

**NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.**

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

SC 9/2021  
[2021] NZSC Trans 6

**BETWEEN**

**TE WARENA TAUA  
GEORGE HORI WINIKEREI TAUA  
NGARAMA WALKER  
HAMUERA TAUA  
MIRIAMA TAMAARIKI  
as Trustees of the Te Kawerau Iwi  
Tribal Authority**

**TE WARENA TAUA  
GEORGE HORI WINIKEREI TAUA  
NGARAMA WALKER  
HAMUERA TAUA  
MIRIAMA TAMAARIKI  
as Trustees of the Te Kawerau Iwi  
Settlement Trust  
Appellants**

**AND**

**TAHI ENTERPRISES LIMITED  
DIANNE LEE  
Respondents**

Hearing:

18 May 2021

Coram: William Young J  
Glazebrook J  
Williams J

Appearances: M K Mahuika and J S Langston for the Appellants  
M Heard and C Upton for the Respondents

---

**CIVIL APPEAL**

---

**MR MAHUIKA:**

May it please your Honours. I'm not sure if you're taking appearances, but Sir, counsel's name is Mahuika, I appear with Ms Langston. We appear for the appellants in this matter.

**WILLIAM YOUNG J:**

Thank you, Mr Mahuika.

**MR MAHUIKA:**

I also have here Mr Hautapu from our office. He has not been admitted. I am not sure if this is in chambers or open court.

**WILLIAM YOUNG J:**

No, this is open court, that's fine.

**MR HEARD:**

E nga Kaiwhakawā, tēnā koutou, ko Heard ahau, kei kōnei māua ko Upton, mo ngā kaiwhakahē.

**WILLIAM YOUNG J:**

Thank you.

**WILLIAMS J:**

Well said.

**WILLIAM YOUNG J:**

Can I just apologise for a late start. We initially intended to have the hearing a little later and then the change didn't make its way into the diary of our number. Mr Mahuika?

**MR MAHUIKA:**

May it please your Honours. I thought I would start just by giving an outline about how we proposed to proceed and then see if that's something that you wanted us to do. The reason is that Mr Crossland has been senior counsel in this matter but is at another hearing in Auckland. I was involved at the Court of Appeal stage, dealing with a very specific matter relating to the application of the *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133 (HL; [1993] UKHL 6 test and whether or not there was a basis for disclosure on the basis of the claim made about the capacity of Mr Taua to bind individual tribal members. So the way that we propose to deal with this hearing, subject to your Honours' leave, is that I would deal more generally with the leave issue, and why it is we think it's appropriate that leave be granted. If we get into the matter of questions then Ms Langston is more familiar with the procedural history of the matter, so I was proposing to defer to her on that particular aspect of it, if that's in order Sir.

**WILLIAM YOUNG J:**

Yes.

**MR MAHUIKA:**

In terms of the matter of leave, you have our submissions. I propose to speak very generally to why it is, in our submission, appropriate that leave be granted by this court to hear this appeal.

**WILLIAM YOUNG J:**

Sure, can I just say something, I hope by way of directional guidance. For myself I'm not that interested in the High Court Rules 2016 about discovery, or the intricacies of the *Norwich* rule. I'm more interested in the substance of the case, which is as to whether there is a defendant for these

claims and, if so, who it should be. So that's, which does raise pretty significant issues.

**MR MAHUIKA:**

Yes Sir, I think I understand that question. Perhaps if I cover the ground I was proposing to cover, which I hope addresses that aspect of it, and if it doesn't then you can, well I assume you'll tell me that it doesn't, and to a degree we agree with you, Sir, in the sense that superficially this is a matter about discovery and a matter about the application of the High Court Rules, and I say superficially because it is the exercise by the Court of its discovery powers that brings us before you. However, in our submission it is a more significant matter than that. From the point of view of the appellants it is a matter that concerns what I would describe as the sanctity of the tribal register, and the circumstances in which a court, in the context of legal proceedings that are before it, ought to or is entitled to order the disclosure of that register, so that the members of the iwi can be made parties to litigation against the tribe in their personal capacity.

**GLAZEBROOK J:**

Just, you're probably going to cover this to a degree, but the tikanga really in relation to who would have the authority to represent the iwi in any particular matters, is something that would be of interest to me. These entities are unusual.

**MR MAHUIKA:**

Ma'am, they're not unusual in the sense –

**GLAZEBROOK J:**

No, they're not unusual in the sense that that's what the entity is, but it is relatively unusual to have beneficial ownership spread among so many different people. It's not unusual in the Māori context, but applying the High Court Rules to that without a tikanga overlay maybe an issue that is, or the extent to which there should be a tikanga overlay to how you would normally look at something where that is the case.

**MR MAHUIKA:**

And it's why I make the submission that superficially this is an issue about discovery. In substance it is a more significant matter than that, and the reason for that is that this is not like a company, for example, where you become a shareholder, you can opt-in or opt-out of your membership of that grouping. So these entities are tribal representative entities. The register is essentially a matter which his for the internal purposes of the tribe. It enables the tribe to communicate with its members, to identify who they are for the purposes of tribal business, and from the point of view of people who are the beneficiaries, it allows them to opt-in and to take the positive step of being involved in tribal affairs.

The submission that we made in relation to that point at the Court of Appeal stage, and the reason that it was made is that it was relevant because the consideration there was the *Norwich* test, and it was read as relevant to the question of bona fides arguable case. That there is an issue that these intending defendants have to answer, which is more than speculative or spurious. It is do the activities of the tribe also involve the members of the tribe in their personal non-tribal capacities.

**WILLIAMS J:**

This is the thing that's bothering me about this case. Given that Tahiti make no pretensions to the personal assets of any individual on any list, but only against the assets of the PSGE which do not vest in those individuals, it's a perpetual trust, will not eventually vest unless the trust is dismantled, what's the point?

**MR MAHUIKA:**

Yes, well I would agree with that contention Sir. I suspect my friend –

**WILLIAMS J:**

It may have been that Justice Lang should have issued a representation order, but in the end the only thing down the sights of this proceeding are the assets of the PSGE.

**MR MAHUIKA:**

And that would be the argument Sir. That to the extent that Tahī advanced funds, and I'm aware there are all sorts of contentions that I'm sure will play out at trial in relation to what happened, but to the extent that Tahī advanced funds to assist Te Kawerau Ā Maki to conclude its settlement, the manifestation of that loan is the assets that are held by the Settlement Trust. It holds the settlement assets, so those are the assets that were derived from the advance that was allegedly made.

**WILLIAMS J:**

Yes, but the trust is separate from the recipients of the loan.

**MR MAHUIKA:**

Yes, but it's also necessary, in my submission, to distinguish between the tribal assets, and a person's individual assets. Now my friends would say that they don't intend to bankrupt –

**WILLIAMS J:**

Well but your friends have also done that.

**MR MAHUIKA:**

I beg your pardon Sir?

**WILLIAMS J:**

Your friends have also done that, because they've said at both levels that they are not aiming at any personal assets, they're only aiming at the PSGE.

**MR MAHUIKA:**

So then you get to a point of why disclose the register at all in those circumstances.

**WILLIAMS J:**

Well it seems to me that the issue here is not the rules of discovery, or the tapu of a register, the proposition about which I'm somewhat sceptical, but

there you go. It's the relevance of a register at all in these proceedings, and whether the trustees are the appropriate representatives of the interests of those who are, who have a beneficial interest of sorts in the PSGE, or in its assets. I just wonder whether you would be better to pitch your argument that way.

**MR MAHUIKA:**

I think the substance of the argument, yes, in the event that the appeal was heard those are the sorts of arguments that would be made in terms of disclosure of the register and whether ordering the disclosure of the register is appropriate at all. So if you, in our submissions we touch on the issue of relevance, so clearly whether there was a contract and whether that contract is breached, the register and who is on the register has no bearing on whether or not that allegation is proven or otherwise.

**WILLIAMS J:**

Well it just seems to me that Justice Lang's decision on representation was based on the idea that the trustees of the PSGE and the members of the tribe had potential conflicts. What troubles me about this is I can frankly can't see how that can be so, if there's no attack on the individual assets of those so-called beneficiaries. The only assets at stake are those in which the PSGE has a set of trustees whose interests are also consistent with protecting those assets. So what's the point?

**MR MAHUIKA:**

I mean I agree with that submission, or certainly the ultimate part of the submission which is what is the point. The tribal assets are already at stake in terms of the proceeding. There is no need to join the individual members of the tribe. In terms of the decision of the earlier courts, in my respectful submission the issue has been, and the point of misunderstanding has been that it is assumed that an action against the members of the tribe is against them in their personal capacity. It doesn't take into account the fact that a person is a member of a tribe by virtue of their birth. The register is a tool to enable participation in the activities of the tribe. But a person's membership of

the tribe is separate from their individual existence. Once upon a time the assets of the tribe were also the assets of the individual members, and that was all that they had. In this day and age you have the tribal collective assets, which are the assets that have been derived from the settlement, and which are the assets that are held by the Settlement Trust, and by the Tribal Authority.

**WILLIAMS J:**

Yes, and that may well be so, but the only important point here is that there's no attack on those assets.

**MR MAHIKA:**

No, well –

**GLAZEBROOK J:**

Wasn't part of the decision at least of the Court of Appeal to say that the tribal members might have other arguments that they wish to put so it was looking at it in a protective sense and I'd suggest probably misunderstanding the tikanga, or at least not applying it, but again that was something I was interested in submissions on, because there must be other ways of protecting adult beneficiaries in terms of arguments they want to put that could be internal to the iwi involved.

**MR MAHIKA:**

Yes, and my friend's subrogation ground deals with that to a degree.

**WILLIAM YOUNG J:**

Just tell me do we have, is there, it's not on our leave file, but is there a copy of the constituting document for the Settlement Trust?

**MR MAHIKA:**

Yes, yes there is.

**WILLIAM YOUNG J:**

So that'll be in the High Court materials?

**MR MAHUIKA:**

I think it is, Sir, yes. Yes, well there are two trusts. There is the Tribal Trust, which was the representative entity for Te Kawerau Ā Maki prior to the settlement, and then there was the Settlement Trust, which is the body that is in receipt of the assets that are derived from the settlement.

**WILLIAM YOUNG J:**

The Tribal Authority was in place just before the second variation agreement?

**MR MAHUIKA:**

I think that's right, Sir, yes. I don't recall the exact timeframe, but I think the initial agreement was signed, then the Tribal Authority was established, and then the variation was entered into about a year or so later. I think that's right Sir.

**WILLIAM YOUNG J:**

And the Settlement Trust is a charitable trust with no named, no beneficiaries having an identifiable interest in it?

**MR MAHUIKA:**

So the Tribal Trust is a charitable trust. The Settlement Trust is an ordinary common law trust. So it's not charitable in nature, it's a trust for beneficiaries.

**WILLIAMS J:**

Well it's not an ordinary common law trust because it's perpetual by statute.

**MR MAHUIKA:**

Yes, yes.

**WILLIAM YOUNG J:**

What's the statute?

**WILLIAMS J:**

The Settlement Act.

**WILLIAM YOUNG J:**

Oh the Settlement Act itself, of course.

**MR MAHUIKA:**

I mean that is true, Sir, that's correct, but beyond that it is simply a, it is a common law trust that's been constituted. I would describe it as, with some different features, but like a big family trust.

**WILLIAMS J:**

Yes, it's a weird common law trust.

**MR MAHUIKA:**

Yes, well it has the same characteristics, Sir, in the sense, that you say, that individual members of the tribe do not have a vested interest in the assets. Their receipt of an interest, or any particular benefit from that trust, is subject to the exercise by the trustees from time-to-time of their discretion to confer a benefit.

**WILLIAMS J:**

Yes, they don't have the fundamental right of a cestui que trust to deconstruct the trust and take the assets.

**MR MAHUIKA:**

No, that's correct Sir, and they couldn't, for example, demand, well they probably do demand, but they wouldn't have a legal or enforceable entitlement to receive a particular share of the trust assets. But to finish off the point that I was making about the, what in our submission is the misunderstanding that's characterised the way this has been dealt with, is that there is a distinction between the collective of the tribe, and its members, and things that are done and held by that collective, and what you might do individually. So the argument that was made is that I'm a member of the

Ngāti Porou tribe. There are certain circumstances in which I am a participant in the activities of that tribe, and there are assets that are held by the tribe on behalf of me and another 70 or 80,000 people, and then there is the house that I own. So they are two separate and distinct things, and the question that was being posed is that there is representation being made by the chief of the tribe.

**WILLIAM YOUNG J:**

Well he did make the representation, doesn't it?

**MR MAHUIKA:**

Yes, well I mean –

**WILLIAM YOUNG J:**

It's in the deed. It's in the second agreement, isn't it?

**MR MAHUIKA:**

Well, yes. But the question then becomes what is the extent of that declaration. As the chief of the tribe does he have the ability to reach through outside of the tribe and to bind the members of the tribe in their personal capacity. So I understand, Sir, the point that you're making, that this is, well my friends say that they will not seek to bankrupt individual members of the tribe, but the question becomes are the individual members of the tribe even appropriately participants in this litigation in their own personal capacities, as proposed to in their tribal capacities, because their tribal capacities are already captured by virtue of the participation in the litigation of the Tribal Trust and the Settlement Trust.

**WILLIAMS J:**

It must, in the end, come down to whether the trustees of the PSGE concede relevant representativity in circumstances where the individual members of the tribe would wish to contest that. But I understood, I might be wrong, I understood the trustees, including Taua himself it appears, do not accept that there was a relevant degree of executive capacity to bind individual members

of the tribe, and if that's the case then the trustees and the individual members are at one on the key issue of contest, possible issue of contest between the two parties, isn't that right?

**MR MAHUIKA:**

Yes that is correct Sir, although to the extent that we're dealing with the disclosure of the register, which is for the purpose of joining the individual tribal members.

**WILLIAMS J:**

Yes, I don't want to talk about the register because I frankly don't think it's relevant.

**MR MAHUIKA:**

Yes.

**WILLIAMS J:**

The relevant issue is whether, the relevant issue is relevance, not *Norwich Pharmacal* or rule 8, whatever it is, 8.2. But I could be wrong.

**MR MAHUIKA:**

Well we would agree with that as well Sir. Relevance is one of the grounds upon which we say that the Court of Appeal was incorrect to invoke rule 8.8, and the other reason we say the Court was incorrect in invoking rule 8.8 is that this deals with tailored discovery. It effectively circumvents the *Norwich* jurisdiction through relying on rule 8.8. In my submission this is being used by the Court of Appeal as a means of allowing disclosure of the register without having to grapple with the question of is there a bona fides not speculative claim about the capacity of Mr Taua to bind the individual tribal members. Incorrectly, in our submission, and incorrectly because ultimately *Norwich*, if you read the speeches of the House of Lords in relation to that particular case, the foundation of the rule that emanates from *Norwich* is what is in the interests of justice. So it is the same basis upon which tailored discovery is provided for in rule 8.8, and by taking the approach that they have the

Court of Appeal have, in our respectful submission, circumvented some of the safeguards that deal with the disclosure of information such as this. Such as there needs to be more than a speculative case against the individual whose personal details are being disclosed, and that is because it is an onerous matter to be brought before the Court, and to then have to defend, or then have to seek a strike out, or to otherwise be forced to –

**WILLIAM YOUNG J:**

Well if you know who someone is, then you can sue them without any problem, and it's then for the defendant to say, well, there's nothing in this, let me out.

**MR MAHIKA:**

Yes, well you then come back to the question of utility of requesting disclosure of the register in that case.

**WILLIAM YOUNG J:**

Can I just go back. I just looked at the Settlement Act. It refers to the Settlement Trust and says that it's effectively a perpetual duration.

**MR MAHIKA:**

Yes.

**WILLIAM YOUNG J:**

But it doesn't actually constitute it as I read it.

**MR MAHIKA:**

No, it's constituted by virtue of a trust deed.

**WILLIAM YOUNG J:**

So presumably are all the members of the tribe, discretionary beneficiaries?

**MR MAHIKA:**

Yes Sir, they are.

**WILLIAM YOUNG J:**

Right.

**MR MAHUIKA:**

And the register is a tool to ensure that the tribal entity, so the trustees of the Settlement Trust in this instance, are able to report, so it assists with elections, it assists with the calling of general meetings, and matters of that –

**WILLIAM YOUNG J:**

There will obviously be loss of descendants of the ancestors who aren't on the register.

**MR MAHUIKA:**

Yes, that's correct Sir. Well I couldn't say in this instance –

**WILLIAM YOUNG J:**

Well, sorry, it's likely that there are.

**MR MAHUIKA:**

Yes, but certainly there –

**WILLIAMS J:**

400 seems a pretty small number for the descendants of –

**MR MAHUIKA:**

Of Maki, yes.

**WILLIAMS J:**

Of Maki, that seems pretty small.

**MR MAHUIKA:**

Yes. Well Sir I've just spent 12 weeks in the High Court in Auckland having debates about those sorts of matters, and I would say that's probably correct, but I don't want to speculate and understate.

**WILLIAMS J:**

No, of course not.

**MR MAHUIKA:**

I'm unfamiliar with exactly what the breadth of the whakapapa referred to in the trust deed of the Settlement Trust is, but I think it is fair to assume that there will be members of Te Kawerau Ā Maki tribe who have not registered.

**WILLIAM YOUNG J:**

And the fact they're not registered provides probably a logistical issue as to access to benefits, but they'll be discretionary beneficiaries because of descent, not because they're on a list.

**MR MAHUIKA:**

That's correct Sir, and what the register does is that that is to assist and enable the activities of the tribal entity.

**WILLIAMS J:**

That's the democratic mechanism.

**MR MAHUIKA:**

Yes.

**WILLIAMS J:**

It's not the beneficial mechanism.

**MR MAHUIKA:**

That's correct Sir. It's not something which determines entitlement.

**WILLIAM YOUNG J:**

Okay. I found that very helpful actually, thank you. So carry on. Where does that leave you? It's left me with a much better understanding of the issues.

**MR MAHUIKA:**

I think I've, I mean apart from the submissions, I've covered the essential point, which is that you could superficially think about this as discovery but for the reasons that we've discussed, actually it goes a lot further than that. So that, in our submission, brings it squarely within the jurisdiction of the Court under section 74(1), (2) and (4) of the Senior Courts Act 2016, and for those reasons we respectfully submit that leave ought to be granted for this matter to be heard.

**WILLIAM YOUNG J:**

Thank you.

**MR MAHUIKA:**

Now Ms Langston can talk on the matter of questions, or I can just sit down and let my friend talk, I'm in your Honour's hands as to how you wish to proceed.

**WILLIAM YOUNG J:**

No, we'll hear from Ms Langston and then – we'll hear from Ms Langston.

**MR MAHUIKA:**

Thank you Sir.

**MS LANGSTON:**

Your Honours, I'm here to answer any questions that you may have, but also talk about the specific questions.

**WILLIAMS J:**

Yes, you're going to pose some questions as well as answer them.

**MS LANGSTON:**

Yes. Now the questions are set out in the submissions. There are five of them, but they can be broadly sort of categorised in three categories. The first is natural justice. It's the appellant's position that in making the determination

of applying High Court Rule 8.8 the Court of Appeal breached the principles of natural justice because they failed to provide sufficient opportunity to argue, allow the parties to argue the matter. That is important because it feeds into the next question, which is whether High Court Rule 8.8 is relevant. Now the appellant's position is that discovery cannot be ordered under –

**WILLIAM YOUNG J:**

I think it's fair to say, and I don't want to be discourteous, but I'm not that, personally not that interested in the intricacies of the Rules, because it is a bit of a distraction, because there are quite, the issue of status and capacity is pretty important and it's also important that if the plaintiffs have a claim they are entitled to have a defendant identified. So those are the, as I said earlier, *Norwich Pharmacal* and Rule 8 point whatever it is, are in a sense a bit among the weeds here. I'd rather get to the guts of the case.

**MS LANGSTON:**

Yes Sir, and those arguments were canvassed in the Court of Appeal, but were not addressed in the judgment because it feeds into the question of whether the plaintiffs have an arguable case against these individual iwi members. Now the Crown –

**WILLIAMS J:**

I would have thought that the most important for you is whether the proposed 400 necessary defendants in terms of rule 4 point, what is it, three? Because if they're not then this issue falls away completely. If they are, then you've probably got a problem, subject to your natural justice arguments, but –

**MS LANGSTON:**

Well that depends on the –

**WILLIAMS J:**

Our sense is that that's not your battleground.

**GLAZEBROOK J:**

Well there is the issue of how they should be represented in terms of –

**WILLIAMS J:**

If they need to be, yes.

**GLAZEBROOK J:**

If they might, at some stage, have a different interest from the representative...

**MS LANGSTON:**

Well it depends on how one categorises the plaintiff's pleadings. Certainly before the High Court, before Justice Lang, there was a question on, you know, who was the proper contracting party to this agreement. Now the agreement references Te Kawerau Ā Maki, so arguments are raised as to is that a proper legal entity capable of being sued, and if it's not, how does one who has entered into such a contract obtain relief. Now a straightforward application of contractual principles would say that the relief is against the signatories to the contract, and anyone who gave authority to enter that contract.

**WILLIAM YOUNG J:**

Or anyone –

**WILLIAMS J:**

That's the agency argument.

**MS LANGSTON:**

And that's the agency argument.

**WILLIAMS J:**

But I think the point I'm being driving at is that on the basis that the assets in the gun are the assets over which the trustees have all control, subject to the

rules of the trust, why are the individual tribe members necessary defendants anyway.

**MS LANGSTON:**

Well we say they're not, but I think the question is I'm not clear, and certainly with the memorandum filed by the plaintiffs about whether it is just the tribal estate that they are seeking to attack –

**WILLIAM YOUNG J:**

They say it is, they've given an undertaking –

**MS LANGSTON:**

So we did file a memorandum after the respondent's submissions. Did the Court receive that memorandum?

**WILLIAM YOUNG J:**

I've got a member that had an attached draft consent order.

**MS LANGSTON:**

So after the filing of that, the respondent's submissions refer to a memorandum where they –

**GLAZEBROOK J:**

31<sup>st</sup> of March?

**WILLIAM YOUNG J:**

I've got a memorandum of 17 June.

**GLAZEBROOK J:**

I don't.

**WILLIAM YOUNG J:**

Is that the one? 2020 I mean.

**MS LANGSTON:**

I'm sorry Sir, I don't actually have a copy of the memorandum.

**GLAZEBROOK J:**

That's okay, there's a memorandum of counsel on the 13<sup>th</sup> of March with a document dated 17 June. Is that what we're talking about?

**WILLIAM YOUNG J:**

Yes.

**MS LANGSTON:**

And within the memorandum doubt, there is, it contains the appellant's view on the plaintiffs assertion that they are only concentrating on the tribal estate, because there are, and apologies to the Court, I don't have the memorandum in front of me, but there is certainly arguments to suggest that actually it's not just the tribal estate that the plaintiffs are seeking to recover, but they are seeking to seek, to attack the individual estates of at least those members who are over the age of 18.

**WILLIAM YOUNG J:**

I read it as an unequivocal undertaking, that except for those against whom there were claims for breach of warranty or authority, it was confined to the assets of the trust. I've got paragraph 3 of this: "Counsel for respondent confirmed that in relation to," this is a memorandum that went to the Court of Appeal, "that in relation to the first cause of action the respondents do not intend to enforce any judgment against personal assets of iwi members, as opposed to collective assets held by and also to the benefit of iwi members collectively. The respondents undertake to that effect."

**MS LANGSTON:**

Yes, and there was a subsequent memorandum filed by the appellants, which addresses undertaking and which identified areas that would indicate that actually that's not the case, but unfortunately I don't have it here. I'm wondering –

**WILLIAM YOUNG J:**

Was that subsequent memorandum in the Court of Appeal or here?

**MS LANGSTON:**

That was a subsequent memorandum in the Court of Appeal, and it was also a memorandum that we filed in the Supreme Court. So after the respondents' submissions were filed, we filed a memorandum which essentially was filed in the Court of Appeal in response to this memorandum and which identified the concern that actually there was still a claim against the private –

**GLAZEBROOK J:**

I don't quite understand how that's the case. I mean what it says is "do not intend to, it's not clear that the undertaking applies to all iwi members or just some. It does seem pretty unequivocal. "Do not intend to enforce any judgment against personal assets of iwi members." It's difficult to see how they could wiggle out of that as an undertaking.

**MS LANGSTON:**

So it's only in relation to the first cause of action. It doesn't apply to the other causes of action.

**GLAZEBROOK J:**

Refers, okay.

**MS LANGSTON:**

In addition to that –

**WILLIAMS J:**

So which causes of action does it not apply to?

**MS LANGSTON:**

So the other, the unjust enrichment cause of action. The subrogation cause of action and the causes of action in relation to a separate agreement. So the property agreement that was entered into.

**WILLIAMS J:**

Oh, this is the house?

**MS LANGSTON:**

Yes.

**WILLIAMS J:**

Right. So the unjust enrichment argument would be you've received some money, we can claw it back?

**MS LANGSTON:**

Yes.

**WILLIAMS J:**

Yes?

**MS LANGSTON:**

Yes. It's pleaded in the alternative to the first cause of action.

**WILLIAM YOUNG J:**

But is that just against the trusts?

**MS LANGSTON:**

It's against –

**WILLIAMS J:**

I see your point.

**MS LANGSTON:**

It's against those iwi members over the age of 18.

**WILLIAM YOUNG J:**

Okay.

**MS LANGSTON:**

Sorry, I would also like to make on that point though, when you look at paragraph 4 of the memorandum setting out the undertaking, it does specify that for the avoidance of doubt the respondents confirm that they maintain their personal claims against the signatories to the joint venture agreement, and against trustees sued in that capacity. Now the way that the claim is pled is that all members who are over the age of 18 are effect trustees. That is what has been pleaded.

**WILLIAMS J:**

I thought they were either beneficiaries or principals?

**MS LANGSTON:**

No, they are principals or they've entered the agreements as trustees for all iwi members. So –

**WILLIAMS J:**

But iwi members themselves are not trustees, they can't be, because they haven't signed anything.

**MS LANGSTON:**

That is what is being pled.

**WILLIAMS J:**

I see.

**MS LANGSTON:**

So it's a very sort of broad pleading where what the plaintiffs are saying is that the signatories entered into the contracts on behalf of those members over the age of 18 as agents, and that those members over the age of 18 entered into the contracts as principals either as agents for the iwi as a whole, or as trustees as for the iwi as a whole. So when you look at this undertaking one must consider what is actually being pled to see what is its ambit, and it's my submission that actually the ambit of this undertaking is very small.

**GLAZEBROOK J:**

That possibly argues against you to a degree if Justice Williams is right.

**MS LANGSTON:**

In what respect?

**GLAZEBROOK J:**

Although I don't personally think that is the case in the case of what one has to look at in terms of tikanga and representation. But there is an issue there in terms of whether there might arise separate issues. It would be the same in any sort of discretionary trust, one might appoint certainly representation for the infant beneficiaries and those yet unborn, but in those circumstances might also apply some sort of representation for the people who might be affected i.e. the adult beneficiaries, but not necessarily by joining them in any manner which seems to me not only overkill but actually possibly oppressive.

**MS LANGSTON:**

I think, certainly the way that I view it, and I do, you do come back to the fact that this is an application for disclosure, what the plaintiffs are seeking is something quite extraordinary. They are seeking the assistance of the Court in order to make a claim against individuals, and while I understand the Court's point, which is if they have this information in any event, they could just issue this claim. But they don't have this information, and so what the Court has to do is the Court has to assess through the rules, depending on which, through the various prerequisites for each rule, whether disclosure should be granted, and then it comes back to, does the claim have merit against these individual beneficiaries, and questions of the tikanga that has been alleged arises, because what is being alleged is a custom whereby a kaumātua or rangatira can individually bind –

**WILLIAM YOUNG J:**

Well it's not without foundation because Mr Taua has actually asserted he had authority.

**MS LANGSTON:**

But he hasn't asserted the authority to the extent that the plaintiff has pleaded.

**WILLIAM YOUNG J:**

Doesn't he just, he asserts the authority of the purposes of the variation of the joint venture agreement, doesn't he?

**MS LANGSTON:**

In what respect Sir?

**WILLIAM YOUNG J:**

Well I'm looking at Justice Lang's judgment at...

**GLAZEBROOK J:**

Are you speaking about binding them individually in respect of individual assets or in respect of the tribal assets?

**MS LANGSTON:**

In respect of individual assets.

**GLAZEBROOK J:**

That's what I thought.

**WILLIAM YOUNG J:**

Paragraphs 13 and 14 of Justice Lang's judgment, and I may misinterpret it, but the second agreement, which is signed on the 22<sup>nd</sup> of July, which is about a week or two after the iwi authority is set up.

**MS LANGSTON:**

Sorry Sir I'm just...

**WILLIAM YOUNG J:**

Paragraph 13. Records that the people signing had authority to sign this agreement on behalf of Te Kawerau, which is defined in the agreement as including the collective group of persons. So there is an assertion by Mr Taua

of authority and I mean if there were, he could be required to give evidence about what was the basis of this assertion. I don't think this is an aspect of the case that Tahi has just pulled out of the air. So has he explained in affidavits what he meant by that, or what the basis of that asserted authority was?

**MS LANGSTON:**

No he has not.

**WILLIAM YOUNG J:**

Is it not legitimate for the Court to infer that he wouldn't have said it unless there was a reasonable basis for it?

**MS LANGSTON:**

But then, Sir –

**WILLIAM YOUNG J:**

For these purposes, I don't mean for the purposes of trial, but for the purposes of saying who were the parties who should be before the Court.

**MS LANGSTON:**

Yes, and I think there's two points to that. First of all, a statement that asserts authority by an agent isn't necessarily taken into account by the Court when assessing whether that agency exists.

**WILLIAM YOUNG J:**

But the question is, I mean we can take into account hearsay on interlocutory applications, so why can't we take him at his word?

**GLAZEBROOK J:**

Does he, sorry.

**WILLIAMS J:**

Isn't his position that he is entitled, he is their representative but he couldn't or didn't bind them in the context of this agreement, or something kind of interesting like that?

**MS LANGSTON:**

Certainly in the defence, you know, he does represent them, but what he says is that he can't bind their personal estates and the nature of the plaintiffs pleading is that by entering into this agreement –

**WILLIAMS J:**

So he can bind their tribal estates?

**MS LANGSTON:**

Well that's not pleaded. There is no statement before the Court which sets that out, but certainly, you know, when you are ordering disclosure of individual, you know, of a list of members, one must look at the pleading and the pleading is it doesn't apply just to the tribal estate, it applies to the individual private –

**WILLIAM YOUNG J:**

Well we'll have hear from the respondents about that. Can I just ask you one question. I'm sort of anxious to see that a case doesn't fail for want of the right parties. Is there any relief which the plaintiffs might seek which if made out on the facts in law might nonetheless fail at trial because the right parties aren't before the Court?

**WILLIAMS J:**

Currently.

**WILLIAM YOUNG J:**

Currently. So if everything the plaintiffs say in their statement of claim is right, is it possible that the judge might say, great case, pity you haven't got the right parties?

**MS LANGSTON:**

No.

**WILLIAM YOUNG J:**

So you say the right, every relief, all relief that is sought can be granted in respect of the current parties?

**MS LANGSTON:**

Yes.

**WILLIAMS J:**

The flip side of that question is, is there any relief that could be granted against the assets in which individual tribal members would have a position distinct from, and/or in conflict with, the trustees of those assets?

**MS LANGSTON:**

Well it depends, I guess it depends, and I don't want to push the point, but it depends on the pleading.

**WILLIAMS J:**

Sure.

**MS LANGSTON:**

So that's why when you look, you have to look at the plaintiff's pleading, and so if they're talking about express authority, so an individual iwi member has said, enter into this agreement for me –

**WILLIAM YOUNG J:**

I don't imagine they would be saying that, I don't imagine they're saying that every single iwi member authorised this agreement.

**MS LANGSTON:**

But that's what is being pleaded.

**WILLIAMS J:**

Well they do plead express or implied.

**MS LANGSTON:**

They plead express or implied and so –

**WILLIAM YOUNG J:**

But some of them might have.

**MS LANGSTON:**

But I think there's – so in terms of that will there be individual iwi members that have a different, you know, have a different position to other members, or to the trustees.

**WILLIAM YOUNG J:**

Can I ask, what's the current pleading, is there a draft second amended statement of claim?

**MS LANGSTON:**

Well there is a pleading that has been filed which sets out the allegations.

**WILLIAM YOUNG J:**

When was that filed? Will that be on the electronic files in the Court of Appeal or does that come later?

**MS LANGSTON:**

It should be on the Court of Appeal file Sir.

**WILLIAMS J:**

I think I remember seeing it.

**WILLIAM YOUNG J:**

Okay, thank you.

**GLAZEBROOK J:**

The issue might be the way in which one might deal with that i.e. is it dealt with by giving the register to the other side, or is it dealt with in some way by having counsel appointed to make sure that the interest, whatever the interest might be, disparate interests are actually represented in some way, which as I say one might do with more conventional trusts. When I say “conventional” I mean...

**WILLIAMS J:**

Statutory interfered with trusts.

**GLAZEBROOK J:**

Yes, this is a statutory –

**WILLIAM YOUNG J:**

Well the only statutory overlay, as I understand it, is that it's perpetual.

**WILLIAMS J:**

Well, yes, it's perpetual and it has this statutory imprimatur of being the representative of Te Kawerau Ā Maki. But I guess your argument might fall over if what's pled is a reach through on an unjust enrichment basis, to individual dividend receivers, if there has been ever such payment, it would be interesting to know whether there have been any at all. But then you might say the individuals might have arguments, probably will have arguments, that the trustees not only won't want to make, but won't even know about.

**GLAZEBROOK J:**

Well not to mention change of position I suppose is the obvious one.

**WILLIAMS J:**

Yes, exactly, that sort of thing.

**GLAZEBROOK J:**

But that might be a second, it might be something that you would deal with later –

**WILLIAMS J:**

Second stage, yes.

**MS LANGSTON:**

I think the point is, is that, you know, these arguments that are being raised here is to do with whether the individual iwi members should be represented in this action, but ultimately where we're coming from, and that was a decision, no, that was subject to a decision that was not appealed.

**WILLIAM YOUNG J:**

I wouldn't necessary regard it as set in stone though because his own, Justice Lang's own judgment recognised that there might be representation orders in the future.

**MS LANGSTON:**

Potentially. Yes he did, he did Sir.

**WILLIAM YOUNG J:**

And so if there is a change of circumstance, for instance a claim that is, whether relevant claims are confined to trust assets, then that might be the simplest way of dealing with it.

**MS LANGSTON:**

Possibly, but that's not the question that's being asked here today, and certainly that is not what has been pleaded by the plaintiffs. So ultimately it's up to the plaintiffs to change their pleadings if that is what they are wanting to do.

The second point I would say is that the question here is not whether these individual iwi members should be properly represented, it's whether their personal and confidential information should be given –

**WILLIAM YOUNG J:**

But isn't there an upstream question and that is whether they are parties to the dispute.

**MS LANGSTON:**

Well I think the plaintiffs would like to join them as parties.

**WILLIAM YOUNG J:**

Yes, so whether they are legitimate parties to the dispute. Whether the claim made by the plaintiff is against them. Now, if it is against them then I can't see any, and it's not fanciful whatever the test is, it'll be higher than that, but if it's a reasonable credible claim then they're entitled to have parties they want to sue before the Court. I mean that's a...

**MS LANGSTON:**

And I think that's the key Sir, which is, is this a credible claim, and we would say –

**WILLIAM YOUNG J:**

Well they've got Mr Taua saying he's got authority to commit them.

**GLAZEBROOK J:**

But then the argument there would be only in respect of tribal assets, and if it's in respect of tribal assets if you look at the tikanga of it then there shouldn't actually be an issue in respect of the individuals subject to them being able to put their own claims because one shouldn't be – well especially with the Settlement Trust, where they don't actually have a beneficial interest –

**WILLIAM YOUNG J:**

No, I think they do. They –

**GLAZEBROOK J:**

Discretionary, you wouldn't say there's any discretionary – you wouldn't sue every single discretionary beneficiary if you were suing a discretionary trust.

**WILLIAM YOUNG J:**

Well you'd normally name the trustees as representing the beneficiaries.

**WILLIAMS J:**

Exactly.

**MS LANGSTON:**

And these were the arguments that were canvassed in the Court of Appeal but which we say were not actually decided, and so although I can understand, we don't want to, you know, that these issues that arise whether you apply 8.8 or *Norwich*, they are important, and they do address the whole idea of whether there is a proper claim against these individual iwi members, and –

**WILLIAM YOUNG J:**

But if there's a proper claim against them in respect of their beneficial interests in the trust, then there's no reason why the trustees can't represent them.

**GLAZEBROOK J:**

Well especially for a discretionary trust. I mean some of these other trusts, there is actually a look through in a beneficial interest even in terms of companies which, of course, wouldn't be the case for normal companies but this is just not a standard discretionary trust but...

**WILLIAM YOUNG J:**

Well we'll have to look at the settlement deed. Ms Langston, we're going to have to draw you to a close because we've got to be out of here by 11 but thank you.

**MS LANGSTON:**

Thank you.

**MR HEARD:**

Thank you your Honours.

**WILLIAM YOUNG J:**

Can I ask you the question that I put a little bit before. Is there any relief which you seek which if made out on the facts in law might fail at trial because you don't have the right parties before the Court?

**MR HEARD:**

Well according to my learned friends your Honour, at every point up until about 20 minutes ago the answer was yes. Now we're here Sir –

**GLAZEBROOK J:**

Sorry, I don't understand the answer.

**WILLIAM YOUNG J:**

I think I do actually.

**MR HEARD:**

Our position throughout this litigation, our starting point, was to engage with the defendants to identify that we had a claim against the iwi, and to ask how we best address that and make sure the proper parties are before the Court. Now the response has been the iwi is not a legal person, you can't get anything from it. The response when we then sought representative orders was initially consent. We will consent, and a memorandum was filed to that effect, we will consent to the Tribal Authority trustees representing the iwi. So far so good. Consent was then withdrawn and through the following contested argument the position was taken that the Settlement Trust trustees cannot represent the interests of the iwi members because there are some conflicts. Now we're in a position where every species of authority and every species of trust which has been alleged by my clients had been denied by the

defendants. We're in a position where their response to every attempt to engage in a question of proper parties from a position respectful of tikanga has, with respect, been to say you need to look to the common law. Now we've done that. The common law says that if you have an unincorporated body, then if you say that unincorporated body is a party to a contract, you must sue the individual members. That's why we're here.

**WILLIAM YOUNG J:**

The members of this unincorporated body will not be confined to those on the register, presumably?

**MR HEARD:**

Your Honour, in terms of, I think if I can get rid of one thing, which I think might help us.

**WILLIAM YOUNG J:**

Yes.

**MR HEARD:**

The contention has been made that my clients are seeking to attack the personal assets of iwi members. With respect, that's a stalking horse, it's been a constant scene from my learned friends throughout this, but the undertaking which your Honours are familiar with is as clear as we could possibly make it, and I do want to spend a little bit of time on that because it's been suggested again that the undertaking, in fact, doesn't make clear that we're not attacking personal assets.

**WILLIAMS J:**

Just before, is this leading you to saying no to Justice Young, that there are no claims in respect of which there are parties missing now?

**MR HEARD:**

Well it's leading me, your Honour, to an answer to that question.

**WILLIAM YOUNG J:**

You say no but you've got to anticipate that there will be arguments to the contrary?

**MR HEARD:**

My position, Sir, is that it's a surprise to me that my learned friend has suggested today that the proper parties are all before the Court, and it's a surprise because as you've heard the contention is that the plaintiff is seeking to attack personal assets, and that the people who represent the iwi, don't speak for their personal assets, and those are two propositions which one of them is wrong and one of them is right.

**WILLIAMS J:**

So if you got a readout from this court on discovery appeal that indicated the proper parties are there, that would serve your purposes?

**MR HEARD:**

Sir, my clients just want to get on with their claim.

**WILLIAMS J:**

Right.

**GLAZEBROOK J:**

Can I just – you'll deal when you're dealing with the undertaking deal with the issue that it only relates to the first cause of action.

**MR HEARD:**

Yes.

**GLAZEBROOK J:**

Right. Because you don't need to convince me it's clear, in other than it only refers to the first cause of action, but don't let that stop you.

**MR HEARD:**

Thank you your Honour, and perhaps if I turn to that now. The undertaking at paragraph 3 of the memorandum that was filed does relate to the first cause of action, it's as clear as it possibly can be, with respect. The balance of the undertaking does refer to claims against signatories and trustees. The position with respect to signatories, and that term is meant in its technical phrase, the people that actually sign the documents, if there was a want of authority there, then of course the consequences of that are the normal consequences. Now those people have all been named as parties to the claim, individually, so we don't really need to worry about them anymore. The second aspect of paragraph 4 is that, of course, in respect of trustees sued in that capacity, again the usual position at law will apply. If the Court were to find that there were people who entered this agreement as trustees for others, then they will be entitled to an indemnity against the trust assets. That's it. The trust assets.

**WILLIAM YOUNG J:**

So it's confined – once subrogation and indemnity are confined to trust assets.

**MR HEARD:**

Yes.

**WILLIAMS J:**

Which trust?

**WILLIAM YOUNG J:**

The two iwi trusts, the iwi trust and the Settlement Trust.

**WILLIAMS J:**

You said they signed as trustees –

**MR HEARD:**

Yes Sir and –

**WILLIAMS J:**

– in a common law implied trust. Well that's what I thought you were pleading, not either of those two tribal trusts.

**MR HEARD:**

The question Sir is when someone signs on behalf of an iwi, what does that mean at common law.

**WILLIAMS J:**

Exactly. Cut it doesn't mean either the tribal trust or the Settlement Trust, does it, because –

**MR HEARD:**

My learned friends have denied that.

**WILLIAMS J:**

But it can't do, can it, because –

**MR HEARD:**

The Settlement Trust wasn't in existence.

**WILLIAMS J:**

It didn't exist at the first signing and neither did the Tribal Trust.

**MR HEARD:**

Yes Sir.

**WILLIAMS J:**

And not all trustees signed anyway and the common law would require unanimity.

**MR HEARD:**

And whether or not there was a unanimity might be a different question, but you've identified correctly, Sir, that we do allege that there may be a broader

trust than that, which is one that just exists at common law. Now that will be a trust in respect of the collective iwi interests which is at stake here.

**WILLIAMS J:**

It's the trust in respect of the Settlement Trust effectively?

**MR HEARD:**

Effectively.

**WILLIAMS J:**

Right.

**MR HEARD:**

So there's no allegation here that there's some trust asset that extends to people's personal assets.

**WILLIAMS J:**

What about the reach through point?

**MR HEARD:**

Well this was one that I've been considering after your Honour raised it. I'm not aware of there having been any distribution to anyone.

**WILLIAMS J:**

It's probably not worth the candle frankly Mr Heard.

**MR HEARD:**

No it's not, and what my clients were seeking is recognition of the agreement, the pact that from their perspective they entered into.

**WILLIAMS J:**

Yes.

**MR HEARD:**

And that was in respect of the settlement assets. They will have diminished, they will go up, they'll go down, they'll do their thing, but no, no one's contemplating a look through claim, and what we've confirmed here, as clearly as I can with respect, is that we're not looking for those sorts of look through claims. What we're looking for is to make sure that we have a claim which is going to be, it's going to result in a judgment against the proper parties. It's as simple as that.

Now there's some very interesting issues, your Honours, fascinating in fact, around how the common law deals with iwi.

**WILLIAMS J:**

Or will deal with iwi.

**GLAZEBROOK J:**

Yes.

**MR HEARD:**

Yes.

**WILLIAMS J:**

Because it's brushed it under the carpet for centuries. Literally more than one century.

**MR HEARD:**

Absolutely. Absolutely. How the common law should deal with iwi perhaps is the best question, and there's a lot to be said, your Honour, for your suggestion about representation and posing the question whether or not the Settlement Trust trustees are really best placed to represent everyone. That is, in fact, the position that we thought made sense, and we sought orders accordingly. They were opposed. From that point, Sir, we've, and I'll come back to your Honour's question –

**WILLIAMS J:**

You say you've been painted into this corner?

**MR HEARD:**

Well, it's a little bit ironic Sir, that on the one hand we're being told that you cannot sue an iwi, you must go through the doorways of the common law, Byzantine as they are, which we've done.

**GLAZEBROOK J:**

Or maybe you should just have a talk after this to see whether you can come to some agreement in respect of a representation order.

**MR HEARD:**

I'm never one, your Honour, to decline the opportunity to talk or the invitation to do so. I would note that we have had that discussion now before two different courts.

**GLAZEBROOK J:**

You might have but you might actually have had a big hint.

**WILLIAMS J:**

This is the third one.

**GLAZEBROOK J:**

From what's been said in this, and actually I'm speaking to both parties, there might be a hint in terms of this leave application as to what might be the appropriate course to agree upon.

**MR HEARD:**

Indeed. I'm sure my learned friends and I will talk. In terms of where we are and the sort of corner that we're in, as I was saying, slightly ironic that we've been told the iwi is not a legal person and you're left with your common law rights.

**WILLIAMS J:**

Yes, of course, that is ironic coming from the Māori side, because it's using the Māori side taking the opposite view, but that's what you do when you're at the end of the barrel instead of at the butt end, and to be fair that would be orthodox common law to say that tribes do not have legal personality. They won't have been the first one to run that argument. They might be the first Māoris to do it.

**MR HEARD:**

Well, I'd agree with that as well Sir, in terms of what we think orthodox is. In my submission you may have to go back a few years, if not decades, to arrive at really a common view of that orthodoxy. However, yes, I do accept that on some views of the common law, that that was the position.

We're now, of course, being faced with an argument that having pushed us into a common law framework, that we shouldn't be able to join these people because of tikanga. That is somewhat ironic. In terms of the issue facing your Honours, which is the Court of Appeal's judgment on disclosure, in my respectful submission confronted with a series of conflicting propositions from the applicants here that we don't want anyone to represent us, we don't talk to Te Kawerau Ā Maki but we're going to talk to Te Kawerau Ā Maki. We think the common law should apply, but you shouldn't be able to join people in accordance with the common law requirements. Now what the Court of Appeal has said is well, let's look at rule 8.8. It says that where it is necessary in the interests of justice to order discovery, then it must be ordered. Now once we have the register, if we were to join every member of Te Kawerau Ā Maki that we can identify, well there can hardly be an argument that the proper parties aren't before the Court, and it would be natural for the parties then to either make their own arrangements around representation and, if necessary, to seek orders from the High Court accordingly. Now for my part, your Honours, I find that a pretty regrettable position. I'd rather not have to do it. I'd rather that we found a way to sort this out. But here we are.

In terms of the threshold for leave, I'd just draw one thing to your Honour's attention which hasn't really been covered so far, which is section 74(4) of the Senior Courts Act where, as your Honours will be well familiar, where we're dealing with an interlocutory matter, leave must not be granted unless it's necessary to hear the appeal prior to trial, and my –

**WILLIAM YOUNG J:**

It might be, I mean we've got this unhappy situation of sequential, dealing with issues sequentially so the representation order is dealt with first, perhaps unhappily, then the next issue of disclosure of parties, and I sort of got the suggestion a bit from counsel for the applicants that it was thought that the fact that Justice Lang's judgment hadn't been appealed closed off representation. It's not a proposition I'm particularly attracted to, but what I, I suppose from a pragmatic point of view, is I would like to see the right parties before the Court and the case then be able to be heard without technical objections. I mean there's going to be enough other issues without the claim failing for want of the correct parties.

**MR HEARD:**

Indeed your Honour, and that perhaps might allow me to circle back to your initial question, which is do I accept that the proper parties are before the Court. Well if my learned friends are going to formally concede that fact, then we may be in a position to move on from it. I confess I'm a little bit cautious about it. You've asked my learned friend the question on her feet. You are also engaging with the question of whether or not we've attacked the tribal estate only, or the personal position of iwi members, and my learned friend's position was that it's the personal position of iwi members, and if that's the case then it must follow that the iwi members need to be here. So I'm cautious, is the way that I'd put it. I'd certainly welcome –

**GLAZEBROOK J:**

Well you say you're not trying to do that.

**MR HEARD:**

Correct.

**GLAZEBROOK J:**

Attack for personal assets, so if you're not trying to attack the personal assets, then a representation order in respect of those people rather than joining 400, which won't probably be the right number of people joined anyway –

**WILLIAMS J:**

It'd be 4,000, I would think.

**GLAZEBROOK J:**

Yes. Would actually make much more sense in this type of litigation because then how those representatives then get in touch with the people they are representing, and how they work it through, will be subject to the supervision of the Court for those representatives to deal with, but you don't have to be involved in that at all. You know that whatever the position is you have those people as representatives either of the iwi in their individual capacities, but not their individual assets, or as the entity, being the iwi, which is probably your position in any event, in order to make out the claim.

**MR HEARD:**

I couldn't have put it better myself, your Honour, in terms of the submissions we made to his Honour Justice Lang, so I agree with all of that.

**WILLIAMS J:**

But you'd have to amend your statement of claim.

**MR HEARD:**

I'm not sure –

**WILLIAMS J:**

To take out the reach throughs.

**MR HEARD:**

Well, yes Sir. I should make it clear that to the extent that that is caught by the statement of claim. I mean...

**WILLIAMS J:**

Not intended.

**MR HEARD:**

No, and whether that requires an amendment or simply another undertaking or conformation I'd have to get instructions on both, but it wasn't intended. We're not aware of there having been distributions.

**GLAZEBROOK J:**

And that's apart from the signatories and the trustees, which trustees, one of the issues, I suppose, is who are those trustees, but your position is that they are not every member of the iwi, whatever else they – so probably the signatories, if anything, would they be?

**MR HEARD:**

That's the clearest position and the clearest expression of if your Honour, yes.

**WILLIAMS J:**

You could, in fact, just name Te Kawerau Ā Maki and then have a battle over whether they're properly a defendant or not.

**MR HEARD:**

Well your Honour...

**WILLIAMS J:**

Be an interesting case.

**MR HEARD:**

I couldn't agree more, and I would love to have the arguments, and I would love to be involved in the case. I have to say Sir, this is one of the situations

where the lawyer's interest and the maybe constitutional scholars desire to see these things resolved properly runs into the pragmatism of client interests.

**WILLIAMS J:**

Quite.

**MR HEARD:**

And the desire, as I say, simply to get this matter done.

**WILLIAM YOUNG J:**

I think we've probably got the essence of your argument haven't we Mr Heard?

**MR HEARD:**

I believe so. There's one other matter I would address, just in brief your Honours, if I may, which is privacy interests. In terms of the register we're not seeking disclosure of individual whakapapa. Whakapapa to Te Kawerau Ā Maki, the whakapapa to that iwi is a matter of public record, it's in the Settlement Act, so to the extent that whakapapa is recorded there, well public record, all we're seeking is the names and addresses of people who say, who identify with Te Kawerau Ā Maki. Now it maybe that the register includes other whakapapa information, Tuakana-teina lines, what have you. We don't need it. No one is seeking to suggest for a moment that it shouldn't properly be something which is properly redacted from any document which is provided. No issue with that.

**WILLIAMS J:**

Given that the names of hapū and hapū members are recorded publicly on Māori Land Court ownership lists, I'm somewhat sceptical of the argument. In fact lots of the whakapapa is too, and Māori scholars access them all the time. Anyway. The only question I have remaining is whether you, how much time you might need for your discussions before we issue whatever it is we're going to issue.

**MR HEARD:**

Sir, for my part it's a discussion we've had before, and the main question is, my clients are pretty readily available, I'm aware that my friends have got a different client group, and that Mr Crossland is in a hearing, so it might be something for them. But I can work within whatever timeframe works for them.

**WILLIAM YOUNG J:**

We will see what Mr Mahuika says. But before we get to that issue, was there anything you wanted to say in reply Mr Mahuika?

**MR MAHUIKA:**

Well probably lots of things. It's an interesting matter to debate. In terms of, I understand my friend's position about the desire to join individual iwi members. There is the issue of relevance and necessity. The point about the representation orders is that what is being discussed here is somebody to speak on behalf of the beneficiaries in case they take a different view of the Settlement Trust. As I understood the original representation orders that were sought before his Honour Justice Lang it was to say that the Settlement Trust could effectively speak for everybody else.

**WILLIAM YOUNG J:**

But that's a normal rule. I mean the normal rule, the trustees represent beneficiaries in relation to trust disputes.

**MR MAHUIKA:**

I think that's true Sir, except that the issue as I understand it, and it's unfortunate Mr Crossland wasn't here because I don't think either Ms Langston, or certainly I wasn't involved in that hearing, but they have a position because they may have been involved in the transactions in some way, shape or form themselves, certainly Mr Taua was, which may well be different to the individual beneficiaries who may dispute the extent of his authority. So I had understood there was a question about the

appropriateness of those representation orders. Now that doesn't detract from the merits of having a discussion about how we might address that point.

**GLAZEBROOK J:**

But if they had a different view then it might be you'd make one or more representation orders.

**MR MAHUIKA:**

Yes Ma'am. I certainly accept that that would be the way that you would deal with it.

**WILLIAM YOUNG J:**

So you're concerned that, say, Mr Taua may have a particular position that doesn't line up with that of the Settlement Trust as a whole –

**MR MAHUIKA:**

Yes.

**WILLIAM YOUNG J:**

And you're just talking, I won't say hypothetically, but of possibilities.

**MR MAHUIKA:**

So it certainly is possible that there might be a contention from members of Te Kawerau Ā Maki that although Mr Taua says that he is the chief of the tribe and has the authority to bind them, they say that he doesn't, acting unilaterally, they say that there are tribal processes that ought to have been undertaken in order for him to properly have that authority to bind them. So that's where you might get a misalignment of the interests. Now I'm not –

**GLAZEBROOK J:**

But your friend would then say, having been denied the opportunity to have any sort of representation order, we actually need to make sure that we have everybody who might have a different view before the Court, because if we don't have everybody before the Court, we might be met with an argument,

either I had no authority to bind anybody, or alternatively somebody coming along later and saying, well you can't take these assets because I wasn't involved in the case that enables you to appropriate them if they were matters.

**MR MAHUIKA:**

Yes Ma'am, or it might be a question of revisiting the type of representation orders that are sought so that in that case it's not the Settlement Trust, it's simply speaking on behalf of the iwi and is that defendant in its place, but they might be separately represented by –

**GLAZEBROOK J:**

Well that might be a fruitful part of the discussion.

**MR MAHUIKA:**

It could well be Ma'am.

**WILLIAM YOUNG J:**

But if Mr Taua has got a conflict of interest, that would have to be dealt within the trust. We couldn't really deal with that, nor should we anticipate that it wouldn't be able to be properly dealt with.

**MR MAHUIKA:**

Yes, although it is a matter that is relevant to determining what are the appropriate types of representation orders.

**GLAZEBROOK J:**

Yes.

**MR MAHUIKA:**

And I, for my part, I have to admit that I hadn't, even having attended the Court of Appeal, quite understood the rationale that my friend had for seeking the joinder of all of the tribal members. In effect, as I understand it, and I hope I'm not mischaracterising it, the reason for that is to ensure that the tribe is a party, and you then come down to the question of, is it actually necessary to

join in all of the individual tribal members, disclose the register, put them to the burden of being individual parties and therefore having to deal with their representation, or find some other method by which that might be achieved.

**WILLIAM YOUNG J:**

What I, you probably grasp, at least, and that they are only provisional views because, you know, we've been exposed to only a slice of the case, and a small proportion of papers, but there is something to be said for the proposition that the Settlement Trust can represent its members, providing the claim is confined to the assets of the Settlement Trust.

**MR MAHUIKA:**

Yes, I think –

**WILLIAMS J:**

And Mr Taua may need to step aside.

**MR MAHUIKA:**

Yes.

**WILLIAM YOUNG J:**

Or have some...

**WILLIAMS J:**

Yes, because he's being sued as a trustee of a different trust, in fact, not the Settlement Trust. He's being sued in respect of the pre-Settlement Trust, over the settlement assets as they came in.

**MR MAHUIKA:**

I think he's being sued in actually a number of different capacities.

**WILLIAMS J:**

A whole bunch of capacities, yes.

**MR MAHUIKA:**

Because he has a number of capacities. He is the Chair of the Settlement Trust, he is the Chair of the Tribal Authority. He was a party to the agreements. He made the representation as to his authority to each of those agreements, so there are numerous capacities in respect of which Mr Taua is involved in this particular piece of litigation.

**WILLIAM YOUNG J:**

Can we leave it with you, say, two or three weeks, and we won't issue a judgment.

**MR MAHUIKA:**

I'm sure that will be fine.

**WILLIAM YOUNG J:**

Or would you need more time?

**MR MAHUIKA:**

I'll look at Ms Langston.

**WILLIAM YOUNG J:**

I don't want to rush you.

**MR MAHUIKA:**

Unless she throws something heavy at me, I'll agree.

**WILLIAM YOUNG J:**

Say three weeks?

**MR MAHUIKA:**

Yes Sir. I'm just a little bit uncertain about – I think Mr Crossland's hearing may have settled so that should be fine Sir, but I just would like to check with him because he is...

**GLAZEBROOK J:**

You can always apply if you need a bit more time.

**WILLIAM YOUNG J:**

Or just file a memorandum.

**MR MAHUIKA:**

Yes, I mean I'm more of a substitute here and dealing with a specific aspect of this, given the tikanga argument that was raised as a basis for the disclosure of the register in the High Court, and then argued again in the Court of Appeal. But as I said Sir, to the extent that the assets that are issue are held by the Settlement Trust, those are the tribal assets, those are the assets that derive from the settlement, and the funds that Tahi is said to have provided, were for the purposes of that settlement. So that is the –

**WILLIAM YOUNG J:**

There's a logic to what is being proposed.

**MR MAHUIKA:**

Well, so that is the reason for my submission. That you don't need to join the individual tribal members because the Settlement Trust, which is the holder of the assets that derive from the transactions that are subject of the proceeding, is already before this court.

**WILLIAM YOUNG J:**

Okay, thank you very much counsel. It's quite an elusive case, and I think we were helped by what you said to us this morning. We will retire.

**COURT ADJOURNS: 11.01 AM**