

Appearances: M K Mahuika, K J Crossland and J S Langston (via VMR) for the Appellants

M Heard and C Upton (via VMR) for the
Respondents

CIVIL APPEAL

MR CROSSLAND:

If the Court pleases, Crossland appearing with Mr Mahuika and Ms Langston for the appellants.

WINKELMANN CJ:

Tēnā koutou.

MR HEARD:

E ngā Kaiwhakawā, tēnā koutou, ko Heard rāua ko Upton for the respondents.

WINKELMANN CJ:

Tēnā kōrua. Well, counsel, we thought we'd start this morning's hearing off just with some points that we've – now the Court's had a chance to read your submissions, and some points struck us as reasonably obvious and I thought it's important that this hearing not proceed through matters we think are reasonably unarguable. So I'm going to make some observations to see if we can resolve this matter.

It seems to the Court that the claim as pleaded raises issues which must be adjudicated and that's clear that that's in the interests of justice and that this Court won't sanction an outcome that doesn't allow that. The High Court chose a particular pathway to allow that to occur which turns on discovery of the register which is simply trying to get to the point of the case being in court. The appellants' argument against that on what seems to us to be technical grounds and they seem also to face the fundamental obstacle of rule 1.6 of the High Court Rules 2016 which allows the Court to make orders in the interests of justice where the rules don't specifically provide for a situation. But ultimately, however, so that we don't need to hear argument on that

unless the parties are insistent upon it, it does not seem to be the right pathway that has been chosen and that's for a number of reason, one of which is that the register may not be a complete list of iwi members, but that's not the main reason. The main reason and more fundamental reason is that the orders are inconsistent. What's contemplated and underlying the orders is inconsistent with the scheme of the rules because it will bring in multiple people against whom personal relief is not sought and it will add cost and complexity to the proceeding. It seems to us clear that if the application for representative orders had been framed differently that order might have been made by Justice Lang but certainly that it could now be made and that a fresh application could be brought and our expectation was that if it was brought it would be successful in the High Court if it was brought on a different basis.

So what we think is a sensible resolution is that a representative order is made and although the first order by Justice Lang, judgment by Justice Lang, was not appealed, there's nothing to preclude fresh application on new grounds to be brought. That will add again delay but it will also add cost for all parties. An alternative resolution would be for this Court to make representative orders, and so we would like to provide the parties with an opportunity to reflect upon those observations and see if they are prepared to proceed on that basis, given the Court's clear indications as to the merits in relation to the discovery issue.

So is it Mr Crossland or Mr Mahuika who will...

MR CROSSLAND:

Thank you to the Court for that indication. It's very helpful to be able to cut through things. Our position, obviously, from our written material, is that the discovery route was the wrong route. However, we were prepared today to argue the representation point. So we would be wanting to deal with matters pragmatically but obviously not delay the case further by insisting on it having a formal application back in the High Court. So I trust that's helpful.

WINKELMANN CJ:

Thank you, Mr Crossland. Have you reflected at all as to the form of order?

MR CROSSLAND:

Well, we still wish to argue on whether the order should be made. We're prepared to argue it but for reasons that we will give we say that there's some pitfalls with that and we are content in interchange between Bench and Bar to explore those just dependent on the reaction of the Court to our submissions.

WINKELMANN CJ:

Right, thank you, and Mr Heard?

MR HEARD:

Thank you, your Honours. I can say that for the respondents and, indeed, in the High Court, the possibility of representative orders being made notwithstanding Justice Lang's decision was always something that was on the horizon. It's been mentioned on a number of occasions through case management but it may be that once iwi members individually were before the Court following his Honour's judgment that we need to revisit the question of representative orders. In my submission, it's the right way to proceed. The reason why we're here we don't need to go into but given Mr Crossland's application, your Honour, I don't know if it's suitable for me to say much more than that for now but I –

WINKELMANN CJ:

All right, so he was to – yes. No, that's okay, thank you. So, Mr Crossland, so what you're proposing now is just simply to address the issue of representative orders?

MR CROSSLAND:

Yes, that probably would make the hearing a lot quicker.

WINKELMANN CJ:

Sorry, we just didn't – just pause, Mr Crossland. I think something went wrong with your microphone. Go ahead.

MR CROSSLAND:

Yes, we're happy just to confine the argument to the representation point. Interestingly, there is some commonality between the *Norwich Pharamacal Co. v Customs & Excise Commissioners* [1974] AC 133 (HL) jurisdiction in terms of looking at arguability and also representation orders because I obviously take on board the Court's view that it does wish to look at a representation order but obviously we would like to make submissions as to whether that's appropriate.

WINKELMANN CJ:

All right. So go ahead, Mr Crossland.

MR CROSSLAND:

Now I what I've done is that Mr Mahuika should have put a one-page summary and with the Court's leave I'd ask him to hand that up. Some of this now will prove to be redundant but I think it's going to be useful just to give a 30,000 feet view of where we see matters.

WILLIAM YOUNG J:

We have already got that, Mr Crossland.

MR MAHUIKA:

Thank you very much, Sir.

WINKELMANN CJ:

That's "ground has shifted", is it? That's that document?

MR CROSSLAND:

Yes.

MR MAHUIKA:

It is tricky conferring with your co-counsel when they're on the screen and you're here. Thank you very much for that indication, Sir.

MR CROSSLAND:

So I think given the Court's indication there is an acceptance that this matter did start life as a discovery application and the second and third appellants were opposed to that because their position is that the names of iwi members were given under confidentiality and that information is tapu. Now it would be helpful to me in terms of articulating the argument today to hear whether the Court is proposing a representative on behalf of individual iwi members or whether we are into the territory of iwi being constituted a separate legal person because there are different considerations for each of those.

WINKELMANN CJ:

Sorry, can you just repeat that statement, sorry, Mr Crossland?

MR CROSSLAND:

So I understand from the Court's review that it is minded to grant a representative order but that can be two forms. The representative could be the Iwi constituted as a legal person which on our submission would be creating new law because on the current state of the law an iwi is not a legal person, or, secondly, there is a person nominated to be the representative of individual iwi members which is a distinct – we would see that as a distinct form of representative order. So we are here prepared to discuss both variants but I just wondered whether the Court had formed a view as to which path it's going to go down or whether both variants are up for grabs at this stage.

WINKELMANN CJ:

Well, I...

WILLIAMS J:

Someone has got their mute off.

WINKELMANN CJ:

Mr Heard, have you got your mute button on?

MR HEARD:

Yes, your Honour. I've just turned the microphone back on but it was muted.

WINKELMANN CJ:

It seems to have fixed itself anyway. Just if you mute again now, thanks. Thanks, Mr Heard, you weren't the culprit.

So I'll tell you what I understand the position to be but if I'm wrong my colleagues can correct me. It is the second alternative. We're not going to assume that the Iwi is a legal person. We would – sorry?

WILLIAMS J:

First alternative.

WINKELMANN CJ:

No, we're not – the first option that he offered was that the legal – the representative would be the Iwi. Yes, it was.

WILLIAMS J:

Okay, sorry. I thought...

WINKELMANN CJ:

Thank you. It was the second option which is there's a person nominated to be the representative.

MR CROSSLAND:

And that would be a representative of individual Iwi members.

GLAZEBROOK J:

Well, it's probably slightly – that was the traditional way if you look at what was said in *Southern Cross*, that an Iwi was brought in, that it was assumed that – and this is looking at it in western terms, I suppose – it was assumed

that the chief or kaumātua was actually the collective representative of the collective entity and so in European terms it would have been assumed that it was a representative order for individual iwi members and, of course, the issue of whether that's appropriate or not or whether the Iwi should be seen as a legal person is incredibly interesting but not, in fact, necessary for this case because the traditional way that it's been done as noted in *Southern Cross* is probably from a western construct but achieves the same ends. Have I put that all right in terms of...

WILLIAMS J:

Well, "iwi" means "people", so the tribe is the people. I think the distinction is a distinction without a difference and certainly in this case it's a distinction without a difference so there's no reason to go rushing off making new law in this context.

MR CROSSLAND:

Well that's very helpful to have that indication because the Mr Mahuika was well armed to address that portion of the argument. I do anticipate he will have further things to say on the, having the chief as representative of individual iwi members so if, and again

WILLIAMS J:

See the point Mr Crossland is that whether the chief represents the individual iwi members for the purpose of this agreement is a trial issue, that is whether that person could bind the Iwi is the whole point in the trial. So we shouldn't mix that up with a representation question which is different.

MR CROSSLAND:

I appreciate that your Honour but we, I do wish to tackle that point because in the appellant's view when the Court is considering making a representative order it nevertheless has to hold the claims up to the light, look at the pleaded claims, and see whether they are reasonably arguable or under the American jurisdiction, a colourable plane and...

WILLIAMS J:

But are you, I know you said this in your submissions, but you're not seriously arguing that there's no tenable possibility that Mr Taua, the chair of the Tribal Authority and the claimant, could not have any reasonable basis upon which to say, when he spoke he spoke for the tribe, because that was the basis upon which the Crown engaged with him.

MR CROSSLAND:

Yes but in our submission those are distinct situations and Mr Mahuika does have submissions to make on that point. So within wishing to –

WILLIAMS J:

Well then you carry on and make, do it as you do it, do it as you wish to do it.

MR CROSSLAND:

I appreciate the added implication but we do wish to have the opportunity to persuade the Court of that particular point and some of the authorities that we refer it to make a distinction between representation of an iwi for the purpose of obtaining something, for example, like a Treaty of Waitangi claim as opposed to representation of an iwi where the, either the tribal estate or the personal estate of individuals is pledged. So I'm just wondering if I can and if Mr Mahuika is ready, ask him to take you through the authorities because I understand there may be one which Mr Mahuika will be referring to that involved your Honour.

WILLIAMS J:

Oh, dear.

MR CROSSLAND:

So if Mr Mahuika's ready I will switch my mute on.

WINKELMANN CJ:

He's ready.

MR MAHUIKA:

I am doing this slightly on the fly given your Honours' indication because we weren't exactly certain as Mr Crossland said at the outset this started off as a discovery application for a register and through a couple of iterations in the High Court, another Court of Appeal, it turns out that the register issues which was the matter that the Iwi had originally objected to has been resolved and, of course, part of the reason that it objected at the time that it objected and I know that there are differences of opinion around this as to whether it was clearly pleaded or not was a concern that you would be bringing iwi members before the Court in their personal capacity. And I take what his Honour Justice Williams and her Honour Justice Glazebrook have said, that it is a tricky type of situation because an iwi is, on the one hand, a group of people but you're actually dealing with them as a collective of people.

So in terms of my friend's submissions there is no argument that an iwi is not the tennis club or an iwi is not the golf club, that the incorporated society type of analogy that we have traditionally used in order to consider the issue of legal standing is inapt and iwi have their own social and political structures with their own levels of complexity. To pick up on his Honour, Justice Williams comment, I don't think that – well, first of all, it is an issue for trial, the question of whether or not Mr Taua had the authority to enter into the agreements that he entered into. You know, you made reference, for example, to the fact that he negotiated but, of course, the negotiation process itself is not a unilateral process where Mr Taua does what Mr Taua wants to do at any given moment in time. There are procedural and other checks that his authority is encumbered with and, of course, the reference that Mr Crossland was talking about is the Tūranganui a Kiwa report where it talks about those complexities that even the most senior of chiefs who wielded significant authority really did so unilaterally and without reference back to the kinship group.

WILLIAMS J:

Quite. But that's for trial. It's just that –

MR MAHUIKA:

Yes, that's true, and –

WILLIAMS J:

Because the argument was that, from Mr Crossland, this was never tenable.

MR MAHUIKA:

Yes.

WILLIAMS J:

And I think that's a steep hill to climb.

MR MAHUIKA:

Yes, and I don't think we're arguing that at all. The point then becomes what is the – I think it touches the representation orders, order question in two ways. The first is about the utility that they would serve and then the second is if they're made around who would be vested with that representative status on behalf of the tribe, given that the reason that the representation orders are considered necessary at all is because these contracts were entered into, or allegedly entered into if there is dispute over that, prior to the establishment of iwi trusts and the receipt of the assets that the plaintiffs now wish to access in order to obtain relief.

O'REGAN J:

Do you accept the proposition though that we shouldn't be putting an impediment in the way of a court deciding that?

MR MAHUIKA:

Yes, I do accept that, Sir.

O'REGAN J:

So why are we in the Supreme Court two years after the case was –

MR MAHUIKA:

Well, it is to do with the procedural history though, Sir, and the reason for that is that it was assumed by Te Kawerau ā Maki that in obtaining the register it was the plaintiff's intention to personally join the members of the Tribe. Now one of the benefits of this process is that's been clarified and so we're now here talking about a separate issue that we hadn't been anticipating that we would necessarily be arguing here, for reasons which I accept are sound reasons, and –

WILLIAMS J:

We did give you some warning.

MR MAHUIKA:

Yes, you did. You certainly did in the leave hearing and we understood that.

WINKELMANN CJ:

So you're not saying you're prejudiced, Mr Mahuika?

MR MAHUIKA:

No, no, not at all. You could have given me a lot more time to think about this and I probably wouldn't be any better prepared is the truth of the matter, given the nature of the issue. But the point I was really wanting to make is that one of the challenges for Te Kawerau ā Maki and a challenge that arises out of the representation order which is not necessarily an argument against it but is a consideration in determining what the terms of such an order might be if you were to make one are that there are the two tribal organisations which are already parties, so that's the Tribal Trust and the Settlement Trust, and the other party who the plaintiffs would say exercises authority on behalf of the tribe is Mr Taua who is also a party to the proceedings.

So the question around how far that gets you, other than dealing with the issue of whether or not you can attach to the Settlement assets, is that you already have the principal representatives of the tribe who are parties before this Court, and the question then becomes if you make a representation order,

who would it be? Likely it would have to be one of those parties because they are the most appropriate unless you choose another party to be the representative of the tribe in which case the question is who might that party be, and we don't readily have an answer to that particular question.

WINKELMANN CJ:

There are some procedural steps we could take and with representatives orders there's normally accompanying it a requirement of advertisements or some sort of notification.

MR MAHUIKA:

Yes.

WINKELMANN CJ:

And so a representative order could be made on the basis that either or both of the two tribal bodies are the representatives but with leave reserves for any iwi member to apply to the Court in respect of the form of that representative order. So that could, would preserve the ability for some or many or individuals who wish to take a different line in the litigation to those to seek a variation of the representation order.

MR MAHUIKA:

Yes, although, and part of the point is that the two Iwi organisations at least, probably not Mr Taua because, I mean, he has, he's personally a party as well as being a party in his representative capacity. But the two Iwi organisations will make the same arguments, I'd have thought, as an individual member of the tribe is likely to make around the nature and extent of Mr Taua's authority, and if you look at the transactions that are being debated in the context of this proceeding in my submission they essentially can be divided into two types. There is the funds that was provided and whether there's an obligation to repay those funds, and then there are a series of broader promises that are contained in the agreement which include, amongst other things, a promise to transfer on a perpetual basis a share of the commercial benefits that the tribe might obtain. And the reason they're different is because on the one hand the

funds have been received, there's no argument about that, that's a much more straightforward matter than these other contractual commitments which are ongoing contractual commitments which purport to bind the assets of the tribe in perpetuity. But in any event the argument will be in relation to those, I'm actually as certain as I could be if an individual tribal member came to the Court is that Mr Taua, while he might have been the chief of the tribe, the nature and significance of these decisions was not such that he could do this unilaterally and without reference back and without some sort of approval from the people on whose behalf he was making the commitment, which is why the reference back to the likes of the Turanganui report.

WINKELMANN CJ:

Yes, but the problem with the absence of representative order is that if we left the proceeding in the form it's in, we could proceed through to judgment and then members of the Iwi could say, well even so you can't, and say the Iwi entities were unsuccessful and orders were made that that resort to the assets of those bodies was available to satisfy the judgment, then members of the Iwi could say but the Iwi wasn't represented in the proceeding.

MR MAHUIKA:

Yes, I understand that point, that's a different angle to the one that I had been thinking about. So, Ma'am, you're thinking about it more from the point of view of ensuring that if there is a judgment everyone who could potentially be bound is bound, as opposed to the need for them to be represented in the event that, well, before the Court, so that all arguments are present before the Court when this matter is being litigated.

WINKELMANN CJ:

And also, I suppose, to ensure that if there is a different voice from the Iwi that is not represented by these two bodies that it is able to be before the Court?

MR MAHUIKA:

Yes, I understand that point.

WILLIAMS J:

There's also the practical context of this, which is unique to this country perhaps, which is that the only assets in sight, in the sight of the plaintiff, are collectively held Treaty settlement assets, apart from the individual claims against Mr Taua and potentially anybody else who received some of that \$1.3 million from Tahī, but that's another question.

So once it's clear in your mind that only the collective assets are at stake, the next thing to be clear in your mind is that although the Authority and the Trust hold on behalf of Iwi members, Iwi members themselves have no vested interest and the Trust is perpetual, so it's almost a private charity, and that's unique to new tribal structures, not been done before, and that's what creates the grey area here that has to be worked through. What we mustn't do is allow that grey area to tie us up in so many knots that bringing defendants to account if they need to be brought to account can't possibly be done. That's why you need representation orders to ensure that all who should be bound will be bound, so that the Iwi members don't come back later and say: "Well, yes, but as an Iwi member I have my own interest in those Trust assets and I wasn't represented," when in fact those assets are only collectively held, so you don't want this thing to fall apart at the last hurdle.

MR MAHUIKA:

I do understand the point Sir and, look, forgive me that we have been thinking about this from the plaintiff's point of view, so the plaintiffs are not looking to include the Iwi members in some collective sense in this proceeding from the point of view that they're wanting to ensure that there's no comeback after a judgment is potentially obtained, it was more from the point of view of being able to access the Iwi assets. So the reason that we have come here is because of the issue that I identified at the outset which is that the Settlement Trust and therefore the assets which are vested in it weren't in existence at the time that the contracts were entered into and so the Settlement trustees have said as a defence that, well that might have been an arrangement that Mr Taua entered into but that's not an arrangement that affects us. So we had really been thinking about it from that point of view as

opposed to ensuring that the Iwi members had their own independent voice and are therefore able to have a say and be bound by it which is a different thing that we hadn't really thought to debate Sir.

WILLIAMS J:

Well I think you're right that the appropriate subject matter of the representation order will be that the authority and the Settlement Trust, that's logical. But allowing anyone who might to attack those entities, to do so if they wish as opposed to requiring everybody to get in by name so that they can mount an attack if they want because that creates a completely impracticable litigation situation when there is actually a genuine issue that needs to be adjudicated upon.

MR MAHUIKA:

Would the issue be there so, Sir, though to attack those entities or is, I mean it's not necessarily those entities that they would attack, they might have a different defence that they wish to bring is what I took from her Honour the Chief Justice's comments so it's not necessarily that they're saying that the –

WILLIAMS J:

Well attack the strategy of those entities.

MR MAHUIKA:

Yes because both entities would say well we weren't party to these contracts, this is something that Mr Taua did off his own bat and so therefore there's an argument that while he made this commitment he wasn't entitled to do so so therefore the contract is not enforceable against the Iwi.

WILLIAMS J:

And presumably you're also going to provide evidence that says as a matter of tikanga he couldn't bind in those circumstances if that's the stance that's going to be taken?

MR MAHUIKA:

Yes.

WILLIAMS J:

And if you have situations where some individuals gave explicit to that course the background to that can be explained as part of the defence if that is the background but it can be properly expected that the two iwi entities can represent that spectrum of interests unless there's an individual that is outside that spectrum that hadn't been predicted.

MR MAHUIKA:

Although it does run to the difficulty with an individual that has a different view in the sense that it is contrary to the argument if the assets are held collectively.

WILLIAMS J:

Quite.

MR MAHUIKA:

So, you know, if an individual has a view that I've got this specific share that's inconsistent with the basis upon which the assets are held in any event because they're held on behalf of the collective which, although on the one hand you could describe these iwi trusts as large family trusts because no one has a vested interest in it and the vesting of an interest is dependant upon the exercise of a discretion by the trustees. Actually there is an extent to which that is consistent with the way that these assets should be held, that they are held on behalf of a group of people collectively as opposed to a series of individuals which is, you know, the issue that we have.

WILLIAMS J:

That's going to be a matter for trial if such a person pops up which I would predict is unlikely.

MR MAHUIKA:

Yes.

WILLIAMS J:

But perhaps I'm wrong.

MR MAHUIKA:

But it does go to, and I don't think I need to take this a lot further, if any further, the question about utility. I accept what the Honourable Chief Justice says about ensuring that any decision binds everybody that ought to be bound. It is, for the reason I've given, difficult to conceive of a position where an individual could have a claim which is distinct from the tribe because of the nature of the assets that are being held, and the vehicle through which they're held. But I'm not sure that I'm able to take it a lot further than I've taken it so far, Sir. And the argument really there was about we have all the representatives, all of the assets are here, to what extent do we really need to have a representative order. I understand what her Honour the Chief Justice has said, the argument from the point of view of the plaintiffs is really an order to deal with an issue around the contracts and how the contracts were entered into. That's why they seek representation because they want the tribe to be present in the room in another sense other than through the entities that have been established to represent it. But I don't think I can take it any further than that, your Honours.

WINKELMANN CJ:

Did you have anything you want to say about the form of the order because I do think normally you'd probably make some sort of order that the order be advertised?

MR MAHUIKA:

Well, I think Mr Crossland did have some further submissions to make. That is one of the challenges of us being in different rooms in different parts of the country.

WINKELMANN CJ:

He can't hand notes to you.

MR MAHUIKA:

If he disagrees with anything that I've said, he hasn't been able to throw anything at me or kick me. But I think he did have some submissions that he was proposing to make in relation to the representation orders but I'm not certain what his view is in the light of the exchange we've just had.

MR CROSSLAND:

If I can come back in, your Honour?

WINKELMANN CJ:

Yes.

MR MAHUIKA:

Ma'am, I might just stay standing if that's okay.

WINKELMANN CJ:

Okay, that's fine. You can be a double act, Mr Mahuika.

MR MAHUIKA:

I'm not intending to be but I...

WINKELMANN CJ:

No. Go ahead, Mr Crossland.

MR CROSSLAND:

So if I could make it clear that the nervousness on the part of the appellants was, number 1, that the private estates of its iwi members were up for grabs, and number 2 was the disclosure of the confidential information contained in the register. So that is why these parties had opposed, vigorously opposed at the High Court/Court of Appeal, but we've now moved to a different position. The other thing I would add is in terms of representation orders, well, that was heard by the High Court and the appellants were successful and it wasn't

appealed. Now I appreciate, of course, that the Supreme Court or, indeed, the High Court can consider another application but as at today no such application had been made, so we had to deal with the case and the appeal on how it was presently footed. But if we end up in the position where there is comfort provided in a judgment that the personal estates of individual iwi members are not vulnerable then that allays that concern, and, secondly, if we do have a representative order then it seems obvious that the register is irrelevant and need not be disclosed. So that outcome would address the two twin concerns that these appellants had. So that's the first thing I wanted to say.

The second thing I wanted to say was that coming into this appeal we had apprehended that what our opponents were seeking was some other representative different from our clients and our concerns were, because again remembering they were also arguing that the Iwi should be constituted as a separate legal person. So what was exercising us is, well, who from this legal entity, this new legal entity, the Iwi, who would be the spokesperson? Who would give the instructions to the lawyers? But what I'm gathering from the Court is that you're proposing on making a representative order such that the existing second and third defendants, the appellants, are the representative. Now if that's the case then that does make things a lot simpler because we were concerned about who would pay for the lawyers, who would give instructions for this representative, but if the representative are the existing authority and the Settlement Trust, that does simplify matters because as Mr Mahuika has said, we have been looking at this in a particular way and frankly haven't considered the concern that Justice Williams mentioned is that when we get to the end of this we don't want a situation where some individual iwi member pops up and says: "Oi, I'm not bound by this. I wasn't part of this. I disagree." So if that is the driver then it does appear the matter can be resolved simply and I think the suggestion about an advertisement which I think was done in the *Whakatane District Council v Keepa* HC Rotorua M7/00, 27 June 2000 case, that's the type of practical order that I understand the Court is considering. So our team could get the

break, perhaps confer and indeed our learned friends may also have some comments on that but certainly in advertisements sounds sensible to me.

MR MAHUIKA:

Ma'am I was wondering, given we are in different locations and it is difficult to confer and we hadn't necessarily anticipated everything that the Court has said, whether it might be useful – I'm not sure, if the Court wishes to hear from Mr Heard and Mr Upton and then perhaps we could confer.

WINKELMANN CJ:

Well it might helpful if we just hear from Mr Heard, if he will just clarify that they would be content with an order which rescinded the order that the register be disclosed on the basis a representative order being made on the terms Mr Crossland has suggested because that might assist if we do take an adjournment to allow you to discuss that?

MR MAHUIKA:

Yes Ma'am. That would be very helpful. I will sit down now.

WINKELMANN CJ:

Mr Heard, you've heard discussions to date so could you clarify your position in relation to that?

MR HEARD:

I can confirm the position of my clients, your Honour, it's not changed, it hasn't changed at all since these matters were argued in front of Justice Lang. In terms of the form of an order it may be helpful for all if I could refer your Honours and my learned friends to the memorandum that was filed in the Court of Appeal that's at tab 42 on the case on appeal. To give your Honours some context to this in the context of the appeal similar questions came up, areas came up where their Honours and the learned judges asking counsel whether this matter might best be resolved by representative orders and we were asked to confer about that and we did. The outcome from that – or we at least discussed it in front of their Honours. The outcome from that is

(inaudible 10:42:27) random for my client's part clarifying that when we had discussed that in front of their Honours at paragraph 2 I hadn't recalled that there'd already been an intent to reach a consent position on representative orders, that was something that arose in front of his Honour Justice Lang. The issue that arose in front of Justice Lang is the very same one as discussed today which is are the plaintiffs seeking to attack the personal assets of iwi members or the collective assets of iwi members, the answer then was the same as the answer which I have for your Honours today, it's no. We clarified that with my learned friends and proposed some consent orders –

WINKELMANN CJ:

Well yes but letting go of all of that Mr Heard which is, because, you know, there are two perspectives on that, but the point is the issue in relation to the orders. So you would be content to record both that the order for discovery of the register is rescinded and that the representative order is made with the tribal authority and the Settlement Trust as representatives leaving detail about leave to reserve et cetera and recording that the personal assets of iwi members are not pursued through that representative order. I see from your memorandum that you do, however, wish to maintain the claim against the trustees and Mr Taua in respect of personal assets do you, is that what you're saying?

MR HEARD:

The position is as his Honour Justice Williams summarised a few minutes ago your Honour, to the extent that there is and was authority to bind the Iwi then the personal claims in respect of the collective assets fall away. To the extent there was a want of authority then there will be a personal liability on the people who have consented to this arrangement without authority. To the extent that ultimately a trial, a court decides that there is a valid claim but that it must be exercised by virtue of a trustees' indemnity and subrogation then, of course, we need to maintain a personal claim against the trustees, that is the limit of what we say needs to be an issue from a personal perspective. It's absolutely correct that my clients will not give that up, it would be contrary

to the spirit of what your Honours are trying to achieve, respectfully, which is that these issues get –

WILLIAMS J:

What about the suggestion of, through an unjust enrichment or perhaps tracing, getting access to the \$1.3 million that you say without evidence, because the evidence isn't available until you find out what the answer is, any other individuals within the tribe other than the trustees who might have received that enrichment.

MR HEARD:

Yes, your Honour, I was I suppose using shorthand and making a leap and then talking about trustees, because I was using that word in the sense of people who will be constructive trustees, my clients say, in respect of those monies, as well as people who were formerly to the extent that the right remedy is against the Settlement Trust or the Tribal Authority Trust.

WILLIAMS J:

Okay.

WINKELMANN CJ:

All right. So those are all quite clearly distinct and quite regular kind of claims, they're not pursuing the personal assets of the Iwi members who are not directly implicated in the "facts, matters and circumstances" in the old expression, that give rise to the claims?

MR HEARD:

One hundred per cent, your Honour.

WINKELMANN CJ:

And you are content with the rescission of the order for discovery on that basis if the representative orders were made, which seems to me – it was hard for us to see any basis for us to make, to uphold those discovery order if the representative order is made?

MR HEARD:

On that issue, your Honour, I wonder if I might take some instructions, certainly in terms of the question of whether it's necessary to join the Iwi, then of course the register then is no longer necessary to that purpose.

There is a broader question around whether or not the participation of Iwi members in the affairs of the Iwi is something which goes to the extent of the Authority, of the people who entered agreements on behalf of the Iwi, but that's separate issue.

WINKELMANN CJ:

Well, that's quite speculative and, I mean, and with respect – well...

GLAZEBROOK J:

And there is general order for discovery, you don't...

WINKELMANN CJ:

Yes, a general order for discovery. And I was going to say with respect, but I don't think I should say that, I don't think I'll add that tag, just say "pie in the sky". So, just to help you with your reflections while we adjourn.

MR HEARD:

Thank you, your Honour, I think.

MR MANUIKA:

I had stood up because I assumed my friend had finished. I'm not so certain now.

WINKELMANN CJ:

I think he has finished. We're going to adjourn now and we're going to give you time to think about the form of the orders, given Mr Heard's indication and perhaps, Mr Heard, an opportunity for you to confer with the respondents?

MR MAHUIKA:

Yes, I think we can do that if we can get technology to enable that to happen.

WINKELMANN CJ:

There's always the old-fashioned phone.

MR MAHUIKA:

Yes.

GLAZEBROOK J:

I think we do have technology though that enables –

WINKELMANN CJ:

Yes, I think he can stay on line and we'll stop recording, so we'll make sure that the recording system is not recording and transcribing your discussions.

MR MAHUIKA:

Yes, okay. Well, just in case we'll make sure we're careful about what we say, I think, but yes.

WINKELMANN CJ:

Mr Crossland...

MR CROSSLAND:

Yes, excuse me, if you might indulge me for a moment. When my learned friend speaks of "trustees", in the pleading "trustees" is described as (inaudible 10:48:48) over 18 –

WINKELMANN CJ:

Mr Heard, can you turn your mute button, I think it's you who's got – shuffling papers, someone's shuffling papers. Can you repeat what you were saying, Mr Crossland?

MR CROSSLAND:

In the pleading, “trustees” is defined to include “all persons over the age of 18 when the first contract was entered into”, so it’s going to be helpful if we can get clarification from Mr Heard when he uses the word “trustees”, is he using it in that pleaded form or is he using it in reference to the second and third defendants?

WINKELMANN CJ:

Okay. Well, just to be plain, I’m clear in my mind that he’s using it with reference to those who are directly implicated in the events and, Mr Heard, that’s correct, isn’t it, you’re not using it in your, in the artificial defined sense, not the broad sense, because that would be, the exception would consume the rule, wouldn’t it?

MR HEARD:

Well, I’ll reflect on that, your Honour. I understand the reason for Mr Crossland’s question. I can certainly say that to the extent that we need to have individual iwi members who may have entered an agreement as trustees on whatever basis, then the only reason that we would seek to maintain a personal claim against them is so that rights of subrogation against the assets held on trust are maintained. So whatever the nature of the trustee, there is no intention to go after their personal assets. It’s the right of subrogation which is at issue.

WINKELMANN CJ:

Well, you’re not seeking – the definition of trustee that Mr Crossland read out, it was effectively the whole iwi, isn’t it, apart from people...

WILLIAMS J:

Adults, yes.

MR HEARD:

It’s adults.

WINKELMANN CJ:

Adults, and you're not seeking to maintain personal – because that just defeats the whole point about not seeking to pursue personal claims against them because then you're maintaining personal claims against them all. You're simply seeking to maintain personal claims against the people directly implicated in the events, the receipt of money and the entering into agreements.

MR HEARD:

The only personal claims we seek to maintain are those necessary to give effect to whatever the Court may ultimately say is the common law mechanism for an iwi entering an agreement.

WINKELMANN CJ:

Yes, okay, and constructive.

WILLIAMS J:

Well, the point is –

GLAZEBROOK J:

Can I just check, maybe the simplest way of saying this is except in relation to people who've directly received money in their personal capacity, the only reason you're maintaining personal claims is through whatever means limited necessarily to the assets of, the collective assets of the Iwi and not personal assets. Is that how I understand it?

MR HEARD:

Yes, that's correct, your Honour, save as we've talked about for people who are directly implicated, yes.

WINKELMANN CJ:

Mr Heard, just when you go to reflect on how you can express it, can you please bear in mind that an expression of your exception that brings everyone

back in as personally liable wouldn't be an acceptable form for the Court. You have to be more precise.

MR HEARD:

Thank you, Ma'am.

WILLIAMS J:

I think to be fair, Mr Heard, when the claim was individualised originally you probably did need to plead that the adults were trustees of the children but you don't need to now if it's accepted that the Trusts are both trustees and representatives of the tribe. They are the only trustees that count and you can probably amend your pleading.

MR HEARD:

Yes, your Honour, and your Honour's correct. The reason that the pleading has come to be framed in the way it was was because of the defendant's position on that stuff, yes.

WINKELMANN CJ:

Thank you. All right, well, we'll adjourn and – timing?

MR MAHUIKA:

Perhaps, maybe half an hour, I think.

WINKELMANN CJ:

I think you probably –

MR MAHUIKA:

We will confer and then I'll need to talk to Mr Crossland and...

WINKELMANN CJ:

I think by the time you've had a cup of tea, then conferred with Mr Heard, I would say...

GLAZEBROOK J:

At 12.30?

WINKELMANN CJ:

Well, shall we say 12? That will give you an hour and seven minutes.

MR MAHUIKA:

As your Honour pleases.

WINKELMANN CJ:

I imagine by the time you've sketched down a form of order...

GLAZEBROOK J:

Written it down and agreed it between you.

MR MAHUIKA:

Yes, I am getting a little bit edgy now that I might have to be writing an order.

WILLIAMS J:

You're the only one here.

MR MAHUIKA:

Yes, I'm very conscious of that, Sir.

WINKELMANN CJ:

At least the basic concepts.

MR MAHUIKA:

I don't have any objection to an hour although it probably means we need to confer now, Mr Heard and Mr Upton, and then perhaps we have to go away and come back again or something like that, just in terms of the logistics of it.

WINKELMANN CJ:

That sounds like the right method. We'll retire now and let you sort the methodology out.

MR MAHUIKA:

Yes, thank you, Ma'am.

COURT ADJOURNS: 10.53 AM

COURT RESUMES: 12.40 PM

WINKELMANN CJ:

Mr Mahuika it's nice of you to stand as the only counsel in the room.

MR MAHUIKA:

Yes.

WINKELMANN CJ:

So thank you for the excellent work, is this your typing is it?

MR MAHUIKA:

No, no I'm not claiming any credit at all for the typing.

WINKELMANN CJ:

Mr Heard?

MR MAHUIKA:

I'm not sure, no it was someone from Mr Crossland's office so I don't think any of us on the screen or here in person can claim any credit for doing the typing.

WINKELMANN CJ:

All right so we have some questions and they're not related to the typing.

MR MAHUIKA:

That's helpful to know.

WINKELMANN CJ:

Why is it only the plaintiffs and third defendants seeking consent orders, why not the other parties, in particular we're concerned about the position of Mr Taua.

MR MAHUIKA:

Look I'm not certain as to the answer to that, Kalev did you hear that question?

MR CROSSLAND:

Yes can your Honour hear me?

WINKELMANN CJ:

Yes.

MR CROSSLAND:

So my firm only represents the second and third defendants who are the appellants, the first defendants are separately represented. In terms of the second defendant certainly we can add that the second defendant would consent to such an order if that assists.

WINKELMANN CJ:

And what's the, was someone going to say something then? No. And the position of the first defendant?

MR CROSSLAND:

We were not in a position to speak with the first defendant, the first defendants are separately represented by Mr Chesterman.

WINKELMANN CJ:

Yes.

GLAZE BROOK J:

They chose not to participate or attend presumably?

MR CROSSLAND:

That's correct your Honour.

WILLIAMS J:

So did Mr Chesterman or anyone from his office participate in the hearing before Justice Lang?

MR CROSSLAND:

No.

WILLIAMS J:

I'm presuming that they were served with the application, the original application for representation orders?

MR HEARD:

Yes they were your Honour, (inaudible 12:43:40) Kalev represented them.

WILLIAMS J:

I can't hear that.

MR CROSSLAND:

I think early on in the litigation my firm did represent the first defendants briefly, then it was appreciated that there was a conflict of interest with Mr Taua and the second and third defendants, so he then got separate representation.

WINKELMANN CJ:

Is there any argument that they are prejudiced by these orders, would it complicate it?

MR CROSSLAND:

Well speaking for myself I don't believe so, just noting though that Mr Taua is also a trustee of both the second and third defendants but I can just indicate that for the running of the litigation he's been recused so I have heard takes instructions from the other trustees.

ELLEN FRANCE J:

On the front page of the judgment of Justice Lang is said the first respondents abided the decision of the Court?

MR MAHUIKA:

I'm not sure that there would be any prejudice to Mr Taua anyway Ma'am in the sense that what is being added here is a representative on behalf of the Iwi at large and Mr Taua's specific interests are in relation to transactions that involved him personally or alleged to have involved him personally.

O'REGAN J:

There's also the power at the end to apply to the Court anyway which he could exercise.

WINKELMANN CJ:

Yes, all right.

GLAZEBROOK J:

So we add the second –

WINKELMANN CJ:

Add the second defendants. Someone should take a note of these. Whoever holds the pen on this should take a note that at paragraph 2 we add the plaintiffs and second and third defendants. Is that what was agreed?

MR CROSSLAND:

Yes.

MR MAHUIKA:

Yes.

MR CROSSLAND:

Your Honour, can I just indicate that you will see from the tracked changes, the blue tracked changes, those are from Mr Heard and Mr Upton and in the time we've had those we've managed to agree some additional points. So if

it's of assistance I can tell you that there's the first addition at A, those additional words.

WINKELMANN CJ:

Yes.

MR CROSSLAND:

(inaudible 12:46:00) –

MR MAHUIKA:

I think they're the red-tracked changes on the version that you had.

WINKELMANN CJ:

Ours are red-tracked changes, Mr Crossland, but we'd worked it out though.

MR CROSSLAND:

So those additional words at A are agreed and the change to C is also agreed.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

So the appellants to provide names.

O'REGAN J:

Of the trustees.

MR CROSSLAND:

The reason for that, your Honour –

GLAZEBROOK J:

No, I understand that. So that will be done. That's still to be done, is it?

MR CROSSLAND:

Yes, and one of the trustees has passed away and a new person has taken over, so we will arrange that with our learned friends just to get the intituling tidied up.

WINKELMANN CJ:

Okay, so paragraph 2. So paragraph 3, what is the situation in relation to changes there?

MR CROSSLAND:

So there's some agreement and some disagreement. So the first, the correction of the adding of the word "dot", that's agreed. The words "held by the Settlement Trust trustees" which were deleted by Mr Heard, we were unsure about that because we didn't understand that there was anyone else who holds that, but we were ambivalent about it. We also wanted to add in that this –

WINKELMANN CJ:

It does however add – it is a, however, quite useful clarification.

MR CROSSLAND:

Well, clear preference to have in. The other minor edit was in the first line where it says "collective", the word "collective tribal estate" to be added.

GLAZEBROOK J:

And so getting rid of "iwi members", were you suggesting, or leaving that?

MR CROSSLAND:

No, it's limited to the "collective", add in the word "tribal".

WINKELMANN CJ:

"Estate of iwi members".

GLAZEBROOK J:

"Tribal estate of iwi members".

MR CROSSLAND:

Yes, your Honour. In the third line, the deletion of “who are” and replacement of “were”. We’re happy with that. Also happy with the addition of the word “unjustly”.

WINKELMANN CJ:

But you’re not happy with “or who the Court finds are trustees for the Iwi”?

MR CROSSLAND:

Yes, yes, we – that’s a sticking point for us unfortunately.

WINKELMANN CJ:

So we had a question for Mr Heard.

GLAZEBROOK J:

We weren’t sure what it meant either.

WINKELMANN CJ:

We have a question for Mr Heard in relation to that, Mr Crossland, because I have to say we weren’t sure what it meant and I apprehend Mr Heard’s trying to get it protected in the right to access the Trust’s assets and exercise the trustees’ right of indemnity from the Trust assets, but it doesn’t seem to say that, but perhaps, Mr Heard, you could clarify that.

MR HEARD:

Well, that is correct, your Honour, and I’m completely open to wording which makes that very precise. We only had five minutes or so with the document. To engage with your Honour’s concerning comment earlier about the proposition that all people who are over 18 at the time of the agreements are trustees, well, it’s accepted that if we have this mechanism for joining the Iwi then that concern or that requirement falls away. We don’t need that.

WINKELMANN CJ:

I suppose my thought is that you don't need that phrase because the limitation that you're responding to in your proviso is a limitation to the assets of the tribal estate, so why do you need the bit at the end about preserving the ability to access those assets?

MR HEARD:

In terms of whether this is going to be limited to assets held by the Settlement Trust trustees. The issue that we run into, your Honours, is that in discussion with Mr Crossland a moment ago I understand from him that the position of the trustees is that the definition of "iwi members" in the variation to the joint venture agreement is narrower than the definition of iwi members in the Settlement Act which is the definition which is used in these draft orders. That being the case then we have this unhappy situation where it may be claimed that there is some different collective interest which is a subgroup of the Iwi as defined in the Act.

WINKELMANN CJ:

So that's why you've taken out "held by the Settlement Trust trustees"?

MR HEARD:

Yes.

WINKELMANN CJ:

But I'm not quite sure then why you need to put "or who the Court finds the trustees for the Iwi" because you're just there trying to make sure that you have access to the tribal assets aren't you for the –

MR HEARD:

Yes.

WINKELMANN CJ:

But that's already covered at the top isn't it, as a matter of drafting?

MR HEARD:

Yes I take your point, you're correct your Honour.

WINKELMANN CJ:

So we could take that square bracketed bit out at the end?

MR HEARD:

Yes.

WINKELMANN CJ:

"Or who the Court finds are trustees for iwi". We're going to make you, counsel, fix this up.

MR MAHUIKA:

I am taking notes Ma'am.

WINKELMANN CJ:

So paragraph 4 that looks quite straightforward. Mr Crossland, you're happy with that?

MR CROSSLAND:

The deletion?

WINKELMANN CJ:

Mmm.

MR CROSSLAND:

Yes we've decided to fight that out in another forum so we can take that away. Then at 5 my learned friend and I were discussing the date. His preference was "as soon as practicable". The reason we have put in "8 February" is we've got the holiday period and whilst we've got email addresses for most iwi members there are some for whom we've only got postal addresses and I've explained that to my friend but again I'm not going to die in a ditch over swapping out the words to "as soon as practicable" but that's just to indicate the discussion my friend and I had so we're in the Court's hands on that.

WINKELMANN CJ:

Well I think “as soon as practicable” is, you know, swings and roundabouts it’s probably okay isn’t it?

MR CROSSLAND:

Okay.

WINKELMANN CJ:

But in any event no later than 8 February?

MR CROSSLAND:

Yes, yes (inaudible 12:52:56) Mr Mahuika’s alternative.

WINKELMANN CJ:

And we had two questions about that, the first is about the method of notice, we just wondered how the Iwi normally handles notice because does it have other formats that it uses to make contact with its members such as Facebook or...

MR CROSSLAND:

We’ve spoken to the person responsible for that. What they say is it’s typically by way of a newsletter which is emailed and for a minority posted. They had said that their preference, and this is perhaps an internal management matter, because this is important they were going to hire Elections New Zealand to be responsible for the distribution just so that there was some independence and separation just to take up Justice Williams’ concern that at the end of the litigation we’ve got a judgment, we want to be absolutely sure that this has been done professionally and independently so whilst we haven’t put it in the order that’s what we were going to be, that’s what the clients advised us it would do.

WINKELMANN CJ:

And is there any issue regarding people who aren’t on the register?

MR CROSSLAND:

Again we've discussed that with them prior to the break. They say that how it operates is that until you've gone through the whakapapa'ing process and formally register you're not considered a member of the Iwi. Now that's, those are the instructions I've had. Some people will, are able to, or make applications to become, as they say, recognised in the Iwi through that formal process. Now I'm not making any statement of whether that's right or wrong, I asked the question and that's the information I've been given.

WILLIAMS J:

Well, since being a member of an iwi is a question of fact and not a question of the discretion of the Iwi Authority, I think you can rest assured that that proposition is wrong. So you're going to have to advertise more widely than people on your register.

MR CROSSLAND:

Right. Well, the Iwi does have a website and the notice could be placed on the website.

WILLIAMS J:

Yes.

MR MAHUIKA:

Yes, we did have a discussion about whether something like a newspaper advertisement would be useful but we didn't think that...

GLAZE BROOK J:

Not particularly...

MR MAHUIKA:

They're not really very effective, so the website...

WILLIAMS J:

Yes, well, you'd normally put your newsletter on the website anyway, wouldn't you? I mean, your client would.

MR MAHUIKA:

We're not certain, Sir, but yes, you would expect that the website would be a good source.

WINKELMANN CJ:

Well, I think the website should be added in there.

MR MAHUIKA:

Yes.

WINKELMANN CJ:

And the question was, as to the content, the second aspect was as to the content, it's usual practice in any kind of representative appointment, et cetera, to give a short summary of the nature of the claim, because most people when they receive the statement of claim wouldn't have a clue what it's about.

MR CROSSLAND:

Yes.

WINKELMANN CJ:

You could put in that category quite a few lawyers too.

WILLIAMS J:

And the odd judge.

WINKELMANN CJ:

So, is there a short –

MR MAHUIKA:

Would that be, Ma'am, instead of the reference to the statement of claim or in addition to it?

WINKELMANN CJ:

I mean, the usual practice actually is, rather than burdening people with statements of claim, which causes people distress, is a simple statement and if they want a copy of the pleadings you just give them an email address or some way of contacting and asking for the pleading.

MR MAHUIKA:

So the suggestion then, to clarify, would be that a copy of the order together with a summary of the claim and then perhaps where they might access a copy of the pleading?

WINKELMANN CJ:

Yes. So the statement might contain a little explanation about "we're attaching a copy of an order which was made", "the nature of the claim that the order was made in respect of is," "that because of contracts into" or, I don't know what the nature of the issues are in relation but, et cetera. So something, a very simple form of it that people...

MR MAHUIKA:

Yes, I understand.

WINKELMANN CJ:

Replying is at the 12 year old comprehension level for public notices is normally the kind of professional...

WILLIAMS J:

And that would normally be cleared by the Judge.

MR MAHUIKA:

So would that come back to this Court?

WINKELMANN CJ:

No, well, that's our next suggestion.

MR MAHUIKA:

So it would go back to the High Court, whoever is supervising this matter?

WINKELMANN CJ:

Yes. So we're going to say – so perhaps it should be drafted, there should be added in a new thing which is...

MR MAHUIKA:

"The statement to be approved by...

WINKELMANN CJ:

The High Court – we were going to amend, though I don't know how we'd do this now, to amend 6 to say leave is reserved to the parties and to any member of the Iwi – we need to make clear that the leave is for them as well – "to seek modification of these orders" and to say "such application is to be to the High Court", full stop: "The High Court has jurisdiction to amend and make additional orders in relation to the issue of representation", "additional and ancillary orders".

WILLIAMS J:

(Inaudible 12:58:47)

WINKELMANN CJ:

Yes, yes, and so we'll have to have, we'll just add in, 5 could have added in at the end that the notice should be approved by the High Court.

MR MAHUIKA:

So on the basis of that, given that I think I'm taking notes, I mean, there will have to be a bit of a re-write of 5 to pick up those different points, I think.

WINKELMANN CJ:

Yes, and include approval by the High Court –

MR MAHUIKA:

Yes.

WINKELMANN CJ:

– and then 6 will make clear that we’re now sending it back to the High Court in terms of its future jurisdiction to approve amendment, additional orders and ancillary orders in relation to representation.

MR MAHUIKA:

So the notes I have in relation to 5 is that it should be advertised on the website as well as the pānui going to individual iwi members rather than including the statement of claim in the pānui it will be a summary of the claim approved by the High Court?

WINKELMANN CJ:

Yes.

MR MAHUIKA:

But will also indicate where any iwi member may wish to obtain a copy of the pleadings?

WINKELMANN CJ:

Get a copy of the plan, and...

MR MAHUIKA:

And in 6 I’ve got, just based on that discussion: “Leave is reserved to the parties and any member of the Iwi to apply to the High Court for modification of these orders”, does that capture the...

WINKELMANN CJ:

Yes and “the High Court has jurisdiction”.

MR MAHUIKA:

And “the High Court has jurisdiction”.

O'REGAN J:

"The High Court has jurisdiction to make any such modification".

WINKELMANN CJ:

I think including "additional and ancillary orders".

MR MAHUIKA:

So perhaps if I could rehearse that 6 one more time. It would say: "Leave is reserved to the parties and any member of the Iwi to apply to the High Court for modification of these orders and the High Court shall have jurisdiction to make any such orders including any ancillary orders."

GLAZEBROOK J:

Do we need to say that if we say "leave is reserved to apply to the High Court"?

WINKELMANN CJ:

Well a High Court Judge may think that they are confined by to modifying it. I think you should say "additional" and "ancillary" because those are two different concepts.

GLAZEBROOK J:

This jurisdiction, we've...

WINKELMANN CJ:

Well because they might, well, I don't know.

GLAZEBROOK J:

Why don't we just say they may "the High Court may modify these orders". It's just jurisdiction's a bit of an odd...

WINKELMANN CJ:

Okay "High Court may". Yes, so don't put "jurisdiction" Mr Mahuika.

GLAZEBROOK J:

It just sounds like we're pronouncing on their jurisdiction which might be a bit odd.

WINKELMANN CJ:

It might cause offence.

GLAZEBROOK J:

Yes.

WILLIAMS J:

We do that occasionally.

GLAZEBROOK J:

Yes I know but usually in a slightly different –

WINKELMANN CJ:

One more time.

MR MAHUIKA:

I'll go through one more time. So: "Leave is reserved to the parties and any member of the Iwi to apply to the High Court for modification of these orders, and the High Court may make any such orders, including any additional or ancillary orders."

WINKELMANN CJ:

Thank you. So we're now going to hear the parties on costs?

MR MAHUIKA:

Yes.

WINKELMANN CJ:

So Mr Crossland you are muted.

MR CROSSLAND:

Can you hear me now?

WINKELMANN CJ:

Yes.

MR CROSSLAND:

So we just wanted to check on the question about opt out because my friend and I were at odds over whether that should be provided for.

WINKELMANN CJ:

That's encompassed within the leave.

MR CROSSLAND:

Just turning to costs, very briefly in our submission because the Court has rescinded the orders below granting discovery of the register our clients would seek rescission of those costs awards in the Court of Appeal and High Court. As to costs in this court the way the appeal was framed and responded to the respondents have been unsuccessful so we would be seeking costs in this court as well.

WINKELMANN CJ:

Thanks Mr Crossland, Mr Heard?

MR HEARD:

Thank you your Honour. The question that hasn't been determined was whether or not if there were not representative orders made it would have been appropriate for discovery of the register to have been ordered. Now, of course, we've agreed rescission of that order out of pragmatism fundamentally. The High Court and Court of Appeal with my client and we went through the process which was laid out by his Honour Justice Lang. So we say that there should be no reversal of costs on that front. In terms of the outcome in this court the reality here if one is to stand back from it, in my

submission, is that the issue has been how do we bring the Iwi before this court or before the High Court.

Now on that issue the defendant has taken a scorched earth approach to resisting being brought before the Court, the Iwi defendants, and my learned friend's clients have pushed their barrow for them. Now one way or another, as your Honours have identified, it was inevitable that the Iwi would need to be brought before the Court and in my submission when one is to look at the overall successful party here it's the respondents. Your Honours invited submissions on the question of whether or not representative orders should be revisited and those have been made, and the outcome is the one we've reached, albeit there's been no judgment. In my submission, there would have been and the position has been inevitable that we would arrive at a point where the Iwi would be able to be joined to the claim. All of the steps which we've taken along the way, the interlocutory skirmishes and so on, have been on the same territory as we've traversed with your Honours, no differences from my clients' perspective. So contrary to what my learned friend says, we would seek costs for our clients. We didn't appeal Justice Lang's judgment. There's no point in seeking to reverse costs on that front, but certainly on the other discovery matters we don't think there's a basis, or we'd submit there's no basis, to reverse the costs orders.

WINKELMANN CJ:

Thank you. All right, I take it, Mr Crossland, you've got nothing to say by reply?

MR CROSSLAND:

I would like to reply.

WINKELMANN CJ:

No reply?

MR CROSSLAND:

Okay.

WINKELMANN CJ:

No, I said: "Do you want to reply?" That was a question. "No reply" question mark.

MR CROSSLAND:

I misheard. Yes, very briefly.

WINKELMANN CJ:

Yes.

MR CROSSLAND:

The fact of the matter is that it's not my client's fault that the plaintiffs neither appealed Justice Lang's decision nor subsequently sought a fresh application for representation. They have fortuitously got that order because this Court in the leave application provided that to them, but my clients have always opposed discovery of the register for all the reasons that its explained because it's a private hapū document and it has been successful in that. So on that basis we say that costs should follow, and the final point is that much of the change has been brought about because the respondents have retreated from the position that the personal estate of iwi members was up for grabs. If you look back at the decisions, certainly of Associate Judge Smith, in granting leave, when you read that you can see that in the High Court and earlier with Justice Lang, both those judges understood the personal estate of iwi members was up for grabs. We've only reached that position because (inaudible 13:08:32) but it has been accepted that it's only the tribal collective (inaudible 13:08:36). So (inaudible 13:08:40) for the Court's consideration on costs.

MR HEARD:

I will, your Honour, if I might, just say one thing about that. There has been comment to that effect in the lower courts. The reason there's been comment to that effect is that my learned friend has made the submission again and again that the personal estate of iwi members was being attacked. The plaintiffs have said again and again it's not, and the record shows that.

So the judges have accepted what my learned friend said. He no longer says it. That's okay. We've arrived at where we've arrived at.

WINKELMANN CJ:

Thank you. All right, and in terms of procedure from here, Mr Mahuika, you've got the pen. You've had the pen today.

MR MAHUIKA:

Yes.

WINKELMANN CJ:

Well, recently. So you'll see to this order being redrafted and submitted because we will put it into a court judgment.

MR MAHUIKA:

Yes. I wonder in that regard, while the discussion was proceeding in relation to costs I had a go at redrafting at point 5. I just wondered, to avoid any confusion of it, perhaps I'll read out what I've drafted. You'll have to bear with me. The writing is around the page a little.

So it will say: "As soon as practicable but in any event not later than 8 February. The trustees are to provide to iwi members a copy of this order, a summary of the proceedings approved in advance by the High Court, details of where the pleadings might be obtained by..." so that's the list, "... and by utilising the register of the Iwi members referred to in the Settlement Trust Deed, and also sending these documents to any other persons known to them who are iwi members but who have not yet been placed on the register." And then the same information will also be placed onto the website of the Settlement Trust.

WINKELMANN CJ:

My only thought is that the summary should probably include a short statement of the effect of the orders so that people can read the thing and understand what they may do.

MR MAHUIKA:

Okay.

WILLIAMS J:

That will be in the summary.

WINKELMANN CJ:

Yes, in the summary. The summary should include a short statement of the effect of the orders so that, you know, whoever is –

MR MAHUIKA:

So perhaps I just, where it says “a summary of the proceedings” I’ll just put in brackets “including –

WINKELMANN CJ:

“Including the effects”.

O’REGAN J:

“Including the effect of the orders”.

WILLIAMS J:

You write and I’ll comment once you’ve finished.

MR MAHUIKA:

Yes.

WILLIAMS J:

You mentioned the website of the Settlement Trust. There’s also the Authority. Are the websites separate?

MR MAHUIKA:

That’s a good point Sir. I’m not aware that they are, if they are then we will certainly add reference.

WILLIAMS J:

If they are then it should be on the Authority's website too.

MR MAHUIKA:

And it may just be an iwi website but what, in finalising that paragraph we'll check to see what the website is so that's accurately described.

MR CROSSLAND

This is Crossland speaking again, I think what we could do is put the website address.

WINKELMANN CJ:

Yes.

MR MAHUIKA:

Yes we could add the URL into it.

WINKELMANN CJ:

Anyway you can work at a simple format.

MR MAHUIKA:

Yes.

WINKELMANN CJ:

To make sure that people understand what is going on.

MR MAHUIKA:

Yes I didn't mean to distract us but I thought given that everybody is here, and given how long it's taken us to get to this point, it would be useful just to make sure that...

WINKELMANN CJ:

It's not often you get the opportunity of five members of the Supreme Court helping with your drafting?

MR MAHUIKA:

Yes, well I was just thinking we've got five lawyers and the entire Bench of the Supreme Court here so hopefully we'll get this right.

O'REGAN J:

I think it's had about too many cooks.

MR MAHUIKA:

Yes Sir.

WINKELMANN CJ:

So that's it I think. Thank you very much counsel, thank you for the very responsible attitude that's been brought to this hearing by all counsel and we will now, when will you file your form of order?

MR MAHUIKA:

Well I will go back to the office and see if I can organise that with Mr Crossland.

WINKELMANN CJ:

Say by next Friday?

MR MAHUIKA:

Well I'd like to think before next Friday. We should be able to file it on Monday I would have thought.

WINKELMANN CJ:

Excellent, on Monday then.

MR MAHUIKA:

Given that we've basically drafted the whole thing it's fairly.

O'REGAN J:

As soon as practical.

WINKELMANN CJ:

But in any case no later than.

MR MAHUIKA:

But in any case no later than Friday yes Ma'am.

WINKELMANN CJ:

All right thank you very much.

COURT ADJOURNS: 1.13 PM