if it were to be accepted that the decisions themselves are not subject to review, that a decision to propose legislation to a certain affect, what is there that's objectionable about the proceedings that warrants their striking-out, because they were only struck out, as I understand it, by the Court of Appeal because they were a challenge to the legislation, the proposed legislation.

MR GODDARD QC:

So I think what Your Honour is asking is if the challenge that was left as just to the overlapping claims policy in effect and in relation to future action that might be taken under it that didn't involve legislative proposals, well there'd obviously be no Parliamentary comity issue in relation to that. The objection at that point would be the hypothetical nature of the proceedings because there would –

WILLIAM YOUNG J:

So that's not an argument that's really been raised in the High Court, certainly in the Court of Appeal, I don't think it was –

MR GODDARD QC:

I've consistently made that argument for whoever I was appearing for from time to time.

WILLIAM YOUNG J:

The judgment of the Court of Appeal goes off essentially on comity.

MR GODDARD QC:

Yes, but the point that, the core of the proceeding is inconsistent with authority and with the comity principle and the rest is hypothetical and speculative as –

WILLIAM YOUNG J:

Let's say the appeal is allowed and the strike-out is reversed. Would the course of events change? Would that have any practical effect on the likely course of events?

MR GODDARD QC:

Well I don't know that it would be consistent with the approach, Your Honour, outlined to me to simply set aside the strike-out. I think Your Honour would be saying –

WILLIAM YOUNG J:
No, I know, I'm not –

MR GODDARD QC:
– struck out as to X but not as to Y.

WILLIAM YOUNG J:
Say it was just struck out completely, and the legislature could say well we're not really interested in what the Courts have to say about this, we're going down a different line.

MR GODDARD QC:
They could but the point that's been made in a number of the authorities is that the answer to a comity concern is not now under the ability of Parliament to ignore –

WILLIAM YOUNG J:
No I understand that, I know, I'm just trying to think what will happen if certain events occur. What will be the likely consequences?

MR GODDARD QC:
So that will be a, initially a political decision for a Government of the day to make about whether against the backdrop of the proceedings there's any reason not to proceed with the legislation, and second, if the Government decides to proceed with it, for Parliament to decide whether it wishes to go ahead or whether it wishes, whether it believes that there's anything which inhibits it from going ahead, but at the point where the Court has said, there can be no proper challenge to the decisions, it's a challenge to the overlapping claims policy insofar as it applies to non-legislative action, there would be no good reason for Parliament to refrain from going ahead with these proposals I would have thought, but of course it's not for me to say. It's a decision for Parliament to make.

WILLIAM YOUNG J:

Mr Hodder's submissions in relation to the disputed decisions were I suppose not particularly different from yours. He's saying, well once the decision was made to go ahead with legislation, at a point we haven't yet reached but which we may reach soon, then those issues become non-justiciable. That as I understood what he was saying. I'm not saying, I mean, I'm not sure, it's not that clear what steps have been taken, you say drafting instructions have been given?

MR GODDARD QC:

Drafting is well underway, as Ms Anderson explains. PCO has done drafts which are well advanced was the language she used and drafting processes can't begin without Cabinet approval because of the scarce resources available in Parliamentary counsel's office, so that process of drafting requires Cabinet approval in itself, and that's part of the problem with my friend's submissions, and I will come to that later, but why the magic point of Cabinet approving introduction of the Bill, rather than Cabinet approving drafting, or Cabinet deciding that X should be done if authorised by legislation is the right cut-off, there's no principle behind that, as a five member Court of Appeal, which included Justice Keith and Justice McGrath, very knowledgeable about the policy process and legislative process, concluded there is no logical, no principle distinction.

ELIAS CJ:

But that might simply mean that the Courts should concentrate on their task, which is to declare what the law is, and what rights exist, and if the legislative process overwhelms that, so be it. But the alternative way of looking at it is that Parliament and Cabinet, before whom this has to go first, may actually be assisted by knowing what legal rights are in issue when the Executive proposing this legislation has taken the view that it's not for it to determine the rights.

MR GODDARD QC:

I suppose that again my answer falls into two parts, which is that to the extent that the rights asserted, are rights in relation to the process to be followed in developing legislation, and that is explicitly part of this –

ELIAS CJ:

I understand that argument, that is not really what I'm speaking about. I'm speaking about the status issues, which remain.

MR GODDARD QC:

That argument has been at the forefront of the appellant's case, to the point at one stage of seeking interim relief, but then withdrawing that application in relation to preliminary steps that might lead to a transfer, even after the revised Ngāti Paoa decision. So this proceeding had its genesis in the proposed transfer and has had, as a central focus, restraining those. Now my friend has moved away from that a bit.

ELIAS CJ:

Probably because of what the transfer stands for, which is the intrusion on mana whenua, so it all really does get back to that question of status.

MR GODDARD QC:

But one would then expect, as I say rather different parties, and a rather differently constituted proceeding because you would need to join everyone else who asserted an interest inconsistent with the exclusive mana whenua claim made by Ngāti Whātua Orākei, and that's why I was going to that list of hapū with interests, cultural interests, spiritual interests and maunga in the area. They would be a minimum set of parties to be included in any proceeding of that kind. So in a proceeding of that kind, if that was genuinely relevant, perhaps, but I don't think I need to take a view on that. Again, at the risk of, you know, seeming like a very prosaic, black letter lawyer, what is struck out is a pleading, not a concept, and this pleading was, in my submission, rightly struck out because of its focus on these particular decisions, and because the rights asserted include, and have at their core,

rights in relation to legislative process and legislative content, but striking-out this proceeding doesn't meant that a separate properly constituted claim that raises issues of legal right couldn't be brought by Ngāti Whātua Orākei, and I said that in my written submissions, and I'm saying it again happily, orally today. But these are not those. But this proceeding, and we'll come to it, and just go to aspects of the statement of claim that my learned friend didn't focus on it as much as in my submission the Court's appropriately did. It needs to be focused on. Let's see, where am I in the cryptic notes I made to myself? So I've covered the decisions that were made and the fact that drafting is well under way. There are –

ELLEN FRANCE J:
Just on the point about the drafting, and how you sort of characterised the process, that won't go anywhere, will it, until there's been an agreement?

MR GODDARD QC:
That's right.

ELLEN FRANCE J:
So why can't you, going back to a point the Chief Justice raised earlier, characterise what's occurring now as negotiations rather than linked to the legislative process?

MR GODDARD QC:
Well, it's both. It's a negotiation about a proposal to be put to Parliament for legislative approval. As both the Minister and Ms Anderson explain in these proposed, in these proposed Treaty settlements, as in the normal run of Treaty settlements, the whole settlement is conditional on legislation being enacted to give effect to it. The proposed legislation is attached to the deed, and Ms Anderson deals with that in a paragraph I hadn't quite reached but I think the members of the Court know that, that's the normal process, well. Ms Anderson does cover it if the Court wants to look at that. So what you end up with is an agreement on something to be put to Parliament which will become operative if and only if Parliament passes legislation to give effect to

it. So it's quintessentially a political negotiation about a proposal to be put to Parliament, and that's where, the point that I again, I keep having trailers, the *Sealord* Court and the *Milroy* Court were right to say that a necessary concomitant of Parliament's ability to consider whatever proposal it thinks fit is that the Executive must be free to put to it anything that the Executive considers it's in the public interest for Parliament to consider. It interferes with Parliament's freedom to consider proposals if constraints are imposed on who can make proposals to it and under what circumstances, and it's no more appropriate to constrain that where the Executive develops a proposal for legislation than, for example, a member preparing a member's Bill. I mean, it seems to me obvious that that would not be reviewable, but actually if what you're working on is a legislative proposal then, and this is overlapped to some extent with a point made by the Canadian Federal Court of Appeal in *Canada (Governor General in Council) v Mikisew Cree First Nation* 2016 FCA 311, (2016) 405 DLR (4th) 721. What is being done is to develop a proposal to be put before Parliament and it cuts across Parliament's ability to consider proposals if there are limits on what can be brought to it. It's the point that the Court of Appeal made in relation to *New Plymouth District Council v Waitara Leaseholders Association Inc* [2007] NZCA 80 is that it can't be unlawful for a local authority to propose to do something wholly unlawful at present if Parliament authorises it and to develop the proposal, to consult on it, and this Court said that was obvious in refusing leave.

So I think the answer is it's essentially political negotiation about a proposal to be put to Parliament and Parliament's freedom to consider whatever proposal it thinks fit as a concomitant that freedom on the part of any person to propose a matter to Parliament, and that's explicitly how the *Sealord* Court deals with it and that's where the *Milroy* Court takes it where they did.

So – I mean, this is, my learned friend said, and I made a note of this, Parliament must be free to receive proposals for change and deliberate on those without interference from the Court. He said there's no dispute about that. Well, at that point we need a dose of I think public law realism, to borrow a phrase from Justice Palmer's very interesting article on constitutional

dialogue that's included in the casebook somewhere, because as a matter of Greek mythology Athena may have sprung fully formed and fully armed I think from the head of her father, Zeus.

ELIAS CJ:
Fully armed?

MR GODDARD QC:
Yes, fully armed. But Bills do not spring fully developed in terms of policy and fully drafted from the head of a Minister on the day that Cabinet approves their introduction, as anyone who's had any involvement in the policy process knows, and Your Honour it's something I've talked about, years can be years and they can, you know, either go somewhere or not. But it is not actually possible for a Minister to put a proposal to Parliament in the form of a Bill without an awful lot of preliminary work, without work by officials to develop the proposal, often they're not always to consult on it, by the Minister making preliminary decisions along the way…

ELIAS CJ:
I don't think this is – nobody disputes this, Mr Goddard, I think you can move on a little.

MR GODDARD QC:
The point in taking that point is that it's artificial to suggest, as my friend does, that there's no hindrance, no interference, with Parliament's freedom to adopt a proposal if there is an interference or hindrance with that process of development, that Ministers are wholly dependent on their process to have any proposal to make. And if one says, "No, there are these hurdles that must be gone through," "consultation," my friend says, "accommodation," my friend says, those are hurdles to the submission of a proposal of Parliament, they interfere with that concomitant right and interest, the right of members to submit Bills, the interest of Parliament to be free to consider them.

So, I've covered a lot of the territory I was going to cover, I think, but let me just see. So I've talked about the ambiguity and what rights or interests are being affected. And again, I understood my learned friend Mr Hodder to accept that rights in relation to land, mana whenua in relation to land, is not affected unless and until the legislation's passed. But my friend suggested that the interest in having that mana whenua respected included rights on the part of Ngāti Whātua and obligations on the part of the Crown to consult before making even legislative proposal, and that's where in my submission the argument is wrong and the Courts below correctly answered the question.

I dealt with the point – no, I do want to say that, that the Ministers', the process of preparing proposals for submission to Parliament is a sometimes lengthy and multi-handed one and that Ministers are, in my submission, like other members, free to prepare and submit proposals whether they're good or bad and whether they're well researched and well thought through, or are open to criticism and it's for Parliament to decide whether to accept them or not.

I did want to touch on an exchange between Your Honour the Chief Justice and my learned friend about the special nature of Treaty settlement legislation, and can I just suggest that it would be inappropriate and indeed problematic in terms of core Parliamentary privilege as well as the comity principle to proceed on the basis that the process for considering Treaty settlement legislation is in some respect inadequate or fails to appropriately accommodate a range of public interests –

ELIAS CJ:
I don't think I suggested that.

MR GODDARD QC:
Well, my learned friend did, I think, in responding and saying, yes, it is different and the Courts should be –

ELIAS CJ:

I was really raising the fact that the Red Book acknowledges that the Treaty settlement legislation is a different type of legislation in the sense that it presents a settlement.

MR GODDARD QC:

Yes. What my friend said in answer, which is what I was engaging with rather than Your Honour's question, was that the Courts should be particularly astute to supervise the appropriateness of the proposals being presented in that context because of the curtailed Parliamentary process. Well, that's how I understood it; if I'm wrong I'm delighted to be wrong. But that would be a line of reasoning that would, in my submission, be wholly inappropriate. Parliament –

ELIAS CJ:

But it may be that it is a process in which the more information that is available, including as to rights, the better, because the process doesn't really lend itself to line by line Parliamentary ownership because it is to implement an arrangement that has been concluded. So it's yes or no effectively.

MR GODDARD QC:

Except that as I –

ELIAS CJ:

Yes, and you gave the example of something –

MR GODDARD QC:

– said earlier that's wildly oversimplified. The process is permeable to concerns and can respond to them in a range of ways, and all I really want to say is it will be quite wrong to assume anything else, and it's really in my submission for Parliament to decide what information it will be assisted by gathering when considering a proposal brought to it, and for Parliament to decide if it's not going to take something further because it doesn't have adequate information on which to make a decision. But real caution is

required in terms of ensuring that anything that's brought to the Courts is within the proper domain of the Courts, and we've identified a number of issues that would be, I think, if they arose, it's just that they don't arise in this case.

I do want to go quickly to some passages in the leading New Zealand cases, and that I think are helpful on these points that my friend moved a little swiftly over. So turning first to *Sealords*, which is in my friend's bundle of authorities under tab 6. The judgment delivered by the President Justice Cooke. Beginning perhaps on page 307. There's a reference to, at line 43, a clause headed, "Crown to Introduce Amending Legislation." Crown indicating it would do so, and then at the foot of the page establish a principle of non-interference, exact scope and qualifications are open to debate as is its exact basis. Then some of the key cases referred. Then at line 12, "however it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill into Parliament." Reference to *Eastgate* and the fact that the proper time for challenging an Act of a representative legislature, if there are any relevant limitations, is after the enactment, and I have developed in my written submissions a proposition that the same is true in relation to declarations of inconsistency. In our opinion, the Court said, non-interference with the introduction of a Bill is the corollary of the principle identified by the High Court. "Namely that an implied right to freedom of expression in relation to public and political affairs necessarily exists in a system of representative Government. That right, which is reflected in the Bill of Rights 1688 (UK) being accepted, it is impossible to suppose that a Minister may be judicially prevented from presenting to a representative assembly a measure for consideration." Or as I say, preparing it. So any assertion of a right that certain things not be developed and proposed, is wrong in law, and any assertion of a right that's certain processes must be followed before such a proposal is made, also in my submission wrong in law. "Closely allied is the conclusion that the Courts would not compel a Minister to present a measure… Surely in a democracy it would be quite wrong and almost inconceivable for the Courts to attempt to dictate, by declaration or a

willingness to aware damages or any other form of relief, what should be placed before Parliament." And yet that's the core of this claim. Ngāti Whātua Orākei say a proposal to transfer these properties must not be placed before Parliament. That was sought in, it seems such broad terms in the earlier statement of claim, and pulled back from it a bit to say there are certain processes that must be followed before you do that now, but that has exactly the same affect.

Then down to line 35, "The point that does matter, in our opinion, is that public policy requires that the representative chamber of Parliament should be free to determine what it will or will not allow to be put before it. Correspondingly Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite the House to consider." And that's what the Minister wants to do here, he wants to invite, that's all the Minister wanted to do. The Government still wishes to do, to invite the House to consider a proposal against the acknowledged backdrop of overlapping and inconsistent claims, and that's why a clause purporting to be an agreement by the Crown to introduce legislation for the described effect can't have any legal effect.

ELIAS CJ:

Mr Goddard, it would be good if you just made the submissions because we have highlighted all of this. We've been taken through all the words you've read out.

MR GODDARD QC:

Let me then go to *Milroy* under tab 8 and in the – responding to Your Honour's encouragement I will make just a couple of points.

ELIAS CJ:

Just make the comments against it.

MR GODDARD QC:

Exactly. So first of all the point which is important that this was a five-Judge Court, including Sir Kenneth Keith, the author of the introduction to the Cabinet manual on which my friend placed some emphasis, so unlikely that His Honour had overlooked the constitutional implications of the approach adopted here and with His Honour and Justice McGrath on the Court we can be fairly confident the nature of the policy process was well understood, and then really just emphasising that it's an inevitable corollary of the approach in *Sealords* that the Court should have said what it said at paragraph 11, and 12, that for the Court to be drawn into an examination of advice given by officials is for the Court to insert itself into the legislative process to enunciate substantive requirements in relation to proposals to Parliament or processes and that that is inappropriate and that is why the Court made the observations it made again at 14.

ELIAS CJ:

Of course, in this case, nobody is giving advice on the central issue because of the policy that it's not a matter for the Crown. So it's…

MR GODDARD QC:

Well, that goes to the question of what is the central issue. Advice is being given on the appropriateness of proceeding with the settlement with Paoa and the settlement with Marutūāhu despite the existence of overlapping claims, and that's what's being challenged. That's what's been advised on. That's what the Minister has taken a view on.

ELIAS CJ:

But are there overlapping claims in fact? There are overlapping claims but are there – is there really a – are there comparable rights? That's not examined. Now it may be it's incapable of resolution. I'm not saying that. But should not an opportunity be provided or even against legislation coming in over the top what's to prevent a party trying to say, "I believe I have a, we have a right and we would like the Court to determine that"?

MR GODDARD QC:
And in proceedings that were about the existence of the rights in respect of the land.

ELIAS CJ:
I understand that you say that.

MR GODDARD QC:
Which is not primarily what these proceedings are. It's not –

ELIAS CJ:
Well, they may not be primarily and it may be that some of the claim should be struck out, but it seems to me that at bottom that is what this case is about.

MR GODDARD QC:
Well, I think at bottom it's about the more fundamental question of whether the Executive can be compelled to take a view on that issue before, or inquire into it, before making a proposal to Parliament to legislate, and that's the central issue here and that's the issue that the Courts below rightly answered, "No."

Now as the appellant squarely faced up to that difficulty in the High Court and Court of Appeal, the claim evolved at one point to an argument that it's about the mana whenua rights and establishing who holds those, and that was front and centre in the appellant's leave application, but it's not front and centre of the submissions made on the substantive appeal or the relief sought where that is expressed in terms of the Crown's obligation to recognise the mana whenua and that's a stepping stone to other relief claimed in respect of the decision-making process and the overlapping claims policy. So I think I'll come back to that when I come to the relief sought.

And then last, in relation to the cases, the *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 *(Crown Forest Assets)* case under tab 11, a judgment delivered by Your Honour Justice O'Regan. And again, just to make the point that is made by the Court at 43,

paragraph 43 on page 329, that what was proposed was squarely and consistent with the then existing statutory framework, but nonetheless the Court refused first of all in that paragraph, over at the top of page 330, to make a declaration to that effect on the basis that that, that it wasn't appropriate – I'm at line 10 – for the Court to make a declaration that a future Act of Parliament will, if passed, override an earlier one or that it will, in my submission, cut across particular disputed rights, and the Court noted the ability of Parliament to seek a report from the Tribunal in relation to consistency within the principles of the Treaty. And then the very important point that in relation to those underlying rights, what I referred to in my written submissions as background rights rather than asserted rights in relation to the legislative process, that the decision, the only decision that affects rights is the decision to be made by Parliament, and the Court in that case drew the parallel with *Waitara Leaseholders* at 53 that I have suggested in my submissions.

Perhaps with turning then to the pleadings so that I can explain my submission about what its core is and why the whole first pleading was rightly struck out, even if there is some other argument about mana whenua rights that inappropriately constituted proceedings might conceivable be pursued. So that's in volume 1 of the case on appeal under tab 17. And the paragraphs I want to – my learned friend has taken the Court through this already – but what we have is a pleading at paragraph 21 about the Treaty settlements currently being negotiated with Paoa and Marutūahu. And then at 22, bearing in mind that it's 22 and 23 that are said to be the matters on which the Minister misdirected himself in law and the mandatory relevant considerations that it's said the Minister failed to take into account. So the heart of the legality challenge in this proceeding loops back to 22 and 23 and 31. 22, "The Crown is required to exercise any powers to make the Ngāti Paoa decision," which is no longer an issue, "the revised Ngāti Paoa decision and the Marutūahu decision for the purposes of Treaty settlements," and then the requirements in relation to those decisions are pleaded. Now those are decisions about proposals to be made to Parliament to seek legislation, that's clear from the letters I took the Court to and from the Minister's affidavit. So the challenge in

22 is squarely to powers to make those decisions, decisions about redress to be provided for in legislation, and it said that those decisions have to be made in accordance with tikanga, with appropriate acknowledgement of the ahi kā of Ngāti Whātua Ōrākei and in a manner which does not erode the mana whenua of Ngāti Whātua Ōrākei consistent with the Treat, and in a manner which upholds, you know, United Nations Declaration.

So what we have here as a pleading, that these decisions about proposed legislation had to be made subject to certain substantive requirements, and that becomes even clearer when we come to 23 where it's said that, "To make decisions which comply with the requirements in 22 the Crown must fully inform itself of the matters referred to." That includes, "Fully and properly consulting with Ngāti Whātua Ōrākei," prior to developing and considering those decisions, acknowledging the ahi kā of Ngāti Whātua Ōrākei and where possible accommodating mana whenua by not transferring or unilaterally developing proposals involving the transfer of land within those areas if it would be offensive to Ngāti Whātua as a matter of tikanga.

So at the heart of this proceeding are claims to rights in relation to both the process to be the followed in making decisions of the kind pleaded and the content of those proposals. The suggestion is an obligation to accommodate by not proposing transfers of land in that area where that would be offensive to Ngāti Whātua Ōrākei as a matter of tikanga, and that's starkest in relation to (c), "The land in question is within the gifted 1840 transfer land and Ngāti Whātua Ōrākei has not provided its consent to the transfer or proposed transfer." So the claim is to a right to block a proposal to take such matters to Parliament.

And that leads in turn to the pleading at 25. On the basis of the two relevant decisions, "Unless appropriate relief is granted by the Court, the Crown will or may continue to conclude Treaty settlements involving the transfer of other land," within those areas, "which do not comply with the matters pleaded." So again, what is anticipated by way of future objectionable conduct is Treaty settlements like the legislative settlements proposed here that don't comply

with the process and substance requirements pleaded. Then there's a reference to those decisions being examples of the overlapping claims policy.

Then 31, which my friend says in his submissions is at the heart of the proceeding, and that's certainly also the Crown's understanding of the position, that, pursuant to the Deed, the Settlement Act, tikanga, the Treaty, the honour of the Crown, the United Nations Declaration, "Ngāti Whātua Ōrākei has the following rights (and the Crown has the corresponding obligations)."

The first one is to be fully consulted by the Crown regarding decisions and proposals on Treaty redress. That's against the backdrop of pleadings that these are decisions to propose redress in legislation. "To have the Crown acknowledge the ahi kā of Ngāti Whātua Ōrākei." And 3, to prevent the Crown. So Ngāti Whātua has the right and the Crown has the obligation that the Crown not transfer or unilaterally develop proposals involving the transfer for the purposes of Treaty settlements if," and the same (a), (b), (c).

So when one reads that, it is in my submission obvious that this pleaded claim, which Ngāti Whātua Ōrākei have confirmed no longer extends to the original Ngāti Paoa decision, so that's been overtaken by events, so that was – that's what the High Court held and that's what was accepted in the Court of Appeal by the appellant, so we're only talking about decisions that involved proposals to go to Parliament and what is pleaded is that those decisions were subject to certain rights on the part of Ōrākei, certain obligations on the part of the Crown in relation to consultation and substancing, and that's what was struck out and rightly so, and that's again reflected in the pleading that, at 32, that public powers and/or statutory powers were being exercised. I deal with that in my written submissions. I won't dwell on that.

And then the two grounds of review, that in making, and we can skip over the first superseded decision, the revised Ngāti Paoa decision and the Marutūāhu decision, "And in adopting the overlapping claims policy the Minister erred in law by misdirecting himself as to the matters pleaded at 22 and 23 above."

In my submission, there can be no obligations of the kind pleaded in relation to the decision's proposed legislation and there is also a fundamental problem with the alleged misdirection as to the matters pleaded at 22 and 23 which is that that those matters are legal obligations said to attach to the preparation of legislative proposals, decisions about legislative proposals, which as a matter of New Zealand law do not exist.

The same applies to the pleading at 35, the mandatory relevant considerations pleading, that a challenge of this kind, you can't challenge a decision to proposed legislation on the basis of failure to consider mandatory relevant considerations. It's up to the Minister to form a view on whether it's in the public interest that a proposal be made to Parliament for its consideration, and the Courts have always, quite rightly, for very fundamental constitutional reasons, declined to tell Ministers what they must do along the way to making a proposal to Parliament. And then so far as the overlapping claims policy is concerned, the complaint is that the matters at 22 and 23 weren't considered as mandatory relevant considerations but those propositions, which are about the decisions to propose legislation, are wrong in law. So maybe there's something out there that could be the subject of a proceeding raising issues that are justiciable and with the right parties, but this is not that, it's a million miles from it, it relies on legal obligations that don't exist, it's a challenge to decisions that cannot be challenged on these or other grounds. Now the relief sought –

ELIAS CJ:

But why can't, leaving aside the legislation – or are you saying that leaving aside the legislation the Ministers' recommendations, say, to Cabinet to implement by transfer, if that course had been followed, are you saying it would have been possible to bring these proceedings in that case but the difference is that it's directed at a Bill?

MR GODDARD QC:

What I'm saying is that because it's directed at a Bill it certainly can't be brought, and that the alternative of attempting to pursue it without authorising legislation raises extremely difficult issues which the Minister recognised.

ELIAS CJ:

No, but would you accept that the Minister's recommendation, if the Minister had got it wrong – if the Minister had failed to take into account an obviously relevant matter, that would have been amenable to judicial review?

MR GODDARD QC:

Any exercise of public power –

ELIAS CJ:

Yes.

MR GODDARD QC:

– is in principle reviewable, as this Court said in *Ririnui*, whether it's sourced in statutory powers or prerogative powers or common law powers…

ELIAS CJ:

Yes. So it's only the legislative dimension, and that may boil down to whether it has the effect of preventing, the order that's being sought has the effect of preventing the Minister presenting a proposal to Parliament?

MR GODDARD QC:

It's a little bit more fundamental than that. The legislative element comes in in two places. First, that what's being challenged are decisions which are to proposed legislation, the Minister make that very clear in his affidavit, but the decision, the record of decisions, is also explicit on that: nothing prevents me from doing further work on a proposal to be implemented through legislation. But it's also that the legal requirements or mandatory relevant considerations invoked here are considerations that are said to apply to the making of decisions about a legislative process. But if one had a process that wasn't

legislative and if one had a decision that was not a decision to propose legislation and if the considerations were not considerations said to be relevant to legislative proposals, then in principle, yes, unless there was some other good reason for the Court to decide to decline to intervene, for example *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA), you know, defence issues.

ELIAS CJ:
Yes.

MR GODDARD QC:
So I'm cautious – Your Honour is always cautioning about the inappropriateness of overly confident general propositions, and I'm doing my, and that same caution that Your Honour applies to the Court must surely apply to counsel, mere counsellors, well, with bells on. So I'm trying to engage helpfully with Your Honours' questions…

O'REGAN J:
We'll just take it as a yes.

MR GODDARD QC:
Subject to the usual safeguards. Perhaps I should – yes, the usual lawyer stuff.

So, I can well imagine such a decision being reviewed. And in a way that's what this Court did in *Ririnui*, it was a decision made in a Treaty context about how the Crown would approach its dealings with Ngāti Whakahemo, or how the Crown would approach the dealings between Landcorp and Whakahemo, and this Court said there may be some – there are some circumstances in which the Court will intervene, and it did. But this pleading is a million miles from that. And we see that in the relief that was sought, which I thought my friend had abandoned but which enjoyed a bit of a second wind in answer to some questions from Your Honour Justice France, (e) and (f) in particular, which my friend says can remain live unless and until a Bill is introduced.

Well, we read E and F in the request for relief on page 97 of the case on appeal and we cross out the reference to the Ngāti Paoa decision because that's been superseded, that's kind of a distraction. What we see is declarations that the revised Ngāti Paoa and Marutūahu decisions have been developed and made inconsistently with the Crown's obligation to make those decisions in accordance with tikanga. So this is squarely a declaration that's sought about the unlawfulness of decisions to propose legislation providing for a particular redress. So that relief can never be granted because the suggested restriction does not exist as a matter of law. It's not an issue of timing, the point is that this sort of decision is not challengeable before the Courts, and the same applies in relation to F.

If we turn to the revised relief in my friend's submissions, paragraph 6.6 on page 29, there's rather a lot going on in paragraph (A). And if we look at the first bit, "That there is a current and ongoing relationship between the Crown and Ngāti Whātua Ōrākei which reflect reciprocal commitments to act towards each other consistently with the principles of the Treaty," there's actually no live dispute about that, existence of that relationship, that was affirmed in the Treaty –

ELIAS CJ:
It's affirmed in the Settlement Act.

MR GODDARD QC:
It's affirmed in the Settlement Act, exactly. So that proposition is obviously right at a level of generality. But it's the "and" bit which is where we come down to earth, "And includes an obligation in law that the Crown respect Ngāti Whātua Ōrākei where Crown conduct may or will have particular impact on the customary rights or interest of Ngāti Whātua Ōrākei." In my submission that is way too general, that the only conduct identified in the pleaded case is not conduct in respect of which there is such an obligation and it's inappropriate to speculate about the possibility of other conduct that might engage in obligation of that kind. The Courts should wait until a case that provides a factual framework for that complaint comes before them and then

deal with it. And the whole of (B) is problematic because it hangs off the suggested obligation to respect tikanga in the context of preparing proposals for legislation, that's the first point about it. But then stepping through (B)(i), that such respect includes the Crown recognising that, "Ngāti Whātua Ōrākei has ahi kā and mana whenua," again just pausing there. That Ngāti Whātua Ōrākei has ahi kā and mana whenua in respect of these lands is not in dispute, it's the claim to exclusivity.

ELIAS CJ:

Well, it's the consequence, and that's a matter presumably of tikanga on these pleadings.

MR GODDARD QC:

So there are two aspects to that I think, Your Honour. The first is that other hapu also assert ahi kā and mana whenua in relation to at least parts of these areas, so the Crown finds itself facing conflicting claims –

ELIAS CJ:

But I don't think that that's a problem, is it? I mean in the sense that it's the parts that are the problem, there's been no effort to differentiate, and maybe it's not going to be possible to. But of course there are overlapping claims, that's acknowledged in the agreement that's been entered into in terms of cultural property.

MR GODDARD QC:

But in relation to this specific proposal to transfer these specific properties, the Crown has engaged with affected hapu and has been told, "Yes, this is appropriate as a matter of tikanga by, for example, Marutūahu, that we have sufficient connection with this land for this to be appropriate, and by Ngāti Whātua Ōrākei that it isn't."

ELIAS CJ:

So, do they say that – and Mr Majurey will tell us this – but do they assert mana whenua in respect of the land of which these properties are part?

MR GODDARD QC:

In respect of the area in which they're situated, yes, that's my understanding.

ELIAS CJ:

What's the area in which they're situated? Do you mean the whole of Tāmaki Makaurau?

MR GODDARD QC:

No, I think the assertion is more specific than that, and it's dealt with in some of the evidence and Mr Majurey can help with that.

ELIAS CJ:

All right, well, Mr Majurey can tell us, yes.

MR GODDARD QC:

And that was certainly the case in relation to the Ngāti Paoa evidence before the Court, although the Paoa issues have been, as the Court knows, the subject of subsequent settlement between the parties which I can't and shouldn't go into. But the question becomes whether it is indeed an obligation on the part of the Crown to recognise that exclusivity, and the Crown says we don't need to go there and it's inappropriate for us to go there in the context of making this particular sort of decision. Whether it would be necessary to go there in other cases remains for those other cases.

I'm conscious of the time. I don't have a lot to go but it probably will be shorter if I have the opportunity to regroup overnight and work out what I really need to do.

ELIAS CJ:

So do you expect about half an hour tomorrow?

MR GODDARD QC:

Yes.

ELIAS CJ:

That's fine. Yes, thank you. Thank you everyone, we'll take the adjournment and we'll resume at 10.00 tomorrow morning.

COURT ADJOURNS: 4.02 PM

COURT RESUMES ON TUESDAY 15 MAY 2018 AT 10.00 AM

ELIAS CJ:
Yes, Mr Goddard.

MR GODDARD QC:
Your Honour, five points, half an hour maximum, quite possibly less. First thing I wanted to do was to very briefly finish the submissions I was making in relation to the revised relief sought by the appellant set out at 6.6 of their submissions on page 29, and I'd addressed paragraph (A) and the linkage between that and (B) and also subparagraph (i) of (B).

I want to deal now with (ii), (iii) and (iv). If we look at (ii), for example, there's a reference to, "Where the Crown's options for future conduct include those which would have particular impact on the customary rights or interests of Ngāti Whātua Ōrākei, the Crown must use full and good faith endeavours to consult with Ngāti Whātua Ōrākei and accommodate those rights and interests." Sought a declaration that it's inconsistent with tikanga for the land owned by the Crown within the 2006 RFR land, the 1840 transfer land, to be transferred to other iwi otherwise than pursuant to the collective Redress Act, the Ngāti Whātua Settlement Act or with the approval of Ngāti Whātua Ōrākei, and then a passing reference to overlapping claims policy.

The point I want to make about (ii) and (iii) in particular is that they divide into two parts, the part that relates to the option actually being pursued by the Crown, which is submitting a proposal for legislation to give effect to a Treaty settlement including the redress objected to, and the options that are not being pursued by the Crown, the hypothetical ones, the speculative ones, and if we focus on what the Crown is actually proposing to do then in my submission the Courts below found and were right to find that these declarations are not available because the legal propositions in them are wrong. It is not the case that if the Executive is developing a proposal for legislation the Executive has the consultation and accommodation obligations described here enforceable through the Courts. It is not the case that the

Executive is constrained by existing legislation, the 2012 and 2014 Acts, or otherwise can only proceed with the approval of Ngāti Whātua.

ELIAS CJ:
Well, Parliament isn't constrained is really what you'd say. It's not about the Executive.

MR GODDARD QC:
Yes. Parliament isn't constrained and therefore it's not constrained in what it can receive from the Executive, that there's that concomitant freedom to prepare proposals for Parliament's consideration. It's a necessary corollary.

So there's the bit that's wrong and the bit that's hypothetical and the Court should not embark on…

WILLIAM YOUNG J:
Sorry, what's the bit that's wrong?

MR GODDARD QC:
The proposition that these obligations exist in relation to the preparation of proposals for legislation.

WILLIAM YOUNG J:
I see, okay, yes.

MR GODDARD QC:
So there's the thing that's actually happening and in relation to that these propositions are wrong. There are no such obligations.

ELIAS CJ:
When could Ngāti Whātua's interests ever be advanced for determination on the scenario that is proposed?

MR GODDARD QC:
Those interests can be advanced in…

ELIAS CJ:

The Parliamentary process?

MR GODDARD QC:

Well, first of all in exchanges with the Executive and to inform the decision about whether it's in the public interest for that to be proposed.

ELIAS CJ:

Well, why is not getting a declaration of legal right informing the Executive?

MR GODDARD QC:

Because that legal right is not a matter about which an assumption needs to be made in order to form the view, or that a view needs to be reached on in order to form the view that it's in the public interest for this proposal to be considered by Parliament. So let me…

ELIAS CJ:

So whether it is a matter of law, whether it is a claim of right, that fact is irrelevant.

MR GODDARD QC:

Parliament's being invited to make this decision on the basis that issue hasn't been resolved. It's not being asked to proceed on the basis of an assumption about that right.

ELIAS CJ:

No, I understand that.

MR GODDARD QC:

And so if Parliament considers that's –

ELIAS CJ:

But why would it not be material?

MR GODDARD QC:

It's not material to the formation of a political judgement that even if this claim were to be correct, nonetheless it is appropriate for this commercial redress to be provided in order to resolve in a timely way the Treaty claims of Ngāti Paoa and Marutūāhu.

ELIAS CJ:

So there is no implication of the honour of the Crown?

MR GODDARD QC:

The honour of the Crown is a –

ELIAS CJ:

Well, if there's a claim of right it must be, it must be a significant consideration surely.

MR GODDARD QC:

If there are – and if there are competing claims of right the Crown has to work out what to do against that background.

ELIAS CJ:

But we don't even know that.

MR GODDARD QC:

We do, Your Honour. There is evidence of that.

ELIAS CJ:

Well, yes, but we don't know how they would be resolved if it – no.

MR GODDARD QC:

And pleadings. We don't know how they'd be resolved. And so the question is does the Crown, faced with such a claim, have to put on hold these Treaty settlements and wait for a final resolution of that question or can the Crown say that actually, as a political assessment, the right thing to do, having regard to its obligations, not just to Ngāti Whātua Ōrākei, which exist, but also to

Ngāti Paoa, also to the Marutūāhu Rōpū, is to say, "We can't put these Treaty settlements on hold indefinitely while that issue is resolved and as a matter of political judgement we, the Executive, believe that it's in the public interest to proceed to a resolution which includes this commercial redress notwithstanding that that issue has not been resolved," and that's exactly the sort of political assessment which it's the Executive's job to make in connection with putting proposals to Parliament, exactly the sort of issue that Parliament is best equipped to decide should the settlements proceed against that backdrop of difference of views or not, and the difference of views is about two things. It's both about the mana whenua interests and the complex overlapping interests in this area, but it's also about the implications of a claim to exclusive mana whenua for the appropriateness in a political sense of providing these properties as a form of commercial redress to another iwi.

My learned friend confirmed that there's no objection to the Crown simply selling these properties to me, for example, well, or anyone else who can afford them, so that wouldn't be me in fact, but no objection to just selling them. So the question is that mana whenua's not considered – is it inappropriate to make them available as a form of commercial redress in a Treaty settlement in circumstances where there's a dearth of properties in the wider Tāmaki Makaurau area that can be used for such redress. The Minister explained that in his affidavit. And that's a quite separate judgement, a judgement that could be exercised even as the Minister explained in his affidavit in circumstances where there was no interest in an area. Properties are sometimes provided as commercial redress outside a hapū's area of customary interest because of all the other factors that are engaged. So there are two issues there.

ELIAS CJ:

I understand that. We've been through it.

MR GODDARD QC:

Yes, we have. And so in my submission – and let me just emphasise that where the option that the Crown decides to pursue – and what we have in this

case, of course, is a change of mind about which option to pursue against the backdrop of these competing claims on the Crown and these conflicts and a concern to make timely progress with Treaty settlements. The decision to pursue the option of proposing legislation has three important implications which explain why the Courts below were right to decline to hear this claim. First of all, it fundamentally changes the nature of what the Executive is doing. The executive is no longer making a decision that will have an impact on who owns the land. All the Executive is doing is preparing a proposal to be submitted to Parliament and the touchstone for that is whether it's sufficiently in the public interest for the proposal to be considered by Parliament, a classic example of something for which there is no legal touchstone.

Second, closely related point, it changes who the final decision maker is. In the sort of scenario that Your Honour, Justice Arnold, was putting to me, exercise of statutory powers, the final decision maker is whichever executive officer has that statutory power, and that decision is the decision unless it's reviewed. Of course, as soon as what the Crown says is we're going to submit this to Parliament to decide whether or not to do it, the Executive is no longer the decision maker.

And, third, it effects a fundamental change to the nature of the consultation process. It means that instead of the consultation process being conducted by the Executive and culminating in the sort of execution decision that Your Honour, Justice Arnold, was asking me about yesterday, the consultation process is in part executive to the point of deciding that the proposal merits submission to Parliament, but then critically Parliamentary, it's conduct by Parliament. Parliament can carry out such inquiries for such time as it considers appropriate, and it's quite wrong to subdivide the consultation process and form views about its adequacy partway through the process that leads to a decision. We wouldn't normally do that for an executive decision maker. There's plenty of case law on that and that's why normally it's appropriate to seek review.

ELIAS CJ:

Mr Goddard, it occurs to me, and it may be quite astray and I'm sure you'll point it out if it is, but what you are postulating is a much more sophisticated doctrine than *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) postulated.

MR GODDARD QC:

Oh, yes.

ELIAS CJ:

Well, but it's to the same effect. All claims which could be put forward as claims of legal right are taken away and become claims which it's for the political process to respond to. There is no legal forum which is really the basis on which Mr Hodder opened.

MR GODDARD QC:

There is no legal forum, no curial forum, for assessing the appropriateness of making a proposal to Parliament, that and only that.

ELIAS CJ:

Well, I understand that.

MR GODDARD QC:

That's all I say.

ELIAS CJ:

But I'm looking beyond that at the effect of a claim which those making the claim wish to see addressed as a legal claim, a claim of right. You say it's a claim only on the political body.

MR GODDARD QC:

If what is happening is preparation of a proposal for legislation.

ELIAS CJ:

If that is the process in which – if that's the process adopted, yes.

MR GODDARD QC:

Yes, and only that. So that's why in my submission, and this was the second I was going to make, *Milroy* is right to say that you've got to focus in on function, what the Executive's doing, not timing, and the question is the Executive making a decision or preparing to make a decision itself, in which case we're in the space that Your Honour, Justice Arnold, asked me about tomorrow and I think after some toing and froing I accepted that yes, that would be reviewable in the ordinary way for failure to take into account any mandatory relevant consideration or for any other defect where you've got executive decision making, but where the function the Executive is performing is the preparation of a proposal for submission to Parliament then the various strands of argument in my submissions are engaged.

ARNOLD J:

So in this particular case the legislation provided for a carve-out for the properties, didn't it, originally? The legislation, I forget which one it was now, but allowed for the possibility of taking properties.

MR GODDARD QC:

The Collective Redress Act.

ARNOLD J:

Yes. The Minister could take properties out of the properties cupboard to be sold separately.

MR GODDARD QC:

The way that was characterised by my learned friends yesterday wasn't quite right and that was one of my five points. Why don't I anticipate that now?

ELIAS CJ:

Well, nobody's really taken us to this legislation which I think is important.

MR GODDARD QC:

So that was one of the things I was going to do. So the collective Redress Act is under – is in volume 1 of my learned friend's authorities under tab –

ELIAS CJ:

Should we start with the Ngāti Whātua Ōrākei Claim Settlement Act? The reason I ask that is I was just flipping through it, mainly on this Canadian notion of the honour of the Crown, to see what promises were made. But the primary area of interest, which one's that, in the Claims Settlement Act?

MR GODDARD QC:

It's not identified. There's no provision –

ELIAS CJ:

Well, it is. The primary area of interest means the primary area of interest shown in attachment 1 to the deed of settlement. Sorry, this is in chronological order, isn't it, to go to the Ōrākei Act before the collective?

O'REGAN J:

No, no.

ELLEN FRANCE J:

No, no.

MR GODDARD QC:

No, no. So that's why –

ELIAS CJ:

It's not? I'm sorry. Then I'm probably getting you out of order.

ELLEN FRANCE J:

Oh, yes, it is, in terms of the – yes.

MR GODDARD QC:

Yes, it is. It is chronological. It is chronological.

ELIAS CJ:

Yes. I just thought it might be useful to go through the legislation in chronological order.

MR GODDARD QC:

I'm happy to do that. I would have to pause to check what the purpose is for which the primary area of interest provision is invoked were in here. Your Honour's right that it's the one shown in attachment 1 to the deed of settlement –

ELIAS CJ:

Yes.

MR GODDARD QC:

– which I think we have in the case on appeal. So volume 5, tab 59, is the Ngāti Whātua Ōrākei iwi specific deed of settlement, and it isn't, as far as I can tell, the whole of it, and I'm not sure that we've got attachment 1 which, if that's right, is kind of unhelpful. No, I can't see the attachments or even an indication of which page they would appear on in the index. But the key point that I will just make about this is that it is in the usual way a final settlement of the historical claims. We see that in section 13. But that, of course, doesn't affect ongoing existing customary rights.

ELIAS CJ:

Just pause there because you've jumped over 11 which is the meaning of Ngāti Whātua Ōrākei, descended from Tuperiri and members of the hapū in relation – that exercise customary rights predominantly in relation to the primary area of interest.

MR GODDARD QC:

Yes.

ELIAS CJ:

So I mean...

MR GODDARD QC:

There's no doubt, there's no dispute between the Crown but that there were customary rights in relation to an area of interest that includes what's described as the 1840 transfer land.

ELIAS CJ:

So that's really what it is, is it?

MR GODDARD QC:

Yes, that's right.

WILLIAM YOUNG J:

Is that the 1840 transfer land or the –

MR GODDARD QC:

It's broader than that, I think.

WILLIAM YOUNG J:

Is that the whole isthmus?

MR GODDARD QC:

But I just can't remember.

WILLIAM YOUNG J:

I thought I'd seen a map of it somewhere actually.

MR GODDARD QC:

There are various maps.

ELIAS CJ:

Well, we've seen maps of the three areas, the 1840 purchase or deed or whatever. Was there a deed for that? No.

MR GODDARD QC:

There was a document. Might have been a deed, I think, because that's where we see references to te utu of this land, and the difference of view that we see explored by Dr Williams and others about how utu might have been understood, translated in the English version as "price" and he says no, that's over-simplified. But the picture is complex, that's what the Waitangi Tribunal held in relation to the Tāmaki Makaurau claims, and we see Maunga within even that core area of interest identified as Maunga in respect of which other hapu have cultural and spiritual interests in the collective redress framework.

WILLIAM YOUNG J:

There's an area carved out, isn't there? There's an area carved out in the middle isn't there, on one of the maps?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

What is that?

MR GODDARD QC:

I think Mr Majurey, who actually has a firmer grasp on this –

ELIAS CJ:

We'll ask him, yes, don't worry about that.

MR GODDARD QC:

– lay of the land than I do, is going to be much more helpful to you on this. I realise that looks like ducking it, and that's probably because it is. But he's the man.

O'REGAN J:

No pressure, Mr Majurey.

ELIAS CJ:

But the other thing is – leaving aside then what it applies to, which does seem rather material, section 19, the Crown is not prevented from providing other similar redress, it's not precluded from doing anything that's consistent with that cultural redress which is provided in this Act. So there are – it's not entirely carte blanche.

MR GODDARD QC:

No, it's not, but there's no suggestion in this pleading that anything that the Crown is proposing to do is inconsistent with that provision for example.

ELIAS CJ:

No, there's no pleading of that.

MR GODDARD QC:

So it's not in play.

ELIAS CJ:

But that's because it's being couched in terms of having mana whenua in particular areas, and that's being put as a legal right. If that is found to be so then it may well be that it's inconsistent with the cultural redress that's been provided, to use land within that area. But it's a consequential issue for trial.

MR GODDARD QC:

But, well, Your Honour, I'm not equipped to deal with the argument because it's never been advanced by the appellant that that provision is engaged in any way. The references to this Act that have been made are references to the acknowledgements and apology and the commitment to an ongoing relationship that reflects the principles of the Treaty. And –

ELIAS CJ:

No, no, I'm not asking you to respond to it, I'm just ask – you're indicating that the Crown has reserved to itself the right to take land for cultural redress. On the face of the legislation it looks a little bit more nuanced than that.

It looks as if it can take the land and apply it to other Treaty settlements, if it's not inconsistent with the acknowledgements and the purpose of the settlement it's already entered into here.

MR GODDARD QC:

That of course, if that were right, and I haven't turned my mind to it, would constrain executive decision-making but still, in my submission, would not constrain approaching Parliament to modify any such restriction, just as the Court of Appeal and this Court declining leave held that the fact that what the New Plymouth District Court was proposing to do in relation to the Waitara lands was inconsistent with the statutory basis on which it held the land, but that didn't preclude it seeking legislation to change that, the Executive acting on that, or a contract being entered into conditional on such a change to the law. So I would still make that submission where what it proposed is legislation, because existing legis –

ELIAS CJ:

But if the Crown is bound by this not to do something that's inconsistent with the purpose of the legislation, then surely ascertaining whether it is inconsistent with the legislation is something Parliament would want to know if it is to legislate?

MR GODDARD QC:

And Parliament has its own processes for ascertaining that.

ELIAS CJ:

No, you've said Parliament doesn't want to know.

MR GODDARD QC:

No, I haven't said that. What I've said is it's for Parliament to decide whether it wants to know, which is a very important distinction, Your Honour.

ELIAS CJ:

All right, yes, okay, I understand.

MR GODDARD QC:

And it's not for the Courts to tell Parliament what it should find out first. That is, I think, reasonably fundamental.

ELIAS CJ:

Well, no declaration would be made in that form. But there can be a declaration of existing right, and what Parliament makes of it is for Parliament.

MR GODDARD QC:

And then we get to the difficulty that the existing right pleaded in this pleading, which is what's been struck out, is an existing right in respect of the preparation of legislative proposals.

ELIAS CJ:

In part.

MR GODDARD QC:

I think really in this pleading in whole. The argument that's presented and relief that's now suggested is broader, but the touchstone, those paragraphs 22 and 23, are all about the making of those decisions, which are decisions about proposed legislation. So it's not the case that you could just say, oh, well, the challenge can proceed in relation to the overlapping claims policy but not the decisions, for example, because the criticism of all of them links back to obligations in relation to the making of these decisions. The whole thing would need to be reconstructed. Now I have said in my submissions and I reaffirm that it may well be possible for some sort of claim that involves legal rights but that doesn't involve a challenge to the decisions or an assertion of obligations in relation to the making of similar decisions to be framed and brought. But that would be such a different proceedings that the response of the Courts below, which was to strike out this pleading, remains the appropriate one.

ELLEN FRANCE J:

Can I just check, Mr Goddard, in terms of that do you make any distinction between the nature of the proceedings? So here, for example, if Sealord's, you're dealing with an application for interim relief or injunctive relief at one extreme, if you like, is there any difference on your approach if the proceedings are juridical review as opposed to brought under the Declaratory Judgments Act 1908?

MR GODDARD QC:

It seems to me that the focus ultimately has to be on the substance of the claim rather than the label attached to it, but that understanding the substance of the claim is advanced by looking at the sort of relief that is being sought. So I think Your Honour's right to say that seeking an interim injunction or other form of interim relief to stop something in its tracks is at the most problematic end of the spectrum. That judicial review, which is about the legality of Crown conduct, also runs into problems here where the Crown conduct in issue is the preparation of proposals for legislation, and that if one is in the territory of declarations to inform decision-making – and I've a submission about whether that's appropriate or not but there are cases that suggest that can be appropriate in some circumstances – if that's what's happening that is the least problematic of the various forms of proceeding. But that comes back again to my proposition that partly because of its genesis but also because of its fundamental structure in identifying certain Crown decisions and saying they're illegal for certain reasons, this is not structured as a declaration about background rights, underlying rights, to inform a decision-making process, that might be possible but that's not what's before the Court, it's not what we're concerned with here. Although it's been attempting to evolve in that direction I think, in response to the decisions below.

ELIAS CJ:

Well, that's the nature of strike-out applications.

MR GODDARD QC:

It is.

ELIAS CJ:
They do evolve, and it's one of the reasons why it's not always a good tactic.

MR GODDARD QC:
It can be –

ELIAS CJ:
I'm not saying in this case.

MR GODDARD QC:
No.

ELIAS CJ:
But, you know, people can refine their case through that process.

MR GODDARD QC:
It can be, and there's, you know, I'm only too familiar with that process and how it can play out. But there are also cases obviously where it is appropriate.

I hadn't meant to say anything about the Ngāti Whātua Orākei settlement legislation, but Your Honour I think has helpfully identified some provisions that in other circumstances or in a very different proceeding might be engaged. What I was going to go to, because there were some, I think, inaccuracies in how this was characterised by my learned friend yesterday and which as a result fed, I think, into the premise of Your Honour Justice Arnold's question. So that is under tab 3 of volume 1 of the authorities, so just behind the Ngāti Whātua Settlement Act, so volume 1 of my friend's authorities. And the RFR land is defined and certain restrictions on its disposal are set out in the Act. These provisions are found in Part 4 on commercial redress, which begins in page 92 of the legislation. So there's a definition of – this an interpretation provision, section 117, which includes a definition of "RFR area" by reference to the collective deed. Identifies the relevant Crown bodies. The sorts of proposals that will trigger the right of first

refusal. Section 118 defines RFR land in the light of those definitions and then just turning over to the next page, which has pages 95 and 96 of the statute on it, the Court will see the "Subpart 1 - RFR land" deals with the restrictions on disposal of RFR land from section 121 onwards. But before we get to that we get to the provision that my learned friend was referring to, section 120. One small point about that, I think my friend suggested that this was an order in council, which removed, it's not, it's just a notice, but more importantly than that this is not in my submission –

ELIAS CJ:

Sorry, can you just pause a moment. I just want to read that.

MR GODDARD QC:

Of course. This is not the source of a power to use land in the area for other Treaty settlements. It's a machinery provision that deals with what happens when a decision to do so has been made, and that's why we see in subsection (1) the Minister for Treaty negotiations must, for RFR land required for another Treaty settlement, give notice that the land ceases to be RFR land. So it's not a power, it's an obligation to give notice if the land is required for another Treaty settlement. What does that mean? That simply means, subsection (3), "Land that is to be vested or transferred as part of the settling of historical claims under the Treaty of Waitangi." So the power to use Crown land for a Treaty settlement remains the same as it was before. It's not sourced in this statute. What we have here is a mandatory notice provision where a decision to do that has been made in order, really, to do the land registry housekeeping on that, and that's the conclusion that Justice Whata came to in the proceedings brought by Ngāti Te Ata in relation to the Tamaoho settlement. I won't go to that decision but we provided it to the Court in the respondent's joint bundle of authorities under tab 7, *Ngāti Te Ata v The Minister for Treaty of Waitangi Negotiations* [2017] NZHC 2058. That as a proceeding mentioned yesterday, and Your Honour asked where that was up to I think in a concern not to cut across it.

ELIAS CJ:

Well I just don't what the parameters of it are. But it's in the bundle.

MR GODDARD QC:

It's in here. It related to the giving of a notice under section 120.

ELIAS CJ:

I see.

MR GODDARD QC:

In the context of early release properties, so they were being transferred by executive decision, not pursuant to settlement legislation. So it was effectively the approach that was being adopted in relation to Ngāti Paoa properties before this proceeding was commenced and the Minister decided that it would be prudent for Parliament to make a decision.

ELIAS CJ:

Those early release powers, you probably told us this, but I didn't absorb it, where are they to be found? Are they statutory?

MR GODDARD QC:

No.

ELIAS CJ:

No, all right.

MR GODDARD QC:

No, and so then we go down that path of one's preferred label in relation to powers of that kind, and whether one describes it as a prerogative power, which I think, one of my submissions, unhelpful or common law or third source, but it's the power –

ELIAS CJ:

Well it's certainly not third source, it's prerogative or common law but they're the same thing.

MR GODDARD QC:

Yes, well, some commentators see prerogative as a subset of common law, but I think happily in this proceeding we don't need to go there. One could even say it's a complex interplay between the powers of the Crown as owner of the land to dispose of them for a range of purposes, and the quintessentially executive function of identifying and complying with obligations under the Treaty, Treaty making being the best example one can come up with of a prerogative power, and one would have thought the performance of those obligations also as a result engaging with those powers, but again I don't know how far we need to get into that question.

So I won't spend any time analysing section 120 because it won't be engaged here, legislation authorising these transfers will simply deal with the consequences for this legislation, but in my submission it is helpfully explored by Justice Whata in the *Ngāti Te Ata* decision. Just in terms of where that's up to, the application was unsuccessful in the High Court. An appeal was filed by Ngāti Te Ata. My understanding that since then security for costs has not been paid, and the consequences of that are to be determined by the Court of Appeal. The properties have been transferred. It's not clear whether it will progress through the system or not, but I simply don't know, I can't comment.

ELIAS CJ:

That's all right. But it's a mile away from the sort of things that we're talking about here. That's the only thing I was concerned about.

MR GODDARD QC:

It's the same area, it's the same RFR land, but it's far from it because it doesn't involve legislation –

ELIAS CJ:

It's not a legislative process, yes.

MR GODDARD QC:

Exactly Your Honour.

ARNOLD J:

But the argument in that case was, was it on behalf of the Crown that notwithstanding that the transfer wouldn't be affected by legislation, that there would be no legislation, nevertheless the decision of the Minister to utilise the properties for settlement purposes was non-justiciable because it was a political settlement process.

MR GODDARD QC:

Yes, that was the argument, and that was not accepted to its fullest extent by the Judge who found that the decision, certainly to give the section 120 notice, was justiciable and…

ELIAS CJ:

It was only the 120 notice that was challenged, was it, the giving of the section 120 notice?

MR GODDARD QC:

It was a little bit broader than that, the challenge.

ARNOLD J:

I thought it was the decision to dispose of the properties.

MR GODDARD QC:

Dispose, yes, so it did reach back to that decision to dispose, and the Judge, His Honour held that the, rejected an argument based on an absence of power to dispose of the land, but what the Judge said at paragraph 54, so I'm in bundle of authorities under tab 7, at 54 picked up the point this Court made in *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 that the Treaty context doesn't automatically preclude review, and said that, "The decision to require RFR land for an individual Treaty settlement extinguishes, by way of the notice procedure contained in s 120, the right of first refusal…

decision to take away a legal right of first refusal." His Honour therefore accepted, "Absent a clear error of sort present in *Ririnui*, the merits of a decision to settle a Treaty claim are typically non-justiciable for the reasons mentioned in that case, the legality of the s 120 notice, in terms of conformity with the requirements of the collective Redress Act, is a reviewable matter." Now that paragraph is not entirely clear but –

ELIAS CJ:
Sorry, what paragraph was that?

MR GODDARD QC:
Paragraph 54 Your Honour, but I understood it, Your Honour, to be a finding that whether there was a power to give the section 120 notice would be reviewable, but there's sort of an indication that the stuff that sat behind that wouldn't be reviewed, and it isn't, in fact, engaged with here. So that's where the Judge got to on that, and again that's background but it's as Your Honour the Chief Justice said to me earlier about quite a different type of decision.

I'm almost done, although I've done it in such a funny order, that I just need to check where I am. Two more things to say very quickly. The first is, and this is really running through everything I've said so far, that the primary submission here is that justiciability turns on function not timing. That's the *Milroy* point. What is the Executive doing here. For the three reasons I mentioned earlier, a decision to propose legislation is fundamentally different from a decision by the Executive, which itself is the exercise of a power that produces consequences, and I deal with that in more detail in my written submissions at 6.39 to 6.50, and I just wanted to mention that without trawling through it.

The last thing I wanted to do was to engage with the exchange between Your Honour the Chief Justice and my learned friend Mr Hodder about what Your Honour summarised as the gravamen of the claim yesterday. So what Your Honour said was that the transactional focus may have distracted attention, and Your Honour said, if there's a right to an exclusive rohe, and

Crown acknowledgement of that, then decisions that are going to be made will be made on the basis there is no such right as a matter of Government policy, and Your Honour went on to say, if there's no ability to challenge the policy, then legislation and the decisions to be made may proceed on an entirely wrong basis, and my learned friend said, yes, that's my case, and counsel almost invariably do when a Judge suggests an argument to them. But you can get into trouble in that way –

ELIAS CJ:
Well it's not a new argument though. I mean that's why I said look through to what is behind the pleadings and that must be the gravamen.

MR GODDARD QC:
The problem with that is, with respect, that I think it proceeds on the basis of an incorrect description of the Minister's decision in this case. It's not right to say that decisions that are going to be made will be made on the basis there is no such right, and that was –

ELIAS CJ:
No, you clarified that, it's on the basis that they don't need to decide whether there is such a right.

MR GODDARD QC:
Yes, so Parliament's been invited to act on the basis that there are different opinions both about customary rights, mana whenua rights in this area, and importantly about the significance of that for the provision of commercial redress properties, which are unresolved, and which it could take many years to finally resolve if they wended their way through the Courts, including as Your Honour suggested the Māori Appellate Court and subsequent appeals, and the decision that was made by the Minister was that in light of all those factors, contest about rights, contest about irrelevance to the use of properties for commercial redress, and the potential time that would be required to reach a final resolution of those questions, the Crown's obligations to Ngāti Paoa and Marutūāhu, it was political assessment, and in those circumstances it was

in the public interest that the proposal be put to Parliament for its decision. So the proposal that was made, the decision, and it really should be in inverted quotes because it's a decision to refer something to another decision maker, is predicated on an unresolved question, not predicated on a particular answer, and if Parliament considers that it's unsatisfactory to proceed against the backdrop of that uncertainty, Parliament can decide not to proceed with the Bill. If it considers that there should be an accommodation to take account of the concerns raised, then both as a matter of principle, and as a matter of historical experience, accommodations can be explored and arrived at and changes made.

ELIAS CJ:

But how does, if we were to allow the case to proceed, how is the action of the Crown constrained, because on your argument it just carries on, and if decisions haven't been taken by the Courts by the time it comes before Parliament, Parliament is free to continue.

MR GODDARD QC:

Yes. The question then becomes what the background expectations are in terms of comity flowing both ways, and this was touched on in an exchange with my learned friend yesterday as well, but would there be, and it partly depends on what issue is being entertained by the Courts, that's obviously fundamental to how the practical matter plays out, but if there were to be an expectation that is a matter of comity Parliament would wait for the answer to a particular decision, then that would also be an interference with the processes of Parliament.

ELIAS CJ:

But we've had a number of examples where Parliament hasn't acted on that principle, and it's perfectly entitled not to, so isn't the best thing for the Court's just to keep their eye on the legal ball, and let the political game be played in another place?

MR GODDARD QC:

I think making it clear that that's what's happening, and that there is no such expectation, could of itself diminish some of the harm that's caused, but even if the Court simply keeps its eye on the legal ball, then in the context of this application the Courts below were right to say that actually there are several balls being offered up for a good kick by my learned friend here, and that some of those balls will never cross the goal line, the claim to rights in relation to the preparation of legislation for example, so the essence of the claim as pleaded, I would say the whole of the claim as pleaded in the body of the pleading, is bad for that reason. If a different claim were to be formulated and brought, it might well be appropriate once one sees it for it to continue on in the absence of any expectation that the Executive should delay its submission of proposals to Parliament, or any expectation that Parliament should wait, and if the absence of such expectations were clear, then the concern I've expressed about potential clashes between the role of the Courts and Parliament, which are the historical background to the comity principle, and I should say *Pickin* is not the source of this comity principle, the history of the principle is discussed much more helpfully in *Prebble* by the Privy Council than by the House of Lords in *Pickin* and in a more nuanced and more historically grounded way. So that's where I think I'd refer the Court for more discussion of that.

ELIAS CJ:

Just to, and this is really the end for me, but it occurs to me that the whole system of Māori land law in this country is based on assumptions, whether they're right or wrong, that correct decisions as to who has mana whenua in a particular place, can be determined through the legal processes that have been set up. Now whether you think that that was right or wrong, that is actually the basis of Māori land law in this country. So it's a bit odd to, and I know your justiciability arguments are related to the Parliamentary process, but if the gravamen of the case is to enable a determination of whether Ngāti Whātua Orākei has the mana whenua in any particular area, that's certainly a justiciable matter.

MR GODDARD QC:

If there's a live issue about that, yes, I said that in my written submissions, and reiterated it yesterday.

ELIAS CJ:

Yes, yes, good, thank you.

MR GODDARD QC:

But the key point here is that mana whenua in an area no more confers a right not to have Parliament consider a proposal in relation to a dealing with land in that area, than any other form of ownership of land confers such a right. The fact that I own a property somewhere doesn't give me, it gives me rights in relation to its use and enjoyment and exclusion of others, but it doesn't give me any rights at all in relation to the development of legislative proposals affecting that property, and Parliament is the place where I can be heard in relation to those.

ARNOLD J:

I just wanted to go back to something I raised yesterday, just to make sure I understand it. One of the allegations made is that as a result of the settlement the Crown owed certain obligations to Ngāti Whātua of good faith dealing and things of that sort. Now if those, if it is argued that they have been breached, and let's put aside for the moment the particular context of that argument and just deal with it in principle, I asked you whether that was something that was justiciable you could deal with that in a piece of litigation, a particular conduct of the Crown was a breach of those obligations. Your answer was, I think, well some of the cases have said obligations undertaken in deeds of this sort are not like a contract and so could you just develop your argument on that for me?

O'REGAN J:

They're also in the Act though anyway, aren't they, so they'd be statutory obligations.

MR GODDARD QC:

That's what I was about to say. If there's a statute that imposes an obligation of that kind, and if the Crown is engaged in decision making within the scope of the activities contemplated by that provision, then it seems to me that a public power is being exercised and that all the normal grounds of review are, in principle, available, subject to any questions about the justiciability of a particular type of decision, and of course questions about the boundary, because no provision says whenever you do anything you must have regard to X, there's always a something, and the something will be defined, usually partly explicitly and party implicitly. But if you're within the zone of the statutory obligation then the starting point, as this Court said in *Ririnui*, is reviewability unless it's a type of decision that's not justiciable. At the most general level that must be right.

ARNOLD J:

Yes, now the problem in this case, you say, is that the decisions are really about the submission of proposals to Parliament and that's off limits. Now let's accept that that's right for the purposes of the argument. What do you say is the, as I understand it, is there might be a context in which a claim could be made based on legal rights, either of mana whenua or arising out of the settlement arrangement, but it's effectively hypothetical at the moment so it's not something the Court should look at. Now is there, if a claimant comes along as Ngāti Whātua does, and says, well we have these rights, and they have in our submission been infringed, we claim they have been infringed, if it accepts that they've been infringed by a mechanism that is not justiciable, that is through the passage of… why aren't they able to say we nevertheless want to proceed and have our legal rights determined, because our argument is the Crown has breached them, it's breached them in a way that we cannot challenge because it involves legislation, but we have a continuing and ongoing relationship, and we want those rights determined because we will have other interactions with the Crown in which these rights will arise, and we want them sorted out now.

MR GODDARD QC:

That's obviously a much less problematic argument than an argument that there can be challenge to the decisions. But it is somewhere in the boundary zone of the law in relation to the appropriateness of the Court embarking on hearings and granting declaratory judgments and –

ELIAS CJ:

But it's a question, something I asked earlier in the hearing, it's about status, and the status continues, and the law has, I haven't checked, but the law has always, I think, been quite mindful of responsibilities when questions of status are entailed.

MR GODDARD QC:

Yes. The Crown, I think, would say that it's not for it to be the contradictor in a case about status of this kind, but rather all the other iwi who say they have cultural, spiritual and other associations with the land to be party to that, they will be necessary parties to any dispute of that kind, and there's a question about whether the Crown should be a party at all. Certainly it's not primarily engaged in that question. So we're looking at a very different sort of proceeding on that status point. To come back to Your Honour's question, you say it may inform future dealings with the Crown, in the absence of specific contemplated dealings, it would be unusual for the Courts to be willing to entertain that, and we've seen in most –

ARNOLD J:

Sorry, what I was going to say is that, I mean you're saying this is happening in a vacuum. As I understand the appellant's argument, it is not happening in a vacuum. It is happening against the backdrop of certain decisions which it claims infringe the Crown's obligation arising out of its settlement relationship. Now if you're right that they are beyond the purview of the Court, it doesn't mean the issue is hypothetical, it just means the way the "breach" has occurred in this case, is not something the Court can do anything about, but it doesn't mean that the declaration of rights is valueless, does it?

MR GODDARD QC:

My proposition is a bit different. I'm not saying, well rights may be being infringed, but the Court can't declare that. What I'm saying is that the Courts below were right to say that whatever the rights of mana whenua may be, they do not extend to decisions of this kind, so there is no – it's not just that there's that breach, but it's not justiciable in some sense, which is the premise of Your Honour's question.

ARNOLD J:

I suppose I am focusing more on the relationship rights that are claimed.

MR GODDARD QC:

And that's where I say when there are decisions being made, which engage those relationship rights outside the space, that would be the right time for an informed testing of what the relationship does and does not involve. Courts are willing to declare status which has familiar consequences. Here what we're really asking is not so much about, it's an inter-related question of status and what that entails for rights and obligations as between the Crown and Ngāti Whātua, and we see that appearing and recurring through the pleading and that's a question that, especially in a novel area, that is much better answered against the backdrop of a concrete factual situation that engages the question. And that, in my submission, is why the Courts have declined to explore those background right questions inconsistency between new proposals and existing law questions in a number of the cases that the Court has been referred to, and it's why this Court said in the *New Plymouth District Council Waitara* case, there are two live issues determined by the Court of Appeal. What was the basis on which this land was held, difficult question but the Court, as Your Honour will remember, took a tentative view on with respect to one category of land, and I think fudged on with respect to another, but this Court said, because the particular action that is proposed will be lawful if legislation is passed, whatever the background obligations, whether it's charitable trust or it's some sort of statutory quasi-trust regime –

ELIAS CJ:

Are you talking about that leave judgment?

MR GODDARD QC:

Yes.

ELIAS CJ:

To my knowledge leave judgments have not been cited as authority before this Court and I would want to be persuaded that it is appropriate for a leave judgment to be cited on a point of substantive law like that.

MR GODDARD QC:

That leave judgment was referred to and the reasoning in it adopted by the Court of Appeal in the *Forest Assets* case so –

ELIAS CJ:

All right, so we can look at the *Forest Assets* case for that, yes.

MR GODDARD QC:

Yes, so I can avoid that particular jurisprudential issue today.

ELIAS CJ:

Mind you if the *Forest Assets* case simply said that that was authority, then we're in a loop, and you still have to persuade us and you have addressed the substantive argument.

MR GODDARD QC:

Yes, I have endeavoured to address the substance rather than rely on authority.

ELIAS CJ:

Yes.

ELLEN FRANCE J:

Can I just ask a factual question? The current version of the Red Book is dated March 2015?

MR GODDARD QC:

Yes, I think that's right. It's the one that's in volume 5 under tab 62. There's an earlier version floating around and –

ELLEN FRANCE J:

Yes, yes, and I what I wanted to know, I've looked at the earlier version, and that has a slightly more expanded version of the overlapping claims settlement policy, and what I wanted to know was whether there was any evidence as to when the sort of current version, if you like, of the overlapping claims policy was adopted. Is it just at the point of that earlier version of the Red Book?

MR GODDARD QC:

The way, what happened was that a deponent earlier on in these proceeding inadvertently attached an out of date version of the Red Book, as I understand it, and that was corrected in the course of the life of the proceeding.

ELLEN FRANCE J:

Yes, I was just interested to know when, if there was evidence about when that policy was adopted, and if the answer was no that's fine.

ELIAS CJ:

So the answer in terms of what is current is that at page 2108 of volume 5 that passage on overlapping claims or shared interests is the current policy adopted by the Office of Treaty Settlements?

MR GODDARD QC:

Yes, Your Honour, that's right and that discussion flows through to the discussions of exclusive and non-exclusive redress on 2109 and 2110.

ELIAS CJ:

Yes.

MR GODDARD QC:

So the whole of that little section that deals with overlapping claims and the implications for exclusive and non-exclusive claims, and that is the live version. I'm grateful to my learned junior for helping me with this, in fact that was picked up only before the Court of Appeal and in volume 1 of the case on appeal, under tab 28, is the joint memorandum of counsel providing the updated version, and what that confirms in paragraph 4, it refers, in fact there have been some amendments as Your Honour picked up, to the text between the third and fourth iterations, "All parties have conferred and confirm, in relation to the sections of the Red Book the parties referred the Court to, there are no material changes relevant to the issues on appeal." So no one's relying on any differences between the versions.

ELLEN FRANCE J:

No, and it was more just getting it factually…

MR GODDARD QC:

I knew I'd seen something like that before and I'm very grateful to my friend for actually finding it. Unless there's anything else I can assist the Court with?

ELIAS CJ:

No, thank you Mr Goddard. Mr Majurey.

MR MAJUREY:

May it please the Court. Just to confirm to the Court that in the division of labour between myself and my learned friends for the Crown, as you've seen they've covered what I might describe as the high law, the black letter law, all the intelligent parts of the case, and you've had also the benefit of my learned friend Mr Hodder and Professor Joseph, so you'll hear from a lowly merits lawyer now addressing hopefully –

ELIAS CJ:

A jury address Mr Majurey.

MR MAJUREY:

Something of that nature. And to preface the comments to say that of course this is in the context of a strike-out hearing, and so my comments definitely reflect that context, but I do go into some of the background matters that have been touched on during the day and yesterday in terms of the Treaty context.

Mr Hodder has conjured up images of King John being dragged off by the people to Magna Carta, and the triumph of the rule of law that was to follow, yet this case is not really about those lofty principles in its context. What comes more to mind is an attempt by hapū in 2006 to secure exclusive redress over central Auckland, despite the many shared tribal interests in that area. Had Ngāti Whātua Orākei secured that settlement, then we would not be here today. The reality is that settlement would have obtained a right of first refusal in an exclusive manner over central Auckland and Treaty redress would not have been available. In the event that's not what occurred and who did the tribes seek protection from in that instance? It was the Waitangi Tribunal, despite the fact that it does not have the power to declare rights, but as we know, the power to make recommendations and provide reports on that expert standing commission of inquiry. It's that standing commission of inquiry that addresses matters of tikanga, mana whanaungatanga and kotahitanga.

Here we are again just over a decade ago somewhat coming full circle in a sense of that matter coming back before the Court on this occasion in terms of rights context following a number of Treaty related milestones that have been canvassed by counsel, and I'll go through some of the chronology as well. As has been said towards the end of the exchange with my learned friend Mr Goddard this proceeding does not live in a vacuum. It is not just about esoteric law in terms of rights of access to the Court, it has a particular purpose, and the purpose, as has been described as transactional, commenced with an attempt to, in a wider sense, frustrate and block Treaty

settlement redress initially to Ngāti Paoa. That's the context of what these declarations are about, and that's a very important part of this case in terms of context. That challenge extended beyond Ngāti Paoa's proposed settlement to that of Marutūāhu, and as you may have seen in appendix 2 to my submissions that I commented on, the people of Ngāti Whātua Orākei clearly have strong intentions in relation to this proceeding. One of those media articles that was attached makes it very clear how those people see what this proceeding is about, and if one was to watch the Māori media last night and this morning, again the airwaves have been flooded with expectations about what this proceeding is about. That's the reality of what's before this Court, and that's why these declarations and the strike-out proceeding is so important.

This has a very special context, this case, and that is Treaty settlements. Treaty settlements, as this Court is well aware, have been occurring for nearly 25 years. The various arrangements have been broadly the same throughout. There is a mandating process to determine who is going to negotiate with the Crown. There are negotiations that are undertaken. Formerly they were one-on-one arrangements, as we saw in the Ngāti Whātua Orākei case in 2006 and 2007, and following the Tribunal's report in Tamaki and the Te Arawa report, they became regional negotiations to make sure everyone was at the table. There are various settlement milestones from the beginning through to a deed of settlement. Those include agreements in principle, record of agreements and the like. There are overlapping claims processes. Those have been there throughout. Yes, they have evolved over time, and mentioned was made of the Red Book and the changes that have been contained in it. Throughout there's been access to the Waitangi Tribunal, as that expert standing commission of inquiry.

The Courts have generally not entertained challenges to those Treaty settlements, as has been canvassed by counsel. Legislation is introduced and then the select committee process takes up the process in terms of ventilating where there are issues arising by the public through making submissions.

WILLIAM YOUNG J:

Can I just ask a question? You may know, I can't remember, after the *New Zealand Māori Council* case, did the legislation proceed or was it amended? That's the 2007 case.

MR MAJUREY:

When you say the legislation Sir?

WILLIAM YOUNG J:

There was a proposal – in issue was a legislated settlement. The relief sought was refused, but I have a vague recollection that things didn't, there were variations.

MR MAJUREY:

No, it didn't proceed in that manner Sir. And that very high level summary of the process is how most of the country has been settled in terms of Treaty settlements. From the South Island up to the North Island of course there are some significant outstanding claims, but in terms of geography a lot of the country has been settled and we are seeing more and more in this proceeding as an example of how those settled iwi see the relationship with the Crown and what their intentions are in terms of what they'd like to see happen in those settlements that have not yet occurred.

I finish this part of the introduction by emphasising that all iwi, all hapū, are Treaty partners, not just settled iwi and hapū, so we all have that Treaty relationship and we all have owed to us the obligations from the Treaty partner.

Turning to the Marutūāhu decision, unlike the Ngāti Paoa decision that has only ever been a proposed transfer of properties via legislation. There was no revised Marutūāhu decision, and that's "decision" in inverted commas, as we know, in terms of that's a decision to seek to put legislation to the House.

WILLIAM YOUNG J:

And is that quite imminent, because is the deed to be initialled shortly?

MR MAJUREY:

The Minister had indicated on the 1st of May that he intends to initial the deed. No date has been set as I understand it.

WILLIAM YOUNG J:

Has it been ratified?

MR MAJUREY:

So the process is that on initialling a deed it then goes to ratification. If ratification is acknowledged and supported by the Crown, the deed's then signed and legislation comes in.

Turning now to the particulars, references made yesterday to the, I will call it the McEnteer map. You might recall the colour map.

ELIAS CJ:

Is there a – I have read it in the materials, maybe in the judgments, but you don't have in your submissions any explanation of Marutūāhu? It's a partnership. What…

MR MAJUREY:

Yes, Your Honour. So in the McEnteer affidavit he talks about the Marutūāhu Collective.

ELIAS CJ:

Yes.

MR MAJUREY:

It comprises five tribes: Ngāti Paoa, Ngāti Maru, Ngāti Whanaunga, Ngāti Tamaterā and Te Patukirikiri. It talks about how they have –

ELIAS CJ:

Yes. So I just wanted – I'd seen it but I just wanted the reference to it. McEnteer, yes.

MR MAJUREY:

Yes, thank you, Ma'am. So at volume 4 of the book and tab 48 is the map exhibit from Mr McEnteer's affidavit. The reverse page has the larger version.

ELIAS CJ:

4 at what?

MR MAJUREY:

Volume 4, tab 48. And on the second page is the larger version. I had attempted to get an A3 in the book but apparently that breaches the protocol, so apologise for the small scale. The important thing to note in terms of the legend key, if you see the legend you have the heading, "Marutūāhu Iwi Treaty Redress," the green triangle is cultural redress and the red triangle is the commercial redress properties, and those comprise various properties of cultural redress in Parnell, a number of schools in central Auckland and some Government property, some Crown properties.

The question was asked, the island, if you like, in the middle. What that represents is there was a separate Crown transaction in the nineteenth century to another tribe and so as I understand it that's why that was carved out.

ELIAS CJ:

So that's the one that does have some of the maunga in it, is it?

MR MAJUREY:

Yes, and you'll recall, and Mr McEnteer comments on this as my friend, Mr Goddard, took you to, the relevance of showing this is that agreements were reached over recognising amongst all 13 tribes of the Tāmaki Collective the spiritual, cultural, customary interests of the tribes listed in those tables in

those maunga in central Auckland, and also to confirm that the Tamaki Collective RFR area is the much wider one that incorporates this 2006 area.

ELIAS CJ:
So on this is there any, I can't see any, is there any non-commercial redress in the CBD area?

MR MAJUREY:
Yes, Your Honour. So again it's hard to see. You'll see a green triangle near the port area. It's in Gladstone Road, Parnell.

O'REGAN J:
You just need to stay near the microphone.

MR MAJUREY:
Sorry, Your Honour. So the green triangle –

ELIAS CJ:
I need better glasses.

MR MAJUREY:
It's almost impossible to see. So if you see the –

ELIAS CJ:
It's a triangle.

MR MAJUREY:
Yes.

ELIAS CJ:
I thought it was a round thing. Yes, I see.

MR MAJUREY:
Yes, the circle is of the Ngāti Paoa properties. So that's the cultural property, and there are the other commercial properties. I will come back to the matter

raised by Your Honour Chief Justice on commercial properties and this concept that an alternative may be cash rather than property, which would be a very new and unusual aspect in the context of Treaty settlements, given the importance that land plays in settlements as you're well aware.

In my submissions at appendix 1 is a chronology, and I want to go through a number of those elements and hopefully not repeat what the Court is well understanding at this stage. So in that chronology we have a number of columns running from the left to right. Ngāti Whātua Orākei, Tāmaki collective, Ngāti Paoa and Marutūāhu. And there you see in a graphic way the chronology as has occurred from 2006 with the Ngāti Whātua agreement in principle, and I want to highlight a number of matters as I walk through of those. Each of those headings in the respective columns have numbers, and I'll refer to those numbers.

So number 1, Ngāti Whātua Orākei agreement in principle. As you've heard that occurred in 2006. That was a one-on-one negotiation and it included proposed exclusive redress in the RFR area and maunga. There were four maunga in that AIP.

Turning to item 2, the Tribunal report. The question was asked yesterday, as I recall it, as to whether in a sense the Tribunal report was an overlapping claims report, or contained overlapping claims matters. The answer is definitely yes. A number of the extracts included in my submission are in the decision of the High Court in this proceeding and also the decision of Justice Whata include references that confirm that was an overlapping claims process. The tribes included in terms of contesting that redress were Marutūāhu, Ngāti Te Ata, Te Kawerau a Maki and Ngāi Tai ki Tamaki. To give one example of the assessment by the Tribunal as to relative interests, I want to take you to the Tribunal report, and that's at tab 50.

ELIAS CJ:
What volume?

O'REGAN J:
Volume 4.

MR MAJUREY:
That's volume 4 at page 1496. There's an extract on the right-hand column and in the first complete paragraph it begins with "Mr Majurey". I'll just pause while Your Honours find that section. So 1496, tab 50, and I'll read from that section. "Mr Majurey also put to Ms Houlbrooke," Ms Houlbrooke was witness for OTS, the Crown, "the proposition that the Crown should take a 'conservative, cautionary approach' before conferring exclusive rights in maunga, because of the huge importance placed upon maunga by Māori and Crown's Treaty duty of active protection. She agreed. Mr Majurey then asked Ms Houlbrooke to comment on an extract from a Crown document. The extract expresses a fairly tentative view on the strength of Ngāti Whātua Ōrākei's interests in Maungawhau (Mount Eden) vis-à-vis those of Marutūāhu. It says, 'On balance, Ngāti Whātua would appear to have the stronger historical interests in relation to Maungawhau.' Was this, Mr Majurey asked, the strongest statement in the documents about the predominance of Ngāti Whātua Ōrākei's interests in Maungawhau? Ms Houlbrooke could point to nothing stronger." So there's an example of those respective tribal interests being addressed in the Tribunal's report.

At item 3 of the chronology it notes that in 2008 the Crown began the parallel deed/legislation drafting in all Treaty settlement negotiations, and that's a matter of evidence as referenced there.

Item 4 is the Graham report. I don't think it's been raised with Your Honours so I just want to address a couple of matters here and I want to refer to Mr McEnteer's affidavit. That's in volume 2, tab 34, and the extract I'm taking you to is at page 284 starting at paragraph 27 of his affidavit. Volume 2, Sir.

WILLIAM YOUNG J:
Yes, sorry, I was looking at the authority and not getting very far.

MR MAJUREY:

Shall I read it out?

ELIAS CJ:

Volume 2.

WILLIAM YOUNG J:

The blue one, okay. Sorry.

MR MAJUREY:

Tab 34, page 284 of the red numbers, starting at paragraph 27 of Mr McEnteer's affidavit. He says, "The Graham Report proposed a way forward for Treaty settlements in the overlapping regions (tribal interests wise) of Tāmaki, Hauraki and Kaipara. It set out the broad outline of Crown offers to settle each of the iwi Treaty claims to provide a starting point for negotiations with the iwi/hapū with interests in each region. In relation to Tāmaki, this included the transfer to, and co-governance of, specified maunga by the various iwi of Tāmaki; the grant of an RFR over surplus Crown properties across a large part of the Auckland region to the various iwi of Tāmaki; proposals for iwi-specific financial redress for the various iwi of Tāmaki in relation to breaches of their Treaty and customary rights in Tāmaki (including central Auckland); and proposals for iwi-specific cultural redress, such as the return of waahi tapu, for the various iwi of Tāmaki. The Graham Report also observed that if the Ngāti Whātua Ōrākei negotiations were not to go back to square one and other iwi negotiations in Tāmaki were to proceed, it would be necessary to remove those elements of the 2006 AIP which were a proxy for exclusive Ngāti Whātua rights to parts of Tāmaki (being the maunga vestings and RFR in central Auckland) and which proposals were rejected by the Waitangi Tribunal."

The Graham report really was the blueprint for what transpired following that for negotiations and settlements in Tāmaki and those overlapping areas.

At item 5 I note that the Tāmaki Collective and other iwi-specific negotiations begin and at that point all Tāmaki iwi in negotiation and overlapping claims processes were ongoing.

We then come to a number of Treaty settlement milestones. So, item 6, 12 February of 2010 was the Ngāti Whātua Ōrākei supplementary AIP that you've been addressed on, and that was the AIP that commenced the recognition that the arrangements from the original AIP were going to change, especially the removal of those exclusive elements.

On the same date, if you move across to item 7, the Tāmaki Collective Framework Agreement was signed. I mentioned those evolving Treaty settlement milestones in the process. This was one of those. It was called a framework agreement. That's the sort of name that we see, AIP, there's record of agreements.

I want to take you to one clause as an example of where the negotiations were at and how the respective interests were being recognised by each of the iwi. So tab 55.

ELIAS CJ:
Now just, sorry, I'm just trying to catch up with just the facts on this. At 284 the reference to the Graham report –

MR MAJUREY:
Yes.

ELIAS CJ:
– removing those elements of the 2006 AIP which were a proxy, being the maunga vestings, they've gone, and the RFR in central Auckland.

MR MAJUREY:
That's the 2006, yes, Ma'am.

ELIAS CJ:

The 2006 one was the large area.

MR MAJUREY:

Yes, Ma'am.

ELIAS CJ:

Not the huge area which is –

MR MAJUREY:

Correct.

ELIAS CJ:

But the larger area – yep, thank you.

MR MAJUREY:

Yes.

WILLIAM YOUNG J:

It's basically the isthmus, isn't it?

ELIAS CJ:

Yes, the isthmus.

MR MAJUREY:

In the round. So three maps that you've seen before you, the 1840 area, that is the smallest of the areas.

ELIAS CJ:

Yes.

MR MAJUREY:

2006 RFR, the isthmus, and 2012, the Tāmaki deed, a lot of the Auckland region.

ELIAS CJ:

Yes.

MR MAJUREY:

That's the Tāmaki Collective one.

ELIAS CJ:

So in the – there wasn't anything you wanted to take us to in terms of the 1840 transfer in the Waitangi Tribunal report or the Graham report, was there?

MR MAJUREY:

No, Ma'am. The Tribunal report covered the larger 2006 area –

ELIAS CJ:

I see.

MR MAJUREY:

– which of necessity covered the 1840 area.

ELIAS CJ:

Yes, I see, thank you.

O'REGAN J:

And so did the Graham report, did it?

MR MAJUREY:

Yes, Sir.

O'REGAN J:

So there was a never distinction drawn between the larger and the smaller?

MR MAJUREY:

No, because the focus came from the 2006 AIP which was the 2006 RFR area.

ELIAS CJ:

Yes, thank you.

MR MAJUREY:

At tab 55, this is in volume 5, I want to take you to clauses 2 and 4. Volume 5, tab 55. At clause 2, "The iwi/hapū members of Ngā Mana Whenua o Tāmaki Makaurau (or other name chosen by the iwi/hapū) recognise they each have a legitimate spiritual, ancestral, cultural, customary and historical interests within Tāmaki Makaurau."

ELIAS CJ:

Sorry, I can't find it. It's under 55?

MR MAJUREY:

Volume 5, tab 55. This is the framework agreement.

WILLIAM YOUNG J:

Red number 1852.

O'REGAN J:

Clause 2.

WILLIAM YOUNG J:

At the bottom, red 1852.

MR MAJUREY:

Yes, 1852.

ELIAS CJ:

1852, sorry, thank you.

MR MAJUREY:

Yes, clause 2, "The iwi/hapū members of Ngā Mana Whenua o Tāmaki Makaurau (or other name chosen by the iwi/hapū) recognise they each have

legitimate spiritual, ancestral, cultural, customary and historical interests within Tāmaki Makaurau."

And at clause 4, "The Crown recognises that the iwi/hapū members of Ngā Mana Whenua o Tāmaki Makaurau have legitimate spiritual, ancestral, cultural, customary and historical interests in the maunga of Tāmaki Makaurau."

So that's where the state of play was at in 2012, sorry, 2010, and that was a precursor to the –

ELLEN FRANCE J:
And then the – am I right, it's clause 25 through to 28 that sets out the process then for the RFR?

MR MAJUREY:
Yes, Your Honour.

ELLEN FRANCE J:
In terms of the collective?

MR MAJUREY:
Remembering this is at the earlier stage.

ELLEN FRANCE J:
Yes, yes.

MR MAJUREY:
So the ongoing design through these negotiations are recorded as at that date. More work went into those negotiations reflected in the ultimate deed.

I note at item 8, as my friend, Mr Goddard, confirmed yesterday, that the Ngāti Paoa agreement in principle equivalent was signed on 22 July of 2011. So these ongoing parallel processes are occurring.

Item 9 is an important matter in the context of this case and that's the Chief Crown Negotiator memorandum. So that's at tab 58, if you still have the same volume. And this received some comment in the Court of Appeal decision. It's dated 27 September 2011 and just to pause there, if you see item 10 in the chronology you'll see the Ngāti Whātua Ōrākei deed of settlement on 5 November. So that's the relative timing between those two events.

So in the 27 September 2011 memorandum at paragraph 4 it begins, "I have been asked whether the Crown would agree to a veto right for other groups over redress offered to Ngāti Whātua Ōrākei; or to a vet right in favour of Ngāti Whātua o Ōrākei over redress to be offered to other groups. The Crown is not prepared to offer such a right to any iwi. Instead, the Crown will continue to make a careful assessment of appropriate iwi-specific settlement offers, it will consider the views of all other groups with an interest when developing those offers and reaching any settlement agreements. As noted above, in the case of Ngāti Whātua Ōrākei settlement redress offer the Crown considers it has sufficient land and assets satisfactorily to resolve the claims of other iwi. The Crown has signalled the shape of that redress since signing the revised Agreement in Principle with Ngāti Whātua Ōrākei in February 2010. The Crown remains committed to making progress towards the settlement of the claims of Marutūāhu iwi and Ngāi Tai ki Tāmaki and we intend to continue to progress these negotiations in coming weeks and months. In developing and agreeing redress packages with those iwi the Crown will take into account the views of all other claimant groups, including Ngāti Whātua Ōrākei."

Turning then to item 10 is the Ngāti Whātua Ōrākei deed of settlement of 5 November 2011, and noting there, which came up in discussion yesterday, there is nothing in that legislation that gives a right of veto of the sort, of the type that's being sought now, and I don't know that – I don't recall my learned friend, Mr Hodder, taking you to it but he did in the lower Courts and there's one part of that settlement I'll take the Court to and that's in relation to the Crown apology.

So this is tab 59 and red number 1933. At 3.10, if Your Honour's have it, is the apology, and there are four paragraphs in that. I won't read the whole four paragraphs out. The last paragraph reads, "The Crown unreservedly apologises for not having honoured its obligations to Ngāti Whātua Ōrākei under the Treaty of Waitangi. By this settlement the Crown seeks to atone for its wrongs, so far as that is now possible, and begin the process of healing. The Crown looks forward to repairing its relationship with Ngāti Whātua Ōrākei based on mutual trust, co-operation and respect for the Treaty of Waitangi and its principles." That's the closest, in my submission, that anything in the documents involving Ngāti Whātua Ōrākei gets close and it doesn't even do that in my submission to a right of veto.

I'd also add that that type of language is common in just about every Treaty settlement where the Crown apologises to the relevant settling iwi. I don't mean to denigrate that and the importance of that. I just note that is quite common in settlements.

In item 11 we have the Tāmaki Collective deed and the references there are contained. I was going to take…

WILLIAM YOUNG J:
Just pause there. The – if you go back to clause 4.

MR MAJUREY:
Clause 4 of the apology, Sir?

WILLIAM YOUNG J:
No, of the deed, 1934.

MR MAJUREY:
Yes.

WILLIAM YOUNG J:

So all historical claims are settled?

MR MAJUREY:

Yes, Sir.

WILLIAM YOUNG J:

But what are the – are the residual rights or expectations of Ngāti Whātua Ōrākei really confined to the way in which the, I suppose, dealings with other iwi or hapū might be conducted? They're not saying, "This is land that we might otherwise get or this is cultural redress that is coming out of what would rightfully be ours"?

MR MAJUREY:

In a Treaty settlement context what this covers, as the Court may have heard in previous cases, is the historical claims, that's a defined term of art, to September 1992. That doesn't prevent what are called contemporary claims for acts and omissions, to use the general language, after that period. What would also be relevant, and this has come up from time to time, is if there has been a breach of the deed. For example, if a property has been promised to be transferred and it has not been transferred, or another tribe sues on rights that it says come from that deed.

WILLIAM YOUNG J:

So what – vis-à-vis Ngāti Whātua Ōrākei, what constraints is the Crown under in relation to the land that's in the new RFR? Is it simply rights of refusal?

MR MAJUREY:

In this specific context we say there are no rights or obligations and in fact quite the reverse because, for the reasons you've heard in terms of reference to section 120 and what the collective deed comprises, there was a joint agreement signed up by everyone that land from the RFR area, that's the overall RFR area, which includes the 2006 area, would be available for Treaty settlements. That doesn't prevent any tribe raising that issue in the

overlapping claims process but there's no right or obligation that land's not available for other settlements.

ELIAS CJ:

There's an obligation that the provision be appropriate though in, or at least inferentially in this apology and in the terms of the settlement that you've just taken us to.

MR MAJUREY:

It would be at best inferentially. The appropriate language does come, as was in the exchanges yesterday, from the overlapping claims process which is run by the Executive as it has been throughout.

ELIAS CJ:

Yes. No, no, I'm not sort of cavilling at that. I'm just pointing out and there is the expectation that there will be some discussion and there is the reference to a continuing relationship which is, presumably, if one looks at the Canadian jurisprudence, something that can be called in aid.

MR MAJUREY:

Yes, your, and so as I say that is in practically every settlement in terms of that affirmation.

ELIAS CJ:

Yes, because otherwise you'll have a new Treaty breach.

MR MAJUREY:

Conversely, it can't be the case in terms of the political context that Treaty settlements live within that those who get to the finish line first could lock everyone else out, and that's the difficult and complex task that the Crown has in terms of the Treaty settlement process and the honour of the Crown not just to settled iwi but to those iwi who've not yet had that benefit.

ELIAS CJ:

Yes, yes, I understand.

WILLIAM YOUNG J:

Perhaps after the adjournment you could walk me through clause 4.13, page 1936.

ARNOLD J:

Yes, and 4.8, just how they work.

MR MAJUREY:

4.13 and?

ARNOLD J:

8, 4.8.

MR MAJUREY:

4.8, yes.

ARNOLD J:

Just how it all works.

ELIAS CJ:

We'll take the adjournment now, thank you.

COURT ADJOURNS: 11.36 AM

COURT RESUMES: 11.54 AM

MR MAJUREY:

I want to pick up with the references to clauses 4.8 and 4.13 of the Ngāti Whātua Ōrākei deed. I'll start in reverse. In relation to clause 4.13, this was a temporal marker. So remembering at the time it's November 2011 and the ongoing Tāmaki Collective negotiations are taking place and you can see this in the chronology which didn't occur until September 2012. The deed had to reflect that there were other elements to the Ngāti Whātua Ōrākei redress,

both its iwi specific, its hapū specific redress in its own deed and the shared redress it was going to be a part of with the other Tāmaki Collective iwi/hapū when that deed came to pass.

WILLIAM YOUNG J:
So this is – 4.13's already spent.

MR MAJUREY:
Yes. And 4.8 is in a similar fashion, road marking, blueprinting, if you like, what was coming in those negotiations through to a Tāmaki Collective settlement.

ARNOLD J:
Right.

MR MAJUREY:
So again, that's transpired that occurred with both the 2012 deed and the 2014 legislation.

ARNOLD J:
Thank you.

ELIAS CJ:
So all the settlement is covered in the legislation? There's not further – apart from the management of the maunga and things like that which was parked?

MR MAJUREY:
That's correct.

ELIAS CJ:
Yes, that's as I understood it.

MR MAJUREY:
So at – sorry.

ELIAS CJ:

And on the management issue, that's now been resolved, has it?

MR MAJUREY:

That's contained in the 2014 legislation.

ELIAS CJ:

The 2014 legislation, that's right.

MR MAJUREY:

Yes, it – yes.

ELIAS CJ:

I knew I'd seen it somewhere.

MR MAJUREY:

So the co-governance regime with the tupuna maunga came from the 2014 legislation.

ELIAS CJ:

Yes. And what is it roughly?

MR MAJUREY:

The co-governance arrangement, Your Honour?

ELIAS CJ:

Yes.

MR MAJUREY:

So over the 14 tupuna maunga that were transferred, so volcanic cones from the North Shore through to South Auckland, a separate statutory entity was established as a co-governance regime, equal numbers from Auckland Council and the collective through its representative entities. Three rōpū, Ngāti Whātua, Marutūāhu and Waiohua, select two representatives that

makes up the six, as Auckland Council does, and they are the administering authority for those tupuna maunga.

ELIAS CJ:
Thank you.

MR MAJUREY:
Turning then to item 11 which is the collective deed, and you've been addressed on this, I want to give you reference to the background, if you like, to section 120 that my friend, Mr Goddard, took you to, and I refer the Court to volume 2 of the book, and again this is the McEnteer affidavit at tab 34 at page 289. That also has that wider Tāmaki Collective RFR map on it, and the paragraph begins at 44 on page 289.

ELIAS CJ:
Volume 2?

MR MAJUREY:
Yes, volume 2, Your Honour, tab 34, page 289, and commencing at paragraph 44. "At the time of the Tāmaki Collective settlement in 2012, the great majority of the iwi/hapū of the collective had not concluded their Treaty settlements. This meant that there could have been a conflict between the operation of the collective RFR and the ability of the Crown to transfer Crown land covered by that RFR under the iwi-specific Treaty settlements. To avoid that potential conflict and enable subsequence iwi-specific Treaty settlements to occur, the following clauses were agreed by the 13 tribes of the Tāmaki Collective and the Crown, and included in the collective Deed," and clauses 6.3 and 6.4 from the deed are set out there.

At 6.3, "The iwi and hapū of Ngā Mana Whenua o Tāmaki Makaurau record their agreement that the RFR is not to apply to any land (including a cultural redress property or land used for financial and commercial redress) that is required for the settling of historical claims under the Treaty of Waitangi, being those relating to the acts or omissions of the Crown before

21 September 1991. To give effect to that agreement, the Tāmaki Makaurau collective legislation will, as provided by section 119 of the draft bill, provide for the removal of any land required for another Treaty settlement."

So a couple of important elements there. Working in reverse, there's an example of the parallel legislative drafting process. In the event, it was section 120 rather than clause 119. It's the equivalent provision. And there was agreement of all 13 tribes, including Ngāti Whātua Ōrākei, to that express regime for making that land available from the wider collective area for iwi-specific settlements. That's a very strong point in this case.

But by this stage, this refers to the whole wider block of land. It's from the raupatu…

MR MAJUREY:
North of the raupatu.

ELIAS CJ:
North of raupatu to –

MR MAJUREY:
Well, the main raupatu, if I –

ELIAS CJ:
– to Muruwai.

MR MAJUREY:
Yes, yes, Your Honour, and to Long, about Long Bay.

ELIAS CJ:
Right, right.

MR MAJUREY:

Item 12 is the Ngāti Whātua Ōrākei Settlement Act in November of 2012. Across to the right at item 13 is the Marutūāhu record of agreement, one of those interim Treaty settlement milestones I mentioned, and that was May of 2013. In again the McEnteer affidavit mention is made of this which is also relevant to the chronology in this case, and you might have that still handy, tab 2, tab 34, and I'm turning to page 292.

WILLIAM YOUNG J:

Sorry, 292?

MR MAJUREY:

292 is the page in volume 2 and paragraph 57 is the relevant paragraph. Para 57 states, "On 21 May 2013, a copy of the Marutūāhu ROA," record of agreement, "was emailed to all 13 iwi/hapū of the Tāmaki Collective. The Ngāti Whātua Ōrākei representatives who received that copy of the Marutūāhu ROA included Messrs Grant Hawke and Ngarimu Blair." So the point's made there that in terms of the processes that occur during negotiations the tribes been made aware of the settlement milestones. That's done in an open way. That was done back in May of 2013 and, as we see in terms of subsequent events, the subsequent litigation that was brought by Ngāti Whātua. Item 14 is the Tāmaki Collective Act or the 2014 Act.

ELIAS CJ:

Sorry, ROA.

MR MAJUREY:

Record of agreement.

ELIAS CJ:

Record of agreement.

MR MAJUREY:

Sorry for the acronyms.

ELIAS CJ:
They use different terms all the time.

MR MAJUREY:
So the Tāmaki Collective Act, 31 July 2014, counsel have taken you to, my friends have taken you to a number of provisions, including the important section 120 which was the legislative reflection of those agreements in the deed about making land available settlements. My friend, Mr Goddard, has emphasised that that is a mandatory requirement on the Minister.

To help the Court with a bit further context in this, I'd like to take you to the decision of His Honour, Justice Whata, in *Ngāti Te Ata* because there is some relevance. While it's not the same type of proceeding, some of the comments are helpful, in my submission. So this is the respondent's authorities at tab 7, and this is *Ngāti Te Ata v The Minister for Treaty of Waitangi Negotiations*. Authorities bundle, tab 7.

As my friend, Mr Goddard, mentioned, this was a case like where this proceeding started with early transfer properties, in this case two properties for the Ngāti Tamaoho settlement, one in Wiri and the other in Ōtara. So a challenge against the Crown but what was an, in issue was one tribe taking issue with the proposed transfer of early settlement properties to another.

The decision traverses some of the background that the Court has received in terms of the background to the Ngāti Whātua AIP in 2006, the Waitangi Tribunal report and the subsequent deeds and legislation. His Honour also refers to section 120. I'd like to pick up the decision at para 37. Paragraph 37 makes the point and I wanted to emphasise this because of the question yesterday in relation to are there preliminary assessments made in these types of matters with settlement redress. You will recall that for the Marutūāhu decision there was both a preliminary decision following assessment by the Crown and a final decision. We see in paras 37 and 38 a similar process with a preliminary decision and the final decision as a result of the overlapping claims process.

The first sentences of several paragraphs highlight what was at stake in this case and what was involved. At paragraph 42, the first sentence confirms that, "Mr Roimata Minhinnick provides a detailed account of the source of the mana whenua Ngāti Te Ata." At paragraph 44, the decision reflects that Mr Minhinnick also referred to the maintenance of ahi kā and kaitiakitanga by Ngāti Te Ata, and at 49 Mr Minhinnick also provided a history in support of Ngāti Te Ata's superior ancestral claims to the early transfer properties, referring to historical records.

Over the page, beginning at paragraph 51, under the heading, "Is the decision by the Minister to dispose of the properties for the purpose of an individual Treaty settlement justiciable?" His Honour confirmed, as my friend also confirmed, that that matter is judiciable. It doesn't rely on legislation, and that's touched on at 52.

I want to pick up then up at 54. "The Treaty context itself however does not preclude review. In the present the decision to require RFR land for," and this is the same RFR, by the way, that we're talking about, "for an individual Treaty settlement extinguishes, by way of the notice procedure contained in section 120, the right of first refusal in respect of those lands enjoyed by the Limited Partnership and rōpū groups. Put simply, it is a decision to take away a legal right of first refusal conferred by the statute. While I accept, absent a clear error of the sort present in *Ririnui*, the merits of a decision to settle a Treaty claim are typically non-justiciable for the reasons mentioned in that case, the legality of the section 120 notice, in terms of conformity with the requirements of the collective Redress Act, is a reviewable matter."

At 57, His Honour states, "The 'absence of power' argument misconceptualises the key issue. Section 120 is a notice provision, the plain effect of which removes identified properties (such as the early transfer properties) from the RFR scheme. The sole express statutory criterion for issuing notice is that the land is required for an individual Treaty settlement. A 'power' to remove or dispose of the land is not therefore a requirement for the

purpose of removal of land from the RFR scheme. It occurs by operation of statute."

Now acknowledging that's a different situation here, it's perhaps the path that would have occurred had the Crown stayed with the early transfer property proposal for Ngāti Paoa but that was changed as the Court's been told.

At para 61, in the second half, His Honour states, "The early release of the two properties under the collective Redress Act is simply a function of the giving of notice pursuant to section 120, with no antecedent requirement to exercise a statutory power of removal or disposal. The real issue, addressed below, is whether the Crown's decision to require RFR land for an individual Treaty settlement is fettered by the collective Redress Act."

ELIAS CJ:
Or anything else.

MR MAJUREY:
Or anything else.

ELIAS CJ:
Presumably.

MR MAJUREY:
That is relevant to that point.

ELIAS CJ:
Well, what does this decide? It decides that it is effectively an unfettered discretion, does it? Surely not.

MR MAJUREY:
What it decides is given that there was no legislative anchor in terms of the proposal, unlike in this case, it was a matter that was judiciable and His Honour ruled on that.

ELIAS CJ:

Right.

MR MAJUREY:

Importantly, at 61, His Honour goes on in the second sentence, "The existence of a power to dispose of Crown lands for Treaty settlement purposes is plainly assumed by the collective Redress Deed and the Act and is incidental to their effective operation, including for the purpose of requiring RFR land for individual Treaty settlements," and that's highly relevant to this case because that's what will occur if and when a legislative proposal is put to Parliament and that is approved. That machinery will need to be triggered.

ELIAS CJ:

What does that – I don't quite follow that, what that means. I'll have to think about it.

MR MAJUREY:

Yes, Your Honour.

ELIAS CJ:

Well, the Act – which Act is incidental to their effective operation? I don't quite follow that, anyway.

MR MAJUREY:

Well, that's the power to dispose is incidental. It derives from the deed and the Act, that's…

ELIAS CJ:

The power to dispose is incidental to the effective operation of the collective redress deed?

MR MAJUREY:

Yes, it precedes it, yes.

Two final extracts, and I'm conscious of time. Over at 68, "But the object and effect of clause 6 of the deed and section 120 is clear. It is a notice provision. It imposes a duty, not a discretionary power, on the Minister to notify the RFR landowner and limited partnership that specified land is required for an individual Treaty settlement."

And at 69, "Similarly, a decision to require land for an individual Treaty settlement cannot be unreasonable simply because another iwi may have a genuine tikanga based interest in that land, and because consensus is not achieved. I agree with Mr Kinsler that would effectively amount to a veto, disenabling the use of land for individual Treaty settlements. This cannot be right, given the clear effect of section 120 of the Act and clause 6(3) of the deed."

ELIAS CJ:
Can I just check section 120 again? Where do I find it? Just quickly. Don't hold up –

MR MAJUREY:
Yes. So this is in the appellant's bundle at tab 3. Page 96 in the numbers on the bottom of the pages.

ELIAS CJ:
Tab 3?

MR MAJUREY:
Tab 3, the appellant's bundle.

ELIAS CJ:
Thank you, carry on.

MR MAJUREY:
Coming back to the appendix 1 chronology, the final point to note is item 15, is the initial statement of claim. So as I mentioned at the outset, if we reflect

then on what we've covered, starting in June 2006, we start with a proposed veto, all the events that transpire following that through to iwi-specific and collective settlements and we arrive back at a veto position. That's what the chronology reflects.

Several points I want to address you on in my submissions, starting at paragraph 15. Paragraph 15 refers to the High Court decision and as the Court recall there are a number of extracts from the Waitangi Tribunal report that were set out. At paragraph 15 is repeated paras 17 and 18 from the decision and within 18 there is a quote from the report and I want to emphasise that. This is where the Tribunal said, "The use of 'predominance of interests' as a basis for giving exclusive rights in cultural sites to one group – even when other groups have demonstrable interests that have not been properly investigated – is a Pākehā notion that has no place in Treaty settlements. Where there are layers of interests in a site, all layers are valid. They derive from centuries of complex interaction with the whenua, and give all groups with connections mana in the site." I wanted to emphasise that given the exchange that occurred yesterday in terms of a potential role that the Courts could play in determinations of mana whenua, and this extract is not alone in terms of Tribunal reports. The Rekohu report is a well known one in terms of the Tribunal confirming that the concept of mana whenua does not have a traditional base. They talk of some of the historical records of the nineteenth century about how that came to be, and so notions of exclusivity don't – this is a very rough paraphrase – reflect the reality of terms of Māori culture and tikanga. The nuance of whanaungatanga overlapping claims and interests is a very live one.

So, importantly, in Tribunal reports and in Treaty settlements exclusivity, mana whenua, vetoes don't have a role. The role that is played is interests and customary interests. That's the language that both Tribunal and the Crown use in settlements. That's the assessments that are made. That's why the Crown has historians that they bring into Treaty settlement negotiations to ascertain whether there is an interest or customary interest, laying a foundation for commercial or cultural redress. So that's quite an important

point in terms of where this Court reaches in its determination of appropriateness, if that's the right word, or utility, of assessing that as mana whenua in a legislative context.

At pages 9 and following of my submissions, I set out the relevant correspondence and process for the period covered, recognising there was a longer process to it of overlapping claims undertaken by the Crown in relation to the Marutūāhu redress. I won't take you through that. That's set out there. But the point to note is clearly the Crown did engage prior to it's decisions, both preliminary and final, as to the Marutūāhu redress. It sought feedback from Ngāti Whātua Ōrākei. As you heard my friend, Mr Hodder, confirm yesterday, there was nothing specific to give informationwise in relation to those specific properties, so what was the utility of that? That's my paraphrase. So a process was engaged on. There's been no dishonour here in terms of how the Crown's tried to approach overlapping claims and the record shows what transpired there in terms of the engagement between the parties.

And, as I think may have been commented on, the repeated use of the word "ignore" just does not have relevance in this context. There's been no disregard. There's been no pay no attention. Clearly there has. Matters of weight, to borrow the analogy in the legal area, are a different issue, certainly not one of disregard.

I have a section starting at the bottom of page 10 where perhaps somewhat flamboyantly used the term "revolution". It started as evolution in terms of the reshaping of the claims and perhaps the flourish overtook me. The point is that in a sense this is a revolution insofar as what's been sought here and why in a strike-out context there are important interests at stake.

As I have mentioned, there has been a long approach, decades old, of how the Crown, how iwi Māori and how the Executive have interplayed in terms of their respective functions. The Crown has been responsible for negotiating settlements. Iwi have participated in that, not always happily, and there's

been ventilations of issues before the Tribunal and attempts before the Courts. In Parliament, matters before the select committee and submissions are played out on a fairly regular basis in terms of issues being raised. But that, in my submission, quite careful and important architecture between the various parties to our constitution has been an important one. There have been many, many settlements over nearly 25 years that haven't involved the Courts giving determinations of rights and making statements of who has exclusive mana whenua. I'm not trying to dismiss that as obviously a role of the Court if that's its determination. The point I'm making is that's not how it's been for nearly 25 years and with the few remaining settlements to go, and in some big areas, of course, what is going to be the continuation of that very important principle of policy, politics and fiscal matters that are at the heart of what Treaty settlement's about, that this Court mentioned or referred to and addressed in *Ririnui*.

I just want to, winding up, finish on this point, and that is that you – bear with me. I thought I was going to have copies but I'll just go to my laptop. It's an extract from a select committee report and we'll make copies available. It's an example of how in terms of where are the rights to have the issues of Ngāti Whātua Ōrākei ventilated. Clearly, Ngāti Whātua Ōrākei is seeking for the Court to have a role in that, as we know they can go the Tribunal, not rights determinations but very important and powerful statements, recommendations, and also the select committee, the select committee report for the Ngāi Tai ki Tāmaki Claims Settlement Bill from March of this year, so this is one of the –

ELIAS CJ:
So which one's that?

MR MAJUREY:
Ngāi Tai ki Tāmaki. It's one of the Tāmaki collective iwi. So their Claims Settlement Bill was before the select committee and they issued their report in March of this year. At page 2 of the select committee report is the heading, "Overlapping Claims," and it's somewhat of a lengthy quote but I think it's of

value. This is the select committee. "We note that there are unresolved overlapping claims between Ngāti Wai and Ngāi Tai ki Tāmaki. The Ngāti Wai Trust Board considers these claims need to be addressed in accordance with a proper tikanga process before the Bill is enacted. Despite attempts by both the Crown and iwi negotiators to have the settling groups resolve matters of dispute, Ngāi Tai ki Tāmaki and Ngāti Wai have not been able to reach an agreement. These discussions are ongoing. The Ngāti Wai Trust Board has opposed the redress offered to Ngāi Tai ki Tāmaki where it overlaps with Ngāti Wai's area of interest and is concerned that the Bill would entrench Ngāi Tai ki Tāmaki's rights in the area before Ngāti Wai's interests have been properly considered. It proposes that these provisions be removed from the Bill to enable overlapping claims to be resolved. The Crown has acted in accordance with its overlapping claims policy throughout negotiations between the Crown and Ngāi Tai ki Tāmaki. This has included engaging with Ngāti Wai about proposed settlement redress. It is within Ngāti Wai's area of interest as set out in the deed of mandate and about matters the Crown's officials anticipated might potentially be of concern to Ngāti Wai. We note that the Crown prefers that overlapping claims in relation to specific redress matters be address through mutual agreement between the overlapping groups. However, in the absence of any agreement the Crown may have to make a decision whether to maintain redress offered to a claimant group where it is objected to by another claimant group. Based on advice we have received from the Office of Treaty Settlements we do not recommend any changes to the Bill on this matter. Any agreements to amend the protocol areas could be implemented without an amendment to the Bill."

So there is another of many examples where the select committee, aware of these contests of rights, fully aware of the claims on each side, has not sought to become embroiled in matters of mana whenua, ahi kā or exclusivity. They receive the submissions that they do. They pay regard to the overlapping claims process that's been there throughout, and they give their report to Parliament. That's how it's been and that's how it's worked, rightly or wrongly, for all the iwi who have been through the settlement process.

Without trying to be flippant, that's the architecture that we have between Parliament, the Executive and iwi Māori.

I tried to reach agreement with my friend that I aim for 12.20 to give him some time, and I see it's 12.20. I'm happy to answer any questions.

ELIAS CJ:
Yes, don't feel you have to be rushed. We can sit after lunch if need be. The only question I have was just again relating to the cultural redress that your clients obtain under the settlement. We were looking at the little map and Mr Goddard said you'd be able to explain it.

MR MAJUREY:
Yes.

ELIAS CJ:
So in the area of the 1840 transfer, for example, there only seem to be one green triangle, that was Fred Ambler's lookout was it? That was for…

MR MAJUREY:
Yes, on both sides of the road, the lookout, and what's known as the tennis courts.

ELIAS CJ:
The tennis courts yes. But that was, what, for Ngāti Paoa was it?

MR MAJUREY:
It's for the Marutūāhu collective.

ELIAS CJ:
For the collective, and what was the basis for that?

MR MAJUREY:
At the risk of giving evidence from the Bar –

ELIAS CJ:

Well is there anything before us in the settlement?

MR MAJUREY:

There's nothing before you Your Honour.

ELIAS CJ:

No, okay.

MR MAJUREY:

So do you want me to trespass?

ELIAS CJ:

Yes, tell us.

MR MAJUREY:

With all the caveats. So there are two areas that Marutūāhu raised with the Crown as to its wishes in terms of Treaty settlement redress. The area down in Mechanics Bay, this is the original Mechanics Bay before reclamation.

ELIAS CJ:

Before reclamation, yes.

MR MAJUREY:

Yes, so that's the triangle that if you know it you come down past the tennis courts to Beach Road. The other was what's called Blackett's Point, that's what the green triangle area is. Promises were made by the colonial secretary to Marutūāhu to recognise its interests for transfers in those areas. Those never took place. That's the basis –

ELIAS CJ:

So that's at 1840?

MR MAJUREY:

Yes.

ELIAS CJ:

Yes, I see.

MR MAJUREY:

That's the basis.

ELIAS CJ:

Yes I see. Thank you.

MR MAJUREY:

There are different narratives to that, of course, but that's the one that you asked for.

ELIAS CJ:

Yes, thank you.

MR MAJUREY:

The only other matter I was going to address, just to let the Court understand that, was I was going to cover some of the declarations, I'm mindful that they have been covered, but what I would emphasise is when you look at language in (B)(ii)(iii) and (iv) those are closely tied to these legislative proposals. These declarations have a purpose and so if there is severability in terms of those things that trespass, what is left, as my learned friend Mr Goddard has said, are very generic and hypothetical propositions. So I wanted just to confirm that last point. Thank you.

ELIAS CJ:

Thank you Mr Majurey. Yes Mr Hodder.

MR HODDER QC:

If the Court pleases, I will be relatively brief.

ELIAS CJ:

You don't need to feel confined if you need a bit longer.

MR HODDER QC:

We'll see how we go. I did have the feeling, well at least me and my learned friend Mr Goddard yesterday and this morning, that we'd been talking past each other which doesn't really help the Court. So what I'm going to attempt to do is try and engage more fully with the thesis that he's advancing to the Court. As I understand it what he's doing is suggesting that we shouldn't spend time on the high level abstract principles, we need to focus on the decisions that have been made, and therefore we don't need to worry about things like the access to the Courts principle that I was emphasising yesterday. His theme, as I understand it, is that the Minister's only relevant decisions have been that the specific properties be transferred only by a new settlement Bill.

ELIAS CJ:

Only by a Bill, yes.

MR HODDER QC:

And if I can call that the legislative transfer decisions as a kind of a form of long shorthand, then he says either such legislative transfer decisions come within the non-interference principle or, or possibly and/or, no rights can extend interference with legislative transfer decisions. Now there's a problem, it seems to me, that if one infers from the fact that there might be a non-interference principle that there are no rights. That seems to be a lack of access rather than lack of rights.

WILLIAM YOUNG J:

Isn't it not a breach? Isn't the argument yes, there may be a right but to change the law doesn't breach those rights?

MR HODDER QC:

It's – I understand that proposition but it really comes back to the proposition that it's all founded on the non-interference principle. If there isn't one of those then the point doesn't get there. So in effect it's a variation but not a substitution for the non-interference principle as I apprehend it.

The consequence of that is that (3) has, their proposition is there, that the current pleading by Ngāti Whātua cannot survive that analysis.

So the question is, is that right? So the pleading, I'm going to have to spend a bit of time on the pleading but the Court will recall it's in volume 1 at tab 17. But in high-level terms it's directed at three matters, or at least I believe it shows that, it was certainly intended that. The first is about, and this is not – I'm not referring to the text at the moment – the first are mana whenua rights. I'm using "mana whenua" as shorthand for all that is referred to in the pleading as being the rights that Ngāti Whātua wishes to have clarified and which it asserts.

In the context of that, you haven't been taken to the statement of defence but I probably should do that. That's at tab 21 of volume 1, if the Court has volume 1, and at tab 21 under – on page 113, we find paragraphs 8 and 9, and you'll see the essence of those is referring to an agreed historical account and otherwise denies paragraph 8. It says aware other iwi/hapū say they have ahi kā in the central Auckland region. And the same thing occurs in paragraph 9. Again, that central point is it's a denial.

If we go back to paragraph 8 and 9 of the statement of claim at tab 17, on paragraphs 8 and 9, pages 87 and 88, you'll see that 8 and 9 are the assertions of ahi kā and mana whenua.

So we have already at this point kind of a point where there is a contest. That is to say the Crown does not accept the proposition that's being advanced in the pleading. So that's the first point in the pleadings, the first matter, contested mana whenua rights.

The second is that there's a legal error in the Treaty settlement process. That's what is the essence and what provoked the original pleading, and there are two aspects of that, one of which I've called the disregard aspect and the second of which is the transfer aspect. My learned friend says all we're

concerned about is the transfer aspect and that's covered by the legislative proposal.

The third matter that's within the pleading is the idea about the overlapping claims policy.

ELLEN FRANCE J:
Sorry, Mr Hodder, the disregard, which aspect of the statement of claim are you referring to there?

MR HODDER QC:
If I can, Ma'am, I'm running kind of an overview of what the statement of claim is rather than the specifics of it, but the disregard is the proposition that there has not been the adoption of the approach set out in paragraph 23, for example, which says that there should be appropriate acknowledgement, consultation and accommodation. So it's all the material that pre-dates a decision, which I've used and I'm using again another shorthand context as I did yesterday, the idea that it's a disregard aspect of the issues that are there.

As I say, the third matter that's addressed by the pleading, the overlapping claims policy which we say itself involves a disregard of mana whenua and tikanga and, in particular, that extends to the post-settlement relationship between the Crown and Ngāti Whātua, and that is expressly challenged in the statement of claim. At paragraphs 34 and 35, where the grounds of review are set out, it refers to the Ngāti Paoa decision which is the one that pre-dates the idea of a legislative transfer decision, the next two decisions are the legislative transfer decisions, and then comes separately adopting the overlapping claims policy. So the overlapping claims policy which is identified there and is described in terms of paragraphs 28 to 30 is a key aspect of the pleading. So three aspects. Mana whenua rights that Ngāti Whātua asserts, error in the Treaty settlement process at two levels, and the overlapping claims policy. Now the question that the Court has been asked to consider by my learned friend is that all of that is absorbed by the legislative transfer decision argument. It all goes away because of that. In our submission, it

doesn't because all that really attacks is the second part of the second proposition, that there was a legal error in relation to the transfer decisions.

So Ngāti Whātua's position is that those issues are real, they're not academic or speculative or hypothetical. That the pleading is that the rights that are asserted in the pleading were disregarded in the lead up to the May 2017 legislative transfer decisions, including the initial Ngāti Whātua decision, which is the one to use section 120. There are other iwi seeking settlements, not just Marutūāhu and Ngāti Paoa. I won't take the Court to it, but in an affidavit by Mr Blair of Ngāti Whātua, which is volume 2 at tab 43, you'll find reference to other enquiries by the Crown about other iwi who are seeking to settle in relation to this area. So these are issues that are continuing and ongoing, not limited to the Marutūāhu and Ngāti Paoa matters.

There is a forward, or at least I was intending it would be a forward-looking dimension to the pleading. So for example is I can ask the Court to look at paragraph 22. Paragraph 22 refers to the Ngāti Paoa decision, the revised Ngāti Paoa decision and the Marutūāhu decision and any similar decisions. The Ngāti Paoa decision was the one that is about section 120, or founded on section 120. It's not about a legislative transfer at all. The next two are about legislative transfers, and while there may be an issue around commas and other bits and pieces, certainly the intention is that similar decision covers any decision of that kind including a decision along the lines of the Ngāti Paoa decision ie one that isn't a legislative transfer decision.

So that's one of the forward looking aspects of the pleading. The other, which sort of follows that, is if one goes to paragraph 25, it sets out again reference, prefaced by reference to those three decisions, one being pre-legislative transfer, the other two being registered to transfer. "The Crown will or may continue to conclude Treaty settlements involving the transfer of other land." Now the "other land" was meant to comprise land other than Marutūāhu and Ngāti Paoa. So that also is forward-looking about other issues. So again our submission is that what the pleading is addressing is on its face not limited to the legislative transfer decisions.

The other aspect of being real, not academic or hypothetical, is that there are other areas that may be affected. There are issues that have to be resolved with the Crown and probably the local Government in relation to waters, harbours and various other matters, and inevitably local Government will follow a Crown lead. But the relationship, the primary relationship in this context is that relationship between the Crown and Ngāti Whātua.

Now my learned friend says he wasn't able to discern with clarity what rights it was that Ngāti Whātua was relying on. Was it process or was it content was the question he posed. The answer is, of course, both, but they're inter-related if one has Ngāti Whātua, has mana whenua as Ngāti Whātua, and has the rights that are pleaded to be had, then there is an obligation about consultation and accommodation which covers both process and substance, as we saw by reference to the Canadian material, and in particular the process issues engage that novel issue, as it's described in the *Mikisew Cree* decision about where the scope of a duty to consult or accommodate interfaces with a relationship about separation of powers, as the Canadians call it, or the non-interference principle as it's more often described in this part of the world.

As far as, if I can separate them out, the content aspect of the rights are those based on the Treaty principles, mana whenua and the settlement terms and the promise that the relationship will be respectful of Treaty principles including tikanga, including the mana whenua that Ngāti Whātua asserts, and which we're assuming provable as for the purposes of the strike-out application.

So the foundation for the pleading is, of course, the relationship and that is made more explicit in the new declaration (A) which has been advanced in our written submissions which has got a certain amount of air-time, and if I could ask the Court to look at that on page 29 of our written synopsis. Paragraph 6.6(A).

WILLIAM YOUNG J:

Sorry, what paragraph?

MR HODDER QC:

It's paragraph 6.6 on page 29 of our synopsis. Now as I understood my learned friend's commentary on this, it was, until we get down to "and" in line 4, it sort of – it's almost stating the obvious I think was what I took from his submission. There is a relationship, the Crown accepts that, but for present purposes it doesn't matter because what follows after "and" is affected the legislative transfer decision. So what comes after "and" is the wording, "Includes an obligation in law that the Crown respect Ngāti Whātua Orākei tikanga where Crown conduct may or will have particular impact on the customary rights or interests of Ngāti Whātua Orākei." What I think the argument is, is to say well that can only be with reference to the legislative transfer decisions involving Marutūāhu and Ngāti Paoa. As there are legislative transfer decisions, and they're protected by the non-interference principle, then the second part simply can't apply, and therefore this is not available. And, with respect, the propositions are that the pleading is wider than that and what has been talked about in terms of the obligations cover those three matters I mentioned before. Mana whenua rights, the Treaty processes, and the overlapping claims policy.

So that, but then the end result of that as well is that we finish up with the idea that the relationships legal features remain unresolved, which is the matter of particular concern as addressed in our submissions. So either the mana whenua issue is resolved, or the overlapping claims policy is in any way resolved, and my learned friend says, well if some other proceeding might be possible but we do need to include all other affected iwi, and they said this morning, somewhat surprisingly I have to say, maybe the Crown doesn't need to be involved. Now that's a surprising proposition when the relationship is between the Crown and Ngāti Whātua, and it's a good idea that other iwi should be involved, but it's not a novel idea. The idea is reflected in the judgment given by Justice Wylie, which the Court will find at tab 24 of volume 1, where there was a resistance of the first attempt by the Crown to

avoid this going to full trial, which was to have a preliminary question determined. That was rejected in the judgment we find from Justice Wylie at tab 24.

ELIAS CJ:
Volume 2?

MR HODDER QC:
My apologies. So tab 24 of volume 1 of the case on appeal, and if one turns to page 155 towards the back, possibly even starting 154, you will see that His Honour is addressing that there should be service on all iwi who might be affected, not merely those within the collective. So there was a question mark and advice was given about who the collectives on both sides were, as it were. 57, the Attorney-General didn't object to these additional iwi/hapū being served. Suggested that other iwis be served in paragraph 57. Commentary on the others, and then paragraph 60, His Honour's conclusion, "It is appropriate to direct that all parties who could potentially be affected by the proceeding, should be served." Then those directions are spelled out in more detail in paragraph 61, and Ngāti Whātua has served all those interests. So we don't need some other proceeding. This proceeding is already fulfilling that function. Or will fulfil the function if it gets back on the rails.

Now if I can come back to the statement of claim in paragraphs 22 and 23, which are at the heart of the criticism by my learned friend, then what is being said is that 22 and 23 have to be understood, says the Crown, as being related only to a decision about transferring this particular land by legislation. Our submission is on its face that is not what it's about. It's about the Ngāti Paoa decision and any similar decisions, but to the extent there were imperfections in the drafting, which one always has to acknowledge that that can happen, there is something of a chicken and egg scenario going on here. It's difficult to draft consistently with say the *Milroy* principle, non-interference principle, when one doesn't know quite how far that principle goes, and it's the *Milroy* principle, or the non-interference principle which is the sole basis of the strike-out application and the sole basis of the Court of Appeal's decision.

So, with clarity on what the scope of that is, then one would draft the pleading according, or redraft the pleading according, but some matters, we say, are clear. It is about the relationship. It is about mana whenua and the fact that on Ngāti Whātua's pleaded version of it, it has been disregarded. It is about the overlapping claims policy and the inclusion of process rights along the lines of consultation and accommodation, and it is about forward-looking ongoing matters.

Insofar as my friend's argument is based on the idea of legislative transfer decisions, one of the issues that is now before the Court, of course, is what is that decision, and there are a couple of choices. One is that the decision was made in May 2016 when the Minister may well have defined the pleading as the Marutūāhu decision and the revised Ngāti Paoa decision. Those were the broad-brush view about what a decision is. We will be legislating to achieve a transfer of those properties, if that's the outcome we get to, finally, in the legislation. The narrow view is that one requires a specific and settled Bill which Cabinet then approves for submission to Parliament, which is what I was contending for yesterday. So the decision, the legislative transfer decision, depends on what the decision is. That's one of the matters that we anticipate the Court will need to deal with, it addresses this appeal, but that will influence the redrafting of 22 and 23 and also 31 of the statement of claim.

In the light of an answer on what a decision is, if the Court is with us on the idea that there ought to be a proceeding along these lines, then it can be capable of effective repair to get those matters in place.

O'REGAN J:
But don't you have to tell us? What decision are you challenging?

MR HODDER QC:
We have.

O'REGAN J:

Well you're saying let's decide later what the decision is and then we'll challenge it.

MR HODDER QC:

Our submission is that we are entitled to challenge all these decisions on the basis set out in the pleading. Our friend says there's a legislative transfer issue here and therefore the non-interference principle applies. We say if that principle applies it only applies to a decision made to introduce a specific Bill, which we haven't got to, so the non-interference principle goes away and the pleading stands as is. That's the argument for Ngāti Whātua.

WILLIAM YOUNG J:

Although you have abandoned the prayers for relief directed to the decisions?

MR HODDER QC:

Sorry?

WILLIAM YOUNG J:

Your review revised declarations don't directly deal with the decisions do they?

MR HODDER QC:

Those were the generic ones and Your Honour asked me yesterday do I stand by (e) and (f) and the answer is yes because I'm standing by (e) and (f) on the basis that the non-interference principle relates only to a, what we call a narrow decision which we haven't go to yet.

O'REGAN J:

So we've got to do (A) and (B) and then go back to the other document and get (e) and (f), that's what you're seeking?

MR HODDER QC:

It is, yes. My apologies for that but that's what I was attempting to do.

O'REGAN J:

Certainly in your written submissions it seemed clear you were abandoning (e) and (f), so you're now reinstating them.

MR HODDER QC:

I'm sorry, that wasn't meant to be quite – "Consciously omit the topics addressed in (e) and (f)," I understand that could have been read that way and I apologise, it wasn't intended to be an abandonment of them. As I said the issue depends on what the decision is. If the decision is the earlier one, the May 2016 one, then there's an issue about challenging those two decisions, but it still leaves the rest of the pleading intact insofar as it deals with the preliminary decision and decisions of that kind.

WILLIAM YOUNG J:

Okay, I think I understand what you mean, but paragraph 6.7 is a bit awkward.

MR HODDER QC:

It is.

WILLIAM YOUNG J:

"Consciously omit the topics address in (e) and (f)."

ELIAS CJ:

So you're not seeking to redraft (e) and (f), is that what you're saying.

MR HODDER QC:

I'm not.

ELIAS CJ:

You're redrafting the earlier, I see.

MR HODDER QC:

I'm not. I'm conscious that the Court, the short answer is no, the unqualified answer is no I'm not seeking to redraft (e) and (f). What I am saying is I'm

conscious if the Court finds that the decision is the earlier, wider view at May 2016, then that will cause problems for (e) and (f).

WILLIAM YOUNG J:
So you say essentially it can be a breach of obligation to make a decision to go for the legislature.

MR HODDER QC:
Yes.

WILLIAM YOUNG J:
And for that reason would you say that either the *Waitara Leaseholders* case is wrong or they're distinguishable.

MR HODDER QC:
It depends on the background to it. It depends on the background to it, so *Waitara Leaseholders* was a bit more a contractual scenario. The proposition there was that the issues that were to be raised would be resolved by the legislation, so there couldn't be an issue about the contract becoming unlawful, but we're saying that in terms of particularly the consultation and accommodation rights, as the argument is *Mikisew Cree*, the one that's now, it wasn't successful in the Federal Court of Appeal, but has gone to the Supreme Court, remains that there is a distinguishable stage in the process where those rights may bite. It's separate from the legislation, or legislative process or proceedings of Parliament, so insofar as we're talking about early decisions, or early preliminary decisions, contingent decisions, such as the ones made in May 2016, the answer to Your Honour's question is yes, we are saying they're subject to review.

WILLIAM YOUNG J:
And it's implicit in that that we could say, don't go to Parliament then. Cease and desist your unlawful actions and you are not to promote a Bill to that effect.

MR HODDER QC:

That would depend at what stage things are at, but no doubt as I was attempting to say yesterday, the formation of that particular declaration at the time that the Court gets to that decision, will depend on what it is and what stage it is. If legislation is still not in sight, then the decision and the declarations could be made. If legislation is already before the House, maybe a different approach taken what the declaration would say. That's a matter of discretion for the Court in the circumstances at the time.

WILLIAM YOUNG J:

Would you go as far to say that we could make a declaration that the Minister should not prepare legislation for submission to the House?

MR HODDER QC:

I think we'd be asking for the affirmation declaration that says that two things. Firstly, that the Minister misunderstood – well firstly, what the rights were that Ngāti Whātua has or hasn't, and secondly, that the Minister didn't take those into account. That's all that would be required. We wouldn't ask for, I don't think we'd be suggesting injunctive relief or something of those kinds.

O'REGAN J:

What would you say, that if the Court doesn't strike, reverses the strike-out, what position do you say the Crown is then in, in relation to the legislation for Mr Majurey's clients, that the Crown would be obliged not to proceed with that legislation, is that the position?

MR HODDER QC:

No, in our propositions, which I won't go back through, 1 through 7 in the back of a proposition we made, and I hope very clear, that we're not saying that the Crown can't do that. What it would be doing is doing it on a more informed basis than it is now, that is regardless –

O'REGAN J:

No, I'm talking about in the period before the matter is finally determined, and we maybe three or four years away from a decision if the proceeding goes, presumably it would have to go to the Māori Appellate Court, it'd then be appealed to the Court of Appeal, potentially in this Court. What happens in the interim is the question I'm asking.

MR HODDER QC:

In the interim I'm not, in the current position I'm not suggesting there be an interim order that could stop the process from going ahead. The Crown can proceed if it wants to in the face of that. Parliament can proceed in the face of it. But what we are essentially concerned with here is whether that issue ever becomes aired at all by way of a declaration of rights, which may inform the Crown and it may inform Parliament, or it should inform both of them, but even if it doesn't inform in a way that changes conduct, it has both ongoing and vindication value to Ngāti Whātua, but it doesn't interfere with the position of Parliament which is the main point of a non-interference process, it is a matter of comity, is the way Mr Joseph put it, one wouldn't expect the Court to try and injunct, nor would we ask the Court to injunct, the Executive from proceeding down the course it's chosen.

The other aspect of this is that in the event that there was to be a repleading and pick up the issues that have been raised about that the legislative transfer decision, there would be an inclination to add some new provision to the statement of claim along the lines of, and this, I have to say, I was thinking about this last night, as opposed to having drafted something back in the earlier day you would have some clarifying provision that said the rights that are asserted in paragraphs 21 and 22, and 22, 23 and 31, do not prevent the Crown from introducing legislation or Parliament from enacting it, to make it absolutely clear, that's the bit that I would have rather assumed it was implicit but to the extent it needed to be explicit perhaps it should be and that could be done relatively easily going to the point that the current pleading, if we get past the strike-out position, is well capable of being reconstructed along those lines.

In terms of my learned friend, Mr Majurey's submissions, there is nothing in there that I need to comment on for present purposes.

The position is as the Court of Appeal explained it in around paragraph 83 of its judgment as the Crown accepts in its submissions that in effect paragraphs 1 to 21 have to be taken as provable for the purposes of the present argument and there will be issues that will have to go on to trial in the event that the appeal is allowed against the strike-out.

But what I would urge upon the Court is that my learned friend, Mr Goddard's, approach that says let us focus at, I was tempted to say at the grassroots level, but it's certainly at the low altitude rather than the high altitude, is that the high altitude is important because the essence of the appeal and the matters of public importance, which are why it's before the Court, are about the interface between access to justice and how far that gets qualified by the need to preserve the freedoms of Parliament, and I stress it's the freedoms of Parliament that are essentially involved excepting that it's that freedom to accept proposals which the executive will normally be producing, but it isn't about purely executive processes. Those are protected by the realm of politics argument but not by the non-interference principle, and here we have rights that we say are involved and the idea that comity removes rights so there are no rights in our submission is surprising and wrong.

Now, Your Honours, I have, I take no credit for this because it required technological expertise well beyond me, but there were questions about the wider area of interest, the primary area of interest that was described in the Ngāti Whātua deed, and my learned friend, Ms Jones, has the credit for this but we have a copy of it which we can hand up for the Court to see what that wider area is. While that's happening can I say that the only thing, to the extent that my learned friend Mr Majurey is no doubt endorsing the overlapping claims policy and its wisdom, the contestability of that may be seen from the Professor Williams' affidavits that are in volume 2, the initial and the reply for that. I have no useful geographical commentary to make on this

map, for instance I don't know why the triangle is in the middle of it, but that is the map that is the primary area of interest attachment to the deed which is missing from the case on appeal.

WILLIAM YOUNG J:
Is that effectively everything that's covered by the first right of refusal?

MR HODDER QC:
It's –

WILLIAM YOUNG J:
And perhaps a bit more.

MR HODDER QC:
It's wider than the 2006, so you now have four maps, as it were. You have coming in you have the one that is covered by the RFR, the collective RFR area. You have this one. You have the 2006, which is the smaller isthmus area, and then you have 1840 transfer, which is the CBD for Auckland near the harbour.

ELIAS CJ:
That makes it more difficult. So this is the attachment to the…

MR HODDER QC:
This is the attachment to the Ngāti Whātua deed.

ELIAS CJ:
Ngāti Whātua deed, thank you.

MR HODDER QC:
So if Your Honours please, subject to any questions, those are the points I wish to make in reply.

ELIAS CJ:
Yes, what's the red? Is that roads?

WILLIAM YOUNG J:

It's the motorways.

ELIAS CJ:

I see.

O'REGAN J:

It's the back lights of the cars that are stopped on the motorway.

ELIAS CJ:

I was hoping this was smaller really.

MR HODDER QC:

With apologies for eye strain, then those are the submissions in reply.

ELIAS CJ:

Thank you counsel for your considerable assistance. We will reserve our decision.

HEARING CONCLUDES