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

SC 93/2021

[2022] NZSC Trans 2

BETWEEN **WAIRARAPA MOANA KI POUĀKANI INCORPORATION**
Appellant

AND **MERCURY NZ LIMITED**
First Respondent

THE WAITANGI TRIBUNAL
Second Respondent

THE ATTORNEY-GENERAL
Third Respondent

NGĀTI KAHUNGUNU KI WAIRARAPA TĀMAKI NUI-Ā-RUA SETTLEMENT TRUST
Fourth Respondent

RAUKAWA SETTLEMENT TRUST
Fifth Respondent

TE KOTAHITANGA O NGĀTI TŪWHARETOA
Sixth Respondent

POUĀKANI CLAIMS TRUST
Seventh Respondent

RYSHELL GRIGGS AND MARK CHAMBERLAIN ON BEHALF OF NGĀI TŪMAPŪHIA-Ā-RANGI HAPŪ
Eighth Respondent

THE TRUSTEES OF THE RANGITĀNE TŪ MAI RĀ TRUST
Ninth Respondent

Hearing:	9-10 February 2022
Coram:	Winkelmann CJ William Young J Glazebrook J O'Regan J Williams J
Appearances:	P J Radich QC, M K Mahuika and T N Hauraki for the Appellant J E Hodder QC, L L Fraser and K C Grant for the First Respondent No appearance by or for the Second Respondent M R Heron QC, H Graham and C D Tyson for the Third Respondent M G Colson QC and M R G van Alphen-Fyfe for the Fourth Respondent C F Finlayson QC, F B Barton and A L Clark-Tahana for the Fifth Respondent No appearance by or for the Sixth Respondent No appearance by or for the Seventh Respondent P Cornegé, F E Geiringer and A Castle for the Eighth Respondent No appearance by or for the Ninth Respondent

SC 127/2021

BETWEEN **RYSHELL GRIGGS AND MARK CHAMBERLAIN ON BEHALF OF NGĀI TŪMAPŪHIA-Ā-RANGI HAPŪ**
Appellant

AND **THE WAITANGI TRIBUNAL**
First Respondent

THE ATTORNEY-GENERAL
Second Respondent

MERCURY NZ LIMITED
Third Respondent

WAIRARAPA MOANA KI POUĀKANI INCORPORATION
Fourth Respondent

NGĀTI KAHUNGUNU KI WAIRARAPA TĀMAKI NUI-Ā-RUA SETTLEMENT TRUST
Fifth Respondent

TAKERE LEACH ON BEHALF OF TE HIKA O PĀPĀUMA
Sixth Respondent

HAAMI TE WHAITI ON BEHALF OF NGĀTI HINEWAKA
Seventh Respondent

KINGI WINIATA SMILER
Eighth Respondent

THE TRUSTEES OF THE RANGITĀNE TŪ MAI RĀ TRUST
Ninth Respondent

RAUKAWA SETTLEMENT TRUST
Tenth Respondent

TE KOTAHITANGA O NGĀTI TŪWHARETOA
Eleventh Respondent

POUĀKANI CLAIMS TRUST
Twelfth Respondent

Appearances:

P Cornegé, F E Geiringer and A Castle for the Appellant
No appearance by or for the First Respondent
M R Heron QC, H Graham and C D Tyson for the Second Respondent
J E Hodder QC, L L Fraser and K C Grant for the Third Respondent
P J Radich QC, M K Mahuika and T N Hauraki for the Fourth Respondent
M G Colson QC and M R G van Alphen-Fyfe for the Fifth Respondent
No appearance by or for the Sixth Respondent
No appearance by or for the Seventh Respondent
No appearance by or for the Eighth Respondent
No appearance by or for the Ninth Respondent

F B Barton and A L Clark-Tahana for the Tenth Respondent
No appearance by or for the Eleventh Respondent
No appearance by or for the Twelfth Respondent

CIVIL APPEAL AND CROSS-APPEAL

MR RADICH QC:

E te Kaiwhakawā, tēnā koe. Ko Radich ahau. Kei kōnei mātou ko Mr Mahuika, ko Ms Hauraki mō te Wairarapa Moana ki Pouākani Incorporated If your Honours please, Radich with my learned friends Mr Mahuika and Ms Hauraki for the appellant in SC 93/21.

WINKELMANN CJ:

Tēnā koutou.

MR CORNEGÉ:

E ngā Kaiwhakawā, tēnā koutou, ko Cornegé tōku ingoa, e whakakanohi ana mātou ko Geiringer, ko Castle mō ngā kaitono. Ms Griggs rāua ko Mr Chamberlain nō Ngāi Tūmapūhia -ā-Rangi hapū. Ko Te Maipi te maunga, ko Kaihoata te awa, ko Tūmapūhia te tipuna. Tēnā koutou katoa. May it please the Court, counsel's name is Cornegé. I appear for Ms Griggs and Mr Chamberlain on behalf of Ngā Tūmapūhia-ā-Rangi together with Mr Geiringer and Ms Castle.

WINKELMANN CJ:

Tēnā koutou.

MR COLSON QC:

E te Kōti ko Colson ahau, kei kōnei māua ko Ms van Alphen Fyfe mō Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust. Colson with van Alphen Fyfe.

WINKELMANN CJ:

Sorry, counsel with you?

MR COLSON QC:

Ms van Alphen Fyfe. Thank you, your Honour.

MR HERON QC:

E te Kaiwhakawā, tēnā koutou. May it please your Honours, Heron. I appear with Mr Tyson and Mr Graham for the Crown.

WINKELMANN CJ:

Tēnā koutou.

MR FINLAYSON QC:

E te Kōti, ko Finlayson taku ingoa. Kei kōnei mātou ko Mr Barton, ko Ms Clark-Tahana mō te Poari Matua o Raukawa, mai te Wairere ki te Raki, tae atu ki te Pae o Raukawa ki te Tonga, ki te uru o Taupō-nui-ā-tia ki Wharepūhunga, ki Maungatautari, whakahokia ki (inaudible 10:08:27) anei ngā Pouwhenua o te rohe nei o Raukawa. Nō reira e te Kōti, tēnā koutou katoa. May it please the Court, Finlayson, Barton and Clark-Tahana for the Raukawa Settlement Trust and I have also for the benefit of the Court set out the boundaries of the district of Raukawa which I will explain in greater detail in the course of my submission

WINKELMANN CJ:

Tēnā koutou.

MR FINLAYSON QC:

May it please the Court, Finlayson, Barton and Clark-Tahana for the Raukawa Settlement Trust and I have also for the benefit of the Court set out the boundaries of the district of Raukawa which I will explain in greater detail in the course of my submission.

WINKELMANN CJ:

Kia ora.

MR FINLAYSON QC:

May it please the Court.

MR HODDER QC:

Please the Court, Hodder with my learned friends Ms Fraser and Ms Grant for Mercury New Zealand Ltd, relevantly the first respondent and the cross-appellant in the SC 93 appeal.

WINKELMANN CJ:

Tēnā koutou. That completes the appearances. Right, Mr Radich.

MR RADICH QC:

Does the mask stay on, your Honour?

WINKELMANN CJ:

Well yes, unless there is difficulty in hearing, but I don't think there is difficulty in hearing, so masks are one of our best protectors. I think there is a preliminary issue in relation, that you have taken, in relation to the evidence filed on behalf of the Crown?

MR RADICH QC:

Not us. My learned friend Mr Cornegé, Mr Geiringer have raised that point, so would you like to deal with that before I?

WINKELMANN CJ:

Well, we were just minded to proceed on the basis. No one seems to have referred to that evidence in any case according to our reading and we were minded just to say that people can refer to it if they wish, but we will receive de bene esse so as to avoid wasting time on preliminary skirmishes. Are you content with that Mr Cornegé?

MR CORNEGÉ:

Yes, thank you, happy with that Ma'am.

WINKELMANN CJ:

And you're content with that Mr Geiringer?

MR GEIRINGER:

Thank you, your Honour.

MR RADICH QC:

Thank you, your Honour. If your Honour please, your Honours please, the only other matter that's sort of preliminary in a way of course and we won't refer to it in detail, but the Crown have advised that the introduction of the Settlement Bill for Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua and, as a result of that, there is a part in the submissions for the appellant paragraphs 80 to 89 that won't be touched upon. I don't believe that any issues arises through the introduction of that Bill in terms of our ability to deal with matters today. No one has raised that in advance. It can be addressed if there's anything relating to it that your Honours would like to discuss in any way, but the general position in relation to it if I can put it this way is that as was said in Ngāti Whātua, the Court may continue to look at legislation, not look at a case should I say, until the legislation is passed. At the moment, it has been introduced. It hasn't got past that stage. We dealt with this in the leave application looking at the distinction between making judgements about legislative proposals which this is not and granting declarations as to rights in a judicial review or in a public law sense. Here we look at the latter only. We say that there remains, despite the introduction of the Bill at this stage and certainly until its passage and then after, utility in the case. The statutory interpretation issues that are raised remain of ongoing relevance in the appellant's submission. There are opportunities well into the future to pick up on the points that exist when we are looking at mana whenua, when we are looking at tikanga, when we are looking at the relationship of Wairarapa Moana Ki Pouākani with the land.

The High Court findings on tikanga touch directly, deal directly with, if I can just paraphrase to Wairarapa Moana's relationship with the land at Pouākani and we say that it can be, that relationship can be conceived of in tikanga terms. The decision of the court almost flattened the layers of those terms, but we say

it's highly relevant just in terms of how Wairarapa Moana are perceived in relation to their land at any level for the issue to be continued so that there is utility.

They were the only things I was wanting to say in terms of the introduction of the Bill.

WINKELMANN CJ:
So, may I just clarify?

MR RADICH QC:
Yes.

WINKELMANN CJ:
You are saying that the introduction of the Bill does not, is no barrier to the Court continuing to consider these issues, but are you taking it further and saying that even if the legislation was passed there remain issues that are of significance?

MR RADICH QC:
Possibly down the track. This is not a matter of walking over the legislation or being any way in breach of the Parliamentary Privilege Act 2014, but there are future generations at the very least, your Honour, who may wish to look back at this moment in time and who may wish to consider the position of Wairarapa Moana. At the moment, through the High Court decision, there is, if you like, a blockage in terms of their ability to get through on the scheme given the tikanga point and we wish to address that and to see if really that blockage is there. Whether that is something that they will never overcome in terms of the resumption regime, or could never overcome. So, yes, into the future, your Honour. I won't advance that point further unless there are questions from your Honours and I would turn to the oral submission outline.

I don't know if your Honours have that near them. This is the oral submission outline for the appellant and SC 93/21 came in yesterday. If I can just say while your Honours…

WILLIAMS J:
Just a moment. I don't seem to have one in front of me.

WINKELMANN CJ:
The oral outline?

WILLIAMS J:
Yes.

GLAZEBROOK J:
Oh, I have probably got it. I can send it to you by email if you want.

WINKELMANN CJ:
It was sent to you by email yesterday. We've got one for you.

WILLIAMS J:
Great, thanks.

MR RADICH QC:
Thank you, your Honours. If I can just say by way of presentation of the case for the appellant, you might have seen a timeline memorandum filed by, a joint memorandum filed by counsel giving a broad indication of the core subject. The core is that how the time might be allocated and so I'm going to, if your Honours please, deal with the introductory sections to this submission. My learned friend Mr Mahuika is going to pick up on the points relating to mana whenua and tikanga directly. I will then deal with the Mercury cross-appeal while we are still on our feet as it were and then my learned friend Mr Geiringer will, depending on circumstances, but around about 12.30 will pick up his case at that point. That's the intention.

Looking at the oral outline, your Honours, there are two primary points at the beginning and I mention these just by way of overview. The first is that contrary to the decision of the High Court at 80 the phrase: "… return to Māori ownership in section 8A" which I will take the Court to "… of the 1975 Act is not limited to

cases involving the restoration of full mana whenua over the land." The requirements in the provision are significant in their own right. They require a claim that relates to the subject land and is well-founded.

Secondly, that contrary to the decision of the Court, the Tribunal itself applied tikanga principles appropriately to the resumption application and there wouldn't be a fresh Treaty breach. It is possible to look at the resumption of the land to Wairarapa Moana in tikanga terms.

The first thing I wanted to do just visually if your Honours please is to look at a map book to orient ourselves in place and I wonder Mr Cox, if you would bring up, I'm looking at 511.2281 for my learned friends in the bundle, in the record, 511.2281. This in front of you now is a map book used in the Tribunal. If I can ask you please to move to the next page. Thank you very much. So what your Honours will see there in pink is all of the memorialised land that followed the hydro development. Now, the hatched line east of the river, you will see the north, south, east, west at the top, is in different ownership, therefore, that is not part of the resumption claim. It's part of memorialised land, but it's not part of the resumption claim. To the west about half way across the river across is the Incorporation's former land, Wairarapa Moana's former land and that is the land that is in issue and you will see there marked on this map, for example, within that pink area, the Maraetai 2 power station and other areas. So, that's an overview.

WILLIAMS J:
Can you tell me whether that land was in Pouākani 1? In other words, was it land originally taken for survey liens or was it purchased land?

MR RADICH QC:
No, I'm sorry, your Honour, I believe, my understanding it's the former, but I can't be certain on that, I'm sorry. We can dig deeper as we go and hopefully come back to your Honour on that.

Certainly one point is that there is other land that was taken, this is a side point, that was never memorialised, therefore, it's offline. It's now in the hands of local authorities, but the claim itself relates to the pink area apart from the hatched area.

WILLIAMS J:
Yes, I'm just trying to establish the derivation of that part land.

MR RADICH QC:
Yes.

WILLIAMS J:
(a) What was its history of transfer into Crown hands because having read the original 1990 whatever it is report, it's pretty complicated.

MR RADICH QC:
Yes.

WINKELMANN CJ:
I thought it was covered in Mr Finlayson's submissions. Is that point covered in your submissions, Mr Finlayson, the historical, how this land came to be available?

MR FINLAYSON QC:
Yes, I've covered it in my submissions.

WINKELMANN CJ:
Yes, I thought it was, yes.

MR FINLAYSON QC:
I'm disappointed Mr Radich hasn't read them.

WILLIAMS J:
Can you tell me whether it's survey takings or purchase?

MR FINLAYSON QC:

I can't answer that particular question. What I do in my submission is explain how exactly Pouākani was taken by the Crown in 1915 and the distinction between Pouākani 1 and Pouākani 2. So there was the Native Land Court orders which took the land and then, because that formed the basis of the Crown grant in 1915.

WILLIAMS J:

Yes, I'm not interested in that part. I'm interested in how the Crown got the title in the first place. If you can't answer it, then that's fine. If someone could answer it at some point I would be grateful.

MR RADICH QC:

Yes, thank you, your Honour, we will look to do that yes. Just moving through the map book, if you're able to go over please two further pages, yes, so there your Honours will see in the bottom the picture of the Maraetai power station. The land that we're dealing with is the lighter shaded grey area right on the corner of the river where it says: "Mangakino". And then if we come forward two further pages please, there are just some, and one more if you would, there are some pictures there effectively of the area and the dams in question. The semi-circular dam that you will see when you go back to the first picture we were looking at is the one that straddles the land that's within and partly outside of the area in question. So I just mention those to orient matters.

Moving away from that, if your Honours please, I'm back at the oral outline at paragraph 3.

WINKELMANN CJ:

I'm not sure if I'm right about this given the confusion to date, this is the answer to the question of Justice Williams at paragraph 14 of Mr Finlayson's submissions which was that 20,000 acres of the Pouākani No 1 Block was vested in the Crown as satisfaction of survey and other costs.

WILLIAMS J:

Yes, the question is whether this is Pouākani No 1 Block because the numbers changed over time and it was a bit higgledy-piggledy.

MR FINLAYSON QC:

That's what I explained. Yes, I thought I explained that in paragraphs 14 to 16, but perhaps it's not clear enough. But there is a difference between Pouākani 1 and Pouākani 2.

WILLIAMS J:

Yes.

MR RADICH QC:

This is Pouākani 2 as I understand it, although it was subdivided.

WILLIAMS J:

Quite, but it wasn't called Pouākani 2 originally. It had a whole lot of other names.

MR RADICH QC:

No, exactly, your Honour.

WILLIAMS J:

So what I'm trying to establish is whether this particular land was taken for survey liens or whether it was purchased.

MR RADICH QC:

Thank you, your Honour, we will work at that.

MR FINLAYSON QC:

I think the answer is surveying, but I will clarify that point for you, Sir.

WILLIAMS J:
I, having read through the report, it's not clear from the material that I could see which it was because the block numbers and names changed across that pre-1915 period.

MR FINLAYSON QC:
Yes.

MR RADICH QC:
I look at the factual background next your Honours. It's to be found in a number of places and the time we have won't allow me to take you through it carefully, but I refer there first of all if I may to the decision of his Honour Justice Cooke, the decision at issue and that can be found at BOA 0320. If I can go to paragraph 7 please and there his Honour put it on the basis and I won't read it all out but he's looking at some of the most significant breaches in the second line associated with the Wairarapa lakes, Lake Wairarapa, Ōnoke, Lake Ferry, the way it was used as a food source, the way in which there were challenges with the European settlers in relation to the settlers digging a channel and therefore disrupting traditional food gathering activities.

The ultimate, and I'm looking over the page now, ultimately the agreement with the Crown to transfer title in the lakes to the Crown one of the promises being that the Māori owners were to be provided with alternative land of value. That never happening. Ultimately, after further delays, the Crown transferring to Wairarapa Moana the lands at Pouākani, not within its area, within the traditional areas of others. Moreover, the land was inaccessible and essentially useless. The Crown later identifying parts of the land as suitable for hydroelectric generation and developing the land for that purpose without the knowledge or consent of the Māori land owners at all and it was Prime Minister Fraser who at the time became aware of this, became aware of the fact that there were memorandum deliberately not providing notice and required that it be compulsorily acquired. That was done. It was delayed and it was discounted and I take up at paragraph 87 of this decision.

If we could just go through to the decision to that point and his Honour Justice Cooke's words where he's looking at the consequences of this and about four lines down, five lines down, he refers to there being a series of closely interlinked Treaty breaches. Wairarapa Moana are representing the successors of those originally who held title to the lakes. The Crown's conduct giving rise to acquiring title, further breaches then arising out of the Crown's failure to honour its promise to provide the owners with alternative land in Wairarapa. Yet further breaches arising from the Crown providing the largely valueless and inaccessible lands in the central North Island at the time. The Crown continuing to breach its obligations by starting to develop some of the lands for the power scheme what consent of the owners and then by compulsorily acquiring it for inadequate consideration. It's a remarkable story of injustice and his Honour referred to the inter-related breaches and an argument that was made with reference to a US case which you have the line: "At the end of the trail of tears there was a promise." And it was a case relating to the taking of lands on the basis for the establishment of a reservation.

There are other places to look for the facts, but I don't want to dwell unduly on this before coming to the key issue, but if could take your Honours just to reference it because we will be coming back to it on a number of occasions to the *Wairarapa ki Tararua Report.* This is in the oral outline at the bullet point under paragraph 3. The document number for the record is 701.0026, 701.0026.

And I, having got to that point, thank you, Mr Cox if we go please quite a way forward to 704.0771 and just as that's coming up I make the point that this is the section of the report dealt with over 60 or so pages that deals quite carefully with the issues that we are looking at there. It starts at that page there talking about the gift of the lakes. It looks at the question about what did happen and concludes that it was a chiefly act in relation to pressures at the time.

If I could just go to one point because we will come back to aspects of this a little further on, 704.0818. This is the part on the left-hand column in the first full paragraph and I will just read the first little bit out if I may: "The actions of

the Crown in compulsorily acquiring 787 acres of Pouākani land for the Maraetai Dam and compulsorily leasing 683 acres as a site for the Mangakino township breached the principles of the Treaty because..." And then the reasons are listed.

I just pause on that because my learned friends for the Crown in the submissions suggest that there wasn't a Treaty breach over the taking of the land itself, but the breach related to, moreover to process issues that followed and the point for the Wairarapa Moana is that this was a clear finding in this paragraph that the act itself was a breach as well as other breaches. The pages in this report –

WILLIAM YOUNG J:
So you mean the act? You mean the taking of the land? You mean the taking of the land was a breach, not just the failures over compensation?

MR RADICH QC:
Yes, Sir. That is right, Sir.

WILLIAM YOUNG J:
But what's the counterfactual? I'm sort of struggling to understand the argument. What's the counterfactual? Do we assume that the government wouldn't have taken the land or do we assume they would have taken the land because of the hydro-electric potential but would have paid more generous compensation?

MR RADICH QC:
Yes, well, the first assumption, Sir, is the former, that they wouldn't have taken the land perhaps without it. There needed to be a conversation about it. Would they, if there had been a conversation, would there have been a consent on the part of the local owners? Would in the absence of consent there have been a taking in any event? They're matters that we don't know. I understand your Honour's point but the Crown –

WILLIAM YOUNG J:
Were they explored by the Tribunal as to what the counterfactual is?

MR RADICH QC:
The pages leading up to this…

WINKELMANN CJ:
When you read that, Mr Radich, isn't it a fair reading to say that really you can't just say the taking on its own was a breach? It's really the taking and the way it was done for the various reasons –

MR RADICH QC:
Yes, I accept the way your Honour's put it.

WINKELMANN CJ:
– for the various – and then that is explored in the subsequent bullet points.

MR RADICH QC:
Yes.

WILLIAMS J:
Doesn't the Waitangi Tribunal view of these, of takings generally which have been the subject of claims for years, that taking is in breach of the Treaty unless there's absolutely no alternative?

MR RADICH QC:
That is right and –

WILLIAMS J:
So whatever one says about process. So the question is what were the alternative sites? Is this explored in the report, or was it just convenient to take Māori land because you didn't need to find a farmer to consent?

MR RADICH QC:

Yes, my learned friend, Mr Mahuika, is indicating that he can possibly cover that point, but there was certainly – and the reason I say that is that in the Tribunal where he was appearing there was some discussion, as I understand it, about the national importance and whether in fact there were alternative sites or not and in exchanges with counsel and the Tribunal, as I understand it, there were certainly discussion as to what the other sites were, whether they could have been used and whether there were – the Crown having cheaper alternatives was a distinct possibility.

WILLIAMS J:

Was this written up in the report that you know of?

MR RADICH QC:

Yes, I can give your Honour – and we'll find the report. I have a reference to the transcript where the point was discussed by the Tribunal and that's at page 396 to 402. In terms of the –

GLAZEBROOK J:

Can you just repeat that, sorry?

MR RADICH QC:

Pages 396 to 402 of the transcript where counsel for the Crown and her Honour, Judge Wainwright, discuss it and the Judge refers to the Crown having had cheaper alternatives, therefore not being justified to take the land at Pouākani.

WILLIAMS J:

But in the main Tribunal report, the report you're referring to, what was the evidence about the exploration of alternatives to this site for the dam, do you know? If you don't know just say so. We can find.

WINKELMANN CJ:

The summary that appears in the March 2020 Waitangi Tribunal report of the breaches in relation to this is at page 51. It's the process point. Well, I suppose it could be caught up in the – no, I think it is the process point.

MR RADICH QC:

The hydro dam discussion in the document we're looking at on the screen comes at page 687, on page 688. Yes, it doesn't deal with the point your Honour raises directly. It talks about at 7.8.2 on page 690, it talks about taking the land without notice and it talks about the process from that point on.

WILLIAMS J:

So there was no exploration of whether there were alternatives to this land?

MR RADICH QC:

It doesn't appear so in these pages, your Honour, no.

WILLIAMS J:

Thank you.

WILLIAM YOUNG J:

Is there – oh, we may come back to it later, sorry.

MR RADICH QC:

Your Honour, so the page that I was on at page of the bundle number 704.0818 looks at in those bullet points or the bullet arrows the ways in which the Treaty was breached and you will see there that the first one, they will never get the land back, process compensation paid, and the third one was "niggardly" was the word used in the third line. The fourth one, the owners could not have been compensated for the loss of productivity at Pouākani as a result of the power lines that had been taken as well. The township which was required to be taken on by Wairarapa Moana through a lease was never going to be viable. There is a significant discussion of that in the report leading up to this and they suffered considerable losses as a result.

I turn to look at the resumption scheme itself and as I say we will come back to bits of the Tribunal's report. In paragraph 4 of the hand-up, or electronic filing perhaps, make the point that the resumption scheme does enable the exercise of substantive rights by Wairarapa Moana and I refer to the *Lands* case and I just wish to take your Honours to two places in that case if I may. The case is at BOA 0387. Thank you and if we could go please to the case, using the case page number to page 653 and I pause at this page to refer to the fact that in the first full paragraph being starting: "An indication," there's a discussion of what are the lands in issue. What are these lands that are going to be transferred to SOEs that need some protection through a scheme of arrangement that ultimately becomes section 8A?

And, if I can refer to the next paragraph down beginning with the words: "To bring." And his Honour, the then president of the Court of Appeal Justice Cooke says, refers to a planning paper by Asher and Naulls published by the Planning Council estimating that in '86 there were 1.18 million hectares of freehold land which together with some smaller total areas of reserved vested in other categories of land represented the tenements of tribal estates. Then he refers to a report by Sir Thaddeus McCarthy on a Royal Commission where Sir Thaddeus looks at two categories of land in question. The first of them, the third line down in the quotation refers to Māori land and in a couple of lines down he refers to that: "Being land which has never been alienated from Māori ownership and is still multiply owned predominantly by Māori." An area that is 1.2 million hectares.

And then just two lines down he refers to the "other type of land" and he says: "The amount of other land, general land, as it is called in the legislation, owned by Māori is very considerable and is to be found in farms, business sites, town and country house sections. This general land has been obtained by grant from the Crown to specific individuals by purchase or by will. There is no way of telling the total of such land holding, but it will be extensive." So I make that point simply to show that the framework that the Court was considering in terms

of the land it was looking as being the subject of the scheme under discussion included not just Māori land but land in the hands of Māori through other means.

I come now, the only other reference I wanted to take you to was page 666 ominously numbered in the case where at about line 10 the Court said, or the President said: “For the reasons he has discussed he would substantively accept the arguments for the applicants to the extent that granting a declaration that the transfer of assets, should I say, to state enterprises without establishing a system to consider in relation to particular assets of categories would be inconsistent with the principles of the Treaty.”

Then the former orders that follows which your Honours may be familiar with are then set out saying, first of all at No 1 that: “Transferring without establishing a system to consider them was needed. There were directions as follows: (i) prepare a scheme of safeguards and submit.” Coming down to number 3, a declaration for the Crown not to do anything in the meantime.

And so that then led to negotiations and an agreement and they are referred to, the best way to look at them if I can shortcut this way is to the 1988 Act and the preamble to that Act. That’s at BOA 0072 and if I can just look briefly at that you will see the preamble there which sets out in some detail the arrangements and down at (e) refers to the Court having made the declaration that I referred to and gave directions for the scheme of safeguards. Down at (f): “After extensive negotiations there has been agreement.” At (g): “It is essential to ensure compliance with section 9 that there be safeguards.” Then at (i): “Including the power for the Tribunal to make binding recommendations for the return to Māori ownership of land.” At (ii): “To hear a claim.” And at (iii) relevant to my learned friends for Mercury’s cross-appeal: “Precluding state enterprises and their successors in title from being heard by the Waitangi Tribunal on claims relating to land or interests in land so transferred.”

From there, if I just hold that thought and move to the 1986 Act, this is the State-Owned Enterprises Act 1986, this is a supplementary, Supp 2555, and just as that is coming through, I observe that this is the mechanical section that

provides for the need for there to be a note on the record of title, the memorials that we refer to that land is subject to this Act. It's just coming on through.

In section 27A(1) it refers to the, partway through you will see that the note on the record of a title subject to section 27B and then in brackets there it says: "Which provide for the resumption of land on the recommendation of the Tribunal which does not provide for third parties such as the owner of the land to be heard in relation to the making of any such recommendations."

Down at 27B where the Tribunal has made that recommendation the land or interests shall be resumed, that's where the word comes from, by the Crown in accordance with section 27C.

If I can just go to section 27C for a moment, this section says that where that happens under B: "The Minister shall acquire the land under the Public Works Act." So that's where the compensation for the landowner ultimately comes in.

In the submissions, in the full written submissions, and I needn't take your Honours to them, there's a discussion of the agreements, the negotiations that led to these provisions. I just let them stand, but I note in passing my learned friend Mr Hodder had indicated by reference to an authority called *R (SC) and Work and Pensions Secretary* [2021] UKSC 26, [2021] 3 WLR 428, this is just to give you the reference without needing to go there, paragraph 53 of the submissions for Mercury about the use of extrinsic aids in looking at legislation and that was a decision of the United Kingdom Supreme Court, quite a recent one and that case was looking at the compatibility of domestic legislation with the UK Human Rights Act 1998 and there was a caution about the court's not treating the absence or presence of poverty of debate as a reason supporting incompatibility findings and to be cautious about their use.

I make the point that this is very different because unlike cases where extreme extrinsic aids may be limited, the statutory history here are the negotiations. Those negotiations themselves led to the very agreement that is recorded

precisely in the preamble to the 1998 Act and finds its way into the substantive Act.

If I can turn now to the very section in issue which is the Treaty of Waitangi Act 1975 section 8A and this can be found at BOA 0023 and it's section 8A. May I just refer to about five steps. So, this is relating to recommendations in (2) and these are the key words: "Subject to section 8B, which come to where a claim submitted to the Tribunal relates in whole or in part to land or an interest in land to which the section applies, the Tribunal may." So there's an element of discretion there.

My learned friends for the Crown suggested that the applicant's in turn had suggested that there was no discretion, that it just followed as a matter of course. That's not the submission. There is discretion in these provisions, but it's limited. So may and then (a)" If it finds (i) that the claim is well-founded," and the Tribunal found that they were well-founded here and then "(ii) that the action to be taken under section 6(3) to compensate or remove the prejudice." If I can come down to two lines before the end of that sub-subparagraph: "Should include." So the words "should include" themselves have an element of discretion in them. "The return to Māori ownership," and they are key words for our purposes on this particular appeal, "the return to Māori ownership." Does that require that it be tangata whenua only, or those holding mana whenua?

Then coming down beyond (ii) to the paragraph sitting out: "Include in its recommendation a recommendation that the land be returned to Māori ownership."

Then moving down to (b): "It if finds the claim is well-founded but that a recommendation for return to Māori ownership is not required, then it can recommend that it is no longer subject to resumption."

Now, I come down just to (3), so there it makes the point: "In deciding whether to resume or not, the Tribunal is not to have regard to changes since

immediately before the date of transfer to the SOE." So, from the time the land is transferred, don't have regard to changes.

Just for completion, section 8B, if I can just roll down a little bit where the recommendation is made, in the first instance it is an interim recommendation and at (3) just down a little bit further, sub-section should I say: "The Tribunal cannot confirm that for 90 days and there are to be discussions effectively between applicant and Crown."

And then coming down to (6): "If subsection (5) does not apply, i.e., if there has not been agreement, then upon the expiration of 90 days the interim recommendations take effect as final."

I come back to it a little bit later in the cross-appeal, but section 8C just down there just to orient us for a moment, deals with the right to be heard and provides that only certain list of people can be heard and not the state enterprises in the submission for the applicant.

So, that's an overview of the scheme itself but, as I say, we come back to parts of it as we discuss the issues.

Your Honours, I turn back now to my road map document and I just want to refer, under paragraph 4, make one reference to the *Haronga* decision, *Attorney General v Haronga* [2017] 2 NZLR 934 (CA), and if I can go to the Court of Appeal decision at BOA 0082. *Haronga*, of course, was the case that told the Tribunal when it first declined to hold an urgent hearing under the resumption powers, deferring instead, as the Tribunal did at that time, to Crown settlement policy and opportunities there said that no, you must go ahead and hear it. It's an important jurisdiction giving substantive redress and there's an obligation to decide.

If I can turn, please, to paragraph 65 of the *Haronga* case, and this just talks about the discretion in the provisions that I have been referring to and it's referring to 8HB. That's the exact equivalent, the mirror-image provisions

related to forestry land, and my learned friends for Ngā Tūmapūhia will be discussing those provisions in their appeal, but subsequent to the lands case, of course, was the forests agreement and the forest case that put similar measures in place.

So just looking at 65, the Court said, the Court of Appeal, the discretion is a limited one, conferred with the intention of promoting the policy and objects of the Act. It's not an unfettered discretion, rather an obligation to act once the Tribunal finds the prerequisites are satisfied. In that event, its powers are limited to a selection between two alternatives, both requiring a recommendation – either the land be returned and no longer be available to the Tribunal's binding recommendations, and then mentions the reference to the Supreme Court at paragraph 91 that there's a residual discretion in the latter which is not to return which is necessary because the land may be subject to other claims making its clearance for liability premature.

Now without taking too much more of my learned friend, Mr Mahuika's, time to come before a core of matters, can I look just at the decision of his Honour, Justice Cooke, again at BOA 0320, and also, if your Honours have it, doesn't matter if you don't, but the points addressed at paragraph 46 of the submissions for the appellant, and that's to look at what it is that is in issue in the appeal and in paragraph 46 of the submissions and I'll just read them without you having to have them.

First, concluding, in issue 3 of the judgment, that the purpose of section 8A is the restoration of the exercise of mana whenua over the land, and interpreting the phrase "return to Māori ownership" accordingly. Now this is dealt with in his Honour's decision in paragraphs 80 to 89 which I'll come to in just a second, but just for completeness the second ground is the finding, in issue 4 of the judgment, that the Tribunal's approach to tikanga meant that it hadn't complied with tikanga and proceeding to make findings on what amounts to a breach of tikanga in these circumstances, and that's at paragraphs 95 to 118 of the decision under appeal.

Now my learned friends for certain of the respondents look at the point that's taken on issue 3 in the decision of his Honour, Justice Cooke, and suggest that either through the submissions of Mercury a whole question of "relates to" is in issue and addresses that, and, of course, looking at section 8A again just to orient those words, it has to be a claim that relates in whole or in part to the land in question, and his Honour, in the section, his Honour Justice Cooke looks at those points and finds that the claim must relate directly to the piece of land in question. It cannot be a remedial remedy effectively to include as part of the relief for wrongs or Treaty breaches in other areas in other ways.

That part of the decision is not challenged in any way, shape or form. It's never been said for the appellants that the High Court's findings on "relates to" are an issue on its appeal. The notice of appeal says that it challenges only the finding that the phrase "return to Māori ownership" involves restoring the exercise of mana whenua over the land and I will show you what I mean if I may by reference to the decision.

In paragraph 71 his Honour refers to the remedy being claim-specific. Talks about, in the last sentence on that past: "The Tribunal can either direct the land to be returned or no longer subject to resumption." Building on that in the next paragraph he says at about four lines down: "He does not agree the words 'relate to' mean something different from 'in respect of'."

Again, just jumping ahead to paragraph 82 he says there three lines down: "But the provisions do not establish a land in lieu jurisdiction." Has to be a connection.

At paragraph 86, he makes the point in the second and third lines that: "It cannot be thought of as a restitution remedy." And in paragraph 88, he doesn't accept that: "The resumption power is available to provide a remedy for other breaches of wider land based claims."

WINKELMANN CJ:

Well, hidden away in that though is an alternative which is that it may relate to that land and other lands, or other breaches, but the land, so there is a connection with the land but land is nevertheless available as remedy for wider breaches, so it is implicated in wider breaches, so it relates to it in that sense, but it's nevertheless available to remedy wider breaches and there is an indication in the language that a section to that effect is maybe because it's in whole or in part.

MR RADICH QC:

Yes, yes, that's a fair point and certainly in paragraph 87 of his Honour's decision I think he talks about the fact that you can go. I think of a pebble dropping into a pond and there being the original breach at the heart but there are just several circles I think to which the "relates to" could line up. This isn't an issue on this appeal and I will explain why in a second, but in paragraph87 Justice Cooke looks at those slightly wider circles beyond just the taking of the land.

WINKELMANN CJ:

No, and it's an issue for your client because your client says: "Well, the breach we're talking about is the breach in relation to this land." But the Settlement trust, for instance, might have said: "Well, there was a system of wrongdoing here and it's widespread and this piece of land should be available as a curative for all, for the systemic breach that was really and this was part of the pattern or this tapestry of that."

MR RADICH QC:

Yes, absolutely right, your Honour, and the High Court, that was the approach taken for the Settlement Trust when it was an active party in the proceedings and it was very much a live issue. In many ways, it's a shame that it's not directly in front of us because it remains a live issue. It's not a point that's within the appeal of the Incorporation. The Incorporation's –

WILLIAMS J:

It might impact on you though because didn't the Tribunal say that the taking itself wasn't enough?

MR RADICH QC:

Yes, and this is where one would, where there is some dispute that had this case, or when it I hope perhaps has its hearing back in the Tribunal, the position will be, because that was a preliminary determination. It's now been set aside anyway but it was very preliminary that there is evidence to show that in fact there is proportionality between the losses and the land.

WILLIAMS J:

You've playing a tough gamble if you are happy not to bank the wider losses of the Wairarapa hapū to justify access to these very valuable assets, aren't you?

MR RADICH QC:

The decision, I understand your Honour's point, the decision taken was that within the framework of the High Court decision on the relates to point, with the exception of the linkage of that to a mana whenua connection, that the High Court judge's decision gave sufficient to work on, but in any event –

WILLIAMS J:

But it's in your particular client's interest because that's why you're not fighting it because in fact you gain out of that if you can convince the Tribunal that the loss of 700-odd acres was enough to justify getting an $800 million asset back.

MR RADICH QC:

Yes Sir.

WILLIAMS J:

But you might lose on that.

MR RADICH QC:

Yes Sir, but the point beyond that is that in the Tribunal and in closing the point was made that it should be for the benefit of all. There should be, in fact, instead of just the corporation looking at its own claim and concentrating on that, there should be an entity for the benefit of Ngāti Kahungunu ki Wairarapa Tāmaki-Nui-ā-Rua as a whole.

WILLIAMS J:

But doesn't that take you back to the point that the relates to reading in the High Court judgment is too narrow.

MR RADICH QC:

The position, your Honour, is that there is enough in the High Court decision on "relates to" to enable a finding for the benefit of Wairarapa Moana generally to be made on the evidence in an iterative stage of the process when it goes back. That was the position that's been taken.

WILLIAMS J:

Well if you look at what a claim is, because I don't think the judge does that, it's defined in section 6. Section 6(1) and (3), 8A leverages off 6(1) and (3), right? The definition of "claim" there is very wide.

MR RADICH QC:

Yes.

WILLIAMS J:

So a claim made alleging prejudice by virtue of laws, policies, practices, acts or omissions of the Crown said to be inconsistent with Treaty principle, and if the claim is found to be well-founded, then the Tribunal can recommend that the Crown take appropriate action to remove the prejudice, compensate for it or prevent it happening to others.

MR RADICH QC:

Yes.

WILLIAMS J:

Now I thought that central to the Wairarapa Moana claim was the failure to make sufficient provision for reserves. Because there's quite a bit in the report about that fact.

MR RADICH QC:

Yes Sir.

WILLIAMS J:

The failure of the Crown and its obligation of acts of protection to ensure that a sufficient land base remained with Wairarapa Moana.

MR RADICH QC:

Yes Sir.

WILLIAMS J:

And that seems to fit section 3. But it seems also to fit all land within the Wairarapa Moana rohe or within Wairarapa Moana ownership. Right?

MR RADICH QC:

Yes Sir.

WILLIAMS J:

Well if that's the case, then the whole point in such a claim is restitutionary.

MR RADICH QC:

Yes Sir.

WILLIAMS J:

The whole point was land bank. That's what reserves are, right?

MR RADICH QC:

Yes.

WILLIAMS J:

So if that's the case, wasn't the High Court judge wrong?

MR RADICH QC:

It's not a point within the notice of appeal for Wairarapa Moana.

WILLIAMS J:

Yes, but we're reading the statute here.

MR RADICH QC:

Yes Sir.

WILLIAMS J:

I mean if the statute has been incorrectly interpreted, it has to be corrected.

MR RADICH QC:

Yes Sir. I can only come back to paragraph 8 of the High Court judge's decision where he looked at the extent of the "relates to" and the point at which he saw it as going and say that in terms of the subject lands here that was seen to be sufficient basis to continue in the Tribunal, but with much more work to be done in the Tribunal.

WILLIAMS J:

The related point, I suppose, is that if you look at the examples given in the New Zealand Māori Council case, in the *Lands* case, they include an example just like this one.

MR RADICH QC:

Yes.

WILLIAMS J:

About insufficiency of reserves. So it was clearly in the contemplation of the parties that sufficiency of reserves was within contemplation of these provisions because that was one of the three examples put up.

MR RADICH QC:

I hear your Honour's point. If I come back to the judgment of Justice Cooke just to complete the point as to the particular focus when it comes off the conversation we've just had, it's the finding, for example, in paragraph 80 of the decision and I'm looking about half a dozen lines down maybe starting at four lines down: "The provisions can be thought of as involving Māori resuming the full exercise of undisturbed possession of lands the subject matter of the claim to use the more contemporary expression to restore the exercise of mana whenua. This is a significant indicator that the well-founded claim would concern the land."

And then if can just go to one further paragraph at 89 where his Honour said that he had concluded that restoring full mana whenua over the land is a key purpose and concludes that the lands at Pouākani are technically eligible to be considered. But then just coming down to the final two, three lines: "But it seems to me the lack of mana whenua is a very important consideration when the exercise of power is considered." And it is that loss because that is directly related, just coming down to 112 finally. I said finally before, but this is finally, where his Honour makes the point that the conclusion that he has reached on that point which we come to are closely related to the first ground of challenge. The key purpose of the provisions is to restore the ability of Māori to exercise full mana whenua over the lands that have come into Crown ownership. These Treaty and tikanga principles also then apply to the exercise of power to remedy the relevant breach." So the focus for the appellant is on that aspect of it and then under finding 4, the related, as was said in 112 question of is this in accordance with tikanga and that's the heart of the matter and I might ask my learned friend Mr Mahuika now to pick up on those points.

MR MAHUIKA:

Tēnā koutou, tēnei i hoatu atu ki te rā whakamaumaharatanga o te hainatanga o te Tiriti. Nō reira, ka nui ngā mihi atu ki a koutou i whakawātea mai tēnei wāhanga, kōrero mā tātou, kāore pea e pā ana ki tēnei kaupapa. So I thought I would, and this is no credit to me, it's a credit to Ms Hauraki's very rapid research skills, give a bit of an explanation about –

WILLIAMS J:
Perhaps I should translate, or you should just translate what you said?

MR MAHUIKA:
Sorry Sir, yes. I said greetings to the Court. May your Honours please. Greetings to you in this, on this day that is close to the date that we remember the signing of the Treaty and we are grateful to have this opportunity to present and to discuss this kaupapa in front of you.

I was going to deal briefly with the origin of the Pouākani No 2 block. Much like you, Sir, I read the *Pouākani Report* and came away from it not terribly enlightened which is not a criticism of the Tribunal, it's probably more of a criticism of me. But what we understand the origin of the block, it was originally of course part of the larger Taupō-Nui-A-Tia block and the Taupō-Nui-a-Tia block was then broken down into a number of subdivisions which included the Pouākani No 1 and the Pouākani No 2 block. The subject lands appear to come from what was a further subdivision of the old Pouākani No 2 block which was the Pouākani 3C block.

WILLIAMS J:
Just a second, please. Just let me get that down, please. So…

MR MAHUIKA:
I can give you some references, Sir. I'll do it after the break if that's okay. But there is some discussion about this in the Pouākani report starting at 11.2 which talks about the original subdivisions of the Taupō-Nui-A-Tia block into Pouākani 1, Pouākani 2 which is a block of some 30,000 hectares. The Pouākani No 1 block is the block that was taken for survey liens and the like.

WILLIAMS J:
This isn't in…

MR MAHUIKA:
Yes, it is in that section of the report.

WILLIAMS J:
No, no, this land is not in Pouākani 1, is it?

MR MAHUIKA:
No, no, it's not in Pouākani No 1. So this land was, as far as we can ascertain, was part of the Pouākani 3C block which was a purchase, and there is also a reference to this in the evidence of Mr Parker who was one of the Crown witnesses in respect of this inquiry. So that's on the record as well.

If the Court pleases, I'll get the page references and the bundle references and provide them to you so that you can look at that.

Now there is the related question, Sir, of the circumstances in which that purchase occurred which, look, in fairness to my friends from Raukawa, the Incorporation has not contested any part of that history. Now the position of the Incorporation has been that the Ngāti Raukawa claim mana whenua in respect of this area on the face of it, alongside Ngāti Tūwharetoa, their interests. Also in some of the evidence they talk about Ngāti Maniapoto, Te Arawa. So it is in that sort of area where there is a bit of a crossover between the different waka groupings because you have obviously the Tainui and the Te Arawa overlap.

But the approach of the Incorporation was not to debate that. It was to accept that that was the case and had really been to focus on its own position, having been placed there by the Crown as a consequence of the Crown's failure to allocate reserves for the lands at Wairarapa and look at the fact that the Tribunal had found that those claims were well founded in connection with the taking of that land, and, of course, the claims clearly relate to that land at Pouākani. But the overall, if you like, the traditional tribal connections, associations, ownership, mana whenua, whichever way you choose to describe that, were accepted as being part of the context within which the Tribunal would need to exercise its discretion in determining whether or not to return the land to Māori,

which is why we're a little vague, Sir, on the origins of it because it was just accepted that not only was the land taken from Ngāti Raukawa, Ngāti Tūwharetoa, it was also accepted that to the extent that it said that there were claims connected with that, that those claims were valid and ought to be pursued and were pursued and settled by Ngāti Tūwharetoa and Ngāti Raukawa.

WILLIAMS J:
Can you tell me who was awarded title to Pouākani 3? Do you know the answer to that question?

MR MAHUIKA:
I don't but I imagine Ms Hauraki would be able to give you the answer to that question. I can find out who it was.

WILLIAMS J:
Well, that will tell you which particular hapū claimed…

MR MAHUIKA:
My understanding is that the Pouākani No 1 block was to Tūwharetoa and descendants of Tia interestingly, but the 3C block was to someone who's identified as being Ngāti Raukawa.

WILLIAMS J:
Okay.

MR MAHUIKA:
No, I can't comment on the significance of that or otherwise although it does tend to support the Incorporation's position to simply accept that evidence, noting that it is an area where there seems to be a confluence of iwi interests.

Secondly, in terms of the discussion around the "relates to" point, so as Mr Radich has said that's not a point that was taken on appeal by the Incorporation and he touched on this but it's worth noting, as Justice Cooke

said, it does radiate out from that pebble that gets dropped into a pond. In his Honour's judgment at paragraph 87 he does, I think, accept that it would include the failure to allocate the reserves in respect of the lands at Wairarapa. Now these are –

WILLIAMS J:
Doesn't that mean that the case just hangs on mana whenua if he accepts that "relates to" includes the failure to provide for sufficient reserves right across Wairarapa Moana's interests, then the only live question here that makes any difference is mana whenua.

MR MAHUIKA:
Yes, I think that's what, I would agree with that, Sir.

WILLIAMS J:
The trouble with me was his reference to land banks.

MR MAHUIKA:
Yes, and if the circumstances were different in fact, we would be debating the "relates to" point. An important aspect of context in respect of this appeal is that of course you have the Incorporation and the Settlement Trust and there has been an effort on the part of the Incorporation to delineate its claims from those other claims which are specific to Wairarapa.

So referencing, Sir, your earlier exchange with my friend Mr Radich about the risks that the Incorporation takes and arguing the proportionality point, it understands that there is that, but is also very conscious that it doesn't wish to overstep into those claims which it considers are properly the preserve of the Settlement Trust. So, there is a risk. It is acknowledged that there is that risk there and that is something which would need to play out with the Tribunal.

There was a section in our evidence, in our submissions before the High Court and it is touched on briefly here which talks about the evidence from Dr Meade which goes on to assess loss and those sorts of things, which is what we based

the proportionality view on. It's not engaged with them by the Tribunal. It deals with the proportionality in a sentence. You can understand that to a degree because of course the Tribunal had already formed the view that these claims radiate out and include everybody from Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua. So, in that respect, they had already made the determination that it should be returned and should be returned to that Māori grouping for the reason your Honour has given.

WILLIAMS J:
Isn't that the basis of Dr Meade's evidence too?

MR MAHUIKA:
No Dr Meade's evidence doesn't go into those broader claims in the same way.

WILLIAMS J:
I thought it was based on the retention of land in the Wairarapa area, or have I misread it?

MR MAHUIKA:
No, there are a number of different ways that Dr Meade looks at it. So he looks at it from the point of view or the adequacy of compensation which is picking up on the Honourable William J's question earlier on. But he then also looks at I think restoring the sort of the economic and social base of Ngāti Kahungunu ki Wairarapa, so he analyses it from a number of different perspectives and comes up with a series of different ranges and there is a comparison that he makes of those ranges as against the value of the dam in the evidence that he provides.

And so it is then dealing with the question of national interest. I'm conscious I'm not into the submissions yet, but also it was a bit more difficult for my friend Mr Radich to answer because of course I was the person in the Tribunal and he wasn't. But the situation in relation to the Tribunal's report as we read it is that it really doesn't make a determination on the national interest. So your Honour Justice Williams is correct in saying that the position that the Tribunal has established in relation to Treaty of Waitangi breaches is that unless

it's in the national interest, or there is some compelling reason for the compulsory taking of land, then the compulsory taking of land is a breach of the Treaty of Waitangi.

In this particular situation, the Crown has not said that it was in the national interest but also hasn't said that it isn't in terms of the way that it has approached this particular matter and you can understand why that might be.

WILLIAMS J:
My question was not about whether hydroelectricity on the Waikato River was in the national interest. I think we can probably accept that. The question is the site.

MR MAHUIKA:
And that's a point I'm focusing on, Sir, is why the land at Pouākani and it is the matter of some debate in the Tribunal. So, of course, if it was in the national interest, there was a compulsory taking, then one of the Tribunal's criticisms about the taking of the land is that it was taken without taking account of the unique hydro value of that land. Of course, if it's necessary in the national interest to take that land, then that emphasises the value of that land to the Crown and therefore, further emphasises the lack of value that was paid to the owners on its acquisition and exacerbates that particular breach.

If it wasn't in the national interest, then it just shouldn't have taken it, following your usual Tribunal approach to these sorts of matters and ultimately, in my respectful submission, the Crown has had a bob each way in terms of the position it's taken around whether it's necessary and whether it isn't. But the evidence on the record is that Maraetai dam as the largest hydro dam on the Waikato River. It generates something like 300 megawatts of electricity and is very significant and the benefit of that particular dam is that if you look at the maps that Mr Radich took you too, you'll see behind there, there's the inundation that created Lake Maraetai. So one of the benefits of that location is that you have a natural canyon sitting behind where the dam would be

located, which could then be inundated to store water for the purposes of hydroelectric generation.

So that's the broader context in relation to the dam. So it's not a satisfactory answer because the Tribunal doesn't actually answer that question and you do have these competing narratives that work themselves through in the context of the debate around valuation of the dam and also assessment of the value of the loss that was suffered as a consequence of that, because the more important it was, then arguably the worse the compensation looks like as a comparison to its real value.

So rather a long explanation. I'm not sure if it's helpful. I hope that it is. But that's the background.

If I now return to the road map summary of the submissions. As my friend Mr Radich has said, if you look at the scheme of section 8A there are essentially three matters that need to be considered by the Tribunal. So there needs to be a well-founded claim, and in this case there is no doubt that the claim is well-founded, the Tribunal has already made findings in its *Wairarapa ki Tararua Report* that finds that there were breaches of the Treaty of Waitangi by the Crown in respect of the lands at Pouākani. Th second is that it has to relate to the land. Now subject to the discussion with your Honour Williams J and in my submission there doesn't appear to be any contention that the claims of Wairarapa Moana Ki Pouākani Incorporation relate to the land at Pouākani. The land that they are looking to get back, is the land that was taken from them compulsorily by the Crown. The significance of the map which my friend Mr Radich took you to is, amongst other things, that if you look at the other land such as the Maraetai block, which is the block on the other side of the river from Pouākani, is memorialised land but is not the subject of the Incorporation's claim for resumption, and why is that, because it was not land that the Incorporation had taken from it.

The issue then becomes whether or not the land should be returned to Māori, because in my submission the first two thresholds have clearly been crossed,

and in the context of this particular case whether or not the mana whenua question precludes the Tribunal from exercising its discretion to order the return of that land, given the remedial nature of the scheme that we're dealing with.

WINKELMANN CJ:
So the third, to take you back to your three matters for the Tribunal, you said a well-founded claim, claim relates to the land in question, and the third thing you would say then is simply a limb that the land was previously owned by a Māori claimant?

MR MAHUIKA:
Well no the third limb of that – the third question for the Tribunal to then answer, having established that the claim was well-founded, having established that it relates to the land, should the land be returned to Māori ownership under section 8A, and the effect of his Honour Justice Cooke's decision was that unless you are a group that has mana whenua, the Tribunal cannot exercise its discretion in your favour, and in our respectful submission that essentially says that when you are exercising the power to say where the land should or should not be returned to Māori, then what that amounts to is that it can only be returned to Māori if it is consistent with tikanga, and tikanga in this case being te mana whenua and nothing else.

So, if I then follow on from that and deal with the nature of the power to say whether the land should be returned to Māori, in public law terms, I would suggest that there are two ways of looking at tikanga and how tikanga should be approached for the purposes of the exercise of that discretion.

So the first is you could take the view that it's a mandatory consideration for the Tribunal. Now, if that's the standard that's required, then the Tribunal has clearly met that standard because, as you will see from the preliminary determination, it wrestles with the notion of tikanga and deals specifically with the question of mana whenua and whether the land – the fact that there are other groups that claim mana whenua and the Incorporation itself doesn't, should that preclude the grant of redress? But if that's the level at which you're

looking at it at the mandatory consideration level, then the Tribunal has clearly discharged its responsibility to consider tikanga Māori and how it might apply in this context.

Bearing in mind also, your Honours, that there are some constraints around how it might exercise this discretion, the most significant of which of course is that Ngāti Tūwharetoa, Ngāti Raukawa have settled their claims and were therefore precluded from being directly themselves a participant or a beneficiary from the resumption. So when you see the paragraph in the Tribunal –

WINKELMANN CJ:
Can I just ask you, you said in public law terms there's two ways of looking at it?

MR MAHUIKA:
Yes.

WINKELMANN CJ:
It's a mandatory consideration and the alternative way is?

MR MAHUIKA:
The other way is that it's an obligation.

WILLIAMS J:
It's binding.

WINKELMANN CJ:
It's binding?

MR MAHUIKA:
It's binding, yes.

WINKELMANN CJ:
They're bound to decide it in accordance with –

MR MAHUIKA:

Tikanga Māori, yes and what I was saying was that if it's a mandatory consideration, then that standard has been met. If it's a binding, and we argue that that actually in the scheme of the section is the appropriate level at which to set the Tribunal's discretion.

WINKELMANN CJ:

You say (a) but you say even if it's (b) they've complied?

MR MAHUIKA:

Well I say even if it's (b), then actually the Tribunal itself does go through an exercise which focuses on tikanga and within the constraints that it was facing around what it could and could not do, it nevertheless is informed by tikanga in the decisions that it reaches.

WILLIAMS J:

Are you going to take us through some detail on that?

MR MAHUIKA:

On that second part?

WILLIAMS J:

Yes.

MR MAHUIKA:

Yes, I will, Sir, yes. I was going to refer to a few more things on the first part but I thought that in the interests of time I would try and go reasonably quickly through that because I think it's clear there's a determination as to whether or not is there a discretion around how tikanga is treated or is it a black and white thing as my friends would suggest.

GLAZEBROOK J:

Can I just check, you said there were three? One was an obligation, one was a mandatory consideration?

MR MAHUIKA:

Oh no, Ma'am, I said there were two.

GLAZEBROOK J:

Sorry?

MR MAHUIKA:

I said there were two.

GLAZEBROOK J:

Just two, okay.

MR MAHUIKA:

Just the two. One is that you are obliged to make a decision that's consistent with tikanga, but the other is that it's a mandatory consideration for the Tribunal to take into account and the essence of the argument is –

GLAZEBROOK J:

I thought you were going on to say that there might be constraints on how you might exercise it which was a third one, but you weren't saying that?

MR MAHUIKA:

No. I was saying that more in the sense of if you consider the application of tikanga in this case you also have to be mindful of the constraints within which the Tribunal found itself when it was seeking to exercise its discretion.

WINKELMANN CJ:

All right, shall we take the morning adjournment at this point?

MR MAHUIKA:

Yes, Ma'am.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.48 AM

MR MAHUIKA:

Now, I said before the break, your Honours, that I would give references in relation to the origins of the Pouākani No 2 block and in particular these blocks. So the *Pouākani Report* is at tab 58 of the supplementary bundle and the relevant paragraphs, relevant pages of that report are pages 191 and 192 which I think is at 2292 of that bundle. There is also, and I don't have the reference, but it's in the report, there is also a brief discussion about the original subdivisions at the start of section 11.2.

WILLIAMS J:

Right, it's C3, not 3C?

MR MAHUIKA:

Yes, yes.

WILLIAMS J:

Thank you.

MR MAHUIKA:

But my understanding is that was a subdivision of not the No 1 block but the No 2 block.

WINKELMANN CJ:

The No 2 block. Yes, that seems to be right.

MR MAHUIKA:

And then there is also a discussion about how the Crown acquired those lands at paragraphs 14 and 15 of the evidence of Brent Parker who was one of the Crown witnesses.

WINKELMANN CJ:
In the resumption application?

MR MAHUIKA:
In the resumption application, yes. So that is at 509.1552 of the bundle.

WINKELMANN CJ:
509.1152?

MR MAHUIKA:
1552 where he briefly discusses his understanding and that's where the Pouākani, I can't remember if it's 3C or – yes, it will be 3C block is.

WILLIAMS J:
C3.

MR MAHUIKA:
Sorry, C3, yes.

WILLIAMS J:
And the paragraph in the Parker evidence?

MR MAHUIKA:
14 and 15, Sir.

WILLIAMS J:
Thank you.

MR MAHUIKA:
I said I would give you the references, so those are them, closing off that point.

I might then briefly recap as I seem to have created some confusion prior to the break. I was saying that there are two ways that you can. So, first of all, I was saying that if look at the scheme of section 8A, there are two prerequisites to a resumption order being made. The first is that there would be a well-founded

claim. We say there is here. The second being that the claim relates to the land. We say that there is no doubt about that here because the land is being sought for return, the lands that were taken in circumstances where the Crown says breaches of the Treaty of Waitangi occurred. The third aspect then is whether the Tribunal ought to have ordered the return of land to Māori which is where the mana whenua question really bites.

Now we say that if you look at the scheme of section 8A your options are that tikanga Māori is either a mandatory consideration for the Tribunal, or tikanga Māori is binding which in our submission does beg a question which I will try and deal with in the second part as to what is tikanga Māori and what is relevant in this situation and is it just mana whenua and if it is, who should make that determination.

But dealing with why it is that of those two options we consider that the mandatory consideration option is a better option and that is because the scheme of section 8A already has two significant thresholds. The first is that there is a well-founded claim and that that claim relates to the land.

Now, the vast majority of cases I would have thought that because of those thresholds and in particular the claim relating to the land threshold, it's likely that you would be dealing with resumption to a group that claims mana whenua or some similar type of interest in any event. So the point is it's going to be largely moot. But for the reasons that relate to the overall purpose of this regime which is restitutionary which is about assessing redress because that is what the land is being used for, that is why is being returned to Māori ownership because as a former restitution for something taken, then the Tribunal must necessarily have some discretion to exercise in circumstances when those first two not insignificant thresholds have been overcome and the exercise of that discretion must necessarily in our submission be informed by tikanga Māori, but there are other considerations that must be at play including the restitutionary nature of the scheme and the context within which the return of land is being considered which includes that there have been breaches of the Treaty of

Waitangi for which the Tribunal has decided that restitution, through the return of land, is appropriate.

A further factor here for the Court to consider in determining that discretion is that the claim is ultimately a claim against the Crown and the return of the land is intended as a remedy in respect of that claim. So, I accept and can't do otherwise that Ngāti Raukawa and Ngāti Tūwharetoa are not happy about the return of this land noting however that the Pouākani Trust which has connections to this land as well is not unhappy and supportive, but I think it's important to acknowledge the position of Raukawa and Tūwharetoa. The fact remains however is that the request for a remedy is not being made against Raukawa and Tūwharetoa. It's a claim against the Crown for the Crown's actions and in this situation the Crown is effectively seeking to benefit from its own breaches of the Treaty of Waitangi. So the Crown failed to allocate reserves at Wairarapa and offered land which at the time was considered to be of very little value in place of those reserves at Pouākani.

My friends make an argument that if there was occupation it only occurred in the 1940s and, of course, the reason for that is that the Crown didn't provide access to that land as it had promised it would.

The essence of the Crown argument is now that you don't have mana whenua so therefore even though you would otherwise be entitled, even though you are there because of our breach, and we then imposed further breaches on you, you don't have access to the resumption regime, and even though you didn't occupy that land until the 1940s because we didn't give you access, the fact that you didn't occupy it until late is a further reason why, Wairarapa Moana, you are not entitled to the benefit of the resumption regime.

And these points I make to illustrate that this is why the Tribunal must have a discretion. It's not a discretion which, in my submission, the Tribunal exercised or would exercise or has exercised lightly, but it's one that must exist in the context of this broader regime which is about restitution and reparation for Crown wrongs.

I was going to now move onto paragraph 13 because in my submission the –

WINKELMANN CJ:
What do you say about the notion of how workable is a, bound to decide in accordance with tikanga Māori generally speaking because that, one assumes, would apply to the entire jurisdiction?

MR MAHUIKA:
Yes, well, I'll answer the question this way, Ma'am. I don't wish to diminish the importance of tikanga Māori, nor do I wish to diminish the significance in Māori terms of mana whenua. Both in my submission are important and they are important to Wairarapa Moana. Part of the reason that Wairarapa Moana doesn't assert itself as having mana whenua is it's conscious of the circumstances in which it came to find itself there and also notwithstanding this proceeding and the debate between and endeavouring to be respectful to those iwi in whose territory they were imposed.

But I made the comment that it begs the question somewhat as to how tikanga Māori might be applied in this context.

So his Honour, Justice Cooke, was of the view that tikanga Māori equals mana whenua and there are no other considerations from a tikanga Māori point of view that are relevant to determining whether or not restitution is appropriate in this case, and his Honour's decision is interesting because he reiterates the trail of tears comment which my friend, Mr Radich, refers to. So, of course, the trail of tears was the forced relocation of a number of First Nations in the United States. It was a long journey. A lot of people died, and so it came to be known as the "trail of tears" and hence the quote from the US Supreme Court which I think deals with the application of native laws in relation to crimes committed in the area.

WILLIAMS J:
Oklahoma.

MR MAHUIKA:
In Oklahoma or Ohio I thought it was, Sir.

WILLIAMS J:
Is it Ohio?

WINKELMANN CJ:
I think it's Oklahoma.

MR MAHUIKA:
I don't profess to be an expert in US geography, so in one of those states, and so the trail, so he acknowledges, his Honour calls this a remarkable tale of injustice, and he acknowledges that it is truly a trail of tears. So there's no debate in his Honour's mind about the seriousness of the harm that was inflicted on Wairarapa Moana, and we talk about "Wairarapa Moana" but it's a proxy for the owners of that block and their families.

So the question then becomes what tikanga principles are relevant in that sphere. So is the absence of mana whenua, given that there is a well-founded claim, given that it relates to the land, does the absence of the Incorporation saying it has mana whenua mean that it must be fatal to its application?

So at paragraph 14 of the overview we suggest that the High Court was incorrect in concluding that there's no tikanga basis for resumption, and I'll refer to the preliminary determination and explain why we say that is, and for therefore concluding that the Tribunal incorrectly applied tikanga, because in my submission if on a fair reading of the Tribunal's preliminary determination it was very conscious of the various tikanga considerations at play and it reached a conclusion which it acknowledged was not the perfect conclusion but it thought was an appropriate conclusion in the circumstances, having regard to those tikanga principles and to an extent applying them, and then, thirdly, even if the Court accepted that it wasn't a mandatory consideration and that it was binding or that the Tribunal needed to look at it further, then the established law in relation to tikanga would have been to leave that question to the Tribunal

rather than his Honour make the determination for it as to how tikanga is relevant.

WILLIAMS J:
Let's go to binding, go to option 2.

MR MAHUIKA:
Yes.

WILLIAMS J:
Walk me through your reasoning as to why resumption would be consistent even under option 2.

MR MAHUIKA:
Yes, I think you're reading my mind, Sir. I'm just…

WILLIAMS J:
About to do that?

MR MAHUIKA:
I'm going to the preliminary determination which is open here and I'm sure I'll find at some point. So yes, so the discussion on tikanga is at 223. It starts in the preliminary determination which is – it starts at paragraph 223 of the preliminary determination. Sorry, I'm just trying to get the bundle reference.

WINKELMANN CJ:
502.0177.

MR MAHUIKA:
Thank you, Ma'am. In answer to your question, Sir, the first section deals generally with tikanga. Quotes your Honour at paragraph 224. I'm not sure if that's a matter in favour of the Tribunal.

WILLIAMS J:
Probably not.

MR MAHUIKA:
I'd argue that it is. And then talks at 226 about the Tribunal being bound to support developments of the law as they relate to tikanga Māori, noting, of course, the Treaty of Waitangi context.

It then refers to a session that the Tribunal held which it called a wānanga on the tikanga of redress. So this is the Tribunal endeavouring to engage with the concept of redress from a tikanga point of view, and it describes the nature of that process at 227, saying: "The objective was to engage in free discussion of tikanga that may be relevant to the Tribunal's exercise of discretion to provide redress to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua."

It then discusses that there's no one word that emerged for redress, and at 228 then discusses various of the options that were proposed. So the session was attended by Mr Paul Meredith who is a historian and actually also Ngāti Maniapoto, and Mr Peter Adds who also has an academic background and is from, I think from Taranaki from Te Āti Awa amongst other things, and you'll see there that there was then a discussion about the idea of whakatika (which is to make correct or make things right again). There were discussions about the concept of utu, the concept of hara, so in some respects similar to the sorts of notions that were being discussed in the context of the Peter Ellis appeal, about a wrong having been inflicted on a party, the notion of finding ea, finding balance, of there being reparation, or actually to use his Honour, Justice William's view, the idea of restitution.

At 231 is then says that "many of the processes relevant to redress are about restoring mana, ensuring that the individual and the group maintain mana at the higher end of the mana continuum", and then also discusses the concept of proportionality, and at 232 Mr Adds discussed the notion of muru, "muru" being a form of customary sanction, generally exercised against property as opposed to people, but that's a way of getting restitution.

He says interestingly, about half way down there, just after the second of the footnotes: "While usually the parties agree that muru is necessary and the

wrongdoer accepts or even welcomes it, it can also happen against the will of the wrongdoer and potentially by force. Muru also encompasses a sense of forgiveness and remorse," and Mr Meredith referred to the words in the Lord's prayer that had been translated into Māori where it says: "Murua ō mātou hara".

And so that's an initial discussion. It talks about the wānanga. It talks about the concepts from a tikanga point of view where the notion of redress was discussed.

Then in the next section there's a discussion by the Tribunal in relation to how it should exercise its discretion, and then it says at 239: "In practice, that," the exercise of its discretion it means there, I think, "means seeing 'ea' as one of the goals – probably indeed the most important goal – of the restorative approach. It involves conceiving the harm to Māori not only in socio-economic terms, but taking account also of the emotional, psychological and spiritual effects. These may have been equally or more damaging, but of course the extent of the effects cannot easily be measured and would have varied across the population."

Then at 240 the Tribunal goes on to say: "We have found that the Crown's Treaty breaches prejudice Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua, finding it difficult and inappropriate to distinguish the effects on particular whānau or hapū," which kind of goes to the "relates to" point, and says: "That marries nicely with the tikanga we identified here. For example, ea is a value, a process, a goal and an experience of the whole group; for people who live communally, resolution of wrongdoing must always be communal," and in that paragraph it's specifically talking about what it is trying to do is trying to work out what best enables a sense of "ea" to be achieved as an outcome.

Now if we skip over that, there is then the rest of that section. There is tikanga and mana whenua. So not only does it talk about tikanga from the point of view of redress, of reparation, of bringing balance, it then goes on to consider the specific mana whenua question that was raised. It discusses the position of Ngāti Raukawa and Ngāti Tūwharetoa, really through to – and the impacts that

they refer to in their evidence of resumption occurring in favour of the Incorporation.

Then at 258 and 259 the Tribunal is grappling with what it should do in these circumstances. So it acknowledges the tikanga-based arguments. It also says that we could not make Wairarapa Moana ki Pouākani tangata whenua, but then goes on to say but we are not minded "to let mana whenua arguments influence us against exercising our discretion in favour of recommending the return of the subject land at Pouākani" and then it goes through quite a number of considerations. So it's more than 100 years since the Crown granted the land. The total area is some 30,000, was it originally some 30,000 acres, it would be returning 700 acres of that land. The consequence of not doing that means that the land remains Mercury's land. So it's not in Māori ownership at all.

The essence of the Raukawa complaint is the fact that Ngāti Kahungunu ki Wairarapa are there at all, so the return of the land makes no difference to that outcome because they will be there no matter what happens, but the consequence of not granting redress is that Ngāti Kahungunu ki Wairarapa are denied the opportunity, my paraphrasing of this, to obtain ea, to obtain utu for the wrongs that were committed against them.

It talks about this not being, the situation with Ngāti Kahungunu ki Wairarapa being at Pouākani was not something that they sought. The Tribunal didn't have the option of returning the land to Raukawa or Ngāti Tūwharetoa because they could no longer benefit from the resumption scheme.

They also note that perhaps there is a way that when the land is returned then parties receiving it could go some way towards ameliorating that outcome in order to establish a state of "ea".

I wanted to talk through that for two reasons. First of all, it's clear that the Tribunal was very engaged in the tikanga issues and it's not overstatement to say that the Tribunal was grappling with how it ought to approach these issues

and deal with them, and, Sir, although the Tribunal perhaps doesn't say this as explicitly but in answer to your question, it acknowledges mana whenua I think and the significance of mana whenua or that there are groups that are tangata whenua but is also mindful that there is a need for ea, for restoration of mana on the part of Ngāti Kahungunu ki Wairarapa as against the Crown, and it balances those considerations in reaching its conclusion.

So for that reason, I submit that although in this particular instance it does not take on board the mana whenua argument to the extent, because it acknowledges it, to the extent that it dissuades it from exercising its discretion against the award of resumption, so even though it doesn't do that there are other tikanga considerations which it considers in the first part of that section which it is also mindful of and in my respectful submission effectively applies in reaching the outcome that it reached.

WINKELMANN CJ:
What do you say about – was the High Court Judge's application of tikanga rigid, I suppose, because there is an argument what the Tribunal's doing is allowing tikanga to be dynamic and evolve?

MR MAHUIKA:
I'm not sure that I would necessarily say that the Tribunal is advocating for an evolution of tikanga in the way that it's applying it here. I would agree with the first proposition that – and it's attractive and in most cases actually it will be the predominant consideration is the mana whenua consideration, but there are other tikanga considerations that the Tribunal was mindful of and sought to apply in balancing a situation that it was clearly uncomfortable about having to balance but did so nevertheless. So this partly informs the first argument as to why perhaps there ought to be a discretion but also in answer to your Honour, Justice Glazebrook's, question, it also explains why it is that actually we think the Tribunal sought to, within the constraints that it had, comply with tikanga in its determination.

GLAZEBROOK J:

So is the argument really that you have the – that tikanga hasn't evolved but tikanga has to reply to the facts as they are because –

MR MAHUIKA:

Absolutely, yes.

GLAZEBROOK J:

– for obvious reasons, because it can't apply in a vacuum? Is that…

MR MAHUIKA:

Yes, and there are particular idiosyncrasies in this situation that in my submission the Tribunal was very mindful of. It won't necessarily arise in other cases bearing in mind that this is not a situation where Ngāti Kahungunu ki Wairarapa are claiming land such as the Maraetai block on the other side of the river. That was not in their possession at any stage. They have limited their claim to the lands that were taken from them because those are the lands that they can have a legitimate claim and connection to. They're not claiming land in that broader area.

WINKELMANN CJ:

And the Tribunal's expectation that the parties will go away and talk through, not parties, that Ngāti Raukawa and Ngāti Kahungunu would go away and discuss this in accordance with tikanga, isn't it?

MR MAHUIKA:

Yes. I mean I can understand if my friend Mr Finlayson is likely to say in response that: "Well, that's putting the matter in the hands of Ngāti Kahungunu ki Wairarapa to resolve that if there's no compulsion for them to do that." I suppose the countervailing argument to that is that nevertheless if you look at Mr Workman's evidence, and I will take you to that briefly because it's also part of the context.

The relationships have waxed and waned over time. Whatever happens, they will be neighbours and without wanting to overstate it, there will at some point be a necessity for these matters to be addressed. I don't know what the outcome is. In the context of this situation, the question really is, is that uncertainty sufficient for the tribunal to say: "No, we shouldn't exercise its discretion." So it's indicated I hope that this might happen perhaps an expectation, but looking at things in a round it's saying actually: "The most important thing here is that we grant redress against the Crown for the things that the Crown has done."

O'REGAN J:
The High Court judge referred to I think evidence that said there's no such thing as compromise tikanga which is what the Tribunal described the situation is. Do you have anything to say about that?

MR MAHUIKA:
Well I think that the Tribunal said "in a tikanga compromised world" or some similar description. That's at paragraph 261, Sir, of the preliminary determination. The Tribunal says: "The situation concerning the land at Pouākani is sui generis. That is standalone and unique in almost every conceivable way. In excluding mana whenua groups from benefit, we are complying with the law in deciding to return the land to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua. In an area outside their rohe we are exercising judgment in a tikanga compromised world to achieve what we believe is the best outcome under the circumstances."

In my respectful submission, even though the Tribunal talks about it being tikanga compromised, and I wouldn't disagree with that, in an ideal world you may try and find a way to include the mana whenua groups, but that's not an option that's available to the Tribunal.

WILLIAMS J:
It is an option available to your client?

MR MAHUIKA:
It is, yes.

WILLIAMS J:
Where has that got to?

MR MAHUIKA:
We are still here having this debate, Sir. Look, I'm very conscious that I think it's a matter of record that there have been discussions, but they haven't reached the concluded point and I don't want to overstate that in any way, shape or form because given the nature of those conversations and given that they are unresolved, I don't want to leave the Court to believe that maybe they will find a resolution when, you know. Based on evidence, there is some distance between everyone.

WILLIAMS J:
Well, because you see, tikanga is not just about result.

MR MAHUIKA:
No.

WILLIAMS J:
It's also and sometimes even more so about process.

MR MAHUIKA:
Yes.

WILLIAMS J:
And kōrero is one of the most important principles of tikanga as you will well know Mr Mahuika.

MR MAHUIKA:
I'm not sure what your suggesting, Sir.

WILLIAMS J:
Well, it's just that if this were occurring in a non-tikanga compromised world 100 years ago, there would be a hui and then there would be another hui.

MR MAHUIKA:
Yes.

WILLIAMS J:
And then there would be another hui until it was resolved.

MR MAHUIKA:
And I think that is why I made the comment, Sir, that these relationships have changed over time. So, if I, and this is probably a good point, if I take you to the evidence of Sir Kim Workman, which is at, if I can read my own writing, I think it's 801.0081 of the bundle. Sorry, I will have to find it myself. Yes, that's Sir Robert Kinsela Workman and if we could go to, let me find this perception. Sorry, Sir, I've highlighted it here. To summarise while I find the piece that I'm looking for, Sir Kim became a member of the committee of management of the Incorporation in the 1980s having discovered his connection to these lands and he talks about in the 1980s there being a good relationship between Ngāti Kahungunu ki Wairarapa and the people living around the Pouākani and he also discusses his own involvement in assisting Ngāti Raukawa to establish a separate, sort of their own representation.

So some of the evidence was that prior to the establishment of a Ngāti Raukawa tribal structures, well, formal regal tribal structures, that there had been engagement between Ngāti Kahungunu and Waikato and that was the primary way that the relationship existed and then he says at 41, I don't want to overplay this because there was some dispute about it in the Tribunal, but at paragraph 41 talking about arguments put forward by the Settlement Trust at that time that the claimants do not have a cultural connection to the land and don't belong at Pouākani. He makes the comment there: "Murray Hemi's excellent article attached as appendix A to that evidence establishes the historical relationship with Tainui and Ngāti Tūwharetoa, the

role of tomo, or arranged marriages to cement those relationships and how those relationships were strengthened during political engagement in the days of Te Kotahitanga. Those relationships still existed in the 1980s and Uncle Major Mason had played a significant role in maintaining those relationships with Tainui and Tūwharetoa. We had a warm relationship with both iwi and over that decade I do not recall any animosity from either or any challenge as to the right to be there."

So the significance of that evidence, Sir, is that it does suggest that there was a relationship and there was a good relationship between the landowners at Pouākani, Ngā Tūwharetoa and Tainui. So, in fairness, I'm not sure when he talks to Tainui he's talking about Waikato or he's talking about Ngāti Raukawa or he is talking more broadly because there are also some Ngāti Maniapoto relationships that he refers to in there. Again, there was dispute about whether there were tomo and I think, Sir, in answer to the question by your Honour Justice O'Regan, so tomo is an arranged marriage. There was a comment made in the evidence by Sir Tipene O'Regan about, you know, unions that are established over a beer at the pub or some similar type of description are not exactly tomo and of course, in the article referred to there by Mr Hemi, he talks about some arranged marriages that did occur around establishing relationships.

Again, I don't want to overplay that, Sir, but it does suggest that there had been a process of some sort followed at some stage which actually, if you take it back to the period of the early 1900s you would expect it given the participants there, given also that there is a whakapapa connection between Ngāti Raukawa and Ngāti Kahungunu.

In terms of the relationship with the land at paragraph 46 of that evidence, I might as well take that to you now, the way that the owners at Pouākani see themselves in relation to that land and I may exercise some caution in the way that they describe it, but this is Sir Kim's take on it. He says at 46: "There is no doubt in my mind that the locals considered Pouākani as their turangawaewae. By 1980 tamariki had been born to the land, had married on the land and were

buried beneath it. Any suggestion that we were not part of the whenua was dismissed out of hand. I came to the board as an outsider and with a different view and I learned my lesson the hard way." And then in the next section he explains why he proposed the sale of some of the leasehold blocks in order to overcome the issues with the township at Mangakino and he didn't get a lot of enthusiastic support from the owners.

It's useful I think in the context of that to also refer briefly to the evidence of Mr Hemi which is at 801.0067 starting at 52. He explains the emotion of having left Wairarapa, his rangatira, in relation to their land and now being in this invidious situation where they have the land at Pouākani but they are not treated as tangata whenua of this area and at 55 I think is the best example of where he makes that point. He say: "While we occupy land at Pouākani that was not traditionally ours, we have maintained ownership of this land for over 100 years and uninterrupted occupation for 70 years. We have built houses, grown food, distributed our wealth, established our marae and buried our dead without the need for the permission of any other. We provide socioeconomic leadership. We act as kaitiaki. We represent a defined geographical area and a defined whakapapa grouping. We uphold all the functional manifestations of an iwi group."

I don't want to take that too far. I come back to my earlier comment that despite all of that, he's explaining the connection of the owners at Wairarapa, some of the emotion that's associated with the position that they find themselves in. This is all context within which the Tribunal was exercising its discretion and while not wanting to diminish at all the position of Ngāti Raukawa and Ngāti Tūwharetoa, the fact remains that this is how people at Pouākani see themselves and their connection to that area.

I am conscious of time and I've overrun somewhat. Unless there were any further questions on those points, I was going to touch briefly on the process part of it around how the Court ought to have informed itself in relation to tikanga.

WINKELMANN CJ:

Go ahead.

MR MAHUIKA:

So in my respectful submission, it's well established that in dealing with matters of tikanga the approach of the Courts to date has been to make an assessment informed by evidence. So I accept that there was some evidence that was filed in the context of the High Court enquiry, but ultimately, it was untested evidence and two of the deponents, because I then there were two briefs of evidence, one was Sir Tipene and the other brief I think was a joint brief.

WINKELMANN CJ:

Professor Ruru and –

MR MAHUIKA:

Pirini. Neither of whom interestingly claim to be expert and the effect of the Court's determination, with all due respect, his Honour Justice Cooke, was to displace the Tribunal's expert consideration and my submission, careful consideration of this topic by a reference to three untested briefs. This is not a commentary either on the deponents. Obviously Sir Tipene is someone who is hugely respected and knowledgeable within Māoridom, but the approach of the Courts to date has been when matters of tikanga arise has been to carefully consider and have evidence before it which is properly tested.

WINKELMANN CJ:

So it's said against you, well, why wasn't objection taken at the time or evidence filed?

MR MAHUIKA:

Well, partly because we felt it was unnecessary to do so. It was expressing a view on behalf of Ngāti Raukawa but ultimately that view had to be aligned up against all of the other evidence and the Tribunal's own expertise in relation to this area. I think the ultimate question, Ma'am, with respect, is whether or not it was safe or wise for his Honour, Justice Cooke, to make the determination in

the manner that he did, and if he'd had any reservations about the application of tikanga the better course was to refer that matter back to the Waitangi Tribunal for further consideration. For the reasons that I've already given, we think his Honour was incorrect with the conclusion that he reached anyway. But that would be the appropriate course, and his Honour says in his judgment that the High Court is entitled to make a determination of these things, but the conventional approach, in my respectful submission, is that whether or not tikanga is relevant or binds is the legal question. What the tikanga is and how it applies is a matter that requires evidence and testing of, what tikanga applies, how does it apply in this particular context.

So that, in my submission, is as much a matter of fact requiring evidence as it is a legal matter. In fact, it's more an issue of fact because in order to apply tikanga you have to say what is the relevant tikanga in this situation, and his Honour was effectively relying on three briefs that were untested as against a Tribunal which had considered this in some detail.

O'REGAN J:
There wasn't any impediment to testing them though, was there, and I mean didn't he have to form a view that the Tribunal had erred if that was the point being brought forward on review?

MR MAHUIKA:
Yes, I think that's fair, Sir, and he would be entitled to form a view as to whether the Tribunal had erred. As I say, for the reasons I've given I don't think it had, but if he formed the view that there may be an error the appropriate course would have been a reference back as opposed to his Honour, without really considering the evidence in any detail, making a determination himself.

WINKELMANN CJ:
Well, can you assist me, in public law terms what exactly is the Judge doing here? It's a judicial review proceeding so what do you…

MR MAHUIKA:

I say in the context of a judicial review proceeding, particularly a judicial review proceeding that relates to a decision by a body which is clearly expert in the subject matter, what his Honour has done is substituted his own view about how tikanga applies for the view of the Tribunal.

WINKELMANN CJ:

So it's a question of fact at the moment as the law stands as to what tikanga is in a situation?

MR MAHUIKA:

Well, yes. Well, that – so, sorry, let me step back a couple of steps. So the first thing I say it's a mandatory consideration. The second thing I say actually is that the Tribunal clearly considered and applied tikanga, in a compromised situation, but clearly that is what it was endeavouring to do. So the question then becomes, first of all, in my submission, should the Judge even have inserted his own view for the view of an expert body, because he essentially made a determination on a tikanga ground, a ground in which he is not expert and in respect of which he had not really heard the evidence whereas the Tribunal had.

WINKELMANN CJ:

It seems to me quite material to analyse in terms of what he's doing because it's a public law area.

MR MAHUIKA:

Yes.

WINKELMANN CJ:

So he's saying that "it's clear from the findings that the Tribunal's determinations did not fully comply with tikanga".

MR MAHUIKA:

Yes.

WINKELMANN CJ:

So he's saying effectively what, that they made an error of fact?

MR MAHUIKA:

I think he's saying that tikanga is binding so therefore they've made an error of law although in order for him to reach that conclusion he has to be adequately informed about what tikanga is and how does it apply, and so it is –

WINKELMANN CJ:

So the question I have in my mind is he actually saying that they've just decided not to apply tikanga which is an error of law?

MR MAHUIKA:

No, what he's – sorry, Ma'am, I interrupted you. I beg your pardon.

WINKELMANN CJ:

No, no. Well, that's one alternative. He's saying they've made an error of law because they've decided that they're not bound by tikanga. So that's your scenario B.

MR MAHUIKA:

I think, Ma'am, what he is saying, the way I would describe it is this, what he is saying is that it is bound by tikanga and making an award or recommending resumption of land to a group that doesn't claim to have mana whenua is not in accordance with tikanga, and so therefore it's failed to comply with this mandatory duty that it has to apply tikanga.

WINKELMANN CJ:

Because there's two alternatives. One alternative is he's saying the Tribunal didn't regard itself, was wrong, what made an error when it directed itself it wasn't bound by the tikanga of the situation. It's error of law, it's mainly –

GLAZEBROOK J:

Well hasn't it got the tikanga wrong, and if tikanga is law –

WINKELMANN CJ:

Well that's the second alternative.

GLAZEBROOK J:

– then it's an error of law just per se.

MR MAHUIKA:

Yes, although –

WINKELMANN CJ:

Although you have to make a factual finding to reach that –

MR MAHUIKA:

Although you'd have to make some factual findings to come to that conclusion. I think that, I mean there are, in my submission Ma'am, a series of errors that his Honour makes.

GLAZEBROOK J:

Well it maybe not a factual conclusion, it may be a legal conclusion based on the fact…

MR MAHUIKA:

Yes, but either way there needs to be a factual enquiry in order to ascertain. So our first argument would be that reading the Tribunal's decision, or preliminary determination, the Tribunal has grappled with tikanga, sought to apply it, so in my respectful submission in the context of – even if you assume that tikanga is binding, if you fairly look at the Tribunal's decision, it wasn't open to his Honour to find that the Tribunal hadn't complied with tikanga, even if he found that it was binding because it had sought to do so, and it had grappled with the different tikanga concepts. Th second question is that in any event he needed to be informed by the fact and his Honour ultimately wasn't because he didn't undertake the type of factual enquiry that you ought to undertake in order to determine what tikanga apply in this context, and of course the –

WILLIAM YOUNG J:

The judge said he was applying the Tribunal's approach to tikanga, at paragraph 109.

MR MAHUIKA:

Sir, I'm aware that is what his Honour has said he was doing, but if you look at the Tribunal's report it talks more broadly about tikanga than just mana whenua. So his Honour has picked up on the mana whenua comment by the Tribunal without considering all of the earlier discussion about ea, about muru, about utu, and those other tikanga contexts which the Tribunal, on the face of it, also felt was relevant to its determination.

WILLIAMS J:

It might have helped if your client had put in some evidence indicating why mana whenua, or the circumstances in which mana whenua has not controlled outcomes, because there were plenty of them.

MR MAHUIKA:

Yes, yes. Look I would accept that, Sir, although in a slight defence, this emerged as more of an issue in the High Court than we had anticipated it would do because there were a broader range of issues there which also is the reason for the non-objection. It seemed, from a judicial review point of view, that the ultimate conclusion would be if the Court had any reservations then it would send it back for a factual enquiry.

WINKELMANN CJ:

So if you take this paragraph 109, it looks like he's doing something reasonably conventional. He's saying, well look, the Tribunal was bound to apply tikanga, so scenario B, and, but it didn't and I can decide that because I just look at the principles that they identified, and they didn't apply those. But you're saying actually when you read his decision he's not simply taking the principles that the Tribunal identified, he's actually embarking on his own factual determination about what tikanga situation was.

MR MAHUIKA:

Yes, and ultimately, and it's a few paragraphs down from this, he concludes that if you don't have mana whenua you can't get resumption. So he reaches a concluded view on what tikanga means and applies in this situation, notwithstanding the broader discussion that occurs in the Tribunal's preliminary determination as to the sort of issues that were weighing on it, and determining whether or not it ought to order the resumption of the land.

WILLIAMS J:

Well he may not have been aware of, for example, the Crown giving Te Kōti land in Ōhiwa Harbour where he had no rights.

MR MAHUIKA:

Yes and I did –

WILLIAMS J:

Or Patuone being given land by Governor Grey in Takapuna where he had no rights, or I think Te Wherowhero being given land in the Domain where he had no rights.

MR MAHUIKA:

Yes, or Mokena Kohere being offered land at Patutahi which I think he promptly sold.

WILLIAMS J:

Yes. This is not uncommon throughout our colonial history.

MR MAHUIKA:

No, and I did wonder, Sir, about whether or not, because there are, there's the Moriori situation, so one of the relevant cases that, one of the cases we cite is the *Kamo v Minister of Conservation* [2020] NZCA 1 case, the Ngāti Mutunga o Wharekauri case, which talks about the need for a factual enquiry around tikanga, but also highlights the issue there where there is a competition between Ngāti Mutunga and Moriori arising out of the circumstances of Ngāti Mutunga

coming to be on the Chathams or something like the, because I don't want to disadvantage my friends, but it's in the Hauraki report about Paora Te Putu's tuku to Ngāti Porou ki Haratanga and the ongoing dispute that is occurring between Marutūahu, Ngāti Tamaterā and Ngāti Porou about the nature of the Ngāti Porou presence there and their rights. So, you know, without taking it too much further, there are situations even in Māori society where there is the grant of a tuku and there is a debate as to what residual rights do the original holder of mana whenua or tangata whenua status have in respect of those lands as against the party that received the tuku.

GLAZEBROOK J:
And here the person or the body that has compromised tikanga if you look at it that way is now seeking to take advance of that compromise?

MR MAHUIKA:
Yes, Ma'am, because ultimately this is about redress against the Crown.

WILLIAMS J:
But you can also more recently the great titanic struggle between mana whenua and mana moana and population in the allocation of fisheries?

MR MAHUIKA:
Yes.

WILLIAMS J:
Or the special provision for the interests of urban Māori within the allocation?

MR MAHUIKA:
Yes.

WILLIAMS J:
All of which was challenging these basic ideas of mana whenua.

MR MAHUIKA:

And a reference in the fisheries deed of settlement, the settlement being for the benefit of all Māori.

WILLIAMS J:

That's right.

MR MAHUIKA:

Notwithstanding the iwi focus of the resolution.

WILLIAMS J:

It does seem to be to be problematic to suggest that tikanga lacks the intelligence to address these paradoxes when we don't make that assumption about the law?

MR MAHUIKA:

I mean I think this discussion is really to emphasise the point that with the greatest respect to his Honour Justice Cooke the need for a better, a fuller enquiry into these sorts of matters if he has reservations about them.

WINKELMANN CJ:

So the wananga that was held, we don't have a transcript of that, do we so we don't know?

MR MAHUIKA:

I do not recall whether there was a transcript of that or not.

MR COLSON QC:

There is a transcript.

MR MAHUIKA:

Thank you. I'm grateful to Mr Colson QC for remembering that. I didn't.

WINKELMANN CJ:

So, the Tribunal was effectively marinating in that information. They had tikanga experts addressing the situation and they refer to that, don't they, in their decision?

MR MAHUIKA:

Yes, and of course you have as the presiding officer a very experienced Māori Land Court judge in Judge Wainwright who was also the presiding officer in relation to the Wairarapa ki Tararua enquiry so she is aware of the broader background and you have Dr Hong who is a person of considerable expertise in my view on matters of tikanga.

WILLIAMS J:

And one of the most senior public servants in modern memory.

MR MAHUIKA:

Your memory is probably better than mine, Sir, so I shouldn't comment.

WILLIAMS J:

Well, it's longer.

WINKELMANN CJ:

Because you're older.

MR MAHUIKA:

So, the reference to the transcript is 605.1123.

WINKELMANN CJ:

Thank you.

MR MAHUIKA:

And again I come back to the point that these are difficult subjects and these are challenging matters. I don't at all want to be disparaging of the view that Ngāti Raukawa and Ngāti Tūwharetoa have taken in relation to this, but ultimately, the view for the Incorporation has to be that the Tribunal was aware

of that. It considered it. It balanced it. It actually thought about it in the context of a broader tikanga framework. If you, in my respectful submission, look at the Tribunal's own analysis of tikanga and have reached a conclusion that was open to it. Could it have reached another conclusion? Possibly, but the point here is that was the conclusion open to the Tribunal? In our submission, it was.

And arguably Ma'am, if his Honour had stopped at paragraph 109 and then hadn't gone on to answer that question, perhaps there wouldn't be so much argument. But he then goes on to apply tikanga in his judgment and in our submission, in error.

I'm perhaps conscious of time. There are two further points that I would make. While we focus a lot on the position of Ngāti Raukawa and Ngāti Tūwharetoa, there is also the position to of the Pouākani Claims Trust which, some of difference of opinion I noticed from the memoranda, but also claims an interest in this area and these lands and is supportive. So it is not the case that Ngāti Kahungunu ki Wairarapa have no support from groups of mana whenua in this region to the award of land to them, a matter which is not really picked up in either the Tribunal or in his Honour's High Court decision.

Then there's the debate about whether the land will create a fresh grievance for Ngāti Raukawa and Ngāti Tūwharetoa, and in my submission the Tribunal found itself in a difficult situation. It had to choose, for the reasons that it gave. Does it risk creating further offence to Ngāti Raukawa and Ngāti Tūwharetoa on the one hand or does it fail to give Ngāti Kahungunu ki Wairarapa the ability to seek redress on the other? Either result would be a bad result for one of the groups, and for the reasons it gave, and reluctant though it was, it made the choice.

WILLIAMS J:
It needn't be. It needn't.

MR MAHUIKA:

I would certainly agree with that, Sir, and could not argue with that at all, but we have to consider the situation that the Tribunal was in at the time it made its determination and whether or not it was entitled to make the determination that it did, and a lot is said about the potential harm to Ngāti Raukawa but there is harm the other way if the Incorporation doesn't have the opportunity. That's the only point that I make.

WILLIAMS J:

Yes. Well, that proposition is sound if this is really a zero-sum game.

MR MAHUIKA:

And I completely accept that you would not want it to be that way and perhaps it won't end up that way but I can't foresee the future, Sir.

So in summary, and in concluding, I think that the last point that I would make is that ultimately was the Tribunal, with all of its experience and in the light of its consideration of this matter, entitled to form the view that it did, and in my submission it was. It was not a view that the Tribunal came to lightly. On the face of its determination it did clearly consider the completing positions and views and different aspects of tikanga. Might it have reached a different conclusion? Was it open to it? Possibly. But was it wrong to reach the conclusion that it did? No, it wasn't, and for that reason, in our respectful submission, the appeal should be allowed.

Unless there are any further questions, may it please the Court, those are my submissions.

WINKELMANN CJ:

Thank you, Mr Mahuika.

MR RADICH QC:

If your Honours please, I turn now to deal with the Mercury Cross appeal. So we go to a different subject matter but within the same set of provisions.

We're dealing with it in this order by agreement for efficiency's sake and I'll deal with these arguments, just acknowledging the fact that we're a little over time but that's fine, very efficiently, if I am able to do so.

There is an outline of oral argument for this part also. I don't know if your Honours have that to hand. It's called "Outline of Oral Argument for Wairarapa Moana on Mercury's Cross-Appeal". Is that available to your Honours?

WINKELMANN CJ:
I think we have it.

MR RADICH QC:
Yes, thank you. Let me deal if I may efficiently with the terms of that outline. So this is dealing with his Honour, Justice Cooke's, decision at paragraph 33. I don't know if that decision is still available to you.

WINKELMANN CJ:
It is thanks to Mr Cox.

MR RADICH QC:
Indeed. Thank you, Mr Cox. So at paragraph 33 his Honour makes the point first of all that Mercury challenges the decision of the Tribunal declining it had any right to participate in the resumption hearing and refers to the procedural direction of 2 March 2020 where her Honour Judge Wainwright recorded that: "Mercury is not an entity entitled to appear."

So I turn your Honours, if I may, to that provision in the Act and the Act, this is the Treaty of Waitangi Act. It is at BOA 0023 and I thank you. I look at section 8C and there are three components I bring from the provision. First of all, the key provision, first of all, subsection (1): "Where, in the course of any enquiry into a claim submitted to the Tribunal, any question arises in relation to any land or interest in land under section 8A," which it does here. "The only persons entitled to appear and be heard on the question shall be," and then you

will see an (a) to (d) a finite list: “The claimant, the Minister of Māori Affairs, another minister, any other Māori who satisfies the Tribunal.”

Much turns on the word “entitled”. My learned friend for Mercury makes the point that that is not a word that means that it is exclusive. That is a word that means these following people are entitled. These people have the right to appear, but it doesn’t preclude others from appearing if they so apply and if the Tribunal grants leave. My learned friend refers, for example, my learned friend Mr Hodder for Mercury, for example, refers to clause 6 of Schedule 2. I don’t know, Mr Cox, if you’re able to run towards the end of the Act, so we can bring that to mind here. It’s on page 36 of the Act itself. I have a hard copy. Thank you very much. Clause 6 and there you will see a provision that reads: “The Tribunal may act on any testimony sworn or unsworn, may receive as evidence, any statement, document, information, or matter which in the opinion of a tribunal may assist it to deal effectively with the matters before it.”

The submission for Wairarapa Moana is that this is saying that, look, the Evidence Act 2006 doesn’t apply. You could introduce here so you’re not bound by those rules. But the bounds of that provision is very much dictated by a clear regime put in place for the express purpose of excluding state enterprises and those to which they have transferred land.

I come back to section 8C to pick up this point if I may. I’m sorry to to and fro. So 8C, as I’ve mentioned, tells us the only persons entitled to appear are those listed and it goes on in subsection (2) to say this: “Notwithstanding anything in clause 7 of Schedule 2.” Clause 7, I should’ve said while I was there, is the right to appear. It’s the right of counsel or people to appear for those people. “Or, in section 4(a) of the Commissions of Inquiry Act 1908.” That’s the provision that says that there is a general right in a commission, and the Tribunal is a commission, to hear any person with an interest greater than that of the public as a whole. “So notwithstanding anything in that provision, no person other than a designated person in paragraph (a) or (b) or (c) or (d) shall be entitled to appear and be heard on a question to which subsection (1) applies.”

And then finally in the section, at subsection (3), there is one provision that enables leave to be granted in one circumstance and that is where a barrister or solicitor or an agent applies for leave to represent a party.

I look back while we are there just for consistency to 8A(3) and that's a provision I think we identified earlier that makes the point that no regard is to be had to changes in the land since immediately before the transfer to the state enterprise. The entity's position is not in the frame.

In the road map document, or the oral document, I mention at paragraph 5 that this is reinforced by the legislative of history. I refer to the decision of *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 (HC) and Tūwharetoa Māori Trust Board. If I can just go quickly to that, it's BOA 0610, and this is a case of a proposed transfer of land from Land Corp to a council and the question – there wasn't a resumption application in the frame there but the issue was put forward as to whether section 9, the Treaty clause of the S-OE Act of its own right was activated to prevent that sale or whether, in fact, the resumption regime would, if it was used, present inadequate protection, and if I can turn to page 111 of the case, there – and I won't read through it all but down at line 40 through to the top of the next page is an explanation because in this case his Honour, Justice Robertson, was given – and this is where the Dangerfield affidavit came from. You will have seen references to it. It was given quite a full background to the nature of the regime and refers there to the course of those negotiations, the objection being put up that that there would be strong political arguments if those to whom the land was transferred, SOEs, were able to appear.

At the top of page 112 it talks about SOEs or third parties creating a powerful incentive for the Tribunal not to award resumption, Māori would be unfairly exposed to allegations of windfall, and makes the point that this was part and parcel of the arrangements.

In the written submission, the full written submissions, and again I don't need your Honours to go there, but at paragraph 10 on this point there is reference to a report of the Technical Advisory Group to the select committee on the Treaty. This is referred to by his Honour, Justice Cooke, as well and they make the point and their quote is set out in that paragraph. It's also in the materials. Maybe we'd have it on screen so we can see, SUP 1509.

The Technical Advisory Group, if we moved forward to the next page, please, if we go to paragraph 2, the top of paragraph 2, and then there's the introductory paragraph. I want to refer in particular, in fact, to 2.03 on page 2, just down a little bit.

WINKELMANN CJ:
I think I've lost you. You're moving at such extreme speed, Mr Radich.

MR RADICH QC:
Sorry, your Honour.

WINKELMANN CJ:
So this document we're looking at now is the expert – we've moved on from *Te Heu Heu* decision, have we?

MR RADICH QC:
We have, your Honour. I'm sorry, I'm trying to go too quickly.

WINKELMANN CJ:
I'm sorry, I'm being too slow, but what's this report?

MR RADICH QC:
It's called the advice of Technical Committee, Technical Advisory Group, on the analysis of submissions made, both oral and written, on a clause by clause basis to the SOE Bill, if you like, to the legislation that we were looking at earlier, and this is making the point at 2.03 talking about the negotiations that: "The issue was," that is to say, the lack of the ability for SOEs to appear or their

transferees, “of major importance in the negotiations. Without the inclusion of such provision it is probable that no agreement would have been reached.”

Down at paragraph 2.05: “It should be borne in mind that the exclusion of an SOE or subsequent owner from an independent right of audience does not mean that evidence which might be useful…will not be available,” and then the last sentence: “What the exclusion prevents is an SOE or subsequent owner taking up an independent adversarial stance as a party in its own right,” which, with great respect to my learned friends, is what we have here as we grapple with this issue.

WILLIAM YOUNG J:
Mr Radich, does section 6 of the New Zealand Bill of Rights Act have a role to play?

MR RADICH QC:
Yes, Sir, and let me move to that point now. In the –

WILLIAM YOUNG J:
Because all of this is before the Bill of Rights is enacted, all this parliamentary material you’re referring to.

MR RADICH QC
I’m sorry, Sir, could you repeat that?

WILLIAM YOUNG J:
Well, the State-Owned Enterprises legislation was enacted before the New Zealand Bill of Rights 1688, was enacted?

MR RADICH QC:
Yes, it was.

WILLIAM YOUNG J:
So under section 27 of the New Zealand Bill of Rights Act, one would expect a party affected by a process to have a right to be heard?

MR RADICH QC:
Yes, Sir.

WILLIAM YOUNG J:
You're saying that the word "no entitlement to be heard" excludes an ability to be heard by leave?

MR RADICH QC:
Yes, Sir.

WILLIAM YOUNG J:
Now, is that consistent with section 6 of the New Zealand Bill of Rights Act?

MR RADICH QC:
Well section 6, which of course requires a rights consistent meaning is only able to be applied in the event that it was very clear that Parliament was not intending such a meaning and I deal with that in the submissions, Sir, by going to the *Fitzgerald v R (2021) 12 HRNZ* case 739 (SC), and I wonder if I can go there because it comes directly an issue. That's at BOA 0166.

WINKELMANN CJ:
So, you're saying the language excludes a rights consistent meaning?

MR RADICH QC:
Yes. In circumstances whereby reference to the parliamentary materials, by reference to the debates that led to this passing of this legislation, one of the key factors was the exclusion of the right for the SOE to appear.

WILLIAM YOUNG J:
But an exclusion of any ability with the leave of the Tribunal?

MR RADICH QC:

Yes, because it comes in, your Honour, through the Crown, the ability to provide evidence through the Crown and that is a point in fact that Sir Geoffrey Palmer made in the introduction of the legislation. If I could refer to that just to deal with it. It's SUP 1531on the left-hand column, if we can go to page 4561, yes, on the right-hand side there, about the paragraph beginning: "The proposed new section 8C is another important section." It lists those persons who have a right to be heard as part of the Waitangi Tribunal hearing regardless of claims to have land transferred or vested in an SOE. That provision has been criticised for not granting a right to be heard to state land. "It is not appropriate for the state-owned enterprises or subsequent purchase to have a right to be heard. That is because of the nature and purpose of the Bill. The Bill is designed to preserve the position that Māori claimants under the Treaty would have enjoyed if the transfers had not taken place. That position involves the ability to deal with the Crown alone. Neither the partnership relationship created by the Treaty nor the practical issues should be interfered with or confused by the intervention of third parties." However, and this is the point, your Honour: "Evidence held by a state enterprise or subsequent owner can still be put to the Tribunal in support of a place of one of the parties. It can be called by a minister of the Māori claimant."

WILLIAM YOUNG J:

What about the last sentence?

MR RADICH QC:

Yes: "The Tribunal has the power under clause 6 to consider any efforts it considers necessary." In that provision, Sir, forgive me as my glasses prevent me from seeing anything at all at the moment, in that provision, it's a provision as I said earlier that in the submission of the Incorporation enables evidence that would otherwise be inadmissible, for example, as hearsay, to come in, but that it must come in given the very specific nature of these provisions, the very specific purpose that Parliament had in mind in excluding SOEs through the Crown.

GLAZEBROOK J:
Isn't it that provision deals with evidence, it doesn't deal with submissions or the right to be heard?

MR RADICH QC:
Yes, Ma'am.

GLAZEBROOK J:
So, yes, of course, I guess if an SOE has evidence it could say: "Here's a whole lot of evidence that I want you to consider"?

MR RADICH QC:
Yes.

GLAZEBROOK J:
I mean I can't quite see what evidence it might have, but if it does, it can say that?

MR RADICH QC:
Yes.

GLAZEBROOK J:
So it doesn't entitle it to make submissions on that evidence?

MR RADICH QC:
That's the point, your Honour.

GLAZEBROOK J:
That particular provision?

MR RADICH QC:
Thank you, your Honour, that expresses it perfectly, yes. Just observing the time –

GLAZEBROOK J:
And then the Bill of Rights, your submission on that would be it's excluded by the legislation itself?

MR RADICH QC:
That's exactly right. I was going to go next and I will do it very quickly because I am aware that I am taking time from my friends, but in the *Fitzgerald* case, the position is taken that if there is a clear intention to exclude a right, then that will be given voice, but it's where there is no such clear intention and you can add to a provision in such a way as to make it rights consistent that section 6 would be applied.

WINKELMANN CJ:
So, shall we take the – how much longer do you think you will be Mr Radich?

MR RADICH QC:
I will do my very best to finish in five minutes, your Honour. I just don't want to take too much more time from others.

WINKELMANN CJ:
Okay, well I think we will adjourn for the luncheon break.

MR RADICH QC:
Thank you, your Honour.

COURT ADJOURNS: 1.05 PM

COURT RESUMES: 2.16 PM

MR RADICH QC:
Thank you. If your Honours please, I make to finish this part of the case. Six points, I'll make each of them very quickly.

The first of them is to look at 1988 Act and the 1986 Act. I won't take you to them, but in the 1988 Act, which we've looked at, the Treaty of Waitangi (State

Enterprises) Act, and the preambles it has, and I'll just read the words explaining one of the tenets of the scheme: "precluding State enterprises and their successors in title from being heard by the Tribunal on claims relating to land or interest in land," that's at paragraph (g)(iii). Secondly, the State-Owned Enterprises Act 1986 makes that clear in the provision itself, which includes these words, having referred to the memorial: "which provides for the resumption of land on the recommendation of the Tribunal and which does not provide for third parties, such as the owner of land, to be heard in relation to the making of the recommendation."

The second point is that getting to that point was a matter of significant negotiation for the Māori Council and those involved, and to give one example of that could I ask you please, Mr Cox, to take us to page 302.0243, this is just as it's coming up, a meeting between Ministers and the New Zealand Māori Council representatives on the Beehive in 1987, the Right Honourables Geoffrey Palmer was there, Roger Douglas, Koro Wetere for the Māori Council, David Baragwanath, Ms Sian Elias as she was then, Mr Martin Dawson, and various official were there also. I think it's just about to arrive. And then, in the typeface of its era, that just shows the heading.

If we come down please several pages, I think it's about eight pages, and 302.0250, and this is the point that was made for the Māori Council, made by she then was Ms Elias, this is the first full paragraph. Ms Elias said she wanted to make two points. The first was that the Government's proposal would impact upon and severely restraint he resources of the Tribunal because in that compulsory acquisition power became available to the Crown on the recommendation of the Tribunal that it would introduce third party economic stakes. This would mean they would have lawyers who would continually challenge the Waitangi Tribunal findings, there would be reams of applications for judicial review. Ms Elias said that her second point was the way the proposal look to Māori people, their preference was – and that was the preference at that time, do the mahi first and then transfer only if it's clear, that was the position the Māori Council took, ultimately acquiescing to the scheme that we have now. And the balance of the negotiations dealing with that point are referred to in the

primary submissions for the appellants, the ones delivered this morning at pages 7 to 9, I just mention that. The third point I make is to pick up the *Fitzgerald* case.

WILLIAMS J:
You didn't mention 302.0313.

MR RADICH QC:
0313?

WILLIAMS J:
Where the summary of agreements refers to preventing not just appearances in the Tribunal but prohibiting judicial review as well. Have you seen that?

MR RADICH QC:
I did, Sir. Can your Honour give me the reference again?

WILLIAMS J:
302.0313.

MR RADICH QC:
0313, yes. Yes, I've highlighted. Thank you for bringing that back to the attention.

WILLIAMS J:
Which is interesting.

MR RADICH QC:
Yes, quite right, being able to bring about judicial review of Waitangi Tribunal recommendations, yes indeed. It was a real sticking point at the time. It was pivotal.

So with that in mind I look at *Fitzgerald* BOA, Mr Cox, BOA 0166. Paragraph 49, there are many references and I know your Honours are very familiar with this clearly, but if I go to paragraph 49. I can just happily read it.

Let me read it while it's coming. It's the second sentence in paragraph 49: "Another way of characterising section 6 is that it is a direction to the courts…" There it comes, 49: "…that they should presume a statutory purpose. that the application of the enactment falls to be construed does not breach the affirmed rights or freedoms unless the language of a statute expressly excludes that possibility." It's partway through 49, and then just down towards the end of that paragraph, the final sentence: "But where the language is clear enough to exclude the possibility of a rights-consistent purpose and effect, section 5 of the Interpretation Act applies to give effect to the remaining rights-consistent text and purpose." There are others, but that reference paragraph is helpful and makes the point.

The fourth point I make is that his Honour Justice Cooke dealt with this very point at paragraphs 41 and 42 in particular of his decision. I just give that reference.

My fifth point is that in paragraph 45, his Honour Justice Cooke dealt with the *Ruakawa Settlement Trust v Waitangi Tribunal* [2019] NZHC 383, [2019] 3 NZLR 722 case where her Honour Justice Grice had referred to there being natural justice rights on the part. In that case it's the Ruakawa Settlement Trust who the Tribunal had found following their settlement shouldn't continue to be involved in the resumption process. They took a case. Were successful in that rightly because they come, as her Honour found, within the terms of section 8C(1). They are 8C(1)(d): "Any Māori who satisfies the Tribunal."

So even though they had settled and even though they had, through their settlement legislation, had removed the right to bring resumption claims obviously under 8A, they still had a right to participate through 8C(1)(d) and her Honour's reference to natural justice rights is referred to by Justice Cooke in 45 and he was making the point that Justice Grice made, he said: "Was that 8C did not purport to codify or provide the entire content of natural justice rights arising from a party falling within section 8C(1)."

My final point, and it's in the oral hand-up. Whether your Honours have it or not it probably matters less than my reference to the fact that in paragraphs 10 to 12 of it I refer to the fact that Mercury presented a memorandum, or filed in 2017, and the Tribunal acknowledged that it didn't have standing, was there as an observer. It did observe the entire Tribunal process.

Secondly, at paragraph 11, I make the point that Mr Williamson, who was Mercury's hydro engineer, gave evidence in the Tribunal. He was called by the Crown. He covered points that Mercury wishes to raise. He accepted through the process that concerns that they might have would disappear in relation to the use of the hydro station, it's integral part in terms of the hydro scheme on the Waikato River if Mercury remained as a manager and I just give two references because I leave. Mr Williams' evidence, his brief of evidence, is at 503.2588 and the cross-examination of him, the relevant reference is 608.1970, and again I mention the Tribunal's determination at 17. The Tribunal said that these points would be explored further effectively, didn't think they needed to be dealt with at that part of the process but the opportunity is open if one is back in the Tribunal to pick up where one left off on this to have that evidence through the Crown.

So they are my submissions, your Honour, sorry, at an enormous trot, but they are the submissions on the cross-appeal.

WINKELMANN CJ:
Thank you, Mr Radich.

MR GEIRINGER:
Tēnā koutou, may it please the Court.

WINKELMANN CJ:
Mr Geiringer, are you doing all submissions for your…

MR GEIRINGER:
I'm doing all of the submissions in response to the appeal for WMI, and then tomorrow my learned friend, Mr Cornegé, is addressing the submissions in support of our appeal.

I realise, your Honours, that you have a rather full dance card today and I'm by no means the main attraction so I'm going to try and keep this very brief, I've said, without dealing with "relates to" which was my understanding when I spoke to my learned friend that that wasn't going to be an issue, that I'd try and get through this in half an hour. I'll try and do that even quicker, given that we're already behind time.

I think the easiest thing to do so that the Court doesn't have to flip between issues too frequently is if I begin at the end and address you on the one point my clients wish to make in relation to the Mercury cross-appeal.

So this is what I deal with in my submissions, starting at paragraph 43, but really, as I say, it's only one point. I've taken on board the fact that other parties are addressing the interpretation of the statute and I'm not going to pick up that or throw my oar in there. The one point is this. That the whole cross-appeal is predicated on the idea that there is this fundamental right to be heard, that the Act as it's being interpreted is inconsistent and therefore it requires I would say a reading down is the way it's being argued, I'm sure my learned friend, Mr Hodder, may argue it, interpret it correctly, to allow that fundamental right to exist to be realised.

My one point is to challenge the assumption that there is, in fact, a right to be heard. Justice Young, you talked earlier about how the Bill of Rights section 27 requires that a party be heard on a matter that pertains to its interests. That's not, in fact, what that section says. As your Honour will be familiar, it says that the principles of natural justice need to be observed, and as this court and virtually every other court has said on numerous occasions, the principles of natural justice are circumstance dependent and the touchstone for them is fairness. So the question is in this particular circumstance, whilst generally it

would be extremely unusual for somebody to have an interest in proceedings and for fairness to not require that they be heard, I'm suggesting that in these particular circumstances that is in fact what fairness dictates, that there is no right to be heard, firstly because in obtaining their interest, to the extent they have an interest in the outcome of the process, they obtained their interest knowing that there was an ongoing process, that they were not to be involved in that process and that the land would be resumed in certain circumstances depending on the outcome of that process.

WINKELMANN CJ:
There's a circularity in that argument though, isn't there, that they were not entitled to be heard?

MR GEIRINGER:
But –

WINKELMANN CJ:
It assumes the answer to the question that's being asked by Mr Hodder.

MR GEIRINGER:
Well, let me put it this way then. They knew that there was a process between the Crown and Māori to determine issues of fundamental, constitutional importance between the Crown and Māori and that that process would affect their rights, and they knew that before they obtained an interest. So they obtained their interest, they came into their interest knowing that there was that process. So if I put it that way –

WILLIAM YOUNG J:
But that was a general proposition that can't be right. I mean if I buy land from someone who's purchased land, and then there's an agreement as to whether the first agreement is valid, I'd be entitled to be heard as to that.

MR GEIRINGER:
It –

WILLIAM YOUNG J:
Even though I take the land only as a dispute.

MR GEIRINGER:
It all depends on the circumstances. If you take it in such a way that you step into the shoes of one of the disputing parties, then obviously you certainly have a right to be heard, but here there's no question that that's what's occurring. Here there, knowing that they're a third party, and in fact it's written on the title so that they will know it, -

WILLIAM YOUNG J:
Doesn't this really go back to the statute though. I mean if the statute excludes the right to be heard then you're right anyway. If it doesn't then this argument doesn't lead anywhere, does it?

WINKELMANN CJ:
Which is the circularity I referred to.

MR GEIRINGER:
Well the question here is whether there's any room for ambiguity in the statute. Is there a –

WILLIAM YOUNG J:
Any, sorry, what?

MR GEIRINGER:
Is there room for ambiguity in the statute.

WILLIAM YOUNG J:
Well I agree, that's the point that Mr Radich was addressing.

MR GEIRINGER:
Right, but if you say there's –

WILLIAM YOUNG J:

There's more room for ambiguity in the statute than there is in some of the background details.

MR GEIRINGER:

If there's room for ambiguity in the statute, taking account or not taking account of the background detail, does that automatically mean that the Court should interpret it to enable Mercury to be heard. Yes, if there is such a fundamental right, no if there isn't. Your honours, I don't think I'm saying anything extraordinary, and anything more necessarily than the Deputy Prime Minister said in the passage my learned friend took you to just a moment ago, which is that it isn't appropriate, in the words of Mr Palmer, for the state-owned enterprise, or its successor, to involve themselves in the proceeding. and I'm also not saying much more than Ms Elias was saying in the other passage my learned friend took your Honours too even less long ago, in that allowing the third party landowner to participate creates other issues of fairness. It creates an issue of unfairness for the Māori applicant. It creates, to use the European term, an égalité des armes issue.

WINKELMANN CJ:

Yes, I don't know if this is going to take you all this far. I think we've got a good grounding about what natural justice requires and what lies at its heart, and the fact normally you need clear words to exclude procedures consistent with natural justice, your point is, you say it's fair, the process as it is, is fair in any case, maybe your best argument in that regard is that their interests are represented by the Crown in any case but really it's all going to turn on the statute, isn't it, whether the statute is clear enough in its own terms to exclude the right of Mercury to be heard.

MR GEIRINGER:

Well on the égalité des armes if the Crown were to set up a process in the Waitangi Tribunal where it gave itself enormous resources but deprived anything like those resources to the Māori applicants, such that there was an enormous imbalance in what could be presented to the Waitangi Tribunal, that

would be an issue of fairness that a court on review would rightly question and maybe interfere with, and here we've got a proposal that the Crown, having carefully arranged itself so that that does not occur, nevertheless a third party with essentially unlimited resources can fairly come into the process and participate creating, in my submission, exactly the same potential unfairness for the Māori applicant.

O'REGAN J:
I can't understand why you're making such a thing of this. Mercury is not related to your client, is it, it doesn't have anything to do with your case?

MR GEIRINGER:
No, I acknowledged that at the beginning of the submissions. The particular application for Mercury doesn't.

O'REGAN J:
Why are you labouring the point then? Make submissions on the case that you can win.

MR GEIRINGER:
Because it's the same principle that'll apply to other potential third parties seeking to involve themselves in other resumption applications, including our own, and as I say in my written submissions it would be just as offensive to my clients if a third party in a similar position to Mercury attempted to involve itself in their application.

O'REGAN J:
We've got plenty of people arguing that case. I don't think we need you as well.

MR GEIRINGER:
Well perhaps if I move on then to the substantive WMI appeal. I did seek to clarify with my learned friend for WMI the extent of the appeal and whether it was going to touch on "relates to". In the discussion with the Court it does seem that the Court has some interest in the "relates to" point.

WILLIAMS J:
Well, to be fair, we dragged your learned friends into that discussion. They were very reluctant.

MR GEIRINGER:
There may be a couple of very quick points that it's worth making without delving into it. The Chief Justice noted that there is wording in section 8A that requires only part of the claim to relate to the land. I just wanted to note for the Court that the same wording is not repeated in 8H(b). There's no "or part of" in there. So, in relation to licenced lands, the requirement as written in the statute is that the claim relates to the land. That's the first point.

The second point is to try and lessen the concern, Sir, that Justice Williams raised in relation to the ability of the Tribunal to bring in other issues and the suggestion that one of the chief prejudices here in relation to Pouākani was the lack of provision of reserve lands. I think that's answered in my submission by paragraph 87 of his Honour's judgment which makes it clear that whilst there is this gateway requirement in "relates to" that the claim itself relates specifically to the land in question and relates to a prejudice in relation to that land, or the acquisition of that land. Once the Tribunal turns to the question of the appropriate remedy, his Honour Justice Cooke was very firm as it is explained in paragraph 87 that other issues can be taken into account.

WILLIAMS J:
I think what the judge didn't seem to understand is that these claims are general and thematic and they always relate to all land within a claimed area. It's in their nature that that's how they run.

MR GEIRINGER:
Maybe. The absurdity that his Honour saw in the interpretation that the Tribunal approach is probably less than the way it's stated by the Tribunal itself. I think the Tribunal at paragraph, I think it's 190, sorry, 129, makes the point that given their interpretation of "relates to", any well-founded claim can relate to any land. So, I mean you say in an enquiry area and I mean, yes, there will be that limit

because that's all they will be considering at any one time, but they've adopted an interpretation that would in fact allow any claim anywhere to relate to any land. Their interpretation makes no limit.

WILLIAMS J:

Any claim within the claim area. In fact, that's exactly what the claims said in this case and it's what the Tribunal agreed with and indeed, it's what the Crown apologised for in the draft that's before The House now. If you see clause 10, I think it's (e) and (f) in relation to the failure to actively protect by ensuring sufficiency of reserves, it applies to the whole claimed area.

MR GEIRINGER:

Well I mean it's always going to depend on its facts and if the claim in fact does relate to the land in question –

WILLIAMS J:

Well, my point is that in my experience, and I do know a little bit about this, they always do.

MR GEIRINGER;

Well then, there's no issue and certainly there's no suggestion of an issue in relation to either of the claim of WMI or Ngā Tūmapūhia that their claims relate to the land that they're –

WILLIAMS J:

That's not a live issue for you, no. The question is then on the remedial issue, whether you've got enough of a grievance to justify the remedy that you're asking for.

WINKELMANN CJ:

Which is something that Mr Cornegé is going to address, isn't it?

MR GEIRINGER:
The proportionality. He's going to talk about the Court's approach to issue of compensation, yes.

Turning then perhaps to the other issue which is the implication of, the importance of tikanga, the position my clients take is essentially what is said by the High Court before the High Court goes one step further, as my learned friends for WMI suggest it shouldn't, and make a finding on what the correct position of tikanga is, which is namely that the Tribunal should never be doing anything inconsistent with the Treaty or inconsistent with tikanga, and for that reason issues of mana whenua will be highly relevant. So it's Justice Cooke's words, I think, at paragraph 89, is it, just before he launches into the consideration of the specific issue. And we would agree with the High Court in that assessment and we submit it's relatively objectionable, given the purpose of the Tribunal, given the purpose of the Treaty of Waitangi Act, given the long title, short title of the Act, it shouldn't be making decisions inconsistent either with the Treaty or, given the requirements of the Treaty, with tikanga. I make that submission because I say you can't make decisions inconsistent with tikanga and be upholding te tino rangatiratanga, the two logical concomitants.

So there's nothing objectionable in our submission in that position from the High Court, nor in its identification therefore of the relative importance of issues of mana whenua. I was fearful of describing WMI's case as sui generis, I thought the Chief Justice would tell me off for using that terms, but since the Court is considering evidence de bene esse…

WINKELMANN CJ:
No bene esses, they're only…

MR GEIRINGER:
I figure I'll get away with it.

WINKELMANN CJ:

I can just never remember if it's section 14 or – it's section 14 of the Evidence Act, I think, is what I should say, isn't it.

MR GEIRINGER:

So, I mean, the WMI position is a series of remarkable facts, and I don't wish to wade into them, I leave that to my learned friends. But the usual position has to be for land to be returned to the Māori who, in accordance with Māori custom, would have exercised the tino rangatiratanga over that whenua.

WINKELMANN CJ:

Is this something you're directly interested in?

MR GEIRINGER:

Yes. If I could turn to our facts as in the same proceeding we have – I don't want to offend my, upset my learned friends for the Settlement Trust. Can I put it this way: we have issues that have not be resolved before the Tribunal as to who claims mana whenua over the Ngāumu forest. We say it's exclusively Ngāi Tūmapūhia. I circulated a map yesterday – does the Bench have easy access to that? It was sent by email last night.

WINKELMANN CJ:

Is that this one here?

MR GEIRINGER:

Yes. This is not to represent any findings of the Tribunal, the Tribunal has not made the relevant findings because of the manner in which it approached issues of relates to and tikanga. But what this map shows you is the claimed area of traditional rohe by my clients, which is the purple outline. You can see the remaining blocks of Ngāumu forest which are outlined there in green. There's the brown outline which shows the part of the forest that's already been awarded, given by the Crown to Rangitāne, and what this demonstrates is that from the perspective of my clients this is very much a central part of their

traditional rohe over which they claim that they were the ones in accordance with Māori custom exclusively exercising rangatiratanga.

My learned friend, Mr Cornegé, in introducing us this morning, used the manner of introduction that my clients used before the Tribunal which is to associate themselves with the maunga Te Maipi and the awa Kaihoata. Now you can see that on the map if you look closely at the area that's just in the pink area that's circled by the red line. You've got Te Maipi very much in the middle of all of the remaining forest blocks and the river which is spelt differently on this map is Kaiwhata which runs from the Poroporo block all the way out to sea.

So the way that my clients associate themselves with this land, it's very much central to the forest in issue. That's not to say that there are conclusive findings by the Tribunal that my clients have that exclusive mana whenua. The Tribunal didn't seem to feel that it was necessary to make any findings on that issue and has not done so. It has found that there are mana whenua, strong mana whenua claims by my client.

The Tribunal, and the Crown has picked up on this, makes the finding that there are two other groups that are claiming mana whenua and I acknowledge that in my submissions. We say that those claims are derivative of our interests and that's an issue that hasn't been resolved.

The Crown then goes to say that there are several other hapū that have interests and it cites a passage in the Waitangi Tribunal's preliminary decisions. It's somewhat misleading. If I could take your Honours to the Waitangi Tribunal's decision on that issue which is – so this is from the Crown's submissions at paragraph 16 which is citing in footnote 21 the Waitangi Tribunal at 287. This is based on a witness for the Settlement Trust who in fact goes further and says that every hapū in Ngāti Kahungunu ki Wairarapa has an interest, and you can find – I won't take your Honours to it but the Tribunal is quoting essentially all of the evidence as it appears in that witness' brief which is at 527.6043. So that's what the witness says. He says all hapū have an interest. He doesn't say what that interest is, whether it amounts to a mana

whenua interest. He doesn't describe the basis for the interest, nothing. It's just a blanket statement that all hapū have an interest. There's no question that in an inquiry area with closely related groups that there are going to be assertions of interest but that doesn't translate necessarily in accordance with Māori custom to an ability for everybody in the whole inquiry area to exert mana whenua over this particular land. What we say is that Ngāi Tūmapūhia was an autonomous hapū, that this was its land, that only the rangatira of Ngāi Tūmapūhia could exercise rangatiratanga over this land, and that issue needs determination because if it's right and if the land is as the Tribunal proposes given instead to a much wider group that includes the majority of people that in fact have no claim of mana whenua over it whatsoever, this is not consistent with the Treaty. It is not consistent with tikanga. It's not consistent with the obligation of the Treaty to look after, as the Māori text in Article 2 says: "The tino rangatiratanga of rangatira and hapū." Article 2 expressly acknowledging that the principal in my submission, that the principal land owning groups within Māoridom were hapū. So it would be inconsistent with that and if I could take your Honours to, it's really the only other point I want to make today because it's one other thing that nobody else seems to be drawing your Honour's attention to is the provisions of the United Nations Declaration for the Rights of Indigenous Peoples and that's in the bundle at tab 36.

I wanted to start with Article 26 and just make the point in support of my interpretation of the Treaty that we now have an international obligation that New Zealand has entered into recently without reservation and what those obligations require is not just a respect in general terms of an indigenous people such as Māori's rights to land, rights to self-determination and association, but to do so with respect to the customs, traditions and land tenure systems of the indigenous people concerned. So Article 26, which is the right of indigenous people to hold their own territories and resources, sub-article 3 says exactly that, that: "Such recognition shall be conducted with due respect to the customs, traditions, land tenure systems of indigenous people concerned."

So it's not enough to say that Māori are to be allowed to hold and control Māori lands. Māori must be allowed to hold and control those lands in accordance

with Māori land tenure systems which we say, and the Tribunal hasn't determined it in relation to this particular block of land, we say that requires the land to be returned to Ngā Tūmapūhia because in accordance with tikanga it was Ngā Tūmapūhia and only Ngā Tūmapūhia that held rangatiratanga over this land.

Article 27, which is the obligation for a system to determine issues in relation to land has the same obligation. So, we say –

GLAZEBROOK J:
It is a declaration, not a treaty?

MR GEIRINGER:
It is a declaration. It's a declaration by New Zealand that it will respect these rights in these ways. It doesn't create a treaty body in the way that a treaty would.

GLAZEBROOK J:
Well, it doesn't create an obligation either at international law.

MR GEIRINGER:
It doesn't create an enforcement regime.

GLAZEBROOK J:
Well, it doesn't even create obligations. It's a declaration, that's all.

MR GEIRINGER:
It's still relevant in my submission to interpretation of the domestic arrangements.

GLAZEBROOK J:
Well, that's a different proposition than the one you were putting.

MR GEIRINGER:
Sorry, if I –

GLAZEBROOK J:
And there is an argument that they reflect obligations under other treaty obligations, although I'm not sure the ones you're actually referring to do.

MR GEIRINGER:
I apologise. I maybe have mis-stated it then, but what we're here to determine is whether the way in which the Waitangi Tribunal approached this and the High Court reviewed that approach was correct. What I'm saying is that having regard to the declarations that New Zealand made within UNDRIP, the obligation must be interpreted to not just return the land to Māori, but to return the land to Māori in accordance with how that land would have been held by Māori under tikanga. I say that's the obligation under Article 27 as well which would be the specific section addressing how the Waitangi Tribunal should operate, in my submission. It's also the obligation under 28 and not often talked about in this context, but I suggest that Article 33 is of particular relevance as well. Article 33 is that: "Indigenous people have the right to determine their own identity or membership in accordance with their customs and traditions."

So, in respect of this situation, what I'm saying is that it's up to Ngā Tūmapūhia to decide who Ngā Tūmapūhia is in accordance with the second part of that article to decide how Ngā Tūmapūhia arranges itself to hold and deal with Ngā Tūmapūhia's resources. It's not for the government or the Waitangi Tribunal or anyone else to come along and say: "Well, it would be more convenient for us if we were to give your land to this big wider group because it resolves a lot of issues for us." That's not consistent with the obligations under, or the commitments in the declaration under UNDRIP.

Commitments and obligations under UNDRIP are to respect the tikanga of Ngā Tūmapūhia, to respect that this is Ngā Tūmapūhia's land and to return it to Ngā Tūmapūhia for Ngā Tūmapūhia to decide who Ngā Tūmapūhia are, who the members of Ngā Tūmapūhia are and how Ngā Tūmapūhia will look after its own resources.

So, to the extent that his Honour identified the importance and acknowledged in his judgment that it was going to require the Tribunal to look again at both the issue of WMI but also the issue of Ngā Tūmapūhia, the decision in relation to that application. I say what is done, what is required dictates a different outcome. It was not open for the Waitangi Tribunal to do what it did in relation to Ngā Tūmapūhia which is to quite expressly say that it was intending to give the land back not to the group that had lost it, that held it traditionally, but to a much wider group and to do so expressly for the purpose of remedying wrongs that had nothing to do with Ngā Tūmapūhia or the loss of Ngā Tūmapūhia's land. His Honour was quite right to identify that as an error.

WILLIAMS J:
Can you tell me what the tukuroa (14:57:18) tuku is, the red line?

MR GEIRINGER:
I was enquiring about that this morning and I got an answer so that I could give it to you and it's fled my mind at this very moment. My learned friend is probably supplying it in a second.

WILLIAMS J:
Do you know whether the Native Land Court enquired into lands in these areas and granted titles, or whether these were all alienated pre 1865 and so there's no judicial assessment?

MR GEIRINGER:
My understanding is that map has the pink areas that you see marked and those pink areas reflect Native Land Court blocks.

WILLIAMS J:
Right, so that pink block there with Te Maipi in the middle of it, what's the name of that block?

MR GEIRINGER:
I think it's Te Maipi.

WILLIAMS J:

Is it? I don't know.

MR GEIRINGER:

Sorry, I don't – I could try and find out for you.

WILLIAMS J:

Well, can you tell me who it was awarded to?

MR GEIRINGER:

That particular block, not without going and looking it up, but I could answer.

WILLIAMS J:

Well, you see, your argument is that Ngā Tūmapūhia-a-Rāngi has exclusive mana within the CFL, within going for a CFL on tikanga and mana whenua bases. Some of the proving of that will be in whatever the Native Land Court said about who the customary owners were and where they came from because mana whenua isn't title. They're different things, aren't they? There can be one hapū with mana whenua whose mana whenua is subject to vested rights belonging to other hapū because there are particular hunting areas or fishing areas on the block that have been traditionally used by others. It's not true to say that mana whenua, even if held by one hapū, excludes any rights by any other hapū in customary terms, are we agreed on that?

MR GEIRINGER:

Yes, Sir.

WILLIAMS J:

When given the size of this block, it's likely that this block would have been subject to multiple overlapping interests even if the mana belonged to Tūmapūhia-a-Rāngi?

MR GEIRINGER:

It's possible and yet to be determined but one can't –

WILLIAMS J:
You need that to make your argument.

MR GEIRINGER:
Well, yes.

WILLIAMS J:
You need that not to be the case in order to make your argument?

MR GEIRINGER:
No. What I need to make my argument is to establish that as a matter of proper law this was something the Waitangi Tribunal needed to determine. But what's happened is that the Waitangi Tribunal has taken the view that it didn't need to determine it, so it hasn't determined it. So I come to you, and I can't say that we have exclusive mana whenua because, despite the fact that we claimed as much, the Waitangi Tribunal has taken the view it doesn't need to determine it and hasn't. So what I need to make my argument is this court to establish that really is relevant and so if this goes back to the Waitangi Tribunal, it's something the Waitangi Tribunal will have to consider. But, your Honour, I take the point.

WILLIAMS J:
It would be good to know whether there is evidence to support your propositions before accepting them so that we avoid an academic dispute.

MR GEIRINGER:
Well certainly witnesses for Ngā Tūmapūhia came to the Tribunal and said what I'm saying.

WILLIAMS J:
Sure.

MR GEIRINGER:
Another part of our claim is a vast quantity of this forest was lost by purchases before the Native Land Court decisions, shonky, in my words. I think the

Tribunal describes it as abandoning best practices and those purchases were, in the evidence that my clients made from Ngā Tūmapūhia rangatira. So, we say most of this land was lost before the Native Land Court, much of this land was lost before the Native Land Court was involved and was lost through purchases off Ngā Tūmapūhia.

WILLIAMS J:
I think the problem we have here is that it's perhaps not as well understood as it ought to be just how subtle tikanga is, particularly with respect to rights to land and resources on land. These are not black and – there are no straight lines. There are no hard lines and nothing is black and white. You have to understand the custom and the culture to understand whose in where and why.

MR GEIRINGER:
Yes.

WILLIAMS J:
It's never straightforward.

MR GEIRINGER:
I don't disagree with any of that, Sir, and in fact, in my written submissions I try to avoid the word "mana whenua" because I mean, what is it? But I would substitute it for is there needs to be a determination by the Tribunal as to who held rights over this land in accordance with tikanga?

WILLIAMS J:
Sure.

MR GEIRINGER:
And if we could both agree on that, Sir, and maybe, maybe the answer is that everybody. I would submit that given the size of the block, that would be unlikely. Given the size of the rohe, yes, maybe there's a fair chance that somebody else will say they have rights within that rohe. But given the size of the enquiry area, the idea that everybody in the whole enquiry area was

travelling great distances to come and exercise customary rights within this forest seems equally unlikely, Sir.

WILLIAMS J:
Mr Geiringer, I'm sorry, it's just not that simple. If you understand the history of hapū interactions, you'll know that these things, they're more complex than unit titles.

MR GEIRINGER:
Yes.

WILLIAMS J:
And the Native Land Court dumbed them down in order to create individual interests that were tradable.

MR GEIRINGER:
Yes including inventing the idea of mana whenua.

WILLIAMS J:
So, the problem is we get arguments in court now that are too black and white when the experts would tell you that that's not how it works.

MR GEIRINGER:
But beyond, in this case, beyond one witness without further elaboration asserting that everybody has an interest of some unknown description, we have 107 out of 110 groups that didn't bring forward any evidence of any specific interest whatsoever and then we have a decision of the Tribunal that on that basis they can award all of the land, this land to everybody.

WILLIAMS J:
Sure, I get that point. You don't need to take that any further. I'm just cautioning you about going too far in the other direction and suggesting that there are bright lines, gates and they're locked and no one is allowed across the boundary because that's very hard to establish in tikanga.

MR GEIRINGER:

I accept all of that, Sir. I didn't mean to suggest to make it look more simple than it is. I accept that it's complicated, but my submission is that it's a complicated issue with which the Tribunal to act in accordance tikanga, to act in accordance with the Treaty, needed to wrestle, and I take it no further than that.

Your Honours, those are the only parts of my submissions I wanted to draw out because they were in any way different from anyone else's. Unless the Court has any questions, given the time, those are my submissions for Ngāi Tūmapūhia-ā-Rangi.

WINKELMANN CJ:

Thank you, Mr Geiringer. So that means next we have the respondents?

MR COLSON QC:

Yes. I wonder, I haven't filed any submissions but I wonder if I can just make one point in relation to that last exchange, given it affects my client?

WINKELMANN CJ:

Yes.

MR COLSON QC:

In relation to the –

WILLIAMS J:

Thanks, Mr Colson. Can you come forward so you're caught on the transcript? When I say "caught" I mean, you know, recorded.

MR COLSON QC:

In relation your Honour's question about tuku, there were different views on which of two tuku represented Tūmapūhia's rohe, quite different views on that, it wasn't decided by the Tribunal ultimately. In relation to your Honour's question about native land titles, I think all the blocks were titled.

The Settlement Trust witnesses both historians and indirect – those members of the hapū gave detailed evidence of all the titles for every block, the people there and which hapū they belonged to and some of the connections, so there was extensive evidence on that.

WILLIAMS J:
In the Native Land Court awards?

MR COLSON QC:
Yes, it's in the Native Land Court admittedly, but it's an overlay on that and that was all contained in the Settlement Trust closing submissions.

WILLIAMS J:
Sorry, was contained in the…

MR COLSON QC:
All contained extensively in the Settlement Trust closing submissions following on from evidence that was called on it, but I just wanted to be clear on those points.

WILLIAMS J:
So the tuku…

MR COLSON QC:
I think it's two tuku which are shown on the map, one in red and one in…

WILLIAMS J:
Red, yes, that's the tukuroa (15:07:00) tuku that I'm interested in, that's the only one on the map that I've got here. But "tuku" is a transfer.

MR COLSON QC:
Yes, of course.

WILLIAMS J:
Who's transferring to whom?

MR COLSON QC:

I cannot remember precisely, I just, I remember there were two and I checked this with my clients last night, two quite different views on which the relevant was. There was one representing a much larger transfer and one a smaller transfer and the issues were to whom was the transfer and were they Tūmapūhia or not. The Settlement Trust position was it was a much smaller transfer which only took in part of the forest. But the wider point being I suppose that the Tribunal didn't decide any of these issues but there was a lot of evidence before and a lot more than is being indicated to you.

WILLIAMS J:

I see.

MR COLSON QC:

That's all I wanted to say, thank you.

WINKELMANN CJ:

Thank you, Mr Colson. So, Mr Heron.

MR HERON QC:

Forgive me, your Honours, if occasionally electronics fail. But if I could – and I'm simply addressing the Incorporation's appeal and I'm working through my written submissions. I don't have a road map but I can tell you there are 21 paragraphs that I want to draw your attention to out of a hundred and something, 175, and those 21 I'm just going to go through in order so I'm not enlarging on the written points but just picking up those which I think are most salient.

So I start at paragraph 3 and our core submission is that Justice Cooke was correct to identify that in reconsidering the Incorporation's resumption claim to the Pouākani lands. The Incorporation's lack of mana whenua in those lands will be a highly relevant consideration for the Tribunal, and that's as per the footnote at paragraph 94 but it's also at paragraph 89.

Our submission is the restoration of mana whenua was the driving purpose of the resumption protections arising from the lands case and the Incorporation, as we understand it, accepts as much in stating that section 8A contemplates in most circumstances the land will return to the mana when, and in fact Mr Mahuika put it slightly differently and said, I think today: "It will be the predominant consideration. So we simply submit Justice Cooke got that correct and, of course, sent the matter back to the Tribunal, didn't decide it himself. The same is true on the second point, the tikanga point. We won't have much to say on that. That's a matter for Raukawa other than we simply say that the High Court did not substitute its own view on tikanga and to the contrary, it expressly relied on and implied the Tribunal's we say unambiguous and firm findings on the absence of Wairarapa Māori customary interests in mana whenua in the Pouākani lands in question, the 787 acres. So that's a broad summary of our position.

If I can take your Honours to the paragraphs I wish to note starting at paragraph 86. Here we are talking about the original *Wairarapa ki Tararua Report* in 2010.

WINKELMANN CJ:
Sorry, what paragraph are you at?

MR HERON QC
At 86. So the original report of 2010, the Tribunal addressed the Incorporation's claims concerning the acquisition of the lands for public works in the 1950s and in that respect the Tribunal did not find that the Crown's taking of the 787 acres for the purpose of constructing the power stations in itself breached the principles of the Treaty of Waitangi, nor did it recommend resumption under section 8A. In fact, it said the owners would never get back the power station lands as per that footnote. Instead it found, the Tribunal found I submit, the Crown breached the principles in the process of its acquisition and, in particular, it gave inadequate notice. You've heard already it entered the lands without telling the owners. It gave inadequate notice and then its compensation was described as niggardly in the extreme. It was inadequate and therefore the

remedy, because it didn't take into account the unique qualities and hydro potential of the land and therefore, compensation was the appropriate remedy.

WILLIAMS J:
Why is the record absent on any alternatives to this site for the taking, or any alternatives to compensation by way of remedy or reparations at the time?

MR HERON QC:
Do you mean from the 2010 report?

WILLIAMS J:
Yes.

MR HERON QC:
I don't know, Sir. There is discussion as I recall of the many years of research that went into this unbeknownst to the owners and I don't know why there isn't any discussion around what alternatives there were.

WILLIAMS J:
You see, it's difficult to reach a conclusion on the necessity for this site without knowing whether there were alternatives to it. It could've been taken and it's impossible to establish whether there were other possibilities such as other Crown land close by in compensation for the loss of this land.

MR HERON QC:
Yes.

WILLIAMS J:
Which was sometimes contemplated by the Crown even in those days.

MR HERON QC:
Even in public works takings you mean, Sir?

WILLIAMS J:
Yes.

MR HERON QC:
Yes. Again, I don't know. One would imagine that those researching the best place to put a power station focused on exactly that, but I don't know as to whether alternatives were exhausted.

WILLIAMS J:
Yes, well in my experience, that's not always the case.

MR HERON QC:
We've seen other public works where that statement probably is correct, Sir. In any sense back to paragraph 87, the Tribunal recommended the Crown should reassess the compensation paid for the lands taken including compensation for the unique qualities. So back then in the Tribunal's view, it was a matter of compensation and appropriately so.

Then if I can take you across to paragraph 90, 9-0, just picking up the settlement negotiations that followed. There was a mandating process which we refer to and then as the Tribunal had recommended, direct negotiations took place with Ngāti Kahungunu and with the group that is now the Settlement Trust and, of course, also settlement negotiations with Rangitāne.

Skipping down to 92, on 22 March 2018 the Crown and the Settlement Trust initialled a deed. We don't need to go into that, but it was paused in the face of the resumption applications.

Then across to 94, the Incorporation makes its resumption application. That was initially opposed by the Settlement Trust. You've heard about the Tribunal excluding Raukawa and then Raukawa joining, and then at paragraph 100, although its preference was negotiated settlement, the Settlement Trust subsequently filed its own "defensive" resumption application, as you know.

So then if I can take you to the determination on the Incorporation's application for resumption by the Tribunal, and this is the preliminary determination of

24 March, and the paragraphs pick up at 102 but I'm going to take you to 109 where the Tribunal determined – no, I beg your pardon, you're well ahead of me, Sir – I'm talking about 109 of my submissions. We're actually talking about 282 of the document you have in front of you on the screen, so if want to go to 282 of that document. Paragraph 282 which comes from the preliminary determination.

In any event, your Honours, I rely on the quote which is reproduced in my submissions which is that the Tribunal – and perhaps I'll go up one paragraph at 108 – the Tribunal said: "We are satisfied that the return of the land to the Incorporation would not be a just outcome." It continues on at 282 and says: "We have –

GLAZEBROOK J:
We might have the wrong paragraph up, have we?

MR HERON QC:
We might. No, we're just quoting from the second sentence on, thank you, your Honour.

WILLIAMS J:
282, yes.

WINKELMANN CJ:
Probably enough if we just look at your submissions, isn't it?

MR HERON QC:
Yes. It's reproduced there, so perhaps if you just leave it as my submissions, thank you, at paragraph 109.

WINKELMANN CJ:
And that really turns on the finding which is set out earlier in your 106 about disproportionality, isn't it?

MR HERON QC:
Yes, that's certainly part of it, yes.

WINKELMANN CJ:
What else is there?

MR HERON QC:
Well, I'm coming to that at 110 because the Tribunal goes on to talk about the tikanga dimension and make findings in that respect, but in terms of proportionality those are the relevant points. Is that what you mean, your Honour?

WINKELMANN CJ:
Yes.

MR HERON QC:
I've covered the proportionality point but tikanga the Tribunal finds there is a – and this is quoted at 110 – "There is a particular tikanga dimension to the fact that the Māori landowners at Pouākani are not tangata whenua there but rather are interlopers in other tribes' rohe." That's not language the Crown uses but the Tribunal does. "There is no controversy about who may be properly characterised as tangata whenua…nor about the source of their customary connection…" My learned friend for Raukawa will address you on that, however the Tribunal goes on at 258 of its report – sorry, that's it thank you, to say, and we put that in bold, that our strong view is that ownership of land at Pouākani does not give Wairarapa Māori the status of tangata whenua there: it can and never will. They are, like Pakeha landowners in the district, manuhiri (visitors) in tikanga terms."

So those are the findings of the Tribunal in respect of tikanga and nevertheless the Tribunal, and this is 110.2 goes on to say well the recommended transfer of the Pouākani land, because we are not disposed to let the mana whenua arguments influence us against exercising our discretion in favour of

recommending the return. So that, the Tribunal is there saying well we're not going to let those arguments influence us against exercising our discretion.

WILLIAMS J:
What do you say to Mr Mahuika's argument that they're not the only things the Tribunal says about tikanga?

MR HERON QC:
Agree absolutely.

WILLIAMS J:
So what do you make of them? How do they factor in?

MR HERON QC:
I would simply echo your Honour's comments how complex it is and that the High Court simply adopts the Tribunal's findings that you have a situation of the Incorporation being manuhiri, you have tangata whenua in the case of Raukawa and Tūwharetoa, and then the Tribunal says, I'm not taking into, I'm not influenced by that, and –

WILLIAMS J:
Is your argument that mana whenua is the only tikanga principle in play here?

MR HERON QC:
No. I'm leaving the tikanga argument to my learned friend to answer.

WINKELMANN CJ:
A prudent move.

MR HERON QC:
Well far be it for me, and also the Crown, to espouse opinions on tikanga.

GLAZEBROOK J:
But you have to be, don't you?

MR HERON QC:

All we're saying –

GLAZEBROOK J:

Well I don't think you're leaving the argument to the Crown, you are actually arguing that aren't you?

MR HERON QC:

What we are arguing is that the Tribunal made the findings and on those findings as a matter of law on these facts, whether you take (a) or (B) of Mr Mahuika's, the Tribunal couldn't ignore that, couldn't put it to one side.

WILLIAMS J:

So your argument is mana whenua is the controlling legal principle?

WINKELMANN CJ:

You do seem to be arguing that, just based on what you've just said Mr Heron.

MR HERON QC:

Ah. Well, I'm simply saying that given the facts as they are found, it is difficult to understand how the Tribunal can reach the point of ignoring overriding however you want to phrase those in an administrative law sense. I'm not saying it's overriding –

WINKELMANN CJ:

Given what facts as they found perhaps might be of assistance.

MR HERON QC:

Given the fats, as I've said, the Tribunal has found that we have manuhiri, the equivalent of Pākehā landowners in the Incorporation making a claim for resumption return to Māori of land against the opposition of tangata whenua or mana whenua the strident opposition that the Tribunal can put that to one side, cannot be influenced as they say.

GLAZEBROOK J:
So is this they didn't take into account irrelevant consideration argument then?

MR HERON QC:
Well it could be that, or that they've ignored the law, A or B.

WILLIAM YOUNG J:
On a literal interpretation of what's said, reproduced at paragraph 111, they didn't take into account because they weren't influenced, that's possibly too literal an interpretation of what they said. It's perhaps easier to read them as saying they weren't, they didn't regard that as controlling.

MR HERON QC:
They didn't – well, that's self-evident, isn't it, I agree.

WILLIAMS J:
Which means you're saying it is controlling?

MR HERON QC:
Well in an administrative law sense on these facts we say –

GLAZEBROOK J:
I'm not quite sure what you mean by "an administrative law sense" that's what I'm having trouble with, because in an administrative law sense it's either a relevant consideration, it's a mandatory consideration or it's the only consideration.

MR HERON QC:
Yes.

GLAZEBROOK J:
But if it's the only consideration, that's nothing to do with administrative law. That's because that is the tikanga or the law.

MR HERON QC:

Yes, that's true, yes, and I'm not going that far. I don't feel, in my respectful submission, I need to take a position on that because on either test the Tribunal has failed.

GLAZEBROOK J:

Perhaps it's a mandatory consideration. You say they didn't take it into account?

MR HERON QC:

Yes. They weren't influenced by it.

WINKELMANN CJ:

And that means that they have themselves said that mana whenua was controlling them?

WILLIAM YOUNG J:

No, they are two issues. They obviously didn't regard as controlling?

MR HERON QC:

Yes.

WILLIAM YOUNG J:

If they're taken at their word, they didn't regard it as relevant.

MR HERON QC:

Yes.

WINKELMANN CJ:

No, I don't think you're right.

WILLIAM YOUNG J:

It's rather hard to take them at their word because they didn't go into tikanga.

WILLIAMS J:

Well, they spend quite a bit of time talking about it.

WILLIAM YOUNG J:

Yes, they spent quite a lot of time talking about it.

WILLIAMS J:

They absolutely did.

WINKELMANN CJ:

They're not necessarily in error if they don't regard it as controlling. So if they don't say, because he says he is applying the principles they found, so for them to be in error, they have to have found that mana whenua was controlling.

MR HERON QC:

Well, we don't go that far, your Honour.

O'REGAN J:

No, because they said they're not going to let it influence their decision. That's the question. If they don't let it influence their decision, then they're basically putting that to one side. I think that's the argument.

WINKELMANN CJ:

Is that what the judge said?

MR HERON QC:

That's what we're saying, that Justice Cooke quite rightly said well it is highly relevant and in fact the Incorporation themselves –

GLAZEBROOK J:

He said it is the only factor. He didn't say it was highly relevant.

MR HERON QC:

No, he says it was highly relevant.

WILLIAM YOUNG J:

Because there must be other factors. He's saying presumably it's controlling?

MR HERON QC:

Yes. Well, I can only rely on his words, which were "highly relevant".

WILLIAMS J:

He says: "It would be unlikely to be lawful to hand an asset to an entity that doesn't have mana whenua." He says: "I'm going to hand it back to the Tribunal to resolve."

WINKELMANN CJ:

Yes, he does say that.

WILLIAMS J:

"But it's very unlikely," I think was his phrase.

MR HERON QC:

I will just take you to the paragraphs because if anything turns on it, we did, I did cite them earlier. 94 is the first one, if we can get that up. So, you can see there an additional fact that: "Ngāti Kahungunu has no mana whenua over the Pouākani lands is highly relevant." So that's 94 and then if you can go back to 89, thank you, and I think this is important. His Honour says: "It seems to me that mana whenua is a very important consideration when we exercise the power it is considered."

What he also says in that paragraph is well it is a key purpose of the provisions, but the lands at Pouākani are eligible to be considered and whilst Ngāti Kahungunu have no mana whenua over these lands, the claims nevertheless qualify for consideration as a matter of plain wording.

WILLIAM YOUNG J:

He took the view that the Tribunal understated the significance either by treating it as irrelevant, we're not influenced by, or giving it insufficient weight?

MR HERON QC:
Yes.

WILLIAM YOUNG J:
So, we're going to wind up, on this basis, we're going to wind up working out what the Tribunal meant.

MR HERON QC:
We would urge you not to do that in the sense that his Honour has, Justice Cooke that is, has sent the matter back to the Tribunal and rightly so on other grounds as well, on the "relates to" point which is not before the Court.

WINKELMANN CJ:
So you say that the judge did no more than say that the Tribunal was in error. You say it wasn't influenced by the mana whenua?

MR HERON QC:
In effect, that's right.

WINKELMANN CJ:
And what about the things he carries on saying thereafter, the second related aspect to this argument?

MR HERON QC:
Well, I think I will come to that.

GLAZEBROOK J:
I'm still not entirely sure. So you are saying that you take the Tribunal at its word because weight wouldn't be an administrative law consideration to go back.

WINKELMANN CJ:
No.

GLAZEBROOK J:

In administrative law terms weight is not an area of law.

MR HERON QC:

Weight is for the Tribunal.

GLAZEBROOK J:

So lack of giving it sufficient weight is not an area of law.

WILLIAM YOUNG J:

Unless a measure of weight is required.

GLAZEBROOK J:

Well, exactly, which I think is what the judge was actually saying.

MR HERON QC:

Or, alternatively, that it is beyond the bounds of reason in the words of President Cooke from not only the *Lands* case but others, i.e. it's irrational or unreasonable.

GLAZEBROOK J:

Well, but that wasn't the finding, was it?

MR HERON QC:

No, not of Justice Cooke.

WINKELMANN CJ:

So in your submission, paragraph 108 of Justice Cooke's judgment is the pivot paragraph, is the critical paragraph? It's the paragraph upon which his reasoning rests?

MR HERON QC:

Well, yes, and 109 I would say, but…

WINKELMANN CJ:
It makes clear what he's finding. He's finding that they didn't have regard –

MR HERON QC:
Yes, that's right, because if the Tribunal had articulated in the way that has been discussed and if it had said that ea, et cetera, prevailed over mana whenua, et cetera, or if these other arguments, but the Tribunal said what it said. So the discretion was being exercised notwithstanding the tikanga.

Now, again, I'm not leading the charge on that, Raukawa are, so hopefully I've been clear on that.

WINKELMANN CJ:
It's putting a lot of weight on the words: "Not disposed to let the 'mana whenua arguments' influence it against exercising its discretion," but there we are.

MR HERON QC:
Yes. Now where was I? I think I was at 111. Yes, 111 of my submissions. So the Tribunal expressly acknowledged the return of the land at Pouākani would not remedy the loss of tribal land within the Wairarapa iwi rohe, but nevertheless the "happenstance" that the land now had on it, the valuable hydroelectric infrastructure, so some $580 million worth, the land itself, the evidence was, was around 18 or so million dollars. So we have to be frank, as you would want counsel to be, that this was all about the value of the power station and the Tribunal was clear about that, and we've inserted the quote there about "happenstance", that the land is now very valuable. Well, it's not actually the land, it's the power station on it, but because the two come together it is very valuable.

WINKELMANN CJ:
So where are you at in your written submissions?

MR HERON QC:

Yes, so that was 111, and then I'm just going to the conclusory paragraphs at 123 through to 131 and those are the only further ones I want to emphasise. At 123 we make, I think, a relatively small change the Incorporation may in its written submissions be asserting an entitlement to resumption. Obviously, the Court knows that there's a discretion and there are options there. Relevant here, we say, will be the earlier determination that return of the lands would be disproportionate to the Incorporation's claims and the prejudice suffered.

The Incorporation, this is 124, submits the High Court was wrong to say that section 8A requires the land can only be returned to mana whenua, and we submit that that's not what the Court said and we respond to the argument of the Incorporation that it was prevented from having its qualifying claim heard and determined. Well, again, we submit that's not what the Court did. It actually sent it back and said within this guidance you have a qualifying claim, and so at 125 we make that point, and we've made the point in the rest of that paragraph. Again, 126, we've made that point about "highly relevant" and we submit there's no error in Justice Cooke's approach.

At 127, again, we've made the point about "highly relevant". We say it's evident from the history of the provisions, founded in the singular importance of belonging to land for Māori. It is difficult to see how the group's customary association to the land (and the nature and strength of the same) would not be highly relevant to whether the land itself is required to be returned, and that's the wording of the section, and we say the incorporation effectively acknowledges that.

Talk briefly at 128 about tikanga, won't say any more about that but simply that Justice Cooke was relying on the Tribunal's assessment rather than making his own.

At 129, the Crown does not understand the Incorporation to be arguing it would be lawful for the Tribunal to have acted contrary to the relevant and undisputed

tikanga, but rather it's saying, we submit, the tikanga was not clear, and the Tribunal – or was not clear in the way the High Court assumed and that the Tribunal in fact –

GLAZEBROOK J:
So what's the undisputed tikanga?

MR HERON QC:
Well, that which the Tribunal stated that the Incorporation were manuhiri, were the equivalent of Pākehā landowners, and then went on to talk about who was tangata whenua. That's in – I'll get you the paragraph reference – because the Tribunal actually –

GLAZEBROOK J:
But that has to be saying, doesn't it, that the tikanga means that mana whenua is controlling, doesn't it?

MR HERON QC:
Well, I'm simply quoting what the Tribunal themself said as to what was clear about the tikanga. So they went through this very extensive exercise and said there was no doubt about it.

WILLIAMS J:
One question, I don't know whether you want to answer this or whether it's for the Raukawa Trust, but is whether tikanga permits of any exceptions to what you say is a hard rule?

MR HERON QC:
Can I pass that?

WILLIAMS J:
Bat that away, straight to touch? Fair enough.

MR HERON QC:

Yes, if you wouldn't mind, Sir. I mean if you force me to answer I will but if I can avoid it…

WILLIAMS J:

Far be it from me, Mr Heron.

WINKELMANN CJ:

So it's for Mr Finlayson?

GLAZEBROOK J:

I'm still having trouble working out what exactly your argument is. That's the trouble I'm having.

MR HERON QC:

In what sense?

GLAZEBROOK J:

Well, I don't see how you can skirt round these issues.

MR HERON QC:

Well…

WILLIAMS J:

Watch me.

GLAZEBROOK J:

Because I don't understand your –

MR HERON QC:

That puts it squarely.

GLAZEBROOK J:

I mean you may be able to but can you put it into – because what's the error of law? I can understand you say they didn't take it into account at all. They put it to one side, so they ignored a relevant consideration. Fine.

MR HERON QC:

Yes.

GLAZEBROOK J:

So what else is the argument?

MR HERON QC:

Well, if, in Mr Mahuika's I think A or B, I'm sorry if I don't get – that it – the tikanga is the law, and Justice Cooke talks about this scenario, then they are bound by a return only to mana whenua and –

GLAZEBROOK J:

All right, so it's controlling.

MR HERON QC:

Controlling, yes, but I –

GLAZEBROOK J:

Okay, well, there we go. All right. Now you've made your argument. That's fine.

MR HERON QC:

Well, with respect, I don't have to choose because on either one the Tribunal fails.

WILLIAMS J:

Why on the first one?

GLAZEBROOK J:

No, I just need to understand what your argument is at the moment –

MR HERON QC:
Yes, and my argument is –

GLAZEBROOK J:
– and your argument is they didn't take into account a relevant consideration and they made an error of law because they didn't see mana whenua as being controlling under tikanga.

WILLIAM YOUNG J:
There are two arguments there.

GLAZEBROOK J:
Well, two arguments, yes, exactly.

MR HERON QC:
Two arguments. The second one I don't make.

WINKELMANN CJ:
Can you just go through what those two arguments are again because people around here –

GLAZEBROOK J:
You don't have to have two arguments, you can have one, but I just need to know what they are.

MR HERON QC:
Yes, well, I certainly have the first.

WINKELMANN CJ:
Can we slow down because everyone is speaking too fast for me?

WILLIAM YOUNG J:
Is one that tikanga was a relevant consideration, perhaps a weighty relevant consideration, and the Tribunal was wrong to say that it was not influenced by it?

MR HERON QC:

Yes.

WILLIAM YOUNG J:

Secondly, the Tribunal should have said it's a controlling consideration and they obviously didn't consider it in that light?

MR HERON QC:

Yes, and in – I'm sorry if I'm being obtuse, my apologies, but on either of those matters of law, I'm not taking the point, but on either of those the Tribunal hasn't met the law or followed the law. My learned friend may wish to elaborate.

WINKELMANN CJ:

So is it those really mirror Mr Mahuika's A and B?

MR HERON QC:

Yes, they do.

GLAZEBROOK J:

That's fine. It's just you were denying – you…

WILLIAMS J:

Well, there was quite an important difference in principle on the (a) which is the mandatory relevant but not controlling.

MR HERON QC:

Yes. I saw it as being quite –

WILLIAMS J:

Yes, yes, they are distinctive. On the mandatory relevant, he did not say mandatorily relevant in the sense that you need a compelling reason to set it aside and that's the substance of what you are saying.

WINKELMANN CJ:

Who did not say?

WILLIAMS J:
Mr Mahuika.

MR HERON QC:
Yes, I agree he didn't say that and I agree –

WILLIAMS J:
You do say that?

MR HERON QC:
I do say that, yes.

WILLIAMS J:
So it's either a compelling, sorry, a special consideration that can be set aside only for a compelling reason, or it's controlling and there's no way out?

MR HERON QC:
Well, that's another way of putting I suppose. I'm not certain that's necessarily – I need to go there as to whether it's binary or not.

WILLIAM YOUNG J:
It's sufficient to say it's a weighty consideration?

MR HERON QC:
Well, yes, and that's effectively what Justice Cooke said.

WINKELMANN CJ:
And what does the word "weighty" add to it?

MR HERON QC:
Well I suppose –

WILLIAM YOUNG J:
It really has to show it's engaged with them in detail.

WINKELMANN CJ;
It has to square up to it in detail.

MR HERON QC:
Yes, you have to square up to it.

WINKELMANN CJ:
In TTR terms, in *Trans-Tasman Resources* terms it has to show it's squared up to it?

MR HERON QC:
Yes, squared up to it, yes. A bit unlike me in the questions Justice Glazebrook was asking me, although I don't accept that, but you most certainly had that view.

WINKELMANN CJ:
Yes, it's a presentational error to say you're not dealing with something when you are dealing with it.

MR HERON QC:
Well, it maybe nuanced, but, thank you.

WILLIAMS J:
So, what would you say was a compelling non-tikanga reason for nonetheless making the transfer?

MR HERON QC:
Again, your Honour, would you allow me to pass that to Mr Finlayson for Ruakawa because I really don't feel either qualified or appropriate?

WILLIAMS J:
That's not a tikanga question, that's another compelling considerations question because what we do know is the Tribunal said: "We're putting mana whenua to one side because Ruakawa and Tūwharetoa have settled, so they aren't going to get it and because of the terrible nature of the role as these people suffered

in respect of their lands in Wairarapa and then in the taking of the land for the barrage." So, you obviously would say those two things are not compelling enough?

MR HERON QC:
Well, no, they're not because the restoration of Wairarapa's grievances won't be restored by the return of land in Pouākani. The restoration, as the settlement –

WILLIAMS J:
Well, that's not what Mr Seddon thought in 1903 or whenever it was.

MR HERON QC:
No, that's right, quite wrongly.

WILLIAMS J:
My question is what would work on the hypothetical?

MR HERON QC:
Well, if I understand the hypothetical, should I answer this way, that if the Tribunal was required to do something by the statute and that was contrary to tikanga, then it would have to square up to that, interpret and perhaps use interpretative aids and purpose. But even then, if it was required, then it would have to do it and that would be my exceptional circumstance.

WILLIAM YOUNG J:
But, in a way, on the approach of the judge in the High Court, this is an issue with the Tribunal has to square up to itself?

MR HERON QC:
Yes.

WILLIAM YOUNG J:
It has to address the issue of tikanga, of the return to an entity that doesn't have mana whenua in a way that goes beyond saying, and this is the problem with it, but goes beyond saying: "We're not influenced by it."

MR HERON QC:
Yes.

WILLIAM YOUNG J:
And the problem, you know, for me anyway is what do they mean by "we're not influenced by it?"

WINKELMANN CJ:
Because, on the face of it, it doesn't look like they really mean we didn't turn our minds to it because they did turn their minds to it. They grappled with it very seriously.

MR HERON QC:
Yes, that's right, they grappled with it, but they put it to one side in terms of weight with respect.

WILLIAMS J:
Well, they said it's not going to control the situation. They said: "We're aware of the importance of mana whenua, but for these other reasons we do not consider it should control our decision."

MR HERON QC:
Well those are your words. The Tribunal itself said: "Was not disposed to let the mana whenua arguments influence us against exercising our discretion." So it didn't use the word "control".

WILLIAMS J:
No, but that's what it meant.

WINKELMANN CJ:
It does seem to me a given.

WILLIAM YOUNG J:
It's not what the Judge meant because he didn't say it was controlling.

MR HERON QC:
The Judge didn't say that either.

WILLIAMS J:
Well, oh dear, okay.

WINKELMANN CJ;
The Judge read it as saying that they put it to one side when they weighed up matters.

MR HERON QC:
Yes.

WILLIAMS J:
Well, they clear did. They said that. But before they put it one side they heartached about it.

MR HERON QC:
Yes, that's true.

WILLIAMS J:
So that must mean they said: "We've been heartaching about this and we do not think it should control the situation."

WINKELMANN CJ:
Yes, the issue is whether they put it to one side when they were weighing up matters or they put it to one side at point of decision and Justice Cooke decided they would put it one side when they were weighing up matters.

MR HERON QC:

Yes, and it might have been that, well, when it goes back they can rewrite their determination in a way that is clear on that subject.

GLAZEBROOK J:

Well, unless it's a controlling consideration and I don't know that you get an error of law unless it's a controlling consideration because if it's only a relevant consideration and you have considered it, then usually you would say that that's all you're obliged to do.

MR HERON QC:

Yes.

GLAZEBROOK J:

So I'm not sure you do have two arguments. I think it has to be all or nothing.

MR HERON QC:

All right, well I won't necessarily accept that but I understand your point.

GLAZEBROOK J:

I'm just trying to unpick what the arguments might be.

MR HERON QC:

Yes, precisely. So I was at 130 which I've really covered. Yes, I've covered all those points and I've also really covered 131 that "relates to" is not actually before the Court as you know. It's not in the appeal and therefore, it seems that all parties accept the Court's finding on that and that was in fact issue three, so that may, or that was the substantive point in issue three, so that may influence this court.

WILLIAMS J:

The question is what "relates to" directly "relates to" means because it could mean the circumstances of the transaction relating to this land, or it could be

other aspects of Crown action which affected this particular land in some way systemically. That's the failure to create reserves point.

MR HERON QC:
Yes, exactly. I mean that was an argument that was had in the Tribunal. It was had in the High Court. No party appeals the High Court.

WILLIAMS J:
But my point is that if that is the position, if the latter failure to make sufficient reserves is within the category of "relates to", then it's a distinction without a difference.

MR HERON QC:
And, well, we're left with the High Court decision at the moment at least and, of course, my learned friends rely in the paragraph 97 I think which has the relevance of in exercising its discretion Justice Cooke says the Tribunal is entitled to have regard to other lands in terms of loss other lands which maybe he is saying the same thing as your Honour. Clearly, the Incorporation has made a decision about that.

If I can just have a moment? There is just one last point and it's a sequencing point that the Tribunal at paragraph 215 of the Tribunal report. It's the preliminary determination. Sorry, if we can just get that number. I will get that number for you. It's 502.009 and the relevant paragraph I want you to be taken to is 215 which is at page 502.0174. Thank you. Just in terms of that discussion around the way in which the Tribunal approached it, you will see at 215 the Tribunal decides there is proportionality between the prejudice suffered by Ngāti Kahungunu and the value of the subject land, both forest and at Pouākani: "We therefore consider we should make binding recommendations for the return to them of all the lands." Now, at that point it hasn't considered tikanga and that may give you a clue then as to whether it really does consider it before reaching its conclusion.

WINKELMANN CJ:

Are you suggesting that because they set out their consideration of tikanga later that they haven't taken it into account by that point in time? You know, they worked over this report. I'm just not quite clear.

MR HERON QC:

It just seems on its face that they've reached a conclusion that they ought to return things before they get to consider tikanga now.

WINKELMANN CJ:

But at the beginning they've set out their methodology in decisions, so it's quite hard to say just because the order of the things, they write things if that's the case.

MR HERON QC:

True.

WILLIAMS J:

Also, they had a special wananga on tikanga.

MR HERON QC:

There's no doubt that they discussed it and considered it. I don't argue with that.

WILLIAMS J:

Well, that in-depth and on their own account, or their own volition if you like.

MR HERON QC:

Yes. Unless there are any questions, those are my submissions?

WINKELMANN CJ:

Mr Finlayson, I'm conscious we're near the graveyard shift of eight minutes before four.

MR FINLAYSON QC:

No, no, it's fine. I'm very happy to start. I can't deal with all the questions that Mr Heron has bequeathed to me. It reminds me of days gone by.

WINKELMANN CJ:

He's got a very good is it a backhand or forehand in your direction.

MR FINLAYSON QC:

Yes, but there are a couple of preliminary points if it pleases the Court I would like to make. The first is very briefly in answer to a question from Justice Williams about whether other tikanga could possibly apply. The answer is theoretically yes, but tikanga is proved as a matter of fact and I refer to the decision, for example, of Justice Palmer in *Ngawaka v Ngāti Rehua -Ngatiwai Ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 which is referred to in the bundle of authorities.

WILLIAMS J:

Not in the Waitangi Tribunal?

MR FINLAYSON QC:

No, I'm talking as a general principle.

WILLIAMS J:

But not in the Waitangi Tribunal?

MR FINLAYSON QC:

In the Waitangi Tribunal obviously there is a slightly different approach that is taken.

WILLIAMS J:

Well, they're experts.

MR FINLAYSON QC:

Yes, but I'm referring to the general principle about tikanga.

GLAZEBROOK J:

Why would that be the case because foreign law is proved as a matter of fact, but if tikanga is the law of New Zealand, then in fact it shouldn't be necessary to prove it is a matter of fact? Now, of course, one of the reasons it is proved as a matter of fact is the total inability of the ordinary courts to make any findings on that in any event in terms of expertise.

MR FINLAYSON QC:

With respect, that's a very fair comment and it's one that maybe can be resolved in years to come as people become more accustomed to dealing with these issues, but the point that your Honour has made is, in my submission, is exactly on point and very fair.

WINKELMANN CJ:

Which takes you back to Justice Williams' question which isn't the approach in the Waitangi Tribunal because they have experts of fact who sit on the Tribunal?

WILLIAMS J:

Experts of law.

WINKELMANN CJ:

Law, yes, law, sorry. Experts in tikanga.

MR FINLAYSON QC:

Yes, but the fact of the matter in this case, I've stated the general principle and then said even in the Tribunal there were matters relating to tikanga which were not adduced and the key principle so far as Ruakawa is concerned is the principle of tikanga and the application of mana whenua and that we say will be developed in submissions a supremely important tikanga factor that is not likely, if at all able to be discarded when making a decision in relation to resumption.

WILLIAMS J:

So, did Raukawa not appear in the Tribunal?

MR FINLAYSON QC:

Raukawa did appear in the Tribunal and I will give you the procedural history in relation to Ruakawa because they had to fight every step of the way to get involved, including coming to the High Court to judicially review the Tribunal.

WILLIAMS J:

Quite, that's what I thought. So they put some evidence in on mana whenua?

MR FINLAYSON QC:

And I'm going to deal with those issues right now because there are two important affidavits from the late Nigel Te Hiko that deal with precisely those issues in relation to who are Ruakawa, where do they stand in their land, what are the boundaries of their land, how did they acquire that land and what is their position today.

WILLIAMS J:

I thought you were saying that the Tribunal didn't have evidence of this nature when both Gloyne and Te Hiko gave detailed evidence on these very points.

MR FINLAYSON QC:

I'm talking about in answer to your question a theoretical abstract question about could there be other tikanga and I've responded to that, but of course, when dealing with the Raukawa evidence, which I'm coming to now, I will say to your Honour that there was an enormous abundance of tikanga evidence that the Tribunal could have had regard to very carefully. It was there. It was overwhelming evidence of the tikanga in relation to Ruakawa.

WILLIAMS J:

Right, but there was no debate about who had, well, there was debate about who had mana whenua generally, but there was no debate that Raukawa was in that mix as being a mana whenua holder.

MR FINLAYSON QC:

Oh no, there is no difference.

WILLIAMS J:
The only question was the weight to be attached to that.

MR FINLAYSON QC:
Correct and the same position applies to Ngāti Tūwharetoa. They filed a memorandum yesterday where they expressed their support for Raukawa's position. I will come to that. We are in that part of the country where there are close relations between Ngāti Maniapoto, Raukawa, Ngāti Tūwharetoa and Te Aroha and the lands that I will talk about tomorrow morning are in the southern part of the rohe of Raukawa where necessarily there are those links with other iwi.

The first point I want to make is in relation to who are Ruakawa because in my submission, that is a very important point and there are two affidavits which I refer your Honours to both from the Tribunal and both by the late Nigel Te Hiko. The first is his affidavit dated 22 May 2017 and that is to be found at 510.1922 and I particularly refer to 1925. Raukawa descent from Hoturoa, the captain of the Tainui waka. In his affidavit Mr Te Hiko outlines the takiwā and when I addressed your Honours this morning I briefly referred to the various pou that identify Raukawa. The takiwā is divided into four pou whenua. Those pou whenua are Maungatautari to the north, Te Kaokaoroa-o-Pātetere to the east, Wharepūhunga to the west and it's the relevant one here, Te Pae o Ruakawa to the south and the area at the heart of this appeal known as the Pouākani area falls within that southern section Te Pae o Ruakawa and this is described by Mr Te Hiko in his statement at page 1929.

He does say, scrolling down, that the name Pouākani was ascribed to a pou raised in the area that delineated the eastern boundary of the rohe pōtae (15:59:??) and he was not aware of any kōrero that ties the name Pouākani to Ngāti Kahungunu.

The second affidavit that I refer you to is Mr Te Hiko's evidence and that is at 5.12 starting at page 2318. It's his third affidavit of 2018. I particularly refer you to page 2321 where he talks first about the principle of take whenua and

ahikāroa, and interests in land that could only be obtained through recognised take and he talks about the various take whenua, including take kitenga, take raupatu, take tuku, and take taunaha, and he sets those, and then in the course of the affidavit he explains those principles and the way in which lands came into the rohe of Raukawa, and I refer you to page 2322 where he talks about the principle of take kitenga. At page 2323, he then deals with the principle of take raupatu. 2325, the principle of take taunaha, and 2327 ahikāroa, the idea of the continuous occupation for fires that continue to burn. He says at 6.3 it's not an immediate thing. It's what develops over generations, the maintenance of the fires over time rather than the lighting of fires.

Both of those affidavits therefore provide a very good background of who Raukawa are, where they came from, what are their boundaries and what are the interests that they have had in the land for generations.

Also in this affidavit, and I refer to it now because my friend, Mr Mahuika, talked about certain marriages when he was making his submission today, at page 2330, I'll briefly mention that now, the concept of strategic marriages. It has been a claim that has been made from Wairarapa Moana from time to time. It's also adverted to in the affidavit of Sir Tipene O'Regan, but the evidence from a Raukawa witness is provided by Mr Te Hiko in this affidavit and he talks about traditional strategic marriages being an important part of establishing a take to the whenua and the purpose of those marriages, and then gives an example of such a marriage that took place. If you scroll just a little further beyond 2331 and into 2332, he is not aware of any kōrero relating to these sorts of marriages in relation to Wairarapa Moana, and so in my submission those affidavits are very important to explain who exactly Raukawa are.

The second preliminary issue is why is Raukawa in this court today and ever since the resumption application was filed in the Tribunal Raukawa have taken a principled stand on this issue and the resumption of the 787 acres at Pouākani. They do so out of no commercial or personal interests but from a principle position in relation to tikanga and their anxiety to ensure that having settled with the Crown in 2012, which settlement was given effect to in

legislation passed in 2014, they are not subject to a contemporary breach of the Treaty. So the process for them has been time-consuming, very expensive and very distressing, but they take the view they have an obligation to all Raukawa whānau to safeguard their position.

Earlier today Your Honour Justice Williams asked why a tikanga process has not been followed, particularly when tikanga can be flexible enough to deal with some of these issue. Raukawa says, with respect, that is a very fair question, it has been prepared to kōrero, but from the very start has been excluded by the Incorporation. Mr Heron has referred you to the decision of Justice Grice involving the Waitangi Tribunal being taken to the High Court by Raukawa and the decision that was made that they had been wrongly excluded and, as a consequence of that they became involved. But every step of the way they have had to fight so that they can state their position in relation to this resumption application.

WINKELMANN CJ:

Now, Mr Finlayson, is that a convenient point to finish for the day, or have you just not finished that point.

MR FINLAYSON QC:

I could finish point 2 so that I can start tomorrow on some basic facts.

WINKELMANN CJ:

Yes.

MR FINLAYSON QC:

As is apparent from Raukawa submissions – and this is extremely important to say in front of people from the Wairarapa – Raukawa has huge respect for the people of the Wairarapa, understands their history and the dreadful wrongs that have occurred to them over many years. It says that the people of the Wairarapa are entitled to a just resolution of their grievances but state the principle that this cannot happen in such a way which would be contrary to tikanga and not in accordance with the principles of the Treaty and, putting it bluntly, resumption of the 787 acres would offend those fundamental principles

so far as Raukawa is concerned. And it's stand is supported by Ngāti Tūwharetoa, which yesterday filed a memorandum in this court acknowledging Raukawa's approach and saying they support the tikanga arguments advanced by Raukawa that the whenua should not be resumed to an iwi with no ancestral connection. I can leave it there and start with some basic facts tomorrow morning.

WINKELMANN CJ:
Thank you, we'll adjourn.

COURT ADJOURNS: 4.07 PM

COURT RESUMES ON THURSDAY 10 FEBRUARY 2022 AT 10.04 AM

MR FINLAYSON QC:

May it please the Court, at the end of the day yesterday I said I was going to start on a couple of preliminary points. Before I do, can I simply refer your Honours, just for the sake of completeness, to the decision of Justice Grice in the case of *Raukawa Settlement Trust v Waitangi Tribunal* [2019] NZHC 383, [2019] 3 NZLR 722 and refer you to two paragraphs. It's at BOA0466, and the two paragraphs are paragraph 11 at BOA0470 which records that Wairarapa Moana opposed Raukawa's application, and the second one, paragraph 72 at BOA0482, which is a reference to the importance of Raukawa being heard to voice its claims summarised in the affidavit of Ms Eparaima for Raukawa, paragraphs 29 and 30, "…having the ability to participate taken away from us, merely two months before the hearing was set down, and over a year after we had filed evidence, is a complete breach of our rangatiratanga and principles of natural justice. It is history repeating itself if our voices and our views are not heard in relation to this land," and then paragraph 30 which you can read for yourselves. So that deals with that issue.

The second matter I seek to deal with was raised by Justice Williams at the opening session yesterday. I've since spoken to Mr Mahuika. What I could do, if it's helpful, is rather than have you taking down tortuous notes about Pouākani C3 is reduce it to a memorandum, but if I can summarise the point for you in this way, the Pouākani lands transferred to Wairarapa Māori appear to be an amalgamation of various land that the Crown acquired out of a number of blocks in a number of ways. This includes, your Honour, by both survey costs and purchase, and that's why it's very hard to follow when looking at the land block titles.

There is evidence I can refer you to, the affidavit of James Brent Parker, and I can – but maybe the sensible way of dealing with it, it's not my problem but I've undertaken the burden of getting to the heart of the matter, is if I prepare a brief memorandum on the subject and then let my friends look at it and then I can put it into the Court.

WINKELMANN CJ:
That would be helpful, thank you.

MR FINLAYSON QC:
Therefore the first substantive point I want to make this morning is that, in my respectful submission, it is very important to focus on what this case is about and what it's not about because it's not about the 20,000 acres that were the subject of the 1915 Crown grant, but one needs to focus on the 787 acres which were taken under the Public Works Act admittedly belatedly in the late 1940s. Although the land, and this is summarised in the submissions but I will say this, although the land was transferred in 1915, it was not used or occupied until at least 1945 after the construction of the hydroelectric works began. Any meaningful connection with the land can only have been after 1945. In relation to the land which is the subject of the application for resumption, the land was never occupied by Wairarapa Māori.

At paragraph 55 of the submissions for the Incorporation, the Incorporation says that Wairarapa Moana have been very clear they don't claim mana whenua over the lands they now occupy and they certainly haven't presented evidence to suggest they are tangata whenua or that the Incorporation or its membership in mana whenua. They say, however: "That by virtue of the Crown grant, they have come to treat the land as if it were ancestral land." Their words not ours and, as Raukawa say in their submission, that's impossible.

While there may be connections with the broader 20,000 acres that have started to develop since 1945, an example would be urupā, the fact of the matter is that cannot be said about the 787 acres. The reality is there have been no connections at all by Wairarapa Māori with those 787 acres. At most, there was a bare legal title which they held from 1915 until the time of the Public Works Act.

WILLIAMS J:
Can we just check the facts on that?

MR FINLAYSON QC:

They never visited the land, let alone developed anything. I beg your pardon?

WILLIAMS J:

You need to be sure of the facts on that. Are you saying that prior to notification, that 787 acres had already been fenced off by the Crown?

MR FINLAYSON QC:

It hadn't been – I'm not saying it had been fenced off. I'm saying what is the connection between Wairarapa Māori and that land. The land in general I don't think there's any dispute was largely inaccessible and that's no good reflection on the Crown and there was no ability to access it. What happened was that in the 1940s there appeared to be a need so recognised by the Fraser government for the development of hydroelectric works and the works began and the way workers got access to the land was by barge initially.

WILLIAMS J:

Quite.

MR FINLAYSON QC:

So, it wasn't fenced off.

WILLIAMS J:

Your submission was that effectively no Ngāti Kahungunu Māori ever went on that 787 acres. Now, what's your evidence for that?

MR FINLAYSON QC:

I'm saying that there was no connection with the land. There was a bare legal title and there is no evidence to that effect of visitation of the land.

WILLIAMS J:

Well, there's no evidence that they didn't either.

MR FINLAYSON QC:

Well, I can't point to any evidence that they didn't. What I can – the points that I have made illustrate the very exiguous nature of the connection with the land until the land was opened up for development and that was only because the Crown had developed roads because, as I said, the initial work was done by barge.

WILLIAMS J:

Yes, yes, I understand that, but your point was to say you can treat the 787 separate, separately, to the remainder of the 20,000 acres because Wairarapa Māori went to Pouākani after the commencement of the works, therefore, they could never have been on that 787 acres. For that to be true, the Crown would've had to excluded, had to have fenced off that 787 acres from the very start. What's your evidence for that?

MR FINLAYSON QC:

But the point I am making is that it's a very dangerous game to start conflating the trail of tears in Wairarapa with the development of the broader 20,000 acres in the 1950s, '60s and so on and seek to ascribe to the 787 acres those same principles because it's not true.

WILLIAMS J:

Well, that's my point, why is not true?

MR FINLAYSON QC:

And the point is that it is clear, according to the evidence, that there were serious access issues from 1915 to the late 1940s and indeed, when the hydroelectric works began, the government workers got access by barge and then the roads were opened up and access was granted, so that's the evidence.

WILLIAMS J:

Right, but we know that when Fraser first arrived there and discovered that the locals had no idea, by the locals I mean Wairarapa Moana, had no idea the land had been taken.

MR FINLAYSON QC:
Yes.

WILLIAMS J:
He was obviously talking to Wairarapa Moana people to have come to that conclusion.

MR FINLAYSON QC:
I don't know the nature of the discussions, but he simply said to the government officials: "Well, this is not very satisfactory, you'd better go and talk to those people."

WILLIAMS J:
Yes, well he found out that they hadn't been talked to. One can infer that there was someone there from the local land owning community who may have come up on the barge with him.

MR FINLAYSON QC:
Or where he spoke to them it could've been in Wellington.

WILLIAMS J:
Apparently it was at the site. During his site visit according to the report.

MR FINLAYSON QC:
Yes, and we don't know the exact purpose of why they were there were talking to him at that time.

WILLIAMS J:
No, but what we do know is they were there. I think we can infer that.

MR FINLAYSON QC:
Well of course they were there because they had a legal title. The question is the extent to which they were there. Bearing in mind the factors I have already mentioned, I submit to you that it was an exiguous presence at best.

WILLIAMS J:
Yes, but you don't have any evidence to suggest that they never visited that land.

MR FINLAYSON QC:
I have no better evidence than what's already before the Court.

WILLIAMS J:
Right, okay.

MR FINLAYSON QC:
The Tribunal at paragraph 258 state their strong view that ownership of the land at Pouākani does not give Wairarapa Māori the status of tangata whenua. I think we covered that yesterday, and, as it said, they are like Pākehā landowners in the district Manuhiri in tikanga terms.

I want to say something about the role of the various parties. I briefly referred to the Tūwharetoa Trust yesterday and Ms Feint has asked me that I make it abundantly clear to your Honours that they have filed a memorandum in the court –

WINKELMANN CJ:
Yes, we have that.

MR FINLAYSON QC:
They acknowledge Raukawa's principle position on the issue of tikanga, they take a slightly different approach on interpretation issues, and they also emphasise mana ā hapū. I don't know that they're necessarily at odds with Raukawa on that issue, as Raukawa's view has always been that hapū and marae are acknowledged and hold mana and that marae and therefore hapū consciously and deliberately chose to come together to share and acknowledge the strength of unity as the representation of iwi, but I don't know that too much turns on it. I have on behalf of Tūwharetoa referred to their memorandum, but particularly their support on the tikanga issue.

I also need to refer, because of the late filing last week of a memorandum by the Pouākani Claims Trust, it's taken issue with Raukawa's submission at paragraphs 32 to 36. My understanding is that the Trust has on several occasions filed memoranda and sought interested party status. It has at no time provided evidence, let alone evidence of tikanga, only Raukawa has provided evidence from kaumātua and kuia and I referred to some of that yesterday. All that Raukawa has pointed out is that the Trust is not a hapū representative body, the Trust represents the descendants of individuals, and that, other than the evidence provided by Raukawa, no evidence has been provided regarding the views of kaumātua or kuia as to either or iwi or hapū views, and so I say, with respect, the Incorporation's submissions at paragraph 63 are wrong.

There is an issue which may arise – and I cover it off for the sake of completeness – whether there could ever be some kind of grant of mana whenua status like the Trust seems, at least by implication, to be saying or doing for the Incorporation, and Raukawa submit that, certainly in theory, tikanga may provide for a tuku of customary interests which may generate mana whenua connections. I recall well the tuku that was given to, by the iwi in the Kennedy Bay area to Ngāti Porou ki Hauraki, and that's specifically referred to in the Marine and Coastal Act as being a tuku, a customary grant, post-1840. But that's a customary relationship and it's not something one would expect from a corporate entity like the Settlement Trust assigning or granting that status to another corporate entity like the Incorporation, and in customary terms my understanding and instructions are that before such a transfer took place there would be a lot of discussion, a lot of kōrero about this, including waiata and haka, and of course there is no evidence before the Court of any of that. The Incorporation is in Pouākani because of a Crown action, not a traditional one, and the idea of some kind of tuku to validate a Crown action is, with respect, contrary to principle and wrong. I now want to turn to –

WILLIAMS J:

It would be, you accept, wouldn't you, that it would be possible for Ngāti Raukawa and Ngāti Tūwharetoa, if they wished to, by means of an agreement from hui, probably accompanied by kōrero, waiata and haka, to support the transfer by its own tuku, on terms, of course, as tuku always are. It would be possible for the parties to come together and validate this action in accordance with tikanga if they so wished and could agree.

MR FINLAYSON QC:

Oh, I think that, and Sir Tipene O'Regan says exactly that in the closing paragraphs of his affidavit.

WILLIAMS J:

Yes, he does.

MR FINLAYSON QC:

So there is no big deal about that at all.

WILLIAMS J:

It would be a pretty big deal –

MR FINLAYSON QC:

No, not big deal. It would be a big deal, but no, I don't take issue with the proposition your Honour has put to me and simply say that has never happened and indeed, the reason why it's never happened, or we haven't even begun the kōrero, is because of the mean-spirited actions of the Incorporation in relation to Raukawa.

WILLIAMS J:

It's not beyond the bounds of possibility though, is it?

MR FINLAYSON QC:

Not beyond the bounds of possibility, well it's idle to speculate, but I would say in theory, not beyond the bounds of possibility.

Can I just mention one thing, and it's referred to the in evidence of Mr Te Hiko, and it's a small nomenclature point but I will raise it nonetheless with some care so as not to offend your Honour? Raukawa are Raukawa. They don't use the term "Ngāti Raukawa".

WILLIAMS J:
Don't they?

MR FINLAYSON QC:
No. There's Raukawa ki te Tonga which is the iwi where some people came from.

WILLIAMS J:
The same people?

MR FINLAYSON QC:
The same people, but they say any indication that Ngāti may say they are part of Raukawa would be resisted. They say they are Raukawa.

WINKELMANN CJ:
Mr Finlayson, can I just clarify your position? Are you saying that we can basically put aside the memorandum from the Pouākani Claims Trust because they didn't file evidence to support, to show that they are actually supportive, that their kaumātua and kuia are supportive of the position of Wairarapa Moana?

MR FINLAYSON QC:
Correct. They've dropped in from time to time to file memoranda, seek interested party status. They haven't actually provided any evidence of anything.

WINKELMANN CJ:
And that's different to Tūwharetoa?

MR FINLAYSON QC:

Tūwharetoa have not provided evidence, but they've simply said they haven't gone further as I read their memorandum saying: "Look, we are named as a respondent. We are not going to actually appear. We support Raukawa."

WINKELMANN CJ:

So they're really in the same position, are they, we don't really put any weight to what they say because they've not filed any evidence?

MR FINLAYSON QC:

Well, what weight you put on it is a matter for you ultimately, but I'm simply faithfully reporting what Tūwharetoa have said.

WINKELMANN CJ:

Right, thank you.

MR FINLAYSON QC:

I now come to issues three and four as described in the judgment of Justice Cooke and simply say in relation to the first issue, issue three, that what we haven't done in our submissions is undertake a detailed analysis of the papers produced within the Crown at the time of the amendments to the Treaty of Waitangi Act 1975. I think it's common ground that these took place, all these discussions took place in the late 1980s in response to various decisions of the Court of Appeal. I would say this, and I will come back to it later on, it's important in my submission that one take into account a very important principle and that is that those discussions and those amendments took place before the commencement of the Treaty settlement era and that really got underway in the early 1990s. The first settlement was the Tainui settlement over, I'm talking in modern day terms, the first thing was the Tainui, the big settlement was the Tainui settlement in relation to Raupatu in 1995 and then in 1997, Ngāi Tahu signed its deed of settlement with the Crown given effect to by the 1998 legislation. So it pre-dates all the work that has been done in the 1990s obviously and as I will say later in my submission, has to be read in that light and ultimately, I also say and submit that the material is interesting,

but it doesn't really give the Court or the parties any guidance on the role of tikanga and so what Raukawa has done and makes the submission, it's taken a principled approach to interpretation of the phrase "should include the return to Māori ownership" in section 8A and submits that the starting point has to be the Treaty and the principle of tikanga known as mana whenua, and we submit, with respect, that the Judge in the High Court was entirely correct in his interpretation and in his approach which involved, first, a careful analysis of the text of the enactment and, secondly, considering the text in light of its purpose, including the presumption that Parliament would have intended to give full effect to the principles of the Treaty when enacting those provisions, and so Raukawa submits, with respect, that the key point is this. It's not a relevant consideration. What is binding is tikanga and the principle of mana whenua. One cannot make a decision contrary to this. It's not an issue of whether something is taken into account as part of a balancing act. It's binding, and what we say is the –

GLAZEBROOK J:

Mr Finlayson, can I just check with you that – we were told yesterday by the Crown that that wasn't what the judgment of the High Court said. I mean I certainly read the judgment of the High Court in the way that you're now saying but what do you say about that?

MR FINLAYSON QC:

I'm saying that I'm not surprised the Crown would not want to make a submission along those lines.

GLAZEBROOK J:

No, I'm not surprised either, but the submission that the judgment of the High Court merely said it was a relevant consideration while highly relevant.

MR FINLAYSON QC:

Yes. Well, I –

GLAZEBROOK J:

And you say that's not what the High Court was saying. The High Court was saying it was a controlling consideration?

MR FINLAYSON QC:

I think the formulation I have given you represents what the High Court decisions says, yes.

GLAZEBROOK J:

Yes, sorry, I was just…

WILLIAM YOUNG J:

Can you just take us to paragraph 94 of the High Court judgment so –

MR FINLAYSON QC:

I beg your pardon?

WILLIAM YOUNG J:

Could you look at paragraph 94 of the High Court judgment?

MR FINLAYSON QC:

Yes.

WILLIAM YOUNG J:

Sorry, that's – I'm looking at the wrong point, I think, sorry.

GLAZEBROOK J:

I think it might be 74, is it? No.

WILLIAM YOUNG J:

No, it's a little bit later.

MR FINLAYSON QC:

94 is actually the conclusion.

WINKELMANN CJ:

Is it 89?

MR FINLAYSON QC:

Yes he says although the purpose of the provisions, the lands on the face of it qualify for consideration as a matter of plain wording. Then there's the qualifying claim. "The lack of mana whenua," the point you're making, "is a very important consideration when the exercise of the power is considered."

WILLIAM YOUNG J:

So I didn't read him to say that it was a showstopper.

MR FINLAYSON QC:

I beg your pardon?

WILLIAM YOUNG J:

I didn't read him to say that mana whenua was a showstopper.

MR FINLAYSON QC:

Well, at the end of the day that's exactly what he said.

WILLIAM YOUNG J:

Where?

MR FINLAYSON QC:

Just hold on. Sorry, I've…

WILLIAM YOUNG J:

Well, look at paragraph 118.

MR FINLAYSON QC:

Yes. "But the fact that other iwi have mana whenua over the land will likely be."

WILLIAM YOUNG J:

Yes, but what I understood him to say is that it is not necessarily a showstopper. It is a very important consideration.

MR FINLAYSON QC:

But it's not something that one can treat as a mere relevant consideration that one weighs in the balance. It's far stronger than that.

WILLIAM YOUNG J:

I agree with that.

WILLIAMS J:

If you look at the next sentence, that makes your point, doesn't it, Mr Finlayson?

MR FINLAYSON QC:

"But the fact that other iwi have mana whenua over that land will likely be."

WILLIAM YOUNG J:

If he thought it was a showstopper, he wouldn't have referred it back. There's no point in referring it back if the order for resumption couldn't be made.

MR FINLAYSON QC:

I see what you're saying. Well, maybe he's, and with respect, would have been mindful of the specialist nature of the Tribunal, would have put the Tribunal right on the relevant principles and says: "Go back and do it again."

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

So the relevant principles are that weight, unlike in most administrative law cases, is actually part of the legal background to this, that the principle of mana whenua is so important that it has to be given the sort of weight that might be just slightly under – and I'm paraphrasing – under an absolute stricture of law that that has to operate, but it is such a small amount under that that in fact

weight, unlike in usual administrative law case, is part of the law, is that the submission too?

MR FINLAYSON QC:
Yes, and that sort of reduces to some kind of legal formulae, like a mere relevant consideration or even a mandatory consideration, under-cooks it considerably, that this is an incredibly important consideration…

GLAZEBROOK J:
So the weight is actually part of the law.

MR FINLAYSON QC:
And on the wording, as he says, it may be possible to have a transfer to certain iwi who aren't necessarily associated to the land, but the mana whenua point becomes so incredibly important that simply to classify it as a relevant consideration I was going to say is disrespectful, but totally under-cooks it, that's the point I'm making.

WILLIAMS J:
The last sentence there does seem to proceed on the basis that there is some land in New Zealand for which there is no mana whenua, which is course is completely wrong.

MR FINLAYSON QC:
It's completely wrong. There may have been – oh, I can think of the area from Paranui city down to the Clarence. It wasn't occupied, but just to say it didn't have mana whenua is just, it would be wrong.

WILLIAMS J:
Right. So is it possible this Judge is proceeding from a wrong premise?

MR FINLAYSON QC:

No, I don't think so, I think that he understands as a result of submissions and analysis the incredibly important aspect of mana whenua when dealing with issues like this.

WILLIAMS J:

You see, I don't think anyone's going to disagree with that, anyone, on any side.

MR FINLAYSON QC:

Well, I can't – yes.

WILLIAMS J:

But that's, the question is really whether that's definitive. And the prior question is what is mana whenua? Because there are a lot of assumptions about what this thing means without a lot of careful thought.

MR FINLAYSON QC:

Oh, yes, and maybe this is not the forum to do it. But the way –

WILLIAMS J:

Well, it does seem to be, you see, because it's the heart of your case.

MR FINLAYSON QC:

Yes, the phrase originally was, as I understand it, mana o te whenua and it's kind of developed over the years into the principle of mana whenua, but that enduring longstanding, in the case of Raukawa, 600 year connection with the land exercising rangatiratanga over it is something that goes to the heart of who Raukawa are and that would apply to other iwi around the motu and it's something that this court and Pākehā society generally have to start to learn to accept.

WILLIAMS J:

Sorry, just one more point. The thing about mana whenua is that it is authority. There are famous proverbs about the importance of authority, but it's not title.

MR FINLAYSON QC:
Absolutely.

WILLIAMS J:
And I don't mean it's not a Torrens title. I mean that mana whenua can itself be subject to the rights of others and often is.

MR FINLAYSON QC:
Oh, and the history of this country shows that.

WILLIAMS J:
Perhaps, but in tikanga terms, a hapū can have mana whenua but not exclusive property rights if you want to use the western term in that land. In other words, notwithstanding mana whenua, they are bound to recognise and indeed protect certain vested rights of other hapū. This is relatively common and does not seem to have arisen on the evidence or in the discussions in this case because everyone seems to be proceeding on the basis that mana whenua is absolute and exclusive and it never is.

MR FINLAYSON QC:
One can understand the principle, your Honour, is making in relation, for example, to shared authority that hapū may exercise over a particular area, and I know that there has been a great deal of debate over the years, particularly following the decision of the Māori Appellate Court in 1990 about the Ngai Tahu boundaries, that one can't apply rigid rules of boundaries, and so on, that is accepted. It is also accepted that within the rohe of an iwi there will be these very significant interests. They're not Torrens title interests, they're not title interests but they are very strong, in tikanga terms, interests nonetheless.

WILLIAMS J:
That's right. So a great example is the rights of Ngāti Hauā Te Waharoa in Tauranga Moana. Te Waharoa is from the other side of the Kaimais, but he had vested rights to access fisheries in Tauranga Harbour and they were, in tikanga terms, rights.

MR FINLAYSON QC:

Yes.

WILLIAMS J:

He had no mana whenua but the mana whenua of the Tauranga tribes was subject to those rights.

MR FINLAYSON QC:

And I better be careful what I say but I think a similar principle may apply in relation to Ōhiwa Harbour for Tūhoe who had rights to go down.

WILLIAMS J:

Yes, well Tūhoe certainly says that, that's my point. So to suggest that mana whenua is the whole point in the settlement process is legally, if you think of tikanga as law, incorrect.

MR FINLAYSON QC:

But I'm not adopting and absolutist view because of course –

WILLIAMS J:

Well that's what the Judge said. He said the only point in the Treaty settlement process, and therefore in the resumption clauses, is the restoration of mana whenua, and in that he appears not to understand the intricacies of tikanga. Because no one told him.

MR FINLAYSON QC:

Whatever inadequacies in relation to those matters you may well be right. Ultimately all judges, including, with respect, the judges of this court, need to be told things before they can actually make a decision on.

WILLIAMS J:

Quite.

MR FINLAYSON QC:

So there's no criticism of him if he went too far, but I don't think it undermines the central thesis of the point that he was making.

WILLIAMS J:

Well it makes the important point that mana whenua is a complex idea and even if it is usually controlling, it will not always be so, even in tikanga terms.

MR FINLAYSON QC:

I don't think there's a dispute about that, although the application doesn't apply here for reasons which I have endeavoured to show by reference –

WILLIAMS J:

So that's the next point, you see, the next question then is, in what circumstances does mana whenua not control the ground. We know that in tikanga terms there are some circumstances, because we've just talked about them. Are there other circumstances to deal with unprecedented or exceptional situations, that's the real question here, because no one is arguing that mana whenua is really important. No one is arguing that, or arguing against that, that's just plain obvious.

MR FINLAYSON QC:

Yes, well I think –

WILLIAMS J:

The question is whether tikanga can cope with exceptions. You say no but –

MR FINLAYSON QC:

Well tikanga can't cope with this exception.

WILLIAMS J:

That's right, but in order to come to that point the evidence needs to be more nuanced than we have here. Because there are obvious examples where that simply is incorrect.

MR FINLAYSON QC:

Well, and we've explored a couple of those examples and we've agreed in relation to Tūhoe and Ngāti Haua just how that could operate in relation to the Bay of Plenty and Ōhiwa Harbour, yes. So I don't think there's a dispute there.

WILLIAMS J:

Well, so my question is, what are the principles of tikanga that will assist parties to cope with exceptional situations which this unquestionably is?

MR FINLAYSON QC:

I think the basic principle is that we have to adapt to changing times while holding fast to unchanging principles, and that we admit of an exception to tikanga only in very, very obvious and clear circumstances, such as your example, collecting kai.

WILLIAMS J:

Well it's not an exception to tikanga, it is tikanga.

MR FINLAYSON QC:

Well it's part –

WILLIAMS J:

That's my point.

MR FINLAYSON QC:

Yes.

WILLIAMS J:

Common law invents equity because exceptions are required to avoid rigidity.

MR FINLAYSON QC:

Sure, understand that.

WILLIAMS J:

This is essentially tikanga doing the same thing by recognising in the case of Te Waharoa, and in the case of Tūhoe, vested rights, which we would call property rights today, that are, that survive the mana whenua of others.

MR FINLAYSON QC:

Yes, understand, but the point that needs to be emphasised here is that such a draconian remedy as resumption flies in the face of any principle of mana whenua and can't be reconciled and shouldn't be reconciled and Raukawa says won't be reconciled.

WILLIAMS J:

Okay.

MR FINLAYSON QC:

In terms of the examples you given, I'm not going to stand here and deny that because with respect, I agree with the propositions.

WINKELMANN CJ:

So, I was going to say there is actually very little then between you and Mr Mahuika on this point because he accepts that mana whenua is an incredibly important principle. He just says that it will not always determine it and you accept that it's not always going to determine the outcome?

MR FINLAYSON QC:

Well, I've referred the example his Honour Justice Williams gave me and I gave him one of my own. There will be those circumstances, but I will simply say this in clear and unequivocal terms that you cannot abandon or downplay or denigrate the principle of mana whenua when one is dealing with an application for resumption.

WINKELMANN CJ:

And you say the Tribunal did and Mr Mahuika says it didn't, it gave it full weight and decided in the extraordinary circumstances.

MR FINLAYSON QC:

Well, admittedly there is no debate other than perhaps in relation to the SILMA lands that this is sui generis, one of its kind, no debate about that. But, as I said, one deals with sui generis situations by not the rigid application of a principle, but by the just application of a principle and that the principle of mana whenua is simply in this situation, according to the submission of Raukawa, not to be set aside.

GLAZEBROOK J:

Can I just check again? Perhaps if I can put it the other way round, is what you are saying that there is absolutely no, in tikanga terms, this is your submission, I'm not saying I necessarily accept it, but in tikanga terms, there is absolutely no mana whenua here held by Wairarapa Moana?

MR FINLAYSON QC:

Yes, I don't think there's a debate.

GLAZEBROOK J:

And so that's why the resumption can't work, but you accept that if there had been some kind of tikanga based limitations on mana whenua, or however one puts it, or sharing of, well, looking at the kai example, then possibly in those cases there could be a resumption issue because within tikanga itself there is a limitation on mana whenua if it's sole mana whenua, is that?

MR FINLAYSON QC:

I think that's, with respect, a rather helpful way of looking at it but I need to emphasise that the point about no mana whenua being held by Wairarapa Moana here is not a submission on the part of Raukawa. It's well accepted and indeed, the Tribunal –

GLAZEBROOK J:

No, no, sorry, I was just putting that in generic terms, sorry. But no, because here, the finding of the Tribunal was that effectively they were like manuhiri and no mana whenua at all. You're basing that on that finding?

MR FINLAYSON QC:
Well, that's exactly manuhiri, yes.

GLAZEBROOK J:
Yes.

MR FINLAYSON QC:
There is no residual, or there's no, to use my favourite adjective this morning, exiguous mana whenua interest. There's nothing.

GLAZEBROOK J:
No, no, that's what I had understood your submission to be. So that's the way I was – that's why I was putting it in that way.

WILLIAMS J:
How within that analysis do you fit, for example, the fisheries allocation, which you will know a little bit about?

MR FINLAYSON QC:
Well, I'd say that's totally contrary to principle and was based on political power.

WILLIAMS J:
But it worked.

MR FINLAYSON QC:
Well, did it?

WILLIAMS J:
I think so.

MR FINLAYSON QC:
Well, there is a debate about the 2004 Act as a matter of principle for iwi like Kahungunu and Ngāi Tahu because the population principle trumped the important principle of allocation according to coastline.

WILLIAMS J:

Yes, but there was a great deal of discussion and despite opposition, on both ends actually, the northern and populous tribes were always opposed to mana moana and the southern and less popular tribes were always opposed to population and a compromise was reached which had some obvious tikanga content and the birth of new ideas as is so often the case when facing unprecedented issues. Isn't this just one of those?

MR FINLAYSON QC:

Well, yes, I don't want to get into necessarily a debate about the fisheries allocation model but I would say, with respect, to whatever was decided, that that spoke more to political power and influence with the Crown than a principled approach to dealing with the concepts of population and coastline.

WILLIAMS J:

Well, many would say that both law and tikanga recognise the power of power.

MR FINLAYSON QC:

Yes, indeed. That's true.

WILLIAMS J:

And what about, for example, the Waipareira, not on fish, but the *Waipareira Report* of the Tribunal that acknowledged that in some circumstances a non-tribal organisation can have access to Article 2 tino rangatiratanga rights?

MR FINLAYSON QC:

That arose in the fisheries allocation issues about the role of urban Māori as well.

WILLIAMS J:

But again this is kind of trying to make tikanga work in a modern circumstance.

MR FINLAYSON QC:

Sure, no. Yes, and that, with respect, is a useful example because where there has been a development, there's been the development of urban Māori authorities, how – and you're dealing with a principle like allocation to iwi which is what the 1992 settlement said – how does one adapt to changing times by recognising the role of urban authorities, and so that's actually not a bad example of where tikanga can be moulded.

WINKELMANN CJ:

I was going to ask about Mr Mahuika's point that one shouldn't use the principles of the Treaty to straightjacket the Tribunal so it can't effect a just remedial outcome in the face of such serious breaches of the Treaty and refer you to the preamble to the Treaty of Waitangi at 1975 where it says that it's desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty.

MR FINLAYSON QC:

There's no issue about that. That's exactly what hasn't happened here because they were overly influenced by what, Mr Radich quoting Justice Gorsuch in the Supreme Court, talked about the trail of tears and a broader history instead of focusing laser-like on the 787 acres.

WINKELMANN CJ:

So, but what do you say –

MR FINLAYSON QC:

And so the inquiry, to that extent, was illegitimate.

WINKELMANN CJ:

So what about the need for flexibility and for the Tribunal to exercise its powers which are remedial powers, and that we shouldn't straightjacket, a court sitting here shouldn't straightjacket the Tribunal with our understanding of tikanga which is something that is needs to respond to the facts on the ground?

MR FINLAYSON QC:

Indeed it does need to respond to the facts on the ground but the facts as properly established and not facts that are not properly part of the analysis when making determinations.

WILLIAMS J:

Isn't it the broad discretion here in the Tribunal to both decide what should be the subject of the removal of prejudice, in this case resumption, and it can do that on terms and conditions, can't it?

MR FINLAYSON QC:

When making any order for resumption it could spell out certain conditions that would need to be fulfilled.

WILLIAMS J:

Yes, well, it says so. The statute says: "On any terms and conditions." Why couldn't the Tribunal order resumption on terms and conditions relating to an appropriate level of accommodation of mana whenua to the satisfaction of the Tribunal, by the resumee, if you like?

MR FINLAYSON QC:

Yes, well, of course, that hasn't happened here.

WILLIAMS J:

Yes, but the Tribunal could require it.

MR FINLAYSON QC:

The Tribunal, when dealing with a matter, could take that and, certainly, impose conditions along that line, yes.

WILLIAMS J:

Would your client be comfortable with that or at least more comfortable?

MR FINLAYSON QC:

Well, it's hypothetical because it hasn't happened and so I'm not going to stand here on behalf of Raukawa saying they'll be happy with such an arrangement.

WILLIAMS J;

No, fair point. But it seems to me this is not necessarily a zero sum game because it is open to the Tribunal to require the proper recognition of mana whenua before resumption is triggered.

MR FINLAYSON QC:

Yes, I suppose that's a very important point because one says what does it mean to recognise mana whenua?

WILLIAMS J:

Precisely.

MR FINLAYSON QC:

And it's paying lip service to it and having a ritual incantation oh yes, mana whenua is important and these other people are just manuhiri, that doesn't do it.

WILLIAMS J:

Well, that's right.

MR FINLAYSON QC:

And that's what's been going on.

WILLIAMS J:

You hadn't got to the point of resumption yet. The Tribunal has not been allowed to, but it does seem to me within the Tribunal's jurisdiction to substantively require an appropriate accommodation in accordance with tikanga with korero, waiata, haka and so forth to the Tribunal's satisfaction.

MR FINLAYSON QC:
Well that is essentially what you are putting to me is what we put. Well, we, but Sir Tipene O'Regan put in an affidavit which was filed at the High Court.

WILLIAMS J:
Yes, it was a very thoughtful affidavit I thought.

MR FINLAYSON QC:
Like all of his.

WILLIAMS J:
Yes, quite. All right, thank you.

WINKELMANN CJ:
And that would be giving practical application to the principle of the Treaty?

MR FINLAYSON QC:
It could be subject to what I'm also going to submit on the legislation but of course that hasn't happened here. Instead, the Incorporation has gone out of its way to freeze Raukawa out of everything.

Can I come to the settlement legislation and that is set out, it's supplementary tab 39 page 1346 because, and if we could scroll down to section 9, various acknowledgements. Come down please to subparagraph (11). Thank you and that's an important acknowledgement that in 1915 the Crown acknowledges a gift of 20,000 acres of land in the Pouākani block to an iwi with no ancestral ties to the area. This gift exacerbated the grievance Raukawa continue to feel today about the earlier loss of their interests in the Pouākani lands and I've set out the history, the sad history of Raukawa in the submission. The Crown acknowledges the loss of land had a negative impact on the ability of Raukawa to participate in new economic opportunities and challenges emerging within their rohe in the 20th century. The Crown acknowledges that it did not recognise the iwi status of Raukawa until the late 20th century and its failure to respect the rangatiratanga of Raukawa created an ongoing grievance and then it

apologises for its failures. In section 10 unreservedly apologies to Raukawa. Deeply regrets its actions. Apologises for its past failures to acknowledge the mana and the rangatiratanga of Raukawa and looks forward to building enduring relationship of mutual trust and co-operation with Raukawa based on respect for the Treaty of Waitangi and its principles.

So the whole question of this awful transaction in 1915 which has gnawed away at Raukawa for years was explicitly the subject of an acknowledgement and an apology and in the submission of Raukawa, that is a very solemn commitment by the Crown. It wants an apology as to past action as all settlement legislation is, but it's a commitment for the future. The bald submission is that compelling the Crown to do something which would undermine that acknowledgement and that apology is, with respect, a showstopper. It cannot happen.

What I need to emphasise is this. One has to see the resumption legislation for what it is. It was established and passed by Parliament in the late 1980s before this sort of legislation started to be passed, and of course this was passed in 2014, and the submission of Raukawa is that the resumption provisions have to be read in the context of the Treaty settlement legislation , which will come before this court on a number of occasions. So the resumption legislation pre-dated the settlement era, and there have been a huge number of statutes, and it's the submission of Raukawa the resumption legislation has to be read in the context of the settlement legislation, indeed I would make the submission that if there is any doubt a statute has to be interpreted so as to give effect to settlement legislation, and in order to oust that settlement legislation, there would have to be an explicit exclusion. The material contained in the Settlement Act is not warm feelings legislation, or nice to have legislation, it is an acknowledgment that what happened as between the Crown and Raukawa went seriously wrong, and there's been an apology for it and a solemn commitment to do things better the next time, and in many respects it's quasi-constitutional legislation, and so the resumption legislation, in my submission, has to be read in the context of the settlement era and settlement legislation, and can't be reduced to sort of a weighing up of relevant considerations.

WILLIAMS J:
So doesn't that just mean that the wisdom of Solomon is required by the Tribunal dealing with another claim about an equally egregious circumstance, and what to do about that.

MR FINLAYSON QC:
Well it's got to look at the facts, which I endeavoured to do from the very start of the morning, and then you've got to weigh up undermining and disrespecting settlement legislation in favour of the transfer of 787 acres.

WILLIAMS J:
Yes, well, unless the terms and conditions of the resumption do not undermine but recognise and address also the interests of mana whenua, then it's a win-win.

MR FINLAYSON QC:
Well you're talking, as you said yesterday, about tikanga of process.

WILLIAMS J:
Quite.

MR FINLAYSON QC:
And just, in the round I can respectfully agree with the proposition and –

WILLIAMS J:
Then real life gets in the road.

MR FINLAYSON QC:
Then real life gets in the road, and the way Raukawa have been treated gets in the road.

WILLIAMS J:
Yes but this is tribal diplomacy writ large.

MR FINLAYSON QC:
Well it's not, it's actually a complete lack of diplomacy from an Incorporation to people who have been in the rohe for 600 years.

WILLIAMS J:
Yes.

MR FINLAYSON QC:
And the idea that – on one level I suppose one could say this about Raukawa, they can't get the land so to hell with everyone else, and sort of an exclusionary attitude. No it's not. This iwi has suffered so greatly over hundreds of years, and is finally able to stand tall within its rohe. There is this fact of history that gnaws away at Raukawa whānau all the time.

WILLIAMS J:
I get that.

MR FINLAYSON QC:
And a bald resumption in flying in the face of what the Crown has said in its settlement legislation, brings it all back again, a total lack of respect for a great iwi.

WILLIAMS J:
But it needn't always be that way, as we've watched for a generation now with claims creating huge conflict, and then resolving themselves.

MR FINLAYSON QC:
There's no doubt that the Treaty settlement process –

WILLIAMS J:
The fisheries allocation is a great example of, you and I both probably thought that Her Majesties Judges were going to be busy with the allocation for another generation, yet that didn't happen.

MR FINLAYSON QC:
Well of course in the CNI it's never stopped.

WILLIAMS J:
Well the CNI is not fish.

MR FINLAYSON QC:
No, no.

WILLIAMS J:
That might be about the way the arbitration was done. But it's not, this is, we are not frozen in time here. It is possible, with the appropriate incentives, including potentially incentives from the Tribunal, that tribal diplomacy may resume, isn't it?

MR FINLAYSON QC:
Again I answer in the round. Theoretically yes but Raukawa start from –

WILLIAMS J:
Sceptical.

MR FINLAYSON QC:
I beg your pardon?

WILLIAMS J:
They're sceptical.

MR FINLAYSON QC:
No. Raukawa are a very, if I say so myself, a very generous spirited people, but the point is they have suffered greatly within their rohe, and what happened in their rohe in 1915 was deeply, deeply insulting, and it's why in the apology, unlike in the Tūwharetoa one, in the Raukawa apology it's explicitly referred to.

WILLIAMS J:

Yes, well, it was quite insulting to the Wairarapa Moana people too, because they lost what at the time was the second-largest lake in the country.

MR FINLAYSON QC:

Well, they're getting it back essentially.

WILLIAMS J:

Yes, well, they're getting back something that's 50 per cent the size of the original lake.

MR FINLAYSON QC:

Oh, no, that's true and, look, I'm not trying to diminish what happened in the Wairarapa, I know those facts reasonably well, especially when it's said they own the lake…

WILLIAMS J:

Yes.

MR FINLAYSON QC:

So I'm not trying to diminish, and what happened with Barton's Run and whatever, it was appalling stuff in the history of the country, not seeking to diminish that at all, but there has been a settlement in relation to those matters, and included in that is they get the bed of the lake back.

WILLIAMS J:

Yes, well, there's debate about that settlement, as you know.

MR FINLAYSON QC:

Oh, of course, no, I recognise that. But the point is that settlement legislation is, in my submission, quasi constitutional, it's a very – and it's easy to diminish the apologies and acknowledgements as sort of warm feelings, but they're not. In fact they go to the heart of what a settlement is and they're fare more important than commercial redress and cultural redress to have the power in

the land, the greatest power in the land, stand up and say: “We got this completely wrong and we apologise for it and we’re not going to do it again and we’re going to work with you in the spirit of the Treaty to make things better,” that’s extremely important and very, very sparingly interfered with.

WINKELMANN CJ:
So, Mr Finlayson, we’ve pushed you, we may have bumped you away from your course there questioning. So I’m just wondering where we’re at in terms of your…

MR FINLAYSON QC:
Well, I’ve probably said as much as I can possibly say on the issue of the settlement legislation which, in my submission, is very much a part of it.

I was going then to refer to the final point, which was some of the material or the objection about the evidence of Professor Jacinta Ruru, Ms Pirini and Sir Tipene, but it’s covered in the submissions and I’m conscious that we’ve got limited time, but it does address the issue that arose in the course of the Tribunal, that is of compromised tikanga. But there’s the rather, some might say, dismissive point, they could have objected on questions of admissibility, they could have file their own evidence on it, they didn’t, and it’s a bit late in the Supreme Court to start raising those sorts of objections.

WINKELMANN CJ:
What are we to make of that evidence though, because we have all the evidence that was – it really responds a…

MR FINLAYSON QC:
Well, it deals with that question of compromised tikanga.

WINKELMANN CJ:
Yes.

MR FINLAYSON QC:

But one of the reasons I referred you to the evidence of Mr Te Hiko yesterday was – unfortunately he died a year or two ago, a wonderful man – but he is an example of a person who has given extensive evidence on a lot of the points that have been the subject of my submission and it's not sort of piling, it's not just providing further evidence for the sake of it but to deal with that particular point.

WINKELMANN CJ:

Yes.

MR FINLAYSON QC:

Those are my submissions.

WINKELMANN CJ:

Thank you, Mr Finlayson.

MR HODDER QC:

May it please the Court, I am also conscious of time and what I am proposing to do is to say something very short about the Incorporation's appeal and then address the cross-appeal by Mercury, if that's convenient to the Court.

WINKELMANN CJ:

Yes.

MR HODDER QC:

So keeping it as much as I can without repetition, in relation to the appeal generally we support the High Court's conclusions with one exception that I'll come back to. We support the Attorney-General's submissions on, it's three of the points that emerge from that. Firstly, that the Tribunal made firm findings about tikanga in relation to the subject land. Firstly, the mana whenua status of Raukawa and various others. Secondly, on the manuhiri, not the mana whenua status, of Wairarapa Moana, and, thirdly, that the Waitangi Tribunal focus was on the monetary value of the subject land, not on its, as it were,

customary value, and in relation to that we also agree with the Attorney-General the High Court didn't make its own findings on tikanga, it was simply adopting what was said by the Tribunal. We also respectfully support what has been said by my learned friend, Mr Finlayson, on behalf of Raukawa.

The only thing I then was proposing to do was to explain, if I could, why we have one exception to our agreement with the High Court, and that takes us to paragraph 89 of the High Court judgment which has already been something focused on, and to some extent I will keep this short but the basic point that we make in our written submissions around paragraph 34 is that we respectfully don't accept that there was scope for technical consideration under a literal reading of the Act.

I should explain that as succinctly as I can. The starting point is, of course, section 8A's own language. The relevant criteria is –

WINKELMANN CJ:
Can I just ask you what you don't accept because I don't understand what you don't accept?

MR HODDER QC:
So in 89 what the Judge says is that the claims "qualify for consideration as a matter of plain reading".

WINKELMANN CJ:
So there's no, you say, effectively, mana whenua is, is it, because there's no small wriggle room that the Judge identifies?

MR HODDER QC:
Correct. We say that in the circumstances the relevant criterion is should the land be returned to Māori ownership? In the context, and given the history of the legislation and on the facts, that means to tika or rightful ownership, Māori ownership, and that is not the basis of either the Wairarapa Moana claim or the

Waitangi Tribunal's conclusion. That being so, it wasn't, we say, within the powers or within the scope of section 8A.

I don't think I – well, I wasn't planning to develop it much but to some extent, reading the legislation, there's not only the Interpretation Act, possibly Bill of Rights Act, well, not so much here, but also the general idea that identifying the proper purposes of the Act is an exercise itself in statutory interpretation and having regard to the idea that the proper purposes of the Act cannot include undermining Treaty principles, then in those circumstances they are returning land where it isn't to tika or rightful ownership is not within the scope of section 8A and the phrase "return to Māori ownership". That's in effect the interpretation point that we are saying.

In essence, we would say that that ties in to an analysis of the Tribunal's decision that it is one effectively of error of law, not about relevant considerations, and the error of law aspect is developed by way of thinking about proper purposes as well.

To save time, can I just simply refer the Court to our statement of claim? Mercury was the first to file a statement of claim on this topic. It's in the materials at 101.0014. There are effectively two causes of action. One deals with what is now the cross-appeal. The part that I am concerned with is the first ground. It starts on page 0029 and paragraph 48, and we've set out in paragraph 48 what we say the errors of law were, and having sat through the hearing to this point and read the submissions, of course, we respectfully suggest that those errors of law remain consistent with the place where we got to, and over the page, on page 031, in paragraphs 51.1 and 51.2, we discuss the question of proper purposes and irrelevant considerations.

That probably just records it. If the Court wants to pursue it then that's the way in which we've articulated there and I, as I've said, don't propose to change aspects of that.

The only other thing that I wanted to say about the Incorporation's appeal is that at least in Mercury's analysis of this, then the starting point is Article 2 of the Treaty. We then take into the Treaty's principles, and in the scheme of the 1975 Act, and all that is partly focused to the prism of the SOE *Lands* case. The SOE *Lands* case sort of underpins most of those discussions the Courts heard. There hasn't been much time spent on it, so can I spend a couple of minutes on that. It's in the bundle of authorities commencing at page 387, and obviously enough it is the event that gave rise ultimately to the legislation that the Court is now concerned with because of the successful applications to the Court at that time.

Can I take us to pages, using the judgment, and keeping it short again, but to page 674. This is from Justice Richardson's judgment and the point that I would pick up is at about line 27 on that page, the paragraph commencing: "There are difficulties in ascribing either perspective…" don't need to worry too much about that, "… However, read in conjunction with Article 2, two points at least are clear. One is that the protection accorded… is a positive 'guarantee' on the part of the Crown. This means that, where grievances are established, the State for its part is required to take positive steps in reparation. The other is that possession of land and the rights to land are not measured simply in terms of economic utility and immediately realisable commercial values."

Now pausing there we say that, in fact, the latter part of that is precisely what the Waitangi Tribunal was focused on. It then goes on to cite from the uncontested evidence, the crucial importance of land in Māori culture, and then quotes from the Māori Council paper, to the effect, and again I don't anticipate this is any issue anywhere, that: "It [Māori land] provides us with a sense of identity, belonging and continuity." And again one draws a distinction between the position of Raukawa in relation to the subject land, and the position of Wairarapa Moana in relation to the subject land. That gulf, we suggest, goes to the point that I was trying to make earlier on.

So the Treaty principles include act of protection by the Crown of Māori rights and interests most relevantly in land, because that's what the situation was.

There was 10 million hectares of land to be transferred, was sought, as the number recorded in the judgments in this case, and the remedies for grievous wrongs could include redress to the appropriate tribe of land which they had been wrongly deprived, and I mention that that phrase “returned to the appropriate tribe” is mentioned by the President at page 652, line 53, and the phrase “of which they had been wrongly deprived” is from Justice Bisson’s judgment at 710, line 22, and in our submission that captures the flavour of what the Court was attempting to do, and which is reflected in the legislation that follows.

To be clear, and I take this was some trepidation because, not least because Justice Williams raised it yesterday, but we’re not saying that there has to be an exact correlation between a specific grievance and a specific piece of land. The general proposition is that a seeks to protect the return of land, that is land held in customary terms and protected by Article 2, and so in relation to the Ōtākou Ngai Tahu claim, which is discussed on the page we’re on, sorry, going back to page 674, it’s picked up by Justice Richardson at the bottom of page 674, and it goes onto the first part of 675, the point that, as I understand his Honour making, and other judges make the same point to the extent they discuss it, including Justice Somers at page 686, it was anticipated that there might be return of land within a very large claim. There’s no suggestion of land outside the rohe, though, of Ngai Tahu, and in effect that’s what the Tribunal has ended up with in the case that the Court is now concerned.

So it’s a contentious phrase but insofar as Justice Cooke in the judgment under appeal talked about a land back, and was critical of the Tribunal taking that approach, we can accept that, as Justice Williams put it yesterday, there is a land bank, but we say it’s a landbank confined to the rohe, the tradition rohe of the claimant group, and again that takes us from, a distance from where we are here.

So, the basic proposition is that for that reason we suggest that there wasn’t a question of discretion, it was a question of law which precluded the Tribunal

from doing what it did, and to that extent we have taken issue with that latter part of paragraph 89 of the High Court's judgment.

Turning to the cross-appeal, if there are no questions of me on that point…

WILLIAMS J:
Well, I guess the only difficulty with that last proposition is that in, what is it, 1844, 1846, whenever the Ōtākou purchase was first made by the New Zealand Company Ngāi Tahu didn't have mana whenua because the title was never vested in iwi, it's a hapū phenomenon, and so you have to talk about whatever the relevant hapū of Ngāi Tahu were having mana whenua. Then the question is whether you're restricted to within the Ōtākou purchase and the promises of tents, only providing reserves for a hapū within its traditional territory, and that's not what happened of course, and there was "shuffling of the cards", if you like, and, as Mr Finlayson mentioned, just the South Island named its Natives Act, took hapū from the north, northern area of the South Island, the Ngāi Tahu territory, and plonked them around Milford Sound where they had no traditional rights at all, and then that particular grievance was then addressed by the Tribunal in the Ngāi Tahu claims without any argument about whether the failure to make good on the SILNA natives promises did not itself generate rights to redress, even though outside the traditional area of the hapū involved. So this is not unprecedented, as Mr Finlayson mentioned.

MR HODDER QC:
And I don't dispute that last proposition, I don't dispute that – well, I shouldn't say I don't claim, haven't researched the Ngāi position in sufficient detail, given Mr Finlayson, Justice O'Regan and your Honour, I'd be unwise to venture much further into this territory, if any. But I would say also that in reading the SOE landscapes, one of the things that of course one has to be borne in mind is that the Court there doesn't talk in terms of Māori groups, it mainly talks about Māori in a general sense, that's the way the language is phrased, and so I'm really using that language in that way. All I would say about, if one descends to questions of groups, then this is the classic example of exactly why Article 2, the trail of logic or principle from Article 2 through to where the Tribunal got to

has a mis-step at the last stage, and we say that was recognised by the High Court. But that's all I've got to say.

WINKELMANN CJ:
I was just going to say that the point that Justice Williams made relates to the point I made earlier that the risk of us straightjacketing in a half thought through way the Tribunal, who is exercising a jurisdiction which requires flexibility, and if you were to apply the mana whenua as it applied at the time of the Treaty and require this all to be worked on a hapū-based approach then you would blow apart existing settlements, wouldn't you, and obviously that can't be the case.

MR HODDER QC:
Well, we certainly accept the final proposition, your Honour, and what my learned friend Mr Finlayson has to say about it. But the basic principle comes back to our interpretation, our suggested interpretation of the Court, that what section 8A and following is about is about returning land to tika Māori ownership. That isn't what the Wairarapa Māori Incorporation claim is about per so.

WINKELMANN CJ:
Well, it's certainly not, no.

MR HODDER QC:
In terms of the cross-appeal, the semantic issue in a sense is what does the phrase "is entitled" means in the 1975 Act, section 8C, but there seems to be a misconception about what it is that Mercury was seeking to achieve, and so there's probably a need for you to go back somewhat to deal with that. The short point is that what we are saying is not that Mercury could roll up and say we're here, we demand to be and you can't stop us from being heard, which in a sense is what "entitled" would ordinarily mean. What we said is, what we mean, or we say it means is, both in section 8C and in clause 6 of Schedule 2, we may be permitted to be heard in the Tribunal's discretion. The Tribunal didn't consider it had a discretion, it considered there was an absolute exclusion, and so what we are submitting in general terms is the legislation

should not be interpreted to say that the Tribunal can never hear from a state-owned enterprise, or any other memorialised owner as a matter of discretion, not as a matter of absolute prohibition. Or turning it around, rather than saying we're asserting Mercury's rights in this matter, what we're really talking about is, in fact, the Tribunal's rights to hear from who it needs to hear from, and we say that it may be helpful to think of it partly in those ways.

GLAZEBROOK J:
What about the – I mean certainly the Tribunal could wish to hear evidence from Mercury, and that's what the schedule, I think, is envisaging, but you're suggesting that gives a right to make submissions – sorry, a discretion for the Tribunal to call for submissions on that evidence, rather than merely the evidence.

MR HODDER QC:
Yes, I should say that the discretion that we're contemplating is a limited one. We don't anticipate it being used in frequent occasions. If it's going to the purpose behind it, before I got into how we got there, we recognise that the 1988 legislative changes were keen to, or motivated by the idea that Māori groups who are making claims shouldn't be confronted by well-resourced state-owned enterprise on top of the Crown as an adversary, there's no question about that, there's no issue about that, and so for example of that 10 million hectares, or whatever it was, much of it which finished up either in the conservation department or in Landcorp, the idea that Landcorp turns up and says, well we think this is a very nice farm, we don't think it should be handed on, it fits nicely into Landcorp's portfolio, it doesn't really give it any basis to get in there, that doesn't, it doesn't make any sense. Or indeed a subsequent owner, perhaps the circumstances in Ruanui. Again you would say that doesn't invoke or give rise to a basis on which it could be done. As I'll come to the point here is that Mercury has expertise which it was offering as part of that, and coming back to Justice Glazebrook's point, it would be appropriate we would say, and we did say to the Tribunal, to have an explanation of that supported by submissions. Not in an adversarial submission saying you're completely wrong in terms of your interpretation of the Act, but that in terms of

what this means, these are matters you still haven't understood, or haven't taken into account.

WINKELMANN CJ:
But if it's relevant then you could offer that expertise through the Crown, couldn't you?

MR HODDER QC:
That's a second class approach for both the Tribunal and for the affected party we would say so yes, technically yes.

WINKELMANN CJ:
But then you're saying you really wanted the opportunity to argue, aren't you? The second class doesn't give you the opportunity to argue.

MR HODDER QC:
It also, well it, the question mark about whether or not that comes through filtered or unfiltered in a sense, that's all I'm saying.

WINKELMANN CJ:
But Mr Hodder I was going to ask you about section 8C(2), presumably address that in relation to the schedualised power to set their own processes? Because it seems to be a problem for your argument.

MR HODDER QC:
Let me just check that.

WINKELMANN CJ:
Which Mr Radich took us too yesterday. It says: "Notwithstanding anything in clause 7 of Schedule 2," it doesn't give anybody else a right to be heard. Shall be entitled to appear.

MR HODDER QC:
My copy appears to be lacking 8C(2). Is your Honour referring to 8(2)?

WINKELMANN CJ:

Section 8C(2) of the Treaty of Waitangi Act 1975.

MR HODDER QC:

Sorry, I'm stuck in the schedule. Let me go back to 8C(2), thank you, my apologies. The language is the same as I recall it.

WILLIAM YOUNG J:

What does “entitled” mean?

O’REGAN J:

It’s the same word.

MR HODDER QC:

Yes, it’s the same language, “entitled to appear”, so the same principle applies.

WINKELMANN CJ:

Yes, but it’s saying – you’re relying on the schedule as showing that there is a power to have set your own processes and this is saying and notwithstanding it, it still doesn’t improve the situation, 8C(1).

MR HODDER QC:

Well, I’m relying on clause 6 of the schedule, not clause 7.

GLAZEBROOK J:

But that’s dealing with evidence, isn’t it?

MR HODDER QC:

Well, not entirely, Ma’am. It’s got wider language than that.

GLAZEBROOK J:

Can you tell me where it doesn’t entirely deal with it?

MR HODDER QC:

The language is can receive as evidence any statement, document, information, or matter which in the opinion of the Court may assist it to deal efficiently. That certainly says that.

GLAZEBROOK J:

So it's dealing with evidence. So it says you're not bound by the Evidence Act and by rules of evidence. You can receive what evidence you like.

MR HODDER QC:

Correct.

GLAZEBROOK J:

And that would include evidence from Mercury's experts, and presumably Mercury could come along and say: "We've got this relevant evidence that you might be interested in. Up to you whether you wish to hear it or not."

MR HODDER QC:

We could and –

GLAZEBROOK J:

But you're saying that gives you the right to make submissions on that evidence as well as present the evidence.

MR HODDER QC:

As will be clear, our position was – I'll come to the way in which we put it to the Tribunal – we offered submissions and the evidence. The Tribunal simply said: "You can't be – or none of that can be taken into account. We're not going to take into account any of that." Let me –

GLAZEBROOK J:

Well, they might be wrong on the evidence but why are they wrong on the submissions?

MR HODDER QC:

Because there's no reason to read section 8C(1) or 8C(2) when it says "entitled" as meaning cannot under any circumstances be heard.

WILLIAM YOUNG J:

Can you look – sorry.

WINKELMANN CJ:

I was just going to say it's hard to read 8C(2) as anything other than intention to make sure that clause 7 is not read to expand the list of those who may appear. So it's intention is restrictive.

MR HODDER QC:

But what clause 7 – well, my –

WINKELMANN CJ:

Clause 7 is about people's, about the right to appear.

MR HODDER QC:

Yes, and again it's a right. Now what I'm contending for –

WINKELMANN CJ:

No, no, I'm sorry. It's about, it uses language of entitlement.

MR HODDER QC:

Well, again, we say "entitlement" does mean "right". We're not claiming that kind of right or entitlement. We're saying that –

WINKELMANN CJ:

I don't think you're understanding my point, Mr Hodder. I'm saying that there's a clear intention in clause 8C to make sure that the list of those who appear and are heard is strictly confined to those listed.

MR HODDER QC:
Well, I understand the argument, Ma'am. That's the argument against us and I don't want to –

WILLIAM YOUNG J:
You rely on entitlement, that is not an exclusion of hearing, but if you look at the preamble to the statute, 1988 Act, it's (g)(iii) I'm looking at.

MR HODDER QC:
Yes, I'm…

WILLIAM YOUNG J:
So one of the purposes of the – it says it's essential that there be safeguards and then (iii): "Precluding State enterprises and their successors in title from being heard by the Waitangi Tribunal on claims relating to land or interests in land so transferred."

MR HODDER QC:
Yes.

WILLIAM YOUNG J:
So your position is that – well, sorry, that if that were in the statute itself as an operative provision then your argument would fall away, wouldn't it?

MR HODDER QC:
On a literal interpretation I have more difficulties in the statute itself but I don't dispute that that was what was one of the things that drove the legislation, but again going back to the purpose of it –

WILLIAM YOUNG J:
But this is precluding from being heard, not excluding, merely including an entitlement to be heard.

MR HODDER QC:

I think that, if I've understood your Honour right, yes, we say it excludes the entitlement to be heard. It doesn't exclude the Tribunal deciding as a matter of discretion it wants to hear.

WILLIAM YOUNG J:

If it were not for the preamble, I would have, I guess, considerably more sympathy for that argument than I do at the moment, but looking at the preamble, the preamble suggests that the purpose was to prevent State enterprises being heard.

MR HODDER QC:

It does say that and I accept that that's the proposition. We say that as a matter of interpretation it has to be considered more widely than just the one word "precluding" and so one has regard to the scheme of the Act, that what's being established here is a body with an adjudicatory role, a standing Commission of Inquiry, and no doubt an expectation that it's properly informed and operates fairly. In those circumstances then the general interpretative principles, we suggest, are ones in which one looks for a way in which they can reconcile those two matters rather than excluding one or the other. So the proposition that the Tribunal could never call upon a memorialised owner to appear and counsel to make submissions about whatever the evidence was, is a strong one, it constrains the Tribunal in a way which seems odd. It's meant to be an adjudicatory body, it's meant to make the best decision it can, why should it be deprived of that benefit if it thinks in its discretion it's useful, that's really what the point comes down to. So I want to repeat, it's not a question of memorialised owners having a right as of, without qualification, without any constraint which simply coming in and opposing the application. So can I, if I may please, just go to our original application which takes us, I think the memorandum is at 301.0010.

This is the application that was made to the Tribunal in February 2020 supported by, well, with support of the application. This is the memorandum of support because it's a convenient way of dealing with it, and supported by an

affidavit that I'll briefly mention. And at page 0012, paragraph 8, there's a reference at paragraph 8 to the March 2017 Mercury memorandum which said – the reference to that, which I simply record for the record, is at 503.0218 – it says: "At present Mercury does not seek to be heard." Over the page at paragraph 9 there's reference to the evidence of Mr Williamson that was referred to yesterday. His brief is at 513.2588 and the evidence-in-chief and cross-examination is at 607.1724 between pages 1954 and 1978, which all took slightly under an hour, that particular part of the evidence. And the position that Mercury took, as is set out in paragraph 10: "Notwithstanding that evidence, Mercury is concerned the Tribunal has no information before it on how the issues identified by Mr Williamson could actually be addressed and/or resolved in a way that made the return of the land to Māori ownership appropriate," it goes on and refers to the directions given by the Tribunal on August 2019, they are at 602.0084. And I won't go there, but they indicated that the Tribunal was thinking about issues that the parties may not have thought about, we describe that in the application and the memorandum as being a "novel approach". And the sequences then described is that there were in late December – this is at paragraph 13 of this document at page 0015 – there's a reference to a Schedule 1 which recorded the Crown's position that there should be further evidence before the Tribunal made, even "an interim indication" – that's at 901.0001. The Tribunal disregarded that when it came out with its directions on the 20th of December, which are referred to at paragraph 14, it simply set down a timetable which indicated it was going to release is decision on the 13th of March. That particular focus, that particular memorandum, is at 502.009 –

WINKELMANN CJ:

Mr Hodder, it's the time for the morning adjournment.

MR HODDER QC:

It is, your Honour.

WINKELMANN CJ:

I was just wondering how much longer you're going to be? Because we seem to have covered your argument and now you're just taking us to what you say would have been helpful, is that right?

MR HODDER QC:

Yes, I was going to take the Court to the evidence that we were proposing to call to indicate that it was in fact fresh evidence, expert evidence, it wasn't a general attack on the Tribunal. But I'm happy to come back and spend five minutes on it after the adjournment if it helps.

WINKELMANN CJ:

Yes, probably no more than five minutes though, I think. We've read the materials, et cetera, so.

MR HODDER QC:

All right. In that case I think I can do that, and I'm grateful to the Court. We set out in paragraph –

WINKELMANN CJ:

Well, we'll take the adjournment now.

MR HODDER QC:

I'm sorry, I misunderstood your Honour.

WINKELMANN CJ:

Yes, I'm sorry, it was me speaking unclearly. We'll take the adjournment

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.51 AM

MR HODDER QC:

Thank you your Honour. I think having dragged this too late in the first run, I was in the point of my, on page 301.0016, which is Mercury's memorandum of

counsel to the Tribunal in February 2020, and at paragraph 14 I was simply giving a reference to the Schedule 1 referred to in the last sentence. That reference is 801.0001. So the position then is described in paragraph 16, there was the position as Mercury perceived it. The Tribunal: "16.1 has signalled it may take an uncontested approach to resumption powers. 16.2 has never previously had to consider an application to resume lands which contain operational hydro assets; and 16.3 has recognised in exchanges with counsel a potential lacuna of evidence before the Court concerning the effects that a resumption order may have on hydro generation. In those circumstances, Mercury applies for leave to be heard and adduce evidence to the Tribunal as an interested party… or alternatively, to provide information to the Tribunal relevant to its deliberations, pursuant to its power to receive such information." Under Schedule 2.

Paragraph 18 summarises the evidence information that Mercury would be providing. That, in effect, is a precis of the evidence of Mr Meek. The reference I can give you to that is at page 301.0025 and he summarises the evidence he would be giving, or is giving, in that affidavit at paragraphs 7 and 11, and they are in the nature of expert evidence, as I indicated earlier on.

Carrying on with the memorandum at page .0019 there's a reference to the Tribunal's discretion as we apprehended it, and as we are contending for again before the Court. At paragraph 26 there is a reference to the *Te Heu Heu* case. If I can just divert to that, that's in the bundle of authorities at .0160 and at page 112 of the judgment, where you were taken to by my learned friend Mr Radich, and the Incorporation endorsed the analysis by Justice Robertson in this case, where at line 5 it refers to the fact that: "The evidence before me indicates that the compromise adopted was that third parties would have the right to compensation… but would have no right to be heard by the tribunal which would be required not to take into account any development…" etc. This a workable compromise, was reached.

There's also reference to other extracts from the judgment. If we go to page 115, in the top line his Honour says: "Section 8C makes it clear that any

third party who has taken land subject to a memorial is not entitled to be heard by the tribunal except with leave." Which was the intuitive point that his Honour reached, and which is the point that we are contending for before this court.

That view wasn't limited to Justice Robertson and Mercury, as we go onto, going back to our memorandum if we could please, at 301.0020 in paragraph 30, we set out there the Tribunal's own guide to practice from the time, and the Court will see in the last sentence it said: "The landowners may, however, sometimes be heard on strictly factual matters relating to the land." Indicating the Tribunal thought there was a discretion.

Then in the next paragraph 31, we refer to the *Turangi Township Report* by the Court, and that explains, on the next page, we have the quote for it, that the purpose of the resumption constraint, or the constraint on appearances, was to ensure that if there wasn't going to be evidence that the State enterprise having incurred expenditure in making improvements or the new owner would incur personal or financial hardship. And as we said in 32, the memorandum of this case: "in this case, Mercury is not seeking to be heard on matters of expenditure or hardship. Nor is it seeking to mount a 'political' argument against resumption." Then it goes on to explain what it wants to do in paragraph 33.

So that, I hope, sets out reasonably clearly what Mercury was attempting to do, and the response to that came at page 301.0106, and we're going into .0107 the next page, this is what is said about the application from Mercury, paragraph 3: "Mercury NZ Limited is not an entity that is entitled to appear or be heard in relation to the applications… The application will be added to record of inquiry. It is declined. The supporting material will not go on the record of inquiry; it is not material that may be adduced." That was it. So that's simply recitation of the words of section 8C.

So what we say is that the Court is entitled to interpret the relevant provisions here, section 8C, in light of legal policy. The idea that the Tribunal should be well-informed, and in certain cases memorialised owners may have a fair case to be heard on matters, it would be helpful in the Tribunal's opinion for

the Tribunal. But it never got that far because the Tribunal said you can't come here under any circumstances. Although it didn't say so, that's to be taken as meaning, and we couldn't have you if we want to, in those circumstances, and we say that can't be the right meaning of the legislation.

The only other point perhaps I should mention is that there's reference to the memorial in section 27A of the S-OE Act. In our respectful submission that's simply a summary of the Act. One has to go back to the Act and interpret the 1975 Act and the 1988 amendments on their own, rather than relying on a summary under section 27A, which doesn't deal with the interpretive issue that the Court is being asked to deal with, which is what does "entitled to appear" mean.

If the Court pleases, although it's somewhat more rushed than I would have preferred, that is, I think, covers the points I wish to make orally.

WINKELMANN CJ:
Thank you Mr Hodder.

MR HODDER QC:
I should also say, your Honours, that subject to hearing the reply, presumably from Mr Radich, Mercury has no interest in the second appeal the Court is hearing and with the Court's leave we would probably seek leave to withdraw at that point.

WINKELMANN CJ:
Right. Mr Radich?

MR RADICH QC:
If your Honours please, just a small handful of matters that hopefully I can deal with expeditiously by way of reply. The first point is in relation to the submissions from my learned friends for the Crown, and looking at the decision of his Honour Justice Cooke under appeal and the degree to which he was final in his conclusions, and if I could just, if I may, go briefly back to that decision

and this issue, paragraph 89, this is BOA 0250, 0320 should I say. So to paragraph 89 of course, and we've looked at this point before, but in the last sentence, as picked up this morning, but it seems to me that the lack of mana whenua is a very important consideration, and then we come directly to 118 when the learned judge has looked at the issue of tikanga, and there he says in the second sentence, that in accordance with the findings on the first ground, the fact that Ngāti Kahungunu has no mana whenua over the land is very significant, not fatal, but the fact that other iwi have mana whenua will likely be fatal. And so when my learned friend Mr Heron says that the Court is sending it back to the Tribunal to have a look at, that's certainly true. But what it is doing is it's sending back to the Tribunal with really no room to move, he's saying: "Here is what tikanga is, it's going to be likely to be fatal, you must take that into account in what you now do. You must replace your views on this topic with mine." And for the reasons given in submissions those views, in the respectful submission of Wairarapa Moana, are not safe.

The second point, just to give your Honours a reference, on the Public Works takings and whether that was a breach or not, the references that I was looking for yesterday are in the transcript and in the bundle at 613.3033. It might come up now but I needn't go through it. What I can tell your Honours, if I could give you just the several pages, this is an exchange between Crown counsel and the Tribunal and her Honour Judge Wainwright looking at this very issue. And the points made for the Crown on these pages and so – thank you, that's the transcript – and the point we need to come is 614.3432. Counsel for the Crown, Mr Irwin, was making the point that in the district inquiry the Crown hadn't provided evidence about national emergency considerations or alternatives. But in the remedies hearing here there was an argument about the fact that there was an importance in the taking, that this was the land that needed to be had, and her Honour Judge Wainwright puts it to, in these pages, to the Crown that really it's looking at it both ways, if it was in the national interest then the value needed to be higher, if not in the national interest then it shouldn't have been taken, and so that is what those exchanges are. They don't necessarily provide an answer to the question but they are the only references of direct relevance.

WILLIAM YOUNG J:

Are there other cases that say a Public Works taking is itself a breach of the Treaty, principles of the Treaty?

MR RADICH QC:

It's a principle, as I understand it, your Honour, that the Tribunal regularly applies, but I can't take your Honour to an authority that deals with the point.

WINKELMANN CJ:

If there were other reasonable possibilities.

MR RADICH QC:

Yes, your Honour, yes, that's the point.

WILLIAM YOUNG J:

But she's got it slightly differently here, she says: "That's the principle, there is an exception for national exigency, and the Crown has explored all available options."

MR RADICH QC:

Yes. For example, if we can come over onto page 614.3434, just down the bottom there where it says "Judge Wainwright" – no, I'm sorry, I've got the wrong page. If I can go back one page, thank you, back one page, yes. Towards the bottom there Judge Wainwright is saying there, well: The Crown can't have it both ways, it can't say: 'This was uniquely suitable and we are going to hardly pay anything for it.' Those two are mutually exclusive. So, we said: 'If the Crown can dress up its actions as being necessary because of the unique circumstances of the land and because others were as good, is got to pay a lot for it because it's meeting a unique need.'" Then she goes on to look at the –

WILLIAM YOUNG J:

So that's stated as a Treaty principle, not a valuation principle?

MR RADICH QC:
Yes, Sir, I think that's, yes, that's fair.

WINKELMANN CJ:
I read it as a valuation principle there.

WILLIAM YOUNG J:
No, I don't think that would be the approach taken of valuation of the Public Works Act.

MR RADICH QC:
Perhaps it's a bit of both at the risk of equivocating. But I can see aspects of both of the points your Honours say there.

But I draw attention to these pages, just to make the point that these are really, as we search, the only references to this issue in the case that are relevant.

WILLIAM YOUNG J:
So was there no evidence given at all as to why the dams were placed where they were in the Waikato River?

MR RADICH QC:
As I understand the position, Sir, in the district inquiry, not the remedies hearing but in the district inquiry, there wasn't evidence.

WILLIAM YOUNG J:
There was not?

MR RADICH QC:
There was not evidence of the national emergency considerations why –

WILLIAM YOUNG J:
No, but it won't be in a national emergency. It's just that here is a river that is suitable for hydro power generation. One would expect a decision about a

placement of the dams to be influenced or probably determined by the typography of the land around the river.

MR RADICH QC:
Yes, I'm –

WILLIAM YOUNG J:
I mean that's – the idea that one's going to take one bit of land as opposed to another because of who owns it doesn't seem hugely plausible.

MR RADICH QC:
I understand your Honour's point and I can't take you to an evidential reference for that material, your Honour, I am sorry. The –

WILLIAMS J:
It doesn't seem that there was anything in any of the old Ministry of Works materials that talked about the choice of this site as opposed to some other site along the river was made available. So we're none the wiser really.

MR RADICH QC:
That is the point, Sir, and I'm sorry to make a point just to say that we're none the wiser but I'm afraid that's what I'm doing in the sense that these are the only extracts we could find knowing that the topic wasn't covered in the district inquiry.

O'REGAN J:
I think if there was another site they would have built a dam on that as well, wouldn't they?

MR RADICH QC:
Perhaps so, Sir.

The next point I make comes back to the submissions made by my learned friends about tikanga. Is it controlling? Is it relevant? So to recap, is tikanga a

controlling consideration? Is that the way in which the High Court was looking at it? How was the Tribunal dealing with that? The case for Wairarapa Moana is that no, it's not controlling in terms of the requirements of section 8A, but if it was controlling then it was in fact considered appropriately on the basis that it was consistent with tikanga because tikanga is capable of and recognises multiple layers of interest, and I think this is the key point. It can and does recognise and provide for both the mana whenua of Raukawa and Tūwharetoa as well as the different, and arguably less, but different interests of others, such as Wairarapa Moana. So therefore in making a decision that's consistent with tikanga the Tribunal arguably would need to be comfortable with the notion that it was making an order that wouldn't affect the nature of the underlying interests in tikanga terms, that is to say Raukawa's interests, Tūwharetoa's interests. So the Tribunal did, in fact, in their submission of Wairarapa Moana ask itself the right question in this sense: would transferring the titles transfer mana whenua, and the answer is no, it would never do that, and –

WILLIAMS J:
It did seem to accept that there was a binary choice here, either Raukawa is cut out or Wairarapa Moana is cut out. That's not necessarily so, is it, as I discussed with Mr Finlayson?

MR RADICH QC:
No, Sir. With terms and conditions and the like, I agree with your Honour, it's not binary.

WILLIAMS J:
In fact, both could have been accommodated in tikanga consistent terms, done carefully and properly. Mr Finlayson's response to that was that your clients have simply refused to engage with Raukawa. What do you say to that?

MR RADICH QC:
On that point, your Honour, I wasn't at the Tribunal but my understanding is that approaches were made during the Tribunal hearings and, importantly, that Wairarapa Moana has been very clear in saying that it doesn't ever dispute or

wish to take away anything from Raukawa's position and the harm it has suffered through the breaches it has faced.

WILLIAMS J:
But that depends on how Wairarapa Moana handles the potential for resumption, doesn't it?

MR RADICH QC:
Yes, Sir.

WILLIAMS J:
Because it's one thing to say: "We're not undermining your mana whenua." It's another thing to say: "We're not undermining your mana whenua but we're taking all the land and we're not accommodating your mana whenua within the terms of the reacquisition," which according to the terms and conditions clause in section 8A is perfectly possible.

MR RADICH QC:
Yes, and the terms and conditions phase is the phase the Tribunal was about to come to –

WILLIAMS J:
But you see, the problem is it started with the binary.

MR RADICH QC:
Yes.

WILLIAMS J:
Someone has got to lose here.

MR RADICH QC:
Yes.

WILLIAMS J:
That seems to be a false binary, doesn't it?

MR RADICH QC:

Well, it said, here's our preliminary determination and now we want to – we're putting that out there to cause a conversation and we're going to come back and talk about terms and conditions, and beyond that, your Honour, in the submission of Wairarapa Moana it wasn't utterly binary in the sense that what the Tribunal did do was to look at the different intersecting, competing, multiple layers of tikanga, and that's the point that his Honour, Justice Cooke, in the submission of Wairarapa Moana, failed to take into account. There are, if you look at paragraph 259, and back in the preceding paragraphs, about 251, 252 –

WILLIAMS J:

Yes, you're right, the Tribunal very carefully assesses hara, ea, mana, tapu, all of these tikanga principles, which would go to the suffering that Wairarapa Moana people have had to go through, being uprooted from their own whenua that they lost and then deposited somewhere where there was no access and no cobalt.

MR RADICH QC:

Yes.

WILLIAMS J:

But Wairarapa – it has to be accepted in tikanga terms, Wairarapa Moana is not the only player here.

MR RADICH QC:

I agree.

WILLIAMS J:

So tikanga should be well able to accommodate both in a way that avoids this, what in my view is a silly zero-sum game.

MR RADICH QC:

Yes, I understand your Honour's point. It's not a question of who was there first. It's not a question of competing rights. This is an issue between

Wairarapa Moana and the Crown ultimately in terms of the restitution or remedy that's available. But your Honour's point, which I'm not addressing I know directly in saying that, is accepted.

WILLIAMS J:
Yes, because it's not just between Wairarapa Moana and the Crown. It's also between Wairarapa Moana and the mana whenua, inevitably.

MR RADICH QC:
And the mana whenua.

WILLIAMS J:
And someone has got to own that.

MR RADICH QC:
Yes, and there are multiple mana whenua interests here at play.

WILLIAMS J:
Quite, but what else is new?

MR RADICH QC:
Yes, quite.

WINKELMANN CJ:
So just to go back to your earlier point, you say that the Judge didn't look at the multiple aspects of tikanga unlike the Tribunal which did, because to rephrase that, you ended with saying that the Judge had said that tikanga was a controlling consideration but on your case he didn't really say tikanga was a controlling consideration. He said mana whenua was the controlling consideration.

MR RADICH QC:
Yes, that's a fair distinction, your Honour. What he was saying is that tikanga equals mana whenua, and didn't go more broadly.

WINKELMANN CJ:

So you're saying he was taking a reductive approach?

MR RADICH QC:

Yes, your Honour, that's a good word to use, if I can say, and the manuhiri point that the Tribunal deals, I think it's paragraph 258, that my learned friend, Mr Heron, emphasised, is a reflection of that, that there are these multiple layers, there are these multiple interests, and certainly Wairarapa Moana doesn't say anything other than that. I don't think it would use that word necessarily but it certainly understands that there are multiple interests at play. Its interests are relevant. Its interests, it says, are sufficient for section 8A and that's what 8A is about. It is that restitutionary remedy.

WILLIAMS J:

Of course, manuhiri have rights, don't they?

MR RADICH QC:

Yes.

WILLIAMS J:

They have a right to be manaaki'd as they say in Māori. They have a right to the hospitality and aroha of the mana whenua.

MR RADICH QC:

Yes. Yes, that's a fair point.

WILLIAMS J:

So manuhiri status is not necessarily a diminishing or a diminished status. It has its own power.

MR RADICH QC:

Indeed. I accept that entirely, your Honour. It's a fair point.

My learned friend, Mr Finlayson, spoke about what he called the mean-spirited actions of the Incorporation towards Raukawa. That's something that troubles Wairarapa Moana just on the basis it's certainly not been their intention to undermine Raukawa's position and, as I say, it's understood that approaches have been made. There's work to be done but there it is.

My learned friend, Mr Finlayson, referred to the lands discussions taking place before the Treaty settlement era – E-R-A, not E-R-R-O-R, although that might resonate here too. I just mention in *Haronga*, in the Court of Appeal decision in *Haronga* – I'm sorry, I've walked up here without the reference for that but someone might whisper it towards me as I speak – at paragraph 62 the Court was making the point that this is an important agreement. They were talking about the forest agreement there, of course, but I refer to it also in a similar way to the lands. This was in a binding agreement, and the settlement policy of the Crown is something that couldn't properly be taken into account and that was what that litigation was all about because the Waitangi Tribunal had declined an urgent inquiries hearing on the basis that the Crown settlement policy pathway needed to be pursued first, only come back here if you really run out of options, and the Courts in *Haronga* were making the point that no, these deals preceded, as my learned friend says, they did precede the Crown settlement policy and therefore the Crown settlement policy couldn't be used to disrupt, to derail them. That's one reference but it is the focus of the case in many ways.

I turn, I think finally, to a point my learned friend, Mr Hodder, made, looking at the Treaty principles and active protection –

WINKELMANN CJ:
Can I just ask, so what do you say about Mr Finlayson's point that the settlement legislation is quasi-constitutional?

MR RADICH QC:
I'm sorry, I did overlook that, yes, thank you very much. The point is that what can be accommodated under the resumption scheme can, in the

Incorporation's submission, be incorporated without doing an injustice to that provision or those provisions in the settlement legislation. My learned friend referred to it as undermining the apology, being a showstopper, and resumption needing to be read in that light, and certainly I just come back to the fact that that is a reflection and expression of the multiple interests that are at play, that is one of the multiple interests to be taken into account, and it's given voice through that legislation but that doesn't, in Wairarapa Moana's submission, prevent accommodations being made under the resumption regime.

WILLIAMS J:
We're just not seeing evidence of it. It would be good if there was, don't you think?

MR RADICH QC:
Evidence, your Honour, can I enquire –

WILLIAMS J:
Of accommodations of the mana whenua dimension of this process.

MR RADICH QC:
Yes, I see. The Incorporation – I understand the point as acknowledged earlier, your Honour. The Incorporation's position is that the way in which the Tribunal reasoned its way through this so as to take into account those multiple interests, it was appropriately either applying tikanga or alternatively taking into account tikanga as a relevant consideration, and when we look at what the Tribunal did, in the Incorporation's view that was not, as his Honour, Justice Cooke, found, an error, and in this way I mean E-R-R-O-R, and I acknowledge the point your Honour makes.

WILLIAMS J:
Well, most particularly, the Incorporation did not offer the accommodation to the Tribunal so that it did not have to see its position as being as binary as it was.

MR RADICH QC:

I think the important point, Sir, is that – yes, I'm given a note and I think it's important just to refer to it, that accommodations were offered but they're not on the record. I can take it no further than that, standing before you now, but most certainly I think the important thing is that the – we're part-way through the process. Of course, the Tribunal's decision was, or preliminary determination, was set aside by Justice Cooke but the Tribunal had reached a point where it had set out its views and then it was going to hunker down and consider terms and conditions. Right, how are we going to give effect to this? And there was quite a lot going on at that point. For example, the Incorporation had reached a point where it was saying: "Well, you needn't give it back to us directly but let us be the steward. Let us put an entity together for all of Wairarapa Moana," and so it was very much at that formative stage that there was quite a lot to do, a lot of discussion, and quite a journey yet to be taken. I think because we've come at it hard at that point where the Tribunal had issued its preliminary determination, we haven't seen a benefit of that additional work.

My last point was in relation to Mr Hodder's consideration of Treaty considerations in terms of the principle of active protection, mana whenua. I simply say that it would mean, if taken to its natural progression, that any lands given by the Crown to Māori wouldn't be subject to Treaty principles. That if it was only in favour of those with a direct mana whenua claim, and other principles weren't taken into account, it surely can't be the case that the Treaty didn't apply to those others in terms of Crown grants also and that cannot be so in the Incorporation's submission.

GLAZEBROOK J:

So can I just check, you were relying on Māori ownership as including land that was given to Māori in breach of everybody's Treaty principles and rights in this case?

MR RADICH QC:
Yes, those multiple different occasions where land was given in different places for different reasons, they must surely be subject to the same Treaty principles in different ways perhaps.

In terms of the cross-appeal, because we went in reverse order I had agreed with my learned friend that it was only if something completely new arose that I would reply. There hasn't and so I leave my submissions at that point with thanks to your Honours.

WINKELMANN CJ:
Thank you Mr Radich. Mr Hodder I think you may be excused.

MR CORNEGÉ:
Tēnā koutou. While my friends for Mercury are leaving, it may be worth having a brief chat, your Honour, about timing. I've discussed the matter with my friend Mr Heron, I think I will be, subject to questioning, an hour to an hour and a half. He thinks he will need an hour and a half. That would have us run –

WILLIAM YOUNG J:
You've only got two and a half hours.

MR CORNEGÉ:
Indeed.

WINKELMANN CJ:
Yes, I think it might be possible to deal with, for the Crown to deal with it in less than an hour and a half, but to be fair because normally the appellant carries the burden of setting out the factual circumstances et cetera, but we can come back at two and we'll see how we go.

MR CORNEGÉ:
Yes, that should give us sufficient time.

WINKELMANN CJ:

Because counsel can appreciate we've read all the written material.

MR CORNEGÉ:

Yes your Honour, and I'm mindful of the fact that this particular appeal will inevitably have ongoing consequences for other claimants, in particular in the Mangatū Inquiry.

WINKELMANN CJ:

Yes, okay. I'm not saying that by way of wanting to rush people.

MR CORNEGÉ:

No, not at all your Honour. Equally the appeal is on a fairly narrow point albeit there is quite a lot that goes in behind there.

WINKELMANN CJ:

Fire away.

MR CORNEGÉ:

Thank your Honour. This appeal obviously concerns issue 5 in his Honour Justice Cooke's judgment, which deals with the narrow question of whether the four year grace period in Schedule 1, clause 6 of the Crown Forests Assets Act should have been extended, and the Crown and my clients agree on at least two things. One is that if not in terms of application, in terms of how the test is stated, his Honour Justice Cooke, and I'm sorry I should have confirmed that the Court has my summary of argument?

WINKELMANN CJ:

Yes, go ahead.

MR CORNEGÉ:

Thank you your Honour. I'll go to the judgment in a moment, but I set out there at paragraph 1.1 the way in which his Honour Justice Cooke framed the relevant test, and I don't take any objection with that, and I don't understand the

Crown to take any objection to that. The other matter that the Crown and I agree on is that for reasons perhaps unrelated to this issue, and because of the preliminary nature of the Tribunal's determination, the Tribunal is going to have to reconsider this issue again, I have no difficulty with that. But what ultimately we disagree about is the way in which his Honour applied the applicable test, and in particular we disagree about the proper characterisation of the compensation that is payable under clause 3(c).

So what I propose to do in my submissions, your Honour, is briefly deal with the background to the forest agreement and the compensation regime, explain why in my submission Justice Cooke was wrong to characterise the compensation payable under clause 3(c) as penalty interest, explain why it was open to the Tribunal to take into account the matters it took into account, and then finally explain why some of the matters which the Crown suggests are relevant are, in my submission, not.

So if we could start, if we could bring up the Crown Forest Assets Act, that's BOA 0653, it's tab 27.

WINKELMANN CJ:
We strangely enough have a gap. We have 1 to 26, 37 to 63 and 64 and 65.

MR CORNEGÉ:
That's helpful your Honour, those are my authorities.

WINKELMANN CJ:
So which Act?

MR CORNEGÉ:
The Crown Forest Assets Act, which we added because it wasn't in the…

WINKELMANN CJ:
Can one of your juniors email it to the registrar?

MR CORNEGÉ:

Yes, thank you your Honour. There may be a workaround in any event your Honour.

WILLIAMS J:

What else is in those 10 tabs?

MR CORNEGÉ:

Preliminary determinations, various parliamentary debates, but we don't need to refer to those. The *Mangatū Remedies Report* and the 2017, sorry, 2015 High Court judgment in *Haronga*. Nothing that should cause too many difficulties.

WILLIAMS J:

Except for the Act?

MR CORNEGÉ:

Except for the Act.

WINKELMANN CJ:

All right, we can just take it. Has it been emailed?

WILLIAMS J:

We can just get it made, one of the clerks to print it off and give it to us.

MR CORNEGÉ:

Sent to Mr Greenhow, thank you.

WINKELMANN CJ:

Well, I don't know if we can set it up on that system, but Mr Greenhow could just email it to us now anyway, he bundles, and we can…

MR CORNEGÉ:

Thank you, your Honour.

WINKELMANN CJ:

That might not be the most intelligent way to deal with it. I don't know if Mr Cox can open it up for us…

MR CORNEGÉ:

I'm seeing it as a workaround, but the High Court judgment doesn't set it out in full, so.

WILLIAMS J:

We can just Google it.

WINKELMANN CJ:

Should we just Google it?

MR CORNEGÉ:

While we're waiting for that, your Honours, I can continue. I won't spend too much time dwelling on the circumstances that led to the forests agreement and the Crown Forest Assets Act, your Honours will be more familiar with that than I am. But there is a couple of points worth emphasising and this is detailed in Mr Quinn's evidence in particular, which I refer to in my submissions, is that the Crown initially proceeded on the assumption that Crown forests would be transferred to the Forestry Corporation and dealt with under the Treaty of Waitangi (State Enterprises) Act regime in the same way that other state enterprises were, and that became problematic because they could not agree with the Forestry Corporation on an appropriate return to the Crown for the transfer of those assets, and part of that arises because of the nature of forestry assets that there needs to be a security of tenure for those who are in control of forestry related assets and that even the payment it was anticipated of full compensation in the event of return was likely to materially reduce the value to the Crown of the transfer of those assets. So the Crown tacked and decided that instead what it would do was essentially separate out the ownership of the land from the forestry rights, that is, it would sell the forestry rights and the ability to mill and replant and then subsequently mill on that land, and the Crown's own assessment was that if they had dealt with the forests under the State

Enterprises Act regime, so the result of the '87 *Lands* case, that that would have resulted in a 20 to 25% discount on the ordinary commercial value of the forests.

Now, of course, having declared in Parliament that there was an intention to sell forestry licences, the New Zealand Māori Council and FOMA came back to the Court of Appeal under the leave reserved in the '87 case and again encouraged to go away and agree a regime, which they subsequently did and which, importantly, this court in *Haronga v Waitangi Tribunal* recognised and described as giving both the Crown and Māori something of value. And certainly the position during the negotiation of the forests agreement was, by the Māori negotiators at least, was that if this had been dealt with under the State Enterprises Act regime, that is the resumption regime that applies to Wairarapa Moana's claim, for example, that could have resulted, in the event of a successful application, the immediate return of forestry assets, including the trees, because at least the common law the trees would have come with the land. So Māori would have been in a position where they got the land back immediately and received the forests. It's important to keep that in mind when analysing, in my submission, the deal that was eventually reached and the way in which that should be properly interpreted, because the Crown clearly got something of value, but the Māori negotiators considered, and this court in *Haronga* acknowledged, that Māori also received something of value, and simply put the way that Justice Cooke has analysed in particular the 3(c) compensation, and which the Crown urges on this court, would have given Māori, or would give Māori something much less than they would have received if these assets had simply been dealt with under the State-Owned Enterprises Act regime.

WILLIAMS J:
It would have been hard to find a buyer under the State-Owned Enterprises Act regime, that was the problem.

MR CORNEGÉ:
Yes, and the Crown's own analysis, and this is reflected in the introduction of the Bill, and in internal papers, was that that would have resulted in a 20-25%

discount on commercial rights, even acknowledging that there would be payment of full compensation in the event of return. Because the Crown's concern was twofold, the overseas forest corporations or companies who might be looking to buy licences, might not understand precisely how the regime worked, and that's probably not unfair. But two, they were much less likely to invest in forestry-related infrastructure if there was the risk of the land simply being taken and returned to Māori, albeit on the payment of full compensation. So yes, a long way of saying yes your Honour.

WINKELMANN CJ:
So what part did you want us to…

MR CORNEGÉ:
Part 3, so paragraph 36 – sorry, section 36, that's at 0675. So this simply explains that in the event of an interim recommendation for the return of land to Māori becoming final, the Crown shall return the land to Māori and then pay compensation in accordance with Schedule 1. So if we can go to Schedule 1, which is at 0678, and its essentially, in my submission, a two-step process. Clause 2 deals with how much compensation will be paid. Clause 3 deals with the different ways of calculating that. Clause 4 and 5 deal specifically with the 3(c) calculation. Now the relevance of the 3(c) compensation and why it was something that the Tribunal determined, it's the only type of compensation that is a genuine moving feast, if I can put it that way. 3(a) compensation is simply the market value of the trees as at the date of recommendation. Now that will obviously vary depending on where you are in the growth cycle in the forestry markets, but that's a matter of valuation evidence. 3(b) similarly market stumpage. 3(c) is relevant because it's the net proceeds received by the Crown from the transfer of the asset plus a return on those proceeds for the period between transfer and the return of the land to Māori ownership. So obviously that, the longer this takes, whatever the proceeds were, the greater that sum will be subject to the extension by the Tribunal of the four year grace period.

Clause 5 explains how that is to be calculated. Clause 5(a), it's an amount to maintain the real value of those proceeds which broadly speaking, there was

some debate between the economists, but broadly speaking that would be pegged to CPI, and that's for a four year period, either from the date of transfer if the relevant claim had been filed before the transfer, or for a period of four years following the date on which the claim was filed, and the original claim filed on behalf of Ngā Tūmapūhia-ā-Rangi by Mr Smith was 20 April 1994, so the relevant period for these purposes is that date.

Then for any subsequent period, and this is 5(b), equivalent to the return on one year New Zealand government stock measured on a rolling annual basis, plus an additional margin of 4% per annum.

And then what's at issue in this appeal is clause 6. So the Tribunal may extend the four year period in clause 5 if satisfied of either of (a) or (b), and (a) is "that a claimant with adequate resources has wilfully delayed proceedings in respect of a claim," and I'll address that a bit later in terms of some of the factors the Crown now suggests are relevant but certainly before the High Court and before the Tribunal there was an explicit acceptance by the Crown that they weren't making that allegation in respect of Ngāti Kahungunu, let alone Ngā Tūmapūhia. So that's not in consideration, in my submission.

Of relevance then is (b), that the Crown was prevented, "by reasons beyond its control, from carrying out any relevant obligation under the agreement made on 20 July 1989 between the Crown, the New Zealand Māori Council, and the Federation of Māori Authorities Incorporated," so the forestries agreement, and that's ultimately what's at issue in this appeal, and the error that we say that Justice Cooke fell into was that he described the compensation payable under 5(b), so the rate of return that kicks in after the minimum four year grace period, as being penalty interest, and we say it's no such thing, it's simply an agreed rate of return on forests, and why that's important, in my submission, is because if it's genuinely penalty interest then that necessarily involves an assessment of whether the Crown has done something wrong for which it should be essentially punished, whereas in my submission if it's properly understood as a rate of return, an agreed rate of return on forestry assets, then the onus must

be on the Crown to demonstrate that it could not reasonably have done more to have complied with their obligations.

Something else I think the Crown and I agree on is the relevant obligation here. So if we could go to the forestry agreement which is 530.6925. There's a number of obligations but the relevant obligation for present purposes is at clause 6 of the agreement: "The Crown and Māori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest reasonable period." There's no great dispute that forestry related claims, and certainly these forestry related claims, haven't resolved within the shortest reasonable period. The question is, in terms of clause 6(b) of the Schedule 1 of the Crown Forest Assets Act, first, has the Crown complied with its obligation, has it used its best endeavours jointly with Māori to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and make recommendations, and then, two, if it has, are the delays for reasons beyond its control? Hence why, we say, the way that Justice Cooke framed the question, if not the way in which he applied it, is not problematic. If we can go to the *Mercury* judgment…

WINKELMANN CJ:
Can you just repeat what you said the questions were? Has the Crown done all it reasonably can?

MR CORNEGÉ QC:
Well, has the Crown, first, has it complied with its best endeavours standard, which in my submission means has the Crown done all it reasonably can to have assisted the Tribunal to identify and then process forestry-related claims and then make recommendations, and, if it has, and there's otherwise been a delay, is that for reasons beyond the Crown's control, which might be two ways of looking at the same question. Because ultimately if the Crown could reasonably have done more then arguably any delays are not for reasons beyond the Crown's control. And to give you an example of something which would, in my submission, indisputably be something beyond the Crown control

in the Mangatū Remedies Report, the period was extended, albeit briefly, because of the COVID lockdown, but there was a delay in all parties and the Tribunal being able to finalise recommendations, which necessary increased, meant that the clock kept ticking on the interest payments, and the Tribunal accepted that that was a reason beyond the Crown's control. So I'll come later in my submissions to what it is that the Crown relied on here, but that in my submission is a good example of something that is self-evidently beyond the Crown's control.

WILLIAMS J:
Sorry, can you just give me the location for the 1989 agreement again?

MR CORNEGÉ QC:
Yes. It is 530.6924.

Now the relevant paragraphs, in my submission, the issue is dealt with by Justice Cooke at paragraphs 119 and following. At paragraph 125 his Honour sets out – I can take you to the prelamination determination but he quotes there the Tribunal's decision on this issue. It is brief, I accept that, but it's brief, in my submission, in the face of a fairly brief argument by the Crown which the Tribunal was, I say, right to reject. And it's paragraph 133 where his Honour frames the relevant test, it's the second half of that starting with that approach, and then what the Crown would need to demonstrate is that, notwithstanding its best endeavours and for reasons beyond its control, Ngāti Kahungunu's claims before the Tribunal concerning this land were not progressed within the shortest reasonable period.

The difficulty, as I say, is that, at paragraph 143, his Honour then says: "Considered in light of their purpose, the provisions that allowed the claimants to receive more than the amount to maintain the real value of the claim – that is effectively penalty interest – was to ensure that the Crown properly co-operated with the claimants to get the claims they wished to pursue determined promptly," and that is an error, that is, in my submission, the wrong way to characterise the interest payable under clause 3(c), and it will make it

easier, if that is the proper way to characterise it, but the Crown's task is easier. If it's the wrong way to characterise it, the Crown's task is harder.

O'REGAN J:
Normally if you have an interest rate that applies only if some adverse event occurs through the fault of someone you call it "penalty interest", don't you?

MR CORNEGÉ QC:
Yes, but that's not the way that, in my submission, this is framed and it's certainly not consistent with the negotiations that went in behind this. What you have here is in fact something that's advantageous to the Crown. The agreed rate of return, that is the –

O'REGAN J:
Well, yes, but if you lose an advantage that's a penalty, isn't it.

WINKELMANN CJ:
Why would it be tied to the conduct of the Crown if it's not a penalty?

MR CORNEGÉ QC:
The parties agreed, and certainly the way in which it's described in the forest agreement is an agreed rate of return on forests, that is, if Māori were in a position where they had the forests in 1989, had the land, had the forests, they could sell the forests, they would have received, that's the rate of return that they would have expected to receive. So in my submission the proper interpretation is that that's the agreed commercial rate of return which in the ordinary course would be payable. The four year period is in fact advantageous to the Crown, that is a period, that's something Māori, successful Māori claimants, are giving up, that they in the ordinary course would have expected to make a rate of return, an agreed rate of return during that period, but the Crown is given a four year grace period to comply with its obligations, to get these things processed, determined and heard. So –

O'REGAN J:

And if the Crown doesn't do that, it then pays a higher rate. I mean, it just seems to me you're dancing on the head of a pin here. If you say the rate is X and then after a certain period if you haven't done something it's X plus 4 per cent or whatever it is, it's a penalty.

MR CORNEGÉ QC:

Well, in my submission the rate is X, we give the Crown an advantage as against – or we disadvantage successful Māori applicants by not –

O'REGAN J:

But if the Crown loses the advantage that's a penalty. You had an advantage, because you didn't act quickly you lose it. Isn't that a penalty?

MR CORNEGÉ QC:

It may seem semantics, your Honour, but in my submission it is important in terms of understanding precisely what it is the Crown need to do. Because there's another way of looking at that, which is that if the Crown's task is straightforward – well, not straightforward, but if the Crown's task is easier, that in looking to whether the Crown has complied with its obligations and looking to whether to extend the four year period, what the Crown has to establish is not as difficult as it otherwise might be, but in fact you're punishing successful Māori claimants from receiving the agreed rate of return on forestry assets.

WILLIAMS J:

It doesn't matter what you call this because the test is whose fault? If taking longer than four years is attributable to the Crown as opposed to the claimants, then 4% immediately. If the claimants carry some of the blame then you can delay it. Who cares what it's called?

MR CORNEGÉ:

Well, if the claimants carry some of the blame then that's caught by clause 6(a). So it can't be, in my submission, that the claimants carry the blame unless they're well-resourced and wilfully delay. Those are the –

WILLIAMS J:

Quite, but the only question here is who at the end of the day, to use that cliché, is responsible for the fact that this has taken longer than four years? If it is the Crown, perhaps directly or indirectly, then the 4% interest rate is triggered immediately at the end of the four year period no matter what. If the fault can be more widely attributed, then perhaps there's a discretion to extend that period. What does it matter whether it's called penalty interest? The test is pretty clear, both in the agreement and in the statute.

MR CORNEGÉ:

Yes, I accept. The point is whether the Crown bears the onus and in my submission it clearly does. Ultimately, given that what has to be shown is a compliance with a best endeavours standard and that delays were beyond the Crown's control, in my submission, is for the Crown to establish that and that's certainly the way that Justice Cooke framed the test.

The second point, your Honour, is that if one – in terms of the actual rate that kicks in, I accept that in practical terms this can – you're right, ultimately, if the Crown is not to blame, the Tribunal can exercise its discretion, but if we look at what the interest rate that kicks in actually is, it's not a rate that is clearly penal, if I can put it that way. It's not 30, 40, 50%. It's not something that directly punishes the Crown for behaving badly. It is, and was agreed by all of the parties, to be a rate of return on forests. So the point of that is that again, you're right, that's the basic question, but how hard is it, whose role is it, and we say it's – and Justice Cooke, by characterising it as penalty interest designed to speed up the process, failed to grapple with whether the Crown had in fact complied with their obligations, failed to deal with whether the Crown had in fact met their onus, what it is that the Crown's job is, and –

WILLIAMS J:

Well, he said the Tribunal had failed to grapple with that.

MR CORNEGÉ:

Yes, he did.

WILLIAMS J:

He's probably got a point, doesn't he?

MR CORNEGÉ:

Well, I accept it's a brief decision. It's useful to look at what the Crown actually did in the Tribunal. The Crown's submissions are at 567.1264.

O'REGAN J:

Do you want us to go to those or you…

MR CORNEGÉ:

567.1264. Let me see if can find it another way.

WINKELMANN CJ:

We'll adjourn and you can all look it up.

MR CORNEGÉ:

Yes, thank you. So back at two, your Honour?

WINKELMANN CJ:

Yes, back at two.

MR FINLAYSON QC:

Your Honour, I wonder if, just very briefly, if the Raukawa counsel could be given leave to withdraw because, interesting as this is, we have no part in it?

WINKELMANN CJ:

Certainly, Mr Finlayson.

MR RADICH QC:
And while people are leaving I wonder if Mr Mahuika might be granted similar leave, your Honour?

WINKELMANN CJ:
Yes, you're excused, Mr Mahuika.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.02 PM

WINKELMANN CJ:
Mr Cornegé.

MR CORNEGÉ:
Thank you, your Honour. Perhaps rather than focusing on whether to call the rate of return "penalty interest" or otherwise, the most useful focus, in my submission, should be on what precisely does the Crown need to do in order to tick the box, so to speak. Self-evidently there has been, particularly in relation to this inquiry, there has been a delay. I don't think anyone would sensibly suggest that these resumptions applications or that these claims have been heard and dealt with in the shortest reasonable period.

Given that the obligation in the '89 agreement was at that stage for the Crown to use their best endeavours, together with Māori, to assist the Tribunal to identify and process claims in the reasonable shortest period, one would have expected, for example, that the Crown might have worked with the Tribunal to set up a priority system for all forestry-related claims and to have adequately funded the Tribunal to heave dealt with those claims in a short period of time. But what the Crown did before the Tribunal was nothing of the sort and this was the document we've now found. It was my handwriting that was the problem. These are the Crown closing submissions before the Tribunal, and it's paragraph 314 and following. I am paraphrasing.

There's an assertion that the Crown used its best endeavours to comply with that obligation. At 316 the Crown says it acted consistently with the Tribunal's preferred processes. This will be a matter for the Tribunal in due course but in my submission it was really a situation of the Tribunal acquiescing to the Crown's preferred Treaty settlement policies but that's a matter for the Tribunal to determine, and then we simply have a chronology of events in a handful of paragraphs. Now there's a reference to Mr Fraser's evidence – I won't take you to it but I'll give you the reference to it. It's 520.4477 – where Mr Fraser simply sets out the chronology in a bit more detail.

But what the Crown didn't do at all was attempt to explain why it could not reasonably have done more to have spared each of those stages up, which is precisely what the Crown should do and needs to do if it can satisfy the Tribunal that the four year grace period should be extended.

So your Honour, Justice Williams, is right. The Tribunal did deal with the Crown's application in brief terms but that was in the face of, with respect to the Crown, a very brief argument on the point with very little evidence explaining what the Crown did and did not do or, more importantly, what the Crown could or could not have done reasonably in the circumstances.

So faced with that, it was perfectly appropriate, in my submission, for the Tribunal to deal with essentially a brief application in a brief way.

WILLIAMS J:
Except that the Tribunal is a Commission of Inquiry, not a Court. It's not stuck with what the parties want to put up. It has to be satisfied itself that the requirements of the Schedule have been met, whatever they might be in this particular circumstance.

MR CORNEGÉ:
Yes, although in my submission there should still be an onus on the Crown in these circumstances to –

WILLIAMS J:

Well, there are no onuses in Commissions of Inquiry. That's what the Erebus claim says.

MR CORNEGÉ:

But this is why it's – putting aside whether to call it a penalty or not, it's important to understand what the purpose of 3(c) compensation is and it's not meant to be fundamentally different necessarily. The numbers will change depending on timing from either 3(a) or 3(b). They're all different ways of calculating the value of the forest which cannot return to Māori any more because it's been sold and it's been – or the licences have been sold and it's now been felled and milled. So 3(a) is obviously the value of the trees as at the date of resumption and that value will depend entirely on where you are in the relevant cycle. The stumpage is again what it is. 3(c) represents a recognition that all of this – the purpose of the agreement was to put, if you're a successful Māori claimant, to essentially put Māori in a position they would have been had they had the forest in 1989, including the trees. So in that case Māori would have been in a position to sell the forest if they wanted to and invest those funds. It's precisely what the Crown did. The Crown will have paid off debt, invested it, whatever it happens to have done. Had Māori had those funds they would have been able to do the same.

It's useful to look at the forests agreement itself. Now these words for some reason don't make their way into the Act but there's no suggestion that this is intentional, and this is 9(b) of the forests agreement. It sets out that same calculation and then says plus an additional margin of 4% to reflect the commercial return. So all parties, and I can take you in a moment if it's helpful to some Crown material leading up to that agreement that showed that all the parties agreed that that formula was essentially representative of a commercial rate of return on forestry assets. So the purpose of this was to put Māori in a position they would have been had they had the forest or had they had the proceeds of sale, and, of course, if these had been dealt with within a four year period Māori would then be in a position to have invested those funds and again made a rate of return on them.

WILLIAMS J:

You see, that presents you with effectively only two scenarios. One is that the Tribunal would hear site-specific claims in relation to the however many hundreds of thousands of hectares, the subject of Crown forest licences. You could probably have done that in four years, you could possibly have done that in four years, or you would wrap the Crown forest licence land in with wider district claims and effectively treat them as an aspect of claims to the whole 66 million acres. The second scenario is what actually happened, the first scenario was never a goer, and I doubt that either party knew that at the time, in 1989. Except that, of course, these broad claims are referred to in the *Lands* case in '87, the Ōtākou reserves, tells you that this was potentially a much bigger game than just these CFL blocks. Everyone was making this up, weren't they, because no one had ever done this before. You've got to give some recognition to that.

MR CORNEGÉ QC:

Yes, that's fair. Against the best endeavours standard, on my submission, one of the relevant factors must be has the Crown done something that's antithetical to – could the Crown have reasonably done more perhaps not to have matters dealt with within four years, I accept the point, but certainly quicker than they were? Could the Crown have reasonably done more? Because the Crown in this case are not saying: "Extend the grace period for five years, 10 years, some limited period," what the Crown are saying and argued before Tribunal was: "Extend it right up until the date at which you release your remedies inquiry. So please excuse us for any responsibly at all for the delay." And so the position can be, there's obviously a middle ground, I mean, this is a much more nuanced question than: "We're either to blame entirely or we're not to blame."

WILLIAMS J:

Yes, that's probably what's problematic about the Tribunal's conclusion that after a paragraph it's all the Crown, because that probably doesn't give sufficient recognition to the difficulty of the task that the parties probably didn't contemplate at the time.

WINKELMANN CJ:

Although this is not a fully adequate description of the dichotomy between the Tribunal and the High Court, but it does seem to be that the Tribunal's taken a system analysis, a system-wide analysis, and said really the Crown has engaged with the system and funded the system in a way which wasn't sufficient to discharge that duty, and the High Court Judge has taken a claim-based analysis and said a claim-based analysis was required, is that your reading?

MR CORNEGÉ QC:

Yes, that is my reading, your Honour.

WINKELMANN CJ:

And do you say that based on the provisions of clause 6 of the schedule, a system-based approach was the right one, since the obligations under the agreement were system-type obligations?

MR CORNEGÉ QC:

It's – take a bob both ways. It's probably a bit of both. I mean, we've accepted in our written submissions that there does need to be a claim-specific assessment…

WINKELMANN CJ:

Yes.

MR CORNEGÉ QC:

Because there can be reasons related to a particular claim that don't relate to any other claims. But equally if you have system-wide issue which the Crown – and this is a matter for the Tribunal to determine and assess – but if the Crown had an ability to influence those systems, they're to fund them, try and drive them in a different direction, and those systems are applicable across the board, and they are the same reason why there's a delay in X, Y and Z inquiry as there is in this inquiry…

WINKELMANN CJ:
So you say it's both?

MR CORNEGÉ QC:
Both, yes.

WINKELMANN CJ:
And the Tribunal is focused on the systemic ones?

MR CORNEGÉ QC:
Yes. And I think, as I said at the outset, we agreed that the Tribunal, if we get back there, will need to do this job again, and it's going to have to do it for a number of reasons, in part because at the minute we don't have a – for example, in my client's case we are currently a successful applicant for resumption, the Tribunal hasn't yet made an assessment of how much of the zero to 95 per cent compensation will be paid. So there's any number of reasons.

WINKELMANN CJ:
So would you say then it would have been legitimate for the Tribunal to say that the Crown has not funded this Tribunal adequately and that meant that this particular claim couldn't come on for hearing as soon as it should have?

MR CORNEGÉ:
Yes.

WINKELMANN CJ:
But it didn't go that far? It just basically said the Crown has managed this through a settlement process and…

MR CORNEGÉ:
In my submission, inferentially that's what the Tribunal is saying but I accept that when Justice Cooke says there needs to be a claim-specific assessment he's not wrong about that. We don't dispute that. That must be right. I mean

it needs to be – it's a claim-specific assessment in which systemic issues are going to be of relevance.

WINKELMANN CJ:
So you accept the Tribunal got this wrong?

MR CORNEGÉ:
In that sense, yes. As I said at the outset, we accept the Tribunal is going to look at this, will need to look at this again, and the question is what is it that the Tribunal needs to do, what is it that the Crown needs to do.

WINKELMANN CJ:
And what do you say the Judge got wrong then?

MR CORNEGÉ:
Well, the Judge got wrong, and where I'm dancing on the head of a pin, the characterisation of this as penal interest…

WINKELMANN CJ:
I thought we'd moved on the –

MR CORNEGÉ:
We have moved on from that but that was one of the submissions. The second thing that the Judge did was to discount funding issues, or at least say the Tribunal was wrong to deal with funding issues in the way that they dealt with them without any regard to the evidence that the Crown brought or the argument that the Crown ran, and the second was to say that Crown Treaty Settlement Policy couldn't be relevant because the obligation under the forest agreement is not to settle claims. It's to assist the Tribunal with processing them. It's on that latter point, the Crown have characterised the way the Tribunal dealt with that as saying: "We were criticised for not settling this earlier." Now that's not my reading of the Tribunal. If that's what the Tribunal is saying, it's certainly not an argument that I would run. I mean the reality is under the forest agreement that's not an obligation on the Crown, and it may

be an obligation on the Crown as good Treaty partner but it's not an obligation on the Crown under the forest agreement. Their obligation is to use their best endeavours to assist the Tribunal to identify and process forestry-related claims.

The point and the relevance of Crown Treaty Settlement Policy, and there was evidence before the Tribunal to this effect, and it may be useful if we can bring up 604.0825. This is the transcript of the hearing before the Tribunal, and then at 605.1117, so this is cross-examination of Mr Fraser who was a Crown witness from Te Arawhiti, and if we just go down the page…

GLAZEBROOK J:
Did you say 1117 because I think we're on 1107?

MR CORNEGÉ:
1117, thank you, that makes more sense. This is cross-examination of Mr Fraser, so if we – starts – it's continued cross-examination. There's discussion about what the obligation on the Crown involves and then over the page we have an acceptance by Mr Fraser that "generally speaking, the Crown will not continue to negotiate," I'm not sure that's the best transcription, but, "negotiate with settlement groups in circumstances where they begin," should be, "litigate against the Crown including bringing resumption applications," and an acceptance that in past settlements the Crown has returned forest licensed land and the rentals but never returned compensation.

So the relevance of Crown Treaty Settlement Policy and what the Tribunal needs to deal with or assess and what the Crown needs to demonstrate, it's not a criticism of the Crown for not settling with Ngā Tūmapūhia or Ngāti Kahungunu ki Wairarapa earlier. The question is in this case, and I appreciate the Tribunal dealt with it at a system-wide level, in this case did Crown Treaty Settlement Policy drive claimants away from having their resumption applications in the shortest reasonable period? Now I don't the answer to that. My submission, if we went back to the Tribunal, is yes, but that's not a matter that you're going to need to deal with today, but Crown Treaty

Settlement Policy must be relevant if it is inconsistent with one of the Crown's – with the Crown's obligation under the forestry agreement. If it –

WINKELMANN CJ:
Although negotiation is a voluntary thing, isn't it?

MR CORNEGÉ:
They are but if the Crown is saying: "You want to directly negotiate with us. You'll get your settlement quicker. But by the way don't simultaneously pursue a resumption application or we won't negotiate with you."

WINKELMANN CJ:
Okay, well, if that's the price of negotiation, yes.

MR CORNEGÉ:
Yes. Now that's a matter for evidence before the Tribunal but that's certainly a submission that we would make, and this isn't a zero-sum game. They can happen simultaneously, but that's not been the Crown's settlement policy. I mean similarly the Crown, one of the arguments they made in the Tribunal, albeit in passing, was we're essentially just doing what the Tribunal told us to do. For example, they said, well, it wasn't until 2012 that the Supreme Court said, well, we have to have a hearing on resumption so from that point we've co-operated, but that's in the face of the Crown saying: "We're actively opposing Mr Haronga, for example, having a resumption hearing."

So Crown policies essentially operated in two ways. One is you want to directly negotiate with us, get your deal quicker, do not litigate, and then when Mr Haronga says: "Actually I want to litigate, thank you very much," they actively opposed his ability to do so all the way up to this court and it took until this court to fix that situation up. So again those must be relevant. Where that lands is a matter for the Tribunal but those factors must be relevant to an assessment of whether the Crown has complied with its obligations under the forest agreement and, in fact, my submission, that's antithetical to the Crown's obligations.

WINKELMANN CJ:

But that wasn't in evidence. The Crown's settlement negotiation strategy wasn't in evidence.

MR CORNEGÉ:

Well, there was the evidence that I pointed in the cross…

WILLIAMS J:

Mr Fraser's?

MR CORNEGÉ:

Mr Fraser's evidence, yes. That, I think, is the extent of the evidence that was before the Tribunal.

WINKELMANN CJ:

Yes.

MR CORNEGÉ:

But…

O'REGAN J:

Was the argument you're making now made to the Tribunal?

MR CORNEGÉ:

I wasn't before the Tribunal. I believe that was the argument. Yes, my friend, Mr Colson, as I understand it, made the precise argument to the Tribunal.

WINKELMANN CJ:

So your argument is then it was – it's not just what you say at 7, that the Crown failed to discharge the onus on it to demonstrate that it could not have reasonably done more which is quite hard to prove really, negative, unless people point to a failing. So I'm struggling a little bit with that.

O'REGAN J:

Well, I mean there's no onus anyway in the Tribunal.

WINKELMANN CJ:

And what do you say about the fact that it's a Commission of Inquiry and there's no onus of proof? It's forming its own view.

MR CORNEGÉ:

This is why, in my submission, it's important to understand the nature of the 3(c) conversation. If the position is that the effect of this is to deprive successful Māori claimants of the return they could and would've expected to receive, either if they had the forest in 1989 or had had the proceeds returned to them shortly thereafter, putting aside the question of onus, the question then is in what circumstances should a successful Māori claimant be deprived of the return of investment at the expense of the Crown, and –

WINKELMANN CJ:

You're saying it effectively requires the Tribunal to have satisfied itself that's more proof required?

MR CORNEGÉ:

There must be some good reason to deprive a successful Māori claimant of the rate of return before you go ahead and do that. Keeping in mind that this is the agreed – in the forest agreement this is agreed to be a commercial rate of return. Now I can point you to it in my submissions where there's evidence from Richard Meade before the Tribunal that the calculation, this particular calculation results in, I think it is a factor. I don't quite understand factors, but a return investment factor of 5.3899. I had Mr Geiringer do the maths because it's a bit beyond me, but that worked out at an annual return of about 8.6% compounding annually and there's also evidence before the Tribunal, before this court, from Mr Meade, sorry, Dr Meade that indicated that the general rate of return on equities in New Zealand would be approximately 10.4%. So the point I make is that on any analysis the Crown benefit from this arrangement. They get a four year grace period. Even if they're paying full compensation without the grace period extended at all, if they invested sensibly, they could have been expected to have made a return even beyond what 3(c) compensation requires and, if you extended the grace period, successful Māori

complaints are missing out. That's the practical realities of it. They're put in a worse position.

WILLIAMS J:
They're only missing out if it wasn't their fault?

MR CORNEGÉ:
Yes.

WILLIAMS J:
It was the Crown's fault. That's the only circumstance in which they're missing out because otherwise if, for example it was just the nature of the beast, say, then it would be fair for both sides to bear the burden of that because neither of them would have sufficient control. If it was the inability of Māori to come together cohesively enough to advance a claim, then that's on them. All of this is a question of fact. If it is the Crown sat back and said, came to the view that the Crown Forestry Rental Trust can pay for the research and hearing process because that's going to save us having to pay for it ourselves, then that's on the Crown, but someone has to advance that evidence.

MR CORNEGÉ:
Yes.

WILLIAMS J:
You see, I think probably the Tribunal knows more about this issue than most of counsel appearing before it.

MR CORNEGÉ:
That's probably fair, yes. But certainly what this Tribunal was faced with and I accept it's a Commission of Inquiry, it could have called for further evidence, what it was faced with from the Crown was fairly limited in my submission.

WILLIAMS J:
Well, what happened was the Crown Forestry Rental Trust interest payments funded the Treaty settlement process for a generation.

MR CORNEGÉ:
Yes.

WILLIAMS J:
I'm not sure whether it was by design, but it was rather useful for the Crown that that was the situation because that meant the Crown didn't have to fund it. Then the question is, is that best endeavours?

MR CORNEGÉ:
Yes.

WILLIAMS J:
Someone should be arguing that.

MR CORNEGÉ:
Yes and that is a matter the Tribunal, I agree, will have to grapple with.

WILLIAMS J:
Because what the claimants lost there was a generation of leaders. It took a generation to go through this process.

MR CORNEGÉ:
Precisely, yes.

WINKELMANN CJ:
So, but when we look at it, we've got the judgment that you're appealing, so can you take us for what you say is wrong with that judgment. For instance, Justice Cooke says: "The Crown's obligation would need to be specific to the claims for forestry land in question. They required analysis accordingly involved later arising determination of Ngāti Kahungunu's claims by the Tribunal and the reasons for them." So you would say yes and no, it was legitimate for the

Tribunal to say: “Well, there are these systemic approaches that were taken by the Crown which delayed the entire process”?

MR CORNEGÉ:
Yes.

WINKELMANN CJ:
But you would then accept that they would then have to carry that through to this particular claim?

MR CORNEGÉ:
Yes.

WINKELMANN CJ:
And do you say they did?

MR CORNEGÉ:
Well, inferentially they did, but beyond what they say. I mean the preliminary determination says what it says and equally, when Justice Cooke discounts the relevance of Crown Treaty Settlement Policy it appears to be on the basis that, and this is the submission the Crown advance in this court, that somehow they’re at fault for not settling. Now, as I said earlier, that’s not, that can’t and is not the criticism when judged against the Crown obligation under the forests agreement. The question is did the Crown Treaty Settlement Policy drive or divert people from having claims heard, and if it did, then that also must be relevant to whether they can use their best endeavours.

WINKELMANN CJ:
Justice Cooke says at 133: “What the Crown would need to demonstrate is that notwithstanding its best endeavours, and for reasons beyond its control… claims before the Tribunal concerning this land were not progressed within the shortest reasonable period.” You’d accept that, wouldn't you?

MR CORNEGÉ:

Yes I'm happy with that formulation.

WINKELMANN CJ:

And the point is the Tribunal didn't really turn its mind to that, did it, or did it? Do you say it did?

MR CORNEGÉ:

Well I say it did, but equally I'm not asking this court to uphold the Tribunal's determination.

WINKELMANN CJ:

So what are you asking us to do then?

MR CORNEGÉ:

Well it can go back to the Tribunal it's just important – it's important for the Tribunal to understand precisely what its function is and what it's supposed to do under this test.

WINKELMANN CJ:

Right. And you say what the judge has said is wrong in what way?

MR CORNEGÉ:

Well the principal argument was that by characterising it as a penalty…

WINKELMANN CJ:

Okay.

MR CORNEGÉ:

And the issue is that the parties to the agreement didn't, put aside whether it operates in that way or not, the parties to the agreement didn't characterise it in that way, they didn't understand it in that way. They understood it as a commercial rate of return, so there's nothing about the interest rate itself that is inherently penal. It is an agreed commercial rate of return. It's consistent with what one would have expected the return on equities to be. So someone, and

obviously if the Crown, if ultimately no claim succeeds to a particular piece of Crown land, the Crown gets to keep the proceeds plus the rate of return. If a Māori claimant succeeds, they elect 3(c), then subject to the period being extended, they too will get the commercial rate of return, which is the rate that they would have expected to receive if they had the forest in 1989 or the proceeds shortly thereafter.

So our concern was the way in which Justice Cooke characterised it in paragraph 143, was that the sole purpose of the 3(c) interest, was just to hurry the Crown along. Now it may have the effect of that, I accept, but it's not, in fact, what the 3(c) interest is. The 3(c) interest is an agreed commercial rate of return. The Crown get the benefit of a four year period, but if you just characterise it in that way, without properly understanding the forest agreement itself refers to it as reflecting a commercial return, and the Crown negotiators, the Māori negotiators understood that that's precisely what it was, that in my submission if you understand just as being designed to penalise the Crown, whether it has that effect or not, if that's the purpose of the arrangement rather than it being an agreed commercial rate of return where there's a benefit, clearly to the Crown getting this done sooner rather than later, it makes it more likely that the Tribunal will extend the four year grace period if you understand it in the way that Justice Cooke has characterised at 143, and in my submission his characterisation in that way is quite wrong.

O'REGAN J:
We were referred somewhere to a comment by Mr Quinn at the time that it was stick and carrot, or something to that effect.

MR CORNEGÉ:
Yes, Mr Quinn says that in his evidence, and that maybe where Justice Cooke has taken that from, but perhaps if I can go to the forests agreement quickly and I'll take your Honours to some of the material that led up to that, that shows that, and ultimately what this was intended, the actual 3(c) compensation itself was simply an agreed rate of return. So if we can go to the forest agreement, 530.6924, clause 9(b). So clause 9(b), when you came to the Act essentially it

was unpacked in the way that often happens and became 3(c), 5 and 6, but at that point everyone had agreed on precisely what the calculation would be, and so it's the final sentence of 9(b): "Subsequent return shall be based on one year government stock rate measured on a rolling annual plus an additional margin of 4% to reflect a commercial return."
So to reflect a commercial return for some reason, I don't know, doesn't find its way into the Act, but there's nothing, certainly no material to suggest that that's, that the absence of those words is intended to fundamentally change the nature of the bargain when the whole purpose of the Crown Forests Act was to put into statute the deal agreed between the negotiators and between the New Zealand Māori Council, FOMA and the Crown.

So that's how it's characterised in the agreement itself, and if we look at some of the preparatory material, if we can go to 533.7528, so this is reactions and concerns of officials to those sections in the Māori Proposal. This is dated 21 June 1989, and if we turn to 7530, please, and then down to I think paragraph 12. I'll give you the reference to the Māori proposal. I don't need to take your Honours to it. That's at 533.7522.

But the way it was initially structured was that whatever the delay, whomever caused it, interest would just continue to run, and that is what the – that's referred to in paragraph 12 and that is what the Crown considered to be penal, and so you see the final sentence, presumably it should say "than": "A positive rather than penal provision inducing all parties to deal rapidly with claims is preferred. The Crown would welcome any suggestions," and that is – so from the Crown's perspective they considered a situation where they had to pay interest irrespective, the commercial rate of return, irrespective of the cause, irrespective of who was at fault, penal, and instead they preferred something positive, and that's essentially where we ended up.

So you then have 532.7455. This is a memorandum for Cabinet State Agencies Committee, 28 June 1989, and while we're at it if we can get up 533.7661. So this is the draft, really the penultimate draft agreement. So this is the agreement that the memorandum is commenting on.

So if we turn back to the memorandum, it's down the page, paragraph 11, the end of that paragraph there's a description of what the compensation in the draft, the penultimate draft agreement, under 3(c), what became 3(c), is, at least from the Crown's perspective. So it's "compensated on the basis of the value of the forest as received by the Crown in real terms plus, and after a four year period of grace after the sale, a return on those proceeds reflecting an average return on forests until the date of settlement of the resumption."

Then if we go to the next document, back to the draft agreement, so you'll see at that point what are now 3(a) and (b) are dealt with under (a) and under (b) which is now 3(c), you have something that's fairly close to what became the final forest agreement, and at that point the only wording was again the return shall be based on an appropriate forestry-related return and you then have the formula put in reflecting what all the parties agreed was an appropriate forestry-based return. The point of which is without getting into semantics about whether the way in which the four year grace period can be extended has the effect of being a penalty or not, there's a distinction, in my submission, between a rate of return under 3(c), which was intended to reflect an agreed forestry return such that whatever amount that the compensation is, zero to 95 is returned to Māori by the Tribunal, it's simply reflecting the rate of return that successful Māori claimants would have anticipated receiving. That's very different from something which in terms of the interest rate itself was by design intended to punish the Crown for failing to comply with its obligations, and it's the characterisation by Justice Cooke at paragraph 143 which, in my submission, is wrong and has the potential to lead the Tribunal to approach its task in a way that simply was not intended.

WILLIAMS J:
You say this 4% is equivalent to the Judicature Act interest on a judgment and in fact the four years was a holiday on the default?

MR CORNEGÉ:
Yes.

WILLIAMS J:
But still fault is the issue, in terms of triggering when the holiday should end, if it's going to be longer than four years?

MR CORNEGÉ:
Yes, that's fair. There's clearly a benefit to the Crown in getting this done quickly, and if it isn't done quickly the question is, who is at fault? And quite right. But there's nothing about the interest rate itself, the nature of the return, it is inherently penal.

WINKELMANN CJ:
So have you got another issue to bring up Mr Cornegé?

MR CORNEGÉ:
Yes, the final point, and the Crown make the submission, and this is in terms of what else might be relevant to the Tribunal's assessment in this particular case, or any case, but certainly in this particular case, the Crown criticise, as I said, in the Tribunal and the High Court the Crown explicitly said they weren't relying on clause 6(a). They were not, certainly not in terms of my clients, but even in terms of the settlement trust alleging that either was a well-funded claimant that wilfully delayed pursuing its claims, but in their submissions before this court, the Crown, in terms of what they say are relevant factors, and I can give you the references, paragraphs 154, 1.75.8 and 160, refer to delays in bringing claims, and in my submission that's either captured by clause 6(a) of the schedule, or it's not.

WILLIAMS J:
Give me the paragraphs again please?

MR CORNEGÉ:
So the Crown submissions, 154, 157.8 and 160.

WILLIAMS J:
What does the Crown say?

MR CORNEGÉ:

Well for example they say: “Further, no claimant had sought to return to the Tribunal for resumption,” this is paragraph 154, this is the final sentence, “of the Ngāumu CFL lands until 30 July 2018,” and they make the same point at 157.8: “The fact that no claimant returned to the Tribunal to seek resumption of the Ngāumu… until the Waitangi Tribunal 429 resumption application of 30 July 2018.”

In my submission either the Crown are relying on clause 6(a) or they’re not. They say they’re not. If they’re not then this must be irrelevant. Conduct on the part of delay, or alleged delay on the part of claimants, is captured by clause (a) and it can’t through a back door then be argued under clause 6(b). Under clause 6(a) the only circumstances in which delay by a claimant is relevant, is if the Tribunal is satisfied that a claimant with adequate resources has wilfully delayed proceedings in respect of a claim. In my submission claimant-related delay, if it isn't captured by clause (a), simply cannot be relevant to the Tribunal’s assessment under clause 6(b). The Crown can't turn around and say, we’re not alleging that you’ve wilfully delayed proceedings, but nonetheless you’ve delayed proceedings, so under clause 6(b) please extend the period. That’s not what was agreed between the parties, and that can't be what Parliament intended.

WILLIAMS J:

Well accept that clause 6(b) is about fault on the Crown’s part so if delay is the fault of the claimants then clearly the flip side of that is they get the benefit of 6(b) because it’s not the Crown’s fault.

MR CORNEGÉ:

Well, no, it’s more than that because it’s in terms of the, it’s not just the Crown’s fault, because there’s poor conduct on the part of the Crown, acting antithetically to the agreement, and then there’s just not using best endeavours. It’s high standard.

WILLIAMS J:

That's an obligation under the agreement too.

MR CORNEGÉ:

That's right, yes. But the point is under clause 6(b) what needs to be shown is the Crown was prevented by reasons beyond its control from carrying out its obligation, that is assist the Tribunal to identify and process claims within the shortest reasonable period, to the extent that any, the delay is as a result of claimant conduct, that in my submission is captured by (a), or not at all.

O'REGAN J:

Well isn't it just saying the Crown can't be expected to respond to claims that haven't been made yet, so it's not their fault? That's not saying the claimants have done anything wrong, it's just that, it's just a reality that you don't respond to claims that haven't been made.

MR CORNEGÉ:

Which again requires an assessment of whether the Crown could have done more to facilitate – I mean the Crown's obligation was to assist the Tribunal, albeit jointly with Māori, to identify and process claims.

WILLIAMS J:

Wasn't Mr Smith's application made in 1994, it's just that it wasn't pressed, because of negotiations.

MR CORNEGÉ:

Yes, that's right, so the original claim was filed on the 24th of April 1994.

WILLIAMS J:

With a resumption application –

MR CORNEGÉ:

No, not a specific resumption application.

WILLIAMS J:
Oh okay.

MR CORNEGÉ:
But did ask for return of all their lands including the Ngāumu forest.

WILLIAMS J:
Okay.

MR CORNEGÉ:
So as your Honour will appreciate a lot of the early claims weren't filed by lawyers, they were filed by the claimants themselves, but this claim…

WINKELMANN CJ:
Can I ask you, this is probably a stupid question, but isn't the amount that you'd be awarded under 5(a) variable and 5(b) certain, so it might be beneficial at different times, more or less beneficial at different times?

MR CORNEGÉ:
Well, sorry, 5…

WINKELMANN CJ:
5(a).

MR CORNEGÉ:
5(a) is fixed. So 5(a), if you're successful, is just the real, what's required to maintain real value of the – so you have the net proceeds. In this case it's about 30 million. Whatever that four year period is, that's what it is. 5(b) –

WINKELMANN CJ:
Yes. Well, so isn't that 5(b) also true? I mean that's what it is, it's determined by market forces as well, plus 4%.

MR CORNEGÉ:

Well, 5(b) is – I mean, you've got the agreed rate of return. The only difference is that 5(b) keeps running, depending on how long it takes to resolve, and realistically that's –

WINKELMANN CJ:

It's either going to be 5(a) or 5(b) which is running. Why is it necessarily one or the other is better or worse? Some of them might be…

MR CORNEGÉ:

Sorry, I'm misunderstanding your Honour. Is this 5(a) of the Schedule?

WINKELMANN CJ:

Yes, mmm.

MR CORNEGÉ:

So there's three different ways of calculating under clause 3. One is just the market value of the trees, discussed, one is stumpage, and then (c) is you get the net sale proceeds, in this case about 30 million, as I understand it, from a four year period running – so from the – it's not a four year period now. You take 20 April 1994 and four years from that date out, what is, what was required to maintain the real value at that stage of $30 million. So presumably the – I mean the economists have filed quite a lot of evidence on this but in broad terms look at CPI during the relevant period and work out what that is. But that figure we know that doesn't – that is what it is. There's a four year period. That number is essentially fixed and that won't change. The latter, the interest rate, the rate of return doesn't change but the total amount changes depending on how long things take.

WINKELMANN CJ:

Yes. But the same is true in a sense of the second one as well, 5(b), because it's the government stock rate plus 4%.

MR CORNEGÉ:

(a) and (b) aren't alternatives. I mean (a) and (b) are part and parcel of the – that's the whole 3(c) compensation.

WINKELMANN CJ:

Yes, I know that, but the question is how long 5(a) applies for.

MR CORNEGÉ:

Four years. So 5(a) applies from either, under subclause (i), four years from the date of transfer if the claim was filed prior to the transfer of the – sale of the licence; or, in the case where the claim was filed after the transfer, from a four year date, for four years from the date of filing the claim. So in this case it'll run until – you've got a four year CPI period on any analysis from 24 April 1994 to 24 April 1998.

So the only thing that's variable is how long things take, or how long – or if the Tribunal extends the four year grace period.

WINKELMANN CJ:

Yes, but I suppose my question is how are we sure that it's always going to be better, the grace period rate is always going to be better than the (b) rate, given the variability of the government stock?

MR CORNEGÉ:

Well, I mean, in theory we – so as I say, that rate works out, given what we – in fact, we know it's worked out at a little under 9% per annum compounding. In theory during that four year period we could have had 13-14% inflation but we didn't.

The final point I make is that the way – if it's an easy task, and my words, but for the Crown to have the four year grace period extended, then realistically it makes it much less likely that any claimant will ever elect 3(c) compensation. It's useful to have a look because the Crown, throughout their submissions, say

this is a large amount of money and it's being glib but it's not fair. It's useful to look at some of the numbers briefly. That's probably the last thing I'll do.

If we can go to the Crown submissions, please, and it's paragraph 171, and then over the page there's a table. There's a table that says – what it's showing is self-evident. The 30 million sale. Market value of trees 2018 74, so that's the 3(a) compensation. Proceeds of sale plus 75, sorry, plus CPI 52, and then 280, and then the Crown footnote just says: "Based on Mr Marren's evidence," and it's useful to turn to Mr Marren's evidence because, with respect to the Crown, I'm not sure that Mr Marren's evidence says what they say it says or whether it's accurate.

Mr Marren's evidence is at 201.0007, and it's paragraph 17, starting at 17 through 21. So the 280 million figure seems to be – this is an affidavit filed by Mr Marren in the High Court, so it's his calculation as at the 31st of August 2020, but it's based on the graph above which in my submission just can't be right because he started his calculation from the date of the transfer of the licence which is one – which is October 1990 – and then he starts his CPI plus rolling interest on October 1994 –

WINKELMANN CJ:
So has the Consumer Price Index been treated as equivalent to the 5(a) calculation?

MR CORNEGÉ:
Give or take, yes. There's some debate between the economists but broadly speaking yes.

WILLIAMS J:
So he starts the clock running too early you say?

MR CORNEGÉ:
Starts the clock running too early. Now it's not to say that this isn't a significant sum of money.

WILLIAMS J:
Why would you want to point that out?

MR CORNEGÉ:
Well, I wasn't in the High Court. I don't believe Mr Marren was cross-examined. But in any case, the figure can't be 280 although it's increasing all the time, I accept that point. But then if we turn over the page there's a table, paragraph 21. Now these are the calculations as at the date of the resumption hearing, or the evidence filed before the resumption hearing, so that's that 74 million figure, so in one sense the Crown aren't comparing in their submissions apples with apples because they're comparing a valuation in 2018 with a calculation in 2020. But significantly, and it's unexplained, but the Crown don't put in the 3(b) compensation at all into their submissions which – now I accept it's paid over 35 years so their discounting factor applied and it's quite beyond me to work out what that is, but that's 272 million.

So the Crown point to the number in relation to 3(c) and say it's a very large amount of money, and I accept that it is, but compensation can be quite large under the other calculations. Why it's useful for the Tribunal to engage in the exercise of working out the 3(c), well, whether to extend the grace period, is because it ultimately gives a claimant an ability to work out which compensation they want to choose. If the grace period is going to be extended through to 2020 then you wouldn't accept –

WILLIAMS J:
You'll take the stumpage, thank you very much.

MR CORNEGÉ:
You'll take the stumpage, precisely.

WILLIAMS J:
What is the stumpage rate, by the way? Do you know?

MR CORNEGÉ:

Mr Marren's evidence usefully has an appendix which – here we go. Page 19. So 201.0030. Now I don't know to what extent this – this will just give you an indication but he deals with stumpage and then you'll see there's a table on the final page, 26, that shows the…

WILLIAMS J:

The amounts.

MR CORNEGÉ:

How much is paid during that 35-year period, so for the balance of the licence.

WILLIAMS J:

Right, and that's just grossed up?

MR CORNEGÉ:

Yes. So, of course, our one compares that to –

WILLIAMS J:

What are we doing here?

MR CORNEGÉ:

Well, there's a discount. I mean I'm not an economist, I'm not a mathematician, but that's not the same. I looked online. It's probably worth about 84 million in the hand right now.

WILLIAMS J:

I see.

MR CORNEGÉ:

So that's what we're doing here.

Now I'm mindful of the time. Unless your Honours have any further questions, those are my submissions.

WINKELMANN CJ:

Thank you, Mr Cornegé. Mr Heron. Are you going to bring brevity and clarity?

MR HERON QC:

Yes, not known for either but I'll give it a go, your Honours. Could we just hold onto Mr Marren's evidence while we're there? Just to clear up a few points. If you are at paragraph 17, which is 201.0015, you'll see there my learned friend criticises the start point of 1990. That's because the Tribunal chose the start point and chose the point earlier in time than the sale date, so you'll know from the Schedule 1 that, and 5(a), you'll see the language there that where the claim was filed before the transfer, the it's a period of not more than four years from the date of transfer. So the four year starts, and you'll see the lines are the same for the years 1990 to 1994, so that's the CPI rate effectively. So the reason that was chosen is because that's what the Tribunal said applied.

WILLIAMS J:

Presumably that's because they were looking at a different claim?

MR HERON QC:

Yes, they were looking at the earliest claim.

WILLIAMS J:

The earlier 1988 version.

MR HERON QC:

I think that's right, or 1987.

WILLIAMS J:

1987 was it? Right.

MR HERON QC:

So that should tidy that up.

WINKELMANN CJ:

So is it Mr Marren who tells us that real value means not compounding value, you don't adjust it as if it was an asset you were managing in the market in some way, returns.

MR HERON QC:

I can't recall. I imagine Mr Marren would. The effect of his evidence is that compounding interest is magical, I would submit, and you'll see the red line shows the magic, sometimes described as the eighth wonder of the world, because the difference here is that 230-odd million dollars and just hopefully if I try and answer the question by reference to my learned friend's next point was that we haven't referred to the stumpage value 3(b). If you look at paragraph 21 where the claim date there is taken as that – well assuming that date, and taking the stumpage value as at 30 September 2018, the specified amount is 272,000 but obviously that is over a 35 year period, and as my learned friend recognises, real value of course is much, much less, and the added factor is, of course, that you have all the risk so 3(c) gives you money in the hand now, so does 3(a), 3(b) is going forward and receiving stumpage over 35 years. So it's fair to say that's not an option that claimants are choosing. So I hope I've dealt with those points.

I'm just a little mindful because my learned friend, as I understand it, well we accept the matter needs to go back –

WINKELMANN CJ:

Yes, I'm not quite clear where we are now quite frankly.

MR HERON QC:

Well in my respectful submission we're at the point that the appeal must be dismissed because Justice Cooke got the decision right. Everyone here accepts the Tribunal didn't follow the process that it needed to. We all accept it needs to go back to the Tribunal and for it to look at claim-specific factors, of course informed by system factors, as your Honour has spoken about and to look at the periods that it, itself, knows better, as I think Justice Williams said,

as anyone else. For example it finished hearing in 2005 and its findings were delivered in 2010. Now it will know the factors that went into that and there can be a discussion around that. From 2010 you'll know from our submissions that the Tribunal recommended settlement negotiations and the parties did just that, and that's at paragraph 84, if you need that, of the Crown's submissions where the Tribunal said: "We hope our findings will set the scene for a successful negotiation about the Treaty breaches…We trust that the government and the tangata whenua will use the negotiation of a settlement, and the settlement itself, as an opportunity to address the breaches identified."

Now, in my respectful submission, then the Tribunal will have to look at during the period from 2010 until this resumption claim was filed in 2017, as I recall, and ask the question and inform itself, well, is that the Crown in breach of its forests agreement obligation?

WILLIAMS J:
The Crown could have said: "No, we're not going to negotiate. Our obligation is to get this thing to a resumption application as soon as possible."

MR HERON QC:
Indeed, and the same is true of Māori who have the joint obligation to advance claims before the Tribunal and so –

WILLIAMS J:
So you're saying you're both in breach?

MR HERON QC:
Well, it's just what does the Tribunal make of it, with…

WILLIAMS J:
Well, you allocate the advantages and disadvantages evenly between the two parties?

MR HERON QC:

They might exactly do that but at least one needs to specifically consider that and work through –

WINKELMANN CJ:

Does the Crown's obligations under clause 6 with settling it and allowing for the transfer, that might – I'm just trying to – settlement negotiations might be in compliance with its obligations under the deed as well, mightn't they, or not?

MR HERON QC:

Because the deed and the agreement obligations refer to advancing the proceedings before the Tribunal and claims and dealing with it in the Tribunal –

WILLIAMS J:

But they do refer to negotiations as well.

MR HERON QC:

Sorry, I just haven't got that.

WINKELMANN CJ:

Because actually negotiating something sometimes can advance proceedings because it can settle them.

MR HERON QC:

Absolutely, one would have thought. So…

WILLIAMS J:

If you look at clause 11(ii), it's clearly contemplating that negotiation is a path and actually most settlements involving resumption that are done by negotiation are treated as deemed resumptions under the Act, aren't they?

MR HERON QC:

I'm sorry, your Honour, I don't know. I know that –

WILLIAMS J:
I vaguely remember that.

MR HERON QC:
Yes, I'm…

WILLIAMS J:
So the state says these are resumptions.

MR HERON QC:
These are resumptions.

WILLIAMS J:
Yes.

MR HERON QC:
And as you'll know, I mean the Crown has returned vast amounts of forestry land since this agreement, something like 250,000 hectares and very often, and it's the Crown policy, that Crown forest land is returned. This particular case, the forest is returning, as you know.

WILLIAMS J:
There's every incentive to take the forest land because you get a free ride on the rentals. That is in the –

MR HERON QC:
That's right. The accumulated rentals come with, and then the compensation, of course, is negotiated. It's – the settlement, the statutory framework is there but, as we know, the Tribunal has a broad discretion between five and 100. So that becomes the subject of negotiation and it's not surprising in this case that the settlement quantum exceeds the sorts of values we're talking about. But it all will be well known to you, your Honour. So…

WINKELMANN CJ:

You don't really – what do you have to say about – I think that covers that point probably, doesn't it, Mr Heron, but what do you say about the point that Mr Cornegé makes that the Judge was wrong to describe this as penalty interest because it's really just a market return on assets with a compound.

MR HERON QC:

I have to disagree but his own witness disagrees as well and if you look at paragraph 70, Justice O'Regan referred to this, paragraph 70 of our submissions, Mr Quinn, who was a Māori negotiator, and his evidence you can see is at 532.7397, and he is talking from the Māori negotiation perspective and he's talking about the options for calculating compensation and that there was a compromise reached, and then at 532.7397 at the top of the page he says, this is back in 2012, that's when his affidavit was sworn, so far closer to the time, he says: "The Māori negotiators were concerned that there was the possibility of the claims dragging on due to the Crown not resourcing the Tribunal properly. To address this, the 'best endeavours' clause (clause 6) requires Crown and Māori to jointly use their best endeavours to process all forest land claims within the 'shortest reasonable period'. An additional stick is contained in clause 5(b)," now that became 6(b), "which applies penalty interest rates for calculating the real value of forest sale proceeds after four years."

Now that's a frank assessment. A penalty interest, as the Court will know, is a higher rate of interest triggered by normally a default in an obligation. Now it doesn't have to be a bad faith or something terrible, it could simply be a breach of a covenant or a late payment, and that's what penalty interest rate is. I agree with his Honour Justice Williams, it doesn't matter what you call it, but to characterise it as effective penalty interest, that's exactly what it is.

WILLIAMS J:

Mr Quinn is an accountant, not a lawyer, so he may not have been using it in the way that us lawyers would use it.

MR HERON QC:

That maybe correct, but the economic impact, it's better to understand the accountant view because the legal view doesn't matter. The accounting view is the one that counts, as you'll see from Mr Marren's evidence.

WILLIAMS J:

The essence of Mr Cornegé's argument is that this is a commercial rate of return, it's not a sting, it just keeps the claimants at an appropriate level of growth to keep up.

MR HERON QC:

Yes, that's the argument, I understand that. In my respectful submission that's wrong. It doesn't reflect the clause itself and you can see –

WILLIAMS J:

Well if they didn't have the 4% they'd lose ground every year wouldn't they?

MR HERON QC:

No, because they continue to get CPIs so in terms of the value of the money they get, in terms of the spending power, it's maintained. So it's only the higher rate –

WILLIAMS J:

Yes, you're right, sorry. What was I thinking.

MR HERON QC:

They get CPI on the value of the trees on 3(c). This is all about the value of the trees. (a) is today, (b) is in the future, and (c) is going back in the past.

WILLIAMS J:

But isn't the argument that the 4% is a commercial rate of return on a CPI asset. Isn't that all it is?

MR HERON QC:

As I understand the argument, yes, but that's not how it's written either in the agreement or the schedule, and my learned friend acknowledges that, that for whatever reason in the schedule in the Act itself it's looking at the period of four years maybe extended where the Tribunal is satisfied either the claimant with adequate resources has wilfully delayed, or the Crown has prevented. So it's nothing to do with a commercial rate of return. It might be, undoubtedly it might be a more commercial rate of return, but that's not the trigger.

WILLIAM YOUNG J:

Mr Heron, one of the things that I really haven't fully got my head around, Mr Cornegé suggested that the commercial rate of return effectively is what might be obtained if the money had been handed over at the time and put in the share market. Has this been analysed in the evidence, because is another way of looking at it, that this is really a risk-free rate of return?

MR HERON QC:

Yes.

WILLIAM YOUNG J:

Because there's no real downside here, is there?

MR HERON QC:

That's right. That it is a risk – this is a risk-free rate of return, whereas a commercial rate of return comes with, I think if I understand –

WILLIAM YOUNG J:

Commercial risks.

MR HERON QC:

Comes with risk. So the period we're talking about included possibly the 1987 share-market crash. It also included the 2008 global financial crisis. The Tribunal's report comes in 2010 and from that date until relatively recently we have incredibly low interest rates.

So as your Honour, the Chief Justice, made the very useful point that this can vary, of course. We only know now what it was but we can't know looking forward, and if they had meant a commercial rate of return then they would have structured it that way.

WILLIAMS J:
The underlying question here is if the application is made in 1994 there's a 28-year interval to today, and, well, 20 years odd, whose fault was that because that's, on any measure, a very long time to get an application heard?

MR HERON QC:
It absolutely is. One, of course, has to unpick slightly that the 1994 claim wasn't understood by anyone to be a resumption claim as was made in 2017, and your Honour knows better than I do but the Tribunal itself, as I understood it, required a resumption claim to deal with a claim in that fashion.

WILLIAMS J:
Wasn't the – I thought the 1987, sorry, the 1994 claim by Mr Smith sought return of the Ngāumu forest.

MR HERON QC:
Well, as I take my learned friend's word on the wording, but the Tribunal itself, when dealing with that claim and others in 2010, didn't say: "Ah, well, we have to treat this as a resumption claim," didn't treat – it simply said, made its findings and said go away and negotiate, and I suppose –

WILLIAMS J:
Right, but that's pretty standard.

MR HERON QC:
That's right and my –

WILLIAMS J:

I think it's inevitable that something saying "we want Ngāumu forest back" ought to be treated as a resumption claim, or resumption application.

MR HERON QC:

I'm sorry, I just missed that. Is your Honour saying it is inevitable or it isn't?

WILLIAMS J:

It is inevitable. They want the land back. That's what resumption is.

MR HERON QC:

Yes, and I think, as I understand it, it took until *Haronga* for this court to say, well, actually you have to get on with it.

WILLIAMS J:

Quite.

MR HERON QC:

So certainly the Tribunal didn't treat it that way and nor did the claimants and nor –

WILLIAMS J:

No. So you've got 26 years before the application gets heard. All the claimant's fault?

MR HERON QC:

Well, we don't say that at all. What we say is the Tribunal needs to have a look at the claim-specific factors as Justice Cooke sets out.

WILLIAMS J:

What's the Crown's position on the question?

MR HERON QC:

Of – you mean the claimant fault?

WILLIAMS J:

The only question that counts in this claim.

MR HERON QC:

All we say on that, and in response to my learned friend's point as well as that question, is that just because you're not specifically saying 6(a) it doesn't mean that within 6(b) you can't look at delays on both sides and the reasons for them and then does that inform has the Crown met its obligations or Māori has?

WILLIAMS J:

Doesn't the Crown need to put evidence in accepting responsibility if there is such responsibility? Isn't that what an honourable Treaty partner ought to do in these circumstances?

MR HERON QC:

Absolutely accept, you know, the honour of the Crown, the obligations that the Crown ought to come to the Tribunal and inform it of what it knows on the relevant test and that ought to happen, I agree. Now, and there will be periods where the Crown may have to say: "Well, we weren't quick enough," and the Tribunal ought to –

WILLIAMS J:

Well, it didn't happen in 2018.

MR HERON QC:

No, it didn't.

WILLIAMS J:

Why not?

MR HERON QC:

Sorry, why didn't?

WILLIAMS J:

The Crown say: “To this extent, our fault. The rest is not us and so you owe us a holiday for this proportion of that 25-odd year delay.”

MR HERON QC:

Yes, I can’t say why that didn’t occur but perhaps one inkling is that this was a rather iterative process and the Tribunal itself was coming up with: “Well, we will give a preliminary indication on these points,” and whether the Crown picked up enough on the signals I don’t know but I can only say I wasn’t there. I don’t know why that didn’t occur.

WILLIAMS J:

Always a good position to be in. So because in reality the Crown Forestry Rental Trust interest funded the historical Treaty settlements process from beginning till now?

MR HERON QC:

As I understand it, yes.

WILLIAMS J:

The Crown –

MR HERON QC:

And it was designed so.

WILLIAMS J:

No, it was not because –

MR HERON QC:

That the – well, as I understood, the design was the interest on the rental payments was to be used to fund claims.

WILLIAMS J:

Forestry claims, but what happened was that interest funded the entire historical claims process.

MR HERON QC:

I see your Honour's point, yes.

WILLIAMS J:

So not just the 300 or 400,000 acres of Crown forest land but the 66 million acres.

MR HERON QC:

I see your Honour's point.

WILLIAMS J:

And the Crown therefore itself didn't have to stump up money to fund claimant research, so on and so forth.

MR HERON QC:

Yes, albeit in this case you have heard the name Brent Parker quite a bit.

WILLIAMS J:

Quite.

MR HERON QC:

And your Honour will know that's a Crown law employee that's put in a lot of time.

WILLIAMS J:

But once the Crown Forestry Rental Trust was undertaking research, the Crown research tended to be supplementary and gap-filling because the primary research load was completed by Crown Forestry Rental Trust historians at considerable cost.

MR HERON QC:

I see. Yes, I'm sorry, I have to –

WILLIAMS J:

So the Crown got the advantage of that for a generation because it didn't have to pay for it itself which is what was – what was the expectation in the agreement. So at some point the Crown's going to have to pay back on that, isn't it?

MR HERON QC:

Well, I suppose does that start from the premise that the Crown Forest Rental Trust money was not the Crown's?

WILLIAMS J:

No, well, it's the interest on the rents.

MR HERON QC:

The interest on the rentals, and I suppose if the land was confirmed or cleared or however we want to talk about, then that money would be Crown's and –

WILLIAMS J:

It does seem to me, my point is that it does seem to me greatly in the Crown's interest for those interest payments to fund the entire historical claims process because that meant the Crown did not have to fund it out of its own consolidated pocket.

MR HERON QC:

I see what you mean. I'm just struggling, and it may be me, to understand how that sort of is a relevant consideration in terms of Schedule 1 but –

WILLIAMS J:

What that meant was that the claims process in respect of Crown forest licensed land slowed right down because it related to the entire historical claims process, not just the CFLs.

MR HERON QC:

So is the counterfactual that the Crown oughtn't have funded the other claims and simply funded the forest claims?

WILLIAMS J:

Well, the CFRT funded the forest claims.

MR HERON QC:

Yes, CFRT.

WILLIAMS J:

But it turned out that it funded all claims.

MR HERON QC:

I understand. I'm just not sure where the counterfactual takes one but…

WILLIAMS J:

Well, it means that it's a generation in the completion inevitably because it's all claims to 66 million acres.

MR HERON QC:

Understand, understand.

WILLIAMS J:

Couldn't have done that in four years even with a –

MR HERON QC:

No, well, I – with respect, Justice Cooke must be right. It was hopelessly optimistic.

WILLIAMS J:

Well, only if it was structured that second way, the way in which was convenient to the Crown because it didn't have to pay then.

MR HERON QC:

Well, I just don't follow, and it may be me and I'm sorry, that because the Crown Forestry Rental Trust funded a broader range of claims, does that necessarily follow that those claims would have been, the forestry claims would have been processed more quickly than under the way the Tribunal operated, for example, moving to district inquiries, as you know, large natural grouping, encouragement of settlements, all those things that developed over the years, and, of course, the first settlement only occurring in 1995 and then 1997 the big settlements of Waikato Tainui, Ngai Tahu and then people being informed, and different governments coming in et cetera, I'm just thinking aloud, well it's a complex picture the Tribunal as you say, your Honour, probably is best placed to know.

WILLIAMS J:

The point is, is that scenario, what actually happened was driven off the fact that the Crown Forestry Rental Trust was the engine room of the entire process. It needn't have been, there was a counterfactual, but that's what happened.

MR HERON QC:

I understand your Honour.

WILLIAMS J:

And the Tribunal fell into line with the Crown Forestry Rental Trust because it had to, there was no other way they'd get that research, and so it took 30 years.

WINKELMANN CJ:

You're saying the counterfactual is that there was more funding.

WILLIAMS J:

The counterfactual is that there'd be a separate Crown Forest Tribunal established as a division within the Tribunal, and all other claims would be separately funded by the Crown, without recourse to the interest on the rentals.

MR HERON QC:

And that, no doubt, the Tribunal is best placed to consider the counterfactuals in my submission. I'm just not able to advance that further.

WINKELMANN CJ:

We've probably exhausted it anyway.

MR HERON QC:

Yes. Your Honours, given where my learned friend got to in terms of, as I understood it, accepting the Tribunal was in error, accepting Justice Cooke's test, taking issue with the characterisation of "penalty" which in my respectful submission was accurate but even if it wasn't doesn't really take us anywhere, I'm not sure whether you need to hear from me on any other points. The written submissions, of course, cover the detail but I don't want to waste your Honours' time.

WINKELMANN CJ:

Thank you Mr Heron.

MR HERON QC:

If I can just have one moment to check the written submissions and my notes and I'll confirm that.

WINKELMANN CJ:

Yes.

MR HERON QC:

Can I just very shortly give you the relevant paragraphs from the written submissions, if that helps, so it's effectively after the fact road map, it's paragraphs 5 and 6, 15 to 19, 43 to 78, paragraph 97, paragraph 112 and 113, and paragraph 117, and then paragraphs 132 onwards summarise the Crown position on the specific appeal. In my respectful submission, in light of my learned friend's position the appeal can be dismissed and the matter will be returned to the Tribunal subject to, of course, the other matters we're aware of

that we can't speak of. Unless there's any questions, those are my submissions.

WINKELMANN CJ:

Thank you Mr Heron. Mr Cornegé did you have any matters by way of reply?

MR CORNEGÉ:

Just a couple of points your Honour. The first relates to the issue of deemed resumptions and settlements. Mr Marren's evidence in cross-examination, and I took your Honours to it, was that compensation has not been paid to any successful claimants in the case of a deemed resumption. So people have received the forest, they've received the rentals, they've not received anything else. To be clear Mr Quinn is not our evidence, he was witness for the, in the Mangatū inquiry his brief was filed in 2012, it was put on the record of inquiry in this case. It then found its way before Justice Cooke. Parts of it we certainly rely on as helpful, but we submit that to the extent that Mr Quinn describes this explicitly as penalty interest, is wrong, and in particular it's just inconsistent with the forestry agreement which explicitly refers to the calculation as reflecting a commercial return. That's what it is. Because of course what successful Māori claimants have missed out on, and will miss out on if the grace period is extended, and I take your Justice Young's point in terms of risk, but the simple point is they miss out on the opportunity of investing those funds and getting a return on investment, and the evidence before the Tribunal, and the evidence before this court, is that the agreed rate of return under the schedule is less than the general rate of return on equities, which of course already builds in risk associated factors.

WINKELMANN CJ:

So the government's stock rate is normally the no-risk rate or return, isn't it? So the 4% affects some sort of commercial rate I imagine?

MR CORNEGÉ:

Yes. In terms of application, determining who's at fault, and dealing with your Honour Justice Williams's discussion with my friend, yes, that's going to

be something that the Tribunal will need to look into, but that's only relevant if either 6(a) or 6(b) apply. 6(a) deals with claimant delay but only if they're well-funded, and then 6(b), if the Crown essentially are faultless, that's the relevant enquiry. So it's not a case of saying well it's a little bit here, and it's a little bit there, I mean if the Crown –

WILLIAMS J:
Well it must be to the extent that there's a discretion over how long the holiday extension is. It's not going to be black and white, is it?

MR CORNEGÉ:
Well, I mean, if the Tribunal says, we can exclude this period because the Crown were not at fault, I think that's fair. But ultimately that's the relevant assessment. There were delays, what was the cause of them, but again only if (b) was met. Did the Crown use its best endeavours, were the delays beyond its control, which is essentially a way of saying is the Crown faultless, in my submission.

In terms of Justice Cooke's judgment, we say he was wrong to characterise, his characterisation at paragraph 143 is wrong, and his Honour's direction to the Tribunal that system-related issues couldn't be relevant to the assessment must also be wrong. Now except there needs to be a case specific assessment as well, but in that sense the way in which his Honour has interpreted and applied the regime is not consistent with either the scheme of the Act or the agreement, and will lead the Tribunal to carry out its function potentially wrongly. Unless you have any questions, those are my submissions.

WINKELMANN CJ:
Thank you Mr Cornegé. That concludes submissions for the case? Yes. Thank you counsel for your submissions. We'll take some time to consider our decision.

COURT ADJOURNS: 3.34 PM