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

SC 93/2021
[2021] NZSC Trans 16
Amended and republished
9 November 2021

BETWEEN **WAIRARAPA MOANA KI POUĀKANI INCORPORATION**
Appellant

AND **MERCURY NZ LIMITED**
THE WAITANGI TRIBUNAL
THE ATTORNEY-GENERAL
NGĀTI KAHUNGUNU KI WAIRARAPA TĀMAKI NUI-Ā-RUA SETTLEMENT TRUST
RAUKAWA SETTLEMENT TRUST
TE KOTAHITANGA O NGĀTI TŪWHARETOA
POUĀKANI CLAIMS TRUST
RYSHELL GRIGGS and MARK PHILLIP CHAMBERLAIN
THE TRUSTEES OF THE RANGITĀNE TŪ MAI RĀ TRUST
Respondents

Hearing: 1 October 2021

Coram: Winkelmann CJ
William Young J
Glazebrook J
O'Regan J
Williams J

Appearances: P J Radich QC and M K Mahuika for the Appellant
J E Hodder QC, L L Fraser and R Jones for the Respondent Mercury NZ Ltd
No appearance by or for the Respondent Waitangi Tribunal
M R Heron QC (via AVL) and H Graham for the Respondent Attorney-General
M G Colson QC for the Respondent Ngāti Kahungunu Ki Wairarapa Tāmaki Nui-ā-Rua Settlement Trust
F B Barton (via AVL) and A L Clark-Tahana for the Respondent Raukawa Settlement Trust
No appearance by or for the Respondent Te Kotahitanga O Ngāti Tūwharetoa
No appearance by or for the Respondent Pouākani Claims Trust
P Cornege, F E Geiringer, K Dixon and A Castle (via AVL) for the Respondents Griggs and Chamberlain
No appearance by or for the Respondent The Trustees of the Rangitāne Tū Mai Rā Trust

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CIVIL ORAL LEAVE HEARING

MR RADICH QC:

Tēnā koutou e ngā Kaiwhakawā, ko Radich ahau, kei kōnei ko Mr Mahuika e tū atu nei mō ngā kaitono, the applicant Wairarapa Moana Ki Pouākani Incorporation, if your Honours please.

WINKELMANN CJ:

Tēnā kōruā.

MR CORNEGÉ:

E te Kaiwhakawā tēnā koutou. Ko Cornegé tōku ingoa. Ko ahau te waha kōrero mō te kaitono, Ryshell Griggs rāua ko Mark Chamberlain, tēnā koutou katoa. May it please the Court, counsel's name is Cornegé, I appear for the applicants Ryshell Griggs and Mark Chamberlain, together with Mr Geiringer and Ms Dixon and Ms Castle via AVL

WINKELMANN CJ:

Tēnā koutou.

MR HODDER QC:

May it please the Court, for Mercury Hodder with my learned friends Ms Fraser and Ms Jones, who are on the link in Auckland.

WINKELMANN CJ:

Tēnā koutou.

MR COLSON QC:

E te kōti, ko Colson ahau, kei kōnei māua ko Ms Watts mō te Ngāti Kahungunu Ki Wairarapa Tāmaki Nui-Ā-Rua Settlement Trust.

WINKELMANN CJ:

Tēnā kōruā.

MR GRAHAM:

E ngā Kaiwhakawā tēnā koutou ko Mr Graham tōku ingoa. I appear for the Crown. I am here as well with my senior, Mr Heron, who we're struggling to get on the VMR. I've got him on the phone here. I think – can you hear that, Mr Heron? Yes, he can hear, we just can't get him on the VMR.

WINKELMANN CJ:

You might have to put your phone by the counsel who's speaking and hopefully we can fix up the VMR link in the meantime. Is he happy for us to

get underway or would he prefer we adjourn for a few minutes to try and sort this out?

MR GRAHAM:
Do you want to adjourn for a few minutes while we sort this?

WINKELMANN CJ:
Yes, okay, we'll do that.

COURT ADJOURNS: 9.55 AM

COURT RESUMES: 9.59 AM

WINKELMANN CJ:

Be seated. So, we have Mr Heron. I see you there. Tēnā koe Mr Heron. Can you hear? You're on mute.

MR HERON QC:

I think I am muted.

WINKELMANN CJ:

Yes, we hear you now. We hear you now.

MR HERON QC:

Tēnā koutou e ngā Kaiwhakawā and apologies. I was sent to the wrong room which is a cunning trick.

WINKELMANN CJ:

Very good. Now, so counsel, we've got an echo which is helpful.

MR BARTON:

Your Honour, tēnā koutou e ngā Kaiwhakawā ko Barton tōku ingoa. E whakakanohi ana ahau i a Raukawa Settlement Trust the fifth respondent e tū e ngātahi ana māua ko Clark-Tahana, tōku pou whirinaki mō tēnei kerēme.

WINKELMANN CJ:

Tēnā koura. I saw you on your feet Mr Radich, did you have something you wanted to say?

MR RADICH QC:

Not at all your Honour. I was just preparing.

WINKELMANN CJ:

So I think it's common ground that the issues, or at least some of them are of significant public importance although some of the respondents say that are

moot in the context of this particular case, but just a helpful indication counsel might be that we are very concerned about the leapfrog issue, whether it is appropriate in this case, to allow a leapfrog appeal and we thought we have a reasonably tight period of time this morning because of other commitments of the Court and our proposal was that the Wairarapa Moana Ki Pouākani and Mr Griggs and Mr Chamberlain split 45 minutes between them and that the same is true of the Attorney-General and Mercury with others having 10 minutes perhaps each. The others who are allocated 10 minutes, now is your chance to speak if you think that you are going to carry more of the argument than that if time allows.

MR BARTON:
I'm happy with that your Honour, thank you.

WINKELMANN CJ:
Right, do counsel need to confer about the split of the 45 minutes or can you work it out as you go?

MR HODDER QC:
As far as Mercury and the Crown are concerned, we've had a prior discussion and the Crown will go first, we will follow. I doubt we will use 45 minutes between us.

WINKELMANN CJ:
Right, excellent. Well, that would be good if wasn't 45 minutes. As someone used to say: "It's a limit not a target." Right, and who is going to speak first? You, Mr Radich.

MR RADICH QC:
Yes. Ngā mihi kaiwhakawā. The mask off. Yes, so the order that was discussed was the Crown, Mercury, Raukawa, and then Mr Colson for the Settlement Trust. Your Honours, in light of the indication that you've given as to the focus of attention for the Court I won't spend very long on preliminary matters, but there were, in terms of the importance of the issue, one or two

things that it would be good for me to cover just to foreshadow and that in particular relates to a non-interference principle and I don't know whether that's an obstacle that it should be dwelt on for a considerable period, but if I might just address that point and also the mootness point because there is considerable in that and that goes very much also to the subsequent question about the leapfrog itself and the exceptional circumstances that might justify it. So I might just if I may at that point spend a moment on those matters as well.

I perceive that I don't need to dwell unnecessary on the underlying facts, but I'm very happy to traverse them. For present purposes, I think one could summarise the facts on the basis that there is a significant story of ongoing loss in the circumstances here. It's a story of loss first of all of the customary land at Wairarapa Moana of the lakes, Lake Wairarapa, Lake Ōnoke which is Lake Ferry as it is sometimes called and the surrounding lands back in 1916. The people that resided there represented by Wairarapa Moana Ki Pouākani Incorporation and their tipuna then were taken to a foreign place. They were taken to the Waikato River at Pouākani near Mangakino, connected, with now the Maraetai Power Station and then they lost part of that land in 1945. The story tells us that without notice the Crown established a township on their land, compulsorily acquired 787 acres for the purpose of a hydroelectric power station, took some land for power lines and power poles, and established the town for a niggardly compensation.

That's covered just in the brief narrative of facts on the first page of the submissions. The situation they find themselves in now is that having been able to avail themselves of the substantive resumption remedy that came about through the *New Zealand Māori Council v Attorney-General (the Lands case)* [1987] 1 NZLR 641 (CA) case, that came about through the amendments to that, I'll come to the legislation in 1988, and in *Forests* in 1989, and having gone partway through that process, they'd been through the Tribunal to a substantive point, they see the potential loss of that resumption remedy with the Crown' s proposed legislation, and this, of course, at the risk of jumping to that immediately, and I'll come back to it, is not a case about endeavouring to stop the legislation. It's not trying to stop the introduction of a

Bill. It's a matter of having established ideally in this court, or at the highest level, the rights that it has to be able to seek resumption of that land on an on-going basis. At the moment that pathway in the Waitangi Tribunal is blocked by the finding of his Honour, Justice Cooke, and the judgment under appeal to the effect that the resumption provisions could only work for mana whenua and that the Tribunal in looking at the interests of the Incorporation, if I might just shorten it to that for today's purposes, took into account tikanga improperly and, in fact, created their own Treaty breach. So at the moment that pathway is blocked because of that tikanga finding. If that is reversed, then what ever the outcome of the other appeals in the Court below, there will be a pathway to resumption for the Incorporation and it is important in the Incorporation's submissions for Parliament just to know about that when it makes its decisions.

WILLIAM YOUNG J:
Why is it not enough for Parliament to know that it's an issue?

MR RADICH QC:
Yes, I understand the point, your Honour. At the moment the Minister, if I can put it on this basis, is labouring, again if that's the right word, under 2 in the submission of the Incorporation –

WILLIAMS J:
It's a good pun.

MR RADICH QC:
Thank you, your Honour.

WINKELMANN CJ:
Not that good.

MR RADICH QC:
It is and I can't think of one to give back. It's very sad. But the two issues for the Minister first of all are that the Incorporation has not been successful,

therefore, the Minister is saying, you've had your chance, you know, you've used the resumption power, you've had a hearing, and you've been unsuccessful in the Tribunal and unsuccessful now before His Honour, Justice Cooke, and –

WILLIAM YOUNG:
So you've got two separate, two distinct findings against you, they're different, on different bases?

MR RADICH QC:
That is the understanding of the Minister, Sir, and that's reflected in the letter, I don't know if you Honours have seen that, but in the affidavit of Mr Kingi Smiler, the Minister's letter is attached and the Minister says in that letter that: "Well, you've been unsuccessful and, therefore, you've had your time."

WINKELMANN CJ:
There is a constitutional convention, isn't there, that legislation is not normally used to take away the rights of the individual when they've succeeded before the Courts.

MR RADICH QC:
Yes, that is so, your Honour, in the legislative guidelines, and this is a point made in the submissions, I think, the brief submissions filed for the Pouākani Claims Trust, although they don't seek to appear, that point is certainly made.

The key point for the Incorporation is that that is not, in fact, so. They are very happy with the outcome in the Tribunal and would regard that as being a significant success story for them. The reason I say that is that the Tribunal found, and look I can – probably in the interests of time I won't be able to take you to all of the provisions, but certainly the way in which the scheme of the Tribunal decision went, is that they would recommend the return of the land. And let me give it, if I may, some paragraph references to the preliminary determination, if that would be helpful? So, in the time available I think it

wouldn't be useful for me to walk you through it, but paragraph 23, it was said that: "The current intention is to recommend the return to Māori ownership of the schedule 27B memorialised lands." In 118 the point was made that the claim was well-founded. In 209 the point was made that the return however should be to Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua as a whole. That is to say, that the whole Wairarapa Moana grouping and not to any particular part of it. In 268 it was said that the prejudice affects a wider group than just the shareholders in the incorporation.

At 278 it was said that not to return, I'm sorry, that it was not recommending return of the 787 acres to the incorporation alone because the land value, it was said, is not proportionate to the prejudice. But at 282 it went on to say that a recipient entity that represents Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua would be the best channel –

GLAZEBROOK J:
Paragraph, what page?

MR RADICH QC:
Sorry, your Honour, 282 and at 295 it should well, it wouldn't be the Settlement Trust either. It really needs to be a new entity and the point for Wairarapa, for the incorporation is that they are twofold. First of all, it was never in it solely for itself. It was proposing in the tribunal a broader trust arrangement that would represent those broader interests of Ngāti Kahungunu, if I can just use that phrase for the wider group and trust structures were proposed. So, it was championing the cause for Wairarapa Moana.

Secondly though, and equally importantly, it remains in the position of being able to say that the losses were in fact proportionate and the land is able to be resumed to it alone. The Tribunal was going through what it called an iterative process. The process was that it was giving these preliminary thoughts expressed reasonably firmly, that's clear, but that it remained fully open to discussing other ways of dealing, I'm just getting the decision out, with the

issues that were before it. Now in particular I note at paragraph 316, and I will just refer to that one if I may, it said this, and I'm reading from it: "This preliminary determination by no means disposes of all the important matters we must decide however, nor would we say that it is necessarily final. It expresses our formed views on key aspects of the discretion under section 8A and H. They are the resumption provisions, but it remains possible we may decide nevertheless that we should not make interim recommendations in the form we currently intend."

And so the position of the Incorporation was that there was considerable evidence that it has in the Tribunal, that the Tribunal hasn't discussed in this decision. That it was going to point to economic evidence from Dr Richard Meade to show in fact that the loss it suffered approximates to value of the land to be resumed.

Combined with that his Honour Justice Cooke in the decision and just to identify where that is for your Honours, that is in the bundle of documents at tab 3. Your Honours might have a bundle there. I doubt that we will have much time to traverse it in great detail.

WILLIAMS J:
What's the evidence you're talking about?

WINKELMANN CJ:
Yes. Are you taking us to the evidence or Justice Cooke's decision?

MR RADICH QC:
I'm taking you to Justice Cooke's decision, your Honour, I'm sorry.

WINKELMANN CJ:
We've got that.

MR RADICH QC:

Yes, paragraph 87 is the one I wanted to refer to. In that paragraph his Honour Justice Cooke said, and again I won't read it all to you, but he's looking at, if one comes down six lines the sentence begins: "That is because there were a series of costly interlinked treaty breaches. Wairarapa Moana represents the successes of those." What here Wairarapa Moana is, is his Honour's shorthand for the Incorporation: "Represents the successes of those who originally held legal title to the lakes Wairarapa and Ōnoke, the Crown's conduct that gave rise to requiring the titles to the land and the surrounding was held to be in breach." He goes on to say: "There were further breaches arising out of the Crown's failure to honour its promise to provide the owners with alternative land in the Wairarapa." And then he says: "There were yet further breaches arising from the Crown providing largely valueless and inaccessible lands in the central North Island. The Crown continued to breach its obligations by starting to develop some of these lands for the power scheme without consent and then by compulsorily acquiring that land for inadequate compensation."

So the point that Wairarapa Moana makes is that its economic evidence in the Tribunal through Dr Mead is sufficient to show that it in fact equates with the loss suffered by the Incorporation's members.

WILLIAMS J:

And this is evidence before the resumption of the Tribunal?

MR RADICH QC:

Yes.

WILLIAMS J:

They obviously didn't agree with it.

MR RADICH QC:

That's a point that the Incorporation would, as part of the interim process, your Honour, be going back and making strongly in the light of the findings to date. The findings to date are seen to be helpful.

WILLIAMS J:

Right, okay, I get that point. You think you're entitled to another shot of this, that's your point?

MR RADICH QC:

Yes Sir.

WILLIAMS J:

Why didn't you offer a structure that ruled all of Kahungunu ki Wairarapa into the Incorporation as a class of shareholder?

MR RADICH QC:

Yes, that was the case, your Honour, there were, as I understand it –

WILLIAMS J:

It's not referred to in the report.

MR RADICH QC:

No, as I understand it, your Honour, there were models that were presented. My learned friend, Mr Mahuika, might be able to address that, but they're model's presented to enable a broader structure whether through the Incorporation as one model, or whether outside the Incorporation as another, if I understand the position correctly.

WINKELMANN CJ:

Well, Mr Mahuika, you can stand if you want and address, we don't mind you swapping between each other.

MR RADICH QC:

Thank you, your Honour.

MR MAHUIKA:

So that's a fair question and it was what was proposed by the Incorporation. It's not clear to me why it wasn't referenced in the Tribunals preliminary determination.

WILLIAMS J:

Right, so you'd want to take that back to the Tribunal as well?

MR MAHUIKA:

Yes.

WILLIAMS J:

Okay.

MR MAHUIKA:

An issue before the Tribunal was the idea that an incorporation has specific shareholdings, and of course the proportions that were equal when the lands were originally allocated in 1916 and 1917 have changed over times because some people have bigger families, there have been different succession arrangements. The idea about proposing a trust structure was to ensure that all of those wider families associated with those original owners would be participants in any redress that was received. So that would, as you say, Sir, be one of the things that we would be proposing to deal with as part of the next iteration in the Tribunal's process.

MR RADICH QC:

And just to add on to the back of that, under section 8A – and, look, it may be useful, your Honours, to have a look at that statutory provisions that we're dealing with, so…

O'REGAN J:

We do accept though there is a valid point to be argued. The question is why is it not being argued in the Court of Appeal?

MR RADICH QC:

Thank you, Sir, let me come to that. The reason for it – and this is where my learned friends will say that therefore it's a breach of the non-interference principle but my submission on that will be that it's, as I've foreshadowed, something very different – that the Minister, it's very important for the Minister to understand two things. The first of them is that the pathway for the Incorporation is not blocked to resumption because of the tikanga findings of his Honour Justice Cooke, and those findings were that only mana whenua are in a position to be able to have the resumed lands, and of course the mana whenua parties here are Tuwharetoa and Raukawa, and of course the Pouākani Claims Trust is the other entity representing direct descendants connected with the land and that body supports this application. At the moment the Minister has said in his letter – and let me just reference that so I can have it clear for your Honour Justice O'Regan – saying that of course the settlement "would include your claim", so that's to say these claims would be removed, and he has referred in the letter to – and I'm looking, just for future reference it's on the second page, the third full paragraph – "I am conscious that your claims have not been successful in the Tribunal and in the Court." The point is on that one in fact they had been successful in the Tribunal and there's a pathway to recovery. In the Court the tikanga point –

O'REGAN J:

Well, they haven't been successful for your client at the moment, have they? What you're saying is they might become successful?

MR RADICH QC:

Yes, Sir, that's absolutely right.

O'REGAN J:

So what he says is correct.

MR RADICH QC:

Success is judged not only on the direct return to the Incorporation but the Incorporation would see success also as being the clear direction to return to

Ngāti Kahungunu generally. It has been their championing the cause to enable –

O'REGAN J:
We've got Ngāti Kahungunu here saying that. We've got Ngāti Kahungunu here saying something different, haven't we?

MR RADICH QC:
Yes, there are two parts to it your Honour. There are two parts to Ngāti Kahungunu before you, that is so.

WILLIAMS J:
Well, they're the same part actually.

MR RADICH QC:
That is, yes, you're right, your Honour.

WILLIAMS J:
They're all the same hapū, it is just that some people have shares and some don't.

MR RADICH QC:
Yes, yes, I understand that there is in fact little overlap between them, Sir. Yes, I might ask my learned friend just to address that point further.

WINKELMANN CJ:
That is, I think that is a point of significance, so we need to get. You can take your mask off Mr Mahuika.

MR MAHUIKA:
I'm sorry, Ma'am. I'm struggling to adjust to these new protocols. Look, I think that is a fair question, although there was evidence before the Tribunal about the registers of the Settlement Trust and the register of the Incorporation and one of the interesting features of that evidence is whereas you would expect a lot of overlap, there isn't. I don't have the numbers to

hand, but it is I think 14% is a number that comes to mind of the incorporation shareholders are on the register of the Settlement Trust and even smaller percentage of the Settlement Trust.

WILLIAMS J:
Yes, but the Settlement Trust –

MR MAHUIKA:
Are on the register of the Incorporation. The other point is that –

WILLIAMS J:
But just on that point, just because they're on the register doesn't mean they're the only ones entitled to benefit?

MR MAHUIKA:
No, that's true, Sir. It does have a bearing when you consider the motion and my friend will make this argument about ratification, is that there is a 68% vote in favour which is relatively small as settlements go based on 31% participation rate amongst the registered owners on top of there being a relatively low correlation between the two registers and of course it's our evidence before the Tribunal that the Incorporation itself has been through a number of processes whereby the shareholders of the incorporation have supported the resumption application.

WILLIAMS J:
How many shareholders in the incorporation?

MR MAHUIKA:
There's 3,000-odd shareholders in the incorporation.

WILLIAMS J:
And they have voted? We don't have any evidence of this or was it –

MR MAHUIKA:
No, but it is before the Tribunal, Sir.

WILLIAMS J:

I see. So my question is this. Your point, I think, is that we are looking at a genuine political split in Ngāti Kahungunu, not a leadership split?

MR MAHUIKA:

Yes, you could describe it that way. The other way of describing it is that because there is this low correlation it's not necessarily safe to assume that the Settlement Trust is representative of that large population of people that have interests in lands of –

WILLIAMS J:

Right, that's my point and in fact they're two groupings now.

MR MAHUIKA:

Yes.

WILLIAMS J:

Although they are all closely related and belong to all the same hapū.

MR MAHUIKA:

And in theory, there should be a lot of overlap in terms of the ability to claim interest in the two, but that's not as a matter of fact how it seems to have transpired. The other point at issue in the Tribunal is that the settlement is for Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua, so it's not limited to the hapū that had land in and around Lake Wairarapa, but it is a wider grouping. So Tāmaki Nui-ā-Rua is that they are further north that goes into Dannevirke would be how best I would describe it. Not that sufficient well informed about those Ngāti Kahungunu boundaries to say that, but it goes further north to where it bounds with the people from Heretaunga Tamatea and so that is a different and bigger grouping of people than just those people that have the lands at Wairarapa who were relocated to Pouakani following the Crown's failing to allocate reserves there in the sort of the latter part of the 19th century and early 20th century.

WINKELMANN CJ:

So your point is that week, your submission is we should not see the basis that the Settlement Trust is more truly representative of the interests of those who are the victims of the wrong than your clients?

MR MAHUIKA:

Yes, I think that would be a fair of saying it. Certainly we would say that on the basis of the evidence that is before the Tribunal, it can't be readily assumed that when the Settlement Trust speaks, it also speaks on behalf of the significant number of people that are owners of the lands at Pouakani. Unless there are any further questions I will get Mr Radich back up again and put my mask back on.

MR RADICH QC:

And I'll move very quickly, conscious of the time and my learned friend's submissions to be made.

WINKELMANN CJ:

Yes, so just to go back to, I can't recall, I think it was Justice Young's point. I'm not quite sure still how it's more important the Supreme Court says that these things than the Court of Appeal says them?

MR RADICH QC:

Yes, your Honour. And the reason for that is that it is the final word that will be important. If I can put it that way, the final word is such an euphemism, but to have a judgment of this Court, without the need for a further step in the appellate structure, would enable, in the event that the Incorporation's claims were successful, the Minister to understand two things. The first of them is that if it went this way, if there was success that the tikanga finding, if I can put it that way, isn't a blockage and that there is a pathway to resumption that way. And secondly, that it will be possible for the Incorporation to be able to pursue that further through the Tribunal process to reach an outcome. Understanding that, rather than the Minister's understandings at the moment which are in the Incorporation's submission flawed –

O'REGAN J:

But why wouldn't a successful appeal to the Court of Appeal disabuse the Minister of the fact that your clients have been unsuccessful? If they become success, doesn't that change the game?

MR RADICH QC:

Understand the position. Only, Sir, that there would be an appeal, that would be inevitable.

O'REGAN J:

Yes, but at the moment he's proceeding on the basis that you tried and failed.

MR RADICH QC:

Yes, Sir.

O'REGAN J:

If you win in the Court of Appeal that will no longer be true.

MR RADICH QC:

That is a fair point, Sir. And, yes, the only answer I have to your Honour is that it's the certainty of being able to have a final position, and knowing that, because time does seem to be very much of the essence here. The settlement deeds are being –

O'REGAN J:

Well, do we have anything to suggest that the Minister would legislate over the top of a Court of Appeal decision?

MR RADICH QC:

We have nothing on that particular point, Sir, no, that's absolutely right.

O'REGAN J:

Well, is there anything to suggest that there's a risk of that?

MR RADICH QC:

The indications are in the Pānui and two of them are attached to Mr Smiler's affidavit, that the deed will be signed, an executive action, so we're not necessarily looking at all of Parliamentary action, but the deed will be signed about now, end of September, was the notion. It looks now more like, due to COVID-19, the middle of October, and the words in those pānui, which is what we have and all we have, is that the settlement legislation will be passed shortly thereafter.

O'REGAN J:

But that's not coming from the Minister.

MR RADICH QC:

It's not, Sir. The Minister hasn't engaged with that point in his submissions in this case.

WINKELMANN CJ:

Now, I understand that some of these VMR participants are having trouble hearing. The microphones in this courtroom are not set up all that well, are they? I take it, I'm not sure whether they're having trouble hearing the Judges or Mr Radich, but both. So we must make more of an effort to speak directly into the microphone and then, or attract an echo.

DISCUSSION REGARDING AUDIO ISSUES

So, if I could also ask the VMR participants to mute themselves, right. Mr Radich, you might have to lean over a bit. I think it might've been, also, Mr Mahuika was not by the microphone.

MR MAHUIKA:

Sorry.

MR RADICH QC:

I'll lean in further. But to come back to your Honour, Justice O'Regan's enquiry of me, the only information is through the panui that have been released that are in the affidavit. The Crown has not, in its submissions, engaged on the point and it would be useful for it to do so. And the position quite simply is that, given the nature of the interests involved, it would be reasonable to say that there would be an inevitable appeal to this Court from the Supreme Court and the importance of the Minister having a, from the Court of Appeal, the importance of the Minister having a final indication showing, if the Incorporation comes through, that the pathway is sufficiently clear will be important. At the moment what we have, of course, is his Honour Justice Cooke has quashed, or set aside the Tribunal's determination. There are appeals on other issues in the Court of Appeal. The Incorporation says that what ever the other findings on those appeals are, a final finding on the tikanga point will be material and ought to be known by Parliament.

O'REGAN J:

So are you suggesting that the Court of Appeal will deal with some aspects as an intermediate court and they might then later come to us, but the tikanga point would come directly to us? Is that –

MR RADICH QC:

At the moment that is the position, Sir.

O'REGAN J:

Well, that's pretty messy, isn't it?

MR RADICH QC:

And that's the position my learned friend, Mr Colson, makes for the Settlement Trust, that his appeal remains there as does Mercury's appeal. Now, Mercury's appeal relates to its right to be heard in the process generally. My learned friend Mr Colson's appeal, which of course was put in when the Settlement Trust was in a different position, it wasn't looking at settling, and it was saying: "Tribunal, you made an error in your relates to finding, you went,"

Justice Cooke said: “You went too broad,” Mr Colson’s client was challenging that, that’s the point now that my learned friend Mr Cornegé’s client Tūmapūhia is taking up. Mr Colson’s appeal will be withdrawn, the pānui tell us, because of the settlement. Those two issue remain issues, but in terms of the Incorporation’s position, your Honour, it says that whatever the findings on those relates to, whether it’s narrow or broad for the Incorporation, doesn’t matter so much because its claims are covered, it says, in the evidence. Whether Mercury’s involved or not doesn’t matter, in terms of its pathway. What matters in terms of its pathway that Parliament should know about is the tikanga point blockage, and that’s why it’s here saying if that can be removed the Minister then knows that there is a pathway to resumption and should certainly, in terms of the legislative guidelines that are on, the Chief Justice mentioned, be taking those things into account.

O’REGAN J:
But he wouldn't be informed that your client was the right recipient on resumption because the Tribunal said the opposite.

MR RADICH QC:
The Tribunal would still have to deal with that. And the Incorporation says “either us”, and let us show you again the evidence why I make that point, “or the broader group”, with which we would be happy. And of course the section 8A relates to not only “the” land but an interest in the land, you can return an interest in the land. So there are options.

WILLIAMS J:
So you’ve got half a mind to support the related finding, the related to finding, because it’s good for your shareholders? Assuming the mana whenua point goes away.

MR RADICH QC:
Assuming the mana whenua point goes away the Incorporation would be quite content to go on the basis of the Tribunal’s current approach so that it can go before the Tribunal in its iterative process and make further points, or to go

the wider approach in terms of a broader grouping, your Honour, through a new trust structure, one of those two ways.

WILLIAMS J:

Right. And you'll argue those in the alterative?

MR RADICH QC:

Yes, Sir. Looking at the time, your Honour, I'm leaving only my learned friend Mr Cornegé about 10 minutes. So I wonder if I just finish on that basis. I think we've covered the primary points. The key really is in terms of the leapfrog, if we can use that colloquialism, that the Minister having a judgment of this Court on that point will, in the Incorporation's submission, be material, if not essential, in Parliament understanding what it is doing when it moves to pass settlement legislation, and I leave my submissions at that, unless there are questions, your Honour.

WINKELMANN CJ:

Mr Cornegé?

MR CORNEGÉ:

May it please the Court, I won't rehearse my submissions or repeat the material covered by Mr Radich.

WINKELMANN CJ:

We have read everybody's submissions.

MR CORNEGÉ:

Thank you, your Honour. The issues that I wanted to address – and I'm mindful of the time – in particular arise out of the Crown's submissions in opposition to our application which were adopted by the Settlement Trust, and in particular the question of whether this appeal or my client's claim is essentially moot, and we have an additional issue which is the timing question, obviously our application being by physical appeal in this Court late.

But before I get there I just wanted to just deal briefly with the final point Mr Radich was addressing, that is, why his Court should hear this, why the leapfrog application should be granted. My clients – and it's annexed to Mr Chamberlain's affidavit – received a very similar letter, an almost identical letter, to that received by the Incorporation. So the position adopted by the Crown is – and it's the same as the position they've adopted in opposition to my application – is that the application was unsuccessful and that's the end of the matter.

I will get to mootness in a moment, but they are aware that there are appeals to the Court of Appeal and not just the Settlement Trust appeal that is going to be withdrawn as part and parcel of the arrangement, but they're aware that Wairarapa Moana has an appeal to the Court of Appeal and the advice from the minister to Wairarapa Moana isn't it they intend to go ahead and settle with the Settlement Trust and, as a consequence, extinguish the resumption claims and therefore the appeal.

So this is to address your Honour Justice O'Regan's point, I don't know what the Crown's position is specifically. If the Crown's position is they will wait for the Court of Appeal, Supreme Court, et cetera, then there isn't a need for this application to come, or this appeal to come, or certainly our appeal to come directly to the Supreme Court. If the position is that they're not prepared or content to wait for a Court of Appeal appeal, and that appears to be case but we don't know, then the reason in my submission why this application should be granted is it's perhaps hopeful as much as anything, if the Supreme Court agrees to hear this, then one would be hopeful that the Crown and Parliament would wait to see what the Supreme Court has to say about the law so that Parliament is properly and fully informed of the relevant position. That's the basis, ultimately, for the application.

O'REGAN J:

So you're saying you're proceeding on the basis of the Crown is not going to wait for the Court of Appeal but it will wait for the Supreme Court?

MR CORNEGE:

One would hope so, yes and that's ultimately something that your Honours are going to need to hear from the Crown on. But the message given by the minister and the relevance is not just in relation to our appeal because in fairness to the minister, while our clients are parties to the Court of Appeal and would be heard on the Settlement Trust's appeal and would want to run one of the arguments they run in relation to issue 5 being the compensation point if they do withdraw their appeal, at that point, we didn't have an appeal before the Court of Appeal because we didn't need to have an appeal before the Court of Appeal. But there is the Wairarapa Moana appeal and yet the same message is being given to the Incorporation that they're simply going to go ahead and settle notwithstanding that there is an extant appeal before that court.

So in terms of mootness, because this seems to be, it's not only the basis for the minister's position but it's also the main thrust of the Crown's opposition and I will similarly to Mr Radich give you some references only to the preliminary determination and the judgment.

The same communique is paragraph or following paragraph, paragraph 23, the Tribunal recommended or indicated an intention to return Ngāumu forest or the relevant –

WILLIAMS J:

Are you going to make any points different to Mr Radich on the mootness point?

MR CORNEGE:

Our claim is different, so yes, some.

WILLIAMS J:

I know your claim is different, but are you going to be referring to, are you going to be emphasising the contingency of the preliminary determination?

MR CORNEGE:

Well, I adopt his submission, but no, that is not the submission.

WILLIAMS J:

You've got more to say, good?

MR CORNEGE:

No, I've got more to say, your Honour.

WILLIAMS J:

I just didn't want you to repeat.

MR CORNEGE:

No, no, I'm not intending to repeat the submissions already made. There was a recommendation or an indication of an intention to return the forest land but not to my clients. It wouldn't be my clients, but not to Ngā Tūmapūhia and whatever model it happened to be and my instructions are that my clients also proposed various models that would represent mana whenua interests and self-evidently, they're not going to receive the land compensation personally.

But that was predicated – the ultimate recommendation and this is 283 of the preliminary determination was that there would not be proportionality between – well, while the return of the land would be a proportionate response to the prejudice suffered by Ngāi Tūmapūhia that inevitability there would have to be compensation and that meant the whole package was too high. While on that first point, that in my submission is simply inconsistent with this court's judgment in *Haronga v Waitangi Tribunal* [2011] NZSC 53 (SC). There's a citation in paragraph 283 to paragraph 107 of this Court's judgment in *Haronga* where the Court in fact says the very opposite. The Court emphasised that on resumption applications the Tribunal has wide discretion not only in terms of to whom the land is returned, how much of the land is returned, conditions that might attach to that, but also when you get to the compensation assessment which in my submission is the next step, once you determine to even return it, how much compensation is returned. So, those

are all live issues, but what the Tribunal said was: “It is to the wider breaches of the Crown we must look to find proportionality between prejudice of the value of the land together with associated compensation,” and then at 284 the Tribunal said: “It is to the wider breaches of the Crown we must look to find proportionality between prejudice of the value of the land, together with associated compensation,” and then at 284 the Tribunal said in essence, because of the finding of relates to, and we support Justice Cooke’s conclusion on relates to and would argue that before the Tribunal, because the Tribunal took the view that “relates to” could mean, or rather that resumption could be used to remedy iwi-wide prejudice for land loss, irrespective of whether that was directly related to the land that was the subject of the application, that it was within its power to use a resumption application to remedy iwi-wide prejudice. Now Justice Cooke has overturned that and significantly quashed the judgment, quashed the preliminary determination, and referred it back to be re-heard.

WINKELMANN CJ:

Well, that’s the important point you're making, which is that it applies within a iwi too, that you can’t remedy the wrong done to one hapū by taking, applying land from hapū, is that your point?

MR CORNEGÉ:

Yes, it is, and that’s precisely the point the Tribunal made, that they could do that, and therefore it was appropriate to make a resumption order but make it not specifically in favour of the Settlement Trust but some body, potentially the Settlement Trust or some equivalent body, to remedy iwi-wide prejudice, and we say that ultimately the Tribunal’s going to have to re-look at that. It may be in a position where – I mean, at this point what the Tribunal was deciding between was give some or all of the land and associated compensation to Ngā Tūmapūhia or use it to remedy iwi-wide prejudice. If that’s not a decision that is open to the Tribunal – and we say it is not and Justice Cooke says that it’s not – then they’re going to have to reconsider this issue in a different light, and in my submission there’s a reasonable prospect that the outcome will be different, and that’s all my client want the opportunity to test, and it’s not

fundamentally different from the earlier *Haronga* judgment. And ultimately what this Court directed was an urgent Tribunal hearing to hear those claims in circumstances where what was proposed was a settlement over the top of those claims that would extinguish them. The Crown was prepared to wait for the original resumption hearing and it was prepared to wait for the judicial review, a judicial review that in fact quashes the resumption hearing and refers matters back. Now in fairness to the Crown there is reference in Justice Cook's judgment, paragraph 94 to paragraph 283 of the preliminary determination or the findings there still be relevant, but we say, one, they're not said to be determinative, they can't be, and, two, as I've just submitted, paragraph 283 of the preliminary determination is predicated on the broader view of relates to rather than the narrow view of relates to, so ultimately the Tribunal is going to have to start from scratch on that point.

WILLIAMS J:
The smaller the claimant group, assuming you and Justice Cooke are right, the less the compensation that must follow.

MR CORNEGÉ:
Well, not necessarily, in the sense that it – and this is one of the issues we want to test in relation to issue five, the compensation provisions – because the Tribunal took a reason – in terms of the question of or the factors that are relevant to extending the four-year grace period, because Justice Cooke characterises it, we say wrongly, as essentially penal interest and we say it's just the return on the forestry assets that are determined, well, where the Tribunal has determined that they should be returned. But, yes, the point –

WILLIAMS J:
Perhaps, but the Tribunal's just as likely to say that we're taking into account the particular loss vis-à-vis this hapū, compared with other losses of other hapū, not on a penalty interests basis or even an accrued loss basis in whatever it might be but on a Treaty basis.

MR CORNEGÉ:

It may do that, we just don't know. It has discretion both in terms of – well, not just both – who land is returned to, how much land is returned, and then ultimately the compensation question. These are all issues that are live before the Tribunal, it's going to have to look at all these issues from scratch.

WILLIAMS J:

Well, you say there's no discretion on who the land has to (inaudible 10:44:31).

MR CORNEGÉ:

Well, no, it's not – it still has to identify an appropriate body to receive the land, that's what I mean. In terms of – I don't know if your Honours want to hear me on the timing of our application? The simple – and I'm mindful of time, I'll do it very quickly.

WINKELMANN CJ:

I should say that, I mean, the reality is that even if there isn't an issue of the timing of your application, if there was a case for a leapfrog appeal you'd probably be a beneficiary of the fact that the appellants, the first applicants proceeded promptly.

MR CORNEGÉ:

Indeed. I think it's important to understand or to make the point, your Honours, one my clients are legally aided. They were legally aided in the Tribunal. They took the view, not unfairly, that because civil legal aid isn't available for representative claims, they wouldn't qualify for legal aid to participate in the High Court. And, in any case, the issues that they wanted tested in the High Court were being tested by other parties. We've now taken the view that the legal aid question is not as straight forward as that and are in the process of applying for legal aid. We don't know the outcome of that. In terms of an appeal, the only issue that they wanted to challenge on appeal, being the compensation point, was being challenged by the Settlement Trust and, as at 30 August, when the Settlement Trust indicated that there was a

vote in favour of moving forward with settlement, they moved quickly to file both in the Court of Appeal and in this court during the lockdown. So in my submission, there's a criticism that they waited too late until settlement was imminent. It's, in fact, the reason that settlement is imminent and that one of consequences of that is that the Settlement Trust appeal will be withdrawn that they're in this position, that they're trying to both appeal themselves in the Court of Appeal and in this court.

If that weren't an issue, they would simply participate as a party in the Court of Appeal and run the arguments they want to run.

And finally, it's worth addressing another point made by the Crown that whether my clients have a mandate to speak for Ngā Tūmapūhia. The first one is my instructions are they do. The second point is that the Crown in their submissions don't, in fact, cite any findings of the Tribunal. They cite their submissions to the Tribunal on the point, none of which are referred to in the preliminary determination at all. So, we simply don't know if the Tribunal accepts them or not. They didn't really need to turn their mind to them because they decided that resumption should be awarded in favour of another party. But, the other point is, we don't even know from the recent voting quite what proportion of Ngā Tūmapūhia, for example, support that vote. Now, my application refers, and I should say, there's a gap in the evidence and I apologise, but I have confirmed this with my friend, Mr Colson, and he accepts that it is the correct position. The application refers to the results as being 68.02% of the 31.05% of voters who voted.

WILLIAMS J:
Can you just go slow.

MR CORNEGÉ:
It's paragraph 8 in my application.

O'REGAN J:

61 of31.

MR CORNEGÉ:

So, 31.05% of voters voted, of which 68.02% voted in favour. So that first, the first number probably won't alarm your Honour, that's unusual, the 68.02% is relatively low and because there's no hapū-by-hapū breakdown, we have no idea, and I mean, I don't know what the position is. But it's not safe to assume that there is overwhelming support –

WILLIAMS J:

Sorry, I'm struggling to keep up. You said the first number is 32?

MR CORNEGÉ:

31.05.

WILLIAMS J:

And that's the proportion of registered members who voted?

MR CORNEGÉ:

Yes.

WILLIAMS J:

How many registered members?

MR CORNEGÉ:

I do have that answer, your Honour, eight and a half thousand.

WILLIAMS J:

Eight and a half thousand, so 31% of eight and half thousand and 16/17% overall.

MR CORNEGÉ:

If you take the total of voter base, it's a little over 20% voted in favour and around about 10% voted against, and we don't know at all what proportion of those who voted in favour are Tūmapūhia.

WILLIAMS J:

No.

MR CORNEGÉ:

And a final point in my submission is, it's in any case legally irrelevant whether my clients have a mandate on behalf of Ngā Tūmapūhia, they have a claim before the Tribunal, their claim succeeded before the Tribunal and they are entitled to apply for resumption. Ultimately, it's a matter for the Tribunal who, if it considers the boxes are ticked and resumption should be granted, who an appropriate or what an appropriate body is to receive the land. It's not going to be clients. It's going to be some other body.

WILLIAMS J:

It's going to be relevant to whether we engage in a discussion with Parliament over that issue, though.

MR CORNEGÉ:

Yes, but my clients have a claim and they're entitled to bring a claim. They had a claim before the Waitangi Tribunal, they took over a claim filed in 1994. That was heard. The Tribunal concluded that that claim was well-founded. There's no issues with –

WILLIAMS J:

But if your clients are mere outliers, that's going to be (inaudible 10:50:06).

MR CORNEGE:

Yes, and my instructions are they aren't and in any case, there's no evidence that they are and all you have from the Crown is submissions, is the submissions they made before the Tribunal which –

WILLIAMS J:

Where is Takirirangi Smith in this?

MR CORNEGE:

My instructing solicitors may be able to assist with that, your Honour.

WILLIAMS J:

No. All right, thank you.

MR CORNEGE:

Unless there's anything I can assist your Honours with further, those are my submissions?

WINKELMANN CJ:

Thank you Mr Cornegé. So, Mr Heron, are you going to speak first or Mr Hodder?

MR CORNEGÉ:

Sorry, if I may, I do have an answer to the question. My instructions are he supports the application.

WILLIAMS J:

All right, thank you.

WINKELMANN CJ:

Interesting. Yes.

MR HERON QC:

Your Honours, I am proposing to, and that was the order we agreed. Now, could I immediately say that we're having problems with the connection and if it's acceptable I might stop sending video so you won't have to look at me which might be a blessing for all and just do audio, if that's acceptable because the court's system regrettably does not seem to hold me and is throwing me out which takes a few minutes to re-join, so that's sort of a warning and a request at the same time, I'm sorry.

WINKELMANN CJ:

All right, so Mr Heron, yes fine, we'll just receive the audio.

MR HERON QC:

Apologies for that.

WINKELMANN CJ:

No, that's fine.

MR HERON QC:

So, I'll continue if I may dealing with Y85 and you will have my submissions. I wanted if I could just to start at paragraph 5 and 5.1 just to very briefly summarise the Crown position. First we say the appeal on tikanga grounds is moot because the Tribunal has declined the Incorporation's claim for different reasons which are unaffected by the current proceedings. Now, I could – could I just ask for some guidance from the Court? I can just give you the paragraphs from the Tribunal's findings. We come in a moment in our written submissions and I'm going to cover some of those, but just for completeness.

WINKELMANN CJ:

Well, yes, you don't need to go through your written submissions. You can just speak to them because we've all read them and we're happy just to take paragraph references as you wish to give them to us, but of course, we can find them in your written submissions too.

MR HERON QC:

Great, thank you.

WINKELMANN CJ:

But it's helpful to have the ones you want us to concentrate on.

MR HERON QC:

All right, and so it's paras 278 right through to 282 where the Tribunal makes it clear there are multiple reasons why it should not return the land to the

Incorporation and the return to Māori and tikanga aspect is not critical to that, rather, it is proportionality, it is representative, the fact that it isn't representative and that the Settlement Trust is a far more suitable entity and I will come back to why the Tribunal considers that to be the case. So that's point 1.

Point 2 is that the live issues in the appeal are between the Settlement Trust and the Crown. The Settlement Trust is choosing to pursue a settlement. Were it to continue its appeal then of course the important issues we say would benefit from refinement and clarification by the Court of Appeal. Now, my point there is probably obvious but if this Court determines to grant leave and leapfrog, it will be the first and final appeal on this issue. The Court of Appeal has set down a three day hearing. Justice Goddard has indicated that perhaps it could be dealt with in two days, but that is a large case.

WINKELMANN CJ:
When is that set down for, Mr Heron?

MR HERON QC:
There's no fixed date but we –

WINKELMANN CJ:
I thought it was breaking news there was.

MR HERON QC:
It might be. I would be grateful to hear that. I thought it might be around the middle of 2022, but I don't know. If anyone in the courtroom knows that answer obviously I'd be grateful for that.

WINKELMANN CJ:
Mr Heron, Mr Cornegé raised a question for you and I wonder if you're prepared to answer it, which is what the Crown's attitude is to waiting for the Court of Appeal and Supreme Court and if it's, yes.

MR HERON QC:

Yes, and you can – there are three points in response to that. The one is that the Minister, at least, has indicated at this point that the executive, at least, wishes to proceed and that's on the basis largely that's set out in the Crown's submissions, that each of the Incorporation and Mr Cornegé's client, have had their applications declined in the Tribunal for reasons that extend well beyond the tikanga point. And they are very clear determinations that, with respect, are not open to be revisited, or not on any rational basis, because, for example, just quoting the Tribunal in terms of the Incorporation, it said: "Even if we considered the prejudice that the shareholders suffered might justify the return, we do not favour the exercise of our discretion in that way." They go on to say at 282: "We have decided the land should return to Māori ownership but not to the Incorporation." And then, when they talk about a suitable recipient entity, at 194 they say that: "The trust does have the attributes that make it an appropriate recipient entity and it talks about –

WINKELMANN CJ:

Nonetheless, Mr Heron, it is still only preliminary and I think, and we have heard today, significant issues raised by the two applicants that they would wish to take back to the Tribunal, if the tikanga point was cleared away.

MR HERON QC:

Yes, and whilst it is entitled preliminary determination there are within it, your Honour, findings that are very clear and, in my respectful submission, are not preliminary, for example, the ones I've just quoted and I encourage you to read or reflect on the findings at paras 278 right through to 295 because, for example, the Tribunal not only suggests that the Incorporation and Ngā Tūmapūhia are not so suitable, but the Tribunal finds that 295 that the Settlement Trust is, in fact, the more suitable and expresses its hope that it does play a pivotal role in this settlement, that's at –

WINKELMANN CJ:

Nevertheless, in circumstances where it hasn't made a finding as to who is the appropriate recipient, it would have to be said they're preliminary and all of

those findings, I would've thought, it would wish to have room to move in relation to factual findings?

MR HERON QC:

Well, I understand that obviously, I don't accept that the language they've used is preliminary in the sense but the aspect they do emphasise that The Tribunal wants done is, of course, the mandate and voting process. So, that's at 295 where the Tribunals –

WINKELMANN CJ:

So your point is, they may not have determined who is the appropriate recipient but they have determined, this is how you're putting it, they have determined that the Incorporation is not?

MR HERON QC:

Yes. And –

WILLIAMS J:

What do you say to 316, the second sentence in paragraph 316 and the sentences that follow that?

MR HERON QC:

Sorry, I just don't have it immediately available. I'm doing an electronic job to get it, so if you bear with me, Sir. It's just coming.

WINKELMANN CJ:

I think it might be from his.

MR HERON QC:

Yes, well I think the third sentence is important too. I accept that the Tribunal there says: "It remains possible we may decide something different." But it's rather difficult to suggest that the Tribunal could possibly reverse the findings that are in the paragraph that I've set out because one would need a rather

dramatic change in the evidential basis to do so one would've thought and none of that can come from the tikanga point. It could only come –

WILLIAMS J:

Or in the circumstances that post-hearing, post-report circumstances and state of the landscape.

MR HERON QC:

Yes, yes.

WILLIAMS J:

That's going to be relevant to this tribunal, isn't it?

MR HERON QC:

I beg your pardon. Sorry, Justice Williams, I couldn't quite hear that.

WILLIAMS J:

So, a lot has happened since that report. It looks to me as if the Tribunal may or may not have been appraised of the possibility that rather than see the Incorporation and its shareholders, for example, entirely excluded by a legislatively imposed settlement, some measure of resumption, albeit more limited, might be appropriate for them. It would not be disproportionate?

MR HERON QC:

Well, if I understand that rightly, I think that that does form part of some measure of recognition of the Incorporation does form part of the current settlement proposal and I'm just looking for that.

WILLIAMS J:

Yes, $5 million.

MR HERON QC:

Yes, that's right.

WILLIAMS J:

I doubt whether that will cut it.

MR HERON QC:

No, well, that seems to be right. Now, apologies, have I answered those questions or is there –

WINKELMANN CJ:

Yes, you have, thank you, Mr Heron.

MR HERON QC:

So I think that deals with my summary. I was dealing with point 2 that we would of course benefit from clarification from the Court of Appeal. As I've said, a first and final appeal where the parties aren't consenting to such would be highly unusual, in my submission and rather, may I say, rather difficult for anyone who is unsuccessful.

GLAZEBROOK J:

I'm sorry, I didn't quite understand that. I thought you had said that there would be no waiting for the Court of Appeal.

MR HERON QC:

Well the current intention of the minister is to keep moving because otherwise it is significant prejudice to the iwi who wish to settle and weighing all those considerations bearing in mind the Incorporation has not succeeded on multiple grounds as is the case for Wai 429 and in those grounds on which they haven't succeeded, if I can put it that way, don't depend upon the appeal, so there's nothing in the appeal which with respect is going to dramatically change the landscape and if either of the Incorporation or Wai 429 wanted to challenge the Tribunal's conclusions, then it ought to have done that before Justice Cooke because in fact that is what, and this is no criticism of them, but both the Incorporation and others urged all parties to have all issues before the High Court with the preliminary determination and the Crown put its issues forward. So, if there were issues to be raised with the inappropriateness of

the Incorporation, disproportionality, non-representative nature, the same with Ngāi Tūmapūhia, and those –

WINKELMANN CJ:
But wouldn't you have taken the point that it was a preliminary finding and not amenable to review?

MR HERON QC:
Well, of course, one could take that point, but we certainly didn't and nor did his Honour Justice Cooke, and I don't think that really is tenable because the findings are very clear.

WINKELMANN CJ:
I have a recollection, and it's vague only and may be incorrect, that the Courts have actually looked at this issue about whether you can review these preliminary determinations?

MR HERON QC:
Well, yes, I think Justice Cooke reviewed some of those authorities and was pretty clear in his decision, his Honour's decision – sorry, I just will have to, sorry, I don't have that immediately to hand, but I know his Honour did cover that and rule clearly on that. I can't find that or my learned friend Mr Graham will just let me know those references.

MR CORNEGÉ:
It's issue 1 in the judgment, your Honour.

WINKELMANN CJ:
Thank you.

MR HERON QC:
Now the third point – and this is just in summary – is that the Tribunal's determinations do support resolution of these issues through engagement between the wider iwi, represented by the Settlement Trust, and the Crown,

and the Tribunal clearly saw the issues here as tribal grievances requiring a response to the broad collective, and that's what the Treaty settlement seeks to achieve. Of course, just to be clear, the Crown does not propose to offer the power station as redress, irrespective of tikanga, the Settlement Trust does not seek the land in the settlement but prefers other land and redress, the Tribunal has said it would not be a just outcome for the Incorporation to get that land. So in context the tikanga issue, we say, has no bearing on the settlement and is not a reason to hold it up. We say the assumption that the Court's findings on tikanga here are necessary here to assist either the Minister or Parliament is, with respect, incorrect, and of course, so therefore we don't say we need to get into difficult discussions about comity. I understand my learned friends may pick that up in the *Ngāti Whātua Ōrākei v Attorney-General* [2019] 1 NZLR 116 (SC) decision but obviously that's a point that clearly the executive Parliament and the Courts will each show respect to each other. But at this point the Minister's position is based on the correct assumption as we have set out.

So, your Honour, then just skipping, the other point about this case and tikanga, as you all know, and we comes to this in the written submissions so I won't repeat it there, but it clearly is a unique case. The facts are unlikely to be repeated. I of course stand corrected, but the Pouākani situation with the Incorporation and the mana whenua and the like, this situation, with respect, must be, if not unique, in my submission extraordinary.

WINKELMANN CJ:
Well, these things do have a habit of recurring quite quickly once they've raised their head actually, so.

MR HERON QC:
Yes, it's always famous last words, isn't it?

WINKELMANN CJ:
Yes.

MR HERON QC:

In any event, so, in my final point I've already made before, this comity point, but I needn't trouble you with that.

I then skip through the written material. You'll see at paragraphs 15 onwards I've set out some of the key paragraphs of the Tribunal. I would say just in response to this issue of representativeness, could I recommend that paragraphs 292 through to 296 of the Tribunal's decision where it talks about a suitable recipient entity and it says that: "In many ways we hope that the Settlement Trust plays a pivotal role," so that gives one a pretty clear steer.

Your Honours, then if I can take as read the submissions right through to paragraph 32. With respect, we say the Incorporation's application doesn't satisfy the criteria and we say at 32, I've covered the mootness, but what is in fact happening with respect we submit is that the Incorporation is really seeking to attack the findings on proportionality and that is borne out if one looks at section, paragraph 21(a) of the notice of appeal for the Incorporation because the Incorporation is submitting in its appeal that it will argue when the proceedings return to the Tribunal that it is proportionate for land to be returned and the economic evidence demonstrates that its losses likely exceed the value. Well, with respect, the Tribunal has heard that and has given not only its proportionality point but has said for other reasons the Incorporation is not suitable and if the Incorporation disagreed with the Tribunal's conclusions, it ought to have brought the challenge in the High Court as it said to all of us, when you challenge is now. We say, and this is 35.2 that there is nothing preliminary in the Tribunal's findings on the merits and I just invite the Court to read that. Of course it will.

In terms of the broader issues, there are of course, and this is paras 37 on, there are of course broader considerations to factor in and of course the minister has done so, the issue, the interests of the Settlement Trust, the interests of iwi, the interests of Raukawa and Ngāti Tūwharetoa in the quietening of claims in relation to these lands. So there were much broader

issues to be considered which have been considered in my respectful submission.

Unless there are questions about Wai 85, I had very little to say beyond the written submissions in respect of Wai 429. The Chief Justice's comment about Wai 85 is successful on this application, then of course it may be helpful to Wai 429, but in my respectful submission, not only has Wai 429 had its application not succeeded for reasons that are clear, those reasons won't change and ought not change. Well, there's no basis on which they could change and paragraph 283 is the Tribunal's statement: "We have also determined that we should not recommend the return of the land to Ngāi Tūmapūhia." But then at 285 it says: "There is another reason why we do not think it is appropriate to return land and compensation to them." Then at 291 it says: "The reason we have quoted this evidence in detail is because it illustrates another part of the narrative that makes it difficult now to make a distinction that is just between the interests of the various hapū comprising Ngāti Kahungunu ki Tāmaki Nui-ā-Rua in terms of the prejudice they have suffered and the redress they should receive."

The Tribunal goes on: "We are firmly of the opinion that any privileging of Ngāi Tūmapūhia because of their mana whenua interests in Ngāumu Forest land would cause unfairness to others," and with respect, none of these findings are going to change.

The final point is of course –

WILLIAMS J:
They could, Mr Heron, given the change in circumstances, this is in my experience the sort of report that is a strong signal to claimants to hold together, don't split, find a way of working together and establishing a single entity that gets everyone in the paddock. Sometimes that works. Often it doesn't and when it doesn't, the Tribunal gets faced with a different set of facts and may well change its mind even at the margins.

MR HERON QC:

Yes, clearly that hypothetical is valid. I would simply submit in response this settlement and this structure has been around now for more than three years. The settlement deed was originally signed in 2018. There has been ample opportunity to explore such a remedy and the Tribunal itself has engaged in an iterative process and explored by the means you've seen possibilities. It doesn't seem that that has borne fruit, if I can put it that way.

WINKELMANN CJ:

Right, so Mr Heron, I'm just looking at the time and I'm mindful Mr Hodder needs to say.

MR HERON QC:

Yes.

WINKELMANN CJ:

Have you got any other points you wanted to cover?

MR HERON QC:

Unless there is any questions, no and 429 really it's on the written material. So, if there are no other questions, those are my submissions.

WINKELMANN CJ:

Thank you, Mr Heron. Mr Hodder.

MR HODDER QC:

Thank you, your Honour. I hope to be relatively brief and I won't, I don't intend to spend very much time on our submissions. Can I make a series of points? The first is that as has been mentioned and just to remind the Court, Mercury has its own appeal in the Court of Appeal and the minute from Justice Goddard in that court from I think a week or 10 days ago invited effectively the parties to apply for a fixture, tell us how long we would have that fixture. So that process is currently in train and that's what we anticipate should happen.

GLAZEBROOK J:

I'm not sure you have something on the microphone or something.

WINKELMANN CJ:

You could actually sit down and direct the microphone to where you are.

MR HODDER QC:

If that's going to be more effective orally then that's what we will do.

GLAZEBROOK J:

It is much better, thank you.

WINKELMANN CJ:

Yes, that's better. It's obviously set up for short people. Well, I say that because I came into court today and my seat is set at an incredibly low level and I tried to adjust it up and it sank even further, so I'm feeling low at the moment.

MR HODDER QC:

I'm not sure if your Honour is talking about the chair or the microphone. The microphone seems designed to impede taller people than myself, but in any event, so the first point is that Mercury has its own appeal in the Court of Appeal and that relates to the standing issue and the terms of section 8(c) about audience in that.

WINKELMANN CJ:

So can I just ask you, how would that, if we were to grant a leapfrog, then what would Mercury's status be in this appeal, undetermined?

MR HODDER QC:

Undetermined and I think Justice O'Regan used the word "messy" and that's really where we finish up, if you deal with some issues and not all of them. Logically, one would've thought, if there was going to be a leapfrog, you'd leapfrog everything, but I don't understand that's what the applicants seek

because the applicants have a particular purpose which I'll come to, and that purpose doesn't include facilitating Mercury getting here on its appeal, as I understand it. So the issue for the Court –

GLAZEBROOK J:
Can I just check then, would you want something else leapfrogged if this was leapfrogged?

MR HODDER QC:
We haven't got a firm view on that. We'd have to abide what the Court decides. If the Court goes with the argument that's put by my learned friend, Mr Radich, that says, that issue alone justifies being dealt with on a leapfrog basis, then we get left behind. If the Court decides it's messy to do get behind, then we get swept up, that's how we've seen it so far.

O'REGAN J:
Well, I don't think we can make you leapfrog, if you don't want to.

MR HODDER QC:
It will probably give us the opportunity to join, perhaps, but –

GLAZEBROOK J:
No, that's what I was asking, whether if we did, and it was a hypothetical, if we did, would you want to –

MR HODDER QC:
I think we'd like an opportunity to consider our position if that was the case.

GLAZEBROOK J:
Right, thank you.

MR HODDER QC:
I hope that's not –

WINKELMANN CJ:

Because there might be some basis on which you could be given the right to be heard, I'm not quite sure what it is, but –

MR HODDER QC:

Yes.

WILLIAMS J:

You're an interested party on these issues anyway, surely you'd want to be heard on them?

MR HODDER QC:

We would.

WILLIAMS J:

Quite apart from your own issue.

MR HODDER QC:

They'd be a respondent in that sense, rather than a separate appellant.

WINKELMANN CJ:

And I doubt, in those circumstances, if it was a condition of leave that the applicants would be opposing.

MR HODDER QC:

I think they'd probably get that hint then, your Honour. The core point for the court is what really we're talking about with exceptional circumstances in terms of section 75(b) of the Act. Nobody here is arguing that there aren't important issues here, but it's the issue around what are exceptional circumstances and having reread what our friends for the applicants are saying, and having heard what they've said this morning, they really are saying that a judgment of this court, or indeed, a pending appeal might either discourage or delay the Minister from proceeding to sign the settlement or Parliament considering a settlement act or bill, should I say. That's the only

thing that was put forward. If it weren't for that, there wouldn't be an application and so it's solely focused on a legislative process, that is the introduction of a bill following the signing of a settlement and consideration of that bill by Parliament. That inevitably gets us into the territory of comity. Whether that's directly in point or indirectly in point, which was partly what my learned friend, Mr Heron, is saying, it seems to us that the key point that emerges from the *Ngāti Whātua Ōrākei* decision is that if the only impact on existing rights is that they will be removed by the legislation in issue, then that's a situation which the Court doesn't interfere. If I can point the Court to the paragraphs in the *Ngāti Whātua* judgment, that's the majority judgment, paragraphs 38, 39, 41 and 48, as I apprehend it, what is contemplated is that there will be live issues of an on-going nature if, in fact, the settlement goes through because part of the settlement proposal is to remove the rights which the applicants in this hearing wish to pursue.

Now we deal with that in paragraphs 21.3 and 21.5 in our written submissions. There's also the Parliamentary Privilege Act 2014 which is addressed by the Court of Appeal in the *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General* [2020] 3 NZLR 1 (CA) decision of last year which we have referred to in our submissions as well at paragraph 22, and I invite the Court to, if it has the chance, to do so and inclined to look at paragraphs 27, 32, and 42 of that judgment. But I'll say no more about that. But the key point that I take from the submissions for the applicants is that the only reason that we are here is because they want this Court's processes to engage with the Parliamentary process which will be triggered by the Minister's decision to sign the settlement and proceed to introduce legislation.

WINKELMANN CJ:

So, Mr Hodder, I mentioned the Convention which Mr Radich helpfully pointed out is a legislative guideline in relation to Parliament not enacting legislation for the purpose of taking away an individual's rights they have established through litigation. But you would say that principle doesn't extend to this circumstance?

MR HODDER QC:

I think where that principle would bite, your Honour, is once a bill is introduced, whether Parliament makes a decision about whether it adheres to that convention or not.

WINKELMANN CJ:

I mean, Parliament's not constrained, doesn't constrain to sit around while people pursue their appeal rights, is your point.

MR HODDER QC:

Essentially yes, your Honour. Can I develop that in a slightly different way? There seem to be two themes to the leapfrog application here. The first is that Parliament ought not to proceed to legislate on what might be an erroneous view of the existing law, that's the first one. The second limb is that only this Court can provide the definitive view of the existing law. And in an abstract level both of those propositions have some merit in, as it were, the more pragmatic world they are problematic. The first point is that the information understandings that Parliament has at the time it makes decisions about enacting or not enacting legislation can't be called into question in the Courts, that's the point of the Bill of Rights of 1688, it's the point of the Parliamentary Privilege Act 2014. And on the second point, that only this Court can provide the definitive view of the existing law, then there may be many matters where the existing law might be better clarified by the Courts before Parliament decides and is better informed, but it doesn't happen like that. So the logic, we say, is not as strong as at one level appear.

Perhaps the critical point in terms of structure of the court system though is the idea that one leapfrogs or bypasses the Court of Appeal, and it may be worthwhile saying something, even if it seems self-evident, as to why that is problematic. The first is that that's not the regime that's set up by the Act. The basic regime under the Senior Courts Act 2016 and its predecessors is that one goes through the intermediate Court of Appeal to the final Court of Appeal, and there's a leave process that polices the last of those stages. So the Court of Appeal does provide a true appellate forum: multiple

judges, an opportunity of refinement of argument and, in the end, a collective analysis and explanation of the reasons and the conclusions, and that's beneficial to the ultimate appellate Court, this Court. So this Court benefits in the end from the work of four judges rather than one, which is the kind of the structure you get from following the orthodox regime through. And as I have mentioned, the presumptive responsibility of the Court of Appeal under section 56 of the Senior Courts Act is for all appeals from the High Court.

There are of course some circumstances where leapfrog can be justified, the jurisdiction obviously exists, but the question is where that might be, and while these come from me thinking about this since we wrote our submissions, can I mention that there may be circumstances where the further Court of Appeal judgment might not be that useful, and those circumstances would be where the Court has already considered the relevant issues and will regard itself as bound by its own earlier decision or, conversely, there are two competing decisions, and one of them has to be resolved, the two strands have to be resolved. And can I mentioned that the United Kingdom Supreme Court's Practice Note recognises those two circumstances as grounds for what we're calling a "leapfrog", that's in its Practice Note at paragraph 3.6.12, and I've no doubt that the Court's resources will enable it to catch up with that if they wish to.

The second point which was made in our submissions and has been mentioned in passing is that earlier grants of leapfrog applications here have generally been marked by the agreement of the parties, that is to say no party has considered itself being denied access to two tiers of appeal, and *West Coast ENT Inc v Buller Coal* [2012] NZSC 107 is a case that I have some recollection of, that was a case where the Court regarded or mentioned on at least two occasions that all parties had joined to get the intervention of the Court in a leapfrog way there. And I was interested to see that in Canada's Supreme Court Act section 38 requires a leapfrog application to be by written consent of all the parties, and I wondered why that might be and I also tragically went back to look at the advisory group on the Privy Council's, what happened after the Privy Council, and there's a passing mention there of

party autonomy. And in a sense what the Supreme Court of Canada's rules imply is a degree of party autonomy in departing from the orthodox system, a bit analogous to go into arbitration where all parties agree. And so in those circumstances that gives some weight to the idea that there is a leapfrog application. There is no such agreement or party autonomy in that sense being exercised here.

Further, this isn't a case where the issue is going to affect the course of substantive trial hearing which is ongoing, which is the case in *West Coast ENT* and why the matter was sought and granted, and nor is this a bespoke test case brought in anticipation of a new and widespread problem, and can I mention to the Court a case called *Financial Conduct Authority v Arch Insurance* [2021] UKSC 1, in which there had been a test case about the impact of COVID on business interruption insurance, it would affect many different insurers' policies and many, many parties, and it was a matter of urgency as COVID was impacting the economy. In that case the Court, the thing was set up as a test case. The original first instance decision was given by divisional court comprising the Lord Justice of Appeal, and one of the chancellery judges I think, and then it went from there to the Supreme Court. So all those circumstances I've just been through seem to us to indicate the kind of thing that exceptional circumstances might be created by and indicated by. That is not this case and that is the essence of our case and our opposition. We join in what the Crown has said but we don't repeat it. We anticipate that we will join with what we have seen from the Raukawa submission, but those are our submissions and opposition. I should say we have nothing to say about Mr Cornege's position. That doesn't affect us.

WINKELMANN CJ:

Thank you, Mr Hodder. Mr Colson?

MR COLSON QC:

I think Mr Barton was going to go next, your Honour, but I'm happy.

WINKELMANN CJ:

Mr Barton, we see you there. I think you are muted. Still muted. Still can't hear you.

MR COLSON QC:

Otherwise I'm happy to go while that is settled.

WINKELMANN CJ:

Mr Barton, we might go onto Mr Colson and you can work out your mute button in the meantime, or it might not be the mute button to be fair to you.

MR BARTON:

All right.

MR COLSON QC:

There he is.

WINKELMANN CJ:

All right, okay, you can stand down Mr Colson. Mr Barton.

MR BARTON:

You can hear me now, your Honour?

WINKELMANN CJ:

Yes, we can hear you now.

MR BARTON:

Thank you. Well, perhaps I start by adopting the submissions of my learned friends for both the Crown and Mercury, but if I could also start by saying that historical injustice here is not one-sided. That from Raukawa's point of view, land, its lands were taken by the Crown and then used to compensate another iwi from another part of the country and those were lands in respect of which Raukawa continues to assert and hold mana whenua and this is very important to them. Raukawa is deeply offended at the concept of resumption

applying in these circumstances to lands that are within its rohe and for this to happen is to rub further salt into the wound.

This leapfrog application clearly turns on section 75 of the Act and I know everyone is familiar with it, but the Act does say: “The Supreme Court must not give leave unless satisfied of those other criteria,” which is quite a high standard that often one would see a statutory provision that says “the Supreme Court may give leave in exceptional circumstances”. So, it is quite a high standard that has to be met on this occasion and the real impact here is the loss of the intermediate appeal and my learned friends have already talked about the benefits that come from that and particularly by the time this Court considers something, four judges have already considered and analysed the issues and the Supreme Court has the benefit of their work.

In this case, what is different here is that at this level a number of other parties have emerged who took no active role in the High Court and we have Ngāti Tūwharetoa and they also share mana whenua in this rohe and their position is that they may seek leave to file submissions and appear at the hearing. So that’s another party who wasn’t actually in the High Court.

The Pouākani Claims Trust, which is the seventh respondent, which has been referred to earlier today has not taken an active part in the High Court. It’s filed documents to say it would have a watching brief, was aware of all the issues because the statements of claim were served on it and now from the point of view of Raukawa, your Honour, if I could perhaps express it in terms of paragraph 9 of their memorandum is a throwing a grenade in the room, suggestions about who actually holds mana whenua between the Pouākani Claims Trust, Raukawa and Ngāti Tūwharetoa and these issues were not before the High Court and so these are new arguments that have been raised. And then Mr Cornege’s client once again is a party who was served with a statement of claim, did not get involved in that earlier stage, now choosing to become involved and so in my submission, what we’re now getting is at this Supreme Court level if the leapfrog applications allow it, is we’re getting further submissions, further arguments that have not in fact been

raised at any earlier stage. So we're not just missing out on one line of appeal, we're actually ending up the Supreme Court being virtually the court of first instance. In my submission, this is undesirable and that there needs to be a coalescing and bringing together of all these submissions and arguments in the Court of Appeal and that refinement that then takes place.

If I could perhaps even refer to the timing here where in the High Court we were four days. Three days has been asked for in the Court of Appeal. Now with these extra parties, how long will this take in the Supreme Court and is this a wise use of judicial resources.

WINKELMANN CJ:

So, Mr Barton, that sounds all very good, but the counterfactuals we have heard from Mr Heron and we don't know if it is actually a counterfactual. It might be both scenarios in any case, but the counterfactual we heard from Mr Heron is that really the appeal will go away if Parliament enacts a legislation. I know it's all rather, it's in a sense speculative although there is clear intention signalled by the minister. So the appellate rights will just go away in the Court of Appeal. So the nice process you've described won't run.

MR BARTON:

Yes, I accept your Honour that's not entirely desirable but I still reinforce my submission which is that the raison d'etre of the Supreme Court is to consider these as the final step in the process rather than what would be it is inchoate still at this moment and it is desirable that this goes through the Court of Appeal and then what's served up to you is something that is clear and the issues are clear, it's been analysed and then a decision can be made. I mean the High Court decision I said before it was a four day hearing. That was some five months before the decision was available, so this isn't something that's going to be available, I wouldn't think at short notice and we do have this – we have the court process on the one hand and we have the parliamentary process on the other and in my submission, the court process shouldn't be compromised.

WINKELMANN CJ:

Thank you, Mr Barton. Are those your submissions?

MR BARTON:

Yes. Yes, the other points I could make have been adequately, very well made by my learned friend so I won't take any more of your time, thank you, your Honour.

WILLIAMS J:

The Pouākani Claims Trust are the original claimants to the Pouākani block, John Pako and Co, is that right?

MR BARTON:

Yes.

WILLIAMS J:

And they've settled the Pouākani claims, have they settled?

MR BARTON:

I don't believe they have, your Honour.

WILLIAMS J:

I thought there was a settlement. I read it somewhere for two and a half million dollars or at least valued at two and a half million dollars?

WINKELMANN CJ:

Does Mr Mahuika know?

MR GRAHAM:

Yes, my understanding is that there has been a settlement.

WILLIAMS J:

Oh yes, it is in the Crown's material. So that claim was settled? Is Mr Paki Ngāti Raukawa, or was he before he died?

MR BARTON:

Sorry, I didn't quite catch the question, your Honour.

WILLIAMS J:

Did Mr Paki affiliate to Ngāi Raukawa?

MR BARTON:

Look, I'm sorry, I can't answer that question. I wasn't in the tribunal.

WILLIAMS J:

Okay, thanks.

WINKELMANN CJ:

Right, Mr Colson.

MR COLSON QC:

Thank you, your Honour. I've got about six or seven points to make. The first as has been made previously of course is that the resumption applications by the two applicants were in fact rejected by the Tribunal.

WINKELMANN CJ:

You don't need to repeat them.

MR COLSON QC:

Thank you. Second, the Court of Appeal, the parties filed a joint memorandum back in May 2021 agreeing on hearing time, the order et cetera, all the material that was needed. The party, the applicants have been aware of ongoing negotiations with the Crown since that time but have taken no steps to progress the appeal throughout that period until recently.

The third point is – and I understand what your Honours –

WINKELMANN CJ:

Well, was it always clear that the Crown would proceed, notwithstanding the Court of Appeal being seized in the matter?

MR COLSON QC:

Well, the other parties have been advised that we continue to be in direct negotiations with the Crown throughout this period.

WINKELMANN CJ:

Yes. That's a different matter though, isn't it, Mr Colson?

MR COLSON QC:

It is, yes. The next point I just wanted was to make in relation to WMI's suggestion of a new trust, et cetera, and there was a faint hint of that for Ngāi Tūmapūhia-ā-Rangi as well. That was raised in oral submissions in closing, there has been no documentation put forward on that. WMI is of course a Māori incorporation under Te Ture Whenua Māori Act 1993, Māori Land Act, that's constitution records in the standard way that it is focused on its shareholders. It would be quite something for it to set up an entirely new trust which was to benefit not just its shareholders but all other members of the Ngāti Kahungunu ki Tāmaki Wairarapa nui-a-Rua community –

WILLIAMS J:

(inaudible 11:41:12) shareholders.

MR COLSON QC:

No, but the – yes, the trustees could of course – sorry, such a trust could of course be set up, but –

WILLIAMS J:

There could be special shares established, could be trustees appointed to hold those shares, there's any number of ways of doing it.

MR COLSON QC:

There could be all of that but none of that has been done or put forward, nor was it put forward to the Tribunal at any stage in that detailed way.

WILLIAMS J:

But it might have been – that's what's proposed in the second iteration, in line 316.

MR COLSON QC:

It might be, but back in August 2019 the Tribunal gave the parties a clear steer where it was coming to. At no stage did either of these applicants put forward an alternative structure.

WILLIAMS J:

I bet you they've got one now.

MR COLSON QC:

Well, they haven't had one the last two years, no one's produced any documents at all and, most importantly, we of course have one, we have a standard post-settlement governance entity with a standard trustee which the Tribunal has recognised has all the attributes you'd expect to see and which has had 68% support of those who voted recently in a settlement-fatigued community in favour of the settlement.

WILLIAMS J:

I'm not sure this is a settlement-fatigued community, this is about standard length in my experience

MR COLSON QC:

And of course one of the concerns is if all the litigation carries on then we are in *Haronga* situation where it goes back to the Tribunal and everyone's fighting about who gets what when there has been a governance entity which has been approved by the people and the people want to move on.

And a point that might have not come out explicitly, but the Ngāumu forest of course is coming back to the Settlement Trust as part of the proposed settlement, that is the forest over which my learned friend Mr Cornegé's

clients have interests in but, as the Tribunal recognised, no one has particular interests in that, they're held communally and equally. Secondly, in relation –

WILLIAMS J:
Can I ask you, the forest, that was in the original settlement?

MR COLSON QC:
Yes, it was in the original settlement.

WILLIAMS J:
Right.

MR COLSON QC:
The issue which is sought to be raised by Tūmapūhia on appeal is the extent of the redress that comes with that, the compensation under the Crown Forest Assets Act 1989, and of course the Tribunal has expressly said that that would not come to Tūmapūhia because it would over- compensate them for the Treaty breaches. Those were the only points I wished to make.

WINKELMANN CJ:
So by way of reply, Mr Radich?

MR RADICH QC:
Thank you, your Honour. Some short points only. The first of them, just by way of clarity, there was mention in the Minister's letter of $5 million going to Wairarapa Moana. Just to be clear, that's not going to the Incorporation, that is for the lake, the clean-up of the lake.

WILLIAMS J:
Oh, I'm sorry.

MR RADICH QC:
Yes. No, no, that was exactly my thinking at the outset too, your Honour, but having had that clarified I don't think anyone would disagree, but it's a small point.

Secondly, just in terms of numbers, the shareholders, the number is 3,780 shareholders in Mangatu Incorporation, of which 14, one four per cent, are registered with the Settlement Trust.

WINKELMANN CJ:
Fourteen per cent?

MR RADICH QC:
Yes, 14% of that 3,780 shareholders registered with the Settlement Trust.

WILLIAMS J:
I don't suppose you – is there anywhere in the record then that that's the shareholders voting in favour of the course that you've adopted? You're not going to get 3,780 shareholders to a shareholders' meeting.

MR RADICH QC:
Quite so.

WILLIAMS J:
Do you know what those numbers are?

MR RADICH QC:
It's a matter of record, but we don't have the numbers here, your Honour, I'm sorry.

WINKELMANN CJ:
Do you want them to give them to you?

MR RADICH QC:
Yes.

WILLIAMS J:
On my count 68% of 1,300 voted in favour of the settlement?

MR RADICH QC:

Yes.

WILLIAMS J:

And you say there's only 14% overlap? You haven't said how many voted effectively against it and I'd be interested to know that so we've got some numbers we can –

MR RADICH QC:

Yes, quite, I understand the point. Shall we raise those numbers, circulate them to other counsel and then give them to your Honours?

WILLIAMS J:

Sure.

WINKELMANN CJ:

Yes, thanks.

MR RADICH QC:

They may be on the record somewhere and we'll check, yes, thank you. The next point briefly was that, of course, when the Waitangi Tribunal went through its deliberation process, issued its determination, the Settlement Trust and the Incorporation were both seeking resumption. They were closely aligned in their approach, both had proposed, I think through my learned friend, Mr Mahuika, in closing submissions, as I understand it, a joint trust arrangement, therefore, it's understandable that the Tribunal didn't go into proportionality as between the different groups at that time in the way in which it might otherwise have done. Now, of course, the position we find ourselves in is that the decision's been quashed in any event. His Honour, Justice Cooke, has quashed that decision. So if the Tribunal were to pick it up, we'd need to start again.

WINKELMANN CJ:

Yes, quashed – what has he quashed, the whole of the decision?

MR RADICH QC:

All of it, your Honour. Yes. He used the words “set aside”. So, one would assume we’ve been looking, of course, at key paragraphs in the decision to get a snapshot of what the Tribunal was thinking at that point in time, but now the High Court has said: “You need to go back and rethink it with these things in mind.”

O’REGAN J:

Yes, but you’re trying to get that overturned, and the decision, aren't you? You’re trying to get the quashing overturned so that resurrects -

MR RADICH QC:

Insofar as the tikanga point arises, your Honour, so yes, yes, your Honour’s right. What you would have is an overturned decision but a judgment from this Court perhaps, if it went that way, that made the tikanga point clear. So that then one, Parliament know that, two, if there’s a chance to go back and exercise the rights of resumption in the Tribunal, the Tribunal knows that. It’s that blockage that becomes clear, your Honour.

WILLIAM YOUNG J:

If Parliament wants our opinion, they can always defer legislation.

MR RADICH QC:

Yes, Sir.

WILLIAM YOUNG J:

So this is a bit of a race to the pass, isn't it?

MR RADICH QC:

One would hope that Parliament would want your opinion, Sir, if I can just answer your question that way.

WILLIAMS J:

Well, they've got, they can refer the matter to the Waitangi Tribunal under the Treaty of Waitangi as –

MR RADICH QC:

Yes, yes indeed.

WILLIAMS J:

It's a special jurisdiction (inaudible 11:47:47).

MR RADICH QC:

Yes. Another pathway, your Honour, quite.

WILLIAMS J:

What do you say to Mr Hodder's point about comity?

MR RADICH QC:

Yes, on that point, your Honour, if I can just mention a couple of references in the cases, and even take you to them. My learned friend mentioned the *Ngāti Whātua* case. Can I refer to paragraph 42 and in that case it says that where controversy raises justiciable issues or statutory interpretation or deed interpretation, then you're not trespassing into comity. At 48: "Public law decisions that can be the subject of challenge without interference with Parliamentary proceedings don't breach the principle." So we're not asking here for an interference in Parliamentary proceedings, there's a distinction between making judgements about legislative proposals and then granting declarations or decisions on pre-existing rights or in this case, on a public law issue. The Parliamentary process is relevant as a matter of timing, but nowhere in this case, unlike the *Wakatu* relief that was struck out, no where in this case does anyone seek to ask Parliament to stop doing something. It can –

WILLIAM YOUNG J:

Well, aren't you really doing that? Aren't you asking us to do something we wouldn't normally do, just to influence Parliamentary processes?

MR RADICH QC:

I understand your Honour's point.

WILLIAM YOUNG J:

Am I right in putting it that way? It's slightly, I know it's (inaudible 11:49:22).

MR RADICH QC:

No, no. Parliamentary, it's a timing issue, your Honour. And the point is that it is relevant that the case goes nowhere near seeking through substantive relief interference in a Parliamentary process, so it asks to deal with the tikanga point and it says that Parliament should be aware of that.

WILLIAM YOUNG J:

Yes, but I know it's a long answer to a question which probably would be yes, because I think you are seeking (inaudible 11:49:50) Parliamentary process and to do that you're asking us to do something which we wouldn't otherwise…

MR RADICH QC:

Yes. We don't seek to stop a bill being passed.

WILLIAM YOUNG J:

I understand that. Well, you do, really.

GLAZEBROOK J:

I mean you could put it another way. You're seeking to inform Parliament as to what the position actually is and that one would expect and I think Mr Hodder even said that that on first blush seems to be something that Parliament would actually welcome rather than not welcome.

WINKELMANN CJ:

I think that was Mr Heron who said that.

GLAZEBROOK J:

Whoever.

O'REGAN J:

It's the minister you're trying to stop, isn't it, not Parliament because once it's in Parliament it would be a problem?

MR RADICH QC:

Once it's in Parliament it would be a problem, so the starting point –

O'REGAN J:

So you're trying to stop the minister bringing it to Parliament?

MR RADICH QC:

Well, first of all, the executive action in signing a deed, so that's not going towards Parliament. I think that in one place is outdoor. Secondly, to inform the minister so that when the minister decides whether to go ahead with the legislation or not and there is no trespass there. Certainly do not seek to go near that. That is by no means something that the Incorporation could contemplate, but it wishes to inform the minister so that the minister can go with eyes open.

WILLIAMS J:

It seems to me that this situation is in the no man's land between the clear cases where declarations are sought saying legislation, but their proposal is illegal for some reason or other.

MR RADICH QC:

Yes.

WILLIAMS J:

And those that do not really care what's going on in Parliament and just want vindication of rights?

MR RADICH QC:

Yes.

WILLIAMS J:

This really is a race to the pass.

MR RADICH QC:

Yes.

WILLIAMS J:

And it appears to me to be in the middle ground.

MR RADICH QC:

Yes.

WILLIAMS J:

We've never had one of these before. Maybe the equivalent might be the High Court granting urgency, or the Court of Appeal granting urgency saying the Wharekauri, the early *Wharekauri* case, although the applicants failed, because of pending, in that case fisheries settlement legislation, do you know what happened there? How did the Court of Appeal deal with that?

MR RADICH QC:

I cannot give your Honour an answer on that on my feet.

WILLIAMS J:

It would be interesting to know whether it just wended its way through the standard Court of Appeal process or whether they were given a priority fixture.

MR RADICH QC:

Yes, that's a good point. I just don't know, your Honour. I come back also to the Port Nicholson settlement block case where we're a little bit different to this one, but where two iwi were looking at consistency between deeds and wanting deeds interpreted before Parliament.

WILLIAMS J:

I know, I read about that.

MR RADICH QC:

Yes, made a decision.

WILLIAMS J:

But there was no question of expedition there from memory.

MR RADICH QC:

It was at the point where I think the legislation was nigh.

WINKELMANN CJ:

I should say we've probably, I don't know how this is going to go with VMR but we've run out of time, but I don't want to cut the reply short because I have a couple of questions myself. I'm wondering if it would inconvenience counsel very much if we adjourned until 12.30 because there is another matter that a member of our court has to attend to and hopefully we can reassemble our VMR crew at that time. Does that cause anyone great inconvenience?

MR RADICH QC:

No problem at all, your Honour. I only had a couple of points to make and I'm very happy to make them at 12.30.

WINKELMANN CJ;

Thank you.

COURT ADJOURNS: 11.53 AM

COURT RESUMES: 12.30 PM

WINKELMANN CJ:
Right, Mr Radich, did you have any more to say?

MR RADICH QC:
Thank you, your Honour. Just two or three brief points. One of them was my learned friend Mr Hodder was talking about leapfrog applications normally being marked by agreement between the parties. I just make the case of an example of one that wasn't and that was the MOM case, the mixed ownership model case which came to the Supreme Court. In that case, the Māori Council brought the appeal into the Court of Appeal so that the Crown could apply to leapfrog, but the Māori Council didn't accept the leapfrog criteria were met and so that was one that found its way to this court against opposition.

The second point my learned friend Mr Hodder was referring to the *West Coast ENT* case, a case which was ongoing. The Court needed to give some guidance about emissions evidence, climate change evidence to help the Environment Court. I make the point only that the Waitangi Tribunal process absent the legislative process is still going here.

My learned friend Mr Barton made the point about the entry of other parties into the fray. I simply observe that the position of the Pouākani Claims Trust was mentioned in the High Court and they had filed a memorandum.

Can I come back to the ground on which urgency is being sought in terms of the non-interference principle? Certainly the ground on which urgency is sought is linked to the parliamentary process, but the proceeding itself is not linked to that process. The proceeding seeks clarity over the right to obtain resumption where Incorporation says the minister is labouring under the misapprehension that it is not available.

Your Honour, Justice Williams raised the question of the Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General [1993] 2 NZLR 301 (CA) (*Sealords)* case and the timing there. I can, with the benefit of having had the break, give your Honour some information about that. So the deed of settlement in that case was signed on 23 September 1992. The High Court hearing was held between 7 and 9 October 1992. Relief was declined. The appeal and the cross-appeal were heard between 19 and 21 October 1992 and the Court of Appeal's decision was 3 November 1992 and that was when legislation was imminent and of course it was a challenge to the deed itself.

WILLIAMS J:
So it's reported as the *Wharekauri* case, correct?

MR RADICH QC:
Yes, Sir. Yes, Sir and the only other point and the final point I would make –

WILLIAMS J:
Sorry, what stance did, do you know what stance the parties took on this urgency?

MR RADICH QC:
On the urgency that was then taken, no, I don't. I don't know the attitude, I'm sorry, Sir, no. Yes, my learned friend says that the Court of Appeal did emphasise the need for speed which I think was a movie.

WILLIAMS J:
The movie came out later.

MR RADICH QC:
It did, your Honour. My final point is that perhaps the best example of the Court stepping into guide in a timing sense is the *New Zealand Māori Council v Attorney-General (the Land's case)* [1987] 1 NZLR 641 (CA) and they were the only points I wished to make in reply, your Honours.

WINKELMANN CJ:
Can I just ask you about Mr Hodder's client's situation?

MR RADICH QC:
Yes.

WINKELMANN CJ:
So, he's in a situation where he's trying to obtain a right to be heard in relation to the issues and that's his appeal which would putter on in the Court of Appeal?

MR RADICH QC:
Yes.

WINKELMANN CJ:
What about if this leapfrogs here without it, what do we do with Mercury?

MR RADICH QC:
I would have certainly thought that they would be here as an interested party, your Honour.

WILLIAMS J:
Can I ask, why do you say the Land's case helps you here?

MR RADICH QC:
I just mentioned it because it was a case of course of Parliament endeavouring to put in place through legislation mainly some quite significant reforms.

O'REGAN J:
That had always been (inaudible 12:35:10) section 27.

MR RADICH QC:
Yes, but this was the Court guiding, effectively, provided guidance to Parliament.

WILLIAMS J:

Well, you could say I suppose at the end of it the Court said: “Parliament, you now need to re-legislate.”

MR RADICH QC:

Well, it said: “Yes, you need to put in place, there needs to be a scheme of safeguard.” In fact it was possibly the most at-your-shoulder guidance there could have been, because it said: “You need to come back here, show the scheme of safeguards, we’ll need to be satisfied,” and then the deals were done, legislative amendments were part of the package and they were re-presented to the Court.

O’REGAN J:

Yes, but that was restraining the executive from transferring assets to entities that had already been set up.

MR RADICH QC:

Yes, Sir, that is a fair comment

O’REGAN J:

So that was restraining executive action, not parliamentary action.

MR RADICH QC:

I think that is so, Sir, but yes, no, that’s a very fair point, your Honour. What it resulted in, of course, it was an intervention that saw parliamentary action as a direct result. So, yes, it was – no, thank you, your Honour.

WINKELMANN CJ:

Thank you. Mr Cornegé.

MR CORNEGÉ QC:

Two brief points, your Honour. The first is in response to the submission made by my friend, Mr Colson, that the suggestion that there be some body or entity set up to receive the Ngāumu forest is –

WINKELMANN CJ:

Can you just repeat yourself? Because there was some strange, someone's phone or something was speaking to us

MR CORNEGÉ QC:

My friend Mr Colson made the point that the suggestion that I had earlier made in my submissions that there would be, were this to go back to the Tribunal, a submission that there be some body or model set up to receive the Ngāumu forest is new, in my submission that's wrong, there were submissions made to the Tribunal on that very point, no particular body was suggested, because at that stage –

GLAZEBROOK J:

Is that right in closing though…

WINKELMANN CJ:

Or was that the other part, was it the incorporated…

GLAZEBROOK J:

The other bit of it, maybe the other bit of it.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

That's all right.

MR CORNEGÉ QC:

Yes, that's right, certainly in terms of our clients, and I don't know the position in terms of WMI, it may be the same. But it's not a new suggestion today that there would need to be somebody, and it's self-evident because Ms Griggs and Mr Chamberlain are not personally going to receive this forest or any compensation that flows with it. It might be the rūnanga, it might be some other body, I mean, that's a matter for the Tribunal ultimately to determine.

The second point is to simply emphasise that we're in a slightly different position from Wairarapa Moana in the sense that other than the question of compensation we support Justice Cooke's judgment, and in fact it's because of Justice Cooke's judgment that there is a reasonable likelihood in my submission of a different outcome when this goes back to the Tribunal. The simple point is that his Honour quashed – for all the suggestion that both WMI and Ngāi Tūmapūhia lost, the preliminary determination was set aside and the matter was referred back to the Tribunal to reconsider, it has to start from scratch. Now there are some paragraphs in the judgment that say "this will still be relevant" but ultimately it's a new process. And so if the Crown was prepared to wait for the initial resumption application and then was prepared to wait for the judicial review, which then refers it back to the Tribunal to re-hear, the only basis it seems why the Crown wants in, that's not fair. Clearly the Crown and Settlement Trust want to get on and settle, I can completely understand that, but the Crown is labouring under a misapprehension that my clients will inevitably lose for the exact same reasons when we go back to the Tribunal.

WILLIAM YOUNG J:

Well, not necessarily. I mean, wouldn't the Crown understand, the Government understand, that what they've got at the moment is a snapshot in time that might change as the litigation continues (inaudible 12:39:18)?

MR CORNEGÉ QC:

Well, but that's what the Minister says in his letter, I mean, whether he's being wilfully blind or not I don't know. But the simple point is that's what the Minister says. The Minister says: "You lost –

WILLIAM YOUNG J:

Yes, but the Minister must realise that that's, in the ordinary course of events, be subject to appeals.

MR CORNEGÉ QC:

Indeed, one would expect so.

GLAZEBROOK J:

But he says he's not waiting for the appeal.

WILLIAM YOUNG J:

Yes.

O'REGAN J:

He hasn't said that, has he?

MR CORNEGÉ QC:

No. Well, he said it –

GLAZEBROOK J:

Well, he did…

WINKELMANN CJ:

Through Mr Heron, Mr Heron's confirmed that, he's confirmed that the Minister is not waiting for the Court of Appeal appeal.

MR CORNEGÉ QC:

That's right.

WILLIAM YOUNG J:

So why would he wait for us?

MR CORNEGÉ QC:

Comity. I mean, the simple point is we're not – and it's to, adds to the point that Mr Radich made in reply, the reason why the leapfrog application has been brought is in some way to ensure that Parliament knows it's going to be properly informed. I mean, comity works both ways. When the simple point is yes, Parliament can say to the Supreme Court, we would like to know about something, but the reality is that's not what Parliament does in a day-to-day

basis, they don't say, we're about to pass legislation. Will you, Supreme Court, in the absence of us being aware of any issue whatsoever, let us know whether you think this is important or not? But if the Supreme Court says, this is an important issue, we're going to hear it, we don't know what Parliament will do.

O'REGAN J:
But everyone agrees it's an important issue, the only question is whether you can jump the gun. There's no debate that it's an important issue.

MR CORNEGÉ QC:
Well, no, indeed. But if – maybe it's in a vain hope. The simple point is if this Court agrees to hear it, one would hope that the Crown would wait for that appeal to be heard, one would hope that Parliament would want to know what the correct let position is. Ultimately they're free to do what they want, but they're not prepared to wait for the Court of Appeal. I don't know why, it seems to be because they're labouring under a misapprehension.

O'REGAN J:
It's not Parliament though, is it, you're trying to restrain, it's the Minister, isn't it?

MR CORNEGÉ QC:
No, no, it's the Minister, that's right. Well, and the Minister is self-evidently misinformed.

WINKELMANN CJ:
Well, possibly.

MR CORNEGÉ QC:
Well, he's misinformed in the sense that the says that there's no chance of us succeeding.

WINKELMANN CJ:

Does he say that? I didn't think he said that.

O'REGAN J:

He doesn't say that, he just says you were unsuccessful –

GLAZEBROOK J:

That was also Mr Heron's submission, that there was no chance of succeeding.

MR CORNEGÉ QC:

That's right, and that's the Crown's submission.

WINKELMANN CJ:

Okay.

WILLIAM YOUNG J:

I'm sorry, but that's not what the Minister said.

MR CORNEGÉ QC:

No, no, but it's the Crown, it's representing the Crown's submission today that the reason that the Minister wants to proceed is because we lost and there won't be a change. Because the position adopted by the Minister in a letter and certainly in more detail in the Crown's submission is that for reasons unrelated to Justice Cooke's judgment there will not be a different outcome, and in my submission that is wrong. There may be a different outcome, there may not be, we don't know, but it's been remitted back.

WILLIAMS J:

Well, you've got the proportionality finding against you.

MR CORNEGÉ QC:

That's right. But the proportionality finding is predicated in part on the Tribunal's view that it could use resumption to remedy iwi-wide prejudice caused by land loss.

WILLIAMS J:

Well, you could read that as saying the Tribunal's considering that it needed cross-subsidisation in order to trigger the answer that it was in and offered.

MR CORNEGÉ QC:

Potentially, yes, but equally –

WILLIAMS J:

Well, that's what Crown was saying.

MR CORNEGÉ QC:

Well, indeed, but as I said earlier when I first made submissions, the Tribunal can do a number of things. It might decide, for example, because it now has the correct legal position before it, to grant part of the land or not a hundred per cent compensation,.

WILLIAMS J:

Isn't that, that's your best argument…

MR CORNEGÉ QC:

Yes.

WILLIAMS J:

That now that they discover they can't, do they want to take another look at it.

MR CORNEGÉ QC:

That's right. Well, they're going to have to take another look at it and –

WILLIAMS J:

Well, your interests and the interests of the Incorporation…

MR CORNEGÉ QC:

Indeed.

WILLIAMS J:

Now that they know they can't do this.

MR CORNEGÉ QC:

Quite. Unless your Honours have any questions, those are the only points I wanted to reply to.

WINKELMANN CJ:

Thank you, Mr Cornegé. So thank you, counsel, for making yourself available at short notice and thank you for your very helpful submissions. We'll take a little time, hopefully not too much time, to consider this issue of leave.

COURT ADJOURNS: 12.43 PM