IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 11/2018

BETWEEN **NGĀI TAI KI TĀMAKI TRIBAL TRUST**
Appellant

AND **THE MINISTER OF CONSERVATION**
First Respondent

FULLERS GROUP
Second Respondent

MOTUTAPU ISLAND RESTORATION TRUST
Third Respondent

TE RŪNANGA O NGĀI TAHU
Intervener

Hearing:	14 August 2018
Coram:	Elias CJ William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	J P Ferguson, A H C Warren and R A Siciliano for the Appellant V L Hardy and C D Tyson for the First Respondent A F Pilditch and D C S Morris for the Second Respondent S J M Mount QC and A R Longdill for the Third Respondent

G M Illingworth QC and P T Beverley for the Intervener

CIVIL APPEAL

MR FERGUSON:

Tēnā koutou, e ngā Kaiwhakawā, ngā mihi ana ki a koutou. Ko Ferguson tōku ingoa. Kei te tae ā-tinana ahau me ōku hoa mahi, ko Mita Warren rāua ko Mihi Siciliano mō te kaitono Piri ko Ngāi Tai ki Tāmaki Tribal Trust. May it please Your Honours. Counsel's name is Ferguson and I appear with Mr Warren and Ms Siciliano for the appellant Ngāi Tai ki Tāmaki Tribal Trust.

ELIAS CJ:

Tēnā koe Mr Ferguson, Mr Warren, Ms Siciliano.

MS HARDY:

E nga Kaiwhakawa tēnā koutou. May it please Your Honours, Ms Hardy and Mr Tyson for the Crown respondent.

ELIAS CJ:

Thank you Ms Hardy, Mr Tyson.

MR PILDITCH:

May it please the Court, Pilditch and Mr Morris for the second respondent, Fullers Group Limited.

ELIAS CJ:

Thank you Mr Pilditch, Mr Morris.

MR MOUNT QC:

May it please the Court. Mount with Ms Longdill for the third respondent the Motutapu Island Restoration Trust.

ELIAS CJ:

Thank you Mr Mount, Ms Longdill.

MR ILLINGWORTH QC:

If the Court pleases. Illingworth with Mr Beverley for the Intervener in this matter Your Honours.

ELIAS CJ:

Thank you Mr Illingworth, Mr Beverley. Yes, Mr Ferguson. I should say, Mr Illingworth, we will hear you, probably quite briefly I would have thought, but 20 minutes or so, but we will hear you after the appellant.

MR ILLINGWORTH QC:

I'm obliged for that indication Your Honour.

MR FERGUSON:

Thank you Your Honours. I have taken the liberty overnight to prepare some oral submissions which are now in writing. Rather than doing a synopsis of the entire argument I would describe them more as an extended opening or introduction that sets the context for the substantive submissions, and I apologise that they are unfortunately double-sided in terms of copying, which is as frustrating to me as it is to you, but I apologise for that. Tapuwae Onuku, Tapuwai Ariki, Tapuwae o Tai. We of the sacred footprint in the earth, the footprints of the high born, the footprints on our foreshores. This whakataukī of Ngāi Tai ki Tāmaki is found at the beginning of the Ngāi Tai ki Tāmaki Deed of Settlement, referencing the fossilised footprint found in the volcanic ash on Motutapu from the eruption of Rangitoto some 600 years ago. The whakataukī reflects the indelible physical and cultural connection of both that footprint in the iwi of Ngāi Tai ki Tāmaki with Motutapu and the adjacent island of Rangitoto which dates back to the tūpuna Taikehu of the Tainui waka who settled in the Tamaki isthmus and whose Ngāi Tai descendants subsequently settled on Motutapu, hence its full name, Te-Motu-tapu-a-Taikehu, the sacred island of Taikehu.

This fundamental relationship between people and place, in this case between Ngāi Tai and Motutapu and Rangitoto is at the essence of this proceeding.

To Māori the relationship with the environment is viewed as one of whakapapa – the mountains, forests, lakes and rivers of tupuna of tangata whenua. Land, Papatūānuku, is one of the ultimate tupuna, as reflected in the following whakataukī of unspecified origin recounted in the 1994 paper *Kaitiakitanga: Māori perspectives on conservation* and I have provided a copy of that paper which is extracted from the here, and too for myself, unheralded journal of the *Pacific Conservation Biology* published in 1995, volume 2, and the authors of that paper are Mere Roberts, Waerete Norman, Nganeko Minhinnick, who of course was intimately involved in the prosecution of the Manukau Harbour claim before the Waitangi Tribunal, Del Wihongi and Carmen Kirkwood, also involved in the Manukau Harbour claim, and of Ngāi Tai and Ngāti Tamaoho descent. The whakataukī which appears on page 10 of that paper, Ko Papatūanuku tō tātou whaea, Ko ia tō matua atawhai, He oranga mō tātou, I roto i te moengaroa, Ka hoki tātou ki te kopu o te whenua. The land is our mother. She is the loving parent. She nourishes and sustains us. When we die she enfolds us in her arms.

These words capture the deepest expression of what has been termed "environmental whanaungatanga" or a "familial relationship" with the components of the environment. This relationship was recorded as long ago as 1887 by Thomas Gudgeon, a historian who was contemporary in 1887, when he wrote, an again this is from his book, *History and Doings of the Māori*, at page 57, but also cited in the paper I've provided, "At times it seems doubtful whether it is the tribe who owns the mountain or river, or whether the latter own the tribe."

This, of course, this concept is not unfamiliar to Your Honours I am sure, and is reflected in the well-known pepeha of Whanganui, E rere kau mai te Awa nui mai i te Kāhui Maunga ki Tangaroa, Ko au te Awa, ko te Awa ko au. The

mighty river flows from the mountains to the sea I am the river and the river is me.

That relationship and perspective of the Whanganui River, which is axiomatic for Whanganui iwi, is of course now enshrined in law in the legal recognition of Te Awa Tupua, as a living an indivisible whole comprising the Whanganui River from the mountains to the sea, including all of its physical and metaphysical elements.

Similar, too, is the legal recognition of Te Urewera as a legal person reflecting the values and relationship of Ngāi Tūhoe with that whenua, formerly the Urewera National Park, which expresses and gives meaning to Tūhoe culture, language, customs and identity as recorded in that legislation. Tamati Kruger of Tūhoe has spoken of the Te Urewera legislation facilitating a reset in the relationship between people and the environment. That reset is not, of course, a reset of the view that iwi and hapū have or their relationship with the environment, but rather it is a rest of the legal framework in which the Crown and its agencies operate to embrace and enhance that relationship.

However, while iwi and hapū have been increasingly compelled to look to Treaty settlement mechanisms to secure change and advance the recognition of their interests in this area, many of these Treaty settlement arrangements insofar as they relate to the conservation lands should be occurring as of right, not as redress, if - as Ngāi Tai advocate - section 4 of the Conservation Act is given true expression.

200 years ago, iwi and hapū were the unquestioned kaitiaki and managers of the mountains, forests, lands, coastline, lakes and rivers of Aotearoa. Those places were considered taonga and were managed in accordance with tikanga Maori. Over time, iwi and hapū have been largely alienated from the management of the conservation estate, contrary to the precepts of Te Tiriti o Waitangi.

Te Tiriti o Waitangi promised to Maori " ... te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa ... ", that is, to use Sir Hugh Kawharu's translation " ... chieftainship over their lands, villages and all their treasures…" or, as the English version of Article 2 reads, "...full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession…"

As the Waitangi Tribunal has recognised, Te Tiriti is therefore a "political agreement to forge a working relationship between two parties". That's from the Muriwhenua Land Report in 1997. As the founding document of Aotearoa, it has been described as our first national environmental policy statement. Bu Hirini Matunga in his chapter, *Decolonising Planning: The Tiriti o Waitangi, the Environment and a Dual Planning Tradition*, published in –

ELIAS CJ:

Mr Ferguson, one of the disadvantages of putting things in writing is I think we've probably all read this. It's principally an introduction. When you said it was your oral submissions I imagine you do want to develop your argument in the written submissions which, of course, we've already read. Do you really need to read through all of this?

MR FERGUSON:

Yes, there was some –

ELIAS CJ:

I was very happy with the beginning, of course, because it's a statement of position, but you could really just touch on anything you particularly want to emphasise.

MR FERGUSON:

I think the final thing I really wanted to emphasise, Ma'am, and I'm grateful for that indication, is really the context that gets us here today, and I suppose the

context of section 4 of the Conservation Act 1987, and what I note, and obviously Your Honours can read paragraph 12, is just the context in which that legislation was developed with the working party report for the then Labour Government in 1985, coming on the heels of Tribunal reports and Motunui, Kaituna and the Manukau claims, and then the decision by the Government to establish the Ministry for the Environment in 1986 and the Department of Conservation in 1987, and so the submission and position in that regard is that that obligation in respect of the principles of the Treaty is used in section 4, is encompassing of both that right to govern the conservation estate and the right of the iwi and hapū to exercise their Article 2 rights over land and resources.

And the paramount nature of that obligation and its pervasive application throughout the Act as a whole signalled an intention in 1987 to take any approach. And what's obviously happened, and what reflects the fact that we are, also that Ngāi Tahu are here, is that that is not borne the fruit that was anticipated and instead it is submitted that we have had a singular, almost singular focus on Treaty settlement redress as being the start and finish of relationships between iwi and hapū and the conservation estate without true reflection and acknowledgement and recognition of the customary rights that have existed mai rānō and also the future opportunities and aspirations that are also obliged to be fulfilled through the Treaty promises.

So that's the context, Ma'am, that I just wish to set out before turning to my written submissions. In terms of the introduction Ma'am I don't think I need to traverse that.

ELIAS CJ:
The Conservation Act itself, of course, is 1987 as you say.

MR FERGUSON:
That's correct Ma'am.

ELIAS CJ:

Is it part of your submission that it's an early wave or…

MR FERGUSON:

There was a lot of waving going on in the 80s in the legislative field in terms of touchstones of the Treaty of Waitangi but in varying capacities. This is certainly the highwater mark and so to use the wave analogy one might suggest that it was that seventh wave, a larger one that comes further up the shore and then you have a number of smaller ones after that in terms of state-owned enterprises and other pieces of legislation including the RMA in 1991, that chooses to grapple with the Treaty with lower legal ratings and in a real sense of balance. It seems to me, and in my submission, that what the Conservation Act reflected in 1987 was a new step forward, and it was a very bold step forward, but it was one that I think looked at objectively, saw, in my submission, the consistency between the Māori conservation ethic and the values that were thought to be upheld in the conservation estate, and there was a genuine desire and intent that Māori and the Crown would work to that end, and that is why, in my submission, you have most of the singularly unique phraseology of the Act as a whole being interpreted and administered to give effect to the principles of the Treaty. Not simply certain decision-making points, but the interpretation and administration of the Act as a whole and therefore, in my submission, that obligation, which is a positive one, not one to act in a way so as not to breach, but a positive one to move forward to ensure compliance and progress of the Treaty principles, is one that bites across all actions of the Department in that regard. And it must have been a deliberate and conscious decision by the legislature to use that terminology and to use it in that form.

The fact that it hasn't, well certainly in Ngāi Tai's submission, it hasn't been realised in that way beyond the decision of the Court of Appeal in the *Ngāi Tahu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553 (CA) case, and obviously that was one the Director General opposed that interpretation, I think reflects not so much an acceptance of that approach but perhaps, given that Treaty settlements didn't start apace until 1995 with

Waikato Tainui and be slowly trickling through a lot of resource and attention has been focused on that course rather than directly engaging through concessions and economic development in the way that Ngāi Tai now wishes to do so, and the iwi and hapū have simply not had that capacity and so we have a real dearth, it seems, from 1995 to now in terms of cases squarely focused on the application of these principles in the conservation legislation, albeit in this case in relation to two reserves, a scenic reserve and a recreational reserve in the case of Motutapu and Rangitoto.

ELIAS CJ:

But the effect of the Treaty settlements may, in fact, work in tandem with section 4 in relation to land administered by the Department because what they seem to do is to unmistakably establish connections which in 1987 had to be painstakingly, Tribunals had to be painstakingly persuaded of.

MR FERGUSON:

I think that's a fair observation Ma'am. I think in my experience if one looks back I suppose the first major settlement was Waikato-Tainui in the Raupatu lands claim settlement in 1995 and somewhat uniquely, well obviously because of the raupatu their major desire was the return of land and economic development of a tribal base, and so that was their primary focus, and at that stage the policy covered was largely bare and was at a formulative stage. They obviously secured some advantage in a relativity mechanism, but as far as the cultural redress that we see laid in through settlements now, there is none in that settlement, and in fact they caught up a little in the Waikato River settlement in 2009, and the fact that they have cultural redress mechanisms in relation to Waikato River, and including some conservation mechanisms there. But in 1995, in fact, I think the deed of settlement, if I'm correct, actually has the magnanimous statement that Waikato-Tainui essentially forego and essentially gift to the nation the conservation estate within their rohe. Now whether they were doing so in the aspiration the Conservation Act in section 4, that partnership that had been promised in that very first substantial iwi Crown Treaty settlement, where the Bill itself was signed by her Royal Highness, Queen Elizabeth, the next step was a genuine commitment

to partnership and that that would be realised and actioned even though the estate remained with the Crown, it's difficult to speculate, but one thing is clear, that shortly thereafter my friend Mr Illingworth's clients Ngāi Tahu took a significantly different course in terms of being the iwi recognised as developing the early stages of what are now comprehensive cultural redress mechanisms such as statutory acknowledgements, deeds of recognition, transfer of certain cultural and other sites and some early co-management, and that really is from that base that a lot of these mechanisms have developed. I think the difficulty that's arisen in relation to a lot of these Treaty settlement mechanisms I suppose is twofold. One, it's a particular chagrin of mine, is that iwi, to use the vernacular, end up using shall we call them Treaty credits, and this, in achieving this redress, in other words either chasing money or these other arrangements, then something often has to give and compromise in those settlements, as one can appreciate, and in many, and I suppose the second and follow up from that is, a lot of these matters that are given expression to, and I think Your Honour the Chief Justice is right, they are capturing and recording matters that previously hadn't been captured and recorded, but a lot of those are matters that should be occurring, in my submission, as a matter of due process if section 4 was being appropriately exercised.

ELIAS CJ:

I wasn't really looking for a discussion about the state of the world here. what I was I suppose trying out is that post-settlement, I'm trying to relate it to this case, you have authoritative recognition of relationship and you also have the vesting/re-vesting and whatever that means in the context of this case. so section 4 needs to be applied in a particular case against that background.

MR FERGUSON:

I think certainly that background Ma'am, assists in some points of focus. My caution for accepting that absolutely, and I'm not suggesting that you put it to me as an absolute proposition, is that it does tend to, I mean that people are looking, and I'm talking about Crown agencies, at those Treaty settlements as establishing the parameters of those rights that need to be recognised through

section 4, whereas, again I don't want to be discursive, but an assessment, a relative assessment or comparative assessment of Treaty settlements would show that the variation in those which is often more a case of bargaining positions and other exigencies is quite different from iwi to iwi and settlement to settlement, and I doubt any iwi would say, please look at our Treaty settlement document as the expression of our customary rights and interests, and in fact it would be fatal to do so, and so I think section 4, while certainly helps to inform and target those contemporary arrangements, doesn't obviate the need for the Crown or in this case the Department, be it the Director-General or the Minister depending on the nature of the decision, to ensure that they have assessed what those customary interests are. What the nature of the aspirations of the iwi or hapū group is, and how those matters are to be manifest in conservation planning yet alone downstream concession decision-making which, with all due respect, seems to not be too dissimilar from the resource consent regime in terms of if you keep applying and they keep being granted albeit on conditions until the concession allocation is full on any particular side, and with respect there doesn't seem to be a greater sophistication than that on a place by place or region by region basis.

Now I think that is potentially changing to some extent where there are some strong mechanisms negotiated through Treaty settlements, such as Te Urewera, such as Whanganui and some other specific ones where we are able to plan or develop joint planning arrangements that do give that expression but again we're dealing with a situation here where we were part way through a Treaty settlement process at the time, but there was not that stepping back and assessing the landscape past and future.

ELIAS CJ:

Sorry, I really think we need to make perhaps a little progress, so your point is that section 4 comes to be applied irrespective of the Treaty settlement process. What I was throwing out to you was the idea that, in fact, the Treaty settlement at least helps you in terms of establishing authoritatively the connection you need to argue in the application of section 4. That's it.

MR FERGUSON:

That's certainly correct Ma'am, and I suppose, just to deal with an issue of argument that I was going to come to later, that was in part, I suppose the difficulty that Ngāi Tai had in relation to the observations of the Court of Appeal in relation to the inability to consider issues of rangatiratanga and somehow conflating that with exclusivity, notwithstanding the clear acknowledged recognition through the Treaty settlement process of Ngāi Tai's mana whenua rights, and mana whenua, I think mana over the whenua, obviously carries with it back authoritative control within the vein of rangatiratanga and obviously there will be places that, where there are shared interests, and in those cases there is a shared exercise of rangatiratanga and it almost seemed to be a default position, with all due respect to their Honours, that somehow silence in terms of the positions of other iwi was taken as meaning there was no evidence as to their position and therefore one could not proceed on a particular basis as to the primacy of Ngāi Tai's interests, and in my respectful submission, that's incorrect. One, I can merely observe from the very fulsome litigation that has made all its way to this Bench, Ngāti Whātua, Ngāti Maratūahu, Ngāti Paoa litigation and also recent applications for injunctions in the Hauraki settlement in the High Court and many applications to the Tribunal, that the area of Hauraki Tamaki is highly contested between the relevant iwi and hapū with interests and the reality is that this case has been underway for several years. We had an early intervention by Ngāti Paoa saying it acknowledged the mana whenua of Ngāi Tai I think a memorandum was filed by Ngāti Whatua –

ELIAS CJ:

Just pause. I'm not sure that we're getting this in a way that is very well related to the arguments that we're addressing here. Perhaps you should move onto those arguments and why you say the decision was erroneous and why the Courts below have erred also.

MR FERGUSON:

Thank you Ma'am.

ELIAS CJ:

I think we do understand the general background and we have read your submissions.

MR FERGUSON:

The one supplementary fact just in relation to the narrative that is traversed in the submission Ma'am is that the Ngāi Tai settlement legislation which was before the House has now received it's royal assent, and that is now in the joint authorities, page 902 of the final Act. So I do not need to cross-reference that.

ELIAS CJ:

And is there anything in that Act that you rely on in your submissions in particular?

MR FERGUSON:

It is consistent with the key parts of the deed Ma'am, perhaps if I can just turn to that volume. The joint authorities at page 902, volume 2B. It begins at page 902 but if I could turn to 908 and section 8 of the Act. This is a summary of the historical account and there's some slightly greater detail in the deed itself. But it accounts the issues in relation to Motutapu in subsection (6) and (7) of section 8, "Motutapu is an island of great significance to Ngāi Tai."

ELIAS CJ:

Sorry, what page is this?

MR FERGUSON:

Page 910. So there's a reference there to the significance of Motutapu to Ngāi Tai. In subsection (6) and (7). Then turning over to 913 and the Crown acknowledgements. There's a general acknowledge in subsection (4) on page 913 of the Crown's, the taking of lands and retention of lands.

GLAZEBROOK J:

I'm just making sure I've got it.

MR FERGUSON:

Page 911 Ma'am, section (9) acknowledgements where it starts on page 912 and continued onto 913 of the joint bundle and it's subsection (4) where the Crown acknowledges the retention of Ngāi Tai ki Tāmaki lands, that's including the Hauraki Gulf/Tikapa Moana.

ELIAS CJ:

Were these pre-Treaty sales or were these FitzRoy's waiver?

MR FERGUSON:

There's a bit of both I think in that regard Ma'am. There was, the transaction in relation to Motutapu I think was January 1840.

ELIAS CJ:

Right.

MR FERGUSON:

And it was a, it was an alienation in a sense within the tribe to the partner of someone who, the settler who had married in, but obviously that saw the land ultimately dissipated upon the passing of that settler, and then ultimately with the recommendations of the Land Commission investigating that was that the land should not be returned to Ngāi Tai in that regard, they were retained by the Crown. So there was also, "Taking surplus land from pre-emption waiver purchases that were acknowledged as being in breach of the principles of active protection and the duty to act fairly and reasonably towards Ngāi Tai ki Tāmaki," and then further down in subsection (6), with particular reference to the inner Gulf islands, which include obviously Motutapu and Rangitoto, "The Crown acknowledges that the alienation of inner Gulf islands, with their deep ancestral associations to the iwi, remains a major grievance for Ngāi Tai ki Tāmaki."

Now in terms of the settlements that have occurred –

ELLEN FRANCE J:

Sorry, Mr Ferguson, do you also rely on 12, so page 915?

MR FERGUSON:

Yes, that's in terms of an overarching acknowledgement there of land loss and the, and I suppose not uncommon in Treaty settlements and in Crown acknowledgements, that essentially this severely impacted on their wellbeing and compromised their ability to maintain and also exercise manaakitanga in their traditional rohe. So that, again that acknowledgement and particularly that reference to manaakitanga resonates with Ngāi Tai because that is the very thing that they are seeking to reassert today in relation to Motutapu and Rangitoto.

GLAZEBROOK J:

Is there anything specifically here on mana whenua that you rely on?

MR FERGUSON:

Sorry Ma'am?

GLAZEBROOK J:

Is there anything specifically here that you rely on in terms of rangatiratanga, mana whenua?

MR FERGUSON:

I think it's Ngāi Tai's mana whenua is acknowledged in terms of its primary interest in relation to Motutapu and I can do that in two ways Ma'am.

GLAZEBROOK J:

No, sorry, I was meaning specifically in the Act.

MR FERGUSON:

In the Act, yes, well certainly in terms of the fact that there are, and I will take you to the relevant sections, there are three sites on Motutapu that are being vested in fee simple to Ngāi Tai ki Tāmaki –

ELIAS CJ:

So am I right in thinking, I think it's in the submissions, that the recitals simply recite Ngāi Tai ki Tamaki's assertion of connection rather than involving a Crown endorsement.

MR FERGUSON:

I think certainly there are statements of acknowledgement, statements of association in relation to Motutapu that are included in the deed and given legal effect in terms of various decision-making through the Act, and those statements of association obviously have some recognition in behind them, they have the baseline that this redress does not get granted unless iwi meet that threshold in my submission. But I think what's unique about the Ngāi Tai relationship, and it's reflected in the redress that is unique to them, is that out of all of the iwi of Hauraki and Tāmaki that have received redress and have negotiated settlements, and there have been a number in this area, Ngāi Tai is singular in receiving a transfer of fee simple title on Motutapu, and there are three sites that are transferred to the trustees of the Ngāi Tai ki Tāmaki Trust and they are, they're such that are referred to in sections 28, "Hukunui… being part of the Motutapu Island Recreation Reserve," and that's on page 931. Ororopupu, section 38 of the Act, on page 938, and the third is Te Tauroa, section 47 on page 941 of the Act, and in my submission those fee simple transfers can only occur when the Crown has recognised an exclusive mana whenua interest on the part of Ngāi Tai and those places. No other iwi is receiving any transfer of sites in relation to Motutapu.

GLAZEBROOK J:

So there's nothing specifically else in the summary of account or…

MR FERGUSON:

Not in that account Ma'am. there is a conservation relationship agreement, which is in the deed rather than in the legislation, and perhaps it might be, if we're able to take Your Honours to that in terms of additional information. That is in volume 4F on the case on appeal, which is a volume of exhibits with a light blue cover, and in fact there are two pages in relation to that volume

that I should refer to. First, the statement of association that I previously referred to is on page 1462, and that's the statement of association of Ngāi Tai's association with Motutapu.

ELIAS CJ:
Sorry, what is this document?

MR FERGUSON:
This is the document schedule to the Ngāi Tai Deed of Settlement.

ELIAS CJ:
Yes, thank you.

MR FERGUSON:
Not in deed to settlement, a very difficult beast in terms of working one's way around, because they tend to be separated into a main deed and then a series of ancillary schedules which often –

ELIAS CJ:
So where in the main deed is this schedule referred to? Do you know? Don't worry if it's going to be too hard to find it.

MR FERGUSON:
Sorry, there is a cross-reference to the… it's in volume 4E, the previous volume, with a lemony cover, of the case on appeal, and at page 1257. This is under a section of the deed relating to cultural redress.

ELIAS CJ:
So are these sites on Motutapu cultural redress under the deed?

MR FERGUSON:
The sites that have been transferred in fee simple, yes Ma'am.

ELIAS CJ:
Yes, thank you.

MR FERGUSON:

And the statutory acknowledgement that I've just referred to, which is in the document schedule, and that's why these deeds are difficult to work through –

ELIAS CJ:

So the Crown is acknowledging those statements?

MR FERGUSON:

It's acknowledging those statements for certain purposes.

ELIAS CJ:

At 5.16.1.

MR FERGUSON:

So in 5.16, "The settlement legislation will, on the terms provided… provide the Crowns' acknowledgement of the statements… association," and obviously statement of association (e), listed there, is the Motutapu Recreation Reserve statement of association, which is the document on page 1462 of the previous volume 4F.

GLAZEBROOK J:

What does "acknowledgement" mean? I mean is there a definition of any sort?

MR FERGUSON:

It's a generic term used to describe an iwi's description of "association" and the acknowledgement gives it legal weight in terms of its, if it's a statutory acknowledgement it requires relevant consent authorities, the Environment Court and Heritage Protection New Zealand, to have regard to that statutory acknowledgement.

ELIAS CJ:

So it has consequences in legislation.

MR FERGUSON:

It has consequences in the resource management space Ma'am in that regard, so statutory acknowledgements are generally directed to that statutory scheme.

ELLEN FRANCE J:

And 1260 is the reference, I think, to a conservation relationship agreement.

MR FERGUSON:

Yes, it's at 1260 at paragraphs, or clauses 5.25 to 5.28. "The parties must enter into a conservation relationship agreement by the settlement date. The conservation relationship agreement must be entered into by the trustees, the Minister of Conservation, and the Director-General of Conservation… must be in the form in part 4 of the documents schedule. A failure by the crown to comply with the conservation relationship agreement is not a breach of this deed." Which is obviously an out, but again it goes –

GLAZEBROOK J:

So where's the conservation –

MR FERGUSON:

Now the conservation, if we go back to the document, and I'm –

GLAZEBROOK J:

So the statements of association are?

MR FERGUSON:

In volume 4F.

GLAZEBROOK J:

And they are the cultural redress issues?

MR FERGUSON:

They are cultural redress and then this conservation relationship agreement is also cultural redress, but what often happens in these deeds is the deed

refers to the nature of the redress but if you want to find the particular documentation and references then one needs to find another volume of the deed of settlement. It's not particularly user friendly for anyone let alone lay members of the tribe. But the conservation relationship agreement that is entered into between Ngāi Tai ki Tāmaki and the Minister and Director-General is found in that volume 4F of the case on appeal at page 1476 through to 1484.

O'REGAN J:
And does the agreement address section 4?

MR FERGUSON:
The agreement does not expressly, oh yes it does, it does expressly address it sorry. I hadn't highlighted that clause, but yes, in terms of its purpose, if one looks at page –

ELIAS CJ:
Which volume is it now, the next one?

MR FERGUSON:
Sorry, the next one, 4F.

ELIAS CJ:
Sorry, you were referring to section 4, where's that?

MR FERGUSON:
So under the heading "Purpose" we've got, "This Relationship Agreement represents a partnership between the Minister and Department of Conservation and Ngai Tai ki Tamaki and signifies the shared commitment to build a strong, lasting and meaningful partnership: (a) to promote and enhance the conservation of natural, physical, historical and cultural heritage… to complement cultural redress provided for in… the Act; and (c), to give effect to the principles of te Tiriti o Waitangi/Treaty of Waitangi, as required by section 4 of the Conservation Act."

ELIAS CJ:

So this agreement endures, does it, despite the legislation. What's the, it isn't overtaken by the legislation.

MR FERGUSON:

In terms of the settlement legislation itself?

ELIAS CJ:

Yes.

MR FERGUSON:

No, Ma'am, this endures beyond that, notwithstanding that, of course, there is that clause that a breach of this isn't a breach of the deed in that regard.

ELIAS CJ:

Yes.

MR FERGUSON:

So it's a relationship document and it creates a number of commitments, but as in all of these things, enforceability beyond one's reference to section 4, and what could be required under the mantle. Enforceability on the face of the agreement itself is a little bit more questionable, one might suggest, and they are generally pitched in that fashion in most cases.

O'REGAN J:

Did Ngāi Tai seek preference in relation to concessions when this was being negotiated?

MR FERGUSON:

This makes references in relation to Motutapu, which is on the next page 1477, it refers to the importance of Motutapu to Ngāi Tai ki Tāmaki historically in clause 3.1. It goes on to say in clause 3.2 on the next page, 1478, that Ngāi Tai has negotiated exclusive cultural settlement redress and as such Ngāi Tai, "desire to welcome and host all visitors to Motutapu as part of any

cultural guiding concession that Ngāi Tai ki Tāmaki acquires for Motutapu; and 3.2.2 desire to be involved in the pastoral management of Motutapu and will focus on opportunities to acquire concessions for that as well as on other iconic island –

ELIAS CJ:
But that's the farming? That's the farm?

MR FERGUSON:
It's also a conservation concession Ma'am.

ELIAS CJ:
I'm just looking at 3.2.2 and that's about the pastoral management, that is about the farming activity.

MR FERGUSON:
That's the farming activities, which is a separate concession on the island.

ELIAS CJ:
Yes, I see, yes.

MR FERGUSON:
That I understand was due to expire this month but I think the period has been unilaterally extended by the Department, and I say unilaterally, for six months, in order to work out the process they're going to go through for the retendering of that, but one can see immediately from that the significance of grappling with these issues when there are other matters such as that on the horizon Ma'am.

GLAZEBROOK J:
Can I just ask what you say exclusive cultural settlement redress means in that context?

MR FERGUSON:
That's the transfer of those three sites Ma'am.

GLAZEBROOK J:

Okay. It's sort of, it isn't clear.

MR FERGUSON:

It's not clear in that regard but there's nothing else beyond this in the statutory acknowledgements and –

GLAZEBROOK J:

I'm just saying, it seems to be related to welcoming all visitors to Motutapu, rather than –

ELIAS CJ:

Well that's because 3.2.1 and 3.2.2 relate to the island as a whole, and that's clear form the pastoral management reference, but –

GLAZEBROOK J:

I understand that but it's just I don't see –

ELIAS CJ:

But the exclusive cultural redress is the specific cultural redress under the legislation, is that right?

GLAZEBROOK J:

Well that's what you say but it doesn't, it's not how it reads, because "as such" sounds like it refers to exclusive cultural redress.

ELIAS CJ:

Yes, but it doesn't.

GLAZEBROOK J:

No.

ELIAS CJ:

Because it's self-contradictory.

GLAZEBROOK J:
It's terrible wording.

ELIAS CJ:
Yes.

MR FERGUSON:
Yes.

ELLEN FRANCE J:
Just in terms of the concessions aspect, 7.2 seemed to me to be the relevant provision.

MR FERGUSON:
Yes Ma'am, there are a couple of further steps that I can take you through before getting to that. obviously there's also linked to those sites that were transferred, 3.3 obviously identifies future desires by Ngāi Tai ki Tāmaki to develop two of those sites, including possible accommodation interpretation of ancient papakainga features et cetera again to provide unique cultural experience and a place for cultural activities. Then we've got a commitment in paragraphs 3.4 to 3.7 to strategic collaboration. "Ngāi Tai ki Tāmaki and the Department will work closely together to assist Ngāi Tai ki Tāmaki realise the potential of Hukunui and Te Tauroa to provide a unique experience for visitors."

3.6, "The Department will consult as early as practicable with Ngai Tai ki Tamaki when pasture management arrangements for Motutapu are to be reviewed acknowledging both the strength of cultural connection with all of Motutapu and the desire of Ngāi Tai ki Tāmaki to be directly involved in the management of the motu." And 3.7, "The Department will explore opportunities with Ngāi Tai ki Tāmaki and conservation stakeholders… to develop shared strategic conservation outcomes for the motu." These are all commitments in this agreement –

ELIAS CJ:.

Sorry, when was this signed again?

MR FERGUSON:

This was initialled in 2015.

ELIAS CJ:

After the decisions?

MR FERGUSON:

Signed on the 7th of November 2015. There was an agreement in principle initialled back previously in 2011 and then a ratification process in 2012. So this has been a very drawn out process in terms of both the Tāmaki iwi and the Hauraki iwi because their collective arrangements and then individual arrangements and they tend to have moved as quickly or as slowly as the lowest common denominator at times, and so –

ELIAS CJ:

Is there reference to the agreement in principle in the decision?

MR FERGUSON:

Let me check that Ma'am.

ELIAS CJ:

Don't, take your time.

MR FERGUSON:

Yes, but two things in that regard. One is obviously this deed itself wasn't signed for a significant period following ratification, so the key deal had been done but then a series of years passed and by the time the Crown came to be signing it obviously things had changed and there were some deeds of amendment but not to material effect in that regard in 2016, 2017 and 2018. But the other important point, and I suppose it goes to how much weight the Department is placing on this deed in 2015 or 2016, is that my understanding,

and my learned friend Ms Hardy will no doubt correct me if I overstate the position, but the deed is conditional on legislation being enacted and therefore unless expressly provided for, none of this is operative until probably 20 working days after the 4th of July this year, with all due respect.

ELIAS CJ:
So it's not, the legislation doesn't affect the deed, it continues.

MR FERGUSON:
It gives legislative effect to what needs to have legislative effect.

ELIAS CJ:
But it, the deed didn't come into effect until the legislation was enacted.

MR FERGUSON:
I would be astonished if it was not the standard provisions in that regard but they normally are conditional in that respect, and I'll just find the reference because it might be of value in terms of context. So if one turns back to volume 4E, at least we're sticking with these two volumes, so 4E, and at page 1279, which at the top right-hand corner is page 73 it has on it, and 72 at the bottom just for confusion, one of those will be the deed numbering and one will be from another document, but this is the clause in section 9 of the deed of settlement regarding settlement legislation and conditions and you'll see 9.6 on page 1279, "This deed, and the settlement, are conditional on the settlement legislation coming into force." There are some provisions that are binding on its signing, but I don't believe that any of those relate to the redress that we are talking about.

Turning over the page to 1280, not only is it conditional, the deed in 9.8.1 is stated to be without prejudice until it become unconditional, so almost another qualifier again in terms of anyone seeking to put weight on it in terms of actions.

GLAZEBROOK J:

Mr Ferguson, before you move on, can I just take you back to the statements of association and what you say about the acknowledgement, does that mean that acknowledges the truth of what's in those statements of association, or does it not go that far?

MR FERGUSON:

Ma'am, I think in this event I –

GLAZEBROOK J:

I mean a "truth" in inverted commas, of course…

MR FERGUSON:

Well, I think the safest way to address that is by reference to what the Crown says matters such as this mean, and they are set out in the red book, but I'm not sure which is the Crown's Treaty settlement policy, and I'm not sure if we have the pages from the red book in relation to statutory acknowledgements, not in evidence I'm afraid. We do have the, just while we're on the topic of redress for Ngāi Tai ki Tāmaki, and just so it can be noted, that at page 1064 in volume 4C in the case on appeal there is a single page from the Crowns' red book of Treaty settlement policy relating to the statutory vesting of fee simple estate and gifting back of sites of great significance. Now that, so the description there by the Crown, page 1064, and that's talking about vesting and gift back of sites of great significance as opposed to in this case where they've been vested outright, but again talking about areas of high importance and significance in that regard and the desire to restore to mildly sensitive original custodianship of the site. I'm sure Your Honours would have access to the Crown's red book or my friend for the Crown could provide it, but it does provide, in relation to each category of cultural redress, an explanation of the intended legal consequences and I suppose thresholds for the grant of such redress in a generic way, but it is a helpful as a statement of Crown policy in that respect.

O'REGAN J:

So what do you ask us to take from the relationship agreement in respect of the issues that we are dealing with on these concessions that are under challenge?

MR FERGUSON:

What one can take with it, given that it only became an unconditional and therefore applicable legal document, possibly not even now depending on whether it's 20 or 30 working days after enactment, is it is simply confirmatory of the associations that Ngāi Tai assert that they have and which should be recognised as a matter of course under section 4, and provided for, but they are captured in this document with an intention that that forms one aspect of the relationship with the Department so there was certainly in the course of the negotiation of this an acknowledgement of these aspirations as long ago as the initialling of the deed back in 2011/2012.

O'REGAN J:

But are you saying there is any error in the way the Department or the Courts below took into account the agreement in whatever form it was in at the time they were making their decisions?

MR FERGUSON:

I think only in respect of I suppose two notions. There was an unfortunate categorisation as I indicated previously about notions of rangatiratanga and what that is imbued with, namely needing to have a determination of some form of exclusivity and that couldn't be determined in the case, and I believe, with all due respect, the Court erred in that regard because there was sufficient acknowledgement through the transfers and through this type of redress of that mana whenua status, and if one has mana whenua status, even if others might also assert that, and there is no evidence of anyone asserting that, and in this case that is telling in its own right in my submission, then it follows that type of control and authority, an exercise of tikanga kaitiakitanga, manaakitanga flows from that. The second limb of that is the unfortunate, albeit that it often is inevitably the case of I suppose ascribing to

Ngāi Tai ki Tāmaki a desire for veto and, with all due respect, that overstates the position and a review of Mr Brown's affidavits reveals that he is quite clear that he seeks priority –

ELIAS CJ:
That's an important point which you will need to develop. I'm just wondering whether it's, the answer to Justice O'Regan's question is a bit –

O'REGAN J:
Well I think the answer is no, isn't it? This isn't the source of the error that you're complaining about?

MR FERGUSON:
This isn't the source of, no, no.

ELIAS CJ:
But is the significance of this that at the moment when we're considering this issue, we can take it that the connection of Ngāi Tai with the Motu is authoritatively acknowledged in the existing legislation, that that was in the course of – that that was part of a process that was known so, although it may not have been authoritatively declared, we don't need to worry about overlapping claims or questions of status for our purposes. Because there is an existing acknowledgement now.

MR FERGUSON:
There is now, and I think there are two aspects to that Ma'am. One goes to the issue of redress having regard to the errors that the Court below have both found and that is that in any reconsideration, if that were to occur, this relationship agreement would be in play in my submission and therefore while there may have been broad knowledge of this, it's not clear in any detail on the record as far as I can see, there's one reference Ma'am, and I'll take you to it shortly, but this provides another level of context and reflection in terms of the agreements that have been reached between Ngāi Tai and the Department and how they move matters along in terms of how one would

consider other concessions as well as the relativity with Ngāi Tai's own concession.

Now it probably is apt at this stage to take Your Honours to the original report the by the Department to the decision-maker in relation to the Fullers Group –

GLAZEBROOK J:
Can I just. what you say about rangatiratanga is that the Courts below made a mistake because they said it had to be exclusive and in any event there was not really evidence in this case of anybody else asserting it, but if they had later then it doesn't mean there isn't rangatiratanga it just means that it might be shared, is that –

MR FERGUSON:
Yes, that it might be shared or somebody else might be, in the event for example, I suppose when Ngāi Tai applied for its own concession which was granted, there's no evidence of, that I can see –

GLAZEBROOK J:
No, I understand that, just in principle that's all.

MR FERGUSON:
You understand the point. The onus was flipped, with all due respect, by the Court of Appeal in saying well there's no evidence of what the position is, in the absence of that evidence we can't make a determination about rangatiratanga, and I'm saying, our submission is that rangatiratanga follows with mana whenua. It may or may not be exclusive depending on the particular circumstances, but it's identifiable.

GLAZEBROOK J:
And there's enough in the acknowledgement, there's enough to, which is why I was asking you specifically about that statement.

MR FERGUSON:

Yes, so that certainly is the position Ma'am.

GLAZEBROOK J:

Right, and then the, well, I think you will need to go through the veto later but I think the Chief Justice is right, it's probably not exactly the time to do it now..

MR FERGUSON:

No. In relation, probably just in terms of references to the knowledge of the Department in relation to the documentation and the progress of the settlement, as I say there is a reference in the report to the decision-maker in the Fullers consent and that is in volume 4A of the case on appeal. So there are two references in this regard, so if we start at page 605 of that volume. There's an original issues paper that begins on page 600, dated the 30th of April 2015. It starts on page 600 but I'm referring to page 605 and there we have a heading on page 605, "Ngāi Tai ki Tāmaki Deed of Settlement."

GLAZEBROOK J:

And just in terms of timing that included the conservation relationship agreement.

MR FERGUSON:

Not signed but certainly included within the deed, yes.

GLAZEBROOK J:

No, that's what I mean, we're talking about the whole thing.

MR FERGUSON:

Yes, almost complete as at that stage in 2015 and you'll see in paragraph 41, "NTKT place a lot of weight on the department complying with obligations set out In their individual Deed of Settlement. At the time of writing the NTKT Deed of Settlement has not been initialled by the Crown. NTKT advise us that in their view it is all but ready for initialling. Within the department best practice is that as Treaty settlement outcomes become clearer as negotiations

progress, so then must those outcomes be increasingly taken into consideration. Certainly Deeds of Settlement should be had regard to once they are signed and become binding on the Crown, and become public documents. Before this they are treated as confidential documents and because the content may change at any time up to signing, a judgement must be made as to the weight that can be placed on their content. The only document that is public is the Agreement In Principle signed by NTKT and the Crown in 2011."

GLAZEBROOK J:

I must stay it seems rather odd to me, which is not a question for you but more for the Crown, that a specific relationship document that is between the Minister and the Department of Conservation and Ngāi Tai, isn't something that's taken into account in negotiations, especially as it purports only to give effect to section 4 of the Conservation Act which effectively predates it, but that's a comment which more is directed to the Crown than you Mr Ferguson.

MR FERGUSON:

No Ma'am, but it does, I suppose, it resonates with one of the points I made earlier on which is a lot is being done under the guise of redress, or being captured in writing under the guise of redress in Treaty settlements that actually should be day-to-day considerations in Department of Conservation decision-making, and thus, even if this wasn't effectively binding, all of those matters and aspirations should be possibly – existed, and should have been properly taken into account and assessed in considering the relevant concessions.

ELIAS CJ:

Well you can see that you can't take into account a form of redress to be determined, but in the absence of any contradiction of what Ngāi Tai is saying, one would have thought that the background was this association, which the Department has acknowledged.

MR FERGUSON:

Yes, and any reasonable Department considering a concession should be ascertaining those, that information directly from the iwi not having to even wait or rely on Treaty settlement redress because the aspirations exist separately from the Treaty settlement, as do the rights and interests that they rest upon.

ELIAS CJ:

Is there any, and I've only flipped through this, but is there any reference in, this is the recommendation report is it?

MR FERGUSON:

Yes, that's the issues paper and then the recommendation report starts at 610.

ELIAS CJ:

Right, so is there any reference in this material to considering whether it is necessary to grant the concession application at all against the background that this is happening? Is there any consideration of that?

MR FERGUSON:

Apart –

GLAZEBROOK J:

What was the other reference, just so I don't lose it?

MR FERGUSON:

The other reference?

GLAZEBROOK J:

The other reference you were just going to take us to.

MR FERGUSON:

Sorry, it's page 617, towards the bottom of that page, heading, "Ngāi Tai ki Tāmaki deed of settlement." "Ngāi Tai ki Tāmaki have placed a lot of weight

on their individual deed of settlement. At the time of writing the deed has yet to be signed. The department's best practice in light of upcoming settlement has been to proceed business as usual, taking regard of impending settlement as much as we are able. Where it has been identified that land will transfer, this may be excluded from a concession."

GLAZEBROOK J:
So from what that looks like, they were really looking only at the special redress, special cultural redress and transfer –

MR FERGUSON:
The particular transfer of sites.

GLAZEBROOK J:
They didn't seem to be looking more generally at the conservation relationship agreement.

MR FERGUSON:
No, between Ngāi Tai and the Motu as a whole, no.

GLAZEBROOK J:
And the statement of association. Is that a fair indication.

MR FERGUSON:
That is fair Ma'am.

ELLEN FRANCE J:
There was at the same time as a similar conservation relationship agreement with the collective. Is that right?

MR FERGUSON:
I think there was in the Tamaki Collective Settlement. I think that's referenced somewhere and that's a generic one, and it looks to the development of a broader gulf plan that will cover the multiple islands and that's yet to be developed and it's yet to be determined whether that will be generic or island

by island, and obviously if it was island by island then one would expect there to be a greater degree of prescription and focus on interests of Ngāi Tai, but that's a collective arrangement generically being developed by a collective, it's hard to…

GLAZEBROOK J:
Can you quickly give us where that is? Sorry, that's probably a silly question.

MR FERGUSON:
We'll be able to give it to you, whether we're able to give it to you quickly, Ma'am, is another matter. Disadvantage of not having had two runs at this before.

ELLEN FRANCE J:
Ms Litchfield refers to it but I wasn't sure that we necessarily had it.

MR FERGUSON:
I'm not sure it's attached. The shaking of heads from those in control of technology suggests it's difficult to find.

GLAZEBROOK J:
Well it's not, anyway you say it's not actually in any particular state at the moment that could be even vaguely reliable.

MR FERGUSON:
No, it has potential but not potency.

ELIAS CJ:
Sorry, the answer to my question about is there any discussion in this about whether the concession application should be processed against this background.

MR FERGUSON:
Not in that sense. There is I think a note, an annotated note that I think is referred to in my friend's, I think the third respondent's submissions, which

refers to the fact that on occasion concessions are declined in recognition of active protection of the site, but that's not the view of the Department that that should happen in this case. So, but again that's not linked to because there are ongoing settlement developments, so I'm not aware of anything there the Department has considered essentially a moratorium or a deferral of concession considerations pending greater certainty of these settlement arrangements.

GLAZEBROOK J:
Well you say, in any event, the settlement is not, well certainly not the be all and end all and can't overtake the obligations under section 4 generally which is also, as I understand it, Ngāi Tahu's point.

MR FERGUSON:
That's correct Ma'am. I think when we were back on –

GLAZEBROOK J:
Or one of Ngāi Tahu's points.

MR FERGUSON:
I think your Justice France went ahead a page, and just for the benefit of completeness, back in the conservation relationship agreement where we were looking at clauses 3.2 to 3.7 on page 1478 and two pages over on page 1480 there's a reference to statutory authorisations, which is obviously again looking at concessions in that regard. It's talking about consultation in that process and, again, a link to a process in the –

ELIAS CJ:
Sorry, this is in 4F is it?

MR FERGUSON:
Yes Ma'am, 4F, page 1480. It's the document we were in before.

ELIAS CJ:

I know but we were in a number.

MR FERGUSON:

We have been in a number, yes. Page 1480, a heading "Statutory Authorisations" and in 7.2, "Ngāi Tai ki Tāmaki has strong interests in exploring the following types of opportunities for concessions that involve public conservation land: 7.2.1 Hikoi o Te Motu/Guided walking tours on Rangitoto, Motutapu, Motuihenga, Motukorea, Waiheke, public conservation land in the southern Hunua and Maungauika." Also guided kayak and waka tours. Camping on Hauraki motu. Hosting sporting activities and hosting cultural events, again another reference to strong desires to explore in the post-settlement environment. And later reference, obviously, to desire, when one looks at the next page, 1481, to section 13 of the conservation relationship agreement "Visitor and Public Information". Again 13.2 on the next page, "Ngāi Tai ki Tāmaki have a concern that all visitors to public conservation land are aware of the cultural history and significance of those landscapes, including visitors undertaking activities led by concessionaires. Ngāi Tai ki Tāmaki are particularly interested in enhancing visitor information for or at the following places." And obviously Rangitoto and Motutapu are both identified in that respect.

GLAZEBROOK J:

The tractor tours don't seem to be something that's mentioned here, and in fact there wasn't an application for a concession in that regard was there?

MR FERGUSON:

By Ngāi Tai?

GLAZEBROOK J:

Ngāi Tai.

MR FERGUSON:

No, not at this stage.

GLAZEBROOK J:

I suppose when you're looking at the veto issue, can you address that, and exactly what you say the – because in light of this, because it doesn't come up in 7.2 either, and in light of that, not now but just when you are addressing the veto issue, and what you say should have happened.

MR FERGUSON:

In relation to that.

GLAZEBROOK J:

And there's probably a number of other issues that come up at that stage, but I think it's better if we go through the, in the order, so we don't get off on a tangent, and only one aspect of what you want to address on that as well.

MR FERGUSON:

I'm just going to return to my written submissions and just make sure that there's nothing I need to take you to in detail I think in terms of the narrative of facts relevant to the issues on appeal, and the grounds on appeal, and I probably am getting close to dealing with the veto issue, but I might reserve that for just after the break so I can confer with my friend Mr Warren and make sure I do have the right documentation that might be relevant to that issue.

GLAZEBROOK J:

Yes, obviously you're not going to address it as a veto issue, you're going to address it in a positive sense, and then the negative sense as to why you say it's not a veto, which is why I didn't want to divert you off the positive side of what you say.

MR FERGUSON:

That's right, yes.

GLAZEBROOK J:

Because it can be too easy to say why it's not a veto and not actually present it in the positive way that you wish to.

MR FERGUSON:

That's correct Ma'am. The label "veto" is generally ascribed by others to perception of power being exercised where Māori are perceived to have the final right of decision. It's seldom used to describe Crown decision-makers who have similar rights when they exist but in any event we will return to that matter.

ELIAS CJ:

Can you just tell us where you want, what points you want to develop. Have you finished going through the decision documents or not?

MR FERGUSON:

I think to the extent that they need to be looked at given the concurrent findings in the Court it's really what one does with them in terms of the significance of the errors and how they relate to the duties that we say apply to the Department or the Minister or Director-General under section 4, and that really comes under the heading of "relief" Ma'am. We don't have a cross-appeal seeking to overturn those findings. There were minor errors.

ELIAS CJ:

Well, the documents rather speak for themselves. It's not like concurrent findings of contested fact. I'm not quite sure where that argument goes, but perhaps you do need to –

MR FERGUSON:

I was going to step through the legal framework in a bit more greater specificity Ma'am.

ELIAS CJ:

Yes, and also the findings in the High Court of error and why you say that the Court of Appeal was, or that the High Court was wrong not to say that they gave rise to relief. If you're relying on them.

MR FERGUSON:

I think they're best placed to return to that is having traversed the legal framework Ma'am.

ELIAS CJ:

Yes, that's fine.

MR FERGUSON:

And as that will –

GLAZEBROOK J:

There doesn't seem to be much disagreement as to the legal framework. I mean I must say the phrase "principles of the Treaty" starting again I might look at it slightly differently from where it has been looked at. On the other hand there doesn't also seem to be in this case much, well any indication that anybody wants us to look at that again and that we are effectively got agreement from the Crown as well on that, on the principles. Do you see that there is a difference between what the Crown accepts and what you're saying. Obviously you're saying the effect of that should have been different, but is there any disagreement with the Crown's outlining of both the principles and the effect of section 4?

MR FERGUSON:

Conversely that they disagree with my outlining of it. I think there is to an extent that I think that the Crown introduces a concept of balance and reasonableness in terms of the level or standard the Crown has to reach in terms of giving effect to the principles of the Treaty. Now whether one can grapple with that in isolation of the principles per se as a question or whether it's kind of imbued with the nature of the principles and what they demand, I'm not sure, but certainly –

GLAZEBROOK J:

So you say there's a paramountcy of section 4 which overtakes the rest of the Act and the Crown is more saying there's a balance with the other factors. Is that…

MR FERGUSON:

Yes, that's right, and I think, again it depends on the extent to which my friends take this point, but as I ascertain it they say that that directive in section 4 needs to be balanced against the purposes and principles of the conservation legislation, the Reserves Act 1977 and its provisions, and the Hauraki Gulf Marine Park Act 2000, in the sense that it has other, identifies other matters of national significance or other interests such as public access, and I suppose our view about the extent to which those matters bite or fetter we would say is a full expression of the, an enjoyment of the principle, protection of the principles of the Treaty by Ngāi Tai ki Tāmaki, I don't think we're on the same page in that respect, and so there are some statutory interpretation, or statutory framework issues to deal with there that I think are important. One, for example, is, and I suppose this goes to the point that it's suggested that somehow Ngāi Tai's position is inconsistent with the right of, or the description of conservation and the aspiration that the conservation legislation has to promote public access, or provide public access to recreational areas and conservation estate, whether one's talking under the Reserves Act or the Conservation Act, and in that respect the rights that Ngāi Tai ki Tāmaki are asserting aren't directed to the right of public access, which is recognised under the Reserves Act and under the Conservation Act, albeit with some limits, and the Department itself imposes limits for a range of reasons about where concessionaires can go et cetera, but rather, well the position of Ngāi Tai is that there is nowhere in those principles in the Conservation Act where there is somehow a right of access for commercial activity, and it's a very different matter in that respect.

WILLIAM YOUNG J:

Some rights maybe, the practicality of access maybe facilitated by someone who's providing paid services.

MR FERGUSON:

There could be a facilitation of public access but that's not a, the absence of that concession does not follow an absence of access because –

WILLIAM YOUNG J:

Well it's not a complete depravation of access.

MR FERGUSON:

No, if there are either other tours, such as the ones Ngāi Tai provides, or obviously people that aren't going on tours but are able to access conservation land, subject to whatever other restrictions the Department may place. People may turn up at the wharf with their private boats or kayaks that aren't part of tour groups in that respect.

ELIAS CJ:

Well one would have thought on your argument that there would have been discussion about the need for commercial access to be balanced against Ngāi Tai's preference in the section 4 assessment, but the concession decisions seem to proceed on the basis it's what I asked you earlier, that they're dealt with simply in their own terms. There's no assessment of whether they are appropriate applying section 4, but your point is that it's not access that is in issue, but commercial concessions?

MR FERGUSON:

That's correct Ma'am, and in relation to that point Ngāi Tai is very clear in its position and in the evidence and in the submissions that it made on the concessions, that it's not acceptable to simply compartmentalise these other concessions and say, oh they're for another group or people with a different interest in, you know, they're happy to leave all of the Ngāi Tai tikanga and cultural stuff to Ngāi Tai's operation, we'll do something else, and Ngāi Tai's point is that this is their whenua. These are their sites. Their interest relate to Motutapu as a whole, and that just as one coming on to a marae or to some other, or someone else's whare, there are certain tikanga etiquette and as they express the exercise of manaakitanga and kaitiakitanga in terms of

information, behaviour, focus, that their view all visitors need to be imbued with, and that giving expression to those matters through section 4, and if that means that we are talking about conditions are standards that need to be met by concessionaires to ensure that they are in a position to discharge that, and that may well require active partnership with Ngāi Tai ki Tāmaki, then again that is not an unreasonable consequence of section 4, because of the import of that relationship and the fact that it is to be given effect to in terms of section 4.

ELIAS CJ:
We should take the morning adjournment now thank you.

COURT ADJOURNS: 11.27 AM
COURT RESUMES: 11.46 AM

MR FERGUSON:
Just a couple of points of clarification before I move on to the next substantive point. I confirm first that the agreement in principle isn't in the bundles anywhere.

GLAZEBROOK J:
Sorry, the general Hauraki…

MR FERGUSON:
No, the agreement of principle that captured back in 2011/2012 isn't in.

GLAZEBROOK J:
I see, thank you.

ELIAS CJ:
That was with the Department, was it, that agreement?

MR FERGUSON:
That's the agreement in principle prior to the deed being developed in 2015.

ELIAS CJ:

Yes, I see.

MR FERGUSON:

So that's one issue.

GLAZEBROOK J:

But as far as you know it was essentially in the same terms?

MR FERGUSON:

No, I don't believe the conservation redress…

ELIAS CJ:

Well we don't have it, we probably…

MR FERGUSON:

No, it was very skeletal I'm advised, I want to be accurate in that, rather than saying it was in the same terms, so it was skeletal at that point. Linked to the same point as the conservation relationship agreement which I said I thought had now been signed. The execution of that, there's a commitment to sign but the actual physical signing of it by the Director-General and Ngāi Tai hasn't been completed yet, so it's initial generically between the Crown and the negotiators and therefore the commitment is there to sign, but it hasn't physically been signed as at yet. Thirdly, we talked about the settlement date, which is the date at which the, and specified in the legislation, at which the deed becomes unconditional, is actually 27 September, though obviously current practice is to extend that a little bit longer than it used to be, that appears like it's closer to 60 days out from the Royal assent. It used to be 20 commonly, but 27 September this will become operative in terms of a binding deed.

In terms of that original point about discussion of the conservation relationship agreement that I just mentioned, the description of it is found, well in terms of the status of that and what form it was in, and the ARP was back in 2011 but

volume 3 of the case on appeal, which is a white cover, page 411, and that is the second affidavit of James Brown on behalf of Ngāi Tai ki Tāmaki Tribal Trust. Paragraphs 19 to 21, 19 confirms what's on the deed of settlement in terms of that broader purpose of the agreement, but in paragraph 20 it clarifies when this was developed. "It was worked on with representatives from the Department in late 2013 and early 2014. It has remained largely unchanged since that time, hence the reference to the 'Ngai Tai ki Tamaki Settlement Act 2014' in the Agreement." And that reference to that date hasn't changed. It was included in the version of the deed that was initialled in July 2015. So as it appears in the deed it seems that that is the version that has been in chain from late 2013 so prior to all three consents including Ngāi Tai's being determined there was some substantially in the same form that it's in now, that's the evidential clarification of that point.

I think then just touching on the issue of Treaty principle and the question about whether there's a difference between, and my friends for the Crown and myself, I'm not sure whether there really is a difference in substance. Certainly I've perhaps gone into a little bit more detail in terms of articulating those principles, and how they interrelate to one another, being partnership, active protection, the right to development, the right of redress, and I've also touched on the importance in that regard also as a separate head of tikanga and address in the written submissions why that's interlinked with the exercise of those Article 2 rights in relation to taonga and lands in relation to Motutapu and Rangitoto in this regard and therefore that that is, that right of exercise of authority and control within those frameworks is one that is enshrined in those tikanga constructs and is reformed by them and the right to exercise tikanga in that regard, in a circumstance where one has a clear statutory directive such as section 4 raises that, the exercise of those particular matters to a heightened state, in my submission. As an aside I perhaps contrast the case of *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 (SC) if there had been a piece of legislation that had required one to give effect to the principles of the Treaty, or for that matter tikanga, then we may have been having a very different discourse around where that sits in the scheme of things from where that ended up, where the recognition was there as part of the fabric, but with

the added weight of the type of statutory impetus that section 4 gives to be able to exercise that tikanga in relation to those lands, waters and other resources where it's in conservation estate land, is a very important one and one that, with all due respect, the Court of Appeal, and again this goes back to the points, I suppose, of these, there seem to be a reference again that somehow the exercise of manaakitanga was to be applied on Ngāi Tai's argument so as to oust the express rights of accessing use that the Reserves Act and the Hauraki Gulf Marine Park Act provided, but again, as I made clear before the break, Ngāi Tai's position is not that it wishes to curtail public access, but rather that it wishes to have a primary role and a say in the terms upon which such activities occur in relation to the two islands and in that regard its view was that it was inappropriate for those concessions to be granted. There was a distinction drawn between the two, and I will turn to that in terms of the position, and Your Honours touched on that in relation to the question about Fullers and the tractor tours relative to the activities that are identified in the conservation relationship agreement, and it's acknowledged that there is no express reference to tractor tours, which are the ones that take place, as I understand it, in relation to Rangitoto. There is reference in the evidence to environmental concerns generally but there isn't evidence before Your Honours so I'm hesitant to relay the rationale that was given to the, in relation to, save as to say that Ngāi Tai are opposed to vehicular, and particularly diesel based vehicles, carrying out tours in relation to that environment, and therefore they are not seeking to carry out that sort of activity. But I don't want to take it any further than that, Ma'am, because it's not a point that, other than the question that's arisen is in evidence before you.

GLAZEBROOK J:

I thought it said it did want to do that in the submissions. Did want to do tractor tours. Was it a different type of tractor tour, or am I imagining that?

MR FERGUSON:

I will check that Ma'am. It may have been –

ELLEN FRANCE J:

Mr Brown does say, we're ready to step in and provide a Volcanic Explorer operation. Was that to be a different sort of operation?

MR FERGUSON:

My understanding is, yes Ma'am, but again I think we're in a different place if I'm going to try and fill that gap.

ELLEN FRANCE J:

That's at page 400 of volume 3, the evidence.

GLAZEBROOK J:

Yes, I thought I had seen that.

MR FERGUSON:

It's not clear whether the terms, I suppose is the point, as to whether the terms upon which that type of activity would occur would be the same or not.

GLAZEBROOK J:

Well it could be a different type of –

MR FERGUSON:

Well it could be a very different type of activity and I think we would be speculating. I mean I understand as far as I can go reliably is the diesel issue and the environmental issue from that respect. There might be other ways in which that can be carried out in a method that is less offensive for Ngāi Tai in that respect, on that issue alone.

I was touching on the issue of Treaty principle and as is ay I think apart from detail, unless there's, I think we are in a very similar place. I think we probably have a more fulsome explanation and view of Treaty principles and their articulation and the fact that they are not, I suppose in terms of an approach to them for Ngāi Tai, and this would be the submission, is that they do require very much decision-,makers to be fully informed of all relevant

circumstances in order to determine the way in which those principles are articulated, and whether the aspirations that are sought in relation to active protection in relation to the right to development are able to be reasonably achieved in that respect, and it is Ngāi Tai's experience and submission that the principles while oft expressed seldom have that level of sophisticated analysis, and often do default to a quasi-consultative process and then some kind of view of reasonableness in terms of the exercise of kāwanatanga that I suppose is distinct from the Crown's duties of active protection in the sense that – excuse me Your Honours. The computer decides it wants to not move up the page.

ELIAS CJ:

Well the active protection idea came from the use of the word "guarantee" in the English version of the Treaty, that's where it came from, so it says nothing about, well, so it's active steps to deliver on the Treaty promises including rangatiratanga.

MR FERGUSON:

That's right, and I think the concern that Ngāi Tai have is that, and it's the way certainly they've read the Crown's approach, and Ms Hardy can correct me if I'm wrong, that this sense that there's a degree to which, of reasonableness that colours active protection, and that's drawn from the Crown's right of a reasonable exercise of kāwanatanga –

ELIAS CJ:

But that can only be, and that's made clear in the *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) (*Broadcasting Assets)* case, that can only be that the Crown can only take such steps as are reasonable for it to take in the circumstances in affording the protection.

MR FERGUSON:

Yes.

ELIAS CJ:

This case does not seem to me a very difficult case in terms of application of the principles of the Treaty, so I'm a bit surprised that in the lower Courts there was so much focus on that because on your argument there wasn't a preference given to Ngāi Tai's wish to exclude commercial operators who were not connected with the Motu, and that that's really the extent of it, isn't it?

MR FERGUSON:

I think that's right Ma'am. there was a consciousness, I think, in the lower Courts, and as I say I wasn't counsel in those two hearings, I suppose to probably a degree of uncertainty as to what, the arguments that would be run in relation to Treaty principle, and certainly from Ngāi Tai's perspective, and I think that is reflected too in the written submissions as filed, a real concern that there has been a, or there has been potential for the principles to stagnate some in, in operative effect an interpretation to become kind of procedural touchstones rather than matters of substance, and I think it was just a desire that in the context of section 4, that this isn't just some balancing exercise against other factors but actually this is, and we would put it so far as to way that the Crown should be positively giving effect to the principles of the Treaty, particularly active protection and partnership, except where to do so would be unreasonable. So not the Crown moving up to a level of reasonableness, but the Crown going as far until there's a point where it would become unreasonable due to prevailing circumstances, and we've seen reference in *Broadcasting Assets* et cetera to financial circumstances and other imperatives, where it would be unreasonable to go beyond that. now, with respect, those two tests are slightly different in terms of the standard and what I'm saying is that if the Crown is relying on there's a kind of a broad discretion and as long as you're in the grounds of reasonableness we're okay in that kind of administrative law sense, I think with respect that section 4 demands action. It doesn't demand the Crown to do something unreasonable but it should be pushing to the highest levels of compliance in that regard to do so, and with respect I would certainly say that if Ngāi Tai was standing here saying the negative veto that was to stop everything else and nobody

else is going to have access and we want to enjoy this place, then that is going to that point of unreasonableness, but we do want to be clear that it is about a number of activities, what those activities do, the way in which they're carried out in a manner that accords with, is consistent with and upholds the values and responsibilities of Ngāi Tai, and it maybe, depending on the nature of the activity, that that can only occur if Ngāi Tai are actively involved in that, even in partnership or themselves. Now that's a different thing from saying public are excluded or a right of veto. It's saying that such is the relationship between Ngāi Tai and Motutapu and also Rangitoto in terms of its interests there, that those things need to be manifest in any activities of a commercial nature on the island. It's not to stop people accessing, and obviously there are other –

O'REGAN J:

But no one is suggesting there's an attempt to stop people accessing the islands. The veto argument is it's a veto of other commercial operations.

MR FERGUSON:

Yes, well –

O'REGAN J:

And I'm not quite sure why you're shrinking from that, because that is your case, isn't it? You're saying that in these circumstances Ngāi Tai should either be the provider or should approve of the provider.

MR FERGUSON:

Or should be setting the standards through the Department, I'll put it another way. The Department should be setting standards that uphold Ngāi Tai's values and principles, and if a concessionaire can –

ELIAS CJ:

But that might be Ngāi Tai's stance that it is able to put forward, but the question for us is whether the decision, accepting or rejecting that stance, is amenable to judicial review because it's not reasonable or it hasn't taken into

account that attitude. So there's no, well, it's hard to see that there's a veto simply because Ngāi Tai says its preference is not to have other commercial operators without its consent.

GLAZEBROOK J:
Well isn't the argument that that's required by section 4, so it's an error of law not to have given effect to what you say should have been given effect to.

MR FERGUSON:
That's correct, so I think, you know, I described it in terms of Ngāi Tai priorities, so in terms of the right to development and opportunity or an economic variety which is recognised by authority and by Treaty principle in these circumstances, and also primacy in terms of the setting of that standard for operations on Motutapu, and those things. It was simply in, I think the comment, in terms of the, it was how the Court of Appeal had placed it in terms of, I took page, paragraphs 52 of the Court of Appeal's judgment, "In terms of the present issue it cannot be inferred from the relevant provisions of the HGMP Act that manaakitanga was to be applied here so as to oust the express rights of access and use that the HGMP Act (and indeed the Reserves Act) assure. That would be to elevate that principle beyond statute. Secondly, we are not persuaded on the evidence before us that manaakitanga has been so transgressed that it can be said, in terms of s 4 of the Conservation Act, that the principle of active protection requires its enforcement to the extent that other forms of visitor experience (most obviously the guided tours) must be excluded."

And again, it just seemed to me that because of the way that judgment started, by immediately going to veto, that that had been perceived as a veto, and I'm just being very careful, and as has already been reported in the lead-up to this case, this is a case about veto, and–

WILLIAM YOUNG J:

I mean it's all I suppose a question of usage but your position is that essentially without the approval of Ngāi Tai the concession shouldn't be granted?

MR FERGUSON:

Without the approval of, well I think there are different ways in which you would approach this. In an ideal world I think what the Department should be doing is agreeing with Ngāi Tai the nature and terms on which concession, types of activities and the terms of those activities that can occur on the Motu –

ELIAS CJ:

Or justify why, in its decision, why Ngāi Tai's preference is not –

MR FERGUSON:

Reasonable.

ELIAS CJ:

– going to be, yes, but it's the absence of that that's the –

MR FERGUSON:

It's that engagement that is missing.

WILLIAM YOUNG J:

Just coming back. Can you conceive of a situation in which Ngāi Tai could say we oppose this concession but it would nonetheless be properly granted?

MR FERGUSON:

I don't –

WILLIAM YOUNG J:

I suspect the answer is no, isn't it?

MR FERGUSON:

No, I'm being very careful about this because I do not think, and I'm going to be careful – making a submission in this regard, but I don't think that the exercise of rights under the Treaty by way of rangatiratanga and application of tikanga is something that Ngāi Tai would or should be exercising in an arbitrary or unprincipled way, and so any refusal, if the refusal is – I think there must be some degree of rationality to that within, with respect to the principles of the Treaty that Ngāi Tai are trying to uphold, and I'm not sure if I'm making myself clear in that regard, but I think I am saying, and I think we saw this, and if I perhaps look at, and again it is by analogy and I think it is referenced, perhaps not in the Supreme Court judgment, but perhaps the Court of Appeal in the *Takamore* case that if one wants to rely on tikanga one must follow tikanga, and I think that duty of manaakitanga is a right but its more an obligation, so I think Ngāi Tai is very much aware of that and I am sure that they are aware that if they are able to have that degree of input, that it is something that needs to be carefully considered and balanced and worked through in relation to those principles, and so I'm, I wouldn't even concede that I can simply arbitrarily say we don't approve. I think there needs to be a rational –

WILLIAM YOUNG J:

Who might say if it's arbitrary.

MR FERGUSON:

Sorry?

WILLIAM YOUNG J:

Who would express a judgment as to whether it's arbitrary, a refusal is arbitrary?

MR FERGUSON:

I would have thought that in relation to that, given that it is still the Department's decision, that would be addressed through that process, and again a lot of these things are about the fact that processes do not exist to

address these matters. The Department has not put in place the mechanisms that actually allow these types of conversations and these type of developments to occur, and it maybe that the plan for the Motu, the Hauraki, Tāmaki Motu, may well help to assist developing as it's allowed to develop on an island by island, motu by motu, basis. That may provide a lot more comfort around that but as we stand we are in a little bit of a shell in terms of not only wat the Department is doing but also what are the, how are those principles interact if they're given an opportunity to do so in terms of the development of that type of plan and that type of approach, which is what the Treaty contemplated in my view, that these arrangements would be worked through, and while Ngāi Tai certainly doesn't step away from its right to, its view that it has a right to a development, it has a right to move forward from those Treaty breaches and that shackling of economic development and social and cultural wellbeing, comes with that over the better part of the last 170 years or so. It doesn't move away from that but I think it also has a responsibility on a broader plane in relation to the health and wellbeing of Motutapu for the benefit of all and so it needs to work within those paradigms as well, which are the paradigms that tikanga demands and those obligations of kaitiakitanga and manaakitanga. That whanaunga relationship that I talked about at the outset between Ngāi Tai and the environment is about sharing ones house, sharing ones family member in the form of the environment, and therefore care and responsibility comes with that, both to the environment and to those manuhiri, those visitors who come to the island, under whatever mechanism they come there.

GLAZEBROOK J:

Can I just check, what do you say the relationship is with public access, you just mentioned something at the end of that in terms of visitors. How do those – I can understand the submission, and it's obviously based quite soundly in terms of the conservation value and tikanga actually coalesce and that's recognised in the Resource Management Act as well. What do you say about the public access issue?

MR FERGUSON:

My understanding is that, that obviously the guided tours, depending on how one gets to the island, provide a mechanism of movement other than walking around, but I understand that, as a recreational reserve as in the case of –

GLAZEBROOK J:

What I'm really asking is what do you say the relationship between section 4 and those provisions that –

MR FERGUSON:

Look I think to the extent that, as I understand it, DOC maintain an office on Motutapu and therefore visitors come on based on acceptance of conditions and directions and guidelines et cetera, even independent visitors, if we should call them that, that the Department is under an obligation to ensure that again those standards and that assistance and that facilitation is available. Now whether that's signage or something else, Ngāi Tai go so far as to say if you turn up to the island you've got to pay them to go on a tour with Ngāi Tai, that is not the principle, and I don't think there is any desire to fetter that beyond any existing controls that the Department, mechanisms the Department also already has in place in terms of the control of visitor numbers and conduct and behaviours. It'll be a question of Ngāi Tai working with the Department and enhancing or developing those to the extent that they are inadequate, but that's not the issue of contest in this present case.

GLAZEBROOK J:

Yes, although one could argue that if you only have independent access it's limited to those people who have access to motorboats or to yachts, or can, in some way or another, which would mean not really public access and not doing terribly much for the disabled.

MR FERGUSON:

Yes, I think the – yes, as I understand it the transportation of people to the island with Fullers, that that isn't part of the concession that is under challenge, so it's the activities on the island.

GLAZEBROOK J:

No, I understand that, it's just I was just trying to get a sense, say it was at issue, trying to get a sense of what the submission was in respect of that.

MR FERGUSON:

Well that's a, that could –

GLAZEBROOK J:

Just in terms of there's public access and there's the right to control.

MR FERGUSON:

And there's means of people getting there independently or on publicly available paid transport can get to the island and what we're talking about is what happens once they are there if they wish to go on a guided tour. By these tour operators in any event.

GLAZEBROOK J:

Do you agree with the Court of Appeal or not in terms of the statutory relationship between section 4 and those provisions, say, in public access, or would you say section 4 trumps those if it happens to need to, and obviously the issue of whether it needs to for conservation purposes is something different. Because in fact it would, the conservation purposes would trump public access in any event without section 4.

MR FERGUSON:

That's correct Ma'am. my view is that I think that there is, there appears to be a sense, and I'm not sure if it comes through as strong in my friend's submission, to the extent that somehow rights of access and use, and we're talking generically, so perhaps potentially commercial access under the Reserves Act and the Hauraki Gulf Marine Park Act are somehow sacrosanct and section 4 can't fetter those in some way and in the sense, in terms of relativity, and I wonder whether in some part that comes from a notion that's found in the Department of Conservation's statement of general policy, which is in, and I might take Your Honours to that just by way of example, and then

perhaps return to the statutory scheme. So in volume 3 of the joint authorities, there's a white volume with Waitangi Tribunal reports and other documents on the front of it, on page –

GLAZEBROOK J:
Well is your submission that it does trump, section 4 does trump? If it needed to?

MR FERGUSON:
If it needed to my submission is that you would need to interpret and apply the relevant objectives in the Reserves Act or the Hauraki Gulf Marine Park Act in a way that does give effect to that or that interpretation. Now to the extent that there is an absolute inconsistency, and I, one is talking about a potential hypothetical there because I can't immediately think of one where one would say there is some Treaty principle that is, that somehow butts up against absolutely such that it shouldn't carry the day, but in my view on the statutory scheme is that I don't think that that conflict should be resolvable and that the approach that's recorded in the statement of general policy in my submission overstates the matter, and I just wanted to take you to that, just so you could see how the Department at least in the statement of general policy express it, and it's on page 1097 of volume 3, which is some 15 pages into the Conservation General Policy, and you'll see the heading, "Treaty of Waitangi Responsibilities. The Conservation Act 1987, and all the Acts listed in its First Schedule, must be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi (section 4, Conservation Act 1987). Where, however, there is clearly an inconsistency between the provisions of any of these Acts and the principles of the Treaty, the provisions of the relevant Act will apply." And it's that hard edge that I certainly on reading this question. It's a bit hard to know what they're meaning by "an inconsistency" in that sense. Is this, that it would require, as I said before, an action so unreasonable on the part of the Crown that, you know, can't be properly said –

ELIAS CJ:

It's hard to know what –

GLAZEBROOK J:

It can't be right anyway. It would be right if the Treaty wasn't incorporated explicitly but the principles of the Treaty, the requirement to give effect to the principles of the Treaty is in the Act itself, and so if there's inconsistency between two provisions you would probably do what you would normally do in terms of trying to work out how that inconsistency, as a matter of statutory interpretation, works.

MR FERGUSON:

That's right, but it's fundamental –

ELIAS CJ:

Or implied repeal.

GLAZEBROOK J:

Or implied repeal, yes.

MR FERGUSON:

Yes, so the concern is, I mean to the extent that this represents a position of the Department, it does on its face, it seems to me the default is always against –

ELIAS CJ:

We're probably aren't really arguing this are we.

MR FERGUSON:

This particular point, no.

ELIAS CJ:

No, I don't think we should perhaps take too much time –

MR FERGUSON:

But I did want to make the point that both in the case of the Hauraki Gulf Marine Park and the Reserves Act that actually the provisions in those Act are stated to not undermine or derogate from the overarching obligation in section 4, and that was the important point I wanted to come to, and one can trace that through in all the cases, and even with respect in the, to the extent that this conservation intention, and I don't think there is a conservation intention, I think to the extent people talk about it I think it's misguided and I don't think there is intention at a general rule between the values of Māori in relation to conservation ethic and what the Department wants. If anything it would be that perhaps that iwi and hapū are often trying to advance the standard rather than lock things up in some kind of preserved unchanging/changing way, but in relation to that legislation, and I'll make sure I have the right reference. There is no overarching statement of purpose, of course, in the Conservation Act. It's somewhat unusual. People talk about conservation principles. Instead what one has is a general, there's a definition of "conservation" in the interpretation section but it's the functions of the Department in section 6 which say, "The functions of the Department are to administer this Act and the enactments specified in Schedule 1, and, subject to this Act and those enactments and to the directions (if any) of the Minister," to do these various functions. So even in exercising these functions it's subject to this Act and again that just reinforces the overarching section 4, that qualifies even those functions of the Department in that regard. So the so-called inconsistent tensions I think – I'm unaware of an example that could exist where that would be the case. I think even if, for example, there was, and I'm using an extreme example, in urupā, and there will be urupā, and highly tapu place sites on various conservation estates where the Department itself commonly embraces and excludes the public. Now when it's doing that it's upholding obviously perhaps public conservation areas but more particularly the values of iwi and hapū and to suggest that somehow that runs up against, because it's preventing public access onto every inch of conservation estate, wouldn't carry the day I think under any reasonable assessment, so in my submission, given the primacy of this clause and it's weight, given the primary and the importance of te Tiriti in terms of the fabric

generically now of the New Zealand society and legal system, that in my submission if there is to be any sway or movement, it should be in favour of adhenrece to the principles and giving effect to them being the other way.

ELIAS CJ:

Can you tell us what else you need to address in your submissions to us Mr Ferguson?

MR FERGUSON:

I've probably covered in a round and about way much of this, albeit perhaps in slightly different terms of emphasis. I was going to make an observation by way of passing that there are, and I think it's consistent with the submission I made earlier, but there are provisions within the, for example, the concessions regime in Part 3B of the Conservation Act which actually allows the Crown, the Department to take a very proactive course in terms of the grant of, in consideration of consents and that's in section 17ZG, we've got one of those awful constantly amended Part 3B where nobody wants to amend anything or change anything, beyond section 17 so section 17 currently I think goes up to section 17ZJ, which is somewhat unwieldy, but interestingly in terms of 17ZG, which is in volume 2A at page 733.

GLAZEBROOK J:

Sorry, what was the point?

MR FERGUSON:

Sorry, page 733, paragraph –

GLAZEBROOK J:

No, I've got that.

MR FERGUSON:

Sorry, the point, so in terms of if we're talking about affirmative action this section actually enables the Director-General or Minister without limiting any other power exercisable to tender the right to make an application, invite

applications, or carry out other actions that may encourage specific applications. So in other words, in my submission, under this provision for example it would be perfectly reasonable for the Minister to actually start targeting the positive economic and other development of iwi opportunities in terms of commercial activities by carrying out actions to encourage specific applications. So rather than just simply sit and receive applications cold and process them as they come through the door, and when that power is in place, then under the earlier section 17R on page 720, which says, "Any person may apply to the Minister for a concession to conduct an activity in a conservation area." But it does say in subsection (2) of 17R on 720, "However, a person must not apply to the Minister for a concession if the Minister has exercised a power under section 17ZG to initiate a process that relates to such an application for a concession." So, "And the application would be inconsistent with the process." So potentially if initiated this could provide some scope for a degree of primacy and priority, if the Department or Minister elected to go down this approach to positively enhance and allow priority access or primacy. So there are negotiations within the legislation. I'm not aware of those provisions ever being used, they may well have been, but it's interesting to note that there are tools within the suite that do allow the Department to do many things and, again, I think this reflects, I suppose, a little bit like the joint management agreements and the RMA that sat there but were never, ever given effect to by local Government.

In terms of any final matters, I think I have traversed the major part of these. In terms of the relief, the two grounds that were found to have been erroneous in relation to the decision making that that economic interests of Ngāi Tai were not relevant and that they had no priority right of access in that respect, which were classified as minor. In my submission that isn't correct. When we are dealing with errors that go to the heart of a paramount provision like section 4 and when one looks at what properly should be grappled with by the Department in this light, it is not sufficient to simply compartmentalise these matters and say that, oh, well, there was some regard to the fact that Ngāi Tai had a concession, they had 10 years so it was twice as long as the others and that's their preference or priority. With all due respect, those are significant

errors when it reflects a failure in the decision-making process at a much more fundamental level and that in view of the settlement, in view of the broader context, the appropriate course is for these concessions to be reconsidered in light of those facts.

WILLIAM YOUNG J:
I just wonder what the decision maker meant by saying there's no scope for preference because she did provide a preference.

MR FERGUSON:
She provided a longer term.

WILLIAM YOUNG J:
Yes.

MR FERGUSON:
I'm not sure if that's a preference. It's a longer right but I'm not sure it gives one any – it doesn't give any priority in that respect.

WILLIAM YOUNG J:
But it did, I mean it's better, it's better for the concessionaire.

MR FERGUSON:
In terms of long-term certainty?

WILLIAM YOUNG J:
Yes.

MR FERGUSON:
Yes, whether that's a preference, a proper, whether I would – I wouldn't describe that as a preference to Ngāi Tai as I think 10 years was the standard rate and in fact what –

WILLIAM YOUNG J:
Well, the others got a discount.

MR FERGUSON:

The other ones got a, not a discount, if one wants to call it a discount, but they got a shorter term, and, look, part of that might have been motivated by, I'm hypothesising here by the fact we're all going to be in a difference post-settlement realm and things might all have a different look then, but it comes back to my –

O'REGAN J:

Well, that was stated, wasn't it, that the settlement would be done by then and then things could be reconsidered?

MR FERGUSON:

Yes, and I think my point is that actually all of those matters are live matters now and one does not need, nor should the Department be waiting for settlement to give effect to those clear understanding rights and interests and responsibilities and that that essentially is a kicking for touch and that's not appropriate in the circumstances nor a good rationale. If the kicking to touch was to be done, it would have been to decline the concessions until such time rather than to allow them to occur, particularly when they were including in part new activities entirely.

And unless there's anything further, I think I have traversed the substantive issues that I wish to.

O'REGAN J:

Can I just ask you, you seek an order from the Court quashing the decisions to grant the concessions to the other two concession holders, so what do you say should happen in the meantime between that order being made, if it's made, and the reconsideration by the Department?

MR FERGUSON:

I think there is, and I can, this point can be clarified by my friend for Motutapu Restoration Trust, that they have not been exercising their concession out of respect for Ngāi Tai and that is appreciated, and I'm not sure if that position

has continued post the Court of Appeal but my friend will be able to clarify that. So I think in relation to that, that certainly is, would be almost a continuation of the status quo to have that reconsidered in relation to the Fullers which was the new consent in respect of Rangitoto then the view is that should be quashed pending reconsideration in a proper way. That would be the primary relief sought.

WILLIAM YOUNG J:
You say it stopped, the system stops dead in the water.

MR FERGUSON:
That's the relief that Ngāi Tai seek primarily, that's their primary relief. I can certainly take instructions as to whether there's an alternative to that but that's it as pleaded currently.

O'REGAN J:
So you would seek an order stopping the operation of the current concessions?

MR FERGUSON:
Yes. I'll just double check that there's been no change in that position, because I want to get this right. Here we are. That's what happens when one looks at simplistic statements that don't reflect the, I want to confirm, because I think this hasn't quite been captured right in the position to date. So in relation, and I want to make it quite clear, in relation to Fullers Group for its Volcanic Explorer operation, they do want a declaration that the decision was an error and unlawful on that basis, and an order directing the Director-General to reconsider, but on terms that Ngāi Tai would allow the Fullers Group Volcanic Explorer operation to continue pending the outcome of the reconsideration decision. So not stopped dead in the water. In relation to Mr Potter I understand that that concession, subject to anything my friend says, and I can obviously reply to that, isn't that operation and Ngāi Tai acknowledge that position from them. Therefore quashing is of no prejudice in regard if the reconsideration decision can be moved to promptly.

O'REGAN J:

So it would be a sort of a deferred quashing in order to reconsider with the existing decision being quashed as from the moment the reconsideration decision is made, is that correct.

MR FERGUSON:

Yes. The findings appropriate to inform that decision being made, but as you say essentially the quashing, an order quashing, essentially sitting on the – as it were, on the books until such time as the reconsideration is made.

WILLIAM YOUNG J:

I may have missed something. But is it possible the decision-maker in the references to "preference" and "economic interests" was referring to the as yet non-ratified status of the deed of settlement? And that that then links in with the view that once, when five year elapses, the position is that will have been established?

MR FERGUSON:

I certainly hadn't read it that way Sir, and I think it's –

WILLIAM YOUNG J:

It doesn't make the easiest reading that document.

MR FERGUSON:

Many of these documents are of that vein, I'm afraid, but I think that would be going too far. Given the, while there's a commitment within a relationship agreement, they're exploration rather than – if they were guarantees of outcomes then I could, one might be able to see that, but again they're saying they wish to explore these things and that's acknowledged by the Department, but I don't think one can really put great weight on that as being a commitment to the type of priority and primacy and economic benefit of the kind required.

ELIAS CJ:

Thank you Mr Ferguson.

MR FERGUSON:

Thank you Ma'am. Sorry Ma'am, there was just one final point and Mr Warren has reminded me of it. I've raised this briefly with my friend for the Crown Ms Hardy in relation to there being any doubt about relationship with Motutapu and mana whenua status. Ngāi Tai in a meeting with the Department yesterday was handed a document entitled, "Rangitoto and Motutapu Island, Island Operation Procedures," issued 16 April 2008. They've never seen it before. They received it yesterday. It's obviously not before Your Honours, but if that's a live issue about recognition by the Department of mana whenua status, I don't think it is, then I will seek leave to –

ELIAS CJ:

Well I'm sure it's not.

MR FERGUSON:

I'm sure it's not too Ma'am but I thought I should fairly raise it.

ELIAS CJ:

Yes, thank you. Mr Illingworth, you can get underway, thank you.

MR ILLINGWORTH QC:

Thank you Your Honour. If the Court pleases. On the face of this matter the case involves a discrete issue between the appellant and the respondents, so the question is what has this got to do with Ngāi Tahu. The answer is that this is the first case since the judgment of the Court of Appeal in the *Whales* case to consider directly the crucially important provisions of section 4. It's also the first case in which section 4 will be directly considered at this level, and as the largest iwi in the South Island, with close connections to large areas of conservation land there, Ngāi Tahu has a vital interest in ensuring that section 4 is correctly interpreted and applied in its takiwā.

The conundrum. In this case the appellant seeks a high level of recognition for its status as tangata whenua in relation to the two motu in question. But the respondents claim that the appellant is really trying to secure an

improper right of veto. So that seems to create a conundrum. The decision-making model is, on the one hand, all the powers in the hands of the Crown. On the other hand, a trump card in the hands of the local iwi.

ELIAS CJ:

That was argued in the *Whales* case too, wasn't it?

MR ILLINGWORTH QC:

Yes.

ELIAS CJ:

The veto. It was characterised.

MR ILLINGWORTH QC:

Yes Your Honour. So in our submission we need a more nuanced and more sophisticated approach to the decision-making model. Ngāi Tahu submits that the principles of the Treaty, including the concepts of partnership and shared decision-making, must be given full and appropriate effect and then importantly that the correct balance can properly be achieved without injury to the existing legislative framework. In our written submissions we've addressed the nature of section 4, and the reasons Parliament adopted it, in what is Ngāi Tahu's submission the most powerful possible requirement to give effect to the Treaty in relation to the conservation estate. We submit that section 4 is in and of itself an empowering provision that both allows and requires the Department to adopt partnership mechanisms as we've described in our submissions. This is so because section 4 requires the Minister or the Department to administer the Act so as to give effect to Treaty principles, but then, as Mr Ferguson has just mentioned a few minutes ago, takes us through to section 6, and section 6 talks about the functions of the Department being to administer this Act, and importantly the enactment specified in Schedule 1, which shouldn't be overlooked but they're very important enactments, and to manage for conservation purposes all land and all other natural historic resources for the time being held under this Act. Now if one reads section 4

with section 6 one can see that that is a very powerful source of power on its own.

We then come to the conservation authority and conservation boards. Their powers are set out in section 6B and again section 4 can be read as controlling those functions, permeating the whole statute, including the functions and powers of the conservation authority and conservation board. Mr Ferguson has mentioned the important provisions of section 17F and 17G. There are provisions there concerning the preparation and approval of draft conservation management strategies. The provisions of section 17R and 17Z, which go together, 17ZG, which deals with management activities, all of those provisions can be read as being influenced by section 4, and so we see that section 4 permeates the whole Act including, as I've just mentioned, the statutes, the separate statutes that are administered by the Department in Schedule 1.

So we submit that the statutory scheme can be synthesised together and made to work together with section 4 very readily, but that is not something that is evident in the judgment under appeal in this case, and the opportunity doesn't seem to have been taken to explore how section 4 is to synthesise with the rest of the statutory scheme. Now the real question therefore is how does section 4 find expression in the rest of the statutory scheme, including the concessions provision?

We come to what we say are serious errors in the present case. In this case, both of the Courts below accepted that the decision makers had acted inconsistently with section 4 and had therefore misdirected themselves in law. In essence, the decision makers erred by saying that the power to grant concessions could not be used to provide preferential treatment or to provide economic benefits for the local iwi.

GLAZEBROOK J:
Sorry, did you say the Court said that or the decision said that?

MR ILLINGWORTH QC:
The decision said that.

GLAZEBROOK J:
Right.

MR ILLINGWORTH QC:
And the Courts below –

GLAZEBROOK J:
The Courts agreed that was wrong?

MR ILLINGWORTH QC:
– agreed that that was wrong. And those conclusions were correctly held to be inconsistent with the requirements of section 4 and we say that's all correct.

ELIAS CJ:
Sorry, the second one?

MR ILLINGWORTH QC:
The conclusions of the decision makers were correctly held to be inconsistent with the requirements of section 4. So we say so far so good. That was correct. But having concluded that the decisions in question were based on material errors of law, it seems highly unusual that the decisions were not declared to be invalid and remitted for redetermination. Now it's not Ngāi Tahu's role to comment on the facts of this particular case but the failure of the Courts below to correct the errors which were acknowledged seems to set an extremely unfortunate precedent for future cases and it is this that Ngāi Tahu is very concerned about.

So what are the basic principles that this Court needs to re-establish in order to correct the record? In our submission the correct starting point is the landmark decision of the House of Lords in *Padfield v Minister of Agriculture,*

Fisheries and Food [1968] AC 997. In that case, and I'm sure the Court needs no reminding, but Lord Reid famously said that Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, and the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the Court, and then further on, "If the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our laws would be very defective if persons aggrieved were not entitled to the protect of the Court."

Importantly, having determined that the Act had been misconstrued and that the power in question had not been exercised in accordance with law, their Lordships allowed the appeal and sent the matter back for reconsideration. We say that is the model for how this case should be resolved too. *Padfield* epitomises the elementary principle that the use of a power in a way that's inconsistent with the intention of the legislature is an error of law that falls under the direct control of the Courts. It is not a matter in respect of which deference or a Wednesbury approach are necessary.

So in our submission the *Padfield* principle underpins both the 1994 decision of the Privy Council in the *Broadcasting Assets* case and the 2013 decision of this Court in *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 (SC) (*Mighty River Power* case). In both cases the principle of direct review for error of law was unambiguously confirmed and we submit that that principle should govern the outcome both in the present case and cases like it.

Coming then to the question of discretionary remedies, in the *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (HC) (CA) (the *Lands* case) section 9 of the State-Owned Enterprises Act 1986 was described as a paramount provision. If that observation was correct, and we submit that it clearly was, section 4 of the Conservation Act must also be similarly a paramount provision. Its wording is significantly stronger than section 9 and

it's mandatory direction permeates every aspect of the Conservation Act. For a Court to conclude that a decision-maker has acted in breach of a paramount provision but to decline to make at least a formal declaration of invalidity we submit is wrong in principle. A determination of that kind sends the wrong message a compliance with the rule of law. It also trivialises the failure to interpret and administer the Act in accordance with principles that are of the utmost importance to those who are meant to be treated as partners who are owed fiduciary obligations.

How then should the power to grant concessioners be exercised? We submit that it is not sufficient for the Department merely to go through the motions of consulting with local iwi, hapū and whānau. Section 4 requires more than a decision-maker merely going through the motions of fair process. It requires the partnership and protection principles to be given effect in a substantive sense and it is certainly not enough to pay mere lip service to Treaty principles. Treaty principles must be given full and appropriate effect and the statutory scheme clearly allows that to be done and that, of course, takes us straight back to *Padfield* but it also takes us to the predecessor of *Padfield* which is the *Tameside* case. In *Padfield* the Minister had certain powers available to him which could and should have been utilised in the circumstances. The Lords held that it was an error of law for the Minister not to utilise those powers because Parliament must have intended them to be used in a situation of the kind that had arisen. The same applies here. As we have shown, there are several powers available to a Minister of Conservation that can and should be used to determine whether Treaty principles are engaged by a proposed decision-making process and, if so, what measures are available to ensure that Treaty principles are given appropriate effect.

As the *Tameside* case established, a decision-maker may have an implied obligation to seek out relevant information in a proactive way before exercising a statutory power of decision, and we submit that the *Tameside* principle applies in full force to decisions that are likely to affect iwi interests, such as rangatiratanga, kaitiakitanga, manaakitanga and the protection of taonga.

In Ngāi Tahu's submission the *Tameside* principle and the doctrine of active protection of Treaty interests go hand in hand. Decision-makers cannot sit back and wait for information to land on their desks. There is an obligation to seek out appropriate information and to act upon it where necessary in order to ensure that right decisions are made.

And Mr Ferguson has dealt with the issue of whether the Department acquainted itself with the appropriate material in relation to the Motu and the relationship between Ngāi Tai and the Motu area.

So, in summary, Ngāi Tahu are extremely concerned at the potential for this case to represent a serious step backwards in relation to the rights and interests of iwi concerning the administration of the conservation estate and that, as I've said, is a matter of the utmost significance to Ngāi Tahu. Part of the answer we submit is for the decisions in the Court below to be overruled in relation to the refusal to grant relief and for appropriate relief to be granted. More importantly, though, it is absolutely imperative for decision-makes to be reminded very forcefully of the following points. Section 4 creates substantive obligations which in appropriate cases may require proactive, preferential treatment. It is not enough to pay lip service to Treaty principles by merely going through the motions of consultation and fair process. The Minister, the Department and other decision-makers under the Act, such as the New Zealand Conservation Authority, must proactively explore how they can give real force and effect to Treaty principles through section 4, including, in particular, the essential principles of protection and partnership.

If the Court pleases, those are our submissions.

ELIAS CJ:
Thank you, Mr Illingworth. All right, we will take the lunch adjournment now.

COURT ADJOURNS: 12.54 PM

COURT RESUMES: 2.15 PM

MS HARDY:
Your Honours, I appreciate that you will have read the Crown's written submissions, so I propose to start with an overview of the Crown's key points and then if necessary and as necessary go to the detail of the written submissions.

Broadly, of course, the Crown's position is that the Courts below were correct, that despite the identification of two misstatements of the legal position in the concession reports and decisions under review, looked at in the round there was compliance with section 4 of the Conservation Act and as is readily apparent from the Crown's written submission, our focus is on the detail of the three decision that were made about Motutapu and Rangitoto. So that includes both the decisions under challenge and the decision in favour of Ngāi Tai. Those decisions are all included in volume 4A on the case on appeal, and they include both the decisions and the contracts which emerged from those decisions.

So I would like to briefly go to those decisions to traverse the points that are covered. Frist there is the initial Motutapu reserve trust decision, and that's at page 564. There's a page of a noting of the decision, but the key document is the non-notified concession report to the decision-maker. That traverses a summary of the proposal identifying that the term is five years but of course –

GLAZEBROOK J:
Sorry, where are you?

MS HARDY:
Page 566 Your Honour. So just broadly going through the decision report. The restoration trust is a charitable trust. It sought 10 years but received five years of a concession. In its own view its work was complementary to the Ngāi Tai application which had earlier been granted. It was a modest concession on page 567, a maximum party size of 12 clients per trip, up to

seven trips per week, and a maximum of 365. Then the locations of those trips are recorded on the following page. Then a summary of the consultation and feedback received about the concession application, including Ngāi Tai's objection made by James Brown, also made through the lawyers. A response from Tāmaki Collective is recorded on page 570. At the bottom of page 570 is addressing of conservation issues, so this concession was to take place on marked or formed tracks, and the identification that the number of trips and the effect from a conservation point of view not high. The following page, this is 570 of the case, there is a recording there under the heading, "Cultural Effects", and, "Economic Benefit to Iwi." A recording of Ngāi Tai's objection to the applications. They held concerns that their Treaty settlement was being compromised. Then below that first bullet point is what the Crown accepts is an overstatement of the legal position. That there could be no preference and clearly that proposition doesn't stand baldly in that fashion given the *Whales* case. However, the decision goes on to deal with the issue of active protection, concluding at the bottom of 571 that the Department will not recommend a decline in these circumstances based on active protection, but acknowledging that in some instances that might be required.

ELIAS CJ:

Sorry, but this report, which is adopted by the decision-maker, that's the sequence isn't it, sees active protection as addressed by an opportunity to make application for another concession.

MS HARDY:

It sees active protection in that the concession to the Motutapu Trust is seen as not compromising Ngāi Tai's own concession.

ELIAS CJ:

Yes, but that's the only way in which it's addressed.

MS HARDY:

Well it's also addressed, and this comes to the five year term, that clearly the decision-maker has looked at all of the applications in the round, and

conceived of a more refined and negotiated out approach to concessions on the two motu in relation to the Motu plan under the Collective Redress Act of 2014.

There's reference, too, at page 575 that the conservation management strategy for the area notes the value of the work undertaken by the applicant. They are an ecological restoration trust and they have identified that the purpose of their seeking a modest concession is to be able to fund that work and put the money back into the island.

ELIAS CJ:
Was there any sort of substantiation of that?

MS HARDY:
The trust –

ELIAS CJ:
Not referred to in this.

MS HARDY:
The trust deed itself, and I'm not sure if that's on the case on appeal, identifies the purposes of the trust and I'm sure my friend –

ELIAS CJ:
No, I mean substantiation of how it will, you know, whether it stacks up in terms of making money to put into the trust. It's just an assertion here. It wasn't anything that was expanded on, was it?

MS HARDY:
Not expanded on in the report.

ELIAS CJ:
Well it's just really an assertion that they'll be able to gain some income from this activity.

MS HARDY:

That's right, it was the first, it's the first guiding application that they had sought, so doubtless they anticipated making an income from the, in the framework of the guiding tour, just as Ngāi Tai must have made the same assessment seeking a very similar concession themselves. And then at page 579 is the point that although a period of nine years and six months was sought, the penultimate line there makes the point that it is recommended that five years be approved.

There are then special conditions required of the trust and they're recorded around page 582 of the case on appeal. So under the heading, "Wāhi Tapu," on that page, a concessionaire must recognise the sensitivity of wāhi tapu and urupā, seek guidance of iwi who claim mana whenua to providing interpretation on matters of iwi cultural significance and recognise the sensitivity of wāhi tapu and urupā.

And then, further down that page, under the heading, "Interpretation materials," "The concessionaire must," this is paragraph 9, "must consult with and seek the guidance of iwi claiming mana whenua over any parts of the land prior to providing interpretation on matters of cultural significance to such iwi."

So that's the first Motutapu Trust decision and, as you will be aware from the chronologies filed, that was a decision retaken at the request of the Trust when they wanted to pause commencement of their concession, mindful of Ngāi Tai's opposition. So a subsequent decision was taken in October that same year, 2015, but no terms altered.

The Fuller decision is also in the same volume and it's at page 610. Again, just to quickly go through this critical decision, it's the case that Fullers had been operating a guided transport experience since 1998 and had been operating since the expiry of that concession on a rollover under the Conservation Act. So this was its fresh application. It sought –

ELIAS CJ:
The rollover provision, don't take us to it, what's the section?

MS HARDY:
Section 17ZAAB. It's under the heading, "Summary of Proposal," on that first page, page 610, of the case.

So again, although the statement says, "Terms sought," that's sought in the recommendation, a 10-year term was sought in Fullers' application and they were restricted, despite the scale of the business, also to a five-year term.

Again, turning over the page, at 610 of the case, there is a record there of meetings with Ngāi Tai and with other iwi that have interests in the Motu. There's a record on the following page, 613, of meetings that the Tāmaki Collective, Nga Mana Whenua o Tāmaki, had with DOC. So that was meeting DOC with Paul Majurey.

There's a commentary at page 615 that the applicant doesn't seek any exclusivity in the use of buildings that DOC owned relevant to the experience. That's at the top of page 615.

Then below the bullet point, "Economic benefit to Iwi," is the statement which was identified by the High Court as being erroneous, "Applications for concessions are processed in the chronological order in which they are received, unless there is an allocation process being" –

ELIAS CJ:
Sorry, where is that?

MS HARDY:
This is under the heading, "Economic benefit to Iwi". It's on page 615 of the case and it's the second paragraph under that heading.

O'REGAN J:

616 it is in ours…

MS HARDY:

There should be a bullet point headed, "Economic benefit to Iwi".

WILLIAM YOUNG J:

As in the other application, the decision-maker seems to have thought that the contention made by Ngāi Tai was that it was entitled to exclusive opportunities in relation to any concessions to be granted. Not quite, I think, what the Ngāi Tai submission was, but we have sort of had that debate this morning, but if that's what she's referring to, that preference means exclusive preference and economic interests associated with exclusive operation are not on the table, then that would be consistent with the *Whales* case, I guess. She sort of said something like, I don't know whether, how, whether it's actually admissible because – but she did say something to that effect in her affidavit, para 29.

ELIAS CJ:

It's a bit odd, yes, just commenting, it's a bit odd having an affidavit to explain a decision. Does that happen often?

MS HARDY:

Well, it's not unusual, Your Honour, in judicial review for a decision-maker such as a Minister to provide an affidavit explaining process.

ELIAS CJ:

No, I know, but normally one would have thought the decision spoke for itself, but maybe not.

MS HARDY:

I accept, Your Honour, here we've got a full decision with the reasoning and that's what stands for the Department's decision-making.

So that commentary on preferential entitlement, I surmise, Your Honour, and it's that surmise, that this relates to the notion that the decision-making here was not in a capped number of concessions or a competitive tender process and so it's conveying the point that the applications are dealt with on their own merits because there is no need to deal with capping.

WILLIAM YOUNG J:

Well, I agree it may suggest that, it's just that she sets out what she understands the submission to be in the first passage under the economic – under the bullet point, which refers to, essentially suggests exclusiveness, and I think it might be a bit clearer in the other decision document, and then there's the partial or perhaps complete rejection of that proposition in the next paragraph.

MS HARDY:

Yes, so the granting of a concession to one party will not exclusive any other party from applying. That, I think, Your Honour, does go to the question of quantity of activity that's permissible on the islands and because there's nowhere, there's no cap placed on that through any of the planning documents. The conclusion being reached here by the decision-maker is that a concession awarded to Fullers doesn't preclude another concession because of a capping regime or a limited supply regime is how DOC would require it or would explain it.

WILLIAM YOUNG J:

Well, the other concession was already operating. The Ngāi Tai concession was under way by this stage, wasn't it?

MS HARDY:

Yes, it was granted in May of 2015 prior to these, the Fullers concession which was granted in August that same year.

ELIAS CJ:

The limitation to five years is also perhaps explicable in terms of a, of looking at this issue through the lens of scarcity and numbers because the report identifies other iwi which might have an interest and there's the reference to the Motu plan to be put in place, so the five-year thing is not necessarily anything to do with Ngāi Tai, is it? It may well be to do with the capacity issues that seem to rather dominate thinking in this decision.

MS HARDY:

Well, Your Honour, the Crown's view is that the five-year term had very much in mind the Nga Mana Whenua o Tāmaki Makaurau Settlement of 2014.

ELIAS CJ:

Yes, that's what I mean.

MS HARDY:

Yes, exactly, and that draws together all of the iwi who claim an interest and have an interest in the Motu beyond Ngāi Tai.

ELIAS CJ:

Yes.

MS HARDY:

Part 10 of that legislation sets out a very detailed process of the relationship between the Department and the iwi in that collective sense, bringing everyone together to make collaborative decisions to the point where there is actually a mediation provision in there also should there be dispute.

So the thinking on the decision-maker's point of view was that five years was a reasonable time in which to allow that Motu plan to actually, to emerge.

ELIAS CJ:

To emerge, yes.

WILLIAM YOUNG J:
Has it emerged?

MS HARDY:
It hasn't yet, Your Honour.

ELIAS CJ:
Well, there's still two years to go.

WILLIAM YOUNG J:
Do we know what it's going to say or not, or is that too…

MS HARDY:
We don't know what it's going to say, Your Honour, but I did look at other plans that have emerged that have similar settlement arrangements and there is one which would be publicly available which is the Little Barrier Island Nature Reserve Management Plan 2017 and that provides at least an example of where issues of cultural competence, the relation of iwi to the whenua is spelled out in the plan, and while the plan for Hauraki, the Hauraki Gulf, hasn't been yet finalised we can certainly point to the kinds of issues that would be dealt with in a very detailed co-operative manner in that plan, and it's the Crown's submission that that is extremely important context for thinking about the operation of section 4 in this setting.

Your Honours are probably aware that the nga mana whenua, and that's critical, the "nga", it's a plural, there are many mana whenua for these islands, that collective redress act emerged out of some fairly trenchant criticism of the Crown's conduct in bilateral negotiations with Ngāti Whātua and what it does therefore is put in place a structure to allow a range of interests to be mediated and accommodated.

So in my submission it was entirely appropriate for the decision-makers to look to that Act in thinking about the section 4 obligations and thinking about the five-year as opposed to the 10-year term.

ELIAS CJ:

But not to detract from that answer at all but the point of the question I was putting to you is that it does seem to me that the decision-making proceeded on the basis that there was no problem if there was no constraint on granting concessions and if a limited time would mean that other management ideas to come out of a collective agreement would be able to be addressed before there was a renewal, but what seems missing from this is any response to the view expressed that it was inappropriate to grant a commercial concession to a body that didn't have any association with the Motu. It's all looked at through the lens of capacity to accommodate concessions. I just wanted to comment on that.

MS HARDY:

Your Honour, I'd say it was looked at in a way that was broader than that particular description, that the enquiry was whether the, and be clear about the fact we've got from Motutapu Trust a modest concession for guiding low impact and drilling through the evidence there has been a good strong relationship between the Trust and Ngāi Tai in the past, that's part of the background. For Fullers it is a short-term extension of the status quo, again, in order to get matters in a shape for reflecting the Motu plan when it crystallises.

ELIAS CJ:

But not addressing the objection to commercial exploitation against Ngāi Tai's preference.

MS HARDY:

Well it's very much implicit in the decision and that's, I'm still, Your Honour, a little confused as to the articulation of Ngāi Tai's stance on its interest because if it's the case that it is a veto, which is certainly how the Crown at least read the material in the Courts below. If it is that there cannot be a commercial concession without Ngāi Tai's agreement, then the decision is that that's going too far from a Treaty principles point of view.

ELIAS CJ:

I suppose it's simply an objection that we prefer not to see a commercial operator come in. where's the indication that that preference was grappled with. You might be absolutely right that it would not carry the day if section 4 was applied, but I don't see how it's addressed. This is the submission that it's inappropriate because there's no connection.

MS HARDY:

So certainly the objection is recorded so it is understood.

ELIAS CJ:

Yes.

MS HARDY:

And then on page 7, which is 616 of the case.

ELIAS CJ:

Sorry, when you say it's recorded, you're referring to where in this report?

MS HARDY:

I'm looking Your Honour still at the Fullers Group decision and on page 611 is the submission, is a reference to the submission on cultural effects by Ngāi Tai.

ELIAS CJ:

I think we've got different numbering have we. I think it's 612 in mine.

WILLIAM YOUNG J:

It's at 612, under the heading, "Information available for consideration."

MS HARDY:

The applicant undertook consultation prior to submitting that application. That records the consultation.

O'REGAN J:

That's page 612 in our version. So we must be one page different from you. So just bear that in mind. We seem to be one page ahead for some reason or another.

ELLEN FRANCE J:

I think it depends if you're looking at the one that was provided after the bundle was produced, or the one that was in the bundle. So if you go, because I've got both here, and the other one, the one that was provided during the week, it is page 611.

MS HARDY:

Right.

ELIAS CJ:

Have you got another bundle?

ELLEN FRANCE J:

No, we got an unredacted version and in the unredacted version for some reason that seems to have the same numbering as Ms Hardy's one.

ELIAS CJ:

I don't know if I've got that.

MS HARDY:

I have only that version in my bundle but I'll try to navigate the numbering.

ELIAS CJ:

Anyway, you say give us a moment to find it.

MS HARDY:

So I'm looking at page 7 of the decision.

WILLIAM YOUNG J:

So where is it that it records the Ngāi Tai objection, what page of the decision?

GLAZEBROOK J:

Well it just says it does it in section 4, but section 4 doesn't record an objection in terms of the Chief Justice's understanding. I must say am still a bit unsure what the objection was in front, the decision-maker and frankly even a bit unsure exactly what the position is now, which is why I was asking those questions, and especially whether it was they wanted to operate a Volcanic Explorer, however that was, which had been my understanding, or whether it was as – which might be the same issue, that if there's going to be a commercial operation it should be done by the party having mana whenua, but I'm still not entirely sure.

MS HARDY:

So what I understand happened, Your Honour, was that there was a meeting on the 30th of March of 2015 between Ngāi Tai and the Department. There were also a letter written by counsel for Ngāi Tai setting out the concerns, and at page, this is page 6 of the Fullers report.

GLAZEBROOK J:

And do we have that letter?

MS HARDY:

Yes.

GLAZEBROOK J:

I thought we did.

MS HARDY:

That's at volume 4D of the case and my page is 1127.

ELIAS CJ:

Yes.

MS HARDY:

And that sets out a series of concerns directly articulated about a range of issues including the pronunciation of te reo and issues of cultural integrity, and on the final page the stance is taken that no concession should be granted while settlement negotiations are underway. That's at paragraph 15 of the letter. Then an emphasis on the economic issues raised by the iwi is recorded at page 6 of the Fullers' decision document. It's recorded there at the first bullet point, "Economic benefit to iwi," is the heading, and the summary is, "Ngāi Tai requested the declining of applications on the basis that concession opportunities should be preserved for the economic benefit of iwi within whose rohe that opportunity was presented."

GLAZEBROOK J:

Sorry, I missed the page number.

ELIAS CJ:

It's 616.

MS HARDY:

Yes, so and then there has been some differing statements made this morning about Ngāi Tai's intentions. The affidavit evidence which is in volume 3 of the case on appeal from James Brown on Ngāi Tai runs along the lines of Ngāi Tai being ready and willing to step into the Volcanic Explorer activity.

ELIAS CJ:

Well it doesn't quite say that, does it. It says it wants to undertake Volcanic Explorer. It's not clear that it's the same activity.

GLAZEBROOK J:

Although that's been a tag name so it might be –

ELIAS CJ:

It might be.

GLAZEBROOK J:

But if might, of course, be in different types of vehicles i.e. not diesel.

MS HARDY:

So, Your Honours, I'm looking at paragraph 94 of the Brown affidavit, which is, again it's my page 400 of the case in volume 3, which includes all the affidavits, and at paragraph 94 Mr Brown's evidence is, "We are ready to step in and provide a volcanic explorer operation." So we're staying if Fullers were not on the Motu, and their concession rejected, we are ready to step in. There's no qualification there about the nature of volcanic explorer activity. Over the page at paragraph 98, "Ultimately we, as Ngāi Tai ki Tāmaki, seek to run our own volcanic explorer activity and ferry concessions." Then at paragraph 100 to paraphrase, we need the Crown's support and a period of time. "If we had the assurance of a period free of competition from others we would take immediate steps to establish our own operations, similar to the Volcanic Explorer." Then what seems to perhaps run against that proposition, over the page at paragraph 101, they're saying a slight delay, this is a reference to the five year provision for the concessions for both Fullers and the trust. Mr Brown says, "That's not enough to address our concerns," and goes on, "We have already received an 'on account' payment for our full settlement, but we are still working to establish our overall governance structure and entities within that structure. If we are forced to rush into commercial entities and activities on the motu simply to protect our interests there, we risk jeopardising the entire settlement package." So a guaranteed period free of competition, not specified as to time, would be a proper reflection of our status as tangata whenua.

So to put it clearly Ngāi Tai made its own application which was granted in May of 2015 that was limited to a guiding tour similar to that granted to the Motutapu Trust. Ngāi Tai made no further application or indicate in any formal sense it was going to make an application to run a Volcanic Explorer style of

enterprise and on the basis of that still not determined intention were asking the Department to halt and not preserve the status quo of the Fullers application, and not grant the modest concession with conditions, which was granted to the Motutapu Trust. Now the essence of the decision which I've taken Your Honours to is that balancing those interests, and I would say that Treaty principles require a balancing of interests not absolutes, balancing those interest, the limited term and the conditions were a reasonable way of approaching a preservation of the status quo until a much more detailed and sophisticated engagement could be made with the range of those with mana whenua and the Motu through the Motu plan.

Just to make the point to conclude looking at the decisions, it's also clear that the decision-maker was attuned to context, so makes reference both, this is at, I think will be your 618, page 8 of the Fullers' decision. It looks at the conservation management strategy, the Auckland Conservation Management Strategy. The Hauraki Gulf Marine Park Act, and that's rehearsed in detail at page 9 of the decision, or 619 of the case, which pays attention to the principles set out in sections 7 and 8 of the Hauraki Act. Looks there, for example, at page 622, page 12 of the decision. Purposes of the Hauraki Gulf Marine Park Act. To protect in perpetuity for the benefit use and enjoyment of people in communities. To recognise the spiritual relationship of tangata whenua with the Gulf. Then it goes on to look at the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, which is again that important recognition that the relations with the Motu go beyond Ngāi Tai. That's apparent, and I've recorded this in a diagram at page 23 of the Crown's submissions. That Act is the Act which effects the gift back to the collective of both islands, Rangitoto and Motutapu, gift back to the Crown to be managed as recreation reserve and scenic reserve, and then preserves in the hands of the collective, Ngā Pona, the summit of Rangitoto, but to be administered by the Department. So the Act is a very clear collective view of iwi about connections and status of the Motu.

Perhaps if, so in sum the Crown's submission is that its really a detailed analysis of those decisions and the comparator of those decisions against the

Ngāi Tai decision, which was a just under 10 year concession giving Ngāi Tai what they sought. Looked at in the round the Crown submission is obviously that the Courts below got it right in saying that that gave effect to section 4 principles. Another structural –

ELIAS CJ:

Was Ngāi Tai entitled to a reasonable degree of preference, just thinking about the language of the *Ngāi Tahu* case.

MS HARDY:

Yes, well the *Whales* case certainly stands for, in that instance, a reasonable degree of preference in the whale-watching permits at the time. Here, and that Court said that's very fact specific, but it clearly indicates that preference and economic interest are both valid issues to be taken into account when interpreting section 4 obligations. Here the facts are very different and there has been, I would submit, a preference given, a reasonable degree of preference, and that's in the terms of the concession. There simply hasn't been an application by Ngāi Tai for anything beyond the concession that was granted.

ELIAS CJ:

That's, again, looking at it as if it's competing concessions. As if the thing is only about concessions, and not about the preference they have as people connected and authoritatively, legislatively connected with that motu to say we don't want commercial operators here.

MS HARDY:

Well the, again, my friend may disagree with the articulation of that proposition but from the Crown's perspective that conception is a right of veto over concessions on the Motu, and the Crown –

ELIAS CJ:

But why do there have to be concessions? What is there in the legislative scheme that says there has to be a commercial concession granted, and

where's the consideration in the decision-making of the option of no concession to commercial operators with no connection to the Motu?

MS HARDY:

So in the Conservation Act itself, section 6 sets out the functions of the Department and section 6(e) says, "To the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and to allow their use for tourism." So again consistent with *Whales* –

ELIAS CJ:

Well no one is suggesting there isn't a power to grant a concession. The question is whether the use of that power is consistent with section 4. In a post-settlement or near post-settlement situation where you've at least got the connection authoritatively established.

MS HARDY:

Well the judgment the decision-maker made.

WILLIAM YOUNG J:

By what?

ELIAS CJ:

Other legislation.

WILLIAM YOUNG J:

But it wasn't enacted.

ELIAS CJ:

I know that but we're dealing with it now. Can I get her answer, thank you.

MS HARDY:

So the Crown doesn't dispute a relation of mana whenua that Ngāi Tai has. In fact, the material that Mr Ferguson took you through earlier this morning, and I won't do that again, but on scrutiny it identifies a relationship with Motutapu

rather than specifically to Rangitoto, and of course it's Rangitoto where Fuller operates, they have a minor maintenance access to Motutapu, and what we've got in terms a recording of association now –

ELIAS CJ:
Is the collective.

MS HARDY:
Is the collective relation.

ELIAS CJ:
Yes.

MS HARDY:
So there are different ways of approaching your question Your Honour but one of them would be that is it correct that when Ngāi Tai objects to commercial concessions on Rangitoto, does section 4 require that to be given effect.

ELIAS CJ:
Well, it may not but where's the indication that it's being grappled with? What I'm concerned about is that this is a very important principle because a huge amount of the country is DOC administered land, over which increasingly we are recognising particular iwi as having mana whenua. Cannot they say legitimately to DOC, no commercial exploitation here by parties that do not have special connection. Now, DOC may well be able to say, yes there does need to be that because we've looked at the demand, we've looked at what people want, it's appropriate, and that may be entirely consistent with section 4, but simply to assert, we have a power to grant concessions, and there's no scarcity here so we can just grant those against that express preference, doesn't seem to me to be terribly consistent with section 4. Without justification is what I'm suggesting.

MS HARDY:

So it's clear from the Fullers' decision that it was understood that Ngāi Tai considered that concessions of an economic nature shouldn't be granted without their agreement. It's also clear from the evidence that there were discussions ongoing between DOC and the collective, which produced at least a draft, though not finalised, of terms of agreement between Fullers and the collective, so they took a difference stance from Ngāi Tai it seems, despite the fact that Ngāi Tai is in the collective, and the decision really goes no further than to say the Department does not accept that a freeze on concessions for an indeterminate amount of time, is a proper balancing of the interest here under section 4. What we will do is ensure that there are conditions, and both are amended up in the contracts for the Trust and for Fullers, conditions about matters directly cultural, and in relation –

ELIAS CJ:

They're recommendations, aren't they? They're expressed as, aren't they?

MS HARDY:

No, no Your Honour they're included in the contracts but you're correct that the Motutapu Trust, the first decision involved making a softer recommendation rather than a condition, but when the final concession was granted, or regranted, in October, they became terms in the contract. So those were a response, not a dismissal of Ngāi Tai's concerns, and then the five year term was very much pitched at, again different treatment. I would characterise that as a preference when you look at the three concession decisions in the round. A preferential terms for Ngāi Tai, and then in my submission a very reasonable and sensible linkage of the decision-making to the Motu plan under the collective agreement. So none of that, Your Honour, I think amounts to the Department simply dismissing the concerns of Ngāi Tai.

ELIAS CJ:

Well there's no point in going over it again, but it is on the assumption that what you're looking at is the ability to grant concessions, and you're not

considering as part of that the option of no concession to someone without connection?

MS HARDY:

Well, Your Honour, the option of declining was considered. That was the crux of the decision-making, and the decision taken was against declining on the basis of the arguments put forward by Ngāi Tai, and –

ELIAS CJ:

All right, I do understand that, yes.

MS HARDY:

Yes, there was a manuscript comment, I think, from the decision-maker in the Motutapu Trust which said, in this case, no, there won't be a decline, but that's not –

ELIAS CJ:

But on what basis in this case, and on what basis in another case might it be appropriate to say these people, their wish should be respected, that they don't want outsiders operating commercial operations. There just doesn't seem to be any grappling with that view.

MS HARDY:

Well Your Honour the decision-maker doesn't speculate beyond these facts as to what might occur with other instances, but just features, for instance, might be aspects of supply, and I understand that's a different point from cultural connection and control, but it also might be the case that the Department would be more persuaded by a collective view about what's appropriate, where there are shared and overlapping interests, and all of that would have to go into the balance against the interest of third parties –

ELIAS CJ:

All I'm really saying is that's all well and good, if that had been identified, perhaps one could say, yes, that complies with section 4, but it doesn't seem

to me that it was looked at in that way. Anyway, I think it's probably exhausted.

MS HARDY:
Just going back to some broader general points about the review before the Court, in the Crown submission, and with respect the task of the Court is to look at the two decisions discretely, the Motutapu decision and the Fullers' decision, and they are different in their facts, and although they have been bundled together in some of the argument, my submission is it would be appropriate to untease them. That's unless the point being made by the appellant's really is that there is a blanket power of veto, and it's a bit difficult to unpick that but it did not seem to be the stance that Mr Ferguson was articulating this morning.

So just for example the reason that that might be of significance is that the stronger relationships, in terms of mana whenua, of Ngāi Tai are with Motutapu not Rangitoto, and as I've mentioned it's Rangitoto which is where Fullers operates. The concession terms are quite different. One a modest trust guiding mechanism that returns money back to the island, the other a commercial operation that has been going for some time. So it's really just a structural approach that we've taken to the validity of the concession decisions.

I think as covering general points rather than going to the written submissions, there was one remaining point I wanted to make which was about the conservation relationship agreement which was referred to this morning, and that is part of the Ngāi Tai Deed of Settlement, the deed having now been given effect through the 2018 legislation. I would just like to go to that agreement, and it's in volume 4F. it starts on my case at 1476, so that might be 1477 of your case. so again connected to the points that I've just made about the distinct nature of the two concessions, this conservation relationship agreement in existence here, though as explained this morning still to be signed out, does record the relationship of Ngāi Tai with Motutapu Island. That's at clause 3. Again it's not Rangitoto there.

WILLIAM YOUNG J:

So what's the date of this agreement? This is an unsigned copy.

MS HARDY:

It hasn't yet been signed but as part of the deed that was agreed –

WILLIAM YOUNG J:

I see. It's part of the bundle that's meant to come into report.

MS HARDY:

Yes, in September of this year when the legislation gives effect to the deed of settlement. So because this was relied on to some extent by the appellants, I refer to it in particular. Over the page, this is page 50 of the conservation agreement itself, it says at 3.2, Ngāi Tai have negotiated exclusive cultural redress on Motutapu. And this is the material we looked at this morning. As such Ngāi Tai, "Desire to welcome and host all visitors to Motutapu as part of any cultural guiding concession that Ngāi Tai ki Tāmaki acquires." My reading, Your Honours, of that provision is that certainly Ngāi Tai has expressed the view that it wishes to host cultural guiding, and refers to concessions that it might acquire, but that's not the same thing as saying there was an understanding on anyone's part that there was to be a control over all commercial concessions by Ngāi Tai.

Over the page at clause 7 of the documents, 7.2, "Ngai Tai ki Tamaki has strong interests in exploring the following types of opportunities for concessions that involve public conservation land," and that includes walking tours on Rangitoto, Motutapu and other locations. So again that's about a cooperative agreement exploration, it's not a statement of absolute control over concessions, and it's also apparent that it's got a focus on the tangata whenua with Motutapu, not Rangitoto.

ELIAS CJ:

But it does, yes, you're right, it doesn't say anything about controlling anyone else. It is about their expectations of what they would like to do because they too will require concessions under the legislation.

MS HARDY:

That's correct Your Honour and going back to the facts of this case, the challenge for the decision-maker, is that only a single concession was sought by Ngāi Tai. There were others, certainly with Fullers, one that was in place, with considerable investment by Fullers no doubt, and my friends will take you to that evidence more closely than I will, but the suggestion on a desire but not yet crystallised, and Mr Brown's comment that the iwi may well not be ready, given the recent nature of it settlement, that that required a decline of the two concessions, and my submission is simply that the partnering agreements that the Court has been taken to, don't endorse that sense of veto or monopoly, and certainly aren't given expression in the text.

Your Honours, those are my more general points about this case and unless there are matters of clarification or aspects in the written submissions that the Court would ask me to elaborate on, my submission is that the written submissions really stand for themselves. Just to recap, and it was a point that Your Honours made this morning, there isn't great contest from the Crown as to the meaning or interpretation of section 4, it's the application of section 4 here that is on contest, and our broad submission is a close analysis of the two decisions in the context of the third, reveals that there was a reasonable approach to section 4, and an informed balancing of the interest at stake, that the starkness of the appellant's approach, at least as it appeared to be put forward, that there should be no concessions for an indeterminate period granted or rolled over without Ngāi Tai, separate from the Tāmaki Collective's agreement, is not something that the Crown or for that matter the decision-maker, considered was required by section 4.

ELIAS CJ:

Thank you Ms Hardy. Yes Mr Pilditch.

MR PILDITCH:

Yes, may it please Your Honours. clearly much of the argument has already been covered and the reason I'm here primarily is to assist the Court with any matters of specific concern in respect of the Fullers' application and particular matters concerning the concession activity that it sought and continues to operate at the present time. So I certainly don't propose to address the written submissions that have been filed on behalf of Fullers, but simply speak to some points which have arisen today in the hope that that may tease out any issues that I can assist the Court with in what I anticipate will be a relatively brief oral submission from me.

If I can just start with an issue that arose this morning, which was the notion of public access, because a submission that I do wish to make on behalf of the second respondent is that it seems that public access through recreation or through concessionary type activities cannot respectfully be divorced so cleanly and clearly as perhaps the appellants who articulate it in their submission, and I just emphasise section 6(e) where the notion of recreation and tourism seem to go hand in hand. Now here clearly the Department don't engage in activities that get people to the conservation estate. They either have to get there on their own steam or they get there through a concession activity, and when the conservation estate is in relatively remote places, such as an island in the Hauraki Gulf, or even other parts of New Zealand, a great number of people would rely on concessionary activities like this to gain access, and without those sorts of activities then one of those primary management goals, one of those primary conservation goals would not be met.

Now in the case of Fullers it's been described as the commercial activity, or the commercial operator on Rangitoto, and I'm not going to shy from the fact that clearly Fullers are a business and they operate a business model, but respectfully if the Court reflects upon some of the evidence that it's received, including from the second respondent in this hearing and the hearings below, there's actually quite a symbiotic relationship that occurs between the Department, between iwi, between community groups, between bach holders

and between businesses like Fullers in terms of the ongoing ecological and conservation management of the islands, and I'd not be doing my job on behalf of the second respondent if I didn't emphasise the contributions that Fullers makes through I suppose its corporate social responsibility to the environment and to the conservation causes in issue here. So that's obviously a long-standing albeit modern relationship with the Motu and Rangitoto in particular, and it's a long-standing relationship with the Department in terms of Fullers' commitment to things like the boardwalk that was built some time ago. To its commitment to utilisation of the wharf with the elevated fees that came with rebuilding the wharf, so in other words the Department couldn't have sustained the funding for that infrastructural development unless Fullers had committed in the way that it had, and of course with the concession activity in issue here, the tractor-trailer, or the Volcanic Explorer, comes with it responsibilities for maintaining the roads for the benefits of itself, but also the Department, Ngāi Tai, other iwi who use those roads privately with vehicles, and the public generally. So it's a slightly bigger picture than a commercial operator driven purely by commercial imperatives and I suggest that the evidence indicates a fairly close working relationship with the many stakeholders for the altruistic and conservation purposes in particular.

As far as the central issues concerned, I'm probably aligned with my learned friends on the left in having prepared written material that really addressed a fairly absolutist position and just reflecting on those, at least those submissions that have been filed in this Court, the matters that perhaps has caused the second respondent to respond in this situation is at paragraph 2.8, which Your Honour the Chief Justice has asked questions about whether it's simply appropriate for an entity like Fullers, that does not have the cultural connection with the Motu to ever be undertaking these sorts of activities, and I coupled that with paragraph 7.3 of the appellant's submissions, which replicate the three grounds on which the objections were brought, being the lack of cultural association, the need to preserve economic opportunity, and the concerns about Fullers and its staff, and its pronouncing te reo, and its lack of cultural knowledge about the Motu. Just in that regard, Your Honour

asked just recently this afternoon in the context of the Fullers' decision, whether that issue of whether it's simply appropriate for a non-connected entity, non-culturally connected entity to be undertaking commercial operations, and whether that was ever addressed by the decision-maker, and it may be a matter of degree or interpretation, but if I can just take the Court back to that decision which is in the case on appeal at 610. It's in volume 4A of the exhibits, 610, we were only there a moment ago. On the case on appeal that I had it's, some of the pages were actually unnumbered, it's page 616, or page 7. There's the bullet point at the very top of that page, "Protection of Cultural Values," which then addresses a number of matters which my friend briefly touched upon, but the second paragraph under that bullet point, where the Department accepted the cultural effects that had been identified by Ngāi Tai, and that identification was through that letter of the 19th of May 2015 and the earlier meeting in March which the Court was also taken to this afternoon. In my submission the cultural concern about having non-Ngāi Tai or non-iwi operators on the island is addressed in the way that it was couched to the Department at the time in this passage where the Department was reluctant to set standards which effectively excluded all other providers of visitor experiences so that no one other than iwi can meet the high test of knowledge and competencies that have been identified.

GLAZEBROOK J:
Can you just tell me exactly where that is?

MR PILDITCH:
It's the second full paragraph on that page 7, and it begins, "The Department accepts." So I'm on page 7 of the decision, which is on my 616 of the case, but it maybe 617 of the Court's case. Now just also reflecting on that passage, my submission is that that addressed the appropriateness or otherwise of a non-iwi operator undertaking commercial activities on the island, but in the way that it was put to the decision-maker through the process of consultation as it's characterised in the documents which precede this report, so I accept that it's not put as starkly or addressed as starkly as the way Your Honour the Chief Justice has raised it this afternoon in the way

that it's set out at paragraph 2.8 of the synopsis of the appellants, but in my submission –

ELIAS CJ:
And the pleadings actually, the statement of claim.

MR PILDITCH:
Yes, yes, but certainly in the High Court we did go through the exercise of identifying well how was this issue characterised by the decision-maker, and in my submission it wasn't quite characterised as starkly to the decision-maker as it has been here, although clearly the same point is captured by it, but I think if we give deference to the decision-maker dealing with the material that she had at that time, then this was the intention or the effort by the decision-maker to grapple with that, that fundamental point, and of course the answer is, well, not every concession opportunity is intended to deliver the same sort of experience. In the Fullers' application, Your Honours will no doubt have read that, and I don't need to go through the detail of it, but in the Fullers' application it was made clear that Fullers did not want to curtail cultural concessionary activities. It didn't want to compete with any iwi-based activities on the cultural front because it definitely saw that as a the provenance and preserve of Māori in relation to the Motu and not for it to undertake. So this passage, in my submission, is a reflection that Fullers were, the second respondent in their application were stepping back from being a party to any cultural dimension to their activity, because they wanted to preserve those opportunities for iwi if they wished to.

ELIAS CJ:
Yes, I'm just concerned as to whether this doesn't set it, this isn't too absolutist on the part of the Department, because effectively they're saying we're not going to consider whether it's not appropriate at all.

MR PILDITCH:
Yes.

ELIAS CJ:

And there maybe, I'm not saying that this is the case, but there may be cases where it really is appropriate to decide whether it's appropriate at all to permit commercial operators in.

MR PILDITCH:

Yes.

ELIAS CJ:

On this approach they wouldn't because they're only looking at it in terms of a fairly narrow view of concessions.

MR PILDITCH:

Yes, yes. I suppose the initial response is that it was never put as starkly as it has been in the context of these proceedings to the decision-maker and certainly I'm not submitting that –

ELIAS CJ:

Because there's not a hearing is there?

MR PILDITCH:

No, no, of course not. Although there was a large amount of dialogue between the Department and iwi and also between iwi and Fullers as the Court appreciates. And of course there may be cases where the cultural impacts of an activity would preclude those activities being undertaken, and of course it must be acknowledged that the decision-maker here in the report reflected a recognition that it's not just dealing with environmental impacts within the conservation rubric. Cultural effects are also part of the conservation rubric and quite appropriately they've been addressed in that manner, but that's always going to be subject dependent. So for example if we recognise that there are parts of Rangitoto which are particularly sacred, they're carved out from walking tracks or any visitors going near them, I mean that is an example where there would – if the entire island were categorised in

that way it would simply never be appropriate for that to take place, but that wasn't the position with Rangitoto in that respect.

I suppose the other dimension to this passage and how the decision-maker approached it, and just a matter I want to briefly emphasise, was that the Department believed that there were relationship opportunities identified through the cultural effects which maybe better addressed outside of the contractual conditions, and that was a recognition that there had been a fair degree of dialogue between the applicant and the second respondent, and I'm sure MRT were in the same waka, and Ngāi Tai and the Tāmaki Collective with a view to identifying and brokering partnership opportunities which would actually address some of these cultural concerns, so in relation to both Ngāi Tai and also the Tāmaki Collective what the second respondent was seeking was contribution, paid contribution from those iwi to assist it to improve its fluency. To assist it to improve its cultural understanding. There were onboard service crew roles offered to Ngāi Tai for its people to join Fullers and take responsibility for that commentary, and so that dialogue occurred leading up to these concessions being granted with a view to that dialogue continuing and the, and then it was completed, but there was a memorandum of understanding which is in the case that was drafted between the Tāmaki Collective and the second respondent which explicitly sought from the Tāmaki Collective input and assistance on issues of cultural fluency to improve the service from that perspective or that dimension. So part of the decision was a recognition that the Motu are successful because of the contributions of stakeholders and their willingness to work together, and the evidence indicates that that was a work in progress, I suppose, and so that's how that particular aspect of the decision was addressed.

The next point that I just wish to briefly make was just in relation to the way in which Ngāi Tai's aspirations were articulated at the time of the decision-making and the process. It was suggested today that Ngāi Tai were opposed to any vehicular kind of activity, and of course there's been examples on the maunga in Auckland where there's no longer any vehicle access for that very reason, but I can say that that was certainly an objection never

communicated through the process to the second respondent, and it doesn't feature in the material that the Court has and also, of course, there's been that discussion where Mr Brown in the first of his two affidavits communicated intention to effectively take on the Volcanic Explorer concessionary activity had the application been declined and created the competition free hiatus, I suppose that was being sought through that affidavit, that they would have assumed responsibility for that. But of course that was all knowledge to Fullers that came out after these proceedings were initiated, rather than objections that were communicated to it at the time.

Now the, I suppose the fundamental point for Fullers, and the rationale for Fullers taking part in the appeal at this level, is simply to ask the Court to contemplate the propositions from the perspective of applicants like it because there are a large number of concession holders operating on concessions throughout New Zealand, and even in relation to the very islands, the Motu, that we're concerned with. One thing that may interest the Court in relation to Ngāi Tai's settlement legislation, if the Court views the schedules where there is vesting or vesting back, vesting with effectively the land being under reserve status, in the right-hand column of that schedule all the concessions are carved out so that those concessionary activities on Motutapu are still preserved through that settlement legislation and the point here from Fullers' perspective is that the way Part 3B appears to be constructed is that it doesn't provide any rights to a person to have a concession, and I'm not here to suggest that, but it does seem to provide a fair opportunity if I can put it that high, that people who have an idea or have a proposal for undertaking forms of activity in the conservation estate, have a mechanism to apply to the Minister through Part 3B and to have that application considered by the Minister. Now clearly that has to be considered in the round with the section 4 considerations and the import that they bring to the legislation, but the short point for Fullers is that if the absolutist position is the one that's being advocated by the appellant, that it's simply inappropriate, that seems to foreclose on any opportunity for non-iwi to utilise those provisions in circumstances where there was at least an obligation on the Minister to consider it, to give it a fair consideration, to balance the impacts, to

contemplate the benefits that the concession activity may bring to the particular part of the conservation estate, and as I've endeavoured to explain today, and also in the content of the written material, for the second respondent that's a benefit which isn't simply about the public access, it's also about the contributions they make to the ongoing conservation management of the island. So Fullers would certainly be submitting to the Court that some caution should be exercised about framing the law in a way that simply adopts that perhaps more absolute position that has been discerned from the submissions. Hearing my friend today when he talked about the need for Ngāi Tai to be involved in the decision-making process to impose standards and to require partnerships, no difficulty from the second respondent on that front and the evidence would indicate that that's what Fullers has been seeking to do in the context of its concessionary activity, but the more absolute position would seem to foreclose on an opportunity which appears to be there for the benefit of all.

That was really the main point that I wish to make unless the Court has any questions about the second respondent's position?

ELIAS CJ:
No thank you Mr Pilditch.

MR PILDITCH:
Thank you, may it please the Court.

ELIAS CJ:
Yes Mr Mount.

MR MOUNT QC:
May it please the Court. Kia ora koutou. I appear of course for the Motutapu Island Restoration Trust, the third respondent, and like my learned friend for the second respondent I believe I can be relatively brief. The written submissions are divided into two sections. We address the facts and we address the law. There are just a handful of points that are particularly

important to the Trust if I may emphasise those. With reference to the written submissions the first is at 1.2, and it's just to say a couple of words about who the Trust is. You'll see at 1.2 that in fact the Trust has a 25 year connection with the island of Motutapu. It is essentially a voluntary organisation representing some thousands of volunteers who over that period have been involved in the planting of something like half a million eco-sourced trees on the island and the work of the Trust is consistent with the management plan to restore the ecology of the island.

Secondly, at 1.3, it's important for the Trust to emphasise that it has had a very close relationship with the appellant, Ngāi Tai ki Tāmaki, going back to its inception when a founding trustee of the third respondent was a representative of the appellant Ngāi Tai ki Tāmaki. So not surprisingly throughout the development of the concept of walking tours on the island, and it is a concept that has a long development period, the Trust has sought to develop that opportunity in partnership with Ngāi Tai. So at 1.3 and 1.4 you'll see that the Trust's vision for its concession was that it would be something originally done in partnership directly with Ngāi Tai. When in fact Ngāi Tai obtained its own concession first, the Trust sought to develop a vision that would be complementary to that of Ngāi Tai. My learned friend for the Crown has described it as a relatively modest concession, and in my submission that is a fair characterisation. What in practical terms we're talking about is groups of up to 12 people able to be guided around the island by a guide, no more than one group per day.

ELIAS CJ:
It's up to 24 hours, is it, as well? I just wondered, are there overnight walks?

MR MOUNT QC:
I don't understand it to be an overnight proposal, no.

ELIAS CJ:
No, thank you.

MR MOUNT QC:

I think it's one group in a 24 hour period, if I've understood that.

ELIAS CJ:

I see, yes.

MR MOUNT QC:

Just if I may pick up on a point asked from the Court by the Chief Justice about the question of the Trust earning income from the concession, that's addressed briefly at 1.9 of the written submissions, but also in the affidavit evidence of the Trust's chair Mr Butland, and that's in volume 3, you don't need to go to this necessarily, but it's volume 3, page 487, at paragraph 23. Just a reference for the Court. Certainly from the Trust's perspective the opportunities to earn income are limited and so they would certainly want me to emphasise that the ability to carry out this concession is significant to the Trust's activities.

ELLEN FRANCE J:

In terms of the material though on that aspect that was before the decision-maker, that was limited to the letter and what's in the application?

MR MOUNT QC:

That's right, Your Honour. I don't believe there was any sort of economic analysis or costings or anything of that sort. It was essentially asserted by the Trust but in my submission it's not a difficult proposition to grapple with. This was to be a paying concession, and I'm not sure that the sums of money that we're talking about are enormous, but they are of significance to the Trust in my submission.

If I may turn to the law, that's addressed in part 2 of the written submissions. Perhaps if I may begin at 2.9, which is reference to the *Whales* decision, and I mention it only because although we have touched on it in the course of the submissions today, perhaps not in great detail. At 2.9 what we have sought to emphasise is the particular context of the *Whales* decision. Now of course as

I'm sure the Court is well aware, some more than others, in that case Ngāi Tai had an enormous sunk cost investment into developing the whale watching and in 2.9(b) you'll see that the expenditure was something like a million dollars that they had put into it, 39 staff employed, and there was expert economic evidence which made it quite clear that the granting of a concession to the rival of a new operator would in fact put the Ngāi Tahu business at risk of falling over within a short space of time. So in factual terms the *Ngāi Tahu* case is very different to this because the proposed concession to be granted to the new operator put at risk the very operation that the iwi had put so much effort into developing.

In this case of course what we emphasise, and I'm loathe to take the Court back to it, but if I may invite you to turn back to volume 4A, pages 571 to 573. In contrast to the *Whales* case where the Department quite clearly took a very narrow approach to their obligation to the iwi and it was certainly described as being almost a mere consultation entitlement, and I think from memory, or on the facts it was a very cursory degree of consultation that the Department engaged in there. What we have at 571/573 is quite a detailed attempt to engage with the cultural effects, and under the heading of "Cultural Effects" there are four subtopics addressed. "Economic benefit; Active protection; Protection of cultural values; Deed of settlement." This is an attempt to go to questions asked by the Chief Justice.

Did the Department, and this isn't the decision-maker's document, although as you've said the decision-maker certainly relied on this, but did the Department adequately engage with the Treaty interests of the iwi and for the Trust, certainly it's my submission that the engagement that is reflected in the two and a half pages of analysis by the Department was proper engagement sufficient to fulfil the section 4 duty, and I emphasise at this point that in fact both Courts below did conclude that in substance there had been sufficient engagement with the section 4 duty to constitute giving effect to the Treaty of Waitangi in this context, and in my submission that was a justified conclusion by both Courts. The particular feature, of course, that we emphasise, and it is in the Crown's submissions and I apologise for repeating

it, it is the handwritten note at the bottom of page 571, where the decision-maker adds her view that in some cases it may be necessary to decline a concession in order to fulfil the active protection duty, but in this case and she underlines, in this case that's not necessary and in my submission a fair reading of that two and a half page engagement by the Department is a careful factual engagement with the particular circumstances here, and a conclusion that the Trust's concession, 12 people on walking tours on Motutapu Island, would not detract from the iwi interests in such a way to put the Crown in breach of its section 4 obligations.

Where that leaves the appellant, in my submission, is that to find a reviewable error of law in the decision, it is necessary to go beyond the normal administrative law grounds, taking into account the relevant interest and so on, and it is necessary to give sufficient content to section 4 that it requires quite an extreme substantive outcome and that's why the Courts below have referred to the veto issue, and I do join with my learned friend in saying really the appellants do need to go so far as to say that a veto is the substantive content of section 4, because on the particular facts of this case, and taking into account the degree of engagement by the Department, only a veto would get the appellant the result they were seeking.

GLAZEBROOK J:
Why do you say, you're effectively saying there wasn't an error of law then, so you're challenging the findings of the Court below on that point. You're relying on a scribble from the decision-maker that doesn't explain why in this case, at all, why in this case that isn't a requirement.

MR MOUNT QC:
If I may answer that question by taking you to three things. The two passages that I rely on from the Courts below and then back to the decision itself. In my submission the best way to understand the finding of the Courts below was that they quite rightly, and there's no dispute with this either from the Crown or from us, quite rightly seize on one or two sentences in that decision as being misstatements of the legal position. There's no contest with that. So where in

the report to the decision-maker at page 571 it is said that there is no basis for preferential entitlement, that's clearly wrong. But, having said that, in my submission, both the High Court and the Court of Appeal looked at the decision in the round and said, actually there hasn't been an error of law overall. If we look first at the High Court, it's the paragraphs from 105 to 108 of the High Court decision, and I acknowledge straight away at 105 the High Court does use the words "the decision-maker did err in law". There's no doubt about that, and what the Judges referring to there –

WILLIAM YOUNG J:
Sorry, what page?

MR MOUNT QC:
Sorry, it's paragraph 105 of the High Court decision. Page 34. But it's 107 and 108 that I rely on in saying that overall what the High Court concluded was that there was no failure to give effect to, in other words no breach of section 4.

WILLIAM YOUNG J:
In other words she did give a preference to Ngāi Tai.

MR MOUNT QC:
To the appellant, that's right. So I think the best way of understanding that, if I may say so, is that yes there was a misstatement of the legal position in that document, but looked at in the round, the decision-maker did give effect to the principles of the Treaty in compliance with section 4.

ELIAS CJ:
What paragraph is he referring back to in the finding at 105, what paragraph?

MR MOUNT QC:
86 I believe.

GLAZEBROOK J:

There was an error of law but substantively there was a giving effect to section 4, but I'm not sure that that's a normal way of looking judicial review, is it? I mean normally an error – you might say there's no remedy because in fact – but to say there wasn't an error of law…

MR MOUNT QC:

Yes, I agree entirely Your Honour.

GLAZEBROOK J:

You may well say there's no remedy because it would be, because there is this idea we are waiting for this, whatever the, however it would be articulated.

MR MOUNT QC:

Yes.

WILLIAM YOUNG J:

Well it depends a bit on what she meant. If she meant that by preferential access she meant, she was assuming it was a claim to exclusive access, then on the Judge's view she did, wasn't an error of law although she formulated the test rather unhappily.

ELIAS CJ:

It's preferential entitlement to concessions is the way it's put.

WILLIAM YOUNG J:

So, but if that means that Ngāi Tai get one and no one else can, if that's what it was meant, and that's what she's dealing with, then that explains why she says that but in fact gives a preference to Ngāi Tai.

MR MOUNT QC:

Through the reduced term and through the conditions and so on, yes, that's right.

GLAZEBROOK J:

Although that's not what is actually rearticulated by the High Court at all. And of course it was dealing with it a bit in the round and I think certainly the Crown's submission on that is actually right, that they were two different, with quite different factual backgrounds, the two different concessions.

MR MOUNT QC:

That certainly is the case, yes. perhaps just before we leave the High Court, the reason I submit that on balance the best reading of it is that whilst finding what the Judge called the error of law, overall he concludes that the decision-maker did not err in law, is because he doesn't directly address the question of remedy. One would expect that had he found a reviewable error, in other words had he concluded that the overall decision was in error, then one would expect that there would be the normal discussion of well you have a presumption in favour of a remedy but in this case I'm not prepared to grant one for these reasons. But 107 and 108, in my submission, are best read as a Judge actually concluding that there wasn't an error of law, and that's why we don't get onto a discussion of remedy.

Certainly in the Court of Appeal's case, it's paragraph 50 of the Court of Appeal, I have the reported version here, it's line 35, half way through paragraph 50 of the Court of Appeal. It's the sentence that begins, "As we conclude below, we are not satisfied any error can be demonstrated in either Fogarty J's judgment or the impugned decisions and certainly none that can demonstrate the principles… were not given effect to."

GLAZEBROOK J:

Sorry?

MR MOUNT QC:

Paragraph 50 of the Court of Appeal, I'm sorry, about half way through, the sentence that begins, "As we conclude below."

GLAZEBROOK J:

Thank you.

MR MOUNT QC:

So certainly on the face of it it seems that both the Courts below did ultimately reach the view that the decision, whilst there was an unhappily expressed sentence in the report to the decision-maker, in overall terms no breach of section 4.

ELIAS CJ:

Mr Mount, how much longer do you expect to be? I'm not trying to hurry you.

MR MOUNT QC:

I was just about to invite any further questions form the Court and I really see that as largely my role on behalf of the Trust as the third respondent, to address any particular points.

ELIAS CJ:

Thank you Mr Mount. Mr Ferguson, how long do you expect to be?

MR FERGUSON:

Ma'am, I've got five points, so I wouldn't think that would take much longer than 15 minutes.

ELIAS CJ:

Thank you.

MR FERGUSON:

The first point Ma'am and Your Honours is in relation to the portrayal of the whale watch decision as unique in terms of the circumstances of the Ngāi Tahu case. There one of the factors of relevance was, and observed by the Court there, that the engagement in the tourist practice and the relationship with the whale was a relatively remote activity compared to customary activities, and to contrast that with the present case in fact on that

front in terms of a fundamental rights at issue in relation to the whenua and as the Court of Appeal also agreed before going on to find against the appellants on other grounds, that the relationship here in terms of the whenua and the actual rights at stake for active protection are much stronger in the case of Ngāi Tai in that regard.

GLAZEBROOK J:

Although there is the development right which has been seen as one of the Treaty rights, and especially in relation to new resources, and I don't know that you'd call *Whales* new resources –

MR FERGUSON:

No, no, I mean to the extent that that was something that the, certainly the Court of Appeal in 1995, identified as a bit of a stretch. I'm not sure I'd agree with them that it's as remote as they perhaps portrayed it there. When one looks at the development right and as an aside, as I made in my written submissions but I didn't repeat, I think if one had run, I don't know, considered section 4 in terms of the majority in the Court of Appeal in the *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA) case, it's hard to imagine how the relationship with the trout could not have been a similar development arrived – and that's why I note that I find the judgment of His Honour Justice Thomas in the minority a much more compelling one, properly engaging with section 4 in that regard. But I think just touching on that point obviously the Crown has, and my friends have indicated that for Fullers, giving others rights over the lands which Ngāi Tai ki Tāmaki have mana whenua over, then that makes the continued infringement of those mana whenua rights more significant, there's a greater need to remedy that situation. At the very time these new concessions were being granted the Crown was finally recognising its prior breaches of the Treaty in relation to the islands, and negotiation the settlement of Ngāi Tai historical Treaty of Waitangi claims including specific grievances relating to Motutapu. Aware of these aspirations including for economic development. So the need and demand was a much more tangible one in my submission in this case

dealing with the whenua here, is one is drawing analogies with whale watch in that respect.

The second point, and it really confirms that, is the point my friend Mr Pilditch made, noting, as we noted, the significance in terms of recognition of mana whenua of the three sites on Motutapu that are being transferred to Ngāi Tai, but as my learned friend notes, of course, once again those transfers are somewhat hollow in the term of reinvesting true ownership, and the full sense of that word, in customary expression, given the preservation of all of those current concessions and other easements on the title, and the reimposition of reserved status on both. So again Ngāi Tai constantly finds itself even where lands are returned to try and rebuild its tribal estate, to have those administered and subject to a third party decision-maker in the form of the Department with powers to continue to grant concessions even in relation to those sites that have returned.

GLAZEBROOK J:
Can I just, are you going to deal with the point that was made about the different connection to Rangitoto?

MR FERGUSON:
Yes, I was, and –

GLAZEBROOK J:
That's fine, just come to it when you come to it.

MR FERGUSON:
Whether it was three or four, let's see what the best way to deal with that, let's deal with it now. Rangitoto. I think this really reinforces this point, and the point I'll come to next in relation to the elusive Motu plan that is to have the status of a conservation management plan, I think both of these reflect the real danger and the reality that seems to subsist post-Treaty settlement where the Crown and third parties, as I have said, look to the Treaty settlement, and the redress in there, as the full expression of the customary rights and

interests and responsibilities of a settling group, such that if it's not captured somewhere in writing by the Crown, in that document to be agreed, that somehow it doesn't exist.

GLAZEBROOK J:
I think the point was made slightly more in terms of different connections of Ngāi Tai to Rangitoto as against Motutapu.

MR FERGUSON:
Yes, and moving to that. There were obviously some different arrangements in terms of the Tāmaki Collective settlement where there was the transfer of the peak because –

ELIAS CJ:
Rangitoto is really one of the maunga of Auckland, isn't it, so it came within the same regime, didn't it?

MR FERGUSON:
It's one of the maunga and that's the point Ma'am. Regime as the various maunga that were being transferred to the maunga authority where, this is after all those volcanic peaks to be returned, and so it got subsumed into that as part of the peak and became part of that regime, but, and it became, with all due respect, somewhat more difficult for Ngāi Tai to get tangibility in terms of recognition through the Treaty settlement process, but importantly the document that was, you were referred to in the course of submissions by my friends, which was the letter from McCaw Lewis to the Department of Conservation in 19 May 2015, which is at volume 4D of the case on appeal, the orange volume at page 1127, which I think was exhibit 4 of Mr Brown's affidavit of 25 August 2016. That letter which was referred to you will see there, if one turns over to page 1130, attached to that letter of submission is a document prepared by Ngāi Tai ki Tāmaki, apologies, it's difficult to read in this formatting, it's presumably a larger document, perhaps an A1 size, where Ngāi Tai ki Tāmaki set out the significance of Rangitoto to them and identify a number of sites of significance, both on Motutapu and on Rangitoto, the

islands being almost contiguous in that regard. Now this isn't a document from the deed of settlement, but it's a document expressing Ngāi Tai's view of their customary associations, and this is the difficulty when Treaty settlements as seen as somehow of dossier of the complete picture, and with all due respect, iwi and hapū should not have to go to the Crown through Treaty settlements to have their mana or mana whenua acknowledged and recognised, and that should be able to be done separately and distinctly from that. Often it will be complementary, will repeat, will build upon itself, but there are many cases where for a variety of reasons that's not the case and here is a classic example where for reasons associated with the way in which that maunga was dealt with, these matters are not addressed in the deed, but they do subsist and they are nulling, and this was to the Department. That deals with that.

Now the next point which is very much related to that is the somewhat, I'm not sure how one would describe it, the false idol of the Motu plan, because a lot has been made of this, this deferral granting a concessions in order, for a short period, to allow that plan to be developed in some kind of implied way that all will be solved when that plan is in place and that will recognise and reflect all of Ngāi Tai's issues and that's jointly developed and all is good and well. Now because the plan hasn't been developed we can only speculate about what its contents will be and whether Ngāi Tai, there will be specific plans and values and standards relating to Ngāi Tai's values in respect of Motutapu or Rangitoto for that matter.

Now I just wanted to quickly take Your Honours to the relevant legislation because actually it's not quite what it has been portrayed to be. Now the document is at volume 2A of the joint authorities, legislation, red cover, at page 821. This is Subpart 10 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, section 89, "Process for preparation and approval of Tāmaki Makaurau motu plan for Hauraki Gulf/Tīkapa Moana inner motu." This relates to Rangitoto, Motutapu and a number of other islands. You see subsection (1) "A conservation management plan… must be prepared and approved in accordance with this subpart." Move down to

section 91 at the bottom of the page, the plan is prepared by the Department Director-General for Conservation, not jointly by the iwi with interests in the motu. "It does so in consultation with the trustee, the Conservation Board, the Auckland Council… and other persons or organisations that the Director-General considers it practicable and appropriate to consult." Well the trustee in that regard is the trustee of the Tāmaki Makaurau Maunga Authority, because that Rangitoto maunga issue, so that is the vehicle when the reference to trustee, when one looks at the definition of "trustee", it's a reference to the, "Tūpuna Taonga o Tāmaki Makaurau Trust Limited, acting in its capacity as trustee of the Tūpuna Taonga o Tāmaki Makaurau Trust." And that obviously links across to the authority in that sense, if one looks at the Tūpuna Maunga o Tāmaki Makaurau Authority as well in that regard, that Authority has a membership in relation to section 106 as I understand it, the membership of the Maunga Authortiy in this regard. Section 107 on page 829, Maunga Authority, and at (1)(c) "2 members appointed by Waiohua Tāmaki rōpū entity." That's the rōpū collective that Ngāi Tai are a part of, but they are one of five iwi alongside, Te Ākitai, Ngāti Tamaoho, Te Kawerau ā Maki and Ngāti Te Ata, as well as Ngāi Tai. Those five iwi appoint two members to that. So there is a consultative requirement there in developing it and then one sees when the draft plan is issued in that regard, and back to section 92, it's publicly notified by the Director-General and by written notice to among other things section 91(b)(3) iwi authorities, being Ngāi Tai, and so it gets written notice and consultation. The plan is ultimately further developed by the Director-General. If there are disputes between the Director-General, the trustee and the Conservation Board they can be referred off and ultimately the Conservation Authority and Minister consider the plan.

Now Ngāi Tai's direct engagement in that process is just remote at least and certainly is not direct so the suggestion that somehow this is the vehicle for Ngāi Tai to codevelop in Treaty partnership mechanisms to actively protect its interests in values in relationship to Motutapu and Rangitoto and that that's a reason to have short-term consents to wait for this great plan is, with respect, somewhat overstating the prospects of what might occur and, in fact, the better prospect, in my submission, is for that enquiry to be made directly with

the Department and that engagement to be made directly with Ngāi Tai to develop those understandings and interests in standards now in relation to it, even if it doesn't have the status of a conservation management plan, is a very matter at an operational level.

There was one more matter that I wished to touch upon, one final matter, and that related to again the actions available to the Minister when dealing with concessions. First I did notice that in the sections that have been reproduced in volume 2A, the same volume we've been looking at, at page 720 of the Conservation Act, it appears that there are sequential sections cited there, 17P, 17Q, 17R, 17S. At 720, if one turns over the page and one sees 17T, in fact, I'll just bring it up, and this is an omission, I apologise, from the bundle, there were inserted in October 2017, which is why it's unusual that these haven't shown up in this regard, but there was inserted new section 17SA through to 17SD, and one of those provisions is of potential relevance, and that's section 17SB. Section 17SB provides in subsection (1), and I'll read it, "If the Minister is satisfied that an application obviously does not comply with, or is obviously inconsistent with, the provisions of this Act or any relevant conservation management strategy or conservation management plan, he or she may decline the application." So again the provisions of this Act obviously encapsulate section 4. So there is the ability where there's obvious inconsistence with the delivery of giving effect to section 4, to decline a concession, and so it's important to refer to that, section 17SB(1).

On a related note, and going back to the volume where we were at, page 721 in relation to section 17T, section 17U also provides in subsection (3) on page 722, "The Minister shall not grant an application for a concession if the proposed activity is contrary to the provisions of this Act or the purposes for which the land concerned is held." Again, a potential crossover reference in terms of something contrary to giving effect to principles of the Treaty under section 4 could arguably be said to be contrary to the provisions of this Act in that regard.

And over the following page, still part of section 17U, on page 723, subsection (8), “Nothing in this Act or any other Act requires the Minister to grant any concession if he or she considers that the grant of a concession is inappropriate in the circumstances of the particular application having regard to the matters set out in this section.” Again, confirming that, you know, the Minister should be, and is able to consider declining or not granting, is not obliged to grant concessions if it considers there are things inappropriate in the circumstances, having regard to the matters in the Act.

And one final provision along the same vein, and this I suppose at one level might be seen as a contra-proposition to my two points to go disparaging of the Motu plan, but if the Motu plan is a great panacea that we should all wait for including Ngāi Tai, then contrary to granting applications on the short-term to wait for that plan so it can be reconsidered against that plan, section 17W on page 724 at subsection (3) makes it clear that the Minister may decline any application, whether or not it is in accordance with any relevant conservation management strategy or conservation management plan, if he considers that the effects of the activity are such that a review of the strategy or plan, or the preparation of a strategy or plan, is more appropriate. So a live provision that was in force that if the view of the Minister, delegated obviously to the decision-maker within the Department, was that it was better to wait for the preparation of this new conservation management plan, the Motu plan, in order to consider the effects or in order that the effects of the activity can be better considered, then actually there was a power to decline the concessions in that case, not grant them for short periods of time.

Just by way of one supplementary point, building on the Rangitoto issue, and it’s because my eyesight is so poor and I’m going to get to your… that’s better. While you can’t read it there, there is provision 1 in the Act itself, the Collective Act, and you can vaguely see it on that map, you’ll see the peak of Rangitoto.

GLAZEBROOK J:

Sorry, where are we?

MR FERGUSON:

That map that I referred you to before that was attached in the McCaw Lewis letter, sorry, 1130 of volume 4D. Apologies for returning to that. And it's difficult to read on the map but it is in the Act. This peak has been named through the legislation as Nga Pona-toru-a-Peretū and while it's very difficult to read the fine print that description by Ngāi Tai identifies that that name refers to a Ngāi Tai tupuna. So that naming through the collective settlement reflects the name of Ngāi Tai ancestor and it's just an additional point that this should have been noted.

GLAZEBROOK J:

Where is the name set out in the legislation?

MR FERGUSON:

The name in the legislation is in section 70 which is on page 810. So we have the reference there to Rangitoto being part of the scenic reserve, the reservation of Nga Pona-toru-a-Peretū and it's declared the name of the peak in that regard.

And if Your Honours would like a better copy of that map so you can read the narrative, one can be provided.

GLAZEBROOK J:

I think it would be helpful. I can just read it but…

MR FERGUSON:

I can – and I can't read it at all, to be honest. So we will get a blown up cleaner version of that, if nobody objects, and provide it to the registry tomorrow.

ELIAS CJ:

Thank you.

MR FERGUSON:

Those are my only points by way of reply.

ELIAS CJ:

Thank you, Mr Ferguson. So, Ms Hardy?

MS HARDY:

Your Honours, I just wanted to correct what may be a small point in relation to the operable provisions of the Conservation Act which my friend referred to. So I'm looking, Your Honours, at page 721 of the joint authorities legislation volume.

ELIAS CJ:

What section?

MS HARDY:

Section 17U, which is about concessions, and my friend referred to section 17U(8). I simply wanted to note that, as the points below, that subsection (8), make the point that that was inserted in 2017 so was not in place at the time of the decision-making in 2015. I don't submit that that's particularly material because clearly there's subsection (3) which says the Minister is not to grant a concession if the proposed activity is contrary to the Act, and clearly section 4 is the focus, but it's simply that that subsection (8) wasn't in play at the time.

GLAZEBROOK J:

Not the SAB or whatever it was, section 17SB, is that the same as that?

ELIAS CJ:

That's the same, yes.

GLAZEBROOK J:

Yes.

ELIAS CJ:

All right, thank you, counsel for your submissions. We'll reserve our decision in this matter.

COURT ADJOURNS: 4.26 PM