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

SC 121/2023
SC 123/2023
SC 124/2023
SC 125/2023
SC 126/2023
SC 128/2023
SC 129/2023
[2024] NZSC Trans 16

BETWEEN **TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA**
Applicant

AND **ATTORNEY-GENERAL**
Respondent

Hearing:	26 August 2024
Court:	Glazebrook J Ellen France J Williams J Kós J French J
Counsel:	K S Feint KC and N A T Udy for the Appellant

R L Roff and Y Moinfar-Yong for the Respondent

COSTS HEARING

MS FEINT KC:

Tēnā e te Kōti. Tēnā koutou e ngā Kaiwhakawā. Ko Feint māua ko Udy o māua ingoa. Ka tū hei māngai rōia mō Te Kāhui Takutai Moana o Ngā Whānau Me Ngā Hapū o Te Whakatōhea, tēnā ra tātou.

GLAZEBROOK J:

Tēnā korua.

MS ROFF:

E ngā Kaiwhakawā, tēnā koutou. Ko Ms Roff ahau, kei kōnei māua ko Ms Moinfar-Yong mō te Karauna. Good morning your Honours. Counsel's name is Ms Roff, and I appear with Ms Moinfar-Yong for the Attorney-General today.

GLAZEBROOK J:

Tēnā korua. Ms Feint?

MS FEINT KC:

So the first item of business is that we filed an affidavit on Friday, late on Friday, and I just want to check that the Court has that. It's an affidavit of Rukuwai Panoho.

GLAZEBROOK J:

Yes we have.

MS FEINT KC:

So just to explain where that came from, that was a response to the Attorney-General's submissions at footnote 111 of the submissions they had disputed our assertion that Te Kāhui were fully funded for their actual and

reasonable legal costs in both the High Court and Court of Appeal, and so we got this affidavit to respond to that statement. I understand the Attorney now accepts that what we say is accurate. But my friend is happy to address the Court on that matter.

MS FEINT KC:

Yes thank you your Honour. When we prepared the submissions for the Attorney-General about this counsel's understanding that because the High Court hearing in Whakatōhea, because it was the original scheme that was in place during the period of time when that hearing took place, I think it was August 2020, our understanding was that it was only the, up to I think a cap of 85% of the costs, but on having a telephone conversation with my friend, and an email on Friday, we followed that up. So I'm happy to accept that in light of the instructions that I've now received from Te Arawhiti, that notwithstanding that it was the original scheme that was in place during that hearing, Te Kāhui did actually receive their actual and reasonable costs in respect of that hearing. So I'm happy for that to be disregarded, footnote 111 I think it is in the…

GLAZEBROOK J:

Thank you.

MS FEINT KC:

The second order of business is because time is short this morning I've prepared a road map with six points to cover, which I can now hand up, along with another document which is an email from Crown Law, which we received last week confirming Crown Law rates. I'll hand those up together. I'd like to start by just giving an overview of the argument for Te Kāhui. This is an application for a prospective costs award, and it's made in response to the Crown announcement on 5 July 2024 which drastically cut the funding scheme that had been created for the Marine and Coastal Area (Takutai Moana) Act 2011. Te Kāhui says that that announcement creates extraordinary circumstances in the context of this appeal and that an application for costs is justified for four principal reasons. So those are, first of all, the scheme of the

MACA Act itself, we say that that statutory regime is constitutionally significant legislation that seeks to balance the rights and interests of Māori and all New Zealanders in the coastal marine area, and that the Act itself directly incorporates Te Tiriti o Waitangi guarantees to protect Māori customary property rights.

Secondly, we say because of that constitutional context, the Crown created a bespoke funding scheme to fund all MACA applicants without any eligibility criteria, and we say that the Crown created that scheme in response to its obligations under Te Tiriti to actively protect Māori property rights. The Act sets up a regime whereby Māori are required to follow one of two statutory pathways in order to obtain either recognition orders or recognition agreements reflecting their rights, but those are rights that they already have of course. So because the onus is placed on Māori to prove their extant customary rights, we say the Crown created this bespoke funding scheme to assist Māori with the burden of proof.

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Our third reason is that because Whakatōhea was the first MACA proceeding to proceed through the High Court, in effect there is a bespoke application of the scheme to Whakatōhea because they were forging the road ahead for the 200 applicant groups that are following, and it became clear as the scheme evolved that the funding that was initially provided was inadequate and Te Whakatōhea were topped up at least twice, so that as a matter of fact they received their actual and reasonable legal costs for both the High Court and Court of Appeal proceedings.

Then finally our fourth reason is that this withdrawal of funding has come at the 11th hour. We say that's not honourable for the Crown to pull the rug out from under Whakatōhea at the 11th hour after leave to appeal to this Court has been granted, and even after the two-week fixture had been allocated. We say it's too late to apply that revised scheme to the Whakatōhea appeal in these circumstances.

KÓS J:

Could I ask a pointy question. It's just really looking at the, if you look at the intituling in your submissions, this is a costs application, advance costs application, so which respondent in your intituling will be paying costs, or is this really not so much this proceeding as the other appeal in which the Attorney-General is the appellant. Because it's, you know, costs, we look for a party liable to pay.

MS FEINT KC:

Yes, and we're saying the Attorney-General is liable to pay.

KÓS J:

Which is not a party in the appeal that you've intituled, so you're talking about the 126 appeal, I presume?

MS FEINT KC:

We're treating all the appeals as effectively being consolidated.

KÓS J:

Okay.

MS FEINT KC:

So there are eight appeals in total I think Crown Regional Holdings might have withdrawn, so there are seven appeals.

KÓS J:

Right.

MS FEINT KC:

But yes, we're seeking the order against the Crown.

KÓS J:

Yes.

MS FEINT KC:

So if I turn to my road map, the first point I want to stress is that this application relies on the principles in *Berkett v Cave* [2001] 1 NZLR 667 (CA) which recognise that costs can be awarded prospectively in extraordinary circumstances, and I just want to note, this is not as the Attorney submits a general challenge to the government's decision to revise the MACA funding scheme, so it's not in the character of a judicial review of that revised scheme, but rather we say on ordinary principles under *Berkett v Cave*, which are referred to at paragraph 20 of our submissions, extraordinary circumstances do arise. So those three criteria are first that the appeal is clearly arguable, and we say that's not in contention because this Court has granted leave.

The second criterion is that there's substantial public interest in the proceedings, which we say again is not in dispute, given the Supreme Court has granted leave and indeed the MACA Act makes explicit the public interest in the entire statutory regime, because of the intrinsic value of the coastal marine area to all New Zealanders, and the mana tuku iho that tangata whenua hold in that area.

Thirdly, the third criterion is that it's unduly onerous for Te Kāhui to have to fund the appeal itself, and I apprehend that this is the key area in dispute between us and the Attorney-General. We say that it would be unduly onerous for Te Kāhui to fund these proceedings given firstly, the bespoke MACA funding scheme as it's been applied to Whakatōhea where we have, in fact, been paid all our actual and reasonable costs and secondly, the unique precedent setting position of the appeals before this Court. So the fact that there's a two-week long hearing, there are seven or eight appeals, and this Court will determine the correct construction of the MACA Act which means that it's of significance extending beyond Whakatōhea's interest in the proceeding to the 200 applications that are following.

GLAZEBROOK J:

Is that truly under that third limb or more under the first two limbs those last points?

MS FEINT KC:

Well –

GLAZEBROOK J:

Because it's not that it can't be funded, that doesn't show it can't be funded, it just shows that you say it's not fair that it should be funded by just one party when it's of public interest or a wider public interest.

MS FEINT KC:

Yes, yes, that might be right but we're saying it's unduly onerous because of the very late notice at which funding has been withdrawn.

GLAZEBROOK J:

Yes, I can understand that sort of illegitimate expectation argument, I guess.

MS FEINT KC:

Yes, yes, exactly that and also we don't have the funds available and we haven't had time to seek funding elsewhere. So –

WILLIAMS J:

What do you mean you haven't had time?

MS FEINT KC:

Well, we were only advised on the 5th of July that we would not be fully funded for this appeal and I'm going to – I've attached a timeline to this road map which I'm going to go through which shows that assurances were given to us prior to the 5th of July which we were entitled to rely on. So if I move to the second point and –

GLAZEBROOK J:

Can I just check something that's said against you, is that we don't have any accounts to show that there isn't funding available and that it's not just 30,000 but 120,000 is the figure that's been given by the Crown?

MS FEINT KC:

Yes, so –

GLAZEBROOK J:

You don't need to deal with those now but those are things that the Court is interested in whenever it fits to talk about it.

KÓS J:

And there's a third one which is the settlement with the Trust Board.

MS FEINT KC:

Yes. So I will come to those points. In relation to the first point we say because there was no eligibility criteria under the bespoke funding scheme, we should not have to prove impecuniosity but, secondly, we have put in evidence to show that the hapū that are the constituent groups of Te Kāhui don't have assets in their own right but I acknowledge there is a point that the Crown has now raised, although it wasn't raised in their notice of opposition, that they have in their submissions included a submission that Te Tāwharau, which is the PSGE for Whakatōhea, should be able to fund this appeal and I will come to that in due course. So if I move to the second point, the –

WILLIAMS J:

Just before, you hold onto the second point, does Te Tāwharau hold fisheries assets on behalf of Whakatōhea?

MS FEINT KC:

I don't know for sure but I think so. I think the assets of the Whakatōhea Māori Trust Board were transferred to Te Tāwharau.

WILLIAMS J:

And Whakatōhea Māori Trust Board is the – I can't remember what they were called – the asset holder, the one that got allocated the fisheries assets?

MS FEINT KC:

I don't know that for sure but, no, there may be another trust. Can we check that point and come back to you?

WILLIAMS J:

I think the point is that there are tribal assets out there that on a reasonable approach one would expect them to be accessed apart from your legitimate expectation argument.

MS FEINT KC:

Yes, and we would say given that we only found out on the 5th of July, which is just over a month ago, that funding was going to be pulled, that we haven't had time to follow those alternative funding sources and we don't have any certainty that they will, in fact, fund the appeals.

WILLIAMS J:

Have there been any discussions at all?

MS FEINT KC:

Not to my knowledge, no.

WILLIAMS J:

This is going to count against you.

MS FEINT KC:

Well we say, given the legitimate expectation created by the Crown's assurances, we're entitled to rely on this.

WILLIAMS J:

Right, so that, and one can see that argument, but that's not a *Berkett v Cave* argument. That's a public law argument.

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MS FEINT KC:

Yes, that might be so but we're in a public law setting in the context of these appeals.

WILLIAMS J:

Fair, but you started off by saying that this isn't a judicial review of the funding regime.

MS FEINT KC:

Well, it's not a general judicial review of the funding regime. We're not saying that the consequence of the Court's decision to award costs in the Supreme Court appeal will necessarily be a precedent for the High Court below in relation to all the applications following.

WILLIAMS J:

So this is a context-specific form?

MS FEINT KC:

Exactly, your Honour.

WILLIAMS J:

But doesn't it come down to, without you being able to say, well, in light of the funding getting pulled we've checked all our funding sources within the tribe and there's nothing, in light of your inability to say we've done that, it does become a legitimate expectation case, doesn't it?

MS FEINT KC:

I think it does. I mean one point that we would note is that this issue wasn't raised in the Crown's notice of opposition so we haven't put in evidence in relation to Te Tāwharau's assets.

WILLIAMS J:

I guess that's fair but the thing is that this is an exceptional form of order not lightly given and not generally lightly applied for, so that's why the Courts would generally expect no stone unturned approaches when they – and the Canadian authorities say that fairly I think. Otherwise you create a precedent which means a lot of people in your situation would get funded irrespective of their

ability to fund themselves which would really undermine the whole point I would have thought of *Berkett*.

MS FEINT KC:

Except that this context is a highly unusual context because it's their only funding scheme that I'm aware of that applies to all MACA applicants, and that doesn't set a precedent in relation to other public interest litigation because generally there isn't a funding scheme in place.

WILLIAMS J:

Still it's likely to be held up as an indication the courts are relatively lenient on these matters compared with other circumstances, and in the context of what is ultimately "you promised it and now you've broken your promise" argument, not a this is a really important piece of litigation, Crown obligations et cetera, et cetera, we're entitled to indemnity funding on general equitable principles and *Berkett* is not really that kind of case. It's you promised and now you've broken it and we're entitled to hold you to that substantive promise.

MS FEINT KC:

Well, it's not just the breach of the promise, it's also the constitutional context within which those promises were extended.

KÓS J:

Can I ask you a question at this point? Your argument is for advance costs. You're not suggesting this Court can create a special legal aid scheme for MACA applicants? It's a cost application, isn't it?

MS FEINT KC:

It is a cost application.

KÓS J:

All right, so the premise of that has to be, doesn't it, that your clients, if successful, would be awarded costs in this Court and they should get those costs now as opposed to later?

MS FEINT KC:

Yes, we're saying that this scheme that applied prior to the 5th of July should be extended to apply on the same basis.

KÓS J:

Well, that sounds like a legitimate expectation legal aid scheme as opposed to advance costs that will be awarded in the ultimate event.

GLAZEBROOK J:

And just to add to that indemnity costs which is another point that the Crown makes.

MS FEINT KC:

Yes, indemnity costs because that's what the Crown committed to and we say the Crown committed to that because of its duty of active protection. As I said earlier, in the context where Māori already have existing customary title rights because they were restored by the MACA regime, we are saying that the step of having to prove those rights, it's a prove it or lose it regime, is the factor that made the Crown decide to ultimately accept the Waitangi Tribunal's recommendation that the scheme should be fully funded.

KÓS J:

So to go back to my point, there was no costs award in the Court of Appeal because, of course, you had been fully funded?

MS FEINT KC:

Correct.

KÓS J:

So now you are less funded so your argument would be before us, if you were successful in the appeal, it would be that you should be awarded some costs because you weren't fully funded this time round?

MS FEINT KC:

Correct.

KÓS J:

And that those costs should be awarded now rather than later?

MS FEINT KC:

Correct. We're saying –

KÓS J:

So it's therefore a question of interim funding really, isn't it, because you're relying on the expectation that you will get costs at the end of the day and they should be brought forward?

MS FEINT KC:

Yes, I mean, in effect, we're saying there shouldn't be a cap on the amount of funding because they've capped the funding at $30,000 for an appeal on a one-size-fits-all basis and we're saying it's not reasonable to apply that $30,000 to a two-week Supreme Court appeal which is the first of its kind under this legislation.

KÓS J:

But we would have to look at what costs we might award on the assumption of success, and then relating that to Justice Williams' point, we'd also have to say well whatever that margin is, is it reasonable that that is not to be funded by you by alternative means such as borrowing or the trust board's settlement funds which we're going to come to.

MS FEINT KC:

Yes, or the counsel acting pro bono I suppose once funding runs out.

KÓS J:

Mmm.

MS FEINT KC:

Correct, so there is some funding, and another point I want to come to is we say it's not reasonable to treat Te Kāhui as one group because it is effectively four separate constituent hapū and they each act according to their mana and their customary title in the Takutai Moana and we negotiate common positions for the purposes of collaborating on the appeal.

WILLIAMS J:

But they're running one case?

MS FEINT KC:

We're running one case but we have to negotiate how we do that and the interests are not all identical, they're not perfectly aligned.

WILLIAMS J:

Yes, but you're still running one case, that's unavoidable, isn't it? I mean it would…

MS FEINT KC:

Well, we are but we would have the right to run four cases as well. We've chosen not to do that for the benefit of the Court so we're not repeating points. But, for instance, Ngāti Rua has its own appeal in relation to Ngāti Muriwai and has to respond to a Ngāti Muriwai appeal. My clients are Ngāti Rua and they don't have interests in Ōhiwa Harbour so the other hapū within Te Kāhui, like Ngāti Ira and Ngāi Tamahaua and Ngāti Patumoana, will be responding to Upokorehe in relation to the Ōhiwa Harbour appeals and then we have Ms Sykes acting for Ngāti Ira and Ms Panoho-Navaja who are representing us on issues of tikanga so –

WILLIAMS J:

So those – that'll be an issue on the reconsideration, the re-hearing but not an issue in this Court?

MS FEINT KC:

Well, those are all issues that are before this Court.

WILLIAMS J:

And you're representing those hapū on those issues with one voice?

MS FEINT KC:

Yes, we are.

WILLIAMS J:

So I'm not following your point then.

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MS FEINT KC:

Well my point is that – let's see if I can explain this better. So there are four hapū within Te Kāhui and each hapū has its own legal counsel. We say that by the Crown treating Te Kāhui effectively as a large natural group that overlooks the mana of hapū, whereas each hapū holds customary marine title in its own right, the evidence showed that customary marine title is held at the hapū level, and so each hapū is instructing their counsel to collaborate within Te Kāhui. So we're pooling intellectual resources in order to reach a shared position on the appeal, but each hapū is nonetheless separately represented, and as I've said –

WILLIAMS J:

But not in court. This is in discussions about how the case will be run in a way that doesn't lead to toes being stood on, right. So is your point there's extra cost in that?

MS FEINT KC:

That is part of our point, but in the Court of Appeal the, each of the hapū was represented.

ELLEN FRANCE J:

But just to be clear, is that the case in this Court, or not? In terms of what the Court will see?

MS FEINT KC:

It is likely that there will be counsel for each of the hapū appearing, yes.

WILLIAMS J:

And running a separate case?

WILLIAMS J:

Not running a separate case, but arguing different aspects of the case, and as I said, the interests of each hapū are not perfectly aligned, because each has customary marine title in relation to different areas, and Ngāti Rua has its own appeal as well.

WILLIAMS J:

So those hapū are not in conflict with each other?

MS FEINT KC:

No they're not.

WILLIAMS J:

Okay, so it's not that they're not perfectly aligned, it's that they, to the extent that their interests are separate, they are not in conflict, so they're capable of running a single case?

MS FEINT KC:

Yes, that's correct your Honour.

WILLIAMS J:

Well it would be sensible, then, to run one case, wouldn't it?

MS FEINT KC:

Yes.

WILLIAMS J:

You'd want the system to encourage rather than discourage that.

MS FEINT KC:

Exactly, and that's what we're attempting to do because it's for everyone. If for the Court's benefit if we're able to collaborate.

WILLIAMS J:

Yes, so, but doesn't that mean that the Crown's 120,000 number is correct. For Te Kāhui?

MS FEINT KC:

Well I'm not clear how that would work because that, the $30,000 is allocated to each hapū, and if each hapū don't have enough funding in their own right, they may not agree to give it to another hapū which has higher costs. So if I'm leading the appeal for Te Kāhui.

WILLIAMS J:

Yes, I get your point.

MS FEINT KC:

And Ngāti Rua has its own appeal, we're going to run through the Ngāti Rua funds much more quickly. There's no obligation on the other hapū to top up Ngāti Rua's funding.

WILLIAMS J:

But you'd want whatever funding regime was in place to encourage co-operation and discourage fragmentation.

MS FEINT KC:

Absolutely.

WILLIAMS J:

And that would be a wise use, not just of public funds, but wise policy.

MS FEINT KC:

Yes, I accept that, and we have, I mean that's why we're collaborating, and we're putting in one set of submissions rather than four. But I'm trying to make the point that it's not as simple as saying you just have two counsel to represent all of Te Kāhui, because it's much more complex than that.

WILLIAMS J:

You'd accept, though, that you do achieve some economy of scale, just not as much as the Crown suggests?

MS FEINT KC:

Yes, I think that's fair. So if I return to point 2 I think I can do this reasonably quickly. I just wanted to quickly touch on the, how the MACA funding scheme came into being. So we're saying that the Crown accepted the obligation to fund the Māori applicant groups, that the issue is the sufficiency of funding, and we say the answers to why the scheme was developed are set out in the MACA Act itself. So just very briefly the preamble sets out that the Act was passed to overturn the injustice of the Foreshore and Seabed Act 2004, which extinguished customary rights to the foreshore and seabed, and then in section 6 the Act restores any customary interests in the common marine and coastal area that were extinguished, but gives them legal expression in accordance with the Act.

Then if you go back to section 4, it sets out the purpose of the Act being to establish a durable scheme that balances the rights and interests of all New Zealanders, and it does this one the one hand by recognising the mana tuku iho of tangata whenua, and giving them the opportunity to exercise their customary interests, but also guaranteeing in subsection (2)(e) the public rights of access, navigation, and fishing, and it recognises the importance of the common marine and coastal area for its intrinsic worth, but also for the benefit, use and enjoyment for the public of New Zealand.

At section 11 the common marine and coastal area is given a special status, which neither the Crown nor any other person is capable of owning, and then

section 7 sets out that in order to take account of the Treaty of Waitangi there will be, in effect, the customary interests that exist are translated into forms of statutory title, which are either customary marine title rights or protected customary rights, and then there are two pathways to having those recognised, and they're either negotiating a recognition agreement with the Crown pursuant to section 95, or obtaining a court recognition order pursuant to section 98.

Now the Waitangi Tribunal, the Crown established its funding scheme, and then that funding scheme was reviewed by the Waitangi Tribunal, and if we go to the stage 1 report of the Waitangi Tribunal, which was issued in 2020, and going to the letter of transmittal, just a few points I want to touch on here. At page 10, so over the page at the bottom paragraph, the Tribunal makes the point that, it concludes "that many aspects of the procedural and resourcing regime fall well short of Treaty compliance" and they note that that's "particularly regrettable given the context in which the Act was developed – as a replacement for the controversial Foreshore and Seabed Act 2004, which left such a damaging imprint on Māori-Crown relations and the social fabric of Aotearoa New Zealand."

Then over on the next page, at the bottom of page 11 in that penultimate paragraph they make findings on the funding regime the Crown have put in place to assist applicants, which was a regime of partly funding Māori, and they say in that second sentence that they "have found Treaty breaches" because "the core premise underlying the current regime – that the Crown will only partially fund applicants' costs – breaches its Treaty duty of active protection and creates very real prejudice." And in the last sentence of that paragraph they say that: "Full, flexible, and timely Crown funding of all reasonable claimant costs is an essential pre-requisite of a Treaty-compliant regime." And the Crown accepted that recommendation and subsequently implemented full funding.

Just before we leave this Tribunal report, I just wanted to touch on two other points on the next page. Page 12 and the second paragraph, just a note there that the Tribunal was troubled by the scope for conflicts of interest with

Te Arawhiti being the Crown agency responsible for administrating funding at the same time that it's instructing Crown Law on litigation in the High Court.

Then over the next page at page 13 the Tribunal says: "It is clear from the evidence that the failings of the procedural and resourcing regime… have prejudiced the ability of Māori to protect their customary rights. These are rights that they should not be expected to fight for – they are guaranteed under the Treaty."

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We say that that is an important point because the onus put on Māori to prove that their existing customary rights exist, puts them to cost of establishing recognition orders, and we say it's not reasonable for Māori to be expected to self-fund that process of obtaining recognition because we say that would be tantamount to what happened under the Native Land Court regime where Māori were expected to and did sell land in order to pay for the surveying costs of putting their land through the Native Land Court in order to prove that they had title to that land, and the Crown has acknowledged that that process was a breach of the Treaty and it's acknowledged that in the Whakatōhea Settlement Act in fact, if I just give you the reference, it's the Whakatōhea Claims Settlement Act 2024, section 9 at paragraphs 19 to 20.

GLAZEBROOK J:

Sorry, can you give that to me?

MS FEINT KC:

It's the Settlement Act 2024, section 9 at paragraphs 19 to 20, the Crown acknowledges its Treaty breaches in requiring Māori to alienate land in order to have their title recognised through the Native Land Court. So we say that's really important context for why this scheme was implemented and why it's equally wrong for the Crown to pull the rug out from under Whakatōhea –

GLAZEBROOK J:

Can I just check, we were talking about legitimate expectation, just at the moment you're talking about unreasonableness, is that in an *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 *Wednesbury* or whatever standard of review that you have? So is that another argument on top of reasonable expectation is really the question?

MS FEINT KC:

It's an argument about legality. So as the Privy Council said in the *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) (*Broadcasting Assets*) case if the Crown has policy that is relevant to Treaty rights, then it's up to the Courts to also determine the legality of that policy. So we're saying it would be unlawful for the Crown to remove funding in these circumstances.

ELLEN FRANCE J:

I was just going to ask well the normal, the usual means of doing that would not be via a costs application unless you subsequently following the case were saying we should get indemnity costs because, you know, the Crown didn't do XYZ. So how do we bring that within what is a costs application? We don't here. We have some evidence but that's quite limited because it's directed towards a costs application, how do we – and in addition to that at the same time the Tribunal is, as I understand it, also considering the similar issue.

MS FEINT KC:

It is and, I mean, your Honour is correct this is not a judicial review application but we're saying that it's nonetheless essential context for considering the costs application and we say that's why there are extraordinary circumstances here.

KÓS J:

But shouldn't your application really be to the High Court with evidence which can then be tested on appeal? I mean, we're dealing with this legitimate expectation argument at first instance and really it's an argument which can be addressed to the High Court because it's about funding mechanisms under an approach which you say is of longstanding and the withdrawal of which is in

breach of a general expectation and completely unfair and unreasonable. I understand that argument but I'm having trouble with the forum.

MS FEINT KC:

Well, that would be a much slower and more costly process to follow.

KÓS J:

Interim orders?

GLAZEBROOK J:

It would be difficult for them to make interim cost orders to this Court.

KÓS J:

No, no, not interim cost orders. They could – what they could do is interim funding orders. To continue the funding arrangement that has prevailed until now.

MS FEINT KC:

But this Court equally has the ability to award costs within its jurisdiction.

WILLIAMS J:

The best argument perhaps is the funding got pulled in this Court.

MS FEINT KC:

Yes.

WILLIAMS J:

Nothing more complicated than that.

GLAZEBROOK J:

And if it's an advanced costs argument I don't see how it can go to the High Court, but I'm still interested in why you say there's illegality. I can understand the reasonable expectation. You were almost, I thought, saying it's illegal because it breaches the duty of active protection, that's probably right, I suspect, and certainly the Waitangi Tribunal has said that, but I don't think

there's ever been a case where the Treaty has been applied directly by the courts to provide rights or create duties. It certainly has been used to interpret legislation. It has been used to develop the common law. But I'm not aware of it being directly applied and even under a principle of duality or – and I know there's issues about international law and the direct application of treaties, but by analogy again it wouldn't be directly applied. So that's why I'm just asking you what's the basis of illegality, which is why I asked you about whether you were doing not only a reasonable expectation, but a *Wednesbury* reasonableness which might have a higher standard of review, and I know you're doing it as background to put up the extraordinary circumstances, but I'm still interested to know exactly what the argument is. In terms of legality. There's probable a whole pile of questions in what I've just said so… but equally I'm having trouble working out exactly what your argument is.

MS FEINT KC:

I do address this in our submissions at paragraph 37. So we're citing the *Broadcasting Assets* case. Actually if you go back to paragraph 36 we say there are two threads to the constitutional context that must be clearly distinguished, and it's the role of the Executive/Crown as kawanatanga to make funding decisions. So it can develop its own policy, but it must do so within the confines of the law, relevantly including its Tiriti obligations under Article 2 and the principles of the Treaty. Whether those legal/constitutional obligations have been complied with is a question of legality for this Court to determine on a "correctness" basis, and we cite that *Broadcasting Assets* in the footnote.

So I accept that this might be a long bow in the terms of a cost application, but we say that nonetheless it is important context because I suppose you could say it goes to unreasonableness in a *Wednesbury* sense as well.

WILLIAMS J:

Isn't it, well, the *Broadcasting Assets* case relied on the existence of section 9 to incorporate strong Treaty feedback, shall we call it. Here you've got section 4 and section 7 which says this Act is intended to give effect to the Treaty. Not a strong Treaty clause, you might say. A little bit like the Trans-Tasman Treaty

clause, but a Treaty clause nonetheless. So isn't your reasonableness the reasonableness in Treaty principle, not necessarily *Wednesbury* reasonableness, the requirement in the Lands Act for the parties to behave toward each other reasonably, in the utmost good faith, et cetera, et cetera. That's how that material gets into the discussion.

1050

MS FEINT KC:

Yes. Thank you, your Honour, that's what I'm trying to say. I might also note in the – yes, so it is a, it's an aspect of the principle of legality in terms of the way that the MACA Act is interpreted. The *Broadcasting Assets* case, also at page 525, also adds that Māori in that context were entitled to rely on the assurances given to them by the Crown and basically say there's a legitimate expectation created in that context. Moving onto the –

WILLIAMS J:

Just tell me which promises were they referring to there? Were they referring to policy promises or the promises in the Treaty itself?

MS FEINT KC:

No, from memory they were promises in relation to the various aspects of the *Broadcasting Assets* policy –

WILLIAMS J:

They were policy promises.

GLAZEBROOK J:

That's what I'm, from memory, that's what I thought too.

MS FEINT KC:

So moving onto the third point and I think this is probably covered this way. We say this appeal is unique because it is the first substantive MACA appeal and that means it has precedential significance that extends beyond the importance to Whakatōhea here alone because this Court will determine the

correct construction of the MACA Act, including such issues as the construction of the section 58 legal test for customary marine title, the correct test for PCRs, the role of tikanga, whether the 1903 Act vesting navigable rivers in the Crown extinguish customary title and so on.

So there are a number of very significant legal issues that need to be resolved and we say that's partly why it's not fair to expect Whakatōhea to fund the appeal itself, and I note in the second bullet point that the circumstances of the funding scheme have created circumstances of expectation and reliance because we have been fully funded through the lower courts, and I just want to step through the timeline that I've attached to the back of the road map just to make clear how this all occurred.

So the first – so the scheme was established in 2013, and I think this is only internal Crown policy documents at that point that showed later that it was estimating that it would be funding 85% of costs, and then Māori took the Crown to the Waitangi Tribunal and then in 2020 the Tribunal found that only partially funding the costs breaches the Crown's duty of active protection and recommended full funding as we've already stepped through.

The Whakatōhea High Court hearing was held over eight weeks in Rotorua. That includes one week where the parties were in mediation and the set level of funding that was provided under the Crown matrix in its original scheme proved insufficient to meet actual costs, and that affidavit of Rukuwai Panoho that we handed up this morning has attached to it at appendix B, a letter that was written on the 10th of March 2021 where Te Arawhiti noted that additional funding had already been provided. They acknowledged that there was still a shortfall of funding to meet the full costs of that High Court hearing and weirdly the High Court judgment doesn't have all the dates of the hearing on the judgment. So it was actually seven full weeks in the High Court but that's not apparent from the High Court judgment itself.

So in that fourth paragraph down, Te Arawhiti acknowledges that it's going to provide advice to joint ministers on the shortfall in funding and at the end of that

paragraph says: "…I can assure you it is my intention to seek funding to cover the actual and reasonable costs of your involvement in the hearing in full" and that's what subsequently occurred. It's now common ground that all actual and reasonable legal costs were paid. I should say the funding scheme includes funding for applicant groups as well as legal fees so it funds their costs of participating in the scheme as well. And then so this year in April 2024, so the Court of Appeal hearing all actual and reasonable legal costs paid for that as well, then there were appeals filed late last year in April, the Supreme Court granted leave and then only a few days later the Attorney-General filed a memorandum in the High Court advising that there was insufficient funding for the scheduled High Court hearings for the 2024/2025 financial year starting on the 1st of July.

On the 7th of May a further memorandum was filed by the Attorney-General in the High Court and she stated in that memorandum that she considered that in light of the funding difficulties priority should be given to the hearing of extant appeals. So she referred this appeal to the Supreme Court and that was noted in the context that Cabinet had decided to cap the funding for the 2024/25 financial year at $12 million. There's documentation showing that at that point Te Arawhiti was estimating that the costs of this appeal would be $623,000 to fund the applicant groups. Then on the 17th of May there were guidelines issued on reasonable costs which included legal fee hourly rates, which I'm not sure they were new rates, I think they were confirming the arrangements as to what was reasonable.

On the 13th of June, so Te Kāhui had written to the Solicitor-General asking for an assurance that funding would be covered for this appeal, on the 13th of June Crown Law replied assuring Te Kāhui that funding will be available in the 2024/25 financial year for the appeals to the Supreme Court. On the 4th of July the eight-day November fixture was allocated in the minute of Justice Williams and then the very next day all applicants under the MACA scheme received a pānui announcing the significant changes to the funding scheme which capped the cost for the appeal at $30,000 plus GST, so that's a one-size-fits-all, and

also reduced the hourly rates that had previously been paid under the scheme to legal aid rates.

So moving onto the point – are there any questions regarding that timeline? So that point is that we reasonably relied on the assurances given to Te Kāhui that funding would be available and it wasn't until the 5th of July that we learnt the rug would be pulled.

My fourth point is that the proposed one-size-fits-all funding is manifestly inadequate for a complex two-week fixture and we say that creates an equality of arms problem. We note, in particular, that Crown Law is not subject to the same constraints so they've confirmed to us that there's no cap on funding available for the Crown counsel. That's in the exhibits to Te Ringahuia Hata's affidavit at page 50, an email, and then I handed up an email this morning that they sent us last week confirming what the Crown Law rates are and they're significantly higher than legal aid rates.

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So we've done various calculations in the submissions but if you assume, for instance, that there are two counsel per applicant group, and they're acting at the senior and medium legal aid rates, then that $30,000 would be, two-thirds of it would be exhausted just in attending the hearing alone. If you assume eight-hour days for the hearing.

We've, I think we've covered the point about Te Kāhui not being one group but representing four separate hapū, and the tikanga that is followed within Whakatōhea is mana a hapū, so they're absolutely determined to ensure that each hapū represents its interests in relation to the customary title.

KÓS J:

Just to understand that wouldn't necessitate two counsel if there is a substantial part of the case that's common and perfectly led by you, so I'm just trying to work out what costs might be awarded, this being the cost application. Is that right?

MS FEINT KC:

There's not necessarily two counsel per hapū group, that's correct. But there is at least one counsel for each hapū.

KÓS J:

Yes.

MS FEINT KC:

And we say, given the significance of the tikanga issues before this Court, that it's also reasonable for both Ms Sykes and Ms Panoho-Navaja to appear as part of the team for Te Kāhui.

So we say in essence that the issues cannot be fully ventilated without Te Kāhui participating in the appeal. The Crown notes that there are other appellants appealing in relation to the section 58 legal test for CMT, but one of those other appellants is the Attorney herself, and the other appellant is Te Upokorehe which has a more limited appeal in relation to specific issues about section 58. So in the Court of Appeal Te Kāhui carried the burden of the argument in relation to customary marine title, the legal test in section 58, and we would anticipate that we do so in this case as well. In this hearing.

So fifthly, as we've canvassed already, we say the constitutional significance of the MACA Act requires the Crown to act consistently with its Treaty obligation to actively protect Māori customary rights, because those can only be exercised through recognition orders under the Act. So you have this kind of prove it or lose it regime, and that's in some respects contrary to the Article 2 guarantee in the Treaty of Waitangi, and that's the point that the Tribunal made, that these are rights that Māori should not be expected to fight for, and so we're saying in this context the Crown cannot honourably resile from its commitment to fully fund legal costs at the 11th hour, and that that's a principle of interpretation in relation to the Crown's Treaty obligations under the MACA Act.

It's also interesting that the Crown has typically funded Māori in constitutional litigation. The most analogous case is *Te Waka Hī Ika o Te Arawa v Treaty of*

Waitangi Fisheries Commission HC Auckland CP395/93, 30 October 1997, in which an advance costs award order was made by Justice Anderson in 1997, and that was in the context of the Sealord Fisheries litigation, which Justice Williams will be very familiar. In that case the High Court found that, and this was in advance of the High Court determining the preliminary question about the meaning of iwi, it found that these are matters of great importance, that the context of the application was specifically indigenous so he, his Honour said that the fiduciary obligations were wider than simply a trust law analogy, and his Honour found that because the answer to the preliminary question is one that would benefit all Māori, it was important that the Court had benefit of arguments on all sides fully ventilated before it, and his Honour awarded advance costs to be paid out of the funds of Te Ohu Kaimoana, and so that decision is at tab 13 of the bundle of authorities, and then at tab 14 there's a follow-up decision where there are actual costs orders made, which appears to be because agreement could not be reached on the amounts to be awarded, and orders were made of up to $150,000 per party, different amounts awarded for each party.

I should note for the sake of completeness at tab 8 three was a follow-up decision, *Morrison v Treaty of Waitangi Fisheries Commission* (2003) 17 PRNZ 37 (HC), where similarly an advance costs award was sought in the same fisheries litigation, but that was in a very different context, because it was after the High Court had determined the preliminary issue, and by that stage all the iwi were in agreement with Te Ohu Kaimoana's proposals of allocation, and so the Court declined to award costs in that case because his Honour said that the plaintiffs weren't truly representative of, by them and the outstanding issues were not of the same public significance as the preliminary threshold issue. So there wasn't the same substantial public interest in the proceeding that there had been earlier.

More broadly there has been a history of the Crown funding the resolution of litigation relating to the historical grievances of Māori albeit that its' more generally in a context of the Court awarding indemnity costs after the event, or indicating that it was minded to so so. So in both the *New Zealand Māori*

Council v Attorney-General [1987] 1 NZLR 641 (*Lands*) and the *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (*Forests*) case the Court indicated that it thought cost orders were appropriate, and the Crown agreed as part of the *Lands* agreement to pay those costs. We have put the *Lands* and *Forests* agreement in the bundle of authorities as well, and significantly it was an aspect of the *Lands* agreement that the Waitangi Tribunal was fully funded with legal aid available to all claimants, which was not means-tested, was not capped and is made available on the basis of common eligibility, and that came out of the *Lands* agreement. It's noted in the *Lands* agreement itself that the legal aid funding regime from the Tribunal needs to be developed on a bespoke basis, and that's what happened.

So as we've set out in our submissions at paragraphs 51 to 53 we say all of that context is entirely consistent with an advance costs award being made in this case, and unless the directly analogous precedent of *Te Waka Hī Ika*.

If I turn now to – and I should also add we've covered in our submissions the Canadian jurisprudence because the Supreme Court of Canada has recognised in a number of cases that in relation to litigation between First Nations and the Crown, it has also awarded advance cost orders in the context of historical grievances that are being advanced, and it focuses on those cases on both the constitutional context, but also the desirability of there being equality of arms before the Court so that there is a level playing field and the issues can be fully ventilated.

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And although it states that an exceptional case will be required, the Court also says in *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371 that most public interest cases would meet this criterion of themselves. We don't rely heavily on the Canadian jurisprudence because they have a requirement of impecuniosity and we say that is not relevant in the context of this funding scheme because the Crown has applied it on the basis that all iwi, hapū and whānau applicant groups are eligible for funding, and that's set out in the affidavit of Frances Dagg for the Attorney at paragraph 6 saying

that: "…there are eligibility requirements in the Legal Services Act for obtaining legal aid, which do not apply to applicant groups under the scheme."

Now if I just turn to some of the points that the Court indicated it wished to hear further on. In terms of there being multiple counsel within Te Kāhui, I've made the point that there are different interests between the hapū and different skill sets amongst the counsel acting for Te Kāhui but it's also fair to say that the integrated nature of the issues on appeal means that counsel appearing on discrete issues still need to be across the breadth of the argument before the Court in full because everything is so inter-related and that's particularly so in relation to the issues of tikanga.

So, for example, there's an appeal in relation to the Court of Appeal's dismissal of the appeal to grant customary marine title in relation to Whakaari and Te Paepae O Aotea, and we say that the High Court and Court of Appeal did not fully appreciate the spiritual significance of those taonga to the iwi along the Bay of Plenty coast and that that spiritual dimension is inherent in the relationship that the iwi have with Whakaari, and that that in turn is relevant to the way the section 58 legal test should be interpreted, and so for that reason the counsel who are arguing those tikanga issues will also need to be fully across the statutory interpretation arguments in relation to section 58.

In relation to the position of Te Tāwharau, I think I've said already we say it's simply too late to ascertain now how we obtain funding, whether and how we can obtain funding from Te Tāwharau. We note that that Crown argument was not foreshadowed in the notice of opposition so we have not put forward evidence in that regard. We've got no certainty that Te Tāwharau would agree, and we say that there's also a matter of principle here because the redress that was provided in the historical Treaty settlement in relation to the historical claims were for past grievances, such as raupatu and to provide an economic base for iwi for the future, and we say as a matter of principle why should Whakatōhea have to spend its own assets in having recognised its customary marine title when that's already been guaranteed by the Treaty. We say that

would create fresh grievances. And I've already noted that we say, in effect, that's analogous to the prejudicial regime of the Native Land Court.

Just to confirm, I've got a note that the assets for Te Tāwharau, so the Settlement Act was only passed this year, and the assets were only settled on Te Tāwharau very recently, on the 1st of August, we understand under section 182 of the Settlement Act that Te Tāwharau does hold the fisheries assets. We are not confident that Te Tāwharau would agree to fund the hapū because there are internal divisions within Whakatōhea, which date back to the 1990s and the failed settlement that occurred back then and because Te Tāwharau is only just getting established and getting on its feet, we're not clear what position it would take, so we simply don't know whether it would agree to fund Te Kāhui or not.

Then finally in terms of the order we seek against the Crown, we're seeking effectively to revert to the same basis prior to the revision of the scheme that there be actual and reasonable legal costs paid. Although we're the only applicant group before the Supreme Court, we note that the other applicant groups have also indicated that they support this application. They haven't filed an application of their own, but the same logic would apply to them. The only applicant group not supporting us is WKW, which is abiding, but the other groups, Te Upokorehe, Ngāti Awa, Te Whānau-A-Apanui, are all supporting, and the Whakatōhea, Te Tāwharau was the Māori Trust Board.

Finally we have added that previously under the scheme the costs of applicants to travel to the hearings were met, and we are seeking that as well, because it's important for our applicants that they are able to travel to the hearing in Wellington to be able to be here a tinana, and tautoko the case.

So I see I have promised to finish before the morning adjournment, and I have done so. Does the Court have any further questions?

GLAZEBROOK J:

Just in respect of the applicant travelling, that wouldn't normally be part of a costs award?

MS FEINT KC:

No, I accept that.

GLAZEBROOK J:

I mean I understand the point, of course, but an advance costs award doesn't seem quite the place to apply for that.

MS FEINT KC:

Well it may be that it can be covered within the funding that has been provided by Te Arawhiti, so that might be coming – now that I think about it – that might be a better way to deal with that point. If that, if the travel disbursements can come out of that funding that's been made available, then that can be dealt with outside this costs award.

KÓS J:

You can have a discussion with Ms Roff about that.

MS FEINT KC:

Yes, it would mean, of course, that there would be a larger shortfall in relation to the legal fees. In relation to the legal fees we're also seeking that the previous hourly rates apply, and that there be provision for King's Counsel to appear as well. So each of the main applicant groups has instructed King's Counsel, and traditionally they have been paid at a higher rate through the funding scheme. So that concludes my submissions your Honours.

GLAZEBROOK J:

Ms Roff, when you're ready.

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MS ROFF:

Tēnā koutou. I haven't prepared a road map but I was intending just to talk to the submissions that were filed by the Attorney last week and dated the 9th of August and just really to summarise at the outset the Attorney's position. Obviously, the Attorney opposes the application that's being sought, and in terms of what is actually being asked and sought by the applicants here, it's not clear to me. We are obviously in the costs realm and, in my submission, the principles that apply to costs should apply here and it's interesting, and it may be that Ms Feint has addressed this, but in terms of the financial exposure I guess of the applicants to date there have been no substantial costs awards in the MACA jurisdictions and that's in respect of with the original schemes in place and the revised scheme, the latest scheme, the more comprehensive scheme. I think there have been a couple of costs awards, adverse costs awards been ordered by the High Court by Justice Churchman but that was in respect of strike-out applications and that was just to – so generally what the approach has been with the Court is that costs lie where they fall –

GLAZEBROOK J:

Well they don't really. If you have one party that's been fully funded if they applied for costs – if they won and applied for costs they'd get nothing. Quite rightly because they haven't incurred any costs.

MS ROFF:

No, that's right, your Honour, but in terms of I guess the original scheme that was in place, yes I accept that with the Whakatōhea members because here of course *Re Edwards (Whakatōhea)* [2021] NZHC 1025, [2022] 2 NZLR 772 they did, even though the original scheme was in place, they did receive their reasonable costs.

GLAZEBROOK J:

But costs are never full costs.

MS ROFF:

No, that's right, yes.

GLAZEBROOK J:

And so they would have to have put up something that said they should get indemnity costs if they weren't provided with full costs and the fact that – and you'd have to make an application for that.

MS ROFF:

Yes, but in the Court of Appeal as well I think there was an agreement between all the parties, even the interested parties, that costs wouldn't be sought by any – that it was agreed that they would lay where they fell so – and in the context of this proceeding what the Attorney says is well the usual and standard approach to costs should apply here in that we wait until the outcome of the hearing and it's at that stage the Court looks at the situation with the costs as in –

WILLIAMS J:

It's not a usual situation though, is it, because this process has been legally aided throughout and now that legal aid has been cut by two-thirds or more.

MS ROFF:

It has been cut, Sir, yes.

WILLIAMS J:

So that’s the context that can't be avoided by referring to context in which that hasn’t been the case.

MS ROFF:

I accept that, Sir.

WILLIAMS J:

So tell me how that makes a difference, or why it doesn’t?

MS ROFF:

In terms of the funding cuts you're talking?

WILLIAMS J:

The context that has been discussed this morning that would suggest the usual approach to these issues isn't that apposite because the context is so distinctive, why do you say that distinctive context doesn't matter?

MS ROFF:

It is relevant, Sir, in terms of – in my submission in terms of, of course, there is public interest in these matters in terms of the nature of what's being sought but in my submission there is – these applicants are still being supported by the Crown, not to the extent that they wish, but they are still being provided with funding in order to have the issues that they want the Court to be ventilated before the Court for those to be ventilated. And so, in my submission, in terms of if the focus of the application is actually the adequacy of the funding, then that is actually a matter for the Executive in terms of those policy decisions around where that funding and the setting of that should sit.

WILLIAMS J:

Why is the adequacy of funding to bring matters to the Courts of Justice entirely a matter for the Executive?

MS ROFF:

In terms of the scheme, Sir, the scheme settings that we have here. The decisions that were made by the Executive in this case on the 1st of July were decisions that were made just in respect of this financial year, not future financial years, but in terms of the revised setting for the 2024/2025 year and that was an order that the appropriation for this financial year would not be breached. So decisions had to be made in terms of ensuring that hearings that are scheduled for this financial year could go ahead within the appropriation that had been approved by Parliament and that was the $12 million. So in order for those hearings to be scheduled across the board in terms of the High Court and in this Court as well, then the settings had to be revised and looked at in order that they could still go ahead in terms of all of those applications that are currently scheduled before the courts, not just this one.

WILLIAMS J:

Right, so that's one way of dealing with it, another way might be to slow the process down to allow those that are in process, particularly the first movers, to be supported to the extent that they needed to be supported, or even to delay the first movers if things were that bad for the Treasury, to ensure that there was proper access to justice and what is to be fair a pretty complex and difficult case don't you think?

MS ROFF:

Yes, I accept it is a complex and difficult case, Sir, in terms of this being the first one that's going before the Appellate Court, yes, but there are still a number of other applicants who want their applications to be heard and scheduled. For example, Ms Monifar-Yong and I were actually appearing in the Whangārei Court at the moment. That coast application is going ahead. Those applicants didn't want their application to be adjourned or stayed. The hearing was scheduled and as it's their right to have their applications that's scheduled to go ahead without any delay and so there is a real pressure, if you like, between hearings that are set down and having the applicants have their opportunity and having their day in court and being able to manage that within the appropriation that's been, as I said, been approved.

KÓS J:

Well it's not just a matter for the Executive though because we direct costs, the Executive doesn't, and in the *Lands* case President Cooke said that was a case where that was looked at after the hearing, a case where indemnity costs would be appropriate. The result of that was indemnity costs were agreed. Why would we not form the same view in this case that indemnity costs are appropriate given the degree of significance of this first and final determination for these parties?

MS ROFF:

And it may be that you will, Sir, once we work our way through the hearing and at the conclusion of that hearing it may be that the Court does, when considering costs, at the conclusion of the hearing determine that –

KÓS J:

Why would we not do so now given the significance of the issues that you've just accepted?

MS ROFF:

Because in my view, Sir, the applicants here haven't put forward enough or sufficient evidence to show they're not in a position to fund that.

KÓS J:

No, that's not – that wasn't the issue in the *Māori Council* case, the *Lands* case. It was simply that given the degree of public interest and importance of the case, regardless of impecuniosity, indemnity costs were appropriate. Well it seems to me this case is on all fours with that and we would likely make an indemnity costs order. If that's so, why would we not therefore make provision now?

MS ROFF:

Because in my case, sorry in my submission, this case based on *Berkett v Cave*, your Honours, wosuld need to be absolutely certain that it was one of those narrow cases and it would be an exceptional case where your Honours would make an advance order for costs and so that is something different, Sir, in terms of what was awarded and determined in the *Lands* case. That wasn't an advance costs award. That was once the Court had heard the submissions and had considered the nature of the case and the way that the case had been conducted and it's then at the end of that, that would be appropriate for those sorts of considerations to be taken at that point in time, not now in advance of the hearing.

KÓS J:

Well this wasn't a case of indemnity costs in the *Lands* case, it was not indemnity costs because of the way in which the case had been conducted, it was indemnity costs because of the public importance of the case.

MS ROFF:

Yes, and that in my submission then that would be appropriate for your Honours to make a determination on that basis once it had heard the evidence, once it had heard the arguments by counsel –

KÓS J:

Why do we have any doubt about the sheer scale of public importance of this case? We know that now. We don't need to go to the hearing to find out.

MS ROFF:

There are a number of aspects, Sir, to the – absolutely in terms of the appropriate interpretation of section 58. So yes, I agree that that is – there is public importance and public interest in that but there are a number of other aspects to the appeals which are more merit-based, I guess in terms of the factual findings that have been made by the Court, in my submission don't fall into necessarily that camp so that would be my response Sir.

GLAZEBROOK J:

Well, so you say 30,000 would be enough to deal with the section 58 issue?

MS ROFF:

Your Honour, it –

1130

GLAZEBROOK J:

Because I just have some doubts about that and I think the one size fits all is something that I'd like to hear more on.

MS ROFF:

Firstly in terms of the $30,000, your Honour, it may be that that amount does not cover all of the costs of each applicant, and when it comes to public funding of, such public funding schemes, for example, legal aid, there is not an expectation that it will cover all the parties' legal costs. It is a contribution that the, that is being made to support the litigants and to allow them to have their

proceeding heard in court. There's no expectation that it's going to cover every single aspect of their costs.

WILLIAMS J:

But the reality in this case is it's not going to cover, not only every single aspect of their costs, but hardly any aspects of their costs. That's the truth of it.

MS ROFF:

But Sir we haven't had evidence –

GLAZEBROOK J:

And not even at legal aid rates as I understand, is the submission.

MS ROFF:

That is the submission your Honour but I haven't seen any evidence or estimate from the applicants to say what they anticipate their costs actually being in terms of the appeal itself, and in my submission it's not, even though it's obviously not desirable, but it's not unusual for parties, for there to be unequal resourcing in terms of parties who are represented at court. Your Honours would, in terms of the cases that come before the Court, that wouldn't be unusual for the parties to have inequality of arms.

GLAZEBROOK J:

No and it usually creates a lot more costs on the Court when that is the case, actually probably outweighing the costs of actually paying for legal aid, and that was certainly the case in the Court of Appeal, and usually puts a lot more stress on the Crown as well because of their obligation in terms of dealing with matters in a fair manner.

MS ROFF:

And it is in terms of this, in this particular appeal as well. The Crown is preparing, for example, the common bundle and putting forward the more, covering the more administrative side of the appeal so that those costs are not borne by the applicants. So there are steps that are being taken to address

that. But here it is the case where we've got an unexpected situation where because of the precedented amount of claims that were made towards the end of last year, then there was a situation where I think Te Arawhiti, the evidence of Frances Dagg, explains that they anticipated that the appropriation would be breached by I think it was September this year if something wasn't done to reset and revise the settings on the current funding scheme for this financial year, for the 2024/2025 financial year, and at the same time though there is research and consideration ongoing in terms of what can be done in the future years to address this, and consultation with the applicants is expected to start on that in September in order to address the later financial years. So there is something that the Crown is conscious of, and does want to work with the applicants in order to work through those issues.

WILLIAMS J:

Not going to help a November hearing in the Supreme Court is it?

MS ROFF:

No Sir, it's not. That is the settings – those are the decisions that have been made by the Executive in terms of the funding for this financial year, so that is correct.

WILLIAMS J:

You do agree that the issues are important enough, constitutionally, in public law terms and in broader terms in fact, that a proper airing will be required?

MS ROFF:

Yes I do, yes.

WILLIAMS J:

How are we going to do that on $30,000 per head?

MS ROFF:

In terms of the, I think we've already raised the fact that it's a pooling of funds, and I accept – so there was $120,000 that is available to the Te Kāhui collective

in order that they can draw on those funds, and that is encouraged from the collaboration and collective approach has been encouraged, and as your Honour will be aware when we were discussing timetabling and the directions about the administrative approach about to how the actual hearing is going to take place, Te Kāhui are filing one set of submissions. They sought leave for it to be expanded beyond the page limit, so those sort of decisions are already made by the applicants in terms of efficiency and being able to run their argument where there is common ground across a number of the applicants.

WILLIAMS J:

Yes.

MS ROFF:

And that indeed happened in the Court of Appeal as well.

WILLIAMS J:

That's to be encouraged, but Ms Feint is right, isn't she, that that requires a great deal more work to pull together hapū with disparate views in order to provide a single case, particularly in a tribe that has struggled to present a single case on any of these big issues over the last 30 years.

MS ROFF:

I accept that Sir, and to her credit Ms Feint obviously in the High Court, that was obviously the case in the High Court and the Court of Appeal in terms of the approach that was taken by Te Kāhui, so there was a similar approach there in terms of Ms Feint leading the legal submissions in terms of the more interpretive approach to section 58 and 51 in the High Court and the Court of Appeal. So that has already taken place in terms of how to approach those issues, but I'm not undermining or, in terms of the difficulty that's involved in that, and the work that will be required by counsel in any way.

WILLIAMS J:

What do you say to the Treaty arguments that were advanced by Ms Feint?

MS ROFF:

Those arguments are for the Waitangi Tribunal to determine. The Tribunal is actually sitting today, under urgency.

WILLIAMS J:

So I hear.

MS ROFF:

And dealing with these very issues, and that is the appropriate forum for those to be put, and –

WILLIAMS J:

The Treaty's not relevant, in this litigation?

MS ROFF:

The Treaty is relevant Sir. In terms of whether or not the funding scheme breaches Treaty principles, that is what the Waitangi Tribunal will be looking at and considering over the next three days.

WILLIAMS J:

Who do you make that division as a matter of statutory interpretation in public law?

MS ROFF:

In terms of context of course it is important and appropriate, but in terms of the application that we're dealing with here today, then in my submission it needs to be dealt with in terms of the costs principles themselves, and there is no direct application to the Treaty in terms of being able to seek direct rights or interests from – on the basis of the Treaty itself Sir.

WILLIAMS J:

Well, and there isn't in section 9 of the State-Owned Enterprises Act 1986 either, but that didn't stop the Court of Appeal in that case, or the Privy Council in a later case making costs awards.

MS ROFF:

But it may be that if that was the case, Sir, then that would be for Te Kāhui to file a separate proceeding and not attempt to get the same relief through the vehicle of a costs application.

KÓS J:

Well *Berkett v Cave* wasn't a case involving the rights of tangata whenua.

MS ROFF:

No it wasn't Sir. That was a –

GLAZEBROOK J:

Yes, just looking at the time, maybe we can continue this.

WILLIAMS J:

Yes, sorry, it's time for my cup of tea.

GLAZEBROOK J:

So we'll continue that, give you a chance to think through a bit further the answer, just in terms of the actual statutory scheme as well.

MS ROFF:

Will do. Thank you Ma'am.

COURT ADJOURNS: 11.37 AM

COURT RESUMES: 11.58 AM

GLAZEBROOK J:

Thank you.

MS ROFF:

Thank you. Before the morning adjournment I was being asked questions around the – by Justice Williams around the Treaty clause, in particular in the Act itself, and my response to that, just to re-emphasise, my response was that

the Treaty, of course, in and of itself does not give rise to freestanding obligations in and of itself and that's the *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 Privy Council case. So but of course where there is direct reference in the particular legislation that we have here that will be relevant when it comes to using the Treaty as an interpretive aid and we will, of course, when we have the substantive appeal in November, that of course will become, will be front and centre in terms of interpreting section 58 and section 51 and that will be obviously relevant for the substantive appeal. But in my submission we are in the, like I said, in the realms of a costs application and the costs principles apply here and we're not having to use the particular section 7 in the Act an as interpretive aid. There is no issues of interpretation that are troubling your Honour in terms of what we're dealing with today. That would be my submission.

WILLIAMS J:

One of the principles I think referred to in the *Lands* case was the right to a remedy. If you've got a right, if there is a right you have, a procedure that you may follow, then you have a right to seek remedy through it reasonably and with the utmost good faith.

MS ROFF:

Yes, Sir.

WILLIAMS J:

Isn't that a sort of a way of thinking that there might be a connection between these two things?

MS ROFF:

In my submission that is what is happening here though in terms of the Crown providing funding, and again in my submission it is the level of funding that the applicants are concerned with, that is the issue for – that your Honours are being asked to –

WILLIAMS J:

At some point that question will become a substantive question, don't you think? At some level of funding, the level will itself be so low that it's –

MS ROFF:

That could be the case, yes, I accept that.

WILLIAMS J:

So the question is whether we're at that point here –

MS ROFF:

And that –

WILLIAMS J:

– because the Treaty does speak to that, you agree?

MS ROFF:

In terms of, in this case, in terms of what your Honours are being asked to look at and consider today.

WILLIAMS J:

Yes, well if it's a Treaty principle there's a right to a remedy, it's got to be a substantive right et cetera.

MS ROFF:

And the applicants are – and they have access to that. There's been no evidence provided by these applicants to say that they are not able to continue with the appeal on the current level of funding. That is not – I do not see that in the evidence.

WILLIAMS J:

Well they probably – well I expect they wouldn't say that, would they? They'd simply do it pro bono.

MS ROFF:

But that on the basis of the Canadian cases then, Sir, that is an issue and that is what those – the Supreme Court of Canada requires of those particular applicants because it's such an extraordinary remedy in terms of rewarding these advance costs orders. It must be something that prevents the applicants themselves from pursuing the litigation and in my submission we're not in that situation here, or the Court hasn't been provided with sufficient evidence to make a call on that.

KÓS J:

There's something deeply unappealing about the Crown's position here though because the result in the Court of Appeal is not something the Crown likes. It's taken its appeal 126 which will deal with that question but at the same time you're pulling the rug in terms of relative funding. So the funding that applied which gave the iwi groups what they might see as a more favourable result in the Court of Appeal, will not now apply in the paradigm in this Court. It seems to me a little bit like gaming.

MS ROFF:

I do not accept that, Sir, but I – it is unfortunate in terms of the timing of the finances but that is just a reflection of the amount of money that was available and in terms of the timing of that, the pressure on the financial assistance scheme, the number of long complex fixtures that are scheduled for this year, Te Arawhiti did seek, it's in the evidence in Frances Dagg's affidavit, Te Arawhiti did seek further funding from Cabinet in order that all of the fixtures could go ahead on the same basis that they have been heard up to date but that just was not possible in terms of the money that is available. There just isn't enough money there and that is a difficult decision that's had to have been made based on the available resources. But, as I said, in terms of the future years that appropriation has still, I think it's been set I think for next year, it's 13 million but there are still ways that Te Arawhiti want to consult with the applicants and work their way through that in terms of how it can be addressed but I accept your point, Sir, in terms of that not necessarily assisting the appeal in November but that is just the situation that we're in and it is unfortunate, I accept that.

ELLEN FRANCE J:

If you look at the first of the Canadian cases, paragraph 38, so that's – I'm not sure how you say the name –

MS ROFF:

Is it Okangan?

WILLIAMS J:

Okanagan.

MS ROFF:

Okanagan, thank you.

WILLIAMS J:

Well at least that's how Canadians say it. I'm not sure how the Okanagan Band says it.

ELLEN FRANCE J:

It's talking there about: "… it is often inherent in the nature of cases of this kind that the issues determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues" and then it goes on to talk about their special circumstances subcategory which I think equates broadly to the *Berkett* extraordinary exceptional circumstances and it says: "… 'special circumstances' that must be present to justify an award of interim costs are related to the public importance of the questions at issue..." Why can't that analysis then incorporate consideration of things like the Treaty, the way in which the funding has operated to date, the time at which – the time we've now got between change and that approach and the hearing of the appeal? Why can't in a purely – under the sort of cost rubric, why can't those matters be taken into account because you're looking at what's necessary, I suppose, for a proper resolution?

MS ROFF:

Yes, but in my submission there is – we don't have any evidence, sufficient evidence sorry, sufficient evidence to show that that can't be the case on the current funding because as well, in terms of these cases as well, it's very clear that full indemnity costs is not awarded in this jurisdiction, it's only a contribution. It's clear, I think it's *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)* 2007 SCC 2, [2007] 1 SCR 38 case, the next case and as they move on it seems that they – the principles around it tighten up in terms of what's required from the applicants themselves. So there must be impecuniosity, it must be that the hearing in terms of the issues being ventilated is actually more of a concern than the actual litigation won't go ahead because there's no ability for those issues and the hearing to go ahead and in my submission that's not the case here. But also it's very clear that there are really strict controls around the orders, advance costs orders in Canada, and so the Court is, the Supreme Court is saying well it's not just a matter of – it's not fully indemnified. Often there are caps in terms of the funding, there is limitations in terms of hours that are able to be claimed and in terms of the hourly rate as well. And so in terms of what we are dealing with here that is the Crown has provided funding. It's not a situation where there is no funding and these applicants cannot pursue their appeals, they can, and it's very clear –

GLAZEBROOK J:

The funding though that's been provided wouldn't cover an eight day hearing in this Court in terms of the normal type of costs orders that would be made in this Court which are only a contribution.

MS ROFF:

Yes, Ma'am. And that's where it comes down again to my point around well who – the level of funding and that funding setting that has been made by the Executive based on not breaching the appropriation. That $12 million is all that is available and just hard decisions have had to be made around trying to address the interests of all the applicants who have a hearing scheduled for this year and that is the decision that – it was a hard decision to make but it's been made and that is the – in terms of appeals, that's $30,000 per applicant, in terms

of substantive hearings it's $120,000 per applicant and then I think there are follow up hearings because the way that these MACA hearings have progressed they're at different stages so there's a different amount for that as well. But in terms of activity funding because there are different work streams, the activity funding and the max or the upper limit of that, I think it's $450,000 per applicant, that hasn't changed, that remains the same. So it's just the actual Court costs, that particular work stream has had to be reined in and managed, in order that the Public Finance Act 1989 is not breached, that's the reason, and it's not in my submission there's no evidence to suggest that that was game playing or any sort of deliberately pulling the rug out from underneath these applicants' feet. It's a pragmatic approach in order to just manage the public purse in the most practical and pragmatic way and addressing all the needs of the applicants who are entitled to have their hearings that are scheduled this year heard and dealt with by the Courts.

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WILLIAMS J:

That all sounds perfectly understandable but we are up on a second appeal for the first time in terms of interpreting the regime, it's hard to see the one-size-fits-all is a sensible policy or administrative response to what's going on here. It's hard to see why an exception wouldn't be made in this particular case because of – and perhaps, you know, there'll be effects downstream.

MS ROFF:

Yes, yes.

WILLIAMS J:

The Waitangi Tribunal dealt with this problem for 30 years and simply said, well, you have to get in the back of the queue and wait, and, of course, you're right: there are fixtures allocated here but that's the reality of it. You have to distinguish between law-finding processes and fact-finding processes, and where you have law-finding processes with wholesale rather than retail effect, underfunding those could be entirely counterproductive.

MS ROFF:

I accept your point, Sir, and I can't take that point any further.

WILLIAMS J:

No. I was just thinking of a counterfactual looking at the *Okanagan* case. Don't you think the answer and the principles would have developed in a different way if, in the *Okanagan* case, they had been fully funded through the British Columbian Court of Appeal and then had their funding taken away just before being heard in the Supreme Court?

MS ROFF:

Well, in terms of the nature of the application itself, I can't speak to that, Sir. I'm not sure what would have happened.

WILLIAMS J:

It's unlikely that the Supreme Court would have seen that as irrelevant, don't you think?

MS ROFF:

It may very well take that into consideration, Sir, but it wouldn't have been – in my submission, it's still very much the way that those lines of cases have gone, that it is an absolutely extraordinary remedy and something highly rare and unusual for the Court to grant. So it may be that it wouldn't be irrelevant but, again, in my submission, this is very narrow cases that this would be apply to and in that situation it was absolutely extreme circumstances in terms of those particular aboriginal bands and the dire financial situation that they were in in terms of, and I think the comments by the Court, that in terms of their financial position they were unable to continue with the – if they didn't get any advance order, unable to continue with the litigation itself but also unable to forfeiture as well because they require – because the logging rights, they wanted to continue, they needed the funds from that for housing and necessities of life. It was that much of a situation and it was the Crown in that case that took proceedings against the bands.

WILLIAMS J:

Well, because the Crown claimed the logs.

MS ROFF:

So they were forced into the litigation, and in my submission, it may be that my friend disagrees with me, but that is a different situation than we have here. It is not on all-fours with the circumstances here.

WILLIAMS J:

It does though – that the *Okanagan* case is distinctive and particularly British Columbian does suggest that whatever framework is developed there and here, those frameworks are very context specific.

MS ROFF:

Yes, I accept that.

WILLIAMS J:

Particularly in the context of indigenous rights litigation there and here, and we see that with the *Lands* case, the *Forests* case, the *Broadcasting* case and so forth. We've developed a somewhat specific way of dealing with civilised dispute between the State and the indigenous people that ensures these issues do get aired properly.

MS ROFF:

Yes, I accept that. We don't – here, in terms of the particular order that the applicants are seeking in this case, it is, up until this point, limited to where you have trust cases or a specific fund and I think that's dealt with in our submissions. Well, this isn't. What's being sought here by these applicants is pushing the boundaries beyond the current jurisdiction or the case law that we've got up until this point in terms of *Berkett v Cave*. So…

KÓS J:

No, it's a straight *Berkett v Cave* application, the difference being twofold. One, there's a real public interest point here that might be established and,

secondly, the Treaty of Waitangi dimension. There might be a third difference too actually which is the change in paradigm in terms of costing between the Court of Appeal result where you lost and the Supreme Court where you're hoping to win.

MS ROFF:

The Attorney wasn't an appellant, Sir, in the Court of Appeal. The Attorney as, as was the case in the High Court, was an interested party, purely involved –

KÓS J:

Okay, well, that's changed, hasn't it?

MS ROFF:

It has, Sir, yes. So that is a different position in terms of this particular appeal. But up until this point and across the other –

KÓS J:

I don't think that really distinguishes my point.

MS ROFF:

No, okay. I do see it as slightly different, I guess, in looking at *Berkett v Cave* in terms of there being – and in the other cases as well where you've got the trust, particular trust situation, where there's the specified funds that are being drawn upon to pay the fees of the parties as opposed to targeting a particular party rather than the source of the funds or the fund itself, a trust fund –

KÓS J:

Well, that's a well known equitable exception. That's not this sort of case.

MS ROFF:

No. Yes, that was the point I was making, Sir. So that would be the difference and in my submission this is –

KÓS J:

But it wasn't the case in the Canadian cases.

MS ROFF:

No.

KÓS J:

And it wasn't the case in *Berkett v Cave*. So there's another whole sequence of cases that are common law, not equitable, and which concern advance costs awards in exceptional cases.

MS ROFF:

Yes, I accept that, Sir. But in my submission, in terms of what's being sought here, it's not an exceptional case so it's not appropriate in this case for the applicants to seek an effect or expand the current system of finance and what is affordable and what the executive has determined is manageable within the appropriation. So that is my fundamental point, Sir, in terms of taking it outside that role and making this something exceptional, and in terms of whether or not the applicants need to show they are impecunious, of course, that is not something that is – it is something that is part of a costs regime in terms of making awards of this nature, in my submission.

KÓS J:

It just seems to me you keep coming back to this point about appropriations and I understand it from a point of fiscal policy but that simply explains the reasonableness of your position. It doesn't actually say anything at all about whether the applicants here are in or are not in an extraordinary situation. I mean clearly one aspect that is extraordinary is that the whole game has changed. They're sitting on a favourable result and suddenly the game changes on the appeal from that. It ends up being your appeal primarily.

MS ROFF:

Well, there are a number of appeals, Sir –

KÓS J:

Sitting on 58 anyway.

MS ROFF:

Yes, that's right, in terms of section 58, yes, I accept that, but there are seven appeals so it's not just the Attorney's. But yes, it is, from the Attorney's point of view, it is important to have clarification around what section 58 means and the Attorney hasn't taken a position on the merits of the case in terms of the factual findings, hasn't taken a position on that. This is really around the legal interpretation of section 58.

KÓS J:

Well, I'm just focusing on that, 58, as being the issue of real public interest. The rest of it is much more private interest.

MS ROFF:

Yes, and I accept that. Yes, I would agree. One point that I would just point out, it's not clear to me in terms of the application that's been made, it does seem to have changed somewhat from the application itself that was made and in the submissions that are filed in terms of the breadth of the scope of the application, and I think Ms Feint did address that in terms of not just being made by Te Kāhui but perhaps extending out to a number of the other applicants even though there are not separate applications or there is no evidence filed by those applicants either in terms of their ability to fund the litigation, and also, and I think this came up further in terms of some of the other costs that are being sought, and I mentioned around the difference between the Court-related costs and the activity costs which come within the funding scheme, and so, for example, applicants travelling, being able to, to the hearing themselves, that would normally come under the activity part of the scheme, not under the Court. That's my understanding in any case, and so it would be highly unusual in terms of a costs order and the Court's ability to make a costs order to be providing for requiring the Attorney or a party to pay those costs in any advance costs order.

The majority of the evidence that we have from the Te Kāhui applicants is from Ngāti Rua and Ngāti Patumoana. There is no direct evidence from Ngāti Ira or Ngāti Tamahaua. So that's the other two applicants. So we don't know what

their financial position is and whether or not they are able to fund the litigation, and in my submission the evidence –

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GLAZEBROOK J:

I thought those submissions were more made in the sense of the Crown submission that there's 120,000 available to say that there are other – that they have their own costs that they're incurring and that the – putting together the case so that you agree on who argues what also takes time and therefore cost?

MS ROFF:

I may have misunderstood, your Honour. My understanding from reading the submissions is that the scope of the order has been broadened. It may be that Ms Feint can address your Honour if it's not right.

GLAZEBROOK J:

Well, certainly in terms of the costs for the litigants themselves to come –

MS ROFF:

My understanding –

GLAZEBROOK J:

– anyway we can find out whether…

MS ROFF:

Yes, thank you. But also in terms of the thinking as well about the actual – the appeals themselves. There are seven appeals and, as I said, the Attorney is the appellant only in respect of one of those appeals and the other appeals she is an interested party and that's the –

WILLIAMS J:

It's the big one though.

MS ROFF:

Yes, it is. That is the key issue, I accept that, yes. There were – I just wanted to – sorry I'm just making sure that I've covered the points I wanted to cover but there were some issues that I think is not addressed in the written legal submissions and this is some points made in the applicant's written submissions around a Bill of Rights issue and that's covered off at paragraphs 54 to 57 of the applicants' written submissions, and my friends there raise issues in relation to section 28 of the Bill of Rights and that's: "An existing right or freedom should not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part" and I think my friends' submissions is that protects individuals from retrospective changes to Crown policy and, in my submission, that's not what that particular provision is, it's not relevant to what we're talking about here.

The BORA prescription of law with retrospective effect is limited to the criminal field. That's what that particular provision is focused on and I don't accept as well that what we have here is a retrospective change. It is a change going forward in terms of claims that are made. That change took effect on 1 July. It is correct that there was a short delay in terms of notifying the parties of five days but it's not a case of retrospectively disallowing claims that have been made.

The other point made is around section 27(3) and these go to the equality of arms arguments made by my friends and the level of funding available to parties that prosecute their cases and, in my submission, that's not what section 27(3) is intended to address. That simply enshrines the default position that citizens have a right to bring civil proceedings against the Crown and to have those proceedings heard and determined according to law in the same way as civil proceedings brought against individuals. It's not in any way intended to address unequal financial resources that parties are faced with.

GLAZEBROOK J:

That's not quite right, is it, in terms of the International Covenant on Civil and Political Rights that that comes from because there have been cases that say it does include a requirement to at least provide a legal aid scheme.

MS ROFF:

In terms of the – I accept that, your Honour. In terms of what we have here, there is a bespoke funding scheme so – which is, I would say, that would be – so there can be no breach because it would be similar to legal aid so it's on the government providing some financial assistance to ensure that individuals have access to the Courts and that is what is happening here.

And the final point made by my friends is section 20, the rights of minorities to enjoy their culture, but again the argument would have to be that the applicants will be unable to advance their appeal or respond to other appeals and so risking being able to have their cultural connection to the land recognised through CMT and, in my submission, there just isn't sufficient evidence that's been provided by the applicants to show that it is the case.

So, in my submission, this isn't one of those cases where the Court should extend the jurisprudence around this particular issue. It is, like I said, it is a very narrow and extraordinary remedy that's been sought and, in my submission, the applicants haven't met and, in particular, the evidential burden that they're required to meet to show that it is justified in this case.

Unless your Honours had any further questions for me that is the Attorney's case.

GLAZEBROOK J:

Thank you very much.

MS ROFF:

Thank you.

GLAZEBROOK J:

Ms Feint?

MS FEINT KC:

First, in relation to the Waitangi Tribunal, an urgent inquiry that's underway this week, we say that's entirely irrelevant because the Tribunal has a different jurisdiction entirely. Its purpose is to inquire into whether the Crown has breached Treaty principles. That has no bearing on this Court's role and responsibility as a matter of administrative law to ensure access to justice in terms of the appeals before it, and if the Tribunal inquiry was to have any bearing whatsoever, I would submit we would require the Crown to assure us that it would abide by the Tribunal's recommendations should the Tribunal recommend that funding be provided but this government so far has a track record of not abiding by those recommendations.

So, secondly, we say that, as Justice Kós so aptly put it, this is a modern *Lands* case and I think it's common ground now that the issues before this Court are of public importance. The hook that we rely on to bring the Treaty principles into the Court's analysis in this context of costs is the MACA Act itself. The Trans-Tasman interpretation that the Treaty is always relevant because of its constitutional significance is relevant we say in the way that this Court should be considering the context in which these extraordinary circumstances arise that we say justifies a costs award. But even if the hook is not in the MACA Act in terms of the principles in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC), the Treaty is part of the social fabric in the constitution of this country. And the Treaty principles, I would suggest, do embrace the right to a remedy but I would also say the Crown's obligation to act in good faith is relevant, its duty to actively protect Māori interests and the principle of equity as well which supports, in my submission, our equality of arms argument.

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And in terms of the Crown's duty of active protection, I just want to unpick a bit what the effect would be if the Te Kāhui applicants were not able to proceed

before this Court. Say we didn't agree to act pro bono and Te Kāhui withdrew, what would be the effect of not obtaining a recognition order, and it seems to me there's one of two alternatives; either that leads to extinguishment of customary title through a side wind, which is a possibility that Justice Goddard alluded to in his majority decision in the Court of Appeal in aid of his statutory interpretation construction, or at the very least if those customary title rights are not extinguished, the fact that you're unable to exercise them through the Act means that, in effect, you can't – you may still have those rights but they're entirely ineffective and either way those are significant constitutional consequences in terms of the Crown's Treaty guarantees to protect Māori customary title until such time as they wish to part with that customary title and that must be an abiding principle in terms of the context in which the Crown's developed the funding scheme.

A couple of more minor points in relation to the question of Executive appropriations, I'll just refer the Court to our footnote 94 in our submissions, which states that under the Public Finance Act 1989: "Costs ordered by a court can be expensed against any existing appropriation without further Executive approval" so costs are dealt with separately.

Thirdly, in relation to the impecuniosity point, in one of the Canadian cases *Anderson v Alberta* [2022] SCC 6, 466 DLR (4th) 391 at tab 16, paragraphs 4 to 5 of that judgment, the Supreme Court of Canada there notes that when you are considering impecuniosity you have to understand that through the lens of the First Nation's peoples and the imperative may be on reconciliation and it may also be on social priorities that the First Nation's government has in terms of their obligations to support their people and restore them to a social and economic and cultural position where they can participate in the full life of the community.

And then, finally, I would make the point in relation to the issue about whether Te Tāwharau is able or willing to fund these appeals, there's a case today brought in the High Court by Ngāti Ira which is arguing that Te Tāwharau and the Crown have breached its tikanga by folding it into the Whakatōhea

settlement, notwithstanding that Ngāti Ira as a hapū and as individuals voted against the settlement. So there are real divisions within Whakatōhea and relating to Te Tawhārau which may mean that the answer if we were to approach them may well be no.

So those are the only points I have in reply. May it please the Court.

GLAZEBROOK J:

Well, thank you counsel for your helpful argument. We will reserve our decision. Thank you. We will now retire.

COURT ADJOURNS: 12.33 PM