IN THE SUPREME COURT OF NEW ZEALAND SC 54/2010

BETWEEN **ALAN PAREKURA TOROHINA HARONGA**
Appellant

AND **WAITANGI TRIBUNAL**
First Respondent

AND **THE ATTORNEY-GENERAL**
Second Respondent

AND **TE WHAKARAU**
Third Respondent

Hearing:	11-12 October 2010
Court:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	B W F Brown QC and K S Feint for the Appellant D B Collins QC, V L Hardy and C R W Linkhorn for the Second Respondent T H Bennion for the Third Respondent

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CIVIL APPEAL

MR BROWN QC:

May it please Your Honours, Brown and Feint for the appellant.

ELIAS CJ:

Thank you Mr Brown and Ms Feint.

SOLICITOR-GENERAL:

Ms Hardy and Mr Linkhorn appear with me for the second respondent Your Honours.

ELIAS CJ:

Yes thank you Mr Solicitor, Ms Hardy and Mr Linkhorn.

MR BENNION:

May it please the Court, Mr Bennion for Te Whakarau, the third respondent.

ELIAS CJ:

Yes Mr Bennion, thank you. Yes Mr Brown?

MR BROWN QC:

May it please Your Honours, the approved ground of appeal is at paragraph 26 of our submissions and the appellant's case comprises three primary points and they are recorded in the executive summary at paragraphs six to nine. First of all the statutory interpretation argument is contended that the Tribunal, the High Court and the Court of Appeal all erred in their construction of Treaty of Waitangi Act as amended by the Crown Forest Assets Act, that the Tribunal's binding recommendation and jurisdiction is not a substantive change but merely a discretionary function.

The second ground assumes the finding against the appellant on that. It assumes a discretionary power to engage with the binding recommendation jurisdiction and contends the Tribunal erred in law in failing to take into account a relevant consideration and in taking into account irrelevant considerations and a third ground is that Judge Clark who heard the urgent remedies hearing and similarly Justice Clifford erred in law in misconstruing the ambit of the Tribunal's Tūranga Tangata Report in holding in effect the Tribunal had discharged its obligation to hear and make recommendations as to remedies for the Mangatu claim and that argument embraces the submission we make on the basis of section 27 of the New Zealand Bill of Rights.

I will present the first and second of those arguments. My learned friend Ms Feint will present the third and they will be presented in that sequence.

The first argument about statute interpretation is really not facts specific. In fact it's not case specific. But the facts, a particular review of which is required, will be relevant, particularly to the second and third cause of – grounds of appeal. And for convenience and proximity, I propose to reserve to coming to that, those second and third grounds of appeal, a deeper exploration or familiarisation of the report and the facts but for now I do want to deal with some of them to better orientate the Court to the claim and then the subject matter. The Crown forest licence land which is the subject of the resumption application represents about one-quarter of the Mangatu State Forest. The Court may have seen it at page 30 of our submissions, although a larger image is found in the pink volume under tab 27 at page 275. And the diagram there shows that the Mangatu Forest is the entire green section. The patched green section, which is at the left lower side, is the piece of land which is the 1961 land. That was the land that was the subject of the acquisition and the finding by the Tribunal in its report. And it was acquired by the Crown from the larger Mangatu block and the appellant, Mr Haronga, who was the chairman of the board of management of the Mangatu Incorporation which owns Mangatu No 1, they'd seek a resumption of that piece of land which you will see is roughly within the eastern border of the original Mangatu No 1 block. The balance, the other three-quarters, of course, is available for Crown settlement with the broader claimant community.

Now this land was acquired by the Crown in 1961 from the incorporation and the status of the incorporation as an incorporation is not a recent status. In fact it seems that the Mangatu Incorporation was the first Māori incorporation sanctioned by law. And it may be useful just to locate the history of, I think conveniently, if it would be under tab 16 of the pink volume, there are a number of affidavits of the appellant, Mr Haronga, in the bundle. This is the one that was filed in the Waitangi Tribunal in support of the

urgency application in September 2009. I'll be coming back to it when we look at the facts as one needs to in a little bit of detail for the second and third causes of action but for now I am asking you to look at page 201 under the heading, "The history of Mangatu Incorporation," and there's quite a long paragraph in paragraph 25 that I won't read all the way through but the fact is that I draw particular attention about two-thirds of the way down, that Wi Pere formed the incorporation as a vehicle for the hapū to maintain control over the 100,000 acre Mangatu No 1 Block. And it was this action that proved instrumental in assuring that Mangatu No 1 remained largely in tact with the particular exception of the 1961 land, and was able to be developed into the successful enterprise that it is today. Wi Pere successfully, this is paragraph 26, successfully advocated the claims to the Mangatu lands before the Native Land Court in 1881 on behalf of Ngāti Wahia and Ngariki. The Mangatu claims to 160,000 acres ended up being split into six blocks of which the largest was the Mangatu No 1 Block, which you've seen and the plan, if you note in paragraph 27, was to protect Mangatu No 1 from the pressure of sale by creating a trust to manage the land on behalf on the remainder of owners. And the Court picks up the note in paragraph 28, "awarded title in name of 12 owners who are to act as a board of management on behalf of the hapū which roughly reflects the structure that is now in section 270 of the Te Ture Whenua Māori Act in relation to Māori incorporations, but 29 is the important point, "To overcome the problems encountered in trying to manage the land on a communal basis." Without the legal ability to do so, Wi Pere and others promoted the Mangatu No 1 Empowering Bill in the fact of considerable opposition from some Pakeha politicians who had said didn't want land under Māori control. That Act as passed in 1893 and provided for the incorporation of the 170 now known as a body corporate and that piece of legislation, it's a very short piece of legislation, is in the yellow volume number 1.

ELIAS CJ:

It was amended in, according to something I read in the 1920s was it to include further owners and you'll probably come to that?

MR BROWN QC:

Yes, Ngariki Park – let's see, it's actually dealt with in the –

ELIAS CJ:

Sorry, you go to the legislation as you intend.

MR BROWN QC:

Yes, to deal with the position of the Ngariki Kaiputahi which is the hapū referred to in the second to last line of paragraph 26 and I'll be dealing with that when I come to look at the two chapters, particularly first related to the Māori Land Court on the second point of appeal but, yes, Your Honour's entirely incorrect. There was, we say, an adjustment of interest to reflect the position of Ngariki Kaiputahi but the Act as passed is the short piece of legislation under tab 28 at page 276 and you will see there about seven or eight lines from the bottom of the first page, the reference to Wi Pere and Wi Haronga from, both of whom the appellant is descended and over the page about half way down the page, you will see in the lengthy recital and just before the enactment clause it says, "The owners of the land shall be incorporated for the purpose of the ownership and management of the said land and the intervention of Parliament should be requested for the furtherance of this agreement as a Native Land Court has no power to effect the same" and that was achieved in paragraph 3, the incorporation provision and the land called or known as Mangatu No 1 Block shall be and hereby is vested in said corporate body as and for in state of inheritance in fee simple and position and the land and affairs of the said corporate body were to be managed and determined by a committee to be appointed from time to time" and that committee continues to operate under Mr Haronga has been the chairman of that committee, I think, for the last quarter of a century.

My learned friend, Ms Feint, reminds me that at the back of our submissions behind that map, there are two chronologies. One is, they've put them in two discrete ones, one is designed to deal with the, this is at page 32, the chronology of the Mangatu Incorporation and then a separate short chronology at page 34 dealing with the Court proceedings, the various claims

in the Court proceedings through to this Court granting leave and the item that the Chief Justice was asking me about is on page 32 about three boxes from the bottom, the inclusion of Te Whānau a Taupara in Mangatu No 1 and I list -

ELIAS CJ:

Further amendment of the legislation to provide for those the Tribunal has now said were excluded wrongly at the outset, is that one of the claims made? Probably wasn't.

MR BROWN QC:

No, I don't think it was -

ELIAS CJ:

No.

MR BROWN QC:

And, Your Honour, the word "excluded" which is in the Court of Appeal's judgment is a word we would take issue with. There may have been a lack of reflection of sufficiency of interest, but the actual, the proposition, the exclusion which is seated in the Fletcher affidavit and stated in the Court of Appeal, or just for assurity, we would take issue with that and, indeed, Wi Pere took considerable efforts to ensure that Ngariki Kaiputahi were represented with their rangatira being one of the 12 trustees nominated in 1917 and, indeed, when we come to it, we'll focus upon that passage at the end of the chapter dealing with the Native Land Court where the Tribunal says it's too late to try and work the numbers on this, and that is, we don't say that overwhelming significance relates to the proximity of the Treaty breach in 1961, although it is a recent memory breach and the Treaty continues to speak even now in terms of how the processor operating but the contrast between what the Tribunal could do in relation to the things that happened in the 1890s and whether that should infect or deal with 1961, it's a very delicate issue and the Tribunal didn't seek to go there.

ELIAS CJ:

No. I just wondered about it saying that it was too late and it couldn't do it but thank you.

MR BROWN QC:

It's just interesting. One of the amazing things about these cases is the, the sort of historical flow and the correlations of time that the Tribunal made a point in its chapter on healing. If you wish to see this, it's in the second volume of the report but I can just read it to you. Page 737, they quote in the chapter on healing, a whakatauki of Te Kooti Rikirangi said this, "The canoe that you must paddle when I'm gone is that of the law. Only the law can be pitched against the law," and the Tribunal thought it appropriate to say that the interesting thing was that was April 1893. The same, six months later this piece of legislation was passed and one can't help but wonder if the legislation, the resort to legislation was doing exactly that, seeking to use the forces of the then, that the European law of the New Zealand law to provide the protection. It's one of the ironies, sort of tragic irony, that that status of an incorporation, we say, is now an impediment to the progression or the manner of resolution of this particular problem. Now, the connection that Mr Haronga with the incorporation just for record is in that same affidavit at page 194, paragraphs 1 and 2. The point I've mentioned about his descendancy and his chairmanship of the committee of management and paragraph 4 he deposes that he acts with the authority of the owners of Mangatu Incorporation. Paragraph 36, just over on page 205, I'll return to this paragraph –

ELIAS CJ:

Is it part of your submission or is it the case that the Incorporation itself, because of the way it was put into being and the purpose behind it and the length of its history, is itself something of value? Is that part of the –

MR BROWN QC:

Yes it is. It's certainly something of value but it's more thorough going that that. I mean, the *Te Rununga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) case recognise that, you know, Treaty obligations are ongoing

and they evolve from generation to generation as conditions change. If this was a modern day Māori corporation, then the same interest would apply but this is one that was, is a historical, I wouldn't say, oddity –

ELIAS CJ:

Trust?

MR BROWN QC:

Yes and it is formed in that way to do the very thing, to stop the land being alienated. We come to the, as I will come, to the Crown Forest Assets Agreement, that at the back of the agreement has the claimant principles and the Crown principles and in the claimant principles are to, I can't remember the exact words but to, as much as possible prevent the alienation of Māori land – same objective as the Act and yet, and we understand the practicality of the Crown's treaty settlement process, the large natural groups – that's understandable that they would want to deal with that but Mangatu Incorporation and as Mr Haronga says, it's – he prefers the word, "owners," rather than shareholders but – and its owners. They have a very proximate interest in relation to this land. The Crown –

BLANCHARD J:

But surely they're a large natural group –

MR BROWN QC:

– no they're not –

BLANCHARD J:

– beneficially?

MR BROWN QC:

Well beneficially they are, but they don't satisfy the collective, that the iwi concept of large natural group that the Crown require. They will not get traction in that way.

ELIAS CJ:

But they did sign up to being land –

MR BROWN QC:

No well, they – sorry I didn't mean to –

ELIAS CJ:

Yes. No. So I mean they are part of that natural group that the Crown has been dealing with?

MR BROWN QC:

Yes although the history is that they, the original claim was filed by Mr Ruru, who is in a conflict position. He's both, in terms of his Mangatu Incorporation and he's a claimant in the large claim, so doesn't take part in the meetings in relation to – into the one, and certainly the hapū that claimed to have the mana whenua in relation to the land that is represented in Mangatu No 1. Yes they were supportive of the overall settlement but they did ask, they did ask that the block be ring fenced for them. You see they wished to have it returned and I'm leaping ahead here in massive ways, but once it became – once the agreement in principle was revealed, it became apparent that's an option to purchase and that's – of course a instruction to option to purchase and to pay for the purchase out of the – that's a, but you see –

ELIAS CJ:

And that's what provoked the claim for the 89 or the –

MR BROWN QC:

Well it was certainly a very important feature in wanting to seek to have the resumption application –

ELIAS CJ:

Yes.

MR BROWN QC:

– because you see if the Crown will only deal with the large natural group, and they have got to make a call, they have a vote on the settlement when it's finally produced and goes round, it's entirely possible that this land or this part of the land which has two massive slips on it, which Mr Haronga in paragraph – I'm going to take you – says, "I'm a businessman, that wouldn't perhaps make a lot of business sense to have this land, that the auction might not be exercised," and he agreed in principle provides that the extent that any of this licenced forest land is not "selected," to use the word by the claimants, it will be available, it will be the Crowns and available for settlement of other claims in other places. I mean the land may not come back. The way of ensuring that the land comes back and, of course, Mangatu Incorporation would say to its rightful owners, the owners from whom it was taken, is to have a resumption application with the Tribunal discharging the obligation that is in that provision to identify the Māori to whom the land should be returned. And none of that happens in the way that things are happening and the dynamic is that the Crown says, this big group here has the mandate, we won't talk to you Mangatu Incorporation, it's an internal matter for you and of course there's the sad pressure of time.

BLANCHARD J:

How would the Tribunal factor in the present value of the consideration that the Crown paid in 1961?

MR BROWN QC:

I suspect, I suspect that the Tribunal would have to sort of titrate that or deal with that in terms of both the rentals that return with the land and the compensation that arises under Schedule 1 that relates to the land, because there is an important provision in section 8HB(3) which talks about when the Tribunal provides for compensation which goes with the land, it may take that into account in terms of whether or not it considers any other recommendations 6(3) or 6(4) so the Act envisages that the – in fact the agreement envisages that there would be, that the extent to which you return land, that must have a bearing on the extent to which any other relief is

proposed. But reflecting also, if I may say the good faith, that the documents reflect here, that what Mangatu Incorporation proposed – Mangatu Incorporation proposed that there be a joint recommendation and in the 90 day period following the first instance recommendation that that issue be explored between the various parties. Now can I just – my learned friend, yes and of course it may be, it may be a little moot as to how much of any issue that is Your Honour because the record shows that the value in 1961 said that in 10 years the – they would earn 90,000 on the land and still have the land, but they were paid £86,000 so there would, there would be an adjustment in a similar way I suppose to –

ELIAS CJ:

Well isn't the position under the legislation – correct me if this impression is wrong, is that if the Tribunal recommended resumption, then in fact there could not be any adjustment to reflect the consideration received in 1961 nor could there be any reduction in the rental entitlement, but it is likely to impact upon the compensation which would remain to be assessed. Isn't that the statutory scheme?

MR BROWN QC:

Yes I, that would seem to be the scheme.

ELIAS CJ:

And isn't the question or wouldn't there be, however, a live question that the Tribunal, if it considered the matter, might take the view that recommending return was disproportionate to the wrong that was done in 1961, that would be an available outcome. I'm not saying it would be the appropriate outcome –

MR BROWN QC:

No.

ELIAS CJ:

– I don’t know, but it doesn’t – as I understand it your main concern is that nobody is investigating whether this land should come back as a result of the 1961 breach –

MR BROWN QC:

That's right.

ELIAS CJ:

– but the outcome may be, in the end, that it doesn’t?

MR BROWN QC:

That would be the outcome – that would be the result of the remedies hearing that we seek to have.

ELIAS CJ:

Yes.

TIPPING J:

Your client has been deprived of the opportunity of arguing it –

MR BROWN QC:

That's right.

TIPPING J:

– for it to come back?

MR BROWN QC:

That's right.

TIPPING J:

Is your essential concern, as I understood it?

MR BROWN QC:

That is right, that is right. We want –

TIPPING J:

Without prejudice to what that outcome might be?

MR BROWN QC:

That's right. I mean we obviously, from my client's perspective, one can't help but – they feel is a strong argument and indeed I think Judge Clark recognised that himself, he seems attracted to the simplicity of what was taken should be – go back, but yes that's the outcome we seek.

TIPPING J:

And the reason why it's not as simple as it might appear to an unversed mind, is that other people are saying a wider group is claiming an interest in this land or at least – the land should be available to settle other grievances?

MR BROWN QC:

Yes, that's right. That's right.

TIPPING J:

I'm just trying to keep this – for my own purposes – as simple as possible.

MR BROWN QC:

Yes I don't know if they would –

TIPPING J:

Is that the essence of the situation? Your client says he's being deprived of the chance –

MR BROWN QC:

Yes.

TIPPING J:

– and the reason why he is, is it's said that other people – this land might be needed to settle other people's grievances beyond this group that your client represents?

MR BROWN QC:

Oh yes because the land in the agreement in principle, which is – and it's in the yellow volume under tab 41, I'm sorry it's a little confusing because there's one copy that has every second page missing and the full copy that starts at page five – 481. This is the agreement in principle that was released in August 2008 and page 483 records the negotiations to date, paragraph 1, the Crown has a strong preference to negotiate with large natural groupings. This is the proposal to deal with all the claims in this region. Section 1, a historical account, Crown acknowledgements, Crown apology. Section 2, cultural redress and then section – there are the cultural redressed properties addressed at 488 and then you can, over to the commercial redress and section 3 on page 501, financial and commercial redress and there are at the bottom of that page, this is the whole settlement that is being proposed for the, all the large natural group. Paragraph 70, the land bank properties, they will be a transfer of fee simple state for nil consideration and then 71, you see Te Pou a Haokai, which is now the third respondent, will have the opportunity to select the transfer to the government seen to be parcels of land from within the licenced Crown forest identified in map 1, attachment 4, and that's at page 569, the relevant map, and you'll see the forest there and the – 74, if they purchase only parts, or select only parts and then you come over to the top of page 503, paragraph 77, any licenced crown forest land within the area of interest that is not selected for transfer will be available to the Crown to retain for use in future settlements with other claimant groups or to dispose of as it chooses and the settlement legislation will therefore remove all statutory protections for Turanganui-a-Kiwa in relation to such land.

So in answer to, I refer to that because there's two layers, Justice Tipping. There's the wider group beyond Mangatu Incorporation which it would be said, yes the Crown seeks to have this, not just the three-quarters of the forest but

the whole of the forest available for selection for them but even if they don't take it then it will be available for claims from entirely other parts.

TIPPING J:

So if it went to a wider group your client would be interested indirectly but if it didn't go to the wider group and went anywhere else you might well not be interested at all.

MR BROWN QC:

This is settlement of these claims and yes they would have a – some of them, well they would have an interest, the individual owners, because they are members of the hapū that have mana whenua to the property but it won't be a direct connection to the property. The property won't –

ELIAS CJ:

And it won't redress the 1961 breach?

MR BROWN QC:

No.

ELIAS CJ:

You say?

MR BROWN QC:

Absolutely not. Can I just take one step back though to that question of whether there could be titration or how does that reflect –

ELIAS CJ:

What's that?

BLANCHARD J:

I'm not sure I know what that means.

MR BROWN QC:

It's a, sorry, chemical term used in terms of adjusting the measurement in a liquid or a volume. Just adjusting. The compensation provision in schedule 1, and this is at, in the volume 1 of the authorities, the blue volume, under tab 1, the Crown Forest Assets Act, and this is one of the functions the Tribunal has to discharge. This is actually, we will say, a determination function, not a recommendation function. But if you come to page 39 you find schedule 1 and it's layered. There's the compensation under section 36 and there's (2)(a), it says, "Five percent of the specified amount." And then (b), and I was going to take you to this for the purposes of looking at the Tribunal's function, but (b), "As further compensation, the remaining portion of the specified amount calculated in accordance with clause 3 or such lesser amount as the Tribunal may recommend." It's interesting the word "recommend" is used there or the word "determined" is used then in 3(a) but that, in my submission, that (2)(b) and I will say is –

ELIAS CJ:

A determination.

MR BROWN QC:

A determination, reflecting in the amendment to section 5 of the Treaty of Waitangi Act when it introduced section 5(ab) and called it a determination. But there is the –

McGRATH J:

What is it that this compensation provision is intended to address? What's been compensated?

MR BROWN QC:

It's compensation for the loss of use of the land. The loss of access to the land over that period and –

McGRATH J:

Over the period of, since the grievances?

MR BROWN QC:

No, no, the Crown forest licence.

McGRATH J:

Oh.

MR BROWN QC:

You see the structure was that when, and I'll take you through this because this is a critical part of our argument on the statutory interpretation is, as I said in the leave application, working from the dictum in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767, the context, the Crown Forest Assets agreement, the legislation, and the idea was that the land would go to Māori or to the Crown. The rentals would follow the land and in the case of a return to Māori there was also compensation for the loss of availability of the land both past and future because in the, the agreement, and the Act provides for a termination of the Crown forest licences that have been in the meantime sold by the Crown, but they have many years to run. In fact there was the 50 to 70 years proposed that led to the claim that came back to this Court in the *"Forests"* case.

McGRATH J:

So it's because they have to take the land subject to the burden of the licence?

MR BROWN QC:

Absolutely and that's what the compensation – and section 36 says, on section 36 of the Crown Forest Assets Act on page 28 says, "Where any interim –

ELIAS CJ:

Page 28?

MR BROWN QC:

Page 28 of the volume. When interim recommendations become final the Crown return the land and pay the compensation according to the Schedule 1 and subsection (3), "Any money required to be paid as compensation…paid without further appropriation than this section." That is the – and that is one of the real differences, of course, between the similar formula in the parallel, the provisions relating to the state owned assets land that had their legislation in 1987 and that the agreement envisaged would be a – would apply or essentially some of the legislation.

TIPPING J:

Is that what, in effect, makes the recommendation binding? This section 36?

MR BROWN QC:

No, ah, well no I think it's actually –

TIPPING J:

Or it supports it then?

MR BROWN QC:

Oh yes.

TIPPING J:

Is consequential perhaps?

MR BROWN QC:

Yes it is but the one that actually makes it binding, if we stay with that Act –

ELIAS CJ:

Is the land and the compensation and this deals with the compensation –

MR BROWN QC:

Yes.

ELIAS CJ:

– component but the land is –

MR BROWN QC:

Yes, what makes it final, Justice Tipping, if you come over to page 31 is section 8C and these are the provisions that are then dropped in like a, like a sort of a cricket wicket into the Treaty of Waitangi Act. This whole section is dropped into the Treaty of Waitangi Act, unlike 36 which stays living the Crown Forest Assets Act, and 8C says, the recommendation they be in the first interest interim and then as I'm going to take you through 4, 5 and 6 and then, particularly 6, subsection (6) on page 32, "If, in the 90 day period there is no negotiations that causes any difference then the interim recommendations, whether it's interim for Māori or interim for the Crown, that they're interim (inaudible 10.38.38) on both sides, they then become final recommendations, without any administrative act, without any further adjudicatory function –

TIPPING J:

Those final recommendations are binding?

MR BROWN QC:

They are binding.

TIPPING J:

But that doesn't expressly say so, what says they're binding?

MR BROWN QC:

Well it says that –

BLANCHARD J:

The end of subsection (6).

MR BROWN QC:

Yes. Shall become final recommendations.

TIPPING J:

But that uses the words “recommendations”.

MR BROWN QC:

It does, it does.

TIPPING J:

That’s just, the context shows that it’s binding on –

MR BROWN QC:

Absolutely.

TIPPING J:

I see.

MR BROWN QC:

It’s very confusing that they still use the recommendation word because the Crown’s argument on section 6(3) focus – I think the Crown’s argument on the statutory interpretation really drives off section 6(3) which we will say is a recommendatory recommendatory provision as opposed to a final recommendatory provision.

TIPPING J:

As this is apparently so important, can you demonstrate succinctly or is it better to leave it, when you’re going to come to it anyway, how a final recommendation is binding on the Crown?

MR BROWN QC:

May I leave that until I go through the sequence?

TIPPING J:

Yes.

MR BROWN QC:

But I don't think –

TIPPING J:

But that's the proposition?

MR BROWN QC:

I don't think –

ELIAS CJ:

It's not in contention.

TIPPING J:

There's no argument about it?

MR BROWN QC:

No, there's no argument of that. I think it's probably one thing, there isn't but I hope, at least if I come to it –

BLANCHARD J:

I'm not sure I follow how the reference to the compensation clarifies the question I ask, the answer to the question I ask about how the fact that the Crown had paid for the land in 1961 is factored in?

MR BROWN QC:

Well, Your Honour, why I referred to that is I was looking for – clearly, there's nothing in the legislation per se that is addressing particular forms of acquisition. I mean, many cases will assume a taking as opposed to a purchase.

BLANCHARD J:

Yes.

MR BROWN QC:

So there's nothing in the legislation that addresses the situation of how do you adjust for the fact that, at a point in time, some money was received but what I was suggesting was that to the extent that the Tribunal considers that that has to be addressed in its recommendation, that clause 2(c) which empowers the Tribunal to decide without indicating what applies, lesser amounts of compensation would be one mechanism whereby that –

BLANCHARD J:

Sorry, clause 2(c) of what?

MR BROWN QC:

Of Schedule 1 on page 39 –

TIPPING J:

It's 2(b) I think.

MR BROWN QC:

Sorry, I beg your pardon, 2(b).

ELIAS CJ:

Although, you have pointed out that this is really, this compensation is linked to the licence arrangements so it's not really – I mean, is that right? So that it's not really compensation at large for the deprivation that's in issue here, is that right?

MR BROWN QC:

No, it's – the best way to look at it and I'm jumping ahead to the agreement –

ELIAS CJ:

Perhaps you're going to go through the statutory provisions –

MR BROWN QC:

I am.

ELIAS CJ:

It may be best to leave it until then.

MR BROWN QC:

I am and I do need to – I will be going through them. I hope not tediously but in some detail because basically on the statutory interpretation argument, my submission is that the Crown is presenting a semantic and I don't use that in a pejorative, I use that in the accurate sense of the words, a words analysis claim focussing upon, right down to the expression the words, "included in" in section 8HB and we are coming from the other direction of the, what is said in *Fonterra*, the legislative context, the social context, the commercial context, the agreement, the statute, the location of these sections in a particular place, both of us coming to the point of, and it's the key point on the statutory interpretation, does the Tribunal have a discretion at large whether it engages with the resumption jurisdiction, the binding recommendations jurisdiction? Is it a door it can elect –

ELIAS CJ:

Is it a jurisdiction it must accept? Is that your –

MR BROWN QC:

That's right.

ELIAS CJ:

Yes.

MR BROWN QC:

Is it, I mean, you might say is it something that would respond to mandamus or not?

ELIAS CJ:

Yes, but it's not part of your argument that it cannot determine, having heard the matter, that the land should not be resumed?

MR BROWN QC:

No.

ELIAS CJ:

No. I think there has been some confusion perhaps because of this emphasis on the word "discretion" –

MR BROWN QC:

Yes.

ELIAS CJ:

But your argument is that just as the Court doesn't, or except in certain circumstances, have a discretion whether to entertain a properly constituted claim, the Waitangi Tribunal doesn't either.

MR BROWN QC:

Well, not in relation to the resumption jurisdiction because of the context that I will explain.

ELIAS CJ:

Well, in relation to any of its jurisdiction?

MR BROWN QC:

Well, it does have the protective procedures that in, that section 6, is subject to section 7 –

ELIAS CJ:

Section 7, yes.

MR BROWN QC:

And section 7 has both the 7(1)(a) and the 7(1A) powers to defer –

ELIAS CJ:

Yes.

MR BROWN QC:

And my learned friends have an argument about that and I have –

ELIAS CJ:

But that's only defer, isn't it?

MR BROWN QC:

Yes.

ELIAS CJ:

It's not reject?

MR BROWN QC:

That's right but in my submission they don't apply here but what we do say is that, and this is, that's the other interesting – as I look at the way the Courts below have dealt with this, there are two propositions seen to be sitting there, one is a statutory interpretation, is there a – I don't like the word "discretion" either, but is there a discretion about this and then there's the other question saying, did the legislation change the role of the Tribunal in a substantive way? Now, it's interesting when you look at the cases below, the judgments below, for example, paragraph 42 of the Court of Appeal's judgment that I'll come to – which one is doing the lead? Is that question being asked about was the substantive change to inform where there's a discretion? Is it the other way? Are they two sides of the same coin? Are they removed and it's a very - the way the case is, or the matters come up through the Courts, there's a somewhat confusing issue and my learned friend, in my submission, are focussing, they are at the, and I stress and when I use the word "semantic" I'm using it in it's literal sense, they're focussing on particular words in the statute. They're saying that the regime under the, introduced by the Crown Forestry Assets Act, the section 8HB onwards, that's all in section 6(3). It's subject to

the – as it thinks fit in all the circumstances of the case and we say that's not right.

We say that these - the relief that is sought under resumption application is exactly that. It is discrete. It will be – there's a relationship the Court, the Tribunal will then look at whether any other relief is appropriate and the like but it is not a case of the Tribunal, to the extent that it has this discretion, a word that's my learned friends and not mine, because it's a word that is in certain sections. The word "discretion" is explicitly used in section 7. It's explicitly used in those special power provisions that I'll come to in section 8HE and section 8D in the State Owned Enterprises but it's not used in section 6(3) and what they're seeking to argue is that you visit section 6(3) on that regime and you say, well, there's a discretion and the Tribunal don't have to decide and we have to deal with that because unless we can do that, then mandamus wouldn't apply, so that's our first argument.

Our second argument is, okay, we've lost on that and Judge Clark did have a discretion, then he didn't exercise it the right way, those errors of law. That's the structure of where we're coming from.

TIPPING J:

And is this the point that was raised at the Leave Hearing about the three possibilities under section 8HB(1)?

MR BROWN QC:

Yes, A B and C.

TIPPING J:

A, B and C.

MR BROWN QC:

Yes. We say there are three choices.

TIPPING J:

It may either do A or B or C but must do one of them?

MR BROWN QC:

Or, in fact, and of course, there's also 8HE, the special power –

TIPPING J:

Yes, yes.

MR BROWN QC:

- and my learned was saying there's a fifth power, the do nothing power and we say, well, that's a bizarre proposition in the context of the Crown Forest Assets Act that not only provided that all claims to licence land would be determined by the Tribunal in the shortest reasonable time but provided then for, at the wash-up, any money left over goes to the Crown. It was a time constrained exercise. It was intended to bring finality to licenced land and if my learned friend's argument is right, and it's perfectly clear in our submission and Matthew Palmer and his book on it refers to the cautiousness with which the Tribunal have approached their adjudicatory role, but if that's right, it was the Tribunal don't want to engage with this, if they're worried now about so much money has accumulated over time that it produces this proportionalities and they will stand back and not hear these things, then there will be no discharge of the function. It actually runs completely counter to the objective of the Crown Forest Assets Act, so that's our, sort of –

ELIAS CJ:

One of the other raised in which this case, it seems to me, maybe slightly confused or have been, is that the particular decision of the Waitangi Tribunal which is impugned is a decision not to give an urgent fixture. Behind that, however, you may be entirely right that there was an obligation to accept the jurisdiction of determining why 1489, is it?

MR BROWN QC:

Mhm.

ELIAS CJ:

Yes, 1489 so that there is a discretion decision but your argument has to be it's exercised on a wrong principle because it is determinative of the ability to entertain the underlying claim but I'm not sure that that comes through very readily.

MR BROWN QC:

No perhaps it doesn't and we do argue that –

ELIAS CJ:

Yes.

MR BROWN QC:

– but can I say we do argue as well that there is no discretion in terms of a Remedies hearing for a resumption application. You see you will only get a Remedies hearing if urgency is granted, that there's no, there's no slip here between urgent remedies and other remedies. Unless you get urgency, you're not going to get a hearing.

ELIAS CJ:

Well in some circumstances that won't be so. So it's only the fact of the pending settlement that means that not granting you urgency is determined?

MR BROWN QC:

Well it's absolute in this case but I would not resile from the proposition that with the Tribunal – with the, what the Tribunal's seeking to do and you know it does an amazing job and it's refining its processes and that, this the Tūranga inquiry, Tūranga inquiry we see as an example of that, but unless you do get that under those guidelines, unless you can satisfy the Tribunal that you can have an urgent remedies hearing, you won't get a remedies hearing and that –

McGRATH J:

Is it fair to say Mr Brown, that the notion in High Court's jurisdiction of an interim injunction won't work here because the process continues on inexorably to result in legislative outcomes which will end resumption prospects or applications –

MR BROWN QC:

That's right –

McGRATH J:

– so that's why one can't think in terms of an interim injunction hearing as being any use?

MR BROWN QC:

No.

McGRATH J:

And it has to – and the urgency or not of – whereas a full resumption hearing which may end up with the Tribunal directing a return of the land is your only opportunity, the way your client sees it?

MR BROWN QC:

That's exactly right Your Honour and the Fletcher, the Fletcher affidavit for the Attorney-General which is under tab 20 in the pink volume –

ELIAS CJ:

So is that the right tab?

MR BROWN QC:

It's under tab – sorry tab 21, tab 21, I beg your pardon. Page – and this is at page 248, paragraph 34 and this is a commentary on the processes involved in the settlement process but she says, "When these," paragraph 34, "When these ratification processes are complete, the deed is signed, the legislation to implement the deed is introduced to the

House of Representatives, settlement legislations removes the jurisdiction of the Tribunal and the Courts to enquire into the historical claims or the subject matter of the settlement," and that's what, that's what the legislation does and that's what in the *Te Arawa* case, the Court said well that's – it's not, you know it's – they said, this is the technique the Crown uses here, the legislation is what gives effect to the settlement and we can't interfere with the legislative process, and there it is. So the only opportunity that the claimants have to have this resolved is to get the Tribunal to engage with its resumption jurisdiction. And the importance –

McGRATH J:

To a substantive resumption jurisdiction hearing?

MR BROWN QC:

Yes.

McGRATH J:

With all of the consequences and terms of that dragging in the issues in relation to the land that those who are relying on prior breaches are involved?

MR BROWN QC:

Well you see that's where I would submit that that proposition is overstated. Is almost –

TIPPING J:

Look I'm sorry, I don't want to head you down the track –

MR BROWN QC:

No.

TIPPING J:

– I'm just trying to get a –

ELIAS CJ:

But on that point, I will ask Mr Bennion about this, but it did seem to me or I may not have read everything in this, that the party that he represents, Te Whakarau, is not so concerned about this particular piece of land it doesn't want however, its negotiated settlement to be diminished and it's really the Crown insistence that this is the whole bag that's available, that is causing the problem?

MR BROWN QC:

Indeed and indeed in the documentation there is at – there's the proposal that comes – that is made to the Crown whereby that would be comfortable with that land. This is at, under tab 49 in the second yellow volume.

YOUNG J:

Tab, sorry, tab what?

MR BROWN QC:

Tab 49 and it's at page 599 of the bundle, of the second yellow volume. This was a letter written by – this is the name of the overall negotiating body and you'll – I haven't taken to these yet but these names, if you – if I just hold it up for you, under tab 25 of the pink volume there's a structure that shows the various names of the entities and this is the entity right at the top of that page, Turanganui-a-Kiwa and you'll see in the final paragraph, it says there on page 59, "In light of the corporation's exchanges with you, Te Pou a Haokai are willing to consider part of the Mangatu CFL lands as described in the (inaudible 10.56.12) as being taken out of the overall settlement package for use by the Crown with the Incorporation if it so chooses. That would be subject to the Crown and Te Pou a Haokai first agreeing the terms of which those parts would be taken out, obviously needed to include agreement around the substitution and value in cash or kind." And over the page at, not the last paragraph, "This opens the possibility for a win-win situation for you and the Crown under corporation."

So absolutely, there is not, it could never be suggested and I don't believe my learned friend Mr Bennion will, that the other interests that don't derive from the 61 acquisition but at these other ones in time, if they are, if they are live would either have the attraction to the, to this land that drives the application by Mangatu Incorporation, or indeed one might ask whether they would justify a finding under the resumption jurisdiction. I know that they will –

TIPPING J:

So that they're not insisting on getting the land back, that the Incorporation wants, they're just saying we want the equivalent?

MR BROWN QC:

Well in this one yes. They want –

TIPPING J:

This – according to this land?

MR BROWN QC:

Yes this would be, this would require the –

TIPPING J:

Is that their stance in this litigation?

MR BROWN QC:

I understand so, I understand that they would, the Crown would be required to up the amount to reflect the difference.

TIPPING J:

To compensate?

MR BROWN QC:

Yes but I think you'll find the tenor of Mr Bennion's submissions – I read –

TIPPING J:

I don't want to distract you down this line, I just – you'd know broadly speaking whether they've resiled from that?

MR BROWN QC:

I don't understand they have, no.

ELIAS CJ:

And in any event that is exactly the sort of thing that a circuit breaker, to use the expression, in the Waitangi Tribunal memoranda is required to do, to investigate that –

MR BROWN QC:

Mmm, that's right.

ELIAS CJ:

– whether it is the case that there really is a claim as strong –

MR BROWN QC:

Mmm.

ELIAS CJ:

– in respect of this particular land.

MR BROWN QC:

Well that's, they're interesting words to identify the Māori to whom the land should be returned –

ELIAS CJ:

Yes, yes.

MR BROWN QC:

– that's a – and it's a very interesting – the... One matter that you won't have seen in the submissions because it hasn't been mentioned yet, but in the – it's

just under the pink volume, I'd like you to keep that – two points – before I go to the pink volume can I say Justice Tipping, well I haven't inferred from paragraph 1.5 of Mr Bennion's submissions that it says, "That it supported the appellant in efforts to obtain a settlement of its concerns, provided that does not undermine the interests of claimants represented by Te Whakarau, so that's what I read that. In the pink volume, under tab 13 is the Waitangi Tribunal's *Guide to Practice and Procedure*, and at page 136 there's a telling distinction made between this role of identifying and on page 136 under the heading, "3.2 Who may bring a claim," I draw your attention to the last paragraph there, it says, "Nevertheless, it is in within the Tribunal's general jurisdiction to recommend to the Crown the persons with whom settlement negotiation should be conducted. In light of the Tribunal's experience in hearing the claim and of the interested groups and their status." This is distinct from the duty of the Tribunal when making binding recommendations for the return of licenced Crown forest lands or memorial lands under sections 8A to 8HJ of the '75 Act, to identify the Māori or group of Māori that is to receive those assets and that's a contrast the Tribunal itself makes and I would suggest it uses the word duty advisably.

And just, the point I was making in response to Justice McGrath is that, because it's a point that arose on the leave application, under section 8HD which is at page 78 of the volume, because I'm now looking at it in the Act, there is a limitation on those who can participate in a licenced lands resumption hearing and it's quite specific. "It's the claimant, the Minister of Māori Affairs, any other Minster of the Crown, any Māori who satisfies the Tribunal that he or she, or any group…has an interest in the inquiry, apart from any interest in common with the public." Now that would be an inquiry in relation to the licenced land, that isn't saying – and I can understand, you can understand the pressure that Mr Bennion's client feels, that we're approaching the end of the year. Next year is an election year. The spectre is there from the Crown of, well this settlement is sitting there. They don't want to lose achieving finality there and there is a conflict, there's an internal conflict there and it doesn't actually help for the Minister's letter to say, well that's an internal process for you to resolve because that can only resolve in one way.

If it can't be resolved by the resumption application it resolves an internal recrimination and one side collapsing in the face of the other.

TIPPING J:

Is the inquiry there the inquiry to which Māori or group of Māori should get the land back?

MR BROWN QC:

No it's, well it says an inquiry into a claim submitted under section 6 so it's actually the – the actual inquiry –

TIPPING J:

Well relevant to this case?

ELIAS CJ:

And relation to licenced land.

MR BROWN QC:

That's right. It's that part of the inquiry –

McGRATH J:

So this excludes the licencee doesn't it?

MR BROWN QC:

Oh absolutely. The licencee only has a say if it applies under section 8HE, the so-called special power.

McGRATH J:

Obviously, is that the purpose of section 8D(1), to exclude people like the licencee coming in –

MR BROWN QC:

Yes.

McGRATH J:

– and interfering if you like?

MR BROWN QC:

And any other group who, who – I mean you do, sort of harking at things like Y262 now but you get groups of Māori who claim interest for a variety of reasons or justifications so this is, this is a provision that it ties the, it's a part of the whole regime that is introduced under the heading at page 74, "Recommendations in Relation to Crown Forest Land" and it is a specific provision saying who can appear and –

McGRATH J:

So what do you say is the effect of the provision in relation to the issues that your client faces and the parties your client faces? Who is excluded?

MR BROWN QC:

Well I'm saying that, people have to satisfy the Tribunal that they have an interest in the land that is the subject of the licenced land. It's not, much is made by my learned friend Mr Bennion and I'll leave it for him to make it about the effects on what's gone before of conducting this inquiry. He says, you know, we've had eight weeks of hearing and we've had all this work done and you're asking us to sort of start again and I don't accept that. I say that this is a relatively confined issue as to who has mana whenua in relation to the Mangatu –

McGRATH J:

Yes I see. So what you're saying is that under section 8D(1)(b), you can't have an interest in the inquiry unless you've got an interest in the licenced land?

MR BROWN QC:

I would –

McGRATH J:

That's your argument?

MR BROWN QC:

– submit that's my position and I, yes I can see that there is a potential for disruption, to a degree, if the Tribunal is going to hold a resumption application, although it's a great shame it hasn't been heard before now and in response to the very first application for an urgent remedy but I'm saying that the submission that I read in Mr Bennion's written submission is I'd like to say a worst case scenario. I think it should be a more contained enquiry than –

TIPPING J:

Mr Bennion's clients would presumably fit within (b) –

MR BROWN QC:

Yes.

TIPPING J:

– but they may well, if what is forecast, simply say, well it's not the land so much that we're concerned about but equivalent value.

MR BROWN QC:

Yes. Well they wouldn't have a part to play in the hearing if that's their position because they wouldn't be seeking to be identified as the Māori to whom the land should be returned.

TIPPING J:

Yes but –

ELIAS CJ:

I think that may be taking too confined a view of the –

TIPPING J:

Surely, yes. They should be heard to the point of whether they do actually take that view, surely.

MR BROWN QC:

Well yes, no that's – I'm taking that too far.

McGRATH J:

But they are maintaining they have grievances in relation to this land from a prior time, aren't they?

MR BROWN QC:

Well some may. I mean they're talking about a, you're talking a big – they're talking about a whole collective group some of whom have no connection with the land. You come to the Tribunal's report, two of the three groups can have no connection whatsoever with Mangatu No 1. Of the, if you look at the, and I really am drifting from my, from my –

ELIAS CJ:

Well there'd be nothing to prevent the Tribunal saying it goes to Mangatu and this group –

MR BROWN QC:

No.

ELIAS CJ:

– or something like that if it were felt that that redress was necessary for some people who had been disadvantaged by the earlier thing or –

MR BROWN QC:

And indeed –

ELIAS CJ:

– that it goes on condition or that it recommends that there's a similar adjustment to the legislation.

MR BROWN QC:

Indeed if there was a pause –

ELIAS CJ:

I mean there might be more –

MR BROWN QC:

If there was a pause and the heat went out of it they might want to apply for the other three-quarters of the forest. I don't know. But where interested in the quarter that was Mangatu Incorporation, had been Mangatu Incorporation since 1898 and but for the taking would now be Mangatu Incorporation. There is no way in the world, and the Tribunal recognised it, that on this inquiry it could have made any adjustments to Mangatu Incorporation land but for the happenstance of the removal in '61 and that is why they have a strong case for getting it back especially in the context of this statement about it's too late now, they'd be adjusting interest –

TIPPING J:

So it would be an irony for your client if by dint of a wrongful action it's now opened up to something against you than it would have been had there been no wrongful action?

MR BROWN QC:

Oh indeed. Indeed.

TIPPING J:

That's, in effect, what you're saying?

MR BROWN QC:

Yes. Well if the land taken in 1961 hadn't been taken –

TIPPING J:

It would still be yours and no one could claim it, could they?

MR BROWN QC:

Absolutely not.

TIPPING J:

So it's only by dint of that wrongful taking that all these others are let in?

MR BROWN QC:

Yes. But all we talk about is having the hearing to deal with –

TIPPING J:

Yes, I know. I'm just expressing…

MR BROWN QC:

Yes. I try to curb my enthusiasm with the merits by dealing with the – Judge Clark recognised the merits. He said it would be strong, the application for –

TIPPING J:

The only thing that made it not strong was the fact that the Crown wanted to use it for this wider settlement.

MR BROWN QC:

Exactly. And you could understand the recipients, they what now, they've waited a long time. The attraction of the present is a irresistible attraction but that's something that we have do sort of guard against.

Now, if I can just regroup for a moment. I think I have, I've already touched on the large – I just, for a moment looking at the further comments I had in my introduction, the large natural groups I've touched on. I've touched on the, it's referred to in the opening line of the agreement principle, it is specifically,

however, in the Baggett, this is a Crown affidavit, pink volume, tab 17, paragraph 17. So I don't, I just, I don't think there's any question that the large natural grouping policy is what, prevails here, but it's –

ELIAS CJ:

What was the reference?

MR BROWN QC:

Tab 17, page 213.

ELIAS CJ:

Yes.

MR BROWN QC:

And its everywhere, I think it's actually stated in the Tūranga Report itself and the paragraphs of Mr Haronga that I have referred to but not taken you to, about the difficulty of their position in terms of being negotiated with is tab 16, I will take you to these because I won't be coming back to them, tab 16, page 206 and at paragraph 42. In fact this is a paragraph that contains much, I think, of what Your Honour Justice Tipping just put to me in that question. The irony of course he's referring to is that the further irony, in addition to losing the land in '61, is the fact that they use the then, must have been – even then it's still a reasonably uncommon exercise of a statute to create the incorporation.

And then he makes a similar comment in his paragraph at tab 18, it's tab 18 at page 220, slightly perhaps emotive and a little colloquial when he says in the last few lines the inflexibility of the Crown settlement policy as such that the Mangatu Incorporation just doesn't fit within the box. And to the extent that the Crown's submissions suggest otherwise, because there is a statement at paragraph 113 of the Crown's submission, that says that, it says, "This is not a situation of a group with interests within the Crown is unprepared to broker," that's the opening sentence but then – and it also says at the end, "This is not a group being precluded from securing remedy at all." But that is all within the

context of the Crown's position that it's the wider group we're dealing with – you're in there, that's where you're represented and they're not dealt with individually.

So the only meaningful course we say is to come, is to seek the orders that the Crown Forest Assets had introduced into the, into the Treaty of Waitangi Act and I've made the point that he makes at page 219 of his affidavit that the particular hapū, page 219 paragraph 21, says, "We represent the particular hapū with mana whenua and the Mangatu land, namely Ngati Wahia, Ngariki or Ngāriki Kaiputahi and Te Whānau a Taupara. And there are a number of other hapū in this, what the Tribunal calls the, 'Mahaki cluster' that just don't have those interests. In my submission Your Honour, Justice Tipping, they could not actually establish the identity that that section that imposes the duty on the Tribunal would require to be identified. And I don't want to take this into too broad a context but the, it is important to bear in mind that under Tikanga Māori, the customary rights to land are at the hapū level, they're not at iwi level, indeed the hapū, the hapū concept is – that's at the beginning of the treaty, the treaty does not talk about iwi, it guarantees the rights of Māori and hapū and others and certainly not the large natural groups, so it's a very much a important context matter.

Finally then on this I've mentioned the option to purchase problem and so that really comes to paragraph 10. This is what we say the – when the claim is shown to be well-founded, because that's a prerequisite under the guidelines for an urgent Remedies hearing, so we've got a well-founded claim. Mr Haronga represents the incorporation for when the land was taken. Whatever others may choose to do with it, the incorporation wants to actually to get it back. The large natural group means that the corporation can't get direct engagement with the Crown and if urgency is not granted, then the practical effect is that the claim is rendered nugatory by the settlement and therefore they turn to the statutorily mandated path and the issue is whether that is something the Tribunal has to engage with.

So I move now directly to address the statutory interpretation issue. And this starts, this commences at paragraph 27 of our submissions and it runs through and I'll just be speaking to these submissions by taking you to particular parts of the legislation and the written argument. Our argument in a nutshell is at paragraph 98. We say that the Crown Forest Assets Act created a special regime. The role of the Tribunal in that regard changed from being merely advisory by conferring a adjudicatory function –

BLANCHARD J:

Sorry what paragraph –

MR BROWN QC:

It's 28 of our submissions.

ELIAS CJ:

Oh you said 98.

MR BROWN QC:

Sorry, 28 – it's the second paragraph of the interpretation argument. Now the Crown's argument, by contrast, if you have their submissions, is really at paragraph 40. This is the argument on statutory interpretation and they say at paragraph 40, "A proper reading," and this is – so they're tying themselves to the provisions, "The reading of the provisions demonstrates that the Tribunal's discretionary power to recommend remedies applies also," I've added also, "To claims to Crown Forest land." And they, you'll see in paragraph 41, rely upon those words which they've italicised that come from section 6(3). "It may recommend if it thinks fit, having regard to all the circumstances of the case."

TIPPING J:

So they regard the general as controlling the particular –

MR BROWN QC:

Yes.

TIPPING J:

– you regard the particular as controlling the general is that a –

MR BROWN QC:

Well not so much controlling the general, yes their argue – you state their proposition correctly, the general controls, the particular – we say that the particular doesn't fit within the general because the general is and always was – in section 6 –

TIPPING J:

Well that's what I meant actually by control – in other words it's a self-contained regime?

MR BROWN QC:

Yes. Because it can't live there.

TIPPING J:

No.

MR BROWN QC:

It's a binding recommendation. Section 6(3) is one of the sections and I was bold enough to have handed up to you before the Court, the actual, the Act in its original form. It's a, it's a very small Act, it was almost reminiscent of the 1908 type legislation. I think it's three photocopied pages and section 6(3) that wording hasn't changed. The – and it always was dealing with a purely advisory jurisdiction. Many, some years after the event then we have these additions that we say, we will say, are significant the Crown didn't – the Parliament didn't seek to amend 6(3). That it dropped in these quite complex regimes in the latter part of the statute and as you've noted Justice Tipping, that they have their own may – what the Crown's argument seems to be saying is that you drop into section 8HB(1)(a) another may as well and it is curious – I'll come onto deal with it. They only seem to suggest it in relation to (a) and not (b) or (c). You see that particularly at, if you look across to paragraph 48, well that's dealing with, sorry it's dealing section 5, they say –

paragraph 55 of the Crown submissions, they say, "As the Court of Appeal found," and I'm not quite sure about that, I'll come back to that, "The words of section 8HB place the granting of resumption orders within the general recommendatory powers of section 6(3) and then you'll see if further over at paragraph 58, in the last few lines, they say, "Recommendations under that section are included in the Tribunal recommendation made under 6(3)." So they're referring to recommendations in favour of Māori, they don't actually – dealing with the (b) and (c) and I'm going to say, well where do they fit, how does that fit with the Crown's argument about the amendments to section 5, so –

ELIAS CJ:

It's wider though than an argument simply based on the text, isn't it because the – if one looks at the possible outcomes as a guide to purpose, and I think the Waitangi Tribunal said this in some of its early decisions, the section 6 jurisdiction as enacted originally was to assist the Crown in making response to Treaty breach –

MR BROWN QC:

Yes.

ELIAS CJ:

– so it was an inevitably political solution –

MR BROWN QC:

Yes.

ELIAS CJ:

– and so it was quite appropriate for the Tribunal to give space for and to defer to the political process, because that was the outcome. But the outcome in this case is a determination under section 8H or whatever it is and there are a number of possible outcomes, but what is required is a determination by the Tribunal as to which of those outcomes applies.

MR BROWN QC:

That's right and it's a tripartite determination. It's determination that land be returned. It's a determination by the way of identification of the Māori and it's a determination of the compensation. They are – it's a bundle of tasks that the Tribunal's being, I think it probably feels saddled with but only the Tribunal can exercise those tasks and I have to say, I find it surprising. I think that the argument – I can see why the Courts have said below, well, the role hasn't changed substantively because it certainly causes problem for the discretion argument, but I have to say myself though, I find it surprising that given those functions and they are determinative and they are binding to say that the role hasn't changed in that regard substantively, is a surprising conclusion.

Just on that, I don't know whether this is relevant to your observations, Chief Justice, but I do notice that the wording of section 6(3), of course, has the action taken to compensate, remove prejudice or prevent other persons from being similarly effected in the future. It's very much looking at a package and future going. The section 8HB doesn't just cross-refer back to those words. It takes some of them, not the others and not surprisingly, it doesn't deal with the, for the future. It is dealing with a particular scenario and that is why you'll find section 8HB. It's a rather long-windered section but it sets it all out, so you have the full gamut. You have the well-founded that action be taken but it's not all the words. It's words that are particular to the circumstances of the case and I will say although my learned friends look at the words as it thinks fit, having regard to the circumstance of the case, the circumstances of the case are determined in the Crown Forest Assets Act regime. These are the circumstances. They're licenced land. They return identification. There's no – the as it thinks fit, doesn't have the object or the (inaudible 11:22:51) to link on here, that's settled.

TIPPING J:

The scheme to deal with this licenced land is engraphted into the Crown Forest Assets Act, isn't it, not into the Waitangi Tribunal Act?

MR BROWN QC:

No, it comes from the Crown Forest Assets Act, inserts it into the Treaty of Waitangi Act.

TIPPING J:

Oh right.

MR BROWN QC:

If you look at –

TIPPING J:

That's all right. I just –

MR BROWN QC:

And I'm sorry that –

TIPPING J:

It probably doesn't matter much either way but –

MR BROWN QC:

The number of times – no, no. I'm sorry it's been said a few times this case and things are confusing, I say they are, but the structure of this legislation is we have the full Crown Forest Assets Act under tab 1 and the full Treaty of Waitangi Act under tab 2 –

TIPPING J:

No it's 38, 38 makes it crystal clear, thank you, I'd overlooked that.

MR BROWN QC:

Now –

TIPPING J:

But what the Crown is trying to do is to read, what you might call, a double discretion. I'm not forecasting a view here, I'm just trying to identify what the – in other words, as you say, almost two mays?

MR BROWN QC:

Yes, absolutely.

TIPPING J:

Before you even get to this, you've got a discretion in effect as to whether you get to it.

MR BROWN QC:

That's right. Two doors. It's Alice in Wonderland. To open the door to go there and then there are three doors.

TIPPING J:

Well, different characters were behind different doors weren't they, but context?

ELIAS CJ:

There's no discretion in the Tribunal apart from section 7 which is not invoked here to entertain an application in any event. It doesn't have a discretion as to its jurisdiction, whether its jurisdiction is recommendatory political or recommendatory determinative. I don't see that there's a – it seems to me to be a problem in any event to say that it doesn't have to entertain an application. In fact, nobody's saying that but it doesn't have to entertain why 1489.

MR BROWN QC:

No. Well, perhaps it isn't saying that but it's effectively doing that. That's what it's doing and it –

TIPPING J:

Well, if you have to entertain an application but you decide not to entertain it until it becomes irrelevant, you're really not entertaining.

MR BROWN QC:

Well, that's right and –

YOUNG J:

What about section 7(1A)?

MR BROWN QC:

Yes, that's the deferral. That's the – my learned friends amount an argument on that at, in their submissions –

ELIAS CJ:

There would have to be a determination.

YOUNG J:

It does authorise the Tribunal to defer an inquiry into any claim.

ELIAS CJ:

Yes.

MR BROWN QC:

My argument in relation to that is this and it's very – I'll gather it in one. That's deferring an inquiry. That's defer under section 6(2), inquiry into whether – you see, 61 says, "A Māori claims that they're prejudiced by action." Section 62 says, "The Tribunal must conduct an inquiry." Section 7 and with the amendment that was introduced in 1989 in about January says that, in (1A), "It may defer or postpone the inquiry," but the inquiry is what leads to the well-founded, the claim being well-founded. The inquiry is actually finished in terms of the claim being well-founded. That has been in relation to the Mangatu afforestation, the Tribunal has found that the claim is well-founded and, indeed, in the remedies guidelines that we focussed on, quite a lot of the

leave application, it contains the clause 6 that I did, that is under paragraph 14, under tab 14 of the pink bundle, you've got on page 187 the important paragraph 3, the Tribunal will not entertain an application for remedies hearing unless the applicants have a report of the Tribunal which claims have been determined to be well-founded and the claim is deserving of a remedy, you see, so you could, I suppose – the Tribunal could have a claim that was other matters and licenced land. It could, I suspect, although I'm not, I wouldn't want to concede it in relation to the Crown Forest Assets jurisdiction, but it could under section 1A say, well, I'm going to defer this whole inquiry until X or something catches up or I'm going to deal with it as a whole, but we're long beyond the deferral of the inquiry.

McGRATH J:

But section 7(1A)(2) seems to contemplate that it may decide not to inquire into or further inquire into a claim.

MR BROWN QC:

That's true.

ELIAS CJ:

And it must be an inquiry anyway. It's an inquiry as to whether there should be a remedy. Which of the options should be available and to whom the land should be returned if it's decided that there should be a return so I think it's refining too much to say that section 7 doesn't, or section 7(1A) doesn't apply, but surely that is a determination by a body set up to look at rights and there would be, and interests and there would be a, one would have thought a requirement of a reasoned decision as to why a deferral is appropriate after hearing from people on it.

MR BROWN QC:

Yes. I may well be guilty of reading too much into it but the – and certainly the 7(1) jurisdiction was quite confined, although it used the discretion word, one of the sections that does. The A, B and C were quite specific, trivial, frivolous then in '89 the, for sufficient reason, defer its inquiry. Why I said its inquiry,

Justice McGrath, was that the further into was actually in the first one. It doesn't actually appear in the 7(1A) but again, that may be reading too much into it.

TIPPING J:

Well, one is not looking into it at all. The other is deferring looking into it.

MR BROWN QC:

Yes.

TIPPING J:

And the deferral surely can't be severed into the first stage and the second stage, but you'd equally think though that if they were going to defer it when such deferral would make the claim nugatory, they'd have to have a pretty good reason for deferring it.

MR BROWN QC:

And they'd have to go through the process. Sub-section 2 applies to both. It's supposed to cause the claimant to be informed and state reasons. It's a –

YOUNG J:

But it's done that, hasn't it?

MR BROWN QC:

No –

YOUNG J:

Or do you say it's not within the jurisdiction of a single member?

MR BROWN QC:

No, it's not purported to defer the inquiry. It said that this isn't a matter that justifies an application for urgency. I don't read there's been any application or suggestion that it's an exercise of a section 7 jurisdiction.

TIPPING J:

Well it's not claimed, as I understand it, that it has successfully exercised that jurisdiction?

MR BROWN QC:

Well that's right. I don't think it is claimed and it's certainly not issued a decision –

ELIAS CJ:

It is, however, a power that might justify what it's done if there's, but then it's a question of looking at the sufficiency of the reasons given and whether it's couched as rejection of urgent fixture or as deferral, because it amounts to the same thing, they're not striking the application out, really your argument has to close on the sufficiency of the reasons, in both circumstances, doesn't it?

MR BROWN QC:

Yes, yes. except that I'd also, I would also say that that was, that change was made in 1989 before the Crown Forest Assets Act regime was introduced and it was still being consistent with the theme, with the provision in the agreement that all claims to licenced land will be dealt with in the shortest reasonable time and if, if the Tribunal is going to use this type of power to say, well we're not going to engage in that jurisdiction, then there's a problem somewhere.

ELIAS CJ:

Well there's a proper purpose argument then.

MR BROWN QC:

Yes, that's right.

ELIAS CJ:

As you're putting forward?

TIPPING J:

If your arguments are good generally it would be odd if they weren't good as demnifying the present reasons.

ELIAS CJ:

Is that a convenient point to take the adjournment.

MR BROWN QC:

Yes except I would just like to flag, I wouldn't entirely want to abandon my point, optimistic as it may seem, that the inquiry function isn't discharged by the time it gets to subsection (3) because of the wording if it finds that a claim is well-founded. The well-founded expression isn't defined but I would submit that well-founded is a stage when you have determined, as it were, in a, what you call a litigation, in a sense liability, and well-founded sits in the guidelines and it sits in section 8HB. Now I accept there may be a further enquiry about remedy but –

ELIAS CJ:

Is this an argument which is in fact specific to the Crown forest regime –

MR BROWN QC:

Yes.

ELIAS CJ:

– because having made that determination you're into having to elect what path you go down under –

MR BROWN QC:

That's right.

ELIAS CJ:

– section whatever it is.

MR BROWN QC:

I'm sorry to prolong that but I just –

ELIAS CJ:

Sorry, I hadn't appreciated that. I was thinking more generally about the section 6 jurisdiction.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.56 AM

ELIAS CJ:

Thank you.

MR BROWN QC:

If I could first make two points arising from the course of submissions this morning? First of all, Justice Tipping asked me where the binding force came from and I, my learned junior Ms Feint has, I think, diplomatically pointed out to me that there was a better answer to give than I gave and is much that I pointed to section HC and that is certainly how, or the manner in which the interim becomes final or binding, but it's actually back in the Crown Forest Assets Act in section 36 itself, and this is at page 28 of the Act, paragraph 36 –

ELIAS CJ:

Sorry, where do we find that again? In the bundles?

MR BROWN QC:

In the first bundle of authorities, the blue one.

ELIAS CJ:

At page?

MR BROWN QC:

Page 28.

ELIAS CJ:

Thank you.

MR BROWN QC:

So it says at 36(1), "Where any interim recommendation… becomes final," and we've seen in 8HC how that happens, "...the Crown shall (a) return the land to Māori ownership in accordance with the recommendation subject to the relevant Crown forestry licence; and (b) Pay compensation in accordance with Schedule 1 to this Act." So the operative force is in the Crown Forest Assets Act and it's one of the, although you will have observed that the Crown Forest Assets Act regime in the Treaty of Waitangi Act and the State Owned Assets regime in that Act, are essentially similar, the two, as it were, empowering Acts are rather different. There is very little left of the introductory Act for SOE, in fact I think only the lengthy preamble whereas in the case of the Crown Forest Assets Act, this Act sits and continues into a number of important provisions and indeed could I make the point here that there's a lot of cross-reference required between them. That is why you'll find that with the amendments to section 5 of the Treaty of Waitangi Act, those amendments to section 5 were (a) to recognise the special power in section 8HE, that is the licencee and Crown power, what's called a special power, and the other one is the, is the wording, this is at page 53 of the volume, "(ab) to make any recommendation or determination that the Tribunal is required or empowered to make under Schedule 1 to the Crown Forest Assets Act."

So here's the Act referring back to the other Act and indeed you'll also note that at section – on page 74, the various definitions in the Crown Forest Assets Act are, as it were imported, but I'm not importing the fact that they are the same meaning for the Treaty of Waitangi Act as they have for that Act. So the two Acts are read, in this jurisdiction, in tandem in terms of the Tribunal's obligations and duties.

The second point that arose was that my learned friend has reminded me that in the practice guidelines that I took you to for that point about duty, there is also a section dealing with deferral of enquiries and you may not feel the need to go there but if you want to take a note it's page 132.

ELIAS CJ:

I'd like to go there, I'm sorry, just briefly because I had made a note coming through reading this earlier. It's 132 of the pink volume is it?

MR BROWN QC:

Yes the pink volume, under tab 13.

ELIAS CJ:

I don't want to hold you up but if I could just have a quick look.

MR BROWN QC:

You'll find it's paragraph 2.9 and I draw attention not only to the fourth bullet, the urgency of the claim, but also the second one, the expected length of time being deferral because of course if one was to regard this as a deferral, it'd be a deferral in perpetuity because there would never be a ruling. It's a bit like in the interim injunction jurisdiction the line of authority of, you know, *Cayne v Global Resources*, interim injunctions having final effect. Anyway there's not any point I seek to expand on from it but I just wanted to draw your attention to it.

ELIAS CJ:

Well I suppose also although you haven't emphasised it in going through this the grounds for urgency at 128, there's maybe an issue as to whether that guidance has been sufficiently followed in the decision.

MR BROWN QC:

Well you have to bear in mind, of course, that there are two distinct documents being looked at in terms of this. There's this document, which is the Practice Guidelines, and then under 14 –

ELIAS CJ:

Oh there's the memorandum.

MR BROWN QC:

– there's the memorandum directions and it probably would be important for those who, perhaps you won't have the leave, to look at this document because this is the, this is a particular document. This is made in September 2007 as a direction specific to remedies and there are important aspects of this I want to come to but perhaps I could touch on them now.

At page 185, 185 you get the hint of the Tribunal's anxiety about the use of its, what it calls its compulsory powers. This is in the top of the second paragraph in 185. And this is the big push of course, for the Tribunal to have, to make findings, so to speak, on what – liability and then leave negotiations for the Crown and the claimants. Not enter into remedies at all. And that's what's happened, that's what we say has happened here. We say that the Tribunal's made it report and when I take you to it they say we invite you, encourage you, we give you some indications because the Crown has requested and you see this paragraph in 2, the reasons for taking this approach are various. Among many considerations Tribunals have been alert to the possibilities, involvement in recommending specific redress, particularly by use of its compulsory powers, could unwittingly lead to uncertainty and consistency. So the – what Dr Matthew Palmer refers to as cautiousness, one would say almost timorousness about this, this compulsory jurisdiction.

And the rest of the paragraph, of course, introduces the, sort of the circuit breaker report then we come across to page 186 where there's the heading, "Directions as to factors the Tribunal will take into account." And at the top of the next page, 187, we've got the paragraph I was taking you to, that the Tribunal will not entertain an application unless there's been a well-founded, so you've got to have sort of got past the liability stage, so to speak. And then it's in this section –

TIPPING J:

Just pause would you. Are the concepts of well-founded and deserving of a remedy disjunctive or is that intended? That once it's well-founded there is general desert of a remedy?

MR BROWN QC:

I don't know but I suspect that looking at section 6(3), and this is not necessarily an answer favourable to my position, but it does, section 6(3) at page 55, talks about being well-founded then it may recommend that action be taken to compensate for or remove the prejudice so that, that it could be said that the deserving of a remedy is a reflection of the prejudice to which a remedy is required to be given so that –

TIPPING J:

So those are two discrete steps?

MR BROWN QC:

Well, yes, well not one anyway.

TIPPING J:

Not one.

McGRATH J:

Obviously well-founded is the concept in section 6(3) of the – is the concept of deserving of a remedy also to be found in 6(3), a way of summarising that further power in the last few lines of that –

MR BROWN QC:

I suspect so and indeed you see it, you actually see it a little more crystally if anything in section 8HB.

McGRATH J:

8HB?

MR BROWN QC:

Yes, in what we're talking about because when you come to that one on page 74, it has the claim – one, the claim at (1) the claim is well-founded and (2) the action to be taken under section 3 to compensate et cetera, et cetera. This is the one that I say doesn't have the future, the future looking part. It is addressing the – and so I would, I would, looking at it –

McGRATH J:

That's the way, in other words, the deputy chair is reading?

MR BROWN QC:

Yes.

McGRATH J:

It's a way of summarising what the statutory principle is here?

MR BROWN QC:

I believe that's what she thinks, yes. And then there are a whole series of factors that are to be taken into account and of course the one that we were most concerned about and emphasised at the leave application was 6, the point that for the avoidance of doubt, no different or separate set of criteria will be applied to the granting of remedies hearing whether remedies sought include binding recommendations relating to particular land and that's, that's a point between us because my learned friend's argument say well this is discretion, different Tribunals can take different factors into account, it's all a matter of weighing. We say that isn't something to be weighed away. That is a, for the avoidance of doubt, no elevating feature is given to a resumption application.

And the reason I draw specific attention to those, and I am jumping ahead here, but when you, you need to be aware, if you're not already, but in Judge Clark's decision he refers to both of those –

ELIAS CJ:

He says that this one is the –

MR BROWN QC:

Pre-eminent.

ELIAS CJ:

– pre-eminent one but I was, yes, going to ask you whether you agree with that because one would have thought that the whole problem here is the urgency and whether he sufficiently addressed the criteria that the Tribunal has indicated it will take into account, which are obvious relevant considerations, whether it was enough, really, to rely on this.

MR BROWN QC:

I believe there is a problem here and I think it would be useful for the Court to be aware of the paragraphs that we're talking about. The judgment is in the green volume under tab 6 and the relevant paragraphs are first of all on page 23, paragraph 19, where he refers to the September memorandum, the second of the two we've been looking at. And then the paragraphs that follow, 20 through to 23 are a commentary on that and then 24 he sets out the specific matters right through pages 24 and 25 and the top of 26, the parts I've been referring to. Then he refers at paragraph 25 to the 2007 practice guide and he notes in paragraph 27 that Judge Coxhead, that was in Mr Haronga's first application for urgency which was declined in 2008, that Judge Coxhead –

ELIAS CJ:

Do we have that in the materials?

MR BROWN QC:

No we don't actually.

ELIAS CJ:

What basis did he use there if he was referring to the urgency criteria? Wasn't it urgent enough at that stage?

MR BROWN QC:

I'm not quite sure he encouraged, he encouraged –

ELIAS CJ:

It doesn't matter.

MR BROWN QC:

– internal, he recommended – Mr Haronga in his affidavit talks about that and perhaps I could come back to that when I deal with that. But he encouraged the parties to talk and that actually I think spawned a lot of those – that led to the approach that the letter I took you to.

ELIAS CJ:

Oh yes.

MR BROWN QC:

And it was only then when it saw that none of that was going to work that the second application was made. But he – at 27 Judge Clark notes that Judge Coxhead did that and then in that same paragraph he says, "Well both sets are relevant, I've placed greater emphasis on the comments of the deputy chairman concerning remedies," he says that at 27 and he repeats it, I think it's 51 over on page 29. He says, "I don't propose to," paragraph 51, "I don't propose to slavishly refer to each of the remedies. I have taken, I have ultimately, I have relied upon the guidelines comments by the deputy chairman in her remedies memorandum. A memorandum which, in my submission, does lean more against resumption hearings than the, well I'll say –

ELIAS CJ:

What's the problem you have though, with those criteria? Do you have any real problem apart from paragraph –

MR BROWN QC:

Six.

ELIAS CJ:

– six and even there is that absolutely critical to you criticism of Judge Clark's conclusion?

MR BROWN QC:

No, no, my criticism of Judge Clark is as it were two-fold. A, if we're right on the statutory interpretation argument that we're about to make that he was obliged to engage with it, that's an error. B, that if we're wrong on that and that he had the discretion to decide, that the three factors that he put weight on were inappropriate factors – the circuit breaker or the mode of application of it, the fact that the Crown had already or the Tribunal had already sort of done and dusted the relief power – we say they hadn't embarked on it but he says, well I can't see the point in doing it because they're not going to do anything different. And then the relative prejudice point which fails to take into account the fact that it is a resumption application which brings me back to clause 6, because I'm saying the fact that it is that particular binding recommendation jurisdiction, ought to be a factor in itself. One factor, but it shouldn't be lost, you can't just say that by – what we say clause 6 does is to say that you are oblivious to whether it involves our binding recommendation jurisdiction.

TIPPING J:

In effect it's a failure to take account of a relevant consideration –

MR BROWN QC:

That's the first –

TIPPING J:

– this direction in 6 –

MR BROWN QC:

That's right and it's actually the first –

TIPPING J:

– results in that –

MR BROWN QC:

When I come to our argument, before I deal with irrelevant considerations I deal first with a failure to take into account a relevant one, that one.

TIPPING J:

And in paragraph 6 invites you to fail to take it into account?

MR BROWN QC:

Exactly. Well if as he said, that document is what he's primarily relied upon, and if he's followed that document and clause 6 says for the avoidance about this is what happens, then there has to be the logical consequence. My learned friend Mr Bennion, in his submissions will say, well look there's a paragraph that he says that a strong case for resumption of the land but what the Judge, I say, is there referring to is it's a strong case. He's not saying, it's a strong case and by the way it's Crown forest land. The fact that it's Crown forest land doesn't get weigh as a factor at all because of clause 6. So Chief Justice – while as a general matter I think the guidelines are – other than I would say perhaps, perhaps over critically revealing a very distinct lack of willingness to grapple with the resumption jurisdiction. Other than that, in clause 6, they contain the sort of factors that one would expect to be addressed but it's the manner in which the judgment was made here that we have the problem with.

Now what I'd like to do now is to move on the statutory interpretation argument first of all deal as reasonably quickly with the 1989 agreement and

then how that's reflected in the Crown and Forest Assets Act. So the agreement itself you'll find in the yellow volume, volume 1 at tab 29. It's immediately following the small statute we looked at this morning. And I'd ask you to have that and also have in the pink volume the affidavit of Hall which is under tab 19.

TIPPING J:

In which tab in the yellow, I'm sorry Mr Brown?

MR BROWN QC:

It's tab 29 Your Honour.

TIPPING J:

Thank you.

MR BROWN QC:

Page 280.

TIPPING J:

Thank you.

MR BROWN QC:

Now the history of the agreement is actually summarised in a number of reported cases. It's set out in the Court of Appeal and the Privy Council decision in the *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 case, it's also in Justice Young in the *"Te Arawa"* case, it's set out in some detail. I wish to just emphasise particular points that are pertinent to our appeal and first of all the context is really in Mr Hall at paragraph 15 to 21. He takes up the discussion after the *"Lands"* case and on page 226 in the pink volume he refers to the fact in paragraph 15 that the, although the State owned enterprise, Forestry Corporation was established, it was envisaged as part of the SOE regime. In fact because of difficulties, a lack of agreement there, the Crown decided to sell its commercial forest on the open market and that led to the announcement to sell the – this is the pink

volume – to sell the Crown Forest assets and that led to the standoff that is explained in paragraphs 17, 18 and 19, the hui in January '89 and the return to the Court of Appeal in paragraph 21, pursuant to the leave reserved and then the Court of Appeal's decision in the *"Forests"* case which is in our bundle of authorities at page, under tab 5. And Your Honours recall the Court of Appeal held that the application came within the leave reserved in the '87 *"Lands"* case and concluded with its expression of hope that the dispute would be resolved in the spirit of partnership in accordance with the principles of the Treaty and that was the hope that was realised in the 1989 agreement which is what you have before you at page 280.

Now it's quite a short document. The clause 1 enables the Crown to sell the crop and to use the land for a defined period. Notice in paragraph 1 in the second line of the second indent, the words, "Until notice of termination is given, and that is the termination provision which is triggered," – you'll see in paragraph 3, "Triggered when there is a conclusion in favour of a successful claimant," so have no cost to the successful claim, "That the termination provision will be automatically triggered on resumption." Then the next important paragraph in this paragraph is clause 5, the bottom of page 280, "The Crown reserve the right to confer on the purchaser a right to freehold land, subject to the Waitangi Tribunal recommending the land is no longer liable to resumption in accordance with the, then, '87 Act or," it says, "Other legislation having the same effect," which of course was what manifested itself in the Crown Forest Assets Act.

Then, and we do place great emphasis in this clause 6, this was the time period the Crown and Māori agree they will jointly use their best endeavours to enable the Waitangi Tribunal to identify all claims relating to Forestry lands and to make recommendations within the shortest possible, sorry shortest reasonable period. So this was a, we say – we typify this as an end point situation.

And then the seven and eight, the first alternative, if the Waitangi Tribunal recommends that the land is no longer subject to resumption, Crown's

ownership and related rights are confirmed. Clause 8, if the Tribunal recommends the return to Māori ownership, the Crown will transfer the land to the successful claimant, together with the Crown's rights and obligations in respect to the land, that of course is the licences subsist, and A, compensate the successful claimant for the fact that the land being returned is subject to encumbrances by payment of 5 percent calculated by one of the methods below in paragraph 9 and then further compensate by paying the balance of the total sum calculated in paragraph 8(a) or such lesser proportion as a Tribunal may recommend and that was the clause 2 of the first schedule that I was discussing with Justice Blanchard this morning. And that was the identified role for the Waitangi Tribunal in that regard.

Then one more sub paragraph down, the statement, "All paragraphs made pursuant to paragraph 8 may be taken into account by the Waitangi Tribunal in making your recommendations under section 6(3) and 6(4) of the Treaty of Waitangi Act, so that's the section we looked, that's section 8HB(3). That one where they could allow for the amount.

And then nine and this is reflected, this is picked up in the statute and also reflected in the schedule 1, where the methods of calculating the total sum on which compensation was payable and also in this one in (b) you will see about four lines into (b), "The period of grace may be extended beyond four years where the Tribunal's satisfied an adequately resourced claimant is wilfully delaying proceedings or for reasons beyond its control, the Crown is prevented from carrying out a relevant obligation," that sits in a latter clause in schedule 1 to the Crown Forest Assets Act, as we shall see.

Coming over the page to clause 10. It says, "The following provisions will operate upon a recommendation for return of land by the Waitangi Tribunal under paragraph 8. And it says return of land – I mean one assumes then it relates to successful claim, it's slightly confusing because one or two paragraphs below relate to either party, but be that as it may, it generally relates to return to Māori. And it's got, First of all rental payments should be paid by the purchaser to the claimant," so it sort of novates the rental

arrangement. In three, "The successful claimant will be entitled to payment from the rental trust," that's the Crown rent, Crown Forest Rental Trust, "Of an amount equal to all the rental payments for the land resumed, covering the period from the time of the sale to the time of resumption." Then in four, sorry this is then – the number 11 is obscured I'm afraid but at that point it should be clause 11(1). "The annual rental payments from land to be set aside in a fund administered by a trust to be known as the 'Rental Trust'." It became known as the Crown Forest Rental Trust. "The final beneficiaries were the successful in the Crown, both appoint trustees to the trust," and you will find in the papers here there's a, I think the last annual report from the trust, a Mr Haronga is actually a trustee of the Crown Forest Rental Trust.

Roman four, "When any land covered by this agreement is recommended for resumption by the Waitangi Tribunal, the accumulated rent capital in the Rental Trust relevant to that piece of land will be paid to the successful claimant. Whenever the Tribunal recommends that land is no longer subject to resumption, the accumulated capital in the Rental Trust relevant to that piece of land is paid to the Crown." So that again reflects sort of the two alternatives, broken into three of course in section 8HB, but in my submission the tenor of this is one or the other, not the situation that would follow from the Crown's argument that if the Tribunal can just say well we're not going to open that door, then, and in my submission there it shows is the rentals keep accumulating. The land gets held and continues to be held by the Crown pending recommendation.

Lastly, with pertinence to the argument, over the page, paragraph 13 reflected that agreement would be reached between the parties on the format of the draft legislation and that's confirmed in Mr Hall's affidavit. And then at paragraph 15 it says, "The attached annex lists the main principles of the two parties within which this agreement has been negotiated." And if you come over two pages you find this annex and we place emphasis on the second of, what's called the "Māori Principles," the minimisation of the alienation of property which rightly belongs to Māori. And I make this point because when I come to section 8HB and you find that in section 8HB that wording about

whether the Tribunal decides that land should be returned to Māori, there's no criteria sitting in the Act as to how it is the Crown decide whether the land should be returned to Māori, it doesn't say. But the agreement, the objective of this was to minimise alienation of property which rightly belonged to Māori, and so that in a case which we would say the actual purchase aside, the purchase element aside, where it's so clear as in this case that it belonged to Māori, it was removed from Māori, sought to become back to Māori, that this alienation factor and we would say return, is an important consideration that the Tribunal would have to weigh, in a Remedies Hearing, if this Court directed that it were to be held.

And then in the Crown principles, similarly we would draw attention to principle 2, "Honour the principles of the Treaty of Waitangi by adequately securing a position of claimants relying on the Treaty," well it has to be claimants for licenced land of course and specifically then, "Adequately securing the claimants position must involve the ability to compensate for loss, once the claim is successful." And that is the – reflected in the rental provision and the compensation. So that's the agreement and that agreement, unlike the Treaty of Waitangi (State Enterprises) Act which introduced the other regime that's at section 8(a) to (i), it doesn't have a long preamble, that section, that Act had a long preamble setting it all out, and what had happened – a bit like the affidavit of Mr Hall. We don't have that here but it's quite clear from the Act, if I can take you to the Act, that the Act is giving effect to the agreement and this is the – the Act is under tab 1 in the blue volume. I suspect that you don't need a lot of persuasion to that, but if one did, you would find it right at the back in page 41 of the Statute, this is actually in the Schedule 1 and I ask you look at clause 6, because this is reflecting that period of grace provision that I drew your attention to where it says in 6(b), "The Crown is prevented by reasons beyond its control carrying out any relevant obligation under the agreement made on 20 July '89," et cetera, so this is the Statute itself speaking to the agreement.

And just at this juncture, if I can take you back to Mr Hall's affidavit briefly. He sets out all that I've traversed in some of his paragraphs and then at

page 230, in the paragraphs 29 through to 32 he talks about the introduction of the legislation culminating in paragraph 33 and I don't go to his paragraphs for the legislation, I take you to it directly – being under tab 1 of the blue volume.

ELIAS CJ:

I suppose one could also refer to the long title to the Crown Forest Assets in terms of the – you probably don't need to, but the expectation that the result of successful claim would be transferred to Māori ownership?

MR BROWN QC:

Yes, that's right. That's – it's absolutely clear that the successful claim was to go to Māori ownership. The only problem I have had with these words and there were various words in the Statute like, "well-founded" and the word, "successful" is another funny word –

ELIAS CJ:

Yes.

MR BROWN QC:

– as to at what point it embraces. Does it embrace for example, and I embrace, wasn't brave to say it myself but Justice Tipping's double discretion point, but does it embrace that sort of exercise or once you're well-founded and you've got to a certain point, are you successful? Or are you successful only when you've got the binding recommendations? Though it's helpful up to a point.

TIPPING J:

There's a danger of over-refining this Mr Brown. I too have spotted this and I just thought that, looked at more simply, it is that if Māori have been wrongly deprived –

MR BROWN QC:

Yes.

TIPPING J:

– it seems that that, at least there's quite a strong implication here, that they'll get it back –

MR BROWN QC:

Yes.

TIPPING J:

– in one form or another?

MR BROWN QC:

Yes and we really place, we place emphasis on the word, "return," because return itself connotes a – what has, where one's come from – in whatever language it's coming back.

TIPPING J:

Well it's a return in the heading part 3. It's transfer in the long title paragraph C.

MR BROWN QC:

That's true.

TIPPING J:

There's not a great deal of consistency.

MR BROWN QC:

No but the, in 18 – in the operative provisions the section, this is looking at page 30 now and I'm staying with the version that's in the Crown Forest Assets Act, I'll stop jumping, but page 30 you'll see the word "return" is used in section HB(1).

TIPPING J:

And it's also used in 36.

MR BROWN QC:

In 36, absolutely.

TIPPING J:

Consistently with the heading to the power.

MR BROWN QC:

"Return" is the word of emphasis, yes.

TIPPING J:

Yes.

MR BROWN QC:

And consistency and indeed, and then the other parts say, like HB(b) return is not required. It's a, it goes to consistence in that regard. So just looking then at the, yes the long title is helpful. There are, there are a number of definitions which I don't need to weary with you on pages 4 and 5 and 6 there are definitions that we see are to treated in the same way as the Treaty of Waitangi Act, the Crown forest land, the Crown Forest Assets, Crown forest licence, licenced land and then over on page 62 in the nation period.

Now then we have to jump across, it's going to be to jump to the termination provision at section 17 on page 12. This is the provision relating t the period of Crown forest licences and you'll see the structure there at page 13 in subsection (4). Every Crown forestry licence shall provide, but if the recommendation is made under 8HB(1)(a), it becomes a final recommendation for return then, et cetera, et cetera and this is the notice procedure for the licence terminating. It will run for a period of another 35 years potentially but that's the start of it and that's – the compensation effects both ends of that chain. Similarly subsection (5) on page 14 provides for the similar in relation to a recommendation made under 8HB(1)(b) or (1)(c) or 8HE all envisaging these four permutations of outcome.

And then if I can take you across to what happens pending a recommendation because we've said to you, well this is – this envisaged a period of time but with an end point and you get that very clearly from two sections in particular. On page 27, that relating to the Forestry Rental Trust, and in particular section 34(2). "All licence fees payable under Crown forestry licences shall, until such time as the Waitangi Tribunal makes a recommendation in relation to the land under section 8HB or section 8HE… be collected by the Crown and shall be paid into an account held in the name of the forestry rental trust." No other permutation. No – because I suppose you might say well if there was another permutation it wouldn't be referred to but then those monies would sit there for ever and ever and ever.

And then over on 35(2), "The Crown shall not sell, assign, or otherwise dispose of, or deal with, any rights or interests in any Crown forestry licence unless the Waitangi Tribunal has made, in relation to the licenced land, a recommendation under –" interesting it breaks into different words here. It differentiates between 8HB(1)(b) and (c) –

ELIAS CJ:

Sorry where are we?

MR BROWN QC:

On page 28, section 35(2).

ELIAS CJ:

Thank you.

MR BROWN QC:

Restraint on the Crown doing things until a recommendation under any of those provisions. Now of course this is subject to what the Court of Appeal accepted in the *"Te Arawa"* case. That if it's done by legislation well then it's done by legislation and that's why the theory there was well because no agreement was entered into or any agreement was the subject to a condition

subsequent being the legislation then nothing happened until the legislation so there was nothing to injunct. So there's only –

ELIAS CJ:

Is the Crown dealing with interests in any Crown forestry licence and entering into agreements about them?

MR BROWN QC:

Well my argument would be that the agreement in principle is really doing that but it's all conditional upon legislation being introduced.

ELIAS CJ:

Right.

MR BROWN QC:

And the reasoning in *"Te Arawa"* is that nothing happens until then and by then the Courts have no control and nothing happens before therefore there's nothing to address. It is a, there may be a Bill of Rights issue on this one when you've got such a clear restraint in an earlier piece of legislation, with a piece of settlement legislation that says – well I think what this title said in the legislation I think deems a recommendation to have been made one way or the other. That's what a subsequent piece of legislation would do.

ELIAS CJ:

But the agreement in principle is conditional upon legislation is it?

MR BROWN QC:

Yes it will be Ma'am and certainly the agreement that is made following the agreement that is ratified will be conditional upon that, yes. Well, assuming it follows the, and I've got no reason to suspect that it wouldn't, the *"Te Arawa"* –

ELIAS CJ:

That's fine Mr Brown. You don't need to take time on it.

MR BROWN QC:

I think you'll find the Fletcher affidavit spells all that out pretty clearly.

ELIAS CJ:

Right.

MR BROWN QC:

So they're the provisions and now I just then ask you to note the changes that are made to – well of course there's the, there's the – before we look at the provisions that are in the Treaty of Waitangi Act we've got the Schedule 1 that I think you've looked at sufficiently before but that is the compensation provision that is the reference to, referred to in section 36. So if we could then move to the Treaty of Waitangi Act reflecting its changes and you find the relevant sections start at – actually as early as page 53 because there were a number of changes made to the functions of the Tribunal by the Crown Forest Assets Act and on page 53 I draw attention first of all to 5(1)(ab), that is the recommendation or determination about the compensation, and then to 5(ac) which is the, what's call the special power that can be the subject of applications by the Crown or licencees that echoes the similar power acknowledged in section 5(1)(aa). And a similar one over the page, (ad), dealing with New Zealand Railways Corporation land which is just being treated as affected by the SOE procedure.

ELIAS CJ:

Do these provisions leave out the power to recommend resumption?

MR BROWN QC:

Yes they do.

ELIAS CJ:

They're within –

MR BROWN QC:

They do –

ELIAS CJ:

– paragraph A are they?

MR BROWN QC:

That's the Crown, the Crown's argument is that they, within – as part of their within section 6, no change is required.

ELIAS CJ:

Yes.

MR BROWN QC:

Although as I will say to it it's a bit curious because section 6(3) is dealing with recommendations in favour of Māori. It's difficult to see how those other provisions (b) and (c) comfortably fit within the, especially 8HB(1)(c), which provides for the claim not having been well-founded whereas section 6(3) is a section that proceeds on the basis that the claim is well-founded so I, I am critical of that when I come to deal with the Crown's section 5 argument.

ELIAS CJ:

Well I don't think it's necessarily against you to have the specific provisions because they don't come within enquiring into and making recommendations in accordance with the Act on any claim submitted under section 6. They're really addressed to a different audience, aren't they? They are a mechanism for clearing the sort of status determinations?

MR BROWN QC:

Yes I entirely agree with those. The (ab) is one because it's not even under this Act at all.

ELIAS CJ:

Yes.

MR BROWN QC:

And (ac) is because that's a special power that is an application under 8HE. You'll find it's – I accept that they need to be there for that reason, but I was – my learned friends then say, they take that further and mount an argument in their favour and I was in anticipation disagreeing with that. I'm not saying that I have a problem with the functions provisions. I disagree with what they seek to read onto it.

But it's convenient then to start off looking at those, what I call, are four paramours by looking first at section 8HE given it's referred to in that one and this is the so called special power. This is over at page 79. This doesn't apply here, of course, but it's interesting it sits there. It's a provision that, first of all, has an express reference to discretion as we've seen section 7 does and it's an application by a Minister of the Crown or a licencee, and it has a procedure for public notice and either no claim has been made under section 6 at all or secondly, all parties to any claims submitted under section 6 have informed the Tribunal in writing that they consent to the making of the recommendation, because this is only for one that is not going to Māori. This is not a route that is available for the return to Māori. This is a route that is only available for return to the, well, held by the Crown. Then there are, with that, there's the – one of the reasons particularly why it would need to have its special function is subsection (2), "The Tribunal can do this without being obliged to determine first whether the claim is or is not well-founded" and then there's the reasonably elaborate procedure in 8HG for directions and 8HH for public notice, and the public notice, you will see, if you look at over at page 82 is required to invite any Māori who considers he or she or any group of Māori may have a claim to make it. So it's designed - if there hasn't been a claim, to make sure that there are no claims before this particular process can be followed. Then in section 8HI, the service of the decision and the limitation of people there so that's quite a detailed route. If it isn't by that route then we say it has to be by the, coming back to page 74, the section 8HB route.

We draw this – this is on the bottom of page 74 after the definitions. This is the whole regime that is inserted by the Crown Forest Assets Act, so it's subject to 8HC. Claims have been under section 6 so every claim, Your Honour, is under section 6 except those under HE or under the equivalent SOE provision. "Tribunal finds it's well-founded. Action to be taken under section 6(3) to compensate. Should include the return to Māori ownership of the whole or part of the land," then the words that my learned friends rely on, "include in its recommendation under section 6(3) a recommendation that the land or part of the land be returned to Māori ownership, which recommendation shall be on such terms and conditions as the Tribunal considers appropriate," so that could also, I suggest, Blanchard J deal with our purchase issue "and shall identify the Māori or group of Māori to whom the land or that part of the land is to be returned." So that's the returning part, then there's the alternative where the claim is well-founded but a recommendation for return to Māori ownership is the words, "not required." The same comment I made before in relation to the annex to the agreement. We don't really get any guidance about "not required" means but in those circumstances recommend to The Minister that the land or part of it not be liable to return to Māori ownership.

Now, I draw your attention as I think I did earlier, to the fact that that is also an interim, in the first instance, and becomes final so its both A and B are in that category. C is not. C is separate. It says, "If the claim is not well-founded, recommend to The Minister within the meaning of section 2 of the Survey Act that the land is not liable to return to Māori ownership" and that's the, they're the four avenues plus the, what I might call, the sort of the innominate fifth.

TIPPING J:

So before A, B and C here and HE, you say the disputed one is the fifth of shouldering arms and doing nothing?

MR BROWN QC:

That's right.

TIPPING J:

Does the wording "not required" tend to suggest in the contrary case it is required? In other words, it's a requirement of justice, if you like, that there be a resumption order or is that pulling a rather long –

MR BROWN QC:

No, I would say that. In fact, my submission is that it is the, sort of the – if you took a circle and carved a line through it. Only if it's held under the first one that it isn't, doesn't, it isn't to be returned to Māori is not required because that would be consistent with the provision in the annex, the Māori principle for –

ELIAS CJ:

Well that, I think, is clear from B in referring back to paragraph A(2). Sorry, was this what you were saying? Because if there is a finding that it is, it should be returned in order to compensate for or remove the prejudice, then it is required?

MR BROWN QC:

Yes. No, I wasn't going to but I gratefully adopt it. Yes, I would add that to the point about the fundamental point of lack of alienation, but as I was saying, with – we don't sort of get, we're not informed either way in the Act other than drawing those inferences.

TIPPING J:

Well, the lack of alienation provision presumably gives the broad parameters within which the jurisdiction is to be exercised. In other words, I hate to use the word "presumption" but, and I don't use it but as a, something like that in favour of returning it to Māori, unless there's some counter weight that suggests that that isn't required, if you like, or should not be done.

MR BROWN QC:

Yes, I suppose one could envisage all sorts of scenarios. I mean, it might theoretically be possible that the Tribunal couldn't determine in such cases to which Māori –

TIPPING J:

The real nub of this case is which Māori, isn't it?

MR BROWN QC:

Yes. Well –

TIPPING J:

Not so much return to Māori?

MR BROWN QC:

That's right. I mean the return to Māori we know that is, that's already reflected in the agreement in principle. The Crown can never really argue that it isn't appropriate for the land to be returned to Māori here, but what is happening is that there is a by negotiation process that we, our view is not being –

TIPPING J:

Yes, I don't need you to elaborate that. It just seems to me it's not quite as simple as return to Māori or not return to Māori.

MR BROWN QC:

No, but that's why those all important words just above B, shall identify the Māori or group of Māori to whom that land is to be returned and that was the reference, that was that reference to the duty in page 136 of the pink volume that I took you to earlier when the Tribunal was distinguishing between its role in terms of showing the Crown the Māori for the purposes of general recommendations as opposed to its duty of identifying the Māori in this jurisdiction. That early passage I took you to in the –

TIPPING J:

So in the identification point there is the proposition that it's not optional. I'll use the word "optional" as opposed to "discretionary." It's not optional to disregard it because this whole process, at least, includes a duty once you've

reached the return to Māori stage which, of course, you may not reach in this case but you've got an arguable case that you will. You've then got the duty to decide which Māori or group of Māori.

MR BROWN QC:

That's right and, of course, you can see – my learned friend, Mr Bennion is saying, well, it's divisive, you know, because we've been, the Crown is, we've had a hearing on a collective basis and there's – see, this has been an enquiry that has been under the new regime and with the, knowing the knowledge of the Crown's aspirations for settlement with large natural groups is that that's how it will resolve after liability, a settlement with large natural group but that's utterly inconsistent with, unfortunately, this jurisdiction which is, is a specific and identifying, sort of a, taking out of context, sort of a tracing jurisdiction. Who is to be identified as the Māori to who receives the land and, of course, the rentals and, of course, the compensation? It's important identification.

ELIAS CJ:

Well, picking up on your tracing, I wonder whether that is perhaps supported by the structure of section 8HB, not only because paragraph (b) refers back to (a)(2) but because all but – the Tribunal – if it finds the claims well-founded, and that the action should include the return to Māori ownership to remove the prejudice, if the substance of the claim is that land has been alienated improperly, it's hard to think how the prejudice would be removed except in particular circumstances except by return. So just picking up on what Justice Tipping said, is that there is some momentum towards return, if not a presumption?

MR BROWN QC:

Yes well that's certainly the way we argue for it.

TIPPING J:

Where does this removal – I'm just missing the reference to removal of prejudice?

MR BROWN QC:

Back on page 74, the bottom Your Honour, reflecting, just echoing the words of 6(3) in 8HB(1)(a)(ii). Third to last – third – last three lines on page 74.

TIPPING J:

Thank you, yes. It's staring me in the face.

MR BROWN QC:

And this – again not pertinent I suspect. But this is the repeating the wording but not the whole wording of section 6(3) because it doesn't have the – or other people in the future. This is dealing with an historical event and addressing it. Just in our case not so historical.

Now then there are some other important subsections, if I may take you to them in HB. In subsection 2, which says, "In deciding whether to recommend the return to Māori ownership of any licence, then the Tribunal should not have regard to the changes that have taken place and the condition of land and improvements or ownership or possession that have occurred after or by virtue of the granting of the licence." So you can't suffer for betterment here.

ELIAS CJ:

Post 1989?

MR BROWN QC:

Yes.

McGRATH J:

And you can't take account of the forests that have been planted on the land?

MR BROWN QC:

That's right. You can't – that's right.

ELIAS CJ:

But pre '89 you could? Because that may be one of things that the Tribunal could take into account in setting the terms and conditions. It's not prohibited from doing that by subsection 2? Wasn't, isn't the purpose of excluding betterment, to freeze the position so that –

MR BROWN QC:

Yes.

ELIAS CJ:

– post the desired transfer, claimants are worse off?

MR BROWN QC:

That's right. I was just hesitating about the period of time before then but I – certainly the purpose of the section, the subsection is clear in that regard. And then the next subsection is the one I visited before where it – and this in my submission will turn out to be quite an important subsection because it says nothing prevent, sorry my learned friend and I see different things in this but it says, "Nothing in one prevents the Tribunal making respect of any claim that relates in whole or in part the licence and any other recommendation under 3 or 4, except in making any other recommendation the Tribunal may take into account payments made or to be made by the Crown, by way of compensation to section 36." And I suspect they're going to say well other suggest this is also a recommendation of section 6.

My point is more that the Tribunal's having to look at the action taken under the Crown Forest Land part first. It can only work out whether there should be any negative reflection or the like on other relief if it knows, as a reflection of compensation. And compensation can only be granted, follows automatically, if there's been a direction for the return of the land to Māori, so in terms of sort of a sequence affect, this is saying that in looking at any other relief we might deal with – this is not land or the like, we're – the Tribunal may take into account how much you've got under this exercise – but you need to have got

there. You could hardly say well we'll see what happens under 6(3) because this shows that there's a difference in the process.

Now we saw in section 36 then the finality or the actual becoming final. If I take across the next page to section 89H(a)(c), the interim recommendations. This is a, again I have to say, there are puzzling components to this section. But it does say, recommendations made by the Tribunal under (a) or (b) in the first instance be interim, again there's no definition of what "first instance" means but the, it's apparent from the remaining subsections that 90 days is the period of time that's been looked at. Then there's subsection (3), "That subject to five, the Tribunal shall not without the written consent confirm any interim recommendations that conclude a recommendation, include a recommendation under (a) or (b) until at least 90 days." Now I have to say I find this a little puzzling because not only do you at least, but also the word "confirm" because when we come to six you'll see there is no further action to be taken. Then four is the interim step, "Where any party is served with a copy of the interim recommendations, they may, within 90 days, offer to enter into negotiations with the other and shall within 90 days, inform the Tribunal whether the party accepts or is implemented the interim recommendations and if the party has made an offer," et cetera. Now that's fine, we accept that that in the 90 days is clearly going to be some negotiations and it's both ways – I mean this is isn't just the Crown negotiating if there's been an award to Māori, this is the Māori negotiating if there's been award to the Crown under (b).

Then we come under that, with the benefit of that to five. It says, "If before the confirmation," so we get this confirmation concept again, "Of any interim recommendations that include a recommendation under (a) or (b), the claimant and administer settle the claim, the Tribunal shall cancel or modify the interim recommendations and may make if necessary a final recommendation." So that's saying well if there is a settlement before the night, the Tribunal will do what the parties want. So that's fine. But then we come to six. If subsection 5 does not apply in relation to any interim recommendation under (a) or (b), upon the expiration of the 90th day after the

date of making the interim recommendations, the interim recommendations shall become final. And there is a slip rule in seven. "Mistake, accidental slip or omission," but that of course doesn't give the Tribunal any power to revisit or recall or reconsider the substance and indeed it's interesting that it, about line 6 down it says, "Drawn up so as not to express was actually decided and intended," so it uses the word of decision and has the word destination. So that's what, that's the totality of 8(c).

ELIAS CJ:

So in this scheme confirmation, once the period, the 90 day period has elapsed without agreement is really some sort of certification by the Tribunal, because the Tribunal is compelled to decide only one way. Compelled to confirm. Is it an evidencing, the notion of confirmation in those circumstances?

MR BROWN QC:

I, I don't read that way. My submission – the subsection 6 is what in a, sort of in a judicial review context, Justice Eichelbaum called a mandatory statutory consequence, it happens. Confirmation only happens in two ways, it happens if there's a settlement and the Tribunal can confirm it even earlier than that, can do it in 90 days and confirm something otherwise it wouldn't happen, you'd wait till the 90th day, that's five and three in my submission, is simply a constraint on the power to confirm at any sort of – really at an earlier time without the written consent confirming interim recommendations until the point has happened, but in my submission the structure of this does not suggest that the Tribunal has even an administrative confirmatory exercise. It would be difficult to reconcile such an approach with the plain words of subsection (6) but having said that, this is one of the, more than one of the things, the wording that I have wrestled with in terms of this.

ELIAS CJ:

Well, they'd need some evidence in order to get the land transferred, wouldn't they or is that directed at the Crown, shall transfer, I can't remember?

MR BROWN QC:

Perhaps not. Well, perhaps not. I mean –

TIPPING J:

It's section 36 of the Forests Act.

MR BROWN QC:

Subsection (2) says they serve copies of the interim findings and after 90 days, section 36 kicks in.

TIPPING J:

The statutory duty to transfer –

MR BROWN QC:

Yes.

TIPPING J:

– then kicks in.

MR BROWN QC:

Mhm.

TIPPING J:

There is a curiosity in this apropos of section 63 in that in paragraph A of 8HB1 that's just over the page, the top of page 75, include in its recommendation under section 63 but throughout HC, the recommendation is said to be made under not 63 but 8HB.

MR BROWN QC:

Yes, and not only under 8HC. One of the, I was going to take you through, hopefully not too tediously but all the places where that is, not only in these sections, but in sections in the Crown Forest Assets Act and, indeed, provisions in the Crown Forest Rentals Trust Deed. They're always under those provisions.

TIPPING J:

Well, that's what one would tend to expect where you're dealing with a particular regime as opposed to a general power.

MR BROWN QC:

Exactly and we say they're made under – you can understand it under section 8HB where there's a special power but these are specific to under these sections and it's consistent. There are –

TIPPING J:

It's not consistent because in 8HB, it talks about include within the recommendation under 63.

MR BROWN QC:

Yes. No, I'm sorry, by consistent I mean in every –

TIPPING J:

Other than that?

MR BROWN QC:

– reference. Yes, throughout there under Crown Forest Assets Act. You remember, I took you to in the Crown Forest Assets Act both the rental trust, the 34 and the 36, the prohibitions. They're all expressed in under 8HB. I agree and that's my learned friend's argument, turns on this one reference. The "include in" as opposed to, for example, "include with." I don't mean to belittle the argument in any way but it comes down to a preposition against the flow of the agreement, the legislation, all the rest of it but, you know, words are words, but it may be that it's a little like, I think, Richardson J in the *Wilson & Horton* v *Commissioner of Inland Revenue* [1996] 1 NZLR 26 about that's asking too much of the pressure draughtsman and the use of words to have everything exactly right. That may be a reflection of the confirm point but the totality of this, we say, is that – well, I'm jumping ahead of myself but that's introducing you to these sections and the structure.

ELIAS CJ:

Now, Mr Brown, we'll take the luncheon now. We've interrupted you already. Some of us have interrupted you a lot and it's been very helpful. Where, what – can you just tell us where you want to take us after this?

MR BROWN QC:

Well, I want to conclude the argument on this statutory, what I call the statutory duty, so to speak, which will take me another, I suppose, half an hour or so then I've got the second argument which is about the attacking the circuit breaker policy and that part of Judge Clark's decision that was taking into account a relevant consideration. Then, of course, my learned friend's got a – her argument is very important. She's presenting it there because that's where it arises but the natural justice point and the like are very – I envisage that we would occupy most of the day, if not the whole day seeing we sit, arise at four, but I will scurry through because I think she's –

ELIAS CJ:

We will, in fact, have to stop at 10 to four, thank you.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.14 PM

MR BROWN QC:

Now I propose now to seek as rapidly as possible to draw some conclusions from that analysis of the statute and the agreement I was looking at and I've contracted quite a bit of what I was going to say in this regard and I think it certainly can be done succinctly but we first of all say that those four pathways were intended to be exhaustive. That there wasn't a, as it were, a fifth or just a do nothing option and we say that particularly because an end point was clearly envisaged. This was a comprehensive addressing of the situation, more so than the SOE scenario with the establishment of the Trust right through at the end of a Trust to establishing that at the end of the – all applications being heard, and there's any money left, then it goes to the

Crown which is one of the, sort of, the real issues in effect in the *Latimer* legislation, the *Latimer* litigation. And on this we do submit that the Crown's submissions, with respect, don't engage with this analysis. Although they make a reference at the outset, having said that the statute's a starting point, and there's a reference to the *Fonterra* case in a footnote, they do not address the end point objective which is an important dimension of the agreement and the clauses or the sections in the statute. They don't address this part which in the words of *Fonterra* is the immediate and general legislative context. They don't address this component of the social and commercial objective of the enactment because the commercial objective was two-fold.

The Crown had a very significant commercial objective here and that was secured in the sales of roughly a billion dollars worth of Crown forestry licences. So the Crown was achieving an objective here that were it not for this arrangement then the prices that it would have obtained for those licence would have been far less than it was able to. And all of that is the matrix for this piece of legislation. In fact the entire discussion, in my learned friend's submissions, at page 19 under the heading "Context, the 1989 agreement, is directed to the issue of the timing of negotiations. Whether you can negotiate before as well as after the, or during the 90 day time period.

McGRATH J:

But your argument is really that the Crown's approach is just literal?

MR BROWN QC:

Yes, yes it is literal. I mean and it may be literal and right but it is a literal argument and it comes down, at the end of the day, to those little group of words in section 8HB, that we would say interface with section 6(3). They would say, and I don't mean to disparage it, but it's the sort of location, location, location argument. They say it's located in section 6(3) and we say, our two responses to that, and they're the key responses really, are that (a) section 6(3) was recommendatory a la advisory. Section 6(3) was never in 1975, wasn't binding and it wasn't binding that – some amendment had to be

made to section 6(3), either amended or do something to it and the way to do it, the legislation decided to put this regime in place.

And the other important fact that is sometimes overlooked is section 6(4A). It's on page 55 of the bundle. "Subject to sections 8A to 8I the Tribunal shall not recommend under subsection (3) the return to Māori ownership of any private land or the acquisition by the Crown of any private land." That often thought to be no jurisdiction in relation to private land. It isn't as absolute as that. The two regimes, the SOE and the Crown forest regime are embraced within that exception and they can't be done under section 6(3) and the section 6(3) power is related to that so we would say that the powers in relation to Crown forest land are not only different in nature but they're broader in ambit than the recommendatory powers.

Now as I said earlier there are three tasks that the Tribunal has. The task of deciding about return or not required, identifying which Māori should, the return should be and the functions, we would say determination in relation to compensation and the, I don't mean in any way to disparage Justice Clifford, he deals with this in some detail but it probably will suffice for me to take you to the Court of Appeal's judgment in the time that I have. The green volume, the pleadings volume. Perhaps if I just draw attention to the few paragraphs in Justice Clifford's judgment. His judgment starts at page 60 under tab 11 and he has a long discussion starting from paragraph – page 72 at paragraph 40, right through to paragraph 61 on page 77 of the jurisdiction and the provisions. The key paragraphs, however, are probably paragraph 110 on page 93 and 112. 110 says, at the bottom of page 93, " In my view, the fact that the Tribunal had power under section 8HB to make a binding recommendation does not in itself change the nature of the Tribunal's function. Applications to be heard are made under section 6. Here, the Tribunal heard the claim as part of the wider inquiry. The Tribunal then has a discretion to make a recommendation – either under 6(3) or 8HB. It chose not to do so. If a Tribunal decides to make a recommendation, it's binding. In essence, the Crown's discretion whether to comply with the

recommendation is removed. That, in my judgment, doesn't alter substantively the Tribunal's role." And similarly 112.

Then the Court of Appeal's judgment is under tab 12 and this is somewhat briefer. There's a paragraph 3 on page 100 that summarises the key provisions and the paragraphs of note are paragraphs 41 to 43. Paragraph 41 captures our argument. Paragraph 42 is really the operative paragraph. It's, I think it's five sentences and some of them I don't disagree with in fact but it says, 42 says, "We agree with Justice Clifford," this is page 114, "that the introduction of the power to make binding recommendations did not change the Tribunal's role substantively. As Ms Hardy submitted, when Parliament granted the Tribunal the power to make binding recommendations in relation to SOE and Crown forest land it left in place the Tribunal's mode of operation as a commission of inquiry with the power to make recommendations." I actually don't disagree with that sentence as it stands. "Section 6(3) remains as the central remedies provision." Well subject to what central imports, I don't have too much problem with that. "Under it, the Tribunal has a general discretion as to what, if any, remedial recommendations it makes, even though under section 6(2) it (generally) has an obligation to investigate claims made under section 6(1)."

Then this paragraph – sentence. "Further, the binding aspect of resumption recommendations comes into play only if the Crown and the claimants are unable to agree a means of implementing the Tribunal's interim recommendations, which is a statutory recognition of the important role of settlement negotiations."

So reading the last sentence and the first sentence together they're quite clear. That even though it's the binding recommendation, it doesn't change the Tribunal's role substantively and I think I commented earlier, it's – this paragraph for example exemplifies the relating of the decision about whether there's a substantive change and 6(3) and I'm not quite sure, and it's not for me, needing to be sure either, you know, which is dictating which but it seems, as I read these decisions, it seems to me that the Courts feel

compelled to make a finding that there's no substantive change in order to sit comfortably with the, then the discretionary power that's visited in the, said to be visited in the Tribunal.

Now the Crown's argument starts at about paragraph 40 as I noted and is in the paragraphs that I mentioned, the discretionary power argument. And its focus, dealing with the literal interpretation point that Justice McGrath mentioned, is really on the literal point rather than the no substantive change. I don't read these submissions as focusing a great deal on that although in their argument it's the flip side, I suppose, they could not really acknowledge there was no substantive change, I think, and run the 6(3) argument that they do. But I have to – I address the no substantive change point first and in my submission, although the Court of Appeal's words are only that, "comes into play only if." That may be so but the fact of a binding recommendation is chartered from the initial recommendation. That is when the Tribunal makes the decision. It is, as it were, a final recommendation in a crystalitic state because the Tribunal has no powers to revisit or to reconsider or to take up the issue again. So absent some intervention by negotiation the first instance decision becomes final and in our submission it's unrealistic and wrong to say that the, that the recommendation power whereby before the Crown was not bound and now it is, where the Waitangi Tribunal is no longer acting merely in an advisory commission inquiry capacity but is determining rights, that that has to be a substantive change and –

TIPPING J:

Are you saying that the binding nature of the recommendation is inherent in the initial recommendation and is defeated only by a settlement agreement?

MR BROWN QC:

Yes. The fluxion of 90 days with inactivity is a final –

TIPPING J:

So in a sense you're inviting us to look at it the opposite way round to that which is recorded in the Court of Appeal?

MR BROWN QC:

Absolutely. I don't know why, I don't know why the Court of Appeal even looked at it that way because they said the binding, in the first sentence, that the binding recommendation jurisdiction makes no substantive change so I don't think they could logically say that it sort of just happens at the end but –

TIPPING J:

It's binding subject to defeasance to use –

MR BROWN QC:

That's right.

TIPPING J:

– a more technical…

MR BROWN QC:

That's right, and that's why I mused on those words "clarify" and "clarification" but they certainly don't derogate from the subsection (6) provision or the section 36 of the CFAA and, and it's that, it's the nature of the power, and that's when my learned friend Ms Feint addresses you, it's that power that is a determination for the purposes of section 27(1) as opposed to the advisory power. Before that time there wasn't such power and now there is and section 36 means that it is a binding power and that is why Justice Baragwanath, we just, we set it out and with respect can't really improve on it the passage from there that we cited to the Court's below and which is in our submissions at page 12.

ELIAS CJ:

Did the majority in that case, which I'm sorry I haven't read the judgment, did the majority take a different view on this point?

MR BROWN QC:

Well that – yes, Justice Baragwanath was on his own on this issue but this issue was really, as I read it, an obiter. They were unanimous for the reasons –

ELIAS CJ:

So they didn't deal with this –

MR BROWN QC:

No.

ELIAS CJ:

– particular point? Yes, thank you.

MR BROWN QC:

I think, I seem to recall they just said –

ELIAS CJ:

Unnecessary.

MR BROWN QC:

Yes. They –

McGRATH J:

What was the paragraph number again in *Mair*?

MR BROWN QC:

It's paragraphs 102, 103, they're set out in our submissions Your Honour, on page 12. That, plus the passage that's also set out in paragraph 49, where he said in there that the effect of the, and this is at page 49 on – paragraph 49 on page 15 of our submissions when he said in there that the effect of those amendments, the CFAA amendments, to the Treaty of Waitangi Act, "Is to charge the Waitangi Tribunal with the sole responsibility for deciding whether clawback will occur and, if so, by which Māori in relation to what land. It is the

constitutional responsibility of the courts of general jurisdiction to ensure that the legal rights to which they give rise are delivered; that is required by the rule of law." And that's why this application which arises out of sort of comparatively simple set of facts in a, you might say, a small forest and a small part of this claim is a case of moment.

Now there are a number of arguments that my learned friends raise in their literalist argument, for example, and I'm not going to address them all, but we've touched on section 7. They rely on the long title, for example, of the Treaty of Waitangi Act and that is why I've put the original Act before you because the long title is in the form it's always been and they say that the reference to practical application, they say in their submissions, is a reference to negotiations of these, you know, complicated historical matters, but that title was in the Act in 1975 when only the contemporaneous jurisdiction was conferred on the Tribunal. There's nothing, no change –

ELIAS CJ:
Well, post '75?

MR BROWN QC:
Yes, post '75. So there's the – count derived from that I would – I've already dealt with the interface point that we say is an interface with section 63 and I would just briefly re-visit the Crown proposition at paragraph 48. This is the point that Your Honour, The Chief Justice is raising with me about the implications of section 5 because in the Crown submissions at paragraph 48 on page 12 they say that, "While sections 5(ab) and (ac) refer to specific functions relating to Crown Forest Land, there is no provision other than 63 to recommend the return of Crown Forest Land to Māori." So they, I think the suggestion there is that there would need to be a reference in section 5 to section 8HB.

ELIAS CJ:
But 5(a) does because it's in accordance with this Act which brings in the other provisions.

MR BROWN QC:

Yes and therefore, would have the capacity to embrace the 8HB(1)(b) and (c) which otherwise would never sit comfortably within a 6C context. Now, I've made the comment - there were two propositions I wanted to extract from section 8HB(3), that is the, using the amount of compensation that has to be, has an impact on whether there can be any other remedy granted and I want to deal with it, however, and make what, on the face of it, it might seem a frivolous point but facing a literal argument is nevertheless right, well, able to be made and it's this – what if the Tribunal considers, when it has dealt with a land matter, that the land and the compensation happened to be the totality of all the relief that should be granted and decides, well, no other relief under section 6(3). Again, this is a highly technical proposition but where then is the section 6(3) recommendation in which the land one is to be included? If one's going to take the argument to this sort of extreme and, let's say, include in another recommendation, if there's an absence of recommendation, then there's nothing to include it in and it's, it would be, it's unattractive in my submission to seek to resolve an issue of the nature that we're addressing here by that degree of literal analysis. It would be uncomfortable. This is why the resolution to this issue should be looking at the context and the agreement and the overall, the overall statutory framework and the Crown Forest Assets Act agreement in association rather than trying to work out whether the words "include in" section 6(3) somehow places the jurisdiction in that section and then adds another layer of discretion.

So our argument to finish on this point is that if the Crown had intended, or Parliament had intended the outcome which was now contended, one might have expected of seeing an amendment to section 63 or a specific reference to discretion as in section 8HE but it's not framed that way. It is may followed by the A, B, C and they cover the basis that were the rationale and objective of the '89 agreement given effect to in the Crown Forest Assets Act and, therefore, our submission on this point finishes at paragraphs 48 and 49 on page 14 where we say it would be a very curious result if the two statutes were interpreted in such a way as to defeat the purpose of the agreement or, at least, thwart it but in effect, that is precisely what is happening. It's a matter

of record that the Tribunal has never made a recommendation returning Crown Forest Land pursuant to 8HB and has made recommendations which respect to State owned enterprises land only once. Yes, true, there have been settlements and legislation, and I think that is the deeming provision in it, but the Tribunal has never had to come to the barrier of exercising the jurisdiction in a CFAA and curiously, it may just be a happenstance, but in that guidelines that is under tab 13 is an extensive precedence and the like for the SOE provisions but nothing about the Crown Forest Assets Act provisions. It just puzzles me that a 2007 guideline that that might be so.

So our argument at 49 is that certainly Crown forest claimants can't get in the door due to the manner in which the Tribunal and the two Courts below have interpreted the framework that led us to citing Justice Baragwanath's comment that we've referred to there.

Now, the second argument assumes that there is some, let's call it a discretion even though it's not I think the preferable word, and that causes us to focus on the report of the Tribunal. Mr Bennion's submissions are a little –

TIPPING J:

Are you assuming, Mr Brown, when you move on to this second argument and the assumption inherent in it, that if your first argument is correct, that there is a duty to engage, it's really a lay-down issue that they should have granted an urgent hearing?

MR BROWN QC:

Yes. If I win on the first point, I don't need to go further in my submission. Yes, mandamus should issue because the Tribunal should – if it's dealing with its guidelines –

TIPPING J:

In other words, there's only one way that a discretion, if there is one to decide whether to give an urgent hearing, there's only one way it could be issued if they've got this duty?

MR BROWN QC:

Yes, the summary really is at paragraph 10. If the Tribunal is in a situation where accepts as a well-founded claim and it's got an applicant representing the group from whom the lands acquired, then there is, we say, a statutory mandate –

TIPPING J:

Yes, I remember but I just wanted to get it clear that that is the premise on which if your first argument succeeds, you say it must follow –

MR BROWN QC:

Yes.

TIPPING J:

That the Judge was in error?

MR BROWN QC:

Yes. Now, the second argument and the third argument as well when my learned friend, Ms Feint speaks, is that there is a discretion and then we're focussing upon whether the discretion was appropriate exercise in terms of whether errors of law were made, and Mr Bennion, in his submissions at 3.3 says that we've glossed over certain matters and we certainly didn't intend to but within a, within the very acceptable 30 page limit, there is a limit to what one can say so what I am now going to do is to touch briefly, I hope not in a way that can be criticised, on aspects of the report that are relevant to the discretion so that you can read the decision against the context of the submissions that my learned friends will wish to make.

I believe you have the reports available to you, the two volumes and there are four parts of the reports that I want to refer to and they are as follows. There are two chapters dealing with Mangatu. There is then the final, the healing chapter and there is the introduction and transmittal letter and I'm just going to take you to some of those, and quite briefly. The Mangatu Title

determination is at chapter 14. These are both in the second volume and chapter 14 you will find starts on page 659. It's called the "Ngariki Kaiputahi Story" and it's simply not possible to do justice to this in this time so I'm not attempting to. I just want to highlight certain aspects that, of how the Tribunal visited it.

Now, first of all jurisdiction at page 661. I ask you to look at the second half of the page where the Tribunal recorded that it's not an appellant Court and they noted the number of times that the customary rights issue in relation to Mangatu Block has been considered by the Māori Land Court and in subsequent matters, and notes at the bottom of the page that the Tribunal should not likely upset longstanding determinations of rights between hapū and so on. Now, it comes through – there's a long chapter dealing with the history of claims to interests in the land but it really culminates at page 678 because, although they say at page 678 in the penultimate paragraph that the Court's decision in 1881 was unsafe for various reasons, they do note then in the last paragraph that because of Wi Pere's intervention, the 1881 decision did not take full effect so far as it effected Ngariki Kaiputahi's interests and saved them from the brunt of the judgment, and that was the steps that were taken by Wi Pere to include the rangatira from Ngariki Kaiputahi in the trusteeship arrangements in relation to the land. That leads to the way in which the Tribunal concluded this chapter at 694, 695.

Its findings start at 693 and the words I want to focus on, naturally enough, are at the bottom of 694 and the top of 695 where they say, having talked about all the problems, they say, that said, "We are unable now to say what rights would have been allocated if Ngariki Kaiputahi had been able to properly re-argue their case. It's certainly too late to argue for a re-arrangement of rights in Mangatu. Our jurisdiction is also constrained. The Tribunal is unable to make recommendations effecting private land which includes Māori-owned land such as Mangatu Incorporations. The same logic applied to Pakeha freehold land must apply to Māori-owned land and new injustice should not be generated to correct the past and justice. What we can say is that the process by which relative interest were allocated was flawed,

all that is possible today is for the Crown to offer an apology to Ngariki Kaiputahi and to compensation for the significant mana and practical loss suffered by them", and you'll see that that is what is repeated in the summary of conclusions when we come to the end. So that's without in any way understating the history of the Native Land Courts association with this block. That's where the Tribunal reached its position on this report.

Then the next chapter is the Mangatu Afforestation chapter which deals with the 1961 acquisition and you'll see it starts – there's the opening quote which gives you the flavour of it, the representation that was being talked about was the protection rather than a productive forest and the lengthy negotiations and pressures that led to the sale. I can, again, take you to the findings which are on page 733. Findings, paragraph 15.5.4, "It's clear that the Crown's conduct in the negotiations over the acquisition of the Mangatu Forest has failed to comply with the required Treaty standard. The owners did not want to sell. The conduct and negotiation processes were uneven. The owners didn't feel they were being fully informed. Owners sold because the Crown offered them no other option. The Crown was far from scrupulously fair, even-handed and honest. Quite the reverse. There appeared to be no serious consideration of the alternatives to sale. We find, therefore, that the Crown failed to act reasonably and with the utmost good faith when it acquired the Mangatu forest lands from the Māori owners. The Crown breached the principles of the Treaty of Waitangi accordingly."

Now, it's very important to notice here the Māori owners' reference, because when we come through to the relief section, you'll see it isn't done in terms of owners, it refers to mahariki and the owners here, in terms of the finding of well-founded, can only be Mangatu Incorporation. They were the owners. They were the ones that were taken but because the Tribunal's approach in this case always envisaged that there would be settlement negotiations as the means of resolution, then as Mr Bennion's submissions so clearly demonstrate, at the beginning of the exercise it was focussing upon the entities whom would be, as it were, the collectives, the groups that would be the subject of settlement and one group of those was the group that are then

referred to in the finding for relief because the Crown say in their submissions that there's never been a finding in favour of Mangatu. They say well-founded in relation to – I'll show you the words in the healing chapter. You'll find it on page 748.

If you look at 747, 748 these are the summaries in the healing chapter of the findings in relation to those two chapters. You'll see the, at the top of page 748 the summary of what I read to you from the, how it's inappropriate to upset relative hapū interests in the lands and then in Mangatu forest, you'll see the summary and then the closing statement, Te Aitanga ā Mahaki were directly effected by these matters.

Now, that's not Mangatu Incorporation. That is, if you look at the chart that is annexed as exhibit or as tab 26 to the pink bundle, the Mahaki cluster. A much larger group than the asterix hapū who have mana whenua in relation to the land. So it was a deliberate act of the Tribunal there in that summary not to refer to the owners because - the reference there is not the owners that is being referred to at the conclusion of the chapter on the Mangatu afforestation.

Now, on the hearing that we seek to have before the Waitangi Tribunal in terms of resumption, how many of those choose to come and argue that they have the association that they should be the Māori to be identified, et cetera. That remains to be seen but for the Crown in its submissions to say that there's been no finding that it's well-founded in relation to Mangatu Incorporation rather understates or doesn't sufficiently describe the real basis upon which the Tribunal have wanted to explain their decision.

Now, chapter 16 is called "The Healing" and that starts at paragraph 75, but before I turn to that, I want to draw attention to the transmittal letter and to look at that you'll need to look at the first volume and the transmittal letter is a very short letter that is immediately before the executive summary. It's at, it would be page xiii and in this transmittal letter, the first substantive paragraph beginning, "As you know" refers to the new form of enquiry process that was

trialled in the Tūranga enquiry, which was an intensive eight week – the whole region being dealt with in this timeframe and then over on the second page is the relevant point. The long first paragraph says, "We have made no general recommendations in respect of possible settlements. We prefer instead to leave it to the parties to construct settlements which represent their choices rather than ours, although it was always open to claimants or the Crown to seek further assistance from us if that is desired. We've given some thought to relativities between claimant groups and our views in that matter can be found in chapter 16." They're intended to do no more than provide an independent guide in the hope that this will assist the parties to focus on the real issues in negotiation, such as the overall quantum for the district, because this is vital in terms of the argument that my learned friend, Ms Feint, will be presenting to you about the conclusion of Judge Clark that the Tribunal had embarked on and dealt with the remedies issue.

Against that context, then we come to look again at the healing chapter, chapter 16 on page 735 starts by saying, "We begin this concluding chapter by drawing together the key themes in the report. Three important ideals: rule of law," which is, we resonate with of course; "just and good government and the protection of Māori autonomy." Then they go on to express frustration at the ignorance in local communities et cetera and then they say, "We then turn to address matters relating to future negotiations. We offer our view of who the Crown should negotiate with, the comparative size of the Tūranga claims that are well-founded, and the relativities between the claimant groups in Tūranga."

Then over to page 741, the heading "Who can settle". And this is a critical point because it was the Crown that requested the Tribunal to provide guidance to the parties on the level at which settlement should be made and the groups which the Crown should engage. And that advice about the groups with whom the Crown should engage, I really ask you to note again that comment in 136 and the distinction the Tribunal itself draws between the guidance it can give as the intervener who's heard the inquiry on the one hand, and the distinct duty to identify Māori for the purposes of the binding

recommendation jurisdiction on the other. So the Tribunal says, "We're prepared to offer our view on these issues. We do so with considerable caution and in the knowledge that the political landscape extant when we completed our inquiries in 2002, may have shifted somewhat –"

ELIAS CJ:

Sorry, where are you?

MR BROWN QC:

I'm on the top of page 741.

ELIAS CJ:

Thank you.

MR BROWN QC:

We do so with considerable caution," is line 3, "in the knowledge that the political landscape, extant when we completed our hearings in 2002, may have shifted somewhat. We therefore restrict our comments to general observations and first principles." And then they talk about the co-operation. This was the co-operation of dealing with the, the sort of the claimant groups collectively and it says, four lines down, "We do not here seek to diminish in any way the important distinctions between claimant groups but district-wide co-operation was achieved in Tūranga to an unprecedented level." And that's certainly true but of course it's biting back when you come to deal with the issues we're dealing with.

And then they go down, the final paragraph on that page, it said, "It would still be our preference, and n o doubt the Crown's, for the claimant iwi and hapū to negotiate the settlement of the Tūranga claims in a single district-wide negotiation process if that is at all feasible. The advantage of this approach to the Crown and claimants are obvious and significant," and sets out those advantages and the, "Disputes over dividing the pie can be resolved more easily by using collective efforts to enlarge it first."

And then on the next page, "That is not to say that a single negotiation would produce a single settlement package… fully expect a single negotiation to result in the creation of several settlement packages. It's the single negotiation that produces the advantages, not necessarily the single settlement. Whether it's feasible we cannot say."

And then they turn to the particular groups and then you'll see the three, the structure, the three large groupings that they recognised. Te Aitanga-ā-Mahaki, Rongowhakaata and Ngai Tamanuhiri, and they're the ones, it's in those diagrams at 25 and 26 in the pink volume. And they then suggest for each of them a percentage of interest. You'll actually see this, if you come over to, right over to the, page 750 you'll find, "Relativities." They say, "In an effort to encourage the claimants to focus on the overall value of a Tūranga settlement rather than engage in divisive internal competition over comparative settlement values, we cautiously suggest the following division in the overall settlement for Tūranga. Te Aitanga-ā-Mahaki: 46 percent. Rongowhakaata, 36 percent and then Ngai Tamanuhiri, 18 percent." And you can, in my submission it's in that context then that if you come back to page 748 you can see why the Tribunal would refer not to the owners, not under 16.6.10 Mangatu forest, not to the owners of the forest, but to Te Aitanga-ā-Mahaki, because that's the collective settlement group that they are envisaging being involved. If they were addressing it in terms of a resumption application and identifying the group of Māori it would not be that large grouping. So that's the context –

ELIAS CJ:

Well it could be though?

MR BROWN QC:

Well it could be, yes, in theory it could be although working from the chart at, under tab 26, the groups named in the Land Court judgments as having customary interests in the Mangatu No 1 Block were the asterix 4. Ngāti Wahia, Ngariki, Te Whānau a Taupara and Ngariki Kaiputahi and that's, they're the ones who Mr Haronga says, in his declaration, are the hapū with

mana whenua in relation to the block. So that's what it comes down to when it gets into the Tribunal hearing. So yes in theory Your Honour it could but in practice, in my submission, it wouldn't.

McGRATH J:

Mr Brown, are you saying at page 750, the first bullet point under "Relativities" that's as close as it gets? That's as close as the Mangatu Incorporation gets to getting specific recognition?

MR BROWN QC:

Yes. At –

McGRATH J:

The first bullet point on page 750?

MR BROWN QC:

Well yes, that's the –

McGRATH J:

As part of the 36 percent?

MR BROWN QC:

Oh yes that's right, yes, that's right. 46 percent Your Honour. Well yes, with the –

McGRATH J:

There are some subtractions which I assumed did not relate to the Incorporation. Is that correct?

MR BROWN QC:

Yes it is. And the, the best I understand you the most explicit recognition of them is in relation to the conclusion at the end of the afforestation chapter when the Māori owners are referred to which, if I read the chapter all the way through, which of course I haven't, is and can only be a reference to

Mangatu Incorporation. They were the owners from which it came. Now this is.

McGRATH J:

Yes.

MR BROWN QC:

Now this is, this may be helpful, it may be creative but this is what the Tribunal has done in response to a request from the Crown that the Crown gives the Tribunal some indications as to how the settlement which the Crown – which the Tribunal are going to leave the Crown claimants to deal with and that's the context to say that it had been revisited and which the Judge Clark was addressing this question of his second point.

TIPPING J:

The level at which settlements should be made and the groups with which the Crown should engage presumably the focus here is not on the ultimate level, is it more on the division of the pie?

MR BROWN QC:

Yes, that's right. The Tribunal is saying if you negotiate as one group you'll get a bigger pie. That maybe good advice but – and here are some percentages that we think that the pie would be cut into and we say well that's all very well and if you've got a situation where everyone's negotiating happily and whatever but, you know my argument about ring fence and the like, we want to have the determination and the trouble is this may be, may be a sort of constructive position from the, as we say, from the Crown's policy perspective and large natural groupings, settlements being final, legislation to pass, but it is absolutely inconsistent with the exercise of the jurisdiction, of the resumption jurisdiction, if it's to be effective as it was intended to be, it just can't fit because it said the very, you would say, and I'm not putting a case against myself, but you would say the sort of divisiveness and the like that has been talked about preventing here, you would say is the antithesis of the duty to identify a Māori to whom land would be returned under section 8HB(1)(a).

Now the last, the very last point is back in volume 1 at page 7 is the difference between mandate. There is a passage that the Court should be aware of. On page 5 there's a heading called "Inquiring into Mandate." And at the bottom of page 5 it says, the last line, "We were aware of the difficulties caused to hearings on some occasions by tribal boundary disputes or lack of agreement over mandate. Clarification of these disputes, how they would be dealt with so as to avoid their becoming a focus in the inquiry, and how they could be resolved before settlement negotiations commenced were matters which had to be dealt with early."

So the envisaged end game of settlement negotiation dictate the beginning. There was a sort of, without being too sort of evocative, sort of a settlement negotiation, sort of vortex in terms of where this would conclude and having said that there's the discussion on page 7 about mandate and this is important when we see, we see the paragraph that says, "What we saw and heard in Tūranga is that mandate for inquiry and negotiations is a complex and subtle thing. There is, of course, a difference between the mandate required to bring a claim before the Waitangi Tribunal and the mandate required to proceed to settlement with the Crown. Any individual Māori can make claims to the Tribunal. Conversely, the Crown wishes to settle with 'large natural groupings'. The political reality, however, is that inquiry mandate and negotiation mandate are closely related." Well it may or may not be the political reality but it's a problem in terms of section 8HB(1).

And then they say, "During the inquiry process, we saw both an evolution of and a demonstration of mandate. The very fact that communities mobilised to prepare claims and host inquiries." The host inquiries is a point because one of the hearings was held at the Mangatu Incorporation premises. They were facilitating, they were there but this is the report that comes out in 2004 and then developments since the year after that, that Mr Haronga talks about the anxiety about the recovery of the land and the lack of ring fencing and the like and the agreement in principle and the option to purchase and so on.

McGRATH J:

I must say that this passage which is featured in the submissions at page 7 is one I've had difficulty understanding.

MR BROWN QC:

Yes well it's interesting the different levels of the system that are focused on this. I mean Justice Clifford engages in, I would respectfully submit, is quite a sophisticated analysis of the political dimension and the relation and all the rest of it but it's not, at the end of the day it's not interpreting the law and interpreting the statutory obligation and the resolution of Crown policy with Treaty practice. What we're here about, and Te Kooti I think would be probably sort of smile upon us, and we say use the law unto the law. We're here to try and establish what the obligations are in terms of that part of the statute which it may be that 21 years on it's proving an embarrassment. It may be proving an anxiety or a – but it continues to be the law and in my submission I drew attention to that passage at page 7 because of how uncomfortably, in my submission, it sits with the, that issue. Because in the words of the Act, and it applies to section 8HB(1) as much as 6(3), there can be one Māori making application for resumption. The Act, neither the Act nor the Treaty recognise the concept of large natural groups.

ELIAS CJ:

Well there's nothing uncomfortable about this if it is, if its limits are understood and if settlement in the absence of any other suggested legal compulsion or legally imposed framework remains a voluntary exercise.

MR BROWN QC:

Absolutely.

ELIAS CJ:

Because anyone can withdraw otherwise you really need to, or the Crown really needs to point to some compulsion, some power that causes them to be stuck with the result negotiated.

MR BROWN QC:

Indeed.

ELIAS CJ:

It may be that there's some sort of estoppel argument that could be run, I'm not sure, but we're not into any of that here. But just using the word "mandate" is really very, it sort of obscures what process we're involved in here.

MR BROWN QC:

Yes and that's particularly telling, Your Honour, in terms of how the Crown, in a series of letters, and I don't think there's really time to go there, but in the latter part of the second yellow volume there's the sequence of correspondence, of which I've taken you to one example, that is the proposal by the settlement body to the Crown to work this out and the Crown says, well there's a mandate we've received. You've decided it but we've received, from the bigger group and you'll find my learned friend's submissions say that we haven't withdrawn from the mandate. Well that is, that is not accepted and indeed the declaration of – or the affidavit of Mr Haronga, which I'm just seeking to put my finger on, says that they have withdrawn from – have withdrawn mandate so far as the Mangatu block is concerned and how one could possibly say that they haven't withdrawn he mandate when they've applied via their separate claim, which they had to, because of Mr Ruru being the main claimant in the other one. They've twice applied for urgent remedies. I think there seems to be a proposition that if you can only withdraw from mandate, if perhaps you go around all the mandated, all the groups and get everyone to agree that you have withdrawn, this elusive statement of we haven't withdrawn our mandate, that needs to be, if not interrogated, regarded with a certain degree of care as to what it imports in the same way as it's said that we, or the Crown will broker with Mangatu Incorporation. It certainly won't. It will broker with a group that it says holds the mandate for all the group. And that's the problem with these words. It's sad how so many words we've dealt with, mandate, well-founded, successful, they're all – behind them are strands of meaning.

Anyway the –

TIPPING J:

There is nothing in the legislation which says once you've given your mandate you're stuck with it?

MR BROWN QC:

No. There's nothing in the legislation that says give the mandate but no absolutely not.

TIPPING J:

Well that's just the ordinary laws, if you're going to be legalistic about it, the laws agency I would have thought.

MR BROWN QC:

Yes, yes, I suppose that's right, although –

YOUNG J:

It's not quite that because actually they're not a complete agency, a complete mandate is not required by the Crown, they're simply saying we're looking for a broad consensus on the basis of which the legislature will legislate.

MR BROWN QC:

Yes and the Crown –

TIPPING J:

A sufficient to be – sufficient for legislative purposes –

MR BROWN QC:

Yes.

TIPPING J:

– in other words –

YOUNG J:

But it's a political concept.

MR BROWN QC:

Yes.

TIPPING J:

You're not, sort of, doing anyone directly in the eye.

MR BROWN QC:

And the Crown says we won't investigate, you'd say who's got the mandate. In fact it's a – my learned friend represents an unincorporated –

TIPPING J:

Of course you can do anything by legislation but until the legislation is there the law must take its course.

MR BROWN QC:

Indeed, otherwise we're in a *Fitzgerald v Muldoon* situation.

ELIAS CJ:

The – I didn't write down *Fitzgerald v Muldoon* on one of these bits of pieces but the Crown, however, can choose who it's going to negotiate with.

MR BROWN QC:

Yes.

ELIAS CJ:

And can decline to negotiate with those it doesn't think has the – have the mandate or are outside the mandated group but maybe the flip side of that, I suppose your submission is that then you really do need the Tribunal to come in and exercise its powers or to permit people to make application to the Tribunal.

MR BROWN QC:

Well that's, Your Honour's hit it exactly on point, because that's where the Tribunal's policy of the circuit breaker policy bites because we have the, we have the Crown's policy of large natural groups, but we have the Tribunal's policy, we call it, or Justice Clifford called it, the circuit breaker policy, where they, the Tribunal will not intervene while negotiations are on foot or have not broken down. But it's with whom the negotiations are and – so we say well here's the, this is the, sort of the kaleidoscope. The Crown's policy large natural group. Tribunal's policy, circuit breaker policy, we won't intervene while the Crown and others say no it's no fine. Clause 6 says no separate discrete criteria in relation to land and coupled with that, if it is the law, that the Tribunal is not required to grasp the resumption application so that's why we say at the end of the submission, and slightly emotively, that Mangatu Incorporation is stymied. Where can one go? It's the circuit breaker policy that we seek to review in terms of, we can't control what the Crown does, but certainly what the Tribunal does can be controlled and that is why when you come to that decision of, and it might be a convenient time to go to it now, the decision of Judge Clark under tab 6 of the green volume.

We got as far, bearing in mind this is all happening in a telephone conference, a telephone judicial conference, but we got as far as really page 29 of the volume where you recall I'd asked you to look at paragraph 51 where he said he's, he's sort of more influenced by the deputy chairman's guideline comments. That is the paragraph that follows the paragraph where he said, "It's a finely balanced and difficult application to decide, attracted by the simplicity and the complication of the offer to Te Pou a Haokai then we get the three headings. A, The Tribunal has already considered and made recommendations to settlement. That will be Ms Feint's submission. Secondly, on the next page –

ELIAS CJ:

But you say, no, it hasn't?

MR BROWN QC:

That's right, hasn't embarked upon it. Secondly, negotiations with the Crown are not broken down. This is the –

ELIAS CJ:

It begs the question.

MR BROWN QC:

Yes.

ELIAS CJ:

Really, doesn't it? It assumes that it's the negotiations with the wider group.

MR BROWN QC:

It is, of course, but that's the second one and then the third one is the prejudice to the shareholders and the passages that my learned friend in their arguments rely upon, and it's the circuit breaker one that I'm challenging as the first of the irrelevant considerations but the structure of our attack on this judgment is fourfold, as to say that there's the, as I said to Justice Tipping this morning, there's a lack of taking into account a relevant consideration that is via the clause 6 provision and then there's the taking into account of irrelevant considerations, that is, the not of the circuit breaker policy and the settlement negotiations haven't broken down, and that's where we say that the Judge went wrong.

I think I've really dealt with the relevant consideration points sufficiently enough. I think if my learned friends want to press that, they will take you to the part of the judgment where they say that either weight has been given to the fact that it is a resumption application or they say it isn't required. In relation to the irrelevant considerations, our submissions on this and on this part of the argument, I'm happy to say and you'll probably be relieved to hear that the written really is, captures what I want to say and if you come to page 15 of our written submissions, you'll see I've referred to, in paragraph 51 to the first part of Clark J's decision. In paragraph 52 to the clause 6, for the

avoidance of doubt and the failure to take into account a relevant consideration. I may be chancing my arm a little bit referring to the Thames Valley decision of where the then president referred to a relative factor of great importance. I appreciate that relative weight is frowned upon currently I think in judicial review, but in my submission, there can be cases where factors have a particular significance such that they definitely require weight and in my submission that –

ELIAS CJ:

Well, otherwise it would be an unreasonable decision.

MR BROWN QC:

Yes. Well you see, that's the – there could not be a better coupling in my submission and the clause 6 and the resumption jurisdiction but then in 54, then I refer to the three ways in which, what we call, are three headline factors and I want now to move to the confluence of the large natural group settlement policy and the circuit breaker policy. We can see if we just go through these paragraphs because it's the Court of Appeal who seem to accept this was adequate. So 57, "It's the appellant's contention that in very material part the vacuum of the exercise of jurisdiction," which I referred to earlier as occasion, "by the interplay of circumstances, the confluence of the Crown settlement policy, the Tribunal circuit breaker policy which combined to ensure that Crown forest land resumption claimants cannot practically obtain access to the Tribunal's adjudicatory role and thereby secure a binding recommendation."

That interplay is demonstrably apparent in the context of the claim by Mangatu Incorporation. Although we say has a well-founded claim, well, to put it passively, if you want to recognise the way in which the Tribunal was phrasing it in terms of the healings, that there is a claim that is being held to be well-founded, just whosever it is and although Mangatu was undoubtedly the entity deprived of the '61 land doesn't meet the requirement. And we say in 59, "Unless the Tribunal is prepared to recognise that claims by Māori claimants for resumption that have already been held to be well-founded and

not subsumed in the freeze-frame, which is this conjunction of policies, then it will be impossible for claimants like Mangatu to secure binding recommendations. The only possible portal which might conceivably have been afforded access, that is the resumption jurisdiction is effectively closed by those policies and clause 6.

Now, the Court of Appeal's attitude to the circuit breaker policy was, in my submission, restrained. The Court said that, and perhaps I should take you to this part of the Court's decision and it's under, in the same volume under tab 12, paragraph 47 on page 116. They say, "Contrary to the appellant's submissions, the Judge was entitled to consider the state of negotiations, accept a blanket refusal to consider making resumption orders because of broader settlement discussions may be problematic, that is, an inflexible circuit breaker only approach may be objectionable, but Judge Clark did not refuse to grant the application simply because settlement discussions were underway, did not take an inflexible or formalistic approach delved more deeply considering which groups were involved. The prejudice of those with interests in '61, the mandate arrangements, the substance of what was happening."

To that we say, well, he may well have explored it but it was still within the context of the confines of the large natural group and one only has to look at the paragraphs of his judgment, these are in the same volume at page 30, to see that he applied the policy. Paragraphs 55, 56 and 57, he refers to the occasions where the Tribunal has held remedies hearings, the Turangi Township and to Te Whanganui-a-Orotu Remedies Reports said, "Effectively the intervention of the Tribunal was sought as a circuit breaker. That is not the case in Turanganui-a-Kiwa. Negotiations far from having broken down are moving apace with a deed of settlement likely to be signed by December 2009. Mangatu are not involved in the negotiation process directly." It says they don't seek a mandate to specifically negotiate.

ELIAS CJ:

Well, I must say that I would have thought that the circuit breaker policy which you are criticising, in fact, is one that can be pressed to your aid in submissions, so I'm a little bit – perhaps I'm being a bit simplistic about it but I would have thought that the Crown is refusing to negotiate about the return of this block to the former owners and so, therefore, negotiations have broken down. They're just looking at the – they're just not looking at it in that way. They're looking at the formal fact that negotiations with a wider group are continuing.

MR BROWN QC:

Yes, that's what we are saying and if you look at the paragraph where he then decides, he says the rest of it, he says, "Their concerns more than asset which once belong to them should be returned." However, the point remains, the negotiation process has not stalled nor broken down thus the invention of the Tribunal intervention is not required in that sense so what we're criticising is his application saying no circuit needs to be broken here.

TIPPING J:

Well, the negotiations don't include your client as a separate party or –

MR BROWN QC:

That's right.

TIPPING J:

That's really another way of putting it, I think both your point and the Chief Justice's point. But the statute, presumably, once you get to the point of moving on to negotiations, the 90 day stuff, they have to be meaningful negotiations, in other words, negotiations that engage the party that would otherwise be claiming for relief.

MR BROWN QC:

Yes, because we've got, anywhere near that. I mean this – we can't get to the 90 day negotiations until we have a resumption order at a hearing to consider

it which is presently being declined, so this is a conclusion that is reached because the Judge is prepared to treat the group that the Crown regards as a large natural group as the one used as the measure of whether negotiations have broken down.

TIPPING J:

This comes under the heading of "deferring", the Crown preferred approach in negotiations. Now, I only put it that way for demonstration. I'm not implying a view of it.

MR BROWN QC:

No, I quite understand.

TIPPING J:

But that's effectively your point, isn't it?

MR BROWN QC:

It is our point.

McGRATH J:

We've got here, have we not, competing claimants to the area of land. There's a lot of common in the two claimants, if one looks at the people behind them but they're different in terms of their institutional nature, perhaps if I can put it that way and the Crown's quite happy to seed in the settlement the land which both are claiming but what the Crown, and this is your complete, is not engaging with, is which of the two institutions is entitled to have the land in the settlement?

MR BROWN QC:

That's right and the Crown says that –

McGRATH J:

And you're saying the statute clearly enables the Tribunal to decide that in terms of the statutory scheme –

MR BROWN QC:

That's right.

McGRATH J:

But unless you act, unless someone acts now, that right's going to be taken away?

MR BROWN QC:

Exactly, that's the nub of it.

TIPPING J:

Well, if the Crown –

McGRATH J:

When you say there's no dispute, negotiations haven't broken down, it maybe correct to say that the Crown's got no problem with seeding the land. There's no issue about that at all but what the Crown's not going to do, willingly it seems, is engage in which of the two institutions claiming this land, both of whom are backed largely by the same people, is legitimately to be preferred.

MR BROWN QC:

I think the Crown's position begins and ends by saying there is an agreement in principle that has land that the group who will ratify can select or not some of this forest land. If you don't select it, it doesn't worry us because the land will be available for the Crown to use in settlements in other cases, but we're saying that it will never have been determined that the Crown should have the land. We say that if we're right and as a resumption application, under section 36, the land should have come back to us and the land would not be within the bundle of assets that the Tribunal is even treating with a negotiating group. It assumes. It assumes, as the legislation almost certainly will say, are deeming, that there has been a finding by the Tribunal either for claimants or for the Crown depending upon which election is made in the settlement.

But we say it all comes back before then and we say that where you have a group that says the land is ours and should be returned to us, and there's the statutory route then you just can't turn off that escalator or not open that door by saying, well, it doesn't matter, we're negotiating with this group, negotiations haven't broken down, the owners will be beneficiaries in various ways in another capacity and if you don't select it, then it's ours. I mean, how on earth that sits with section 35(2) when they're not supposed to dispose of things until there's been a finding and what it's supposed to do with the rentals that are supposed to sit in the trust until there's been a recommendation, I don't know.

ELIAS CJ:

Well, I was going to say it's more than just who the land will go to, it seems to me. It's the manner in which the land is used and the way in which it comes back is also important, not only because of the additional benefits but because of the distinct Treaty breach in relation to the 1961 taking.

MR BROWN QC:

Absolutely.

ELIAS CJ:

Which otherwise doesn't get distinctly acknowledged.

MR BROWN QC:

Yes, and that's not a durable lasting settlement for the Crown. It's understandable the Minister would write the letters back and there are several of them saying it's internal process, you know, sort it out amongst yourselves. Well, you know, facilitate if we can but that's not durable, but as we've seen from the Fletcher affidavit, the moment the legislation is past, then the jurisdiction of the Court, the Tribunal gone, that's it, it's over. So we say that it's – whatever the Court of Appeal may have thought about how good a process Clark J engage with, he did apply the circuit breaker policy in the sense of saying, "Well, I don't need – we can't go there, still on foot" and he'll be told that until settlement because, he'll be told that because the Crown say,

"We're dealing with Te Whaka" and my learned friend will say, "We're the ones to deal with" and, as I say, unless we can break that deadlock by the application then that follows night, follows day.

TIPPING J:

Well, they can deal with whoever they please, can't they, Mr Brown?

MR BROWN QC:

Who?

TIPPING J:

The Crown?

MR BROWN QC:

Yes.

TIPPING J:

But the argument is that their choice shouldn't dictate who gets it –

MR BROWN QC:

That's right.

TIPPING J:

And that is effectively, you say, what is happening here?

MR BROWN QC:

That's right and we have a –

TIPPING J:

The Tribunal decides who gets it, not the Crown by a perfectly legitimate choice of who they're going to negotiate with.

MR BROWN QC:

That's right and we have a conflicted Tribunal who's sitting there at the one hand saying, "I don't need to intervene because settlement negotiations are going on and I'm not going to move into my resumption jurisdiction mode" and it's the only body who can. It's the only one who's statutory authorised to deal with that.

ELIAS CJ:

Isn't it rather that they shouldn't be precluded from the opportunity to have their statutory claim heard rather than the land should – I mean, the ultimate decision may be quite different –

MR BROWN QC:

I put it too high. I agree entirely. It's really the loss of the statutory chance. It might be a simple way to categorise it actually. It's a loss of a statutory chance which no one can, ought to deprive you of.

MR BROWN QC:

Yes, well, I think that chance looks at it from the losing side. I would prefer to look at it from the other side and is appropriate when we're doing so in terms of Courts and obligations in saying, we're missing the chance because the Tribunal is not observing a duty.

TIPPING J:

Well, "chance" is not a very happy word. "Opportunity" is probably a better word.

MR BROWN QC:

Yes. Well, if it was a (inaudible 15:27:01) analysis and the Tribunal had a duty to hear it, we'd be losing a right and it's pretty close to where Justice Baragwanath was stating it in there.

TIPPING J:

It doesn't have to be a right.

MR BROWN QC:

No.

TIPPING J:

It just has to be a statutory opportunity that the procedural ruling is denying you –

MR BROWN QC:

That's right.

McGRATH J:

It's a right to a hearing.

ELIAS CJ:

Yes, a right that you –

MR BROWN QC:

Yes, it's a right to a hearing and I'm now –

TIPPING J:

Which may lead somewhere advantageous, it may not.

MR BROWN QC:

And as soon as I get a right to hear I'm trespassing into my learned friend's argument but, yes, that's the way it goes and the Tribunal is, it's the flip side – as soon as it says, one it's operating a circuit breaker policy, it's not dealing with its statutory obligation, duty, whatever, call it what you will, but there they are with those conflicting problems and they – it's even reflected back at 136, as I think he and I said, where it talks about advising the Crown as to who to settle with as opposed to the duty to identify the Māori that should be the recipients of any returned land.

ELIAS CJ:

Mr Brown, should we perhaps move on or have you – I was just thinking that it would be good to get Ms Feint underway?

MR BROWN QC:

Yes, well, the rest of my submission, Your Honour, is really set out in the paragraphs 56 to 69. There is really nothing that I would wish to add to that in the sense – no, I think that happily it's all collected there as you probably would expect it, it should be. The only thing I would say is that counsel's, the Crown's argument I think is captured, if I might leave it on this basis, in paragraph 8 of its submission. This is how it typifies it when it says on page 2, the last sentence, "Suffice for present purposes to record, the Tribunal has ultimately decided that there is no benefit to be obtained in entertaining the appellant's claims for resumption."

It's an interesting statement in terms of benefit. In my mind, it rather suggests the Crown's perspective but that seems to capture all of those matters, the circuit breaker policy and the resumption or the declining to embark on the resumption exercise but, thank you Your Honours, and I would be very grateful to have Ms Feint be heard now on the third issue. I have also asked her if she wishes to deal with the relief issues at the end. We've got a very brief point about *Fiordland Venison v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA), the orders that you would make if you – that anticipates rather much and I think it's better to just deal with the argument. Thank you Your Honours.

MS FEINT:

May it please the Court. My submission focuses on the third limb of our argument which is the issue relating to whether or not Judge Clark erroneously considered the Tribunal had already considered remedies and dealt with them and that moves into an argument about natural justice and whether the appellant has, in effect, already had its day in Court.

The Courts below, and the Crown in this hearing, say that there's no breach of natural justice in this context. They say that the Tribunal have considered whether to issue recommendations on the claim decided not to and instead recommended that the claimants and the Crown enter into negotiations. So they say that there's no issue from a natural justice point of view because Mangatu has in effect already been heard.

The essence of the appellant's complaint, however, is that for all practical purposes the resumption application has been determined in substance by the procedural decision not to call a hearing. So I wanted to deal with the argument in two heads. The first that to examine whether the Judge was erroneous in deciding that the Tribunal had already discharged its remedies function and then secondly, to move look at the breach of natural justice issues.

So if we start with Judge Clark's decision which is in the green volume at tab 6 and I'd ask you to turn to page 29 and look at the way the Judge approached this issue. If you look at the heading at the bottom of the page, which Mr Brown has already referred you to, it says, "The Tribunal has already considered and made recommendations as to settlement." And then he goes on in paragraph 52 to say, "That the Tribunal recommended there should be a single district-wide negotiation process." Now the reference to the word "recommendation" is relevant because of the statutory jurisdiction under section 6(3) but if you go over the page to page 30 and look at the final paragraph in his analysis here, he seems to downgrade his initial view that there was a recommendation made because he starts using the language of settlement suggestions instead. In that first sentence of that last paragraph he says, "It's unlikely that the Tūranga Tribunal, faced with this information, would now change its settlement suggestions." And his analysis is interesting because he's anticipating the ultimate failure of the application if Mr Haronga was to proceed he seems to think that there's no point in hearing the application because the Tribunal had already considered the matter and made its mind up and there is therefore no value to be had in revisiting the issue which we would suggest carries with it a strong element of determination but

the really critical thing, first of all, to establish is that the Tribunal, as my learned friend Mr Brown has already anticipated, did not get as far as embarking on a remedies inquiry in our submission.

So although Judge Clark's language is somewhat ambivalent, both the High Court and the Court of Appeal below picked up on his language to do with recommendations and the High Court said at paragraph 109 of its judgment, which is on page 93 –

ELIAS CJ:

Isn't it more important to look at the, what the Waitangi Tribunal said than what the High Court thought – or we're really dealing with what Judge Clark thought they said and we've already been taken through what the Waitangi Tribunal did recommend. I would have thought the principal submission is that he's mischaracterised the recommendation. Is that right?

MS FEINT:

Yes that is exactly right Ma'am. We don't need to go through what the Courts below have said –

ELIAS CJ:

No, no. Take us to it if you think it would be helpful but that's the principal point that we have to consider, isn't it? Because if Judge Clark got it wrong it doesn't much matter what the High Court and Court of Appeal said if we accept that submission.

MS FEINT:

Yes well I suppose that's true. I mean the only reason I was directing you to what the Courts below said was because in our submission they took it one step further and said, well it's unnecessary in law to –

ELIAS CJ:

I see.

MS FEINT:

To hold a remedies hearing again because in effect the section 6(3) discretion has already been exercised.

ELIAS CJ:

I see. Well perhaps you should take us to it then?

McGRATH J:

That's really paragraph 110?

MS FEINT:

It's 109 of the High Court's judgment and then it's paragraph 48 of the Court of Appeal. So it's almost like they're saying that the Tribunal is functus officio because it has considered its discretion as to remedies if you call that a discretion at all but it's made a decision that it's not going to make recommendations on settlement. And we say that if you analyse the Tribunal's report it's clear that the Tribunal didn't embark on a consideration of remedies at all and the reason why it doesn't do that I think is best explained in the Remedies Guidelines that Judge Wainwright had issued which are found at tab 14. This is an important context before we consider the Tribunal's report.

If you turn to tab 14 of the pink volume, page 185, the deputy chairperson was explaining there why what had formerly been a sequential process that's anticipated by the Act, namely that the Tribunal enquires into whether or not there is a Treaty breach and then considers whether to make recommendations as to remedies. It was anticipated to be a sequential inquiry initially but that presupposed that the Tribunal was only considering one claim at a time and it then moved onto this district inquiry process and – so Her Honour says that, in that first paragraph about halfway down, she says, she draws attention to the district inquiry model and says that that's led to the grouping together of historical claims into a region for hearing all together. She says that the Tribunals have made a wide-ranging inquiry into issues arising in a district with corresponding wide-ranging findings.

The focus has been on making explicit the Crown's breaches of the Treaty and the prejudice that has resulted. Recommendations have tended not to be specific. Rather the parties, Crown and claimants are invited to use the Tribunal's findings as a basis for negotiating their own arrangements by way of settlement.

So in effect what's happened is that the Waitangi Tribunal, by reason of district inquiry model, is divorcing its inquiry function from its remedies function and it's not conducting them simultaneously. So with that context in mind we then look at what the Tribunal has done in its report, and my learned friend Mr Brown has taken you there already, but I'd remind you he said, he referred you to the Letter of Transmittal where it was made explicit by the Tribunal, "We have made no general recommendations in respect of possible settlements." So it didn't think that it had gone there at all. It hadn't even embarked on a consideration of whether it was going to make recommendations. It simply deferred the whole issue should claimants seek to invoke the leave that it had reserved. And that was referred to at, both in the Letter of Transmittal, which Mr Brown has already read I think. It says, that it's always open to claimants or the Crown to seek further assistance from us if that's desired." Then at page 751 on the second volume of its report that is repeated, "Leave is reserved to all claimant and Crown parties to apply for further direction if necessary."

So our submission is that it's quite clear, both from the context of the district inquiry model which divorces the inquiry function from the remedies function and what the Tribunal actually said in its report, that it never embarked on a consideration of whether to make recommendations or not. So in that sense we can conclude that it didn't embark on that inquiry and I think that follows, as we say in our submissions at paragraph 88, that if it had, in fact, made recommendations that the Crown and claimants embark on settlement negotiations, there would be a sense that it was functus officio and that there wouldn't be any need to preserve leave for the claimants to return should they seek to invoke the remedies jurisdiction.

TIPPING J:

The very fact of using the word "recommendation" doesn't mean that they were actually making a recommendation as envisaged by the legislation. Is that the nub of your point?

MS FEINT:

Well they didn't use the word recommendation. They said we have made no general recommendation –

TIPPING J:

Sorry, the Judge used the word "recommendation" to start with.

MS FEINT:

Yes Judge – yes you're right Your Honour.

TIPPING J:

Yes, Judge Clark. I'm sorry, I didn't put that very well. He's used the word "recommendation" in a sense, or he's misunderstood what they were doing. That's effectively your submission? They weren't making a recommendation?

MS FEINT:

Yes.

BLANCHARD J:

I don't think he's saying that at all. I think he's just saying that they made some recommendations about how the parties should go about the negotiation process and because the Tribunal has taken a stance on that it's unlikely now to change its settlement suggestion. I'm not – it seems to be a non sequitur at that point but I suppose the more important question is, well is that a basis for saying you can't have a resumption hearing?

MS FEINT:

Well I think you're right. I think he may not have thought that the Tribunal had made recommendations but the use of that word confused matters and

certainly by the time it got to the High Court and the Court of Appeal the view that they took, and which they recorded in their judgments, was that it was unnecessary in law to hold a further remedies hearing. But our submission on the point is that if you set aside the question about whether the remedies function had been discharged and then examine his conclusion that it's unlikely that the Tūranga Tribunal would now change its views, we say that the Tribunal, for the reasons that my learned friend Mr Brown has already covered, the Tribunal is actually undertaking to provide advice on embarking on settlement suggestions, which is an entirely different jurisdiction and function from considering the resumption application.

ELIAS CJ:

Ms Feint, can you just give us an indication of where you want to take us with these submissions? I'm just trying to, as I indicated I'm going to have to stop sitting in five minutes and I just want to know whether you're really expanding on the submission, the written submissions, which of course we've read, or whether you want to get onto the remedies point?

MS FEINT:

I did want to expand on the written submissions.

ELIAS CJ:

Yes, that's fine.

MS FEINT:

In reference to the natural justice issues so that was where I intended –

TIPPING J:

Is this your resumption application determined by procedural ruling? That's what I imagined to be your second – is that what you're calling the natural justice point?

MS FEINT:

Yes.

TIPPING J:

Well it's self-evident that it did. I mean…

MS FEINT:

Well, yes.

TIPPING J:

I mean if things go as you anticipated you'll find it will never get to a substantive hearing. Is there something more subtle to it than that?

MS FEINT:

No I completely agree with you Your Honour but the reason we want to go there was because the Crown is saying that if you look at the Tribunal's decision in context it considered the whole context of what had already occurred with the Tribunal inquiry and what was occurring with the settlement negotiations and that that context means that it doesn't have to grant a hearing in order to fulfil the requirements of natural justice.

TIPPING J:

You mean the Crown in effect is saying they've already heard your resumption application in effect and rejected it? Because unless they can put it that high, they can hardly –

MS FEINT:

Well that is part of what they're saying but the other part of it is at page 21 of their submissions they say that fairness – they say first of all at 87.1 that the Judge, "Had a discretion as to whether the Tribunal needed to intervene by way of substantive hearing into a matter already the subject of Tribunal proceedings and negotiations that are the subject of the Tribunal's supervision."

And then at 87.3 they go on to say that, "Fairness does not require the Tribunal to entertain a substantive hearing, regardless of the context or

circumstances. In particular given that the substance of the appellant's claim is before the Tribunal and the Tribunal's recommended negotiations." They say that the Judge, "Was entitled to decide that the negotiation process ought to continue uninterrupted."

TIPPING J:

Well speaking for myself I don't think that addresses the issue.

MS FEINT:

I don't think it does either.

ELIAS CJ:

What point do you want to make in response to this? Is there a point, are you drawing our attention to the fact that it doesn't seem to meet the submission that you're putting forward. Do you want to take that any further?

MS FEINT:

Well this, the response was two-fold. The first, as I've already addressed, was that the Tribunal had not, in fact, made recommendations and there's become confusion from the use of the word "recommendation" in Judge Clark's decision but the second was to take further the issue about the substantive effect of the procedural decision essentially and to consider the section 27(1) of the Bill of Rights Act. We have also uncovered a High Court of Australia case which has some resonance on the issue as well.

TIPPING J:

It seems to me your argument is that you've been tossed out in substance without being heard. Am I right in – I'm just, I'm not saying that's the view I hold but is that, in effect, is your argument?

MS FEINT:

Yes, that's exactly right. We say that the crux of the issue is it wasn't simply a case management decision about priority, and whether to grant urgency or

not, but the effect of it is that we won't be there at all so there's going to be no hearing –

TIPPING J:

Well if you're right on that, that clearly should get you somewhere. One would have thought.

MS FEINT:

Yes well –

ELIAS CJ:

A long way perhaps.

TIPPING J:

But what more can be added to the proposition that in essence what has happened here is that you've been substantively denied on a purely procedural basis? I mean I'm not trying to depreciate your argument at all. Like the Chief Justice, I don't quite see where it's susceptible of much elaboration?

MS FEINT:

Well yes that, that maybe right. where I was going to go with it was to, I mean I do think that it's clear that if the effect of the decision is that you don't have a, you're not going to be heard because you're going to be overtaken by a settlement, then it's clear that there's a natural justice issue but where I wanted to go with that was to look at the statutory scheme and the fact that Judge Clark sitting as a presiding officer didn't have the power to make a decision on the resumption application although we say, in effect, that's what has occurred, for all practical purposes.

ELIAS CJ:

Do you mean that a Judge sitting alone couldn't exercise that authority?

MS FEINT:

Yes, that's right. It had to be a Tribunal which in terms of the Act means a full Tribunal panel.

ELIAS CJ:

All right. Well –

BLANCHARD J:

But then we'd be back to the first two arguments again if that full Tribunal panel came to the same conclusion. I'm not sure that this third ground really adds much. It points out the consequence but I'm not sure it stands on its own feet.

ELIAS CJ:

We will have to take the adjournment now. You mentioned that you had some authority that you wanted to refer us to. Do you want to give us that authority to look at overnight and perhaps in the light of what you've heard from the Bench when we resume in the morning you can meet the points that have been put to you by Justice Blanchard.

MS FEINT:

Thank you Your Honour, yes, I'll look at the submissions overnight and see whether there's anything further that we need to entertain.

ELIAS CJ:

Yes. the point about whether the Tribunal can, or whether the judge had authority to make the determination he made, is not one I would want to prevent your elaborating on shortly if that can be done. I haven't really appreciated it from the submissions that we've received but maybe I've just missed that. What is the authority, the High Court of Australia authority you want to refer to us?

MS FEINT:

It's referred to in the *Muriwhenua* decision which is in the bundle of authorities and it's called *Administrator of the Territory of Papua and New Guinea v Daera Guba* (1973) 13 CLR 353. I've brought copies today which I can hand up to the Bench now if that would be helpful?

ELIAS CJ:

Perhaps if you can give them to the registrar when we adjourn and we can have them distributed after Court. I'm very sorry but I have this commitment I cannot get out of but I'll have to take the adjournment now and we'll resume tomorrow at 10 o'clock.

COURT ADJOURNS: 3.54 PM

COURT RESUMES ON TUESDAY 12 OCTOBER 2010 AT 10.00 AM

MS FEINT:

Good morning. Overnight I have reduced the remainder of my submissions to seven, what I hope are pithy points that don't traverse any of the ground that my learned friend Mr Brown covered yesterday, so with your leave I'll proceed to cover those.

The first point is simply to reiterate that the reason that we have added natural justice as an additional ground is because we say that quite apart from the statutory interpretation argument, it is a ground that compels the Tribunal to hear the appellant's resumption application.

The second point is that we say that it is clear that section 27(1) of the Bill of Rights Act applies, and that the power to order resumption is a determination in respect of the appellant's rights and interests. Now I don't imagine that this is a controversial point, but I handed up the High Court of Australia decision *Daera Guba* yesterday because that is authority for our proposition. It was referred to in the *Muriwhenua* case and in that case the Court of Appeal had said that the general jurisdiction of the Tribunal does not involve determinations of right and it distinguished *Daera Guba* on the basis that that involved a statutory Land Board that did have jurisdiction to decide questions of ownership. Now in the *Daera Guba* case, if I ask you to look at that and I won't go through this at length, but simply to note the point that the case involved the determination of rights to wastelands in Papua New Guinea where there were disputes of ownership by indigenous Papuan and there was a land ordinance that provided for a statutory board to be appointed and interestingly the ordinance states, and it's on the cover page of the decision, that the board that is appointed to decide cases of disputed ownership of land, shall be guided by the principles of equity and good conscience and shall not be bound by rules of evidence or legal procedure. So in that respect the position of that statutory board is analogist in some ways to the jurisdiction of the Waitangi Tribunal which also is not bound by the rules of evidence in legal procedure and the question before the High Court was whether it was a

res judicata issue, whether the decision of the Land Board was binding, and I'll refer you to page 402 of the decision, because there the Court said towards the end of that page, it held that the decision of the Board was binding and it said this, "That the obligation to act judicially comes from the power to decide the rights of individuals. The Board was quite clearly a Tribunal which having power to decide such rights, was a body to which the prerogative writs would have gone. It was bound to observe the rules of natural justice even though it might act according to equity and good conscience and not be bound by rules of legal procedure." And so on and so forth. So, we simply put forward that decision as authority for the proposition that the binding powers of the Tribunal are a determination of rights under section 27(1) of the Bill of Rights Act.

ELIAS CJ:

You don't really need to go so far, because it's rights or interests recognised by law and there must be an interest in having the resumption application determined.

MS FEINT:

Yes, I would accept that. And as –

ELIAS CJ:

Even if it's not a right to resumption.

MS FEINT:

Well it's a right to seek –

ELIAS CJ:

Yes.

MS FEINT:

To apply for resumption I suppose. I would accept that and as Justice Glazebrook said in the *Combined Union Beneficiaries* case, even claimed rights or interests, for within and at a section 27.

The third point that I had is that the appellant submits that the scope of the right to natural justice is a right to a hearing on an urgent basis, and we say that that follows from the adjudicatory nature of the right as well as the statutory context and I'd point to for instance, section 8HD which concerns the rights of interested Māori to be heard, which we say anticipates a hearing. Again you might wonder why we even need to traverse what would appear to be obvious, but we are raising these issues, because by contrast the Crown is submitting that a negotiated outcome with Te Whakarau fulfils Mr Haronga's right to natural justice and they say that at paragraph 96 of their submissions.

The fourth point is the point I referred to yesterday concerning the rights of the distinguishing in the statutory scheme between powers of the full Tribunal sitting as a panel and that of the presiding officer sitting alone and that is referred to at paragraph 93 of my submissions. But I'd like to refer you to the Act on this, so if you take the bundle of authorities and look at the Treaty of Waitangi Act under tab 2, the Waitangi Tribunal is appointed pursuant to section 4 of the Act and that says in subsection (2) that the Tribunal consists of a Judge and not less than two other members and not more than 20 and interestingly (2A) it says that in considering the appointment of members to the panel, the Minister have regard to the partnership between the two parties to the Treaty. And in practice the Tribunal panels tend to be a mixture of Māori and Pakeha interests and as well as the presiding officer, who's a Judge, there's usually a range of other knowledge and expertise, such as experts in Tikanga Māori, historians and other people of standing in the community.

In schedule 2 of the Act at clause 5, that clause there refers to sittings of the Tribunal and it says in subsection (1) that the persons that constitute the Tribunal for the purposes of any sitting shall comprise the presiding officer who is either the chairperson of the Tribunal or a Judge of the Māori Land Court and then under (b) "Such other members of the Tribunal (being not less than two and not more than six) as are appointed." And you can see that under sub-paragraph 6 of that clause it says that power conferred on the

Tribunal are exercisable notwithstanding the absence from any sitting as long as you have at least the presiding officer and not less than two members present and one of those members has to be Māori.

So it follows from those provisions that for any of the full powers of the Tribunal to be exercised that has to be sitting, as that panel comprised of at least the presiding officer and two other members. Judge Clark was sitting pursuant to clause 8 of schedule 2 and there is in the green volume, the pleadings volume, the direction pursuant to which he was appointed, that's at tab 5 and that simply says, "That pursuant to clause 8(2) of the second schedule, the –

YOUNG J:

I've lost that, I was looking at clause 8 and where do we go from there?

ELIAS CJ:

Green volume.

MS FEINT:

Green volume, tab 5.

YOUNG J:

All right, thank you. Sorry.

MS FEINT:

Is the Tribunal direction delegating to Judge Clark the role of presiding officer in respect of the resumption application.

YOUNG J:

What's the consequence of him not granting urgent hearing? Does it just mean – when would it be heard absum, an urgent hearing direction? You say never I suppose?

MS FEINT:

Practically the consequences that the application is still extant but the way the procedure of the Tribunal works, it doesn't have a case management system like the standard track procedure of the High Court, so it wouldn't be brought on for hearing unless you apply effectively for priority, because the Tribunal –

YOUNG J:

So are all hearings that are heard, urgent?

MS FEINT:

No they're not, but the way the Tribunal works is it has its district inquiry programme, which it plans years in advance and that sweeps all the claims in a district into that inquiry to be heard, and those are scheduled by the Tribunal and all other claims, if they're contemporary claims, that fall outside a district inquiry, then in effect you have to obtain priority to have them heard because of the workload of the Tribunal. So –

YOUNG J:

Do you say this in substance with a deferral, a decision not to hear?

MS FEINT:

Well I say that had that practical effect, yes. But I don't think we can go as far as saying that it was a substantive decision to decline the resumption application.

TIPPING J:

But you say it wasn't a substantive decision to decline, but that its effect in the circumstances was as if it had been?

MS FEINT:

Yes that's precisely it.

YOUNG J:

So it's not the case where the Tribunal in substance is saying, well we're jolly busy now, but around 2012 we might fit this case in?

MS FEINT:

No, and in fact this application was filed over two years ago, in August 2008 and it hasn't been called for hearing, and as I said, the way the procedure works is because this was part of the Turanga inquiry and the report's already been issued, you have to invoke the leave of the Tribunal given under the report, and in effect you have to obtain urgency in order for it to be heard, to secure priority on the Tribunal's hearing programme.

ELIAS CJ:

The power to defer, which is in the statute isn't it? Weren't we taken to that yesterday?

MS FEINT:

Yes.

ELIAS CJ:

Is that a determination that could be made by the chairperson under clause 8(2)?

YOUNG J:

The answer I suppose is possibly. It might be under section 8(2)C, clause 8(2)C

MS FEINT:

Well I would –

ELIAS CJ:

I'll accept it is – that's why I raised the fact that it's a power, a substantive of power in the statute and whether the exercise of that power by the Tribunal is contemplated, I don't know, yes, it's not very clear.

MS FEINT:

Well it's the power of the Tribunal, so I mean my reading of the Act is that the substantive powers of the Tribunal have to be exercised by a Tribunal panel sitting as one under that clause 5, because if you look at –

ELIAS CJ:

So that arguably could include a deferral which in substance this may have been, but you wouldn't go so far as to say that a – that the chairperson of the Tribunal current exercising the powers in 8(2) decline an application for urgency, urgent hearing.

MS FEINT:

Sorry what, can you repeat that last part?

ELIAS CJ:

Well, the chairperson of the Tribunal can do anything that's preliminary or incidental to the hearing of any matter by a Tribunal, one would have thought that declining an application for urgency fixture would be within the powers of the chairperson in the ordinary course.

MS FEINT:

Yes, I think that's right. Or the presiding, the presiding officer was sitting under this clause –

YOUNG J:

What about a power to defer a hearing?

MS FEINT:

I think the –

YOUNG J:

Is that arguably within clause 8(2)(c)?

ELIAS CJ:

It's probably not clear is it? But I suppose the fact in your favour there is that it is a power conferred by the statute. Oh, I suppose this is too, this is in the schedule.

YOUNG J:

So is everything else, I think.

MS FEINT:

I would say not, because it seems to me you have to read this clause in light of clause C that it acts preliminary or incidental to the hearing of matters by the Tribunal, which is purely procedural as opposed to decisions having substantive effect.

ELIAS CJ:

Scheduling is procedural though, I mean scheduling is not a, on its face a disposal of the proceedings.

MS FEINT:

No, that's true, but –

TIPPING J:

Your argument has to rely, I would've thought, on the proposition of what's been put to you is the general situation, but if you have an unusual case like this, you can't, as it were, procedurally deny someone an effective hearing.

YOUNG J:

But that would apply whether it was the presiding officer that did it, or whether it was the Tribunal, so that the point about Judge Clark lacking power, because he sat alone, really doesn't have any force in it.

MS FEINT:

No, and we're not going that far, and in fact –

YOUNG J:

Mmm, but you were making that point.

MS FEINT:

Well I wasn't – perhaps I haven't expressed myself as clearly as I could have. We – I do accept it's putting it too high to say that he was acting ultra vires, but what we do say is that, and this really comes from the *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC) authority that was cited in our submissions that because he's exercising a gate-keeping function, that has a substantive impact in terms of shutting out the applicant from having his application heard, that a higher level of scrutiny is required.

TIPPING J:

Is that another – that's a separate point, it's got nothing to do with Judge Clark sitting alone.

MS FEINT:

Well it's –

BLANCHARD J:

You make the same point if he'd sat with two other members, you have to.

MS FEINT:

Yes that might be right.

ELIAS CJ:

Yes.

MS FEINT:

Yes, I accept that.

TIPPING J:

You're argument, you're over complicating it, is that no one could do this to your client.

MS FEINT:

Yes, even if –

YOUNG J:

Do you say it would be impossible for the Tribunal addressing fairly and squarely section 7(2) that it wouldn't be open to the Tribunal to make a decision to defer the hearing?

MS FEINT:

Yes, I do say that. Because that would breach his right to natural justice.

YOUNG J:

But isn't it just a right to have a hearing which is susceptible to deferral? I mean if the right is only a sort of feasible right to have a hearing subject to a deferral decision, then making a deferral decision is just part of the bundle of rights that the applicant has.

MS FEINT:

But if you make the deferral decision that has the effect of extinguishing his ability to ever have it heard.

TIPPING J:

This just shows what we were saying last night, that this natural justice point, very marginally adds, and I think – unless Mr Brown's argument is correct, I doubt your argument standing alone would get you home. Can you in a sentence, say why you'd get home on this if we don't accept Mr Brown's argument?

MS FEINT:

If we don't accept his argument –

TIPPING J:

Yes.

MS FEINT:

– on the interpretation of the Act?

TIPPING J:

Yes. How do you get home on this point in isolation?

ELIAS CJ:

Well, that it's an unreasonable exercise of the power but he was really – although his was an argument based on interpretation, it was also a claim that the determination is unreasonable, it seemed to me.

MS FEINT:

Yes, it was unreasonable to decline to grant an urgent hearing of the application because otherwise it would never be determined.

ELIAS CJ:

It really comes down to that, doesn't it? That's the merits of your claim.

MS FEINT:

Yes.

ELIAS CJ:

There's isn't a – yes, I tend to agree with Tipping J that there's no need to complicate it.

TIPPING J:

If you can articulate clearly how this point gets you home without the other points, then that's fine but at the moment, I can't, candidly can't see it.

MS FEINT:

You mean the point about section 8(2)?

TIPPING J:

No, I mean the natural, what you're calling the natural justice point in the round, how you get home on that if you don't also get home, or without getting home on the other points. I don't want to ride you off it but I just, in signalling to you, I don't understand how you can but you maybe able to persuade us.

MS FEINT:

Well, I suppose if you didn't accept the statutory interpretation point, then –

BLANCHARD J:

But Mr Brown has canvassed the administrative law remedies which include unreasonability. Does this really take it any further?

TIPPING J:

It's a species of unreasonableness in a sense. It's a consequential point. It's not a point that has legs on its own. That's the problem I'm having and you should have a fair opportunity to –

ELIAS CJ:

It is true that section 27 enters into the scales when you're looking at what is reasonable because it does recognise that peoples whose interests are effected have the right to go to a Court or a Tribunal for determination, but it seems to me that it's the same point, really, that we've heard argued.

TIPPING J:

You either have a right to a hearing or you don't. If you do, Mr Brown's the float. If you don't then denying you it is hardly a breach of natural justice. That may be very simplistic but that's what's gnawing at me.

MS FEINT:

But isn't the point that when there is genuine circumstances of urgency to deny a hearing and to say it's just exercising a case management decision effectively, it does breach a right to natural justice. I suppose another way of putting it is to say that the urgency criteria that the Tribunal operates under, is

also not given sufficient weight or considered effectively by the presiding officer.

ELIAS CJ:

Because one of the criteria is whether it's going to be fatal or it's going to prejudice the substance of application and that's your complaint?

MS FEINT:

Yes, that's precisely it.

ELIAS CJ:

I thin it is the same argument.

MS FEINT:

The um, well, I might turn to my next point now which is relating to the urgency criteria. The prejudice issue is something that I did want to address and that relates to Clark J's finding that the owners of Mangatu as members of Te Whakarau are entitled to share in the benefits of the settlement, and we say that this point is really important because the Crown's argument is that, and Judge Clark's argument is that the members of Te Whakarau, the members of Mangatu won't be precluded from securing a remedy by reason of their membership of Te Whakarau and we say that that's like saying it doesn't matter whether company A or company B gets the land as long as your shareholders of both companies and we say that from a tikanga Māori perspective, that completely misses the point because it's not about individual benefit but about the membership of a collective group and the mana and identity of that collective group. The Mangatu community of owners, as Mr Brown covered with you yesterday, represent the hapū with mana whenua in the land, namely Ngāti Wahia, Te Whānau a Taupara and Ngariki Kaiputahi and for the land to be returned to the wider group does not reflect the mana or identity of those hapū or their desire to re-integrate the 1961 land that's their turangawaewae and that's –

ELIAS CJ:

Or, indeed, provide redress for the 1961 breach, you would say?

MS FEINT:

Yes, I would say that.

ELIAS CJ:

I don't know that you need to elaborate on this. I think we did and it may be that because we asked so many questions of Mr Brown relating to the decision of Judge Clark, that we have traversed a lot of this. I think if there are any points of emphasis you want to make, you should do that, of course, but I do think we have on board that the submission of the appellants is that there are illogicalities in his determination that they're beside the point, some of the points that he makes. There's a non-sequitur about, for example, the question of whether negotiations have broken down. There's a failure to appreciate the distinct interest of the appellants in respect of the 1961 taking.

MS FEINT:

Yes and there's also the point that the land that's being returned to Te Whakarau is being returned as commercial redress which is for the Treaty breaches of the entire group of Te Whakarau. It doesn't just relate to the Mangatu land.

ELIAS CJ:

Yes.

MS FEINT:

Well, I'm grateful for that indication, Ma'am. I think the only other point that I wanted to make and I thought it was an important one to make from the perspective of my clients, is that from a Māori perspective, the answer to the case is really crystal clear because we say that it's as simple as looking at the 1989 agreement that was entered into between Crown and Māori in the spirit of good faith and Treaty partnership and the Act was passed to implement that agreement, and the legislation should be interpreted in such a way as to

provide the meaningful legal rights that were intended by that agreement and for Māori, with the Crown arguing for an interpretation that defeats the intention of the agreement, is absolutely galling and we say is, does not reflect well on the honour of the Crown and I just wanted to finish by saying that it's an irony really that one of the parties to the 1989 agreement was the Federation of Māori Authorities of which Mangatu Incorporation happens to be a member, and that's a matter to which Mr Hall disposes. I mean, it's interesting, isn't it, that at that time there was no thought given to what have now become the Crown's Treaty settlement policies. So in conclusion, Your Honours, those are the submissions for the appellant unless there are any other questions.

ELIAS CJ:

No, thank you, Ms Feint.

MS FEINT:

May I please the Court.

ELIAS CJ:

Yes, Mr Solicitor.

SOLICITOR-GENERAL:

Thank you Your Honours. I've asked Ms Registrar to hand up to you a one page synopsis that the Crown wishes to speak to you during the course of its oral submissions today. You will see that the workload has been divided between Ms Hardy and myself and that I propose to give a very brief introduction and then hand over to Ms Hardy in a few moments.

ELIAS CJ:

But then are you proposing to take it back, Mr Collins?

SOLICITOR-GENERAL:

If it's necessary to do, yes, Your Honour.

ELIAS CJ:

Well, the outline suggests that sort of programme. It's just rather an unusual way to proceed.

SOLICITOR-GENERAL:

Well, I'm quite happy to see how things pan out, Your Honour, but that was our intention if it's suitable to the Court.

ELIAS CJ:

All right, that's fine, thank you.

SOLICITOR-GENERAL:

By way of a very brief introduction, it is the Crown's case that when Judge Clark made the decision which he made pursuant to clause 8(2)(c) of the Treaty of Waitangi Act, he exercised a discretion which he was entitled to exercise. Now, clearly if the Court decides that the Crown was wrong on that point and that the Court of Appeal was wrong on that point, and the High Court was wrong on that point and that there is no discretion, then the appeal will be determined on that basis and can be determined on that basis in favour of the appellant. If, however, the Court accepts the submission that there is a discretion, then it is the Crown's case that Judge Clark, in essence, made a discretionary decision relying on four key points. The first of those key points was that the owners and the beneficiaries of Mangatu Incorporation had a claim heard by the Tūranga Tribunal and the claim was the claim which Mr Ruru filed in 1992, and at that time, Mr Ruru, as I understand it, was the chairman of Mangatu Incorporation and he filed that claim on behalf of, amongst others, the owners and the proprietors of the Mangatu Blocks. So their claim, which is in all material respects, the same as the claim which Mr Haronga brings, was before the Tūranga Tribunal.

ELIAS CJ:

The original claim sought a different remedy, however?

SOLICITOR-GENERAL:

It sought the return of, amongst other things the 1961 lands to the owners and proprietors of the Mangatu –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And that's, I think, the key point, Your Honour.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Now, the second point which Clark J relied upon was that Mr Ruru's claim was well-founded in relation to the 1961 land and that Te Aitanga-ā-Mahaki was affected, and that the Tribunal had considered making recommendations as to relief but instead made a number of suggestions as to how the parties might settle their differences with leave reserved to return to the Tribunal.

Judge Clark was also persuaded by the fact that the Crown and Te Whakarau, the mandated entity, had acted consistently with the Tribunal's suggestions, and that no steps have been taken by any person to modify or revoke the mandate held by Te Whakarau, indeed, Mr Haronga is one of the person's who actually moved the mandate and a factor which influenced Judge Clark and in the Crown submission quite appropriately was that all affected persons including the owners of Mangatu Incorporation will get to vote on the proposed settlement, and if that proposed settlement is not ratified, then those who are affected have leave to return to the Tribunal. If, however, the settlement is ratified, including by the owners and shareholders of Mangatu Incorporation, then all persons with a customary interest in the 1961 land will be the beneficiaries that will see that land returned to the tribal communities from whom it was alienated, and that includes persons who were dis-enfranchised and unable to become members

of Mangatu Incorporation because of the consequence of an 1881 Native Land Court decision, which resulted in persons with a genuine interest in that land not becoming members of Mangatu Incorporation –

ELIAS CJ:

Not that's – I understand that submission but I thought you were telling us what Judge Clark had said.

SOLICITOR-GENERAL:

Yes, and that was known to Judge Clark.

ELIAS CJ:

Well, where does he say that?

SOLICITOR-GENERAL:

Well, he – I'm sorry, Your Honour, what he's saying is that he understands, from the Tribunal's report, that the beneficiaries of the proposed settlement will include those who were alienated from, as a consequence of the 1881 decision and not able to become members of Mangatu Incorporation.

ELIAS CJ:

Where does – what are you referring to?

SOLICITOR-GENERAL:

Paragraph 44, Your Honour.

ELIAS CJ:

Now, that's his recital of the Crown's submissions but where in his reasons does he rely on that?

SOLICITOR-GENERAL:

Fifty-nine, Your Honour and 61.

ELIAS CJ:

Well, I must say, I don't really read that but I understand the background that you're giving us here and, presumably, you're going to come on to deal with the decision of Clark J in its own terms so perhaps we can look at it there.

SOLICITOR-GENERAL:

Yes, and of course, Judge Clark was intimately aware of the Tribunal's decision, its 1994, ah, 2004 report.

ELIAS CJ:

Yes, but it's not precluded. These issues are not precluded from being considered on any resumption hearing because on a resumption hearing, the Tribunal can come to the conclusion that the land should not be returned or it can decide that the land should be returned on conditions, so it's not a knock-out sort of point and it doesn't seem to be relied on by the Judge.

SOLICITOR-GENERAL:

Well, with respect, it may be a question of emphasis –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

But it was definitely a factor that was before him.

ELIAS CJ:

All right, yes.

SOLICITOR-GENERAL:

And that is all that I'm saying at this stage Your Honour.

ELIAS CJ:

Right thank you.

SOLICITOR-GENERAL:

That he was aware of the background and that was a factor that must have been into account and indeed I believe it's quite implicit.

TIPPING J:

Well it was the decisive factor wasn't it, in the light of 60 and 61. If there wasn't the complication he said, "From the wider group being involved, the case for an urgent remedies hearing would be very strong" and he goes on to say that, Mr Brown's clients would be entitled to share, if you like, rather than get the whole lot, he says he doesn't see it as a case for the intervention of the Tribunal, which is an interesting word. It doesn't warrant the intervention of the Tribunal. But I mean –

SOLICITOR-GENERAL:

Whether it's decisive or not is not a matter that I think I need to engage with Your Honour on in this moment, it is definitely a factor.

TIPPING J:

Well we're going to come back later to these?

SOLICITOR-GENERAL:

Absolutely.

TIPPING J:

Right.

SOLICITOR-GENERAL:

I'm just simply giving a very brief thumbnail sketch at this juncture.

BLANCHARD J:

Mr Solicitor, you said a little while back that the owners would get to vote on the settlement –

SOLICITOR-GENERAL:

Yes.

BLANCHARD J:

And you were referring to the Mangatu owners.

SOLICITOR-GENERAL:

Yes.

BLANCHARD J:

How large is the wider group?

ELIAS CJ:

15,000 isn't it, because that's the evidence.

SOLICITOR-GENERAL:

Yes, there seem to be various numbers to that effect Your Honour and that the Mangatu Incorporation apparently comprises about 5,000 persons.

BLANCHARD J:

So they'd bet out-voted potentially.

SOLICITOR-GENERAL:

Depends on how many people actually vote Your Honour.

BLANCHARD J:

Well yes, but to say that they're protected by their right to vote, could be a little illusory.

SOLICITOR-GENERAL:

As I understand it Sir, the voting process isn't like a general election or a local body election, there is a –

BLANCHARD J:

No single transferable votes.

SOLICITOR-GENERAL:

No. There is a process of negotiation and consensus building which results in those who are mandated, being able to present the results of their consensus discussions to the Crown to advise whether or not a proposal is accepted.

McGRATH J:

That 15,000 that you refer to, that's the – that's one of the three clusters is it? Or is 15,000 all three clusters.

ELIAS CJ:

All three.

SOLICITOR-GENERAL:

I understand it's all three clusters, Your Honour.

McGRATH J:

But a much lesser number would have an interests in the offer insofar as it relates to the disputed land would it not?

SOLICITOR-GENERAL:

Yes. Actually Your Honour I am told that in fact the 15,000 relates to Te Whakarau, so that's one-third, I'm sorry that's one of the three major groupings.

ELIAS CJ:

Oh yes. But so –

SOLICITOR-GENERAL:

So I hadn't answered Your Honour's question.

ELIAS CJ:

But the point is also correct, isn't it, that Te Whakarau is a much bigger grouping than those who were perhaps excluded from Mangatu in 1883 or whenever it was?

SOLICITOR-GENERAL:

1881. As I understand it Your Honour, there was a group who were excluded from becoming members of Mangatu Incorporation as a result of the 1881 Native Land Court decision.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Now as a consequence, when the Tribunal looked at the way in which those people had been particularly disadvantaged and made recommendations, proportionate recommendations as to how they might benefit from the proposed settlements, it was suggested that they should get, it was either six or eight percent, something in that vicinity, which I think was the Tribunal's assessment as to their proportionate size compared to others who were within the Mangatu Incorporation.

ELIAS CJ:

That's in that thing on commercial proposal that we were taken to yesterday?

SOLICITOR-GENERAL:

Yes indeed.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Now, to summarise this very brief introduction, it is the Crown's case that Judge Clark was entitled to take these factors into account in exercising his

discretion and to have regard to these factors, not to grant an application for an urgent hearing and that was the extent of his decision, simply not to grant an application for an urgent hearing and that the legislation permitted him to make this preliminary decision about the appellant's claim to the Tribunal and that it was the appropriate decision to make because he exercised his discretion appropriately. Now there is a lot of –

TIPPING J:

Did he ever factor in Mr Solicitor, the fact that on the probabilities at least it would render the claim nugatory?

SOLICITOR-GENERAL:

He certainly refers to that in his decision. Yes, he recognises that there is a prospect, a realistic prospect that ultimately the claim will not be able to proceed.

TIPPING J:

Yes.

SOLICITOR-GENERAL:

And he expresses that in terms of, towards the end, I think the language is something along the lines of frustration or disappointment that he recognises the appellants will have.

TIPPING J:

Well he says, whilst I am sympathetic to the disappointment that the Mangatu Incorporation is experiencing, when I consider the ultimate position of their shareholders, and that they're going to share, rather than scoop the pool, if I can be colloquial –

SOLICITOR-GENERAL:

Especially ultimately, yes.

ELIAS CJ:

Scoop part of the pool.

TIPPING J:

Well, scoop –

SOLICITOR-GENERAL:

Most of it.

TIPPING J:

But the pool that they regard as significant.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

I'm not sure that he did Mr Solicitor, that's why I asked you the question. He acknowledged their disappointment, but I think it's arguable that he didn't take into account at all it has to be, because I'm one of those who believe that balance is within the discretion, but he doesn't say, well I bear in mind that in the light of my decision, of if I make the decision this way they might never get a hearing, or an effective –

SOLICITOR-GENERAL:

I wonder Your Honour, if you would turn to para 2 of the decision?

TIPPING J:

Yes, it may be that I'm looking at the wrong place.

SOLICITOR-GENERAL:

Again, it's not, I accept, explicit, but he's recognising the need for urgency because the deed of settlement was at that stage, scheduled to be signed in December 2009 and if a deed of settlement is signed, then the next step of course is legislation to give effect to that deed of settlement.

TIPPING J:

This is 36?

SOLICITOR-GENERAL:

Thirty-two, I'm sorry.

TIPPING J:

Thirty-two.

SOLICITOR-GENERAL:

Yes, and certainly, I mean the whole reason for bringing the urgency application as Ms Feint would've been emphasising –

TIPPING J:

Yes quite. Well I suppose it could be said that it was so blindingly obvious that it didn't have to be expressly stated. But it is a little odd that it's not put there right up front as a key issue to balance all the other factors against.

SOLICITOR-GENERAL:

It might actually also be recorded when reciting the arguments from Ms Feint, is to the reason for urgency.

TIPPING J:

Well it's at 36, there's a suggestion of that.

ELIAS CJ:

He's just really going through the arguments –

TIPPING J:

He is.

ELIAS CJ:

– that he heard.

TIPPING J:

Yes.

ELIAS CJ:

But where in his disclosative reasons?

TIPPING J:

You see because I see this, if I may, as close to the nub of this case. The effect of this decision.

SOLICITOR-GENERAL:

And paragraph 3 again is –

TIPPING J:

Three?

SOLICITOR-GENERAL:

Yes. Again it's implicit that blindingly obvious, to quote Your Honour, what the consequences are likely to be if the proposed agreement is ratified.

TIPPING J:

That's common ground I take it, that if the proposed agreement is ratified, Mr Brown's clients have got no chance of getting what they're seeking.

SOLICITOR-GENERAL:

Yes, if it's ratified.

TIPPING J:

Yes.

SOLICITOR-GENERAL:

Thank you. Now having given that very brief introduction of what I hoped would be just a very brief introduction, I'll invite to Ms Hardy to go into the

further details which are outlined in that one page synopsis and if it becomes necessary and with the Court's leave, then I will return to rostrum a little later.

ELIAS CJ:

All right. Since you've prepared on that basis, but I think for the future we'd prefer a more orderly progression of counsel.

SOLICITOR-GENERAL:

Thank you Your Honour.

MS HARDY:

May it please the Court. As set out in Mr Solicitor's outline, my intention is to address the Court on the issue of statutory interpretation that was largely canvassed by Mr Brown, then the issue of discretion and then the natural justice issues will be addressed by Mr Solicitor.

The Crown appreciates that in relation to this case it's very important to address the statutory framework which of course under section 6 says that the Tribunal shall inquire into every claim and the Crown is conscious that section 8HB of course provides binding powers to the Tribunal and the point that the Court was just traversing with Mr Solicitor, if the Wai 1489 claim is not given a priority fixture, then there is a real risk that it might be rendered nugatory.

TIPPING J:

More than the real risk, a dead cert I would've thought.

MS HARDY:

Well no Your Honour –

TIPPING J:

But subject to ratification.

MS HARDY:

Yes. Yes Your Honour, subject to ratification and subject to the passing of legislation. So if it were to falter at that point, then of course all of the affected parties would properly return to the Tribunal for a hearing and fresh circumstances. The primary issue before the Court is of course whether the Tribunal has any discretion to decline an urgent or priority hearing. So that's the issue where the discretion squarely fits.

There are two planks as the Court is aware, to the appellant's argument and that is first that the Tribunal has no discretion whatsoever to decide whether to grant urgent hearings or not. Mr Brown said that this was not fact or case specific, so there's no question of sufficiency of reasons on the part of the Judge Clark. It is simply a matter of mandatory hearing. And in fact the intervention of Judge Clark as a gatekeeper if you like, would be entirely otiose, because that would be a step that the statutory regime doesn't permit. The second plank of course is unlawful exercise of discretion and I'll get to that in due course.

Before tackling those matters, I do want to go to some of the facts about the case as Mr Brown did, and reiterate his point that of course the factual matrix bites most strongly in relation to the question of the discretion and issues of natural justice, rather than the more spare argument of absolute rights provided by the statute.

I want to take the Court first to Judge Clark's decision that you have just been through and it is of course tab 6 of case, volume A. This is just a thumbnail sketch of what in fact Judge Clark did take into account. He relied very heavily on the Turanga Report that came out in 2004. And at paragraph 11, and then this is repeated at 52 and 53, he acknowledges that the Mangatu Forest claim, so that's the 1961 claim, was well-founded and rehearses there that what the Tribunal said was that that was a well-founded claim of the iwi Te Aitanga-ā-Mahaki. It was not a finding that the Incorporation had a well-founded Treaty claim and that's unsurprising

because the Incorporation never put that claim to the Turanga Tribunal as a discrete entity.

I'd like Your Honours to turn to paragraph 48 of the decision.

ELIAS CJ:

Are you going to take us to the statement of claim that the –

MS HARDY:

Yes I will Your Honour, yes.

ELIAS CJ:

Yes, thank you.

MS HARDY:

Paragraph 48, again this is reasoning but it rehearses Ms Feint's argument that was put to the Tribunal at this juncture, and this was a characterisation of the 1961 claim that the Incorporation's claim, as a small modern claim and earlier on in the judgment at 31 he rehearses Ms Feint's linked submission that this was akin to a Public Works Act taking. So he's hearing a submission that this is a small narrow claim about a relatively contemporary event from 1961. It's clear that the Judge, like the Turanga Tribunal, was not persuaded to that because as Mr Solicitor has taken you to other points in the judgment, he acknowledges that others have an interest. In other words, this is a question of overlapping and layered claims, it's overly simplistic to identify as a single claim occurring at a single time. And that's where the 1881 and subsequent adjustments come into play. He clearly acknowledged the reason behind the application, which was the need for urgency because of the impending settlement and Mr Solicitor has taken you to those sections of the judgment.

Also, at paragraph 59 the Judge properly acknowledges that Te Pou a Haokai, which is now called Te Whakarau, that they would be forced into an urgent remedies hearing. So this is not a case where the wider iwi and

the groups who were not fortunate enough to be included in the ownership lists of the Incorporation, don't have an interest in resuming this land and I'm sure Mr Bennion will address the interest of Te Whakarau more broadly in the 1961 land, everyone would be drawn out of the negotiation and into a complex hearing about overlapping claims. This is not a small modern and discrete claim as the appellants characterise it.

At paragraph 53 of the judgment, Judge Clark points out that based on the Tribunal's –

ELIAS CJ:

Sorry, my lot is not numbered, but I've assumed that we should read in 53 and 54 into those?

MS HARDY:

Yes Your Honour.

ELIAS CJ:

I'll put it in.

MS HARDY:

Yes, this is on page 30 and the unnumbered paragraphs, so in the middle, paragraph 53, it's recorded there by the Judge that all the parties have relied on the Tribunal's advice and the parties of course were the claimants before the Turanga Tribunal that incorporated the shareholders and they have abided by the advice of negotiating in tribal clusters. The Judge then makes the finding that Mangatu Incorporation have never sought a mandate to negotiate with the Crown.

ELIAS CJ:

Sorry, where's that?

MS HARDY:

This is, sorry Your Honour, that's at paragraph 57. And it's at 60 that the Judge makes the very important point about layered interests.

ELIAS CJ:

At para?

MS HARDY:

Paragraph 60, this is page 31. The case might have been quite a different one if in fact the appellant's submission were correct, that this is a small discrete modern claim.

ELIAS CJ:

He – in 61 though, is really just about the fact that there's an offer on the table.

MS HARDY:

Your Honour, I was looking at paragraph 60.

ELIAS CJ:

Oh right sorry, I thought it was 61.

MS HARDY:

Which is to say there would be, you know, a very compelling case here for the Incorporation, or rather for its members, if in fact those members were the only claimants interested in this land, but it's a much more complex and polycentric problem than that. That's what the Turanga Tribunal recognised and this is being reflected in Judge Clark's decision here. He makes the point that Your Honours have already traversed with Mr Solicitor at paragraph 61, that all will benefit and it is very important that this settlement and the engagement of Te Whakarau in that settlement does directly deal with the 1961 grievances, it's not that that's left out of the package. So the grievances are the layered ones that go from 1881 through to the early 19th century adjustments and into the 1961 events.

He's also very careful at paragraph 59 Your Honours, to make the point that this isn't a simple matter of resourcing or stretched resources on the part of the Tribunal, he makes it clear that a meritorious claim would be given a hearing. He says this is finely balanced, but having interrogated it, and obviously having been informed by the Turanga Report, Judge Clark made the hard call that there should not be a hearing in this instance taking into account all the repercussions that that would have for groups beyond the Incorporation.

TIPPING J:

The repercussions would be that they would have to face a challenge by Mangatu to get the whole lot and that was a disruption to the settlement process. Is that the flavour of it?

MS HARDY:

That is the flavour of it but and the disruption needs to be taken in the context of the events that happened from prior to 2004 through the 2001 hearing, 2004 settlement negotiations, years of engagement and I think it's fair to say too though, this isn't apparent in the judgment expressly that the Tribunal is generally highly attuned to the need to try to maintain collective consensus through hearing processes and settlement, and that looking at this from a narrow right-spaced, property- based, title-based analysis, actually has to be dealt with very carefully by the Tribunal because bringing a range of parties into litigation is potentially a destructive event. Clearly that –

ELIAS CJ:

Tribunal processes aren't litigation, however.

SOLICITOR-GENERAL:

Well, Your Honour, I think that that's exactly the point that the appellants are making here that there are some special field here which is akin to a Court process –

ELIAS CJ:

I understand that but what I'm saying is what was choked off here was the opportunity for the Tribunal to consider the matter further. Am I right in thinking that the proposal in terms of settlement didn't arise until quite a late stage in the piece and that it was what provoked the 1489 application?

MS HARDY:

No, Your Honour, I wouldn't accept that as a characterisation. The Tribunal process itself and I will take you to the relevant statements of claim, clearly involve collective Mahaki pursuing rights to the 1961 land and seeking resumption amongst other binding and non-binding orders. The matter progressed through mandating again of a collective iwi/hāpu grouping. Terms of negotiation I think –

ELIAS CJ:

No, I understand all of that, yes.

MS HARDY:

Yes, so the short point is the land at issue and the claim, the 274 claim has always been in the mix being dealt with by the collective for ultimate settlement and my characterisation of what has happened is that, belatedly, the members of the Incorporation or, at least, the committee of management has made an assessment that the collective settlement doesn't serve their purposes that they might, as Your Honour pointed out, be somehow outvoted by the majority and the group now wants to extract itself from that portion of the settlement though not the settlement as a whole, a bob each way if you like, in terms of pursuing the resumption –

ELIAS CJ:

But they're entitled to do that so I think characterising it as a bob each way, is not particularly kind, Ms Hardy, because they do have the wider claims as well as the specific front in terms of the 1961 taking.

MS HARDY:

But, Your Honour, I think that that creates a complexity because the settlement –

ELIAS CJ:

Well, it may. I understand your point about complexity also and I'm not unsympathetic to it. It is the case, though, that the 274 claim flagged at the outset that what was sought then was resumption by the owners from whom the land was taken in 1961, and that it was only in the subsequent claim after everything had been consolidated that it was made more vague in terms of a claim, am I right, by –

MS HARDY:

Yes, Your Honour. If I could – I'll take you through perhaps the interlocutory process –

ELIAS CJ:

Yes. So what I was raising that in response to was your suggestion that this was a late thought. It was really the basis on which the claim was originally put forward.

MS HARDY:

Yes, Your Honour, it was the original basis then it changed through the interlocutory process before the Tūranga Tribunal and I will take you to that interlocutory process and to the statements of claim.

ELIAS CJ:

Yes, thank you.

McGRATH J:

Ms Hardy, can I just say along the same lines that when you come to it, I'd appreciate some help with paragraph 57 and the criticism of the Mangatu Incorporation that it did not seek a mandate to negotiate the purchase. Now, I have some trouble with the word "mandate" there.

I wouldn't, would not have thought that the Mangatu Incorporation needed a mandate to negotiate for itself in support of its own claim, so is mandate there referring to something other than that, not to negotiate its own claim but to negotiate the wider group of claims? You don't have to answer that now but certainly I'm having a problem with that part of the reasoning, because this is a part that is critical of the conduct of the Incorporation so it's quite important to my mind.

MS HARDY:

Yes, Your Honour, well perhaps if I take you sequentially through the narrative of the interlocutory process and the negotiation process that followed that.

McGRATH J:

That would be helpful and if you can relate it to that paragraph at some stage.

MS HARDY:

I'd like to start first with the two volume Tūranga Report and if Your Honours were to turn to page 1 of that report which, of course, is in volume 1. This is chapter 1 of the report which provides a careful outline of the process that the Tūranga Tribunal adopted to embark on this hearing and it was the so-called new approach that was being developed by the Tribunal at the time. If you look at page 2, the third paragraph down, the Tribunal there says, "The primary innovation of the new approach has been the introduction of a formal pleading process after the completion of research prior to hearing. All the claimants were required to identify and carefully document their grievances in fully particularised statements of claim" and I'd now like to take you to the fully particularised statement of claim that's relevant here which is in case sections –

ELIAS CJ:

Can you take us to the first claim, 274 first? I'd just like to see that sequence.

MS HARDY:

Yes, certainly, Your Honour, same volume, case C, volume 1 –

TIPPING J:

Which colour?

MS HARDY:

Yellow. Behind tab 1 is the claim Wai 274 –

ELIAS CJ:

Sorry, I don't have a tab 1.

MS HARDY:

I'm sorry, tab 31. So this is the claim that was brought by Mr Ruru but on behalf of the members of Te Aitanga-ā-Mahaki and on behalf of the Incorporation and as the core has pointed out, this is on page 300, what was being sought there was that the lands comprising the state forest be returned to the Incorporation. But then if you turn over to the next tab and can I just interpose, there was another claim filed by Mr Ruru around the same time which is not in the case book and that's number 8 –

ELIAS CJ:

Sorry, this claim is for the whole of the state forest?

MS HARDY:

Yes, not simply the 1961 land.

ELIAS CJ:

But it recites that the acquisitions in para 1, does it?

MS HARDY:

Yes, so those are the –

ELIAS CJ:

So there were two claims of prejudice by actions of the Crown. The first is in the, in respect of the 1961 purchases, is it and the second is acts, policies and omissions, oh no, sorry, the other way round? I'm not sure.

MS HARDY:

That's right so one is the acquisition of land in Mangatu more broadly –

ELIAS CJ:

Yes.

MS HARDY:

And paragraph 2 is about the purchase which really straddled 1961 and '62 though we call it the 1961 land.

ELIAS CJ:

Yes.

MS HARDY:

And relief there being directed at the Incorporation. As I mentioned, there was another claim 283 at the time also filed by Mr Ruru on behalf of Te Aitanga-ā-Mahaki. There were claims also by individuals representing the other two iwi clusters, Rongowhakaata and Ngai Tamanuhiri. What happened through the detailed interlocutory process was that for Te Aitanga-ā-Mahaki, there was a substituted statement of claim which is the one found at tab 32 and if the Court were to turn to paragraph 305 there, sorry, page 305, paragraph 4, this amended claim seeks, or says, that the claims are on behalf of the iwi/hapū collective, Te Aitanga-ā-Mahaki. Then turning to page 410, this records the relief sought in this substituted statement of claim and that at paragraph (c) is the area known as the Mangatu State Forest be returned to the claimants, the claimants now being the broad collective, Te Aitanga-ā-Mahaki.

McGRATH J:

Sorry, what page is this, 310?

MS HARDY:

Page 410, Your Honour.

TIPPING J:

That's a very broad proposition. It doesn't say by what manner and in what proportion or anything like that. Do you read that as the whole lot should go to everybody?

MS HARDY:

Well, yes. This is a broad collective claim and it's seeking a return and it's a return to the broad collective and that's been –

YOUNG J:

Is it to the broad collective?

MS HARDY:

Well, return to the claimants is the language of –

TIPPING J:

It's just that you seem to be relying on this, this somehow rather leading for something consequential. That's why I ask otherwise I wouldn't have trouble but do you say that this is clearly, that Mr Brown's clients have now in effect lost the chance to look at their particular bit because of the way this was put here?

MS HARDY:

I wouldn't put it in the negative like that. I would say that Mr Brown's clients have chosen through the interlocutory process to place their claims into a collective grouping to be prosecuted by that collective and to ask the Tribunal to return property to the collective.

YOUNG J:

Sorry, where do you get the collective from, just because it says to the claimants as opposed, by which you treat that as meaning the claimants generally or the collective of the claimants rather than the claimants or such one or more of them as the Tribunal shall decide?

MS HARDY:

Well, just a literal reading of the statement claim, return to the claimants. The claimants is the broader group and there's no suggestion –

McGRATH J:

And that's because of the definition, you say, is at page 305?

MS HARDY:

That's right and there's no articulation any longer in the claim that the Incorporation is pursuing discrete rights or interests.

ELIAS CJ:

But it does recite the separate claims in paras 2 and 3 but there is a claim in respect of the lands taken from the proprietors of Mangatu Blocks and that there is another claim in relation to wrongful dispossession of traditional land -

MS HARDY:

Yes and that's –

ELIAS CJ:

I mean, this is a consolidated claim, isn't it? It doesn't merge everything.

MS HARDY:

Well, it does – what it does, is pick up the two key claims and there is a narrative rehearsing what those claims are in paragraphs 2 and 3 and then it makes, takes some care, I would submit, in paragraph 4 to say who the claimants are because in the Wai 274 claim, Mr Ruru said that he was

representing the Incorporation and then discretely, Te Aitanga-ā-Mahaki. That has dropped away and nor does it feature in the relief.

ELIAS CJ:

Well, it's part of the recital.

TIPPING J:

It's a point of some astuteness.

MS HARDY:

Well, it is a point of some importance to the narrative of the facts because it does, in my submission, demonstrate collective action on the part of –

TIPPING J:

But can they not disassociate themselves when it comes to the remedy stage which they've demonstrably, at least, attempted to do?

MS HARDY:

Well this, Your Honour, is the question whether they – once I've traversed the facts, the question and I would say this case is very much in the area of discretion not the high pitched argument that there is an absolute right to a hearing no matter what the facts and circumstances.

TIPPING J:

I didn't understand Mr Brown to put it that high. I noted him as saying, the question was, is there a general discretion whether to engage with the resumption issue? That doesn't, he wasn't arguing you could always get urgency. He was trying to forestall the contention, as I understood him, that the Tribunal didn't ever have to look at this.

MS HARDY:

Well, Your Honour, it's been with some difficulty identifying exactly what the high end argument of the appellants is, but what I did was record through the hearing that this issue of statutory interpretation is not fact or case specific

and that it really is a matter of pure statutory interpretation as to a right to a hearing, and that's the high end and that was the way it was argued at the leave application. In other words, there's no ingredient of discretion at play here at all.

TIPPING J:

Well, I thought Mr Brown's proposition was, and this is pretty important, that it couldn't be said that the Tribunal never had to give someone a hearing as a matter of discretion. They were ultimately entitled to a hearing when you filed an application for a hearing and it couldn't be said that the lack of urgency was justified on the premise that, well, actually you never have to give them a hearing if you don't choose to.

MS HARDY:

Your Honour, that's not how I understood the argument because I think everyone acknowledged that under section 6(2) the Tribunal is tasked with hearing all claims, and then the question becomes, does the Tribunal have to hear all resumption claims?

ELIAS CJ:

Ultimately.

TIPPING J:

Ultimately it does.

MS HARDY:

And does it have to – yes, more refined, does it have to give a priority fixture? Does it have to hear it upon application?

ELIAS CJ:

No, but if there is an obligation ultimately to entertain a properly constituted application, then an application for urgency needs to be construed against that background, so that if declining it prevents the claimant actually getting to

the Tribunal, then that's a very powerful consideration in favour of granting the application.

MS HARDY:

And I would agree, Your Honour, to the way that you have put that proposition that it's a powerful consideration, but I understood and if I'm wrong that would be helpful to have that clarified, I understood that the situation, well, at least, the point that was being argued by the appellant, is that there is no question of consideration. There's no discretion whatsoever.

TIPPING J:

I don't think the appellant would go in to bat and say that whenever you ask for urgency you must be given it, because that is self-evidently bizarre.

ELIAS CJ:

But in the context, it may – I think the appellant is saying that the discretion could only reasonably have been exercised to grant the application in this case.

MS HARDY:

Well, Your Honour, that's what I understood the second line of argument to be but not the first which was a more absolute proposition than that.

ELIAS CJ:

Well, I think that was, the absoluteness was directed at the requirement to entertain the application.

TIPPING J:

You can't excuse yourself from giving urgency because you never have to look at it anyway.

ELIAS CJ:

Yes.

TIPPING J:

Because of all that Mr Brown was trying to warn off, that's as I understood it.

MS HARDY:

Well perhaps I'll get to that other statutory interpretation –

ELIAS CJ:

Because it's like a Court. A Court must, if a properly (inaudible 11.20.11) is made the Court has to entertain it, at some stage.

MS HARDY:

Well that's the at some stage point.

ELIAS CJ:

Yes but that's the second point.

MS HARDY:

And I will get to this on the statutory interpretation point but just briefly the consequences of that, if one draws too strongly on the analogy with a Court, and I think that's where there is a real difference between the Crown's submissions and the submissions of the appellant, that there really has to be a very careful acknowledgement of the kind of framework in which the Tribunal is working and if you get too closely into a right spaced argument then an individual, and that's what a Wai claimant can be, that an individual has a right to a hearing, then it has the kinds of consequences that Judge Clark was attuned to in his decision. That that actually in this polycentric layered area has significant consequences. All the Crown is saying is that in that circumstance the Tribunal has a discretion, needs to exercise that extremely carefully and is properly subject to review by this Court but there is a discretion.

McGRATH J:

Ms Hardy, can I just come back to your argument in between pages 410 and 305, that claimants are defined and in terms of all of the members mentioned

in paragraph 4. If you go back to paragraph 2 it does seem that the proprietors of the Mangatu blocks are excluded from the category referred to in 4 because they're referred to separately. And on behalf of the proprietors of the Mangatu blocks so in paragraph 4 is Mr Ruru asserting he has authority to file the claims for a group that includes the proprietors?

MS HARDY:

All, Your Honour, all of the proprietors, all of the shareholders are by whakapapa members of the Mahaki cluster.

McGRATH J:

Yes.

MS HARDY:

So in my submission what Mr Ruru is representing in paragraph 4 is that with this backdrop of Wai 274 and 283 he is now representing all of those interests through the collective of Te Aitanga-ā-Mahaki.

McGRATH J:

He's certainly representing a group that includes all of the shareholders of the Mangatu Incorporation but isn't the way it's expressed in paragraph 2 by comparison with paragraph 4, excluding the Incorporation itself?

MS HARDY:

Your Honour are you meaning the Incorporation as a discrete entity as opposed to the members of the –

McGRATH J:

Well yes –

MS HARDY:

– Incorporation?

McGRATH J:

Paragraph 2 is referring to the fact that he's representing in 1992 all of the members, that is the individuals by descent, and on behalf of the proprietors of the Mangatu blocks recognising that separate incorporative status and then when he's saying he's got the authority to file these claims, and we come to the definition of the claimants, this is only the members as individuals, individual persons that he's claiming to represent. What I'm saying is it doesn't seem to me that the way that this claim has been set up, it's totally, is in substitution for the Mangatu Incorporation's own claim.

ELIAS CJ:

Well it was his claim and but there are distinct claims and 4 is simply a representation of authority but it refers back, it relates back to the claims described in paragraphs 2 and 3.

MS HARDY:

Well of course the Incorporation, and I think that the appellant's have accepted this, is not – could run into some difficulty as being a claimant under the Treaty of Waitangi Act so it's really that there –

ELIAS CJ:

Yes, it's a way of identifying a group of people in terms of the jurisdiction of the Tribunal but the point still is that this claim purports to be based on these two different grievances and it's drawing, it's making – it's making a very, sort of, technical pleading point to say that the distinct claim in relation to the Mangatu Incorporation is, or the proprietors of the Mangatu Blocks, is somehow being thrown into the pot in this because it's separately identified and carried forward.

MS HARDY:

Well perhaps it would be more reassuring to the Court that this isn't a technical point of reading the statement of claim and I'll take you to some of the Tribunal's engagement with the claimant communities and who pursued the claim. But the short point is that this claim provided the platform for a

series of hearings across eight and a half weeks and closing submissions and nowhere in any of that engagement before the Tribunal was the Incorporation's case discretely or separately put.

ELIAS CJ:

But that's because it was content to let it be put forward on that basis and it's only when the question of remedy emerged and the Crown position was that this land would be part of the whole pot rather than being separately earmarked for return in some way that there is any difference between the different parts of the claimants. That's the real problem. That they haven't been heard on this because that wasn't the focus. They were all sailing along together, perfectly happily, when the only question was identifying the grievances and obtaining the Tribunal's determination that there had been Treaty breaches.

MS HARDY:

Well except Your Honour I would put the case more strongly based on the nature of the claim and the prosecution. That in fact what this represents is, if you like, an agreement to act collectively, to seek redress collectively, and that's how the Tribunal saw it and –

ELIAS CJ:

What are you saying, that they're estoppel from saying we now want to be heard separately on remedy?

MS HARDY:

I wouldn't use the language of estoppel for this kind of a claim. What I do say is that the Tribunal, Judge Clark, was entitled to be informed about the history of the claim, the participation and apparent support by the Incorporation, both the claim process and the negotiating process, and to weigh all of those factors in exercising a discretion.

ELIAS CJ:

Thank you.

MS HARDY:

Just to reinforce the engagement of the Tūranga Tribunal with these issues of mandate and collective action, at page 2 of the report again, where the Tribunal is talking about the interlocutory process that produced the particularisation of claim. The Tribunal said, and this is the end of the second paragraph on page 2, "Important aspects of the new approach are the early identification of mandate and the isolation and management of mandate issues." And they discuss that further below.

ELIAS CJ:

Sorry, where's that?

MS HARDY:

This is the bottom of the second paragraph on page 2 of the report.

ELIAS CJ:

Yes, thank you.

MS HARDY:

And then on page 2 the Tribunal comments about mandate for inquiry and negotiations. "They say they're discrete matters but they say the inquiry process and the mandate that developed within it could thus be seen as building blocks for a negotiation." So the kind of thinking that is expressed here by the Tribunal comes out of the Tribunals being attuned to the fact that any individual can bring a claim under its jurisdiction but the Tribunal's philosophy and task is concerned with iwi and hapū restoration. It's about community restoration and ensuring that collectives are built and maintained and the hearing process is seen by the Tribunal as being part of that.

ELIAS CJ:

Is it relevant that this was, as the Tribunal makes clear, a new process?

MS HARDY:

I don't know that it's relevant to the narrative of facts because the facts as they unfolded but –

ELIAS CJ:

Well it may impact upon the expectations that the parties had of the process because the Tribunal was clearly driving a change through here.

MS HARDY:

Yes and I, my recollection of the time was that the Tribunal was really explicit about its attempts to make more practical and useful to the claimants its hearing process.

ELIAS CJ:

For the purpose of negotiation?

MS HARDY:

For the purpose of really empowering communities so that they had the capacity to work collectively together including, obviously, for negotiation.

ELIAS CJ:

Yes. I'm not criticising it at all but I'm just trying to get the background.

TIPPING J:

The description we were given by Mr Brown yesterday leads me to think that the expectation would have been that the Tribunal would only go so far as liability, if I may put it like that in conventional terms, whether or not the claim was well-founded, and would then say, well go away and see if you can sort it out. But if that's the case then it's quite understandable that they joined forces, if you like, for establishing their grievance but they might want to separate for remedy.

MS HARDY:

No Your Honour, I don't think that would be a reasonable interpretation of the events.

TIPPING J:

Is it not correct that the general approach is to determine whether there's well-founded grievances and then to go away and see if it can sort it out and the Tribunal may make some suggestions in that respect like it did here. But would that not be the expectation, that the whole – there would be a break, if you like, at that point, because that's the impression I got from what Mr Brown, and I may have got the wrong end of the stick.

MS HARDY:

Yes Your Honour. The broad approach would be to make inquiries into grievances and then to endeavour to assist the claimants with those findings to engage in solutions but the parties were certainly expected to address the Tribunal on remedies and the remedies they sought so that was taken into account when the Tribunal made its recommendations and gave its guidance about negotiations and how that should occur. But it's also the case, isn't it, that the sections of the report that I've taken the Court to indicate that the Tribunal's view, having heard the claimants and having experienced the consolidation of claimant communities, was that solutions would be collectively focused and not fractured. So I think there's a strong expression in the report that the intention of the Tribunal and the expectation was not simply that it would do its task and then groups would fracture subsequently and pursue individual pieces of redress, but that that collectivity would remain and I think it's that philosophy, in view of Treaty principles, that informs both the Tūranga recommendations and then Judge Clark's decision.

TIPPING J:

Well I think this is at the heart of it and the question really is whether it's consistent with the legislation, with the sections H(a)(b)(c)(d) et cetera.

MS HARDY:

Yes Your Honour and I will get –

TIPPING J:

And that's what you're going to go to?

MS HARDY:

I will get to that, yes.

COURT ADJOURNS: 11.35 AM
COURT RESUMES: 11.53 AM

MS HARDY:

I was canvassing before the break which was about the relation of the statement of claim with the interlocutory process. I just ask the Tribunal when it has the, sorry, the Court, to look at page 2 again of the Tūranga Report and at paragraphs 1.2 through to 1.3, there's an elaboration on the interlocutory and hearing process, and importantly at the top of page 3 at the end of that paragraph, that Tribunal describes why so much effort was put into the interlocutory process and the formality of a process that was unusual in the Tribunal prior to that, and the Tribunal says, "All the parties attended the judicial conferences as did significant numbers of people from the claimant communities" and then in the middle of the page, having rehearsed the formal process, "There are advantages to this approach. All the issues advanced by all the claimants were on the table for everyone to see and this reduced unfounded concern about the stance co-claimants might take about issues, such as boundaries," so there was a really important aspect to the process to flush out all the interests at play here, and it's in that context that I say the combined statement of claim 274, 283 was significant in making the case for the collective Mahaki as seeking relief for Mahaki.

I want to turn briefly then to the Tūranga Tribunal's findings of breaches and the reason for doing this is that it's very important to understand that the 1961 land issue is not a separate and discrete small modern claim as the

appellants have said, but it has a long tale and the implications of some of the earlier Treaty breaches play out both in the '61 transaction and the very nature of the incorporation today. So, of course, the Tribunal found the Crown responsible for various Treaty breaches. In relation to the 1961 purchase and this was traversed yesterday, the Tribunal certainly said that the purchase from the owners was a breach of Treaty principles and that's the finding they make in chapter 15 of the report. Though, they go on to say that those who suffered the prejudice were Te Aitanga-ā-Mahaki and Ngariki Kaiputahi, but chapter 15 isn't a standalone chapter. The previous chapter, chapter 14 is very significant and if Your Honours would turn to page 694 - what the Tribunal records there and just to recap, there was a Native Land Court finding as to ownership in Mangatu in 1881 and the concern raised by some claimants was that that had inappropriately excluded them, and then there were concerns about the ownership identification and the relative shareholdings amongst the owners and that was what was prosecuted through the Native Land Court in 1917 to 1922 so at page 694 in the second paragraph, what the Tribunal records there is that in relation to the title and, therefore, who actually gets to be in the incorporation, that itself offended Treaty principles and they said in the middle there, "Ngariki Kaiputahi suffered both material loss and further damage to its mana." So it's the absence of adequate shareholding there to reflect customary interests. That is part of the grievance.

Just at the bottom of that page, there is a section that Mr Brown took the Court to yesterday which was to focus on the statement that it is certainly too late to argue for a re-arrangement of rights in Mangatu so I think that that was being deployed to suggest that even if there were deficiencies in the identification of who should be owners and, essentially, who should be in the incorporation, it's too late to do anything about that.

ELIAS CJ:

Is that against that background of the earlier finding that, in fact, the intervention to change the shareholding earlier, have been, itself, a breach of the Treaty?

MS HARDY:

That's right. The detail of that was that I think Te Whānau a Taupara thought that it had missed out when it, through petitioning Parliament and then ultimately achieved Native Land Court inquiries, there was a re-adjustment and it was that re-adjustment which was said to prejudice the proportions because Ngariki Kaiputahi lost out disproportionately.

ELIAS CJ:

Well, their shareholding was reduced?

MS HARDY:

Yes.

ELIAS CJ:

Yes, I see. So against that background, you can understand the Tribunal says, well, look, it's not a good idea to interfere with these things because you're going to be impacting upon others if you do.

MS HARDY:

Well, what the Tribunal is saying at the end there is that it's too late to argue for a re-arrangement of Mangatu, the existing incorporation –

ELIAS CJ:

Yes.

MS HARDY:

And they go on to point to their, the jurisdictional prohibition that they can't entertain that anyway because that would be to interfere in a private landholding and Māori holdings are just as protected, if you like, from that jurisdiction as non-Māori holdings. So I just wanted to clarify that that's the reasoning behind that section, not suggesting that the Tribunal is endorsing that land that is now being returned by the Crown to the people of the Gisborne area should go to the incorporation. In fact, the Crown and

Te-Whakarau are looking at making good the breaches that did disenfranchise groups from a customary and tikanga point of view.

ELIAS CJ:

I think we should go and take a view. It's said reading all of this so far away.

MS HARDY:

Just to finish off on that point about breaches. There's also a very important chapter in the report which is chapter 8, which is an engagement in the Tribunal's critique of the Native Land Court itself and that's again the backdrop. The whole notion of private individual shares and shareholdings that emerge out of the Native Land Court is said by the Tribunal to be in breach of Treaty principles and just to briefly underscore that point, if Your Honours turn to page 16, that concept is encapsulated in the penultimate paragraph –

ELIAS CJ:

16 of the first report, is it?

MS HARDY:

Yes, volume 1, page 16 and there the Tribunal says, "First and foremost, the notion of land ownership in individual freehold right was foreign to Māori. Control and management over resources was a community affair" and then they make the point, again, at page 19, "The idea of permanent" – this is the first full paragraph on page 19, "The idea of permanent individual separate and freely exercised right to resources without reference to the kin group was un-Māori." So again, that's the philosophy, the Tribunal's view of Treaty principles which indicates that individualised shareholding and in the incorporation there will have been transaction sales of shares so the Tribunal would be attuned to the fact that current shareholders and proportions of property is not the equivalent of tikanga or mana whenua rights.

Then onto the recommendations, the Tribunal did have before it applications for resumption. It did ask the claimants to address it on relief and if

Your Honours would turn, I think it's in volume 2 of the yellow volumes, the final tab –

ELIAS CJ:

Volume 2?

MS HARDY:

Volume 2, yellow bundle, final tab 57 and these are the closing submissions of the claimant group that prosecuted the claim through the lengthy hearing process, Te Aitanga-ā-Mahaki on page 651 and paragraph 392, binding recommendations sought to all Crown forest amongst other properties and it's Te Aitanga-ā-Mahaki the collective that is seeking that return.

TIPPING J:

Where's the reference to "return?" I'm looking at 392 (a) and (b).

BLANCHARD J:

Second line.

TIPPING J:

Oh I see.

MS HARDY:

The opening.

YOUNG J:

Is paragraph 2 material, 647?

MS HARDY:

Yes, it reiterates that the claimant group here and this is at the end of the proceeding, other hapū of Te Aitanga-ā-Mahaki. So again, this is a iwi/hapū-based claim and in my submission, the Incorporation or the shareholders had ample opportunity form the interlocutory process right

through to this point to indicate that there was something about their claim that should be prosecuted discretely.

ELIAS CJ:

And is, in fact, not asserted by all claimants?

YOUNG J:

I think it means "any" doesn't it?

ELIAS CJ:

I don't know.

MS HARDY:

Sorry, Your Honour?

ELIAS CJ:

Yes, I think that Justice Young is right. "All" must mean "any" in para 2?

MS HARDY:

Yes. Can I move on to the negotiation process?

ELIAS CJ:

But this separate representation is obviously not indicative of separation. Were there – who was heard? What does that – do you know what that refers to? Was there separate representation? It doesn't matter if you don't know. It may be that Mr Bennion can tell us.

MS HARDY:

Yes, Your Honour, I wasn't at the hearing. I'm not sure the detail of the representation. To move on then to the negotiations and the key steps are recorded in the chronology, the joint chronology that was attached to the appellant's submissions but just to rehearse that the Crown and iwi representatives have actually carefully followed the Tribunal's advice about how to proceed and mandate was secured by the groups which are now

called Te Whakarau and others in 2004. It was recognised by the Crown in 2005 so at that point, the appellant and the Incorporation made no objection and, in fact, the evidence shows that in 2004, the appellant moved support for the mandate –

BLANCHARD J:

So this was a re-mandate in process after what one can call the liability findings?

MS HARDY:

Yes, this was a mandating process for negotiations with the Crown.

YOUNG J:

What's the actual point when there's a part of the ways? Is it when the draft or the agreement in principle emerges?

MS HARDY:

That's certainly the point at which the Wai 1489 claim is filed so we had mandate acceptance, then we had terms of negotiation which were over all claims including Wai 274, that's not in the case but it's mentioned in the chronology, so that was May 2007 and then we have negotiations proceeding, again, over all the claims because that's what's covered in the terms. That leads to an agreement in principle in August 2008. In advance of that, in July 2008 the Wai 1489 claim is filed so one would assume that it's at that juncture that the appellant is concerned that the collective is not planning to deliver the 1961 land out of the settlement to the Incorporation but to hold that land with the rest of the Mangatu forest collectively and for the benefit of the collective.

BLANCHARD J:

Well there are some letters, aren't there, in which they write objecting and it's essentially saying that they want to the Mangatu land to come back to them alone?

MS HARDY:

There are, there's correspondence in the case, yes, Your Honour.

BLANCHARD J:

And they get told no?

MS HARDY:

Well they get told –

BLANCHARD J:

But what is now Te Whakarau.

MS HARDY:

Yes Te Whakarau says no essentially and overtures to the Minister are unsuccessful.

ELIAS CJ:

Because Te Whakarau says no unless the settlement isn't diminished?

MS HARDY:

That's right. They essentially proffer, I think in a spirit of compromise, the concept that the Crown could transfer the 1961 land to the Incorporation plus accumulated rentals as long as they got the value of, the entire value of that land plus rentals as well and the Minister was not prepared to consider that as a fair solution to the issue.

YOUNG J:

Well what would the economic effect of that be in terms of the value of the settlement?

MS HARDY:

I don't have particular values of the land but I – and there's no particular value for the 1961 land discrete from the Mangatu forest as a hold but I understand

the accumulated rentals on the Mangatu forest are in the region of $8 million so –

ELIAS CJ:

To date?

MS HARDY:

To date and so that would mean –

ELIAS CJ:

It's about a third, isn't it?

MS HARDY:

Roughly a quarter I think and my understanding is that, again this is extremely rough and ready, that the value of the 1961 land might be the equivalent to the rental so another $2 million.

ELIAS CJ:

So a deficiency of about $4 million?

MS HARDY:

That's right.

ELIAS CJ:

And what's the total settlement offer?

MS HARDY:

I haven't got an up to date figure and I think that's, it may be in negotiation but there certainly was a much earlier figure of around 60 million.

TIPPING J:

So Mr Brown's clients pull out of the general camp when they see that what they're hoping to get is not likely to be delivered. Is that the nub of it?

MS HARDY:

That would appear to be the case. So to recap on those facts and that background, the Crown's perspective is that all of that material that I have just traversed is actually highly irrelevant to the exercise of the Tribunal's discretion and at the very least it's permissible for that to be weighed when the Tribunal thinks about whether the proper course is to reconstitute the Tūranga Tribunal presumably and to draw all of the parties into a full resumption hearing and conversely the appellant says none of that material is relevant because either there is no discretion in any event or if there is a discretion then that wider Tribunal inquiry in negotiating set of events, should not inform the Tribunal in its decision.

TIPPING J:

Do you accept, as a matter of principle, that if you are, if someone has a "right to a hearing" and a procedural direction will deny them that right, in substance, to a defective hearing, that that has – this has to be something pretty powerful, as a matter of discretion, to outweigh that denial?

MS HARDY:

Yes I'd accept that Your Honour.

TIPPING J:

And what is it that is so powerful here, either in isolation or in combination, in essence? I mean it's all very well to talk about the background but what is it? Are you able to articulate 1, 2, 3 or one overwhelming point or whatever?

MS HARDY:

Your Honour do you mean as a counter to the Tribunal's appreciation that this could potentially render the Wai 1489 claim nugatory?

TIPPING J:

Yes. Well potentially yes. We don't debate what level of likelihood but yes. It's quite a strong step, I would have thought, to exercise a procedural

discretion in such a way as to probably deny someone the ability to seek the relief that they're claiming.

MS HARDY:

Your Honour I think I would answer it, rather than saying one key point, I think it's an accumulation of the fact is properly articulated in Judge Clark's decision which is –

TIPPING J:

What, that it would be a nuisance to everybody?

MS HARDY:

No, not at all Your Honour. The Judge actually carefully runs through the factors that inform him and perhaps key when he looks at the issue of prejudice which comes from the urgency guidelines which is key here when one is talking about a priority hearing and the potential for extinguishment. Key, I think, to the Judge, was the fact that these shareholders will all participate and benefit from a global settlement and they will benefit in relation to the 1961 land grievance, because that's part of the settlement. They will also benefit from all of the other grievances in which they are participants and –

ELIAS CJ:

And what is the benefit they get attributable to the Treaty breach in 1961?

MS HARDY:

Yes it is.

ELIAS CJ:

No, what is the benefit they get attributable to the Treaty breach in 1961?

MS HARDY:

Well they share in the ownership of the whole of the Mangatu state forest including the 1961 land.

ELIAS CJ:

They get what, they get their proportion of the – or they get a share of the other, the reparation for the other grievances?

MS HARDY:

That's right. They get a global settlement.

TIPPING J:

They're entitled to that anyway, aren't they? Quite irrespective of the remedy for the breach of the 1961 land issue?

MS HARDY:

Well I don't know about the word entitlement Your Honour. They agreed to participate in a broad community that would broker with the Crown and produce a global settlement.

TIPPING J:

So factored into this counter-balancing is that they'll all benefit and that they threw in their lot, if you like, with the wider group and should be stuck with it? I'm speaking very colloquially Ms Hardy and I may not be putting it very well, but just so that I can understand it?

MS HARDY:

No Your Honour, concerned about the pejorative aspect of the encapsulation of the point –

TIPPING J:

Well never mind the pejorative. It's something along those lines, that having mandated the wider group they shouldn't now, at the last minute, be allowed to withdraw.

MS HARDY:

Well that's –

TIPPING J:

There must be connotations of that in the Judge's assessment I would have thought?

MS HARDY:

I think you're right Your Honour.

McGRATH J:

The main point though, really, the Judge is making in this part is in substance the key people are getting it. If not, although informed, there may be differences as to which entity should be getting it.

MS HARDY:

That's right. so substantively the shareholders will benefit and perhaps more, in a more nuanced fashion to that those such as Ngariki Kaiputahi who will benefit because they are part of the Mahaki cluster as well so importantly, and this reflects the Tūranga Tribunal's reports inquiry, the return to Mahaki, as opposed to a discrete return to the shareholders will actually be a more nuanced reflection of the layers of the Treaty breach that apply to the 1961 land.

ELIAS CJ:

But that's to pre-determine what the outcome might be because the outcome might be different. I mean the complaint here is lack of the opportunity to have the relative merits considered.

MS HARDY:

And part of the Crown's response to that is the material that I've taken the Court through –

ELIAS CJ:

Yes I understand that.

MS HARDY:

– indicates there was a participation and opportunity.

TIPPING J:

Can I put to you something that strikes me as a possible inference to draw? And I'd like your comment on whether it is, and if so how valid it is. It seems to me that coming through this, at least to me, is a strong preference for negotiation as opposed to adjudication. In other words a strong preference, at least from the point of view of remedies, to negotiate or require negotiations as opposed to adjudicating and I just wonder whether that's consistent with the particular regime we've got about licenced land and I have a worry in the back of my mind that the, unconsciously perhaps, the Tribunal presiding officer has been influenced by that wrongly.

MS HARDY:

Yes I understand your point Your Honour and I think it's a fair observation that the Tribunal expresses encouragement to negotiation in the Tūranga Report and I'll take you to this later but there's also a finding of the Muriwhenua Tribunal which was chaired by Sir Edward Durie at the time where that Tribunal was entertaining the question of remedies having heard the first tranche of the Muriwhenua inquiry and at that point the Tribunal chose to defer a further hearing into remedies to allow the parties to negotiate and I think in those excerpts the Tribunal expresses very much the philosophy that there is an empowerment to the Treaty partners in actually engaging in negotiations and that should be given a chance to be worked through. Which is not the same as saying that the Tribunal then would never engage in a remedies hearing if that proves necessary, but I think your right, Your Honour, to say the Tribunal is inclined to give space to negotiations.

TIPPING J:

But if doing so means that someone's, and this may be begging a question, right to a hearing is compromised, there must be some issue there?

MS HARDY:

I think that goes back to Your Honour's articulation of the issue which is, the Crown's submission is that this remains a discretionary decision but it's one that has to be taken with considerable care and it needs to take into account eh prejudice to all of the parties involved and very much including a party who says they want to have a hearing. But can I just broaden that out a little because if the proposition is that any Wai claimant should be able to have a hearing because that's our conception of a right to a hearing, I guess a right to natural justice to put it in other terms –

TIPPING J:

A right to an effective hearing. Not a right to a hearing per se but a right to an effective hearing is probably a more helpful way of putting it.

MS HARDY:

Then if one precludes the discretion of a Tribunal to interrogate the nature of the claim that is seeking the hearing – because here of course Judge Clark did look at all of the factors, received memoranda, held a –

TIPPING J:

I'm not for one moment putting in issue that – the care and so on. I'm putting in issue the result. I would have thought it's arguable that this was an outcome that was outside a properly exercised discretion? And effectively that's the argument against you. Because it is such a Draconian outcome.

MS HARDY:

And in my submission is first that the Crown does accept that there's a discretion here that needs to be scrutinized but only that and not an absolute statutory right and I'll move on to that point. But also that prejudice needs to be weighed carefully and it's open to the reviewing Courts and this Court to say that Judge Clark got the balance wrong. We, of course, say that that's incorrect and I'm going to run through that argument. But can I just suggest an alternative scenario which is that if the Tribunal is to give hearings to all Wai claimants who seek resumption, then this Court would be opening out the

task of the Tribunal to, I would suggest, in virtually every kind of settlement, to allow an individual who is aggrieved because they don't see their interests as being –

TIPPING J:

It wouldn't be every type. It would be cases in which the legislative overlay that we have before us applied.

MS HARDY:

Well Your Honour that's what happens in every Treaty settlement. Treaty settlements are agreed and then they are given legal effect through legislation –

ELIAS CJ:

No, no.

TIPPING J:

But they don't all involve licenced land do they?

ELIAS CJ:

Yes, that's the point that's being put to you.

MS HARDY:

I'm sorry. I'm sorry Your Honour.

ELIAS CJ:

It's that statutory overlay.

MS HARDY:

Right, well it would apply, wouldn't it, to Crown licenced land and to any SOE land because they raise the same issues and if one, just recalling a map of what land remains outstanding in both the top of the South Island and the bulk of the North Island, then that covers a good range of the claims that are in negotiation.

ELIAS CJ:

But a lot of those are, the land is land bank land. It's land where the claims are made in respect of that land because that's all that's left and they can't get private land back but here you have the grievance associated with this particular block of land.

MS HARDY:

Again perhaps this is becoming evidence from the Bar but I can say that –

ELIAS CJ:

Well in the Raupatu claims the remnants are, of course, the land that was taken, the remnants of the land that was taken but it is a very close connection in this case. Between the grievance and the remedy that's being sought.

TIPPING J:

It's the very same organisation, as I understand it, from which the land was acquired.

MS HARDY:

That's right but the Tribunal took care in its chapter 14 as well as its chapter 15 to make it apparent that in fact there are grievances that are significant that go beyond the 1961 transaction and indeed the 1961 transaction, obviously the Crown accepts Treaty breach there and the Tribunal found undue pressure but what happened there was that the shareholders got a fair price for the land and the people who were really disenfranchised were those who never got a look in because of the earlier deficiencies of the 1881 Native Land Court finding.

TIPPING J:

But the claim to resumption by the Incorporation may fail, for all these reasons. But it's, in effect, pre-judging it, isn't it, to say that it can never be heard effectively? I'm being a nuisance to you I know Ms Hardy but these are

the thoughts that are going through my head and it's important that they be ventilated.

MS HARDY:

No. Again Your Honour I wouldn't agree with the propositions in the way that you put them. That the claimants are part of a group who have been heard through the Tūranga process and have committed –

TIPPING J:

Have they been heard on this precise issue, even though they might have been if they'd been more awake, if I can put it like that?

MS HARDY:

The 1489 claim has not been heard but my submission is that the Tribunal is entitled to consider whether that is required and whether it's required to involve those claimants, all of Te Whakarau back in full hearing, or whether it's a reasonable response to look at the Tūranga Report, its recommendations, and decide, albeit it in a finely balance decision, that a hearing is not warranted.

TIPPING J:

Well I would be helped by your reconciling that with the legislative provisions that are specific to this type of land, frankly.

MS HARDY:

Certainly Your Honour and I was going to move on to the statutory interpretation issues.

ELIAS CJ:

Does that finish your traverse of the history? Are you going to be coming back at all to the Tribunal decision?

MS HARDY:

No I wasn't going to Your Honour.

ELIAS CJ:

Can I just put to you, before you deal with the statutory interpretation point, the reasoning of Judge Clark, which really is, well he groups it under three headings and, it seems to me, there are three reasons. The first is that the Tribunal has already considered and made recommendations and I would have thought that that was highly debateable but also that in paragraph 54, there's an indication there of, that there's no need to hear from the claimants on this point. It anticipates that the Tribunal won't change its suggestions but that's a matter that we can look at. I'd like your comment on it but that's a matter we can really look at what the Tribunal said about.

The second is that negotiations with the Crown have not broken down and that seems to me arguably to raise a total non-sequitur or to sort of beg the question of whether Mangatu can withdraw from that process. For the moment, I cannot see what legal compulsion there is for it to remain in it and I would have thought that the very filing of Wai 1689, 1489, was the, was sufficient indication that those negotiations were not continuing on this point.

Then the third is the principle reason and it is that they're not prejudice because they will participate and you've been addressing us, really, on that point. It's a bit odd though, because the Judge says that the Tribunal shouldn't be slow to intervene in cases that warrant it and suggests that this, in para 60, this would be a case that warrants it if the Tribunal, if there wasn't the complication of an offer on the table, and really, for myself, I don't find this reasoning very convincing so anything that you want to say in addition to what you put to us, I'd be grateful for.

MS HARDY:

Thank you, yes, and I'm mindful I haven't answered Justice McGrath's question from earlier as well. The treatment of mandate and support and withdrawal here, is that – if I start at paragraph 60, I would submit that that comment that is to be interpreted in this way, that if the Tribunal was simply faced with a discrete claim about the Mangatu Forest and there weren't others

interested in it, and there weren't other layers of claim to it, in other words, if this was what Ms Feint was submitting before the Tribunal, a small modern claim or something that was more akin to a property claim of an offer back under the Public Works Act, then really the Judge thinks that would put forward a reasonable case for a hearing –

ELIAS CJ:

Well, would undoubtedly be the case.

MS HARDY:

Yes, but here, the Judge is attuned to the fact that there are others interested. There are layers of claim –

ELIAS CJ:

Well, there's an offer. It doesn't really talk about layers of claim or anything like that.

MS HARDY:

But the offer is to a collective group that has been mandated including by the shareholders –

ELIAS CJ:

It's a collective group through whom these claimants will benefit.

MS HARDY:

Yes, but it's also a collective which these claimants have mandated to settle their claims including –

ELIAS CJ:

Well, that really takes you back into what was meant by that. I suppose that pleading and the submissions and whether, really, that is so very clear.

MS HARDY:

But, Your Honour, also I think the terms of negotiation that were signed up and now the, that that reflected –

ELIAS CJ:

Did you take us to take? I can't remember.

MS HARDY:

No I didn't, Your Honour. It's not in the case, it's mentioned in the chronology but I did check it this morning and noted that it's terms of negotiation that mandates, what is now, Te Whakarau and it includes all of the claims of Mahaki and it lists them by Wai number and that includes Wai 274.

ELIAS CJ:

Yes, which was a – yes, all right. So we're back into whether it all gets merged or whether they're are – because the claimants all have to establish the distinct grievances. That's the framework of the Treaty of Waitangi process, so these were distinct grievances that were put forward.

MS HARDY:

Well, Your Honour, I see them as grievances that were put forward on a tribal basis –

ELIAS CJ:

Yes, no, I understand that.

MS HARDY:

Yes.

ELIAS CJ:

I understand that but I'm just trying to work through what happens to them at this stage and you say, well, they merge because a mandate was given to negotiate.

MS HARDY:

Well, a mandate was given to negotiate and what that involves is a range of hui with the claimant community.

ELIAS CJ:

I know, yes.

MS HARDY:

And so that's a mandate that has been given to the collective to deal with the collective claims. The point that's being made in the, in Judge Clark's decision is that that mandate hasn't gone through a community process of withdrawal and that's what Justice Clifford found. He made a finding of fact that there had been no mandate withdrawal and that –

ELIAS CJ:

Well, I don't understand what that means as a legal animal in this, because any individual Māori can bring a claim that he's effected by a Treaty breach and Wai 1489 is such a claim.

MS HARDY:

Well, 1489 is seeking a remedy to a claim –

ELIAS CJ:

Well, it's that there will be, if you like, further grievance if I'm not heard on this, because it repeats the Wai 274 claim, I think I'm right in this and then it, I thought it – does it, in fact, can you just put us to it?

MS HARDY:

It's at tab 3 of the green – so it rehearses background and then seeks relief.

ELIAS CJ:

But it also does claim a grievance in relation to the settlement. That's para 31.

MS HARDY:

Yes it does and then it seeks recommendations under section 8HB, section 36 and a preservation of the value of the offer made to Te Whakarau in (c) –

ELIAS CJ:

None of which have been heard by the Tribunal.

MS HARDY:

No, so the Tribunal and this is what the Crown says is available to it, under its, Ms Feint called it "the gate keeper role" of Judge Clark looking at a claim such as this, interrogated it to exercise a discretion.

ELIAS CJ:

Well, it held that there's an offer on the table and that there will be a sharing in that offer and, therefore –

MS HARDY:

That's right. So that was one of the planks of the reasoning of the decision and as I endeavoured to explore, that's got its roots in a careful analysis of who had rights and what was affected in Tūranga.

ELIAS CJ:

Well, there is a background that the Judge could have invoked.

MS HARDY:

Yes.

ELIAS CJ:

All right, thank you, you better go on to the statutory –

McGRATH J:

Can I just ask Ms Hardy, I'm right, aren't I, in saying that you're putting this squarely in terms of the statutory scheme on the submission that there is a discretion and that the discretion was properly exercised? You're not saying

that the appellant waived rights. You're not saying that the appellant has stopped in any of the senses that New Zealand law normally understands those terms? You're not putting the argument within that framework?

MS HARDY:

I wouldn't use those legalisms in this setting, Your Honour.

McGRATH J:

Well, if you don't use those legalisms, you're really not, you're really saying that you don't want those heads of legal argument to be considered by the Court. You want the Court to consider the matter entirely within the framework of discretion and whether it was, the decision was a discretion that was open to Judge Clark?

MS HARDY:

That's right.

McGRATH J:

Thank you.

MS HARDY:

I'll move on now, Your Honours, to the statutory framework and this is in response to the appellants, what they called the primary contention, I think at the leave application was that the claimant here, but I think any claimant, is entitled to elect a resumption hearing and the Tribunal is required to hear that application, and that's the articulation of the claim at paragraph 28 of the appellant's submissions. So, in my submission, that high end of the appellant's claim is that there's no gate keeping, there's no discretion and there's no question of the Tribunal looking at a sufficiency of reasons on the part of the Tribunal. The latter enquiry, we say, of course, is entirely open and appropriate for the reviewing Courts and this Court.

TIPPING J:

You haven't, I'm afraid, in my mind, accurately encapsulated paragraph 28 of the appellant's submissions which we're back to this debate we were having before morning tea that all they're saying is, is that they're entitled to a hearing and if a refusal of urgency denies them a hearing in substance, that's a very powerful factor in the overall equation. They are not saying that every grievant has a right to an urgent hearing, as I understand it. Now, Mr Brown will leap up and correct me if I'm wrong, I'm sure.

YOUNG J:

You say this applicant is entitled, has a right to a hearing?

TIPPING J:

Well, I'm not sure that he's even saying this application is –

YOUNG J:

Well, I think the second sentence, last sentence of 28, "If he elects to seek resumption, the Tribunal must hear him."

TIPPING J:

Well, it must determine the claim?

YOUNG J:

Yes, we should focus on that.

McGRATH J:

But it doesn't say, as my brother points out, when the claim is to be determined?

TIPPING J:

No, it doesn't say they've got a right to an urgent hearing. It says they've got right to a hearing, an effective hearing and if the discretion is exercised so as to deny that right that is a very major factor in the overall picture.

MS HARDY:

Well, I'd welcome clarification in reply on this point because my understanding of the high end of the argument was that there is a statutory process provided through the amendments produced by the Crown Forest Assets Act that that is discrete, and apart from the negotiations process. That a negotiations process is entirely irrelevant, and also that if one reads context, such as the 1989 Forestry Agreement, then the theme of that context is that forest claims should be heard as quickly as possible. So I was extrapolating from those submissions that an applicant seeking remedies in relation to Crown forest land, or state-owned enterprise land for that matter, should be able to elect a hearing and because the analogy the appellants draw in relation to binding powers is with a Court, then like a Court, there ought to be a hearing essentially upon application. And the provisions allowing for a deferral under section 7(1)(a), for instance, or the deployment of Schedule 2, clause 8 gate-keeping is not appropriate here. And it's for that reason that the Crown has taken care to submit that that is not the Crown's reading of the provisions. It's not consistent with the context behind it but if that is not what's been argued and what is being argued is actually the particularity of this case most focussed on the impending settlement, then we've got a slightly different argument.

TIPPING J:

Well, we note that your argument is that there's no absolute right to an urgent hearing. That's your first proposition.

MS HARDY:

That's my first proposition.

TIPPING J:

Your second proposition is that that being so, there was no per se error in refusing an urgent hearing, but Mr Brown says, as I understand him, that the fact that this would preclude an effective hearing is a major, probably the dominant factor in the exercise of the discretion because of the nature of the legislation, which he argues, gives a right to a hearing some time, an effective

hearing some time and if you don't give them an urgent hearing here, there will never be an effective hearing.

MS HARDY:

Well, I think Your Honour that's –

TIPPING J:

That's the argument as I understand it. It's as simple as that really.

MS HARDY:

That's certainly the question in the Crown's mind. Is it – are we talking here about a statute that allows for a gate keeping discretion where the only answer in relation to the proper exercise of the discretion, if there is an impending settlement, is that a hearing be granted and perhaps that's what the appellant is saying, or is the appellant making an even broader argument that when claimants choose to elect resumption hearings rather than a negotiation process, then upon application the statutory regime provides them some entitlement to a hearing?

ELIAS CJ:

It has to be intensely contextual, doesn't it, but one way of viewing it is that really the matter is the converse of what the Judge said that it's because of the offer in context the applicant will be denied the opportunity to make his claim. Now, in some circumstances, it may be perfectly proper for the Tribunal to regard an attempt to derail a settlement at a late stage as colourable or something else, but it's got to confront that and give the reasons why that's so. Here it's not colourable. It's manifestly not because it was the basis of the claim as originally framed. Everything else has been concentrating on the identification of the grievance and whether it's well-founded and it's only when it emerges during negotiation that the Crown proposal will put everything into the same pot that the separate is brought, and it will be overtaken if the Tribunal won't hear it.

YOUNG J:

Maybe, maybe. It depends on the process.

ELIAS CJ:

Well, I mean, they'll be a further claim about breach of the Treaty in the implementation of the settlement.

MS HARDY:

Your Honour, perhaps a couple of points emerging from what you have said, and I think that the first point that you're making is that, is acknowledging perhaps a discretion on the part of the Tribunal.

ELIAS CJ:

Well, I don't think anyone would say that they don't have to make an assessment. They're exercising a judicial path, but it's the context that makes this determination one that you instinctively recoil from a little bit, although you've made great headway in pointing out the countervailing circumstances. And part of that background is this opportunity for resumption under the statute.

MS HARDY:

Yes, so –

ELIAS CJ:

So it will not only defeat the ability to maintain a claim that's been there throughout, but it will also work around the statutory framework that came in with the Forestry settlement.

MS HARDY:

Your Honour, I think I've probably said all I can about the Crown's analysis of whether the claim –

ELIAS CJ:

Yes.

MS HARDY:

– as a discrete claim has been there all along.

MS HARDY:

And so perhaps it would be helpful if I moved on to the statutory interpretation points.

ELIAS CJ:

Yes.

MS HARDY:

Just as a preface, my understanding of the applicant's claim is that because they accept that every claim shall be heard by the Tribunal, which is the section 6(2) direction, not every claim – there is a discretion at play generally with granting hearings, so what they do is mark out through section 8HB and the relevant sections a special field, which I think is being characterised as something that is more Court-like than the usual Tribunal process, and it's for that reason that both parties here have interrogated the nature of the Tribunal's recommendatory powers and discretions in relation to Crown forest land. So that's the reason for going through the kind of detailed analysis that is in our written submissions of section 8HB and the other section. So briefly, with that in mind, and if we turn to the legislation itself, which is in the appellant's authorities at tab 2. And on page 55 there is section 6(3), which is the primary and original remedies section, if you like, so if the Tribunal.

BLANCHARD J:

Even under the subsection, isn't there an obligation on behalf of the Tribunal which has found that a claim submitted is well-founded –

MS HARDY:

Mmm.

BLANCHARD J:

– if there hasn't already been a hearing at which it has considered or heard argument on whether it should make a recommendation, isn't there an obligation for it to have such a hearing? Though of course it may be that it would be unwise for a claimant to press it too strongly because at the end of the day, under section 6(3) the Tribunal doesn't have to make a recommendation. But it's the difference between the obligation to hear the parties on the making of a recommendation and the discretion not to make a recommendation. Now, that's your starting point. But when you get to the sections that we're more concerned with, then the Tribunal is more constrained in what it can do. Hence, it may be more necessary in certain circumstances to have an urgent hearing.

MS HARDY:

Well, my submission is that in relation to applicants for remedies hearings generally, the Tribunal, as a standing commission of inquiry, has the power to allocate and prioritise fixtures, and there's also an express power under section 7(1)(a) to defer hearings and, in my submission, part of the reasoning that can be appropriate for deferral or not prioritising hearings, can be that there is an alternative avenue of redress available. So just, if we look quickly at section 7(1) –

ELIAS CJ:

Well, I think nobody would dispute that.

MS HARDY:

So, my submission is that that applies to recommendations or remedies generally which are discretionary under section 6(3) and the Crown's submission is that the regime imported through section 8HB, those powers of deferral and prioritising also apply, and the reason is that if one interrogates the statutory structure of the Treaty of Waitangi Act then it makes it clear that those provisions do actually fall within the general provisions of the standing Commission of Inquiry with recommendatory powers, and the key argument is

that the Crown disputes the appellant's argument that section 8HB through to 8HI is an entirely discrete stand-alone section.

ELIAS CJ:

No, it's within the framework of the legislation. Again, I mean, speaking for myself, I don't have any problem with that. It's what you do with it, against the background of the specific powers that are available under section 8HB.

McGRATH J:

The fact that the Tribunal has limited resources and many demands on its time is clearly relevant in terms of prioritising generally. But we then get back – I mean, this case would not be taking place if it wasn't for the fact that there was an offer that would lead to legislation that would extinguish the appellant's claim, it seems to me, and that's the context. For example, I don't see that this Court need be particularly concerned with the argument based on urgency which derived from the 1989 agreement, because what really is driving the urgency is the potential disappearance of the claim.

MS HARDY:

And in that –

BLANCHARD J:

And the fact that the legislation seems to mandate that it's the Tribunal that makes these calls, not other parties through settlements or the Crown.

MS HARDY:

Well, that's where my submission that the section 8HB provisions fall under the rubric of the section 6(3) provisions is relevant and, in essence, it's section 8HB, just to go to the language, which is on page 74 of the casebook, says that the Tribunal may make recommendations. It's clearly discretionary and they make them under section 6(3), so it again brings it back to that section. Now, the –

TIPPING J:

But, with respect, I think you're fusing the recommendations that may or may not be made with the duty to consider an application for recommendations. I think my brother Blanchard put the point, to the same effect.

BLANCHARD J:

Yes, that was what I was driving at.

MS HARDY:

Perhaps I'll put it this way: when settlements are brokered and have the potential to be given legal effect by legislation, they cover a range of remedies, some that are binding and some that are not binding. A claimant that is, say, an individual or a subset of the collective group, may be unhappy with the overall settlement at some point, perhaps in the middle or towards the end of the negotiation process. Both of a claimant to non-binding as well as binding recommendations is going to have the right to have that heard and for the Tribunal to recommend this wāhi tapu actually should be returned by the Crown to this hapū and not that hapū. So if you look at it from the point of – and those are very significant issues, the issues of wāhi tapu, you know, sometimes more than a Crown forest licensed land. So if the proposition is that people who make claims –

ELIAS CJ:

Must be heard.

MS HARDY:

– that might be extinguished must be heard, it opens a huge area for compulsory inquiry by the Tribunal into remedies and, in my submission, that's not either intended or required by the statutory framework. What is required is a good a careful gate keeping by the Tribunal as to whether there should be a hearing, with all of the implications that granting a hearing might give. Because of that proposition – and I think that the appellants would accept that that's really an unworkable outcome, and I will take you after the break which we're at to the decision of the Waitangi Tribunal in *Mair,* which is the

second-to-last authority in our bundle, which was calling into question the collective group in a settlement is the commonplace, it happens all the time, it's not unusual. So you've got to start drawing some lines about who can be heard.

ELIAS CJ:

But what is – well, after the break perhaps you can return to this. What is so wrong and so unmanageable about the Tribunal hearing the parties on the point and confronting and articulating the reasons why the Tribunal isn't going to make a recommendation under section 6(3), that the Tribunal is satisfied that the mandated settlement process is sufficient discharge of the Treaty obligations? And that's entirely understandable, particularly in the context of normal claims, where a political solution is what is envisaged. But it's in this area, it's in the application really, here, that I think the Court is troubled.

Now, it's clear we're not going to finish today, I would think. You are hopeful, are you? I'm really just making enquiries. The Court is able to sit tomorrow morning if need be, so I'm just raising that so that you know that there is that…

BLANCHARD J:

If you can get a flight.

ELIAS CJ:

Yes, it is subject to my being able to get on a flight to Auckland for a swearing in, and we would prefer not to sit tomorrow morning. But I don't want to hurry the parties too much. Sorry, Mr Solicitor?

SOLICITOR-GENERAL:

I am optimistic, Your Honour, that we'll be able to finish today. But can I signal, as I think I mentioned to Mr Thatcher yesterday, we might be asking the Court to sit till 4.30 today if that was at all possible, in order to achieve that.

ELIAS CJ:

Yes, think we will sit on. In fact, I think we may sit till five, if we can – we might take a break at 3.30. Thank you, well take the adjournment.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.13 PM

MS HARDY:

The question the Chief Justice was asking before the break was a practical one, which was essentially what would be so unmanageable if the Waitangi Tribunal were to embark on a hearing of the resumption application.

ELIAS CJ:

Or if they were to just determine them.

MS HARDY:

Yes, so go straight to a substantive hearing and determine the issue of resumption. The Crown's response is it wouldn't be an issue of being unmanageable in terms of resources, and Judge Clark properly said that that wasn't an influence on his decision. But what would occur is that there would be a hearing where there would a cluster of resumption applications. So there's a resumption application over the 1961 land by Ngariki Kaiputahi. There's one by the Mahaki cluster and there is the fresh one, if you like, of 1489, from Mr Haronga, so any hearing would certainly pull in all of those people for a hearing, where that relief is contested. But it's more than that I would suggest as well and, to explain that point, could I ask the Court to look at the Crown's bundle of documents, which it would be best if I located.

ELIAS CJ:

It's a white one, is it?

MS HARDY:

Yes. And to look at tab 12, and if you could turn to page 10 of that document, these are a series of appendices to a judgment, so it's appendix B, which is in the middle of the document, page 10. This was the determination –

ELIAS CJ:

I think I've got the wrong thing. Is this the Waitangi Tribunal Muriwhenua?

MS HARDY:

That's right, it's the preliminary determination of issues.

ELIAS CJ:

Yes.

MS HARDY:

And there are a few pages of decision and then an appendix B in the middle, and page 10. So this was the Muriwhenua Tribunal considering a range of issues, including applications for resumption orders, and appendix B is the Tribunal's elaboration on its role in granting relief for claims and the thrust of what they say is that the Tribunal's task is to look globally at relief. So, in the third paragraph, "The broad strategy of the Act, as we see it, is to provide the Crown with a total picture of the relief that may achieve a satisfactory result." Down the bottom, "We are assisted in that view by a reading of section 6(3). The fact that the power to make binding and non-binding recommendations is discretionary, requiring consideration of all matters and the preamble to the Treaty of Waitangi State Enterprises Act 1988, which indicates that the purpose of the resumptive scheme was to secure lands for future claims but not guarantee a return on proof of a claim.

So what the Tribunal is saying there is that its role under section 6(3) is to look at the relief that is appropriate for claims to remove the prejudice, and it will look at that globally. So, in my submission, and given that section 8HB provides for recommendations which are made under section 6(3), the Tribunal's task is to look globally. That would mean the kind of decision that

the Tribunal would be making on a resumption application, if it were to make some sort of order that a part of the 1961 land went back to the Incorporation, or all of it –

TIPPING J:

This paragraph actually recognises that in some circumstances, including urgency, you can do a more particularised – it refers to the *Pipitea Marae* case and then – so I'm not quite sure where this takes you, Ms Hardy. Clearly, this Tribunal recognised that there may have to be exceptions from the general approach, for example, urgency.

MS HARDY:

It did, but it said that the general principle was to look at global relief, and what I'm suggesting is that if the Tribunal were to properly exercise powers under section 6(3) in relation to the forest land, and taking into account its current place in the settlement with Te Whakarau, it should look at the implications for Te Whakarau on any sort of award of the land to the Incorporation. And similarly, given that the Incorporation members are part of Te Whakarau, what does, what is the impact of the, any sort of transfer of land to them on their global settlement. The short point is, it's not a narrow inquiry into who gets title to a piece of land, it's actually also a more global inquiry into what implications that has on a settlement, the quantum of the settlement, how that should be adjusted.

So – and in my submission it's that kind of implication which the Tribunal is facing when it considers whether urgent hearings should be given and the compelling point to the Judge here was, and it's the key one I responded to Justice Tipping, the key point is that all of the shareholders are actually benefiting and getting recompense for the 1961 land through the settlement. So weighing, if you like, the prejudice of embarking on a hearing process of the kind that would unfold, against the prejudice to the members of the Incorporation, that's where the discretion –

ELIAS CJ:

If, however, the Tribunal having inquired into this application were to have made a recommendation that the land go back to the proprietors, we know how much value is at stake because you've helpfully told us that so it's not inconsiderable. One wonders really, and that's leaving aside, you know, those who might also be entitled to share in it and what discretion the Tribunal could exercise in tailoring the remedy, but it seems a bit cavalier to say, oh well, they'll participate in the settlement. Surely the Tribunal really needs to weigh up the consequences and the prejudice?

MS HARDY:

Well Your Honour I would submit that that's what the Tribunal did in its decision –

ELIAS CJ:

Well it simply said there's an offer on the table but anyway you've taken us to the decision and it speaks for itself really.

MS HARDY:

Yes I have.

BLANCHARD J:

Do we have the preamble from the Treaty of Waitangi State Enterprises Act 1988?

MS HARDY:

Yes Your Honour. That's tab 1 of the Crown authorities. That's the State Enterprises Act 1988.

ELIAS CJ:

It is essential.

MS HARDY:

So there are safeguards there expressed in paragraph (g) in the preamble but the point being made in the –

ELIAS CJ:

Well in fact looking at this, look at (g)(ii), requiring the Waitangi Tribunal to hear a claim as if it, that the land had not been so transferred. Well the Crown only has this land – oh I see it wasn't transferred under – yes, sorry.

MS HARDY:

Your Honour I think that's the piece that is the origins of the, I think it's section 8HD, limiting those that can be heard –

ELIAS CJ:

Yes, yes.

MS HARDY:

– and the valuation of the land. So can I move on just to conclude on the statutory interpretation arguments that the core Crown submission is that there isn't a discrete and stand-alone regime applying to Crown forest land. That it does fit under the section 6(3) provisions and that's explicit in the statutory language. My friend said that that was an overly literal interpretation but it's a clear reading of the language of the statute. And the other provisions on which the appellant rely to argue that this was some sort of discrete and stand-alone provision, in my submission, don't support that argument. I thought I would run through those briefly. They are covered in the written submissions but section 8HC is at page 76 under tab 2 of the appellant's bundle of authorities and that's the provision that says that recommendations will be made in the first instance on an interim basis then there's a 90 day period and then they become binding. But in my submission that doesn't change the point that they are recommendations that can be made that are made under section 6(3) and that they are, according to the language of section 8HB, discretionary. The Tribunal may make a range of orders. Similarly section 8HD on page 78 –

ELIAS CJ:

It may make, as you say, a range of orders but doesn't it have to make one of those orders?

MS HARDY:

In my submission it doesn't need to make any – one of the three orders upon an application. It could entertain an application and possibly decline to make orders at that juncture and indeed that's what happened with the Muriwhenua claim. There were applications, there were these three options, but – and again this is at the Crown authorities tab 12. If the Tribunal turns to page 5.

YOUNG J:

Sorry page?

MS HARDY:

Page 5 at the –

ELIAS CJ:

Sorry whose bundle is this?

MS HARDY:

Crown white bundle, tab 12, page 5. It's got the Tribunal has resumption applications before it and it says it will defer a remedies hearing to allow for negotiations. Now one could envisage, for instance, the Tribunal deciding to hold a hearing. Hearing from all of the competing parties and hearing from the Crown and being persuaded in the course of that hearing that a deferral is appropriate and in my submission those provisions that allow management of a hearing through section 7(1A) would certainly permit deferral in the case of a resumption application just as any other –

TIPPING J:

But deferral is different from having reached the barrier and deciding whether you can decline to make any order at all. It's been put to you that in that

situation doesn't, as a matter of logic, doesn't the Tribunal have to make one or other of these alternatives? That was Mr Brown's argument.

MS HARDY:

Yes Your Honour, and the Crown has a contrary argument. That question of prejudice and the potential for extinguishing a claim which the Crown accepts is a highly important issue for any discretionary decision, applies in the Crown submission to the range of claims that the Tribunal hears. If the Tribunal was asked, as I mentioned before the break, to make a determination about what group should receive a wāhi tapu, then one would expect the Tribunal and any reviewing Court faced with a situation where that claim was going to be settled by imminent settlement and legislation, to take great care before it declined to hear that claim, but my point is that the statutory regime doesn't privilege Crown forest licensed land claims over other very important claims like those to wāhi tapu. The statutory regime which clearly fits section 8HB into section 6(3) makes that apparent.

ELIAS CJ:

Well, is it though a question of privileging them or is it simply that the background of the opportunity for resumption which will be gazumped by the settlement, is a significant factor that has to be weighed?

MS HARDY:

In my submission the loss of the opportunity for that kind of a claim but there are others of a non-binding nature that are also –

ELIAS CJ:

Yes, yes.

MS HARDY:

So I perfectly accept, Your Honour, the point that the gazumping aspect of any claim is of significance, great significance when the Tribunal considers an urgent application but it's not a distinguishing feature that applies to Crown forest land alone and, of course, in the Crown submission it's the case

that Judge Clark did consider prejudice, did weigh it. He was directed to do so by the urgency criteria in what he does and we've been through this earlier, but at the conclusion of his judgment, he looks at prejudice to the Incorporation, prejudice to the members of the Incorporation and prejudice to Whakarau, and that persuades him that this is finely balanced and he makes the decision, informed by context, that a hearing is not required.

TIPPING J:

I do not, at the moment, understand. As this may be important, I'd be grateful if you could elaborate. How you say that HB, 8HB, doesn't cover the field. In other words, it leaves open the ability to do nothing. Mr Brown's argument was it must be either (1)(a), (1)(b), (1)(c) or 8HE but not doing nothing, and it would seem to me, although it's not a direct indication, subsection (3) of 8HB tends to support the view that it covers the ground.

MS HARDY:

Well, in my submission the language of 8HB still leaves it as a broad discretion with the language, the prefatory language the Tribunal may, if it finds the claim well-founded, go on to traverse some options. And so, therefore, it repeats the language of section 6(3) in that language of discretion and, in my submission, what the Tribunal has done is not, in effect, a do nothing option. What it has done, just as the Muriwhenua Tribunal did, was look at the application, decide against the three doing – making orders and, if you like, defer so that negotiations could take place. There may come a point where the circumstances are such that the Tribunal should make orders because so much time has gone past or the negotiation process is so dysfunctional that that's the only outcome –

ELIAS CJ:

Or the claim will be overtaken?

MS HARDY:

But again, that's the discretionary point. It's not just that a claim will be overtaken because as the Mair Tribunal said, that's the common place in

settlements. It's a question of the merits of the particular claim, but it could be in that circumstance that, yes, it is, the proper exercise of the discretion is to grant a hearing but in my submission that's about reasonableness of the discretion not because there's a statutorily mandated requirement that upon an application, one of three options must at that juncture be delivered.

Just an interesting comparison is looking at section 8HE which is on page 79 of the case there. This is a section which is a little different from the others in that it permits the Crown to make a direct application to the Tribunal for basically the release out of the Crown forest license system of land and in that situation public notice is given to flush out any claims. If the outcome of that is that there are no claims or that where there are claims, the claimants have consented to the release of the land, then the Tribunal may issue the appropriate orders and documentation to release the land but again, this is consistent with the statutory scheme that the discretion of the Tribunal is preserved even there and it's emphasised may in its discretion, so even where a piece of land has apparently been cleared of claims, the Tribunal can need not, is not obliged, according to the statute, to make a final decision at that juncture.

ELIAS CJ:

Well, at that point, the sort of consideration, if this power is looked at in terms of its obvious purpose, is that the Tribunal may not be satisfied that it can rely on the fact that no claim has yet emerged, otherwise there's no purpose in not clearing the land.

MS HARDY:

Yes, that may be one of the purposes behind that, though, there is actually – the provision is for a process to actually flush out those claims, so another purpose might be that the Tribunal simply can leave in the stock of Crown forest land, land until it explores more fully other claims to consider what redress might be appropriately more broadly than particular claims that are filed in relation to it.

ELIAS CJ:

Yes, I suppose that's right that if 8HB exhausts everything, the Tribunal would not, the Tribunal would have to deal with each application only in terms of the particular claim before it, whereas it might be aware of other claims for which this land should be retained, so it wouldn't be wanting to clear the land.

MS HARDY:

It may not in the statutory that's preserving that discretion.

TIPPING J:

But wouldn't you have everybody involved who was claiming an interest at this stage where you have to identify the Māori or group of Māori to whom that land or part should be returned, because if you don't, you're in all sorts of trouble?

MS HARDY:

That's true, Your Honour. I expect the Tribunal would take steps to ensure that it had a comprehensive presentation of the claimants to make that hearing work. Your Honours, my intention was to move on next to the issue of discretion, but I am happy to answer any outstanding questions about statutory issues?

ELIAS CJ:

No, thank you.

MS HARDY:

Okay. Can I just draw Your Honours attention to the written submissions, which traverse the context of the 1984 agreement and also the Crown Forest Rental Trust Deed, that's all set out in the submissions.

ELIAS CJ:

Yes.

MS HARDY:

For example that the deed provides funding for negotiations over Crown forest land, so, in my submission, clearly reflects that the parties to the settlement that preceded the reforms contemplated the concept of negotiations. This wasn't a pure litigation frame of the kind that the appellants are suggesting was behind the legislation and the broad Crown submission from that is there's nothing in the settlement, the Lands or Forests Act or the legislation which precludes the concept of negotiation and which precludes the Tribunal properly exercising its discretion to allow space for that to happen. In relation to discretion, and certainly the Crown has considered that the appellant's case is really about the proper exercise of a discretion, rather than about absolute rights to a hearing. The important points that the appellant makes are that there are illegalities in the decision of Judge Clark. One of those emerges from the apparent application of Judge Wainwright's guidelines, and I'll discuss that, and the second is the circuit breaker notion and the third is the reliance of Judge Clarke on the Tūranga Tribunal's findings and recommendations. In relation to the guidelines, and these are at the pink book, case B.

YOUNG J:

Sorry, pink book, sorry?

MS HARDY:

So this is section B, the pink…

YOUNG J:

All right, sorry, yes.

MS HARDY:

At tab 14, and the essential concern that the appellants express is in relation to page 187 of the case at paragraph 6, which is the point that, for the avoidance of doubt, no different or separate set of criteria will be applied to the granting of remedies hearings where the remedies sought include binding recommendations relating to particular land. Now, the inference that the

appellant takes from that is that Judge Clark failed to weigh the potential prejudice to Incorporation members, in other words that he failed to appreciate that, by the Tribunal declining the application, the members faced a very real prospect that the application would not be heard and it would then miss out on the potential for binding recommendations, the rentals and the compensation that comes out of that under the Crown Forest Assets Act. If there is a discretion on the Tribunal's part, which the Crown says that these clearly is, then in my submission the combination of the Tribunal guidelines, Judge Wainwright's guidelines and also the urgency criteria, which are under the previous tab, which direct the Tribunal to consider prejudice, and that's under tab 13 and…

ELIAS CJ:

I'm sorry, I'm just trying to –

MS HARDY:

Yes.

ELIAS CJ:

– hear the end of the sentence. The appellants say that the combination of these practice notes is what?

MS HARDY:

The Crown says the combination of the guidelines and the practice note on urgency means that there is sufficient and appropriate direction to the Tribunal to consider the prejudice to the Incorporation, including the prejudice of possibly not being able to pursue the 1489 application through to resumption orders and, in other words, the urgency criteria which are clearly in play here are direct the Tribunal to consider prejudice and when, and Judge Clark addresses prejudice at the conclusion of –

ELIAS CJ:

Does this, does it really – we're not having judicial review of these guidelines or practice notes for themselves.

MS HARDY:

Mmm.

ELIAS CJ:

Doesn't it all turn on what use is made of them?

MS HARDY:

Well I understood that the appellant's case was that the, the guidelines themselves were ineffective with illegality because of that expression in paragraph 6. While they took no quarrel with –

ELIAS CJ:

Yes.

MS HARDY:

– the urgency application. So it's my submission that it's important that both of those documents be read together and that, when one looks at Judge Clark's decision towards the end…

ELIAS CJ:

Well I would've thought that really, there's nothing problematical about the urgency practice note at all and it must be imported in this because it invokes the criteria the Tribunal applies, and then it's just a question of whether the Judge properly applied them or came to a decision that was reasonably open them.

MS HARDY:

Exactly, Your Honour, and that's the Crown submission, and so the question is an interrogation of Judge Clark's particular decision and, again, without wanting to be overly repetitive it's, clearly the decision has to stand for itself and it's at paragraphs 58 onwards that the Judge addresses the issue of prejudice and it's the Crown submission that it must clearly be the case that the Judge appreciated that this was a claim about to be extinguished. There's

earlier commentary that you've been taken to and that the repercussions would be a preclusion of obtaining the relief that is available under section 6(3) for resumption and the rentals and the compensation that can potentially run with such an order. So, in the Crown submission, the Judge has properly –

ELIAS CJ:

Well, he's identified, do you say, the prejudice?

MS HARDY:

He's, he identified and weighed the prejudice.

ELIAS CJ:

Yes. The question whether he really is weighing it is – it's a bit bare of reasoning really, that's the problem, but…

TIPPING J:

These global remedies guidelines, this is what they are, aren't they? They – concerning remedies applications?

MS HARDY:

Yes.

TIPPING J:

That's what they're described as. I'm not, by any means, satisfied that the, whether you characterise it as an illegality or just liable to put you off your stride, this paragraph 6 isn't a problem because it's a different type of remedy from the ordinary recommendatory remedy. This is a recommendatory remedy with a difference.

MS HARDY:

Well –

TIPPING J:

I'm not sure that one size fits all is entirely correct. So I wouldn't want you to feel that, from my point of view anyway, that's off the table?

MS HARDY:

Well the –

TIPPING J:

Never mind whether it's –

MS HARDY:

Yes.

TIPPING J:

Never mind whether it's illegality or whatever but –

MS HARDY:

Yes.

TIPPING J:

– it's part of the mix upon which the Judge has directed himself.

MS HARDY:

But the Judge has directed himself to the issue of prejudice, as required by urgency, and, in my submission, it would be unrealistic to think that the Judge was not aware of what was being sought by the applicant, and that this is the meat and potatoes of the Tribunal's jurisdiction, forest land is highly contested because of the rentals that provide economic advantage over other assets. So, in my submission, I think it's sound to infer that when Judge Clark talks about prejudice to Mangatu and lines that up against prejudice to others, that he's taking into account the economic prejudice or potential, and potential to get binding orders.

TIPPING J:

How can you assess prejudice to Mangatu without, in effect, determining their claim and saying, well, it's so weak, for example, that it doesn't really matter that they're being shut out?

MS HARDY:

That's where I think that long tale of the inquiry that the Tūranga Tribunal undertook that fully explored all of the grievances comes in to play, and where – so the nature of the grievances is well understood by Judge Clark and so is the configuration of the collective groups that are in negotiation and benefitting.

TIPPING J:

But he doesn't say, look, this claim is so weak that really it doesn't matter. He says, in a way that I'm having difficulty understanding, that just it's the offer on the table that causes the "complication" or whatever the word was. He doesn't reason it through on the basis that perhaps would have been more persuasive.

MS HARDY:

Mmm.

ELIAS CJ:

There's no way of the comparative advantages and disadvantages beyond the identification of the offer on the table.

TIPPING J:

I mean, I could quite understand if he says, look, I've looked into this very carefully as best I can at this stage and this present claim is so weak, in my estimation, that it doesn't really matter if we have a hearing. But he's not saying that at all, he's saying, but for the offer on the table it would be a monty.

MS HARDY:

Yes, Your Honour, he –

ELIAS CJ:

And he's saying that if the Tribunal were to consider it, it wouldn't – yes, it wouldn't grant the remedy because it would simply say, carry on negotiating.

MS HARDY:

Well, the Judge says it's finely balanced, and he does more than simply point to the negotiations on foot. He – and this is why the point that the beneficiaries or the membership of the Incorporation are the same people as those in the Mahaki cluster, that Mr Haronga supported the mandate of the cluster that the people by whakapapa are –

ELIAS CJ:

Yes, we understand.

MS HARDY:

Yes.

ELIAS CJ:

We do understand all that background.

TIPPING J:

If there wasn't the complication of an offer, et cetera, application for it would be very strong. Now, I think he must be saying here that they should be satisfied with the offer, putting in bluntly. Now, was that a call he was entitled to make?

MS HARDY:

In my submission, the call about comparative prejudice was a call that he was entitled to take. And what the Judge is doing is comparing the prejudice amongst the three groups he talks about in the heading on page 10 that addresses prejudice, which is the Incorporation and, yes, the Incorporation

isn't getting a discrete settlement, the shareholders, so the individuals, and what is now Te Whakarau and the people of Te Whakarau. So, looking at that, the Judge is satisfied that the line falls in favour of not granting the hearing.

TIPPING J:

And he then talks about the ultimate position of the shareholders, and so he's really – do you dispute that he's really saying that because of the outcome of the negotiations they should be satisfied, they should be satisfied with the outcome of the negotiations? I think…

ELIAS CJ:

Sorry, I was just listening to the drilling going on.

TIPPING J:

I want your help –

MS HARDY:

Yes, he's –

TIPPING J:

– on whether that is a fair reading of what he's saying? He seems to me to be saying, there are these negotiations, there's this offer. Bearing in mind everything, Mr Brown's clients should be satisfied with what they are offered under the offer, so they can't have an urgent hearing.

MS HARDY:

I think he's certainly saying that the outcome, which is one of compromise, is a Treaty-compliant one, otherwise, if it were not, then the Tribunal would be looking at engaging. So, it's being satisfied –

TIPPING J:

How do you relate that to their apparent right to have a hearing of their resumption application? By that, not a right to any particular form of relief, but

a right to have it heard, an effective hearing. Because I'd need a lot of persuasion that they don't have a right to an effective hearing.

MS HARDY:

Well, in my submission, there are a range of cases that will come to the Tribunal where it legitimately decides whether an effective hearing is required at this juncture. Some of them will be very straightforward and easy to resolve. Some of them will be hard. Judge Clark said this was a hard one and he, in the specialist Waitangi Tribunal, interrogated the facts, was informed by the Tūranga Report and made the hard call. And he did that in the kind of specialist jurisdiction where the Tribunal members are attuned to the kinds of implications that fall out of this right to be heard. And, Your Honour, I don't think I can take it much further than that, because what the Judge said is what the Judge said.

TIPPING J:

Yes, no, no, I just wanted to be absolutely clear where the Crown stands on this, that this was a case, albeit perhaps of a particular kind, where they were entitled to say, I'm sorry, but you can't have a hearing, an effective hearing. That has to be your argument, doesn't it?

MS HARDY:

Yes, of course, Your Honour, it has to be the argument, it is the argument.

ELIAS CJ:

Ms Hardy, can you just – don't take time, but just tell me again where I find the direction of the deputy chair of the Tribunal appointing the Judge to hear this matter.

MS HARDY:

Yes, I think it's tab 5 in the green volume.

ELIAS CJ:

Thank you, that's fine. Because Judge Clarke, had he – he hadn't been a member of the Tribunal, had he?

MS HARDY:

No, he hadn't, that was a Tribunal that was –

ELIAS CJ:

Yes.

MS HARDY:

– chaired by Judge Williams.

ELIAS CJ:

Yes, thank you.

MS HARDY:

There are two final points which go to the discretion, and I'll dispose of those quickly. The second argument against the judgment is the so-called circuit breaker policy, and I'd submit that I've canvassed the kinds of issues around that. The point that the Crown makes is that there was no rigid application of a notional circuit breaker policy, namely that simply because negotiations were underfoot that precluded any inquiry, and the Crown's submission is that the material in Judge Clark's decision clearly points to his looking at the nature of the negotiations, the fact that all of the Incorporation members were part of the mandated group. That mandate had not been withdrawn and that was the finding of Justice Clifford not challenged on appeal, and that given that situation, it was, if you like, a reasonable alternative for the negotiations to continue on.

The Tūranga Tribunal's findings is the final point that the appellants have raised and challenged to Judge Clark's exercise of discretion and the essence of the appellant's argument there is that the, that Judge Clark mis-interpreted the Tūranga Tribunal's approach to making recommendations to the extent

where they suggest that the Tribunal and the reviewing Courts somehow saw the Tribunal, that Tribunal as having discharged its remedies functions and even getting to the point of being functus and, again, that's an overly legalistic approach to what the Tribunal was doing. It's clear that the Tribunal carefully looked at the claims it had before, including in the closing submissions that I took Your Honours to, applications for remedies, and thoughtfully at that juncture said we're not making those kinds of orders, we're proposing negotiations and then in the healing section at the end of the report, they propose how those negotiations might play out to a certain extent. So, in my submission, that kind of engagement and inquiry was entirely appropriately considered by Judge Clark when he was weighing whether this was a situation that warranted a fresh inquiry and re-constitution of that Tūranga Tribunal.

Your Honours, those are my submissions and the Crown considers that the thrust of those submissions and the written submissions canvass all of the points that we wish to make, including the natural justice arguments which really are canvassed in the points that I've made submissions on, so subject to some final comments on relief, I would propose to move to relief but Mr Solicitor would be happy to answer any questions on the natural justice issue if they arise.

ELIAS CJ:

No, that's fine. Thank you. Just before you deal with relief, I'm getting confused with the numbering, Wai 814, which one is that? Is that the one, is that the – there was 274 and was 814 the other one?

MS HARDY:

814 is the administrative number provided by the Tribunal for the, all of the claims that were heard in Tūranga so there were 12, I think, claims and that's just the number that is an umbrella over them.

ELIAS CJ:

I see. I just noted that in that direction by Judge Wainwright delegating the matter to Judge Clark, she had the direction served on all parties on the notification list for Wai 814 so that's all the Tūranga claims?

MS HARDY:

That's right.

ELIAS CJ:

Thank you.

MS HARDY:

A short point only on relief which is, essentially, that from the Crown's perspective, the issue before the Court is one of the proper exercise of a jurisdiction, sorry, of a discretion that if the Court were to find against the Crown and find that the discretion had not been properly exercised, then the Crown submission is that the appropriate course would be to send that back to the Tribunal for a fresh decision guided by the advice of this Court and not the mandamus that is sought by the appellants.

TIPPING J:

Might this not arguably be a *Fiordland Venison* type of case where the answer properly directing yourself is so compelling that to remit as opposed to direct would be somewhat a waste of time? I'm just putting that to you because that's the proposition that you have to answer.

MS HARDY:

Yes, well, -

TIPPING J:

It depends a little bit, I suppose, on the basis on which hypothetically the Court finds the discretion has not been properly exercised.

MS HARDY:

Yes, in the Crown submission, the factual matrix here is of a complexity and the issues to be weighed would warrant any corrective advice from the Tribunal about the approach to go to the Tribunal and for a fresh decision, but clearly, if the Court finds otherwise, then –

McGRATH J:

I suppose new circumstances could arise even after the Court's decision, it might effect the matter?

MS HARDY:

This is a – yes, Your Honour, there's a fluid area where the situation of negotiations is never fixed in stone until it's fixed in stone, so that's, perhaps that's another point in support of the concept of a return to the decision maker rather than a mandamus order.

ELIAS CJ:

If the view were taken that the jurisdiction, I don't much like the use of the word "discretion," but if the jurisdiction to grant or not grant an urgent fixture, necessarily entailed some sort of assessment of the merits, however, why not let the Tribunal get on with it? It might come to a fairly summary view but should there not be a determination that resumption is not appropriate?

MS HARDY:

In the Crown submission, the appropriate course would be a respect for the Tribunal's role as gate keeper on these kinds of inquiries and a return to that gate keeping role with the kind of guidance –

ELIAS CJ:

Well, I don't particularly, I must say, like the word "gate-keeper." I mean it has jurisdiction that it has to exercise.

MS HARDY:

Yes.

TIPPING J:

How would all this, if we sent it back for a re-hearing of the application for urgency, how would all this line up with the imminent settlement?

MS HARDY:

The current timeframe in relation to which I've been instructed is for, if it's to include or have an initial deed around the end of the year, so probably finality some time in the New Year. Again, all contingent on the question of ratification of any settlement.

ELIAS CJ:

What ratification does the Crown look for? Is there a percentage or something?

MS HARDY:

Your Honour, there's nothing hard and fast but there's basically an approach that's scrutinised by officials and then a decision made by ministers, the Minister in charge of Treaty of Waitangi negotiations and Minister of Māori Affairs who review the methodology of the ratification and then the vote.

ELIAS CJ:

Thank you. Does that mean it's a contextual decision?

MS HARDY:

Another one, Your Honour.

ELIAS CJ:

Yes. Thank you. Thank you Ms Hardy.

ELIAS CJ:

Yes, Mr Bennion.

MR BENNION:

Your Honours, obviously a lot of matters have been traversed so I don't intend to take too much time. We obviously support the submissions that the Crown has made that this issue really is about a discretion which the Tribunal is able to exercise. The consequence in this case is very difficult for the Incorporation how we believe the Tribunal carefully exercise the discretion appropriately as my friend has explained. I just thought I should start with a couple of factual issues, clarify a couple of matters and then just move to a few points central to our approach here and then leave it at that. The first point is that the question of numbers came up. I have hunted in the materials and cannot find the precise reference, but I think the numbers are, as Your Honour correctly put it, I think it's about 15,000 claimant beneficiaries in the overall Te Whakarau settlement and around 5000 in the Incorporation. So those order of numbers are the appropriate proportions, I think, in general terms

TIPPING J

So the 15,000 includes the 5000?

MR BENNION:

Yes, and, yes, that's right. And of course that doesn't tell you entirely who the original owners or who the original entitlements were or what the original titlements were in the Mangatu Block, because of the change since 1881. But you'll be aware of those arguments and whether shares have been aggregated by –

ELIAS CJ:

And, indeed, since –

MR BENNION:

– a few individuals.

ELIAS CJ:

– 1961?

MR BENNION:

Yes, yes. Now, I did just want to take you to also one other matter around the background history around Ngariki Kaiputahi and Te Whānau a Taupara Now, my friend the Crown explained what happened with Te Whānau a Taupara, there's an adjustment there and that has a corresponding adjustment that affects Ngariki. But I did just want to take you briefly to volume 2 and page 678 and 6 –

ELIAS CJ:

Sorry, the adjustment was in, at the beginning of the 20th century, was it?

MR BENNION:

Yes, and the complexity was of course that the adjustment further impacted –

ELIAS CJ:

Further affront, yes.

MR BENNION:

Further affront. It's, I was trying to find a suitable metaphor but this is kind of like a cobweb and you pull or you touch one strand and others are affected, it's a very…

ELIAS CJ:

Cat's cradle.

MR BENNION:

I think polycentric is the term my friend used, and I know another term from a social policy which is to call it a wicked policy matter, because you touch one part and it affects the others. But if I can just take you to the bottom of page 678, the point was, just to clarify, that in 1881 there was a Court decision that the Tribunal finds unsafe. It says that Ngariki Kaiputahi were defeated when that wasn't the case. But the point that's made at the bottom of 678 is that because of Wi Pere's intervention, the 1881 decision did not take full effect, so the trustee arrangement, saving Ngariki Kaiputahi from the brunt of

the judgment, and in fact if you look at the Mangatu Incorporation Act you will see that Pera Te Uatuku, the Ngrariki Kaiputai rangatira is actually first on the list of trustees. And I simply make this point to say that Mr Haronga in this debate is invoking the legacy of Wi Pere, and I suggest that one has to be cautious about that because of course we can see here he's trying to preserve the entire block and the relative's interests within it. So if someone is appearing now and saying, well, we want to preserve the Wi Pere legacy in relation to a smaller part, one has to approach that proposition fairly cautiously because of this historical background.

Now, the other factual matter I wish to clear up is the discussion about the offer from Te Whakarau to settle this matter, to negotiate compromise by having the forest, the 1961 forest land vested in the Incorporation and that would be a win-win situation, provided the Te Whakarau settlement was topped up and just to say that my clients want to make clear, there's absolutely no suggestion in that proposition that they have less concern for or don't care about the 1961 land. In fact, they're horrified that that, that might be an implication that you would think, looking at the papers, but that's certainly not one that was intended at all. It's the case that either they would want to take that entire block, that option should be there for them, they think that's probably the one they'll have to take because the owners really want the land back, but the idea that the Incorporation would take the 1961 land would create a win-win for everybody, well, the land is back with some of the owners, and that's a compromise that they looked at. It certainly doesn't indicate any lesser concern –

TIPPING J:

You mean it's a stance they're prepared to take, but not –

MR BENNION:

– about that part.

TIPPING J:

– their preferred…

MR BENNION:

Yes.

TIPPING J:

Option?

MR BENNION:

Yes, that's the situation. It's certainly not a lesser interest in that 1961 land by any means. The other, just the final factual point to make briefly is that the deed to settlement of course has to be ratified so that, while the Tribunal's decision to date does make it unlikely there would be a hearing, of course if the deed to settlement – about remedies, the deed to settlement, if it's not ratified would not, it would bring the matter back to the Tribunal. But the other small point to note here is that the deed of settlement would also set up what's called a PSGE, which is a Post Settlement Government's Entity, and I think I made a point in earlier submissions and I think in the Court of Appeal that the final form of that is not settled. How, or whether beneficiaries of the Mangatu Incorporation owners and their links with the land might be dealt with in some way and that has not been, not been finalised. I have to say that I think it's unlikely a separate arrangement would be made, but it's a, it's a possibility that exists.

TIPPING J:

Is the Magatu Incorporation in effect in the hands of the Crown on this ratification as to whether the Crown accepts sufficient ratification to move to legislation?

MR BENNION:

Yes, I think that would be fair to say if the deed goes to a vote and a ratification strategy for a hui to discuss the deed and to vote on it is now being developed. If that vote is, and the numbers aren't precise here, if it's significantly in favour or…

TIPPING J:

But the Crown –

MR BENNION:

Then the Crown makes –

TIPIPNG J:

– makes the call?

MR BENNION:

Crown makes the call. There is no set process here, in a sense, so I think to date most votes have been quite, quite high in favour of settlements, we just don't know what would happen if a vote was perhaps only 60 percent in favour or, you know, a bare majority, whether the Crown would accept it in those circumstances, whether claimants would, would like to revisit the issue or talk with the Crown about that if there was this, a closer vote.

TIPPING J:

So all 15,000 are eligible to vote, are they? Assuming it's 15,000 and you just look at numbers –

MR BENNION:

Yes.

TIPPING J:

– within that 15,000, or however many choose to vote?

MR BENNION:

Yes, they would vote on the overall, on the overall debt of settlement, which is the entire, entire package.

TIPPING J:

And is it fair to say that it would be in the interests of the majority of that 15,000 to go for the settlement?

MR BENNION:

Well, that's for them, for them to weigh up, I mean there's even a possibility I was, I was contemplating was that – but we don't know that the Mangatu Incorporation shareholders might do better personally after this and then if, if they had the land out, a separate settlement out for themselves…

TIPPING J:

But if there's no topping up from the Crown, it surely must be significant in the interests of the 10,000 of the 15 to go –

MR BENNION:

Well if the issue is –

TIPPING J:

To go for the settlement.

MR BENNION:

If the issue is whether they would be essentially out voted, if you want to put it that way, yes, I think that's something that they would certainly contemplate, and perhaps there would be discussion about that at any ratification, hui and those sorts of matters.

ELIAS CJ:

Is there going to be a super – you said part of the bigger picture, it's not just Te Whakarau, is it? It's, you're talking about the Tūranga settlement?

MR BENNION:

Yes, if – in my submissions I think I point to that complexity, if you like, at, I've got a footnote, footnote 2.

ELIAS CJ:

Yes, I saw that.

MR BENNION:

Yes, so –

ELIAS CJ:

I always read the footnotes.

MR BENNION:

So it's a fairly – yes, yes. It might be of assistance to the Court if you have available solicitor general's chart, which is also in the materials of who Tūranganui-a-Kiwa iwi are and just to briefly say –

ELIAS CJ:

Sorry, where do we find that again?

MR BENNION:

This is the brief synopsis given to you, which contains on the back –

ELIAS CJ:

The Crown submissions, yes.

MR BENNION:

– of this chart, which comes from page 273 of the bundle, but I think it's attached there.

ELIAS CJ:

So when you say that a final form of governance mechanism is settled, it might be a Tūranga-wide governance model that is adopted?

MR BENNION:

Well, no let me explain. The Tribunal recommended district-wide negotiations –

ELIAS CJ:

Yes.

MR BENNION:

And those were progressed under this Tūranga Manu Whiriwhiri negotiators, as you see at the bottom of that table.

ELIAS CJ:

Yes.

MR BENNION:

The agreement in principle covers off the different groups: the Mahaki cluster, which has the most difficult job because it's not just a –

TIPPING J:

Sorry, I haven't – I've either lost it or it's not attached to my copy.

MR BENNION:

Okay, I'm –

ELIAS CJ:

Is this the Crown's submissions?

MR BENNION:

Yes, I'm looking at the Crown's, Solicitor-General's synopsis –

McGRATH J:

The one-page synopsis put up today.

MR BENNION:

– one-page synopsis, an attachment.

ELIAS CJ:

The synopsis, I see.

TIPPING J:

Oh, the one-page synopsis, right sorry.

MR BENNION:

I'm sorry.

ELIAS CJ:

Yes.

MR BENNION:

So negotiations were progressed by this Tūranga Manu Whiriwhiri negotiators on behalf of, for the whole district, and in the agreement in principle you'll see a package has been created. You've got the Mahaki cluster, you've got Rongowhakaata and Tamanuhiri. The Mahaki Cluster, as you can see, has got, as I say, the most difficult task in a way, because it's actually an amalgam of a number of groups, whereas the others, Rongowhakaata and Tamanuhiri, are iwi groups in their own right. And what has occurred and what I'm talking about in footnote 2 is that having negotiated this overall package, each group will develop its own PSGE or post governance settlement entity, and they provided in the agreement in principle for a process where they would negotiate between each of these three big groups about how the different components of the settlement go to each group. But if they could not decide that then they needed to, well, they agreed, the Minister of Treaty Negotiations would deal with the issue. So we have just been, we have just done that and been through that process that you see at footnote 2, where groups have been submitting to the Crown their reasons for getting a bigger or lesser part of the overall pie, who suffered most loss, who didn't, those sorts of matters. And the Minister's issued his decisions on that.

ELIAS CJ:

What, on the split?

MR BENNION:

On the split, yes.

ELIAS CJ:

Has issued his decisions on it?

MR BENNION:

Well, yes, and groups are now looking at that and deciding what they want to do from there.

BLANCHARD J:

Are they decisions or just recommendations?

ELIAS CJ:

Well, it's in the context of this –

BLANCHARD J:

It seems a bit unusual for the Crown to play the adjudicator, to carve up the amount that the Crown is paying as compensation.

MR BENNION:

Yes, and it's a matter of –

ELIAS CJ:

It's a negotiation though. I mean, the Crown is negotiating as a principle. If they don't like it, they can then go back to the Tribunal presumably.

MR BENNION:

It's within the context of the negotiations. The group said, "We're going to try and work this out ourselves, but if we can't we think the Crown – we say to the Minister, 'Please look at submissions that we'll make, give us a process, we will make submissions to you and you will come back to us with your thoughts on it'." Now, groups of course are still free to say, "Well, we really don't like that and we want to walk away, we don't know where this, you know, we think you've made the wrong call." So it's all in that negotiations basket.

TIPPING J:

So that's what the plaintiff's trying to do, isn't he?

MR BENNION:

Trying to use the Tribunal –

TIPPING J:

Yes.

MR BENNION:

– to achieve a –

TIPPING J:

Yes, to walk away. He doesn't like the way it's going, so he's walking away and saying, "I've got a case in the Tribunal." I don't quite see where this fits in, Mr Bennion, I'm sorry, it's…

MR BENNION:

No, I'm just –

ELIAS CJ:

You're just giving us the factual background.

MR BENNION:

I'm giving a factual background to indicate – I think if it indicates anything, it indicates that the suggestion from my friend that you could have a fairly discrete remedies hearing around this forest and this issue, is rather optimistic, to be polite really. These matters are quite complex and, you know, let the – it's the reason why the Tribunal very early on foresaw these matters. Claimants go into a hearing knowing these potential possible outcomes and the wrinkles within them.

TIPPING J:

I'm sorry, why is it so complex? Surely you'd assemble a hearing where the plaintiff and anyone else that was interested in this land would be entitled to be heard? And it needed be very long, we know all the background, and the Tribunal just decides what's the right way to go.

MR BENNION:

Yes, I mean, I think two complexities: one is that the Tribunal would not just look at the forest land but at the broader issues and settlement – what was the settlement package to date, what would be the implications, what would people feel, how would that affect a settlement for all of these groups?

TIPPING J:

Would this –

MR BENNION:

I think, obviously, the most affected would be the Mahaki cluster.

TIPPING J:

Would it affect anyone other than the Mahaki cluster?

MR BENNION:

Well, I think, I've said in my submissions that it would affect the Mahaki cluster first and foremost. Would it affect the other clusters? I can't say, I think –

BLANCHARD J:

How would it affect them?

MR BENNION:

Well, they might take the view that it – if the Crown keeps its overall package, maintains it where it is, that's the Crown's submission, then they may feel that there's some implications for them.

ELIAS CJ:

Is the –

YOUNG J:

Who's the offer been made to, Mr –

MR BENNION:

If, for example, the Mahaki cluster felt that it was losing interest and therefore said, "Well, we need to change the arrangements between the three groups overall."

McGRATH J:

Who's the offer been made to, Mr Bennion? Has the offer been to the, here, has it been made to the Mahaki cluster?

MR BENNION:

Yes, in effect.

McGRATH J:

It hasn't been made to the other two head groupings?

MR BENNION:

No, well, it's been made to all three, and the Minister has now come to an allocation decision between the three.

McGRATH J:

Yes.

MR BENNION:

So I guess all three are in play, certainly in play at this stage.

ELIAS CJ:

The sixty –

MR BENNION:

Nothing's final until the deed of settlement goes out and we have this vote, everything's in play until then.

ELIAS CJ:

The 60 million that's been mentioned, that's for the whole, is it?

MR BENNION:

The 59 million is for – that's the overall settlement, is my understanding.

ELIAS CJ:

That's for the whole –

MR BENNION:

Yes.

ELIAS CJ:

– Tūranga Manu Whiriwhiri claim – negotiation?

MR BENNION:

Yes. I should also point out that that's the sum, I think, mentioned in the agreement in principle in 2008, so there are ongoing negotiations and there are, there's talk, the term is "top-ups", is there anything else that the Crown might bring.

BLANCHARD J:

Well, presumably there are rentals that have accrued in the meantime.

MR BENNION:

Yes, yes. That's what makes the forest so compelling, because it has, you've got the issue of the land itself and it's got perhaps an iconic value, there's the forest, but the accrued rentals are a significant part as well. And now also carbon credits are part of the mix.

ELIAS CJ:

Well, it is the case then, that the combination of the Tribunal's district preference, the Crown's preference in terms of settlements, means that it's going to be very unlikely that you'll ever have recourse to the resumption provisions.

MR BENNION:

Well, Your Honour, I look at it this way: that we have emphasised in our submissions quite strongly what the Tribunal did early in the hearing, and our submission is that everybody comes to hearings knowing full well what it means to say, "We represent an iwi," versus an incorporation or something of that nature. And the Tribunal's concern has been to say, "Let's get that flushed out earlier, because otherwise people get diverted into side disputes about who owns a grievance. In fact, those are words the Tribunal uses. Who owns a grievance becomes the big issue. And we don't get to pool all the evidence together and look at the district as a whole and all of the issues within it. And so our submission is that –

ELIAS CJ:

I'm not criticising it, I understand that, but that is the effect.

MR BENNION:

Well, my submission from there is that when you come to a decision late in the piece, as Judge Clark has, about whether to undertake a remedies hearing, and Judge Clark says, "Look, negotiations are going on, on a district-wide basis and that's what the Tribunal says and that seems to be happening," the Judge is able to look at that Tribunal report and say that all of the grievances have been appropriately contextualised and thought about, and the reporting on them has not been hindered by ownership by particular groups, but they've actually been put into an overall round so that you can see how they relate to each other and, over a historical span, how they – the relativities between them historically, if you like. And so I read into Judge Clark's decision, and the comments about the fact that we have this report, we had a talk about the negotiations, the Judge is there reflecting - the

Tribunal's looked at all these grievances. It's seen, for example, Ngariki Kaiputahi's grievance and said, "Well, in the end, I'm afraid you're just going to have to accept 4 percent as an iwi because I know you say you've lost a lot, but looked at and around, we've had a look at everything and we think this is where this sits" and in the same context, I'd submit, the Mangatu Forest chapter sits there. It sits beside the Ngariki Kaiputahi chapter just before and before that the Native Land Court chapters where the Tribunal, that's the substantial part of its work in that report, I would submit, it says, "This system of Native Land Court title really did create all of the big problems in this district."

ELIAS CJ:

Apart from the problem that happened in 1961 or subsequent ones, you know, yes?

MR BENNION:

Yes.

ELIAS CJ:

There are distinct grievances but what you're saying is the Tribunal processes adjust them as part of the overall process.

TIPPING J:

So the remedy doesn't go strictly or clearly with agreements?

MR BENNION:

No.

TIPPING J:

You have grievances established and then remedy as a sort of much more broad brush approach. Is that the right way of understanding what your saying?

MR BENNION:

Yes. I think – I take the point from the Tribunal's – what the Tribunal was trying to do was to say, yes. The ownership of a grievance may not be everything and if we obsess on that issue, we're going to go nowhere in terms of trying to understand what happened in this district.

TIPPING J:

To a lay mind, if someone has something wrongly taken from them, bought, yes, and it can be given back to them, a lay mind not overburdened with all the sophistications, might say, well, that's pretty simple stuff.

MR BENNION:

And that's why that idea is so attractive and my submission –

TIPPING J:

But why doesn't it sound, at least, that he can have a crack at it?

MR BENNION:

Well, again, if I go back to the point I made earlier about Wi Pere. If one says, well, all I'm trying to do is protect the legacy of Wi Pere, this was taken in 1961, the loss, what, that –

TIPPING J:

You might not ultimately get it, Mr Bennion, but surely it has enough prima facie. Maybe I'm talking in terms that just don't float in this Tribunal but prima facie he must have an argument to get it back. I mean, there may be a wider lot of things that show that in the end he won't, but what bothers me, frankly, is that he's choked off. He's simply told he hasn't got a shot.

MR BENNION:

And I can only submit that what Judge Clark was doing was finally, was fully engaging with the Tribunal's report in what it was trying to do and then came to a decision, a hard decision I will accept, but a finely balance one from a very specialist Tribunal, trying to do a very difficult task obviously. I always

note the Tribunal has not be reformed since 1975, I think. I was set up in the '75, and it's really just had these additional powers added and is really attempting a very delicate task to make sure that all rights and interests and dealt with.

ELIAS CJ:

Judge Clark said it would have been different, a different result, if there hadn't been an offer.

MR BENNION:

Yes.

ELIAS CJ:

What difference does the offer make? I don't mean all the background, all the grievance adjustment, but what difference does the offer make?

MR BENNION:

I simply relate, I do relate to the fact that the Judge earlier says – and I'm thinking paragraphs 53 and 43 – the Tribunal looked at all of these grievances and it said there should be district-wide negotiations, and that is what is happening, here is this offer in that context.

TIPPING J:

What's the magic of the offer, as opposed to the continuance of negotiations? Is it it just shows that the negotiations have borne some fruit?

MR BENNION:

No, I think, I think there is obviously a concern from the Tribunal about what it would mean at this time to have the remedies hearing, it goes back to that, that issue. Although Judge Clark says, "Well, we're not going to talk about disruption and those sorts of matters, I do put those to one side," in a meritorious case we will hear this, but I think when the Judge looks to the Tribunal report and has a look at where this sits and why the Tribunal said, "Let's have a district-wide approach," and says, "Well, here's this offer right

now, and this could really disrupt that," I think that's a matter that's on his mind.

TIPPING J:

Is this an attempt to protect the new approach, the district-wide approach, that if we start doing what's requested here we're going to have slippage from our new way of doing things.

MR BENNION:

Yes, well, I would turn it the other way. I'm startled that, in spite of everything, Judge Clark says, "This is very difficult to call and I almost give this, but I don't quite judge" – he's prepared to entertain, absolutely in my view, if you read the decision, going to a remedies hearing, "Disruption, et cetera, be damned, we'll do that if we really have to, but then I look at the overall round, the issue in the round, and I don't give it in this case." It's just another way of looking at the same question, I think.

ELIAS CJ:

Mr Bennion, you said you were going to take us through the facts, and I think you've done that.

MR BENNION:

Yes.

ELIAS CJ:

What submissions – I'm just working out when we will take the afternoon adjournment. What do you intend to take us to now?

MR BENNION:

Well, Your Honour, I really – I think that I don't really have much, anything more to add. I think if those are your questions, I think you've fully canvassed the issues as far as I can see, and I've been steadily reducing the points that I intended to make. So I'm happy to leave it there if you need any further questions.

ELIAS CJ:

Thank you Mr Bennion. Well, we'll take the afternoon adjournment now and hear you after then, Mr Brown.

COURT ADJOURNS: 3.37 PM

COURT RESUMES: 3.56 PM

ELIAS CJ:

Yes, Mr Brown, thank you.

MR BROWN:

Thank you, Your Honour. There are only four points that I wish to make in reply. The first of them is merely confirmatory really of the position, and to state that it is as Justice Tipping was recording our position. That is, that we have taken the position throughout that there is an entitlement to a remedies hearing and there's a discretion concerning the granting of urgency in relation to it. And there was a little hint that we had changed position on that, and I think it would be desirable just to look at the Court of Appeal's decision for a moment, because you'll then have the context to what I was saying about matters not being fact specific or case specific. Could I take you to tab 12 of the green volume, and you will see our position recorded. The Court of Appeal approached this as if everything was discretionary. I'll have to say the opening salvo I received was, "This won't take long," because the Court of Appeal thought this was just an appeal from a discretion and we said, "No, this is more complicated here." And when it's recorded in paragraph 27 you'll see it said, "Mr Brown argued that the appellant is entitled to elect to apply for a resumption order and, if he did, the Tribunal was required to determine his claim." Now, that's the resumption. Come across to paragraph 30, "Although Mr Brown acknowledged the question of whether urgency should be granted was different from the question of whether the appellant was entitled to have a remedies hearing, he said in exercising his discretion as to timing the Tribunal had to take into account the background

reality," that's the two-step process. But critically, on that second one, on what we acknowledge is a discretion, we say that among the matters that confounded Judge Clark's decision was his believe that the first decision is discretionary, whether there is to be a remedies hearing. And the Court of Appeal confirmed that approach. If you come down to their – and this is what I thought the Crown were defending – if you come to paragraph 44 on page 115, this is what the Court of Appeal said. First of all, they said, "We accept that the Tribunal's not entitled to adopt a policy that it will never consider whether or not it will conduct a remedies hearing for a resumption order," and I'll agree with that, but then they talk about the policy, what it would do and the like. But then the last paragraph is the critical one. It said, "In short, each application is to be addressed on its particular merits and the relevant Judge or panel retains the discretion whether or not to order a remedies hearing. The same is true in relation to the granting of urgency." So there's discretion 1, discretion 2. And when I said that my first point was not fact specific or case specific, I say that anyone who, in terms of the remedies guidelines, has a well-founded claim, et cetera, is entitled to a hearing when it involves a resumption.

YOUNG J:

But that's subject to a deferral decision.

MR BROWN QC:

Oh, yes, I agree with that.

YOUNG J:

Subject to the discretion of the Tribunal as to timing of the hearing?

MR BROWN QC:

Yes, I agree, and that's what the second, that's what the last sentence is, "Granting of urgency." But the trouble is that Judge, I think what Judge Clark has done, recalling his decision, he has said in his decision, "I am primarily relating my views to Judge Wainwright's remedies memorandum." Whereas Judge Coxhead had dealt with under the urgency, in those two paragraphs,

Judge Clark said, “I put my primary emphasis on the remedies ruling,” and it’s in the remedies guidelines of Judge Wainwright that we find clause 6 that says, “No distinct,” well, I’m summarising, “No distinction to be drawn between land and not land,” or the words for the avoidance of doubt, et cetera, and it’s at that juncture in the remedies context, not urgency, in remedies context, that the Tribunal is saying we’re not going to put resumption applications in any special category, and we do say that, when Parliament changed the law to introduce that regime, it said there it is, this is the process for licensed land there’s HE and is HB(1)(a), (b), or (c). There is not some discretion whether to engage with the process at all. There is certainly a discretion whether to grant urgency for that application.

TIPPING J:

But I, this is exactly as I understood you, that there may be an, there is an entitlement to a remedies hearing…

MR BROWN QC:

Yes.

TIPPING J:

But no entitlement to any particular, or any remedy?

MR BROWN QC:

Any remedy?

TIPPING J:

Yes.

MR BROWN QC:

Or any particular timing of the hearing?

TIPPING J:

Of the hearing.

MR BROWN QC:

Although, at practice, and I think my learned friend agrees with me on this, the practices, the Tribunal's schedule of regional claims, that unless you make an application for urgency, you're not going to get a hearing, that's the practical reality and of course in this, this is an *a fortiori* situation because if we don't make an application for urgency then we know, because if you, Judge Clifford accepted, and the Court of Appeal footnote I think at a near decision – yes, coming back to that paragraph where I, paragraph 30 of the Court of Appeal's decision, where I was, where they're recording my position on urgency as opposed to remedies, the rest of the paragraph reads as follows. The Court of Appeal said in third line, "He," that is me, said in exercising its discretions to timing, the Tribunal had to take into account the background reality in the present case, if urgency was not granted, the appellant's entitlement to a remedies hearing would be gazumped, given the stage the settlement negotiations had reached. The right to remedies hearing in this type of case was a special right and a priority right, and the footnote, was it, that they'd noted at 95 at the, from the very last sentence of the next paragraph was Justice Clifford had accepted that that would be the consequence of what was happening. That was Justice Clifford, first instance. So that has been no – I'm, I will no doubt have contributed to any confusion that has arisen in the course of rather frantic preparations, but there has been no change in position. We do recognise we are attacking a discretion as far as urgency is concerned, but really, Judge Clark seemed to be dealing with this as to whether it should be a remedies hearing and the constitutional moment, if I can sort of call it that, is whether the Court of Appeal's ruling, which is the current ruling as the law stands, is correct that there is a discretion so far as the entitlement to remedies is concerned, that is the first of that two discretions that they recognise in that concluding subparagraph to paragraph 44, and that's what I thought.

ELIAS CJ:

So you say the first sentence is wrong –

MR BROWN QC:

Is wrong.

ELIAS CJ:

- and the second is right?

MR BROWN QC:

The second is right, but of course the, the, Judge Clark's consideration of the discretion that is the second has been impaired or affected by the erroneous appreciation on the first, among other things, and that's why I say that he didn't take into account a relevant consideration that it was a resumption application.

TIPPING J:

Would you allow me to suggest a slight amendment to your – your client has an entitlement to an effective remedies hearing.

MR BROWN QC:

Yes.

TIPPING J:

I know that might sound pedantic, but I think it's quite –

MR BROWN QC:

No, no.

TIPPING J:

- significant.

MR BROWN QC:

That's right, and so that's my first point, and –

ELIAS CJ:

I'm sorry. In terms of the remedies direction, do you say that – I know you link it fairly firmly to the resumption –

MR BROWN QC:

Yes.

ELIAS CJ:

- point, but do you have a wider criticism of the remedies direction than that?

MR BROWN QC:

Well we've, no, we've –

ELIAS CJ:

Would you say that it's really about timing?

MR BROWN QC:

Well not in this case. I mean I –

ELIAS CJ:

Yes.

MR BROWN QC:

- haven't set, we haven't –

ELIAS CJ:

No.

MR BROWN QC:

As you've said yourself this isn't judicial review of that memorandum. There are some parts that, there are some parts of it that are valuable and would ward off the very concerns, the floodgates concerns that my learned friend was addressing, because it starts off at the top of that page by saying, for starters, you've got to have a well-founded claim. You've got to have been

through the process and reached that stage. You've also got to satisfy the Court that you're speaking for the truly interested people. That's where the Court were unanimous in their, in overturning Justice MacKenzie and restoring Judge Melroy's direction. So the floodgates is not the concern that it ought to be. Nor is it such because you're only dealing with licensed land and yes, there's a reasonable number of forests that's, despite the Kangiora settlement remained to be resolved. But that is the critical question of law that this appeal raises, whether it's discretionary or not. But the critical one, as far as I'm concerned, in this licensed land context of this case is that clause 6, because that is the, that is where you see the dramatic evidence and the remedies memorandum.

ELIAS CJ:

Isn't that, what is it, a direction, isn't it really a scheduling indication which is available to the Tribunal? And, in that context, if it were simply dealing with scheduling, isn't it fair enough to say that resumption hearings are going to be treated on the same basis?

MR BROWN QC:

Well it's –

ELIAS J:

In other words, you have to have your well-founded claim and all the rest of it?

MR BROWN QC:

Yes, those…

ELIAS J:

Yes.

MR BROWN QC:

Those apply, but it says no separate or different criteria. It's ruling out. It's not saying that none of the above apply, but it's saying no, there's no difference in terms, there's no sort of - you can't cake into account the fact

that it's licensed land and that it cuts right across, of course, the objective of the disposition of all claims to licensed land and, notwithstanding, I think what was said earlier in argument the provision in the agreement about the, in the shortest reasonable time. And if there is no constraints, if you don't have legislation looming, no doubt – and we're back into urgency then, maybe there isn't a problem. I mean Justice McGrath said, in terms of the Fiordland venison point, well, could there be an intervening circumstance, and if there was an intervening circumstance such that the deed went off the table, or say the agreement principle didn't manifest itself in a deed, or the deed didn't get ratified, maybe the pressure would go off, but for the present circumstances, and I've lurched here into my fourth point, which is relief. We would say that, given the fact that Judge Clark said, A, "Not a resourcing issue problem," that's what he said himself, B, very strong, but for the complication, C – when he said he's attract - when he said "finely balanced" but "difficult", the difficult part was back in the complication of the offer. That's the thing that seems to have been the confounding factor, so if you take that out of the equation, then really, and look at the fact that on the present timeline it's likely that the possibility of a ruling would be lost by the legislation. It's very difficult to accept that this is not an application that should be the subject of urgency. So that's why we are bold enough to submit that it is a Fiordland venison category and that, rather than send us to A and then hopefully get to B, we should go direct to B and, and it's in the interest of all the parties in my submission that there should be a resolution of the resumption point.

TIPPING J:

And I think the Chief Justice mentioned this point earlier, as I did, that if you're going to have to examine the strength of the case as part of the assessment as to whether you should have urgency, you're three-quarters of the way there anyway.

MR BROWN:

Yes, you're not applying an American-type situation, you're back in the – well, taking an interim injunction analogy, back in the bad old days, that's right. And on that also, and this was my third point, I don't agree with the impression

given – if that is what my learned friend, Mr Bennion, really is doing – of saying it's this big exercise. The persons who are entitled to really be considered are those who have a claim to the land, and Justice McGrath asked in relation to the – it's useful to look at that page of the agreement in principle, which is at page 481 of the second yellow volume. I believe it is quite clear, and I don't understand it have been suggested, that looking at those three collective that you see on page 481, which is the front page of the agreement in principle, that Ngai Tamanuhiri or Rongowhakaata would have any interest, they wouldn't be claiming any interest to that land, it would be the, at the most it would be the, the outer boundaries would have to be the Mahaki cluster, and then it would be an issue between those. And section 8HD makes it clear that you were addressing that question. That's that section that limits the people who can be heard on the issue. So when Mr Bennion was saying, "Well, of course, if that happens then people will be thinking about the percentages," that's not part of the resumption application, all right? There may be, people may have to rethink their positions after it, but it's not part of that application.

So, they are my three points. The fourth point, and I'm afraid, I hope I haven't moved away from the question the Chief Justice asked me in my first point, but if I have I hope you'll bring me back to it. But my fourth point was simply, and I bow to anybody in the mathematics department, but the question was asked about the topping up and the implications, and we sort of said, "Two million for the land and then two million for the rentals," but that's a doubling up, because it doesn't reflect the fact that if the party that's party to the settlement were to elect to take the option to purchase the forest, they have to pay for that out of the rentals, the money they get back, so it's actually half, it's the two million, because you have to use the proceeds you get from the rental to pay for it if you exercise the option to purchase, this isn't land that comes back automatically and with no consideration, so that –

TIPPING J:

So this is really, with respect, a sideshow, isn't it? What consequences there might be if your resumption application succeeds is not, as you said a moment ago, for the resumption applicant.

MR BROWN:

That's right. But it was more a question that arose in the context of, you know, how significant was the topping up that would be required. I was simply making the point it, I think it would be 50 –

ELIAS CJ:

No, I was really exploring the significance of the prejudice to your clients, if they're not given an opportunity for a resumption hearing to determine the merits of that relief, because that is a straight $4 million, isn't it, in application of the legislation?

MR BROWN:

Oh, yes, in terms of what we would lose, I thought that – sorry, I thought the question was in the context of what was involved with the Crown in topping up, although of course the Crown would be mindful of its obligations for compensation, which only apply of course if you go through the statutory door. For our client, for my client, the implications are more than that.

ELIAS CJ:

Yes.

MR BROWN:

I mean, if you have – not only is the loss of the land that would relate to this breach of the Treaty, but, and it's bad enough the idea that you would be one, the interest you would supposedly have, assuming that the option was exercised to take land, but if the option was not taken to exercise the land, then that chunk, that right arm of Mangatu No 1 Block could be forever with the Crown or some other Māori group that had no connection at all, because

it's been kept for utility and other settlements. So that's the – and this isn't the case of sort of land down the road, this is, they've been looking at this since 1898 and they will continue to look at it, absent slips and earthquakes and those sorts of other events. Anyway, they're the four points I wish to make, unless there's any matters I have left untraversed.

ELIAS CJ:

No, thank you.

MR BROWN:

As Your Honours please.

ELIAS CJ:

Well, thank you for your considerable assistance, counsel, we will reserve our decision in this matter. Thank you.

COURT ADJOURNS: 4.15 PM