IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-0435
[2018] NZHC 3372

BETWEEN	TAHI ENTERPRISES LIMITED First Plaintiff
	DIANNE LEE Second Plaintiff
AND	TE WARENA TAUA and MIRIAMA TAMAARIKI as executor of the estate of HARIATA ARAPO EWE First Defendants

Cont…/2

Hearing:	6 July 2018
Further Submissions:	26 November 2018 and 29 November 2018
Appearances:	D M Salmon and C Upton for the Plaintiffs K J Crossland and A Alipour for the Defendants
Judgment:	18 December 2018

JUDGMENT OF ASSOCIATE JUDGE SMITH

This judgment was delivered by me on 18 December 2018 at 11.00am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors / Counsel:
LeeSalmonLong, Auckland
Shieff Angland, Auckland

TE WARENA TAUA, GEORGE HORI WINIKEREI TAUA, NGARAMA WALKER, HAMUERA TAUA and MIRIAMA TAMAARIKI as trustees of the TE KAWERAU IWI TRIBAL AUTHORITY
Second Defendants

TE WARENA TAUA, GEORGE HORI WINIKEREI TAUA, NGARAMA WALKER, HAMUERA TAUA and MIRIAMA TAMAARIKI as trustees of the TE KAWERAU SETTLEMENT TRUST
Third Defendants

TABLE OF CONTENTS

[1] The plaintiffs wish to sue, as additional defendants in this proceeding, the individual members of the Te Kawerau Ā Maki Iwi (the Iwi). They do not have access to the register of members of the Iwi, and they now apply for pre-commencement discovery of that register (or registers) so that they can identify the members and add them as parties. That application is opposed by the second and third defendants, against whom the discovery orders are sought.

[2] An earlier application by the plaintiffs for an order under r 4.24 of the High Court Rules appointing the third defendants as the representatives of all affected Iwi members was dismissed by Lang J in a judgment delivered on 26 March 2018 (the representation judgment).[1]

The parties

[3] The first plaintiff (Tahi) is an Auckland-based incorporated company. The second plaintiff, Ms Lee, is a commercial manager, and she is also the sole shareholder and director of Tahi.

[4] The Iwi is the collective group composed of individuals descended from an ancestor of Te Kawerau Ā Maki (as further defined in s 12 of the Te Kawerau Ā Maki Claims Settlement Act 2015).

[5] The first-named first defendant, Mr Taua, is the chairman and rangatira of the Iwi. The second-named first defendant is the executor of the estate of Hariata Arapo Ewe (Mrs Ewe), who before her death in August 2009 had been a senior member of the Iwi. Mr Taua and Mrs Ewe had been claimants on behalf of the Iwi in the Iwi's claim Wai 470 filed in the Waitangi Tribunal, and they had also been claimants on behalf of the Iwi in an urgent Waitangi Tribunal hearing into the Crown's Tāmaki Makaurau settlement process (Wai 1362). Mr Taua had also been claimant on behalf of the Iwi in claim Wai 2401 in the Waitangi Tribunal.

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1 *Tahi Enterprises Ltd v Taua* [2018] NZHC 516.

[6] The second defendants are the trustees of a charitable trust established by Mr Taua on behalf of the Iwi on 13 July 2008, known as the Te Kawerau Iwi Tribal Authority (the Tribal Authority). The Tribal Authority was registered under the Charitable Trusts Act 2005 on 23 July 2009, for purposes including the negotiation and settlement of all historical Treaty of Waitangi claims of the Iwi, and the management of any settlement assets derived therefrom for the benefit of the people of the Iwi. Mr Taua is the chairman of the Tribal Authority. In this judgment, I will refer to the trustees of the Tribal Authority as "the Tribal Authority Trustees".

[7] The third defendants are the trustees of a trust known as the Te Kawerau Iwi Settlement Trust (the Settlement Trust). The Settlement Trust was established in February 2014 for the benefit of the Iwi. Among the purposes of the Settlement Trust was representation of the interests of the Iwi, and the receipt and administration of settlement assets received by the Iwi as part of settlement with the Crown of its historical Treaty of Waitangi claims.[2] Mr Taua is the chairman of the Settlement Trust.

[8] In this judgment, I will refer to the trustees of the Settlement Trust as "the Settlement Trust Trustees".

[9] Where reference is required to the Tribal Authority Trustees and the Settlement Trust Trustees collectively, I will refer to them in this judgment as "the Trustees".

The plaintiffs' claims

[10] In their amended statement of claim dated 16 March 2018 ("the March 2018 claim"), the plaintiffs pleaded six causes of action. All of them arose out of dealings Ms Lee had with members of the Iwi during 2007 and 2008.

[11] The following description of the plaintiffs' claims is substantially taken from the representation judgment.

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2 The Iwi's historical Treaty of Waitangi claims were settled under the Te Kawerau Ā Maki Claims Settlement Act 2015 and the Ngā Mana Whenua O Tāmaki Makaurau Collective Redress Act 2014.

[12] Four of the causes of action relate to two joint venture agreements said to have been made between Tahi and members of the Iwi. The other two causes of action are based on transactions between Ms Lee and Mr Taua relating to a house property situated at 517 Oruarangi Road, Mangere (the Mangere property).

[13] The first of the two joint venture agreements pleaded by the plaintiffs was dated 27 June 2007 (the 2007 Agreement). The named parties to the 2007 Agreement were Tahi and "Te Kawerau Ā Maki". Ms Lee signed the document for Tahi, and Mr Taua and Ms Piki Taylor for Te Kawerau Ā Maki. Under the 2007 Agreement, Tahi agreed to provide funding of up to $2 million "in support of Te Kawerau's Treaty claims process". Tahi was required to pay $1 million within three working days of execution of the agreement, and the balance of the money was to be paid "within 2 months after signing of the Agreement in Principal with the Crown".

[14] In consideration for receiving these sums, Te Kawerau agreed that Tahi would be the Iwi's exclusive partner in all future joint venture developments. Any profits from those undertakings would be shared as to 65 per cent by Te Kawerau and 35 per cent by Tahi.

[15] The second joint venture agreement (the Variation Agreement) was signed on 22 July 2008, and it purported to vary the 2007 Agreement. The parties were the same, and the signatories were Ms Lee on behalf of Tahi and Mr Taua and Mrs Ewe on behalf of Te Kawerau. The Variation Agreement recorded that Mr Taua and Mrs Ewe had "authority to sign this agreement on behalf of Te Kawerau".

[16] Under the Variation Agreement, Te Kawerau Ā Maki was defined as "Te Kawerau Ā Maki Iwi Tribal Authority". The agreement confirmed that that group comprised:

> (i) The collective group comprised of persons:
>
> (a) Who descend from the following ancestors:
>
> i. Tawhia ki te Rangi (also known as Te Kawerau Ā Maki); and
>
> ii. Mana; and

iii. Te Au o Te Whenua; and

iv. Kowhatu ki te Uru.

(ii) Every whanau, hapu or group of persons to the extent that the whanau, hapu or group includes persons referred to in 4.i and

(iii) Every person referred to in clause 4.i.

[17] In addition, the Variation Agreement contained the following clause:

> It is reasonably foreseeable that upon the successful settlement of the Treaty Claims with the Crown, Te Kawerau will use or form various entities ("related entities") that are associated or controlled by Te Kawerau to govern, manage and develop all assets being settled. Both parties agree that this agreement should also be binding on all those related entities.

[18] Under the Variation Agreement, Tahi agreed to "provide total funding up to and not exceeding NZ$2 million … in support of the Te Kawerau's Treaty claims process". The parties acknowledge that Tahi had already paid the $1 million. The balance was to be paid in instalments of $200,000, $100,000 and $700,000, on the occurrence of specified events during the treaty claims settlement process.

[19] A new provision (not present in the 2007 Agreement) required Te Kawerau to repay the sums paid by Tahi, in accordance with the following clause:

> 13. As soon as Te Kawerau or any related entities receive any cash settlement (including and not limited to accumulated rentals related to Crown Forest Licences) from the Crown of not less than $2 million, Te Kawerau agrees to ensure the prompt repayment of the sum of $2 million capital back to Tahi Enterprises. Payment to be made within 2 months of receipt.

[20] The Variation Agreement reiterated that all profits and interests arising from "future business endeavours" were to be shared as to 65 per cent to Te Kawerau and 35 per cent to Tahi. It also recorded that, save as varied by the Variation Agreement, the 2007 Agreement was to remain in full force and effect.

[21] For convenience, I will refer to the 2007 Agreement and the Variation Agreement together as "the Agreements".

[22] The plaintiffs allege that the Tribal Authority Trustees entered into an agreement with the Crown on 7 August 2008 setting out the terms of negotiation of

the Iwi's treaty claims. They say that on 5 September 2008 Tahi paid $200,000 into a bank account nominated by Mr Taua in accordance with the Variation Agreement, and a further $100,000 (into the same account) in October 2008.

[23] On 12 February 2010 the Crown and the Iwi entered into a written agreement in principle to settle the Iwi's treaty claims. And on 22 February 2014 the Crown entered into a deed of settlement with Te Kawerau Ā Maki and the Settlement Trust Trustees, setting out the terms for settlement of the Iwi's treaty claims.

[24] The Te Kawerau Ā Maki Claims Settlement Act 2015 came into force on 15 September 2015. Under this Act, the Iwi's treaty claims were settled on the basis that the Crown would transfer nominated properties to the Settlement Trust Trustees and would also make certain payments to them. In addition, the Crown granted the Settlement Trust Trustees the option to purchase several parcels of land, and the right of first refusal to purchase other parcels of land.

[25] Under the Ngā Mana Whenua O Tāmaki Makaurau Collective Redress Act 2014 (the Redress Act), Te Kawerau Ā Maki and 12 other iwi/hapu were collectively granted certain rights and interests by way of redress for historical treaty breaches by the Crown. These included the ownership of certain parcels of land and the right to purchase other land.

[26] By letter dated 27 September 2006 the solicitors acting for Te Kawerau Ā Maki, the Tribal Authority Trustees and Mr Taua purported to cancel the Agreements. Tahi and Ms Lee then filed the present proceeding.

[27] The plaintiffs' fifth and sixth causes of action relate to the Mangere property which was acquired by Ms Lee in January 2008. The plaintiffs say that Mr Taua has resided in the Mangere property throughout the period with which the proceeding is concerned. Ms Lee contends that Mr Taua told her the Iwi had agreed to give him a sum equivalent in value to at least four per cent of any assets received from the treaty settlement, and that he agreed to assign to her his right to receive that share of the treaty settlement assets in return for the transfer of the Mangere property to him as soon as she received those assets. Ms Lee entered into a further agreement with

Mr Taua, under which she leased the Mangere property to him for $360.00 per week. She says that in May 2011 the parties renewed the tenancy agreement and Mr Taua agreed to pay rent in the sum of $400.00 per week.

[28] Ms Lee says that she never received the share of the treaty settlement assets Mr Taua purported to assign to her. In her fifth cause of action, she seeks an order requiring the Iwi, the Tribal Authority Trustees and/or the Settlement Trust Trustees to perform the agreement or pay damages in lieu of specific performance. Ms Lee also alleges that Mr Taua is now significantly in arrears with the rental payable for the Mangere property. In the sixth cause of action, she seeks judgment against Mr Taua for the unpaid rental.

The representation judgment

[29] In the representation judgment, Lang J noted that the Crown dealt with the Iwi as a group in settling the treaty claims, and that the Settlement Trust Trustees now hold the treaty settlement assets for the benefit of that group. His Honour also noted that the Settlement Trust Trustees maintain a current register of members of the Iwi who are beneficiaries of the settlement. His Honour therefore proceeded on the assumption that it would be possible to identify the persons whom it was proposed the Settlement Trust Trustees would represent. They would be the persons listed on the register held by the Settlement Trust Trustees, who were older than 18 as at 27 June 2007. The Judge noted counsel's advice that there would be approximately 400 such persons.[3]

[30] In dismissing the application for a representation order, Lang J made a number of observations. First, His Honour noted that the statement of claim did not specify the precise basis on which the plaintiffs alleged the Te Kawerau signatories signed the Agreements as the authorised agents of the Iwi. However, during the hearing counsel for the plaintiffs confirmed that the plaintiffs would allege that the signatories had actual authority of all members of the Iwi to sign the Agreements on their behalf. His Honour noted that that would require the plaintiffs to prove that each member of the Iwi knew of the proposed venture and authorised the Te Kawerau signatories to sign the Agreements on their behalf.

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3 At [40]-[41].

[31] His Honour then noted that each member of the Iwi would be entitled to defend the claim on the basis that he or she did not know of the proposed joint venture and/or did not authorise the Te Kawerau signatories to sign the 2007 Agreement and/or the Variation Agreement on his or her behalf. The positions of individual members would differ according to the extent to which they were aware of what was occurring in 2007 and 2008, and common sense suggested that it was likely that some Iwi members would have no knowledge of the negotiations with Ms Lee. In those circumstances, His Honour did not consider it appropriate to require the Settlement Trust Trustees to be responsible for ensuring the interests of all members of the Iwi were properly protected. The Settlement Trust Trustees could not be expected to know or make enquiries as to whether individual Iwi members had sufficient knowledge of the proposal to give their informed consent to those who would sign the agreements on their behalf.

[32] Lang J did not consider the making of a representation order would serve the usual purpose of removing the need for a multiplicity of proceedings. His Honour said that the plaintiffs can proceed against members of the Iwi by adding them as respondents and arranging for them to be served. The learned Judge said:[4]

> The scope of the evidence the plaintiffs will be required to adduce at trial will also remain the same because they have no option now but to prove that each member of the Iwi authorised Te Kawerau signatories to sign [the Agreements].

[33] Lang J recorded the plaintiffs' proposal that the Settlement Trust Trustees be directed to serve copies of all documents and minutes from the proceeding on all members of the Iwi currently shown on the register as being more than 18 years of age as at 27 June 2007. The Judge considered that the same amount of administrative effort would be required to do that as would be the case if the Iwi members were named as respondents. The only difference was that the burden of that effort would shift from the plaintiffs to the Settlement Trust Trustees. His Honour did not see that procedure as achieving any overall economy of effort or expense.[5]

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4 At [50].
5 At [51].

[34] Lang J noted that the position might have been different if the plaintiffs had relied upon the status of the signatories to the Agreements as cloaking them with implied authority to bind individual members. In that event it might be possible to establish an agency relationship regardless of the state of knowledge held by individual members of the Iwi. But on the pleadings as they stood, the plaintiffs were not alleging agency based on implied authority. Nor was there any evidence to support any such implied authority.

The March 2018 claim

[35] The hearing of the application for representation orders took place on 26 and 27 February 2018. Lang J reserved his decision. Before the representation judgment was delivered, the plaintiffs filed the March 2018 claim.

[36] It is not necessary to refer to this document in detail, as the hearing before me proceeded on the basis of a draft second amended statement of claim dated 3 July 2018 (the Draft Claim), in which the individual Iwi members, when their names and addresses were known, would be named as defendants. However, I will summarise the March 2018 claim briefly, as it is the pleading to which the Trustees responded in their statements of defence filed on 11 June 2018.

[37] The March 2018 claim pleaded the Agreements, and it pleaded that Mr Taua and Ms Piki Taylor executed the 2007 Agreement with the authority of the Iwi members, as agents of the Iwi members and/or as trustees of the Iwi. It went on to plead that Mr Taua and Ms Taylor had the authority of the Iwi members to manage the Iwi's interests under the 2007 Agreement, and that Mr Taua confirmed that the 2007 Agreement was binding on the Iwi (or members of Te Kawerau Ā Maki).

[38] The March 2018 claim stated that Mr Taua and Mrs Ewe had the authority of the Iwi members to execute the Variation Agreement, and that they did so "as agents of the Iwi members and/or as trustees for Te Kawerau Ā Maki". Mr Taua was said to have executed the Variation Agreement as the agent of the Tribal Authority, and to have had authority to do so (and to manage the Tribal Authority's interests under the Agreements).

[39] The March 2018 claim pleaded that Tahi made the first three payments to the Iwi parties under the 2007 Agreement as varied by the Variation Agreement: $1 million on 29 June 2007, $200,000 on 5 September 2008, and $100,000 on 2 October 2008. The plaintiffs say that these funds were held by the recipients for the benefit of the Iwi, and were used by some or all of the defendants to assist with advancing the Iwi's claims under the Treaty of Waitangi.

[40] The March 2018 claim pleaded the four causes of action relating to the Agreements that were referred to in the representation judgment. The first cause of action pleaded breach of the joint venture agreement as varied. On it, Tahi sought specific performance or damages in lieu of specific performance. In the second cause of action, pleaded in the alternative to the first cause of action, Tahi alleged unjust enrichment and/or entitlement to compensation in equity (in case the Court should hold that the Agreements are not enforceable according to their terms).

[41] In the third cause of action, said to be "against the Iwi (all members of Te Kawerau Ā Maki)" Tahi asked for an order charging the interest of the Iwi in the Settlement Assets and the earnings from those assets held by the first defendants, the Iwi members and the Trustees for the benefit of the Iwi. The cause of action was said to arise out of Tahi's alleged entitlement, as a creditor of the trustees, to be subrogated to their various rights of indemnity out of trust assets held by the trusts.

[42] In the fourth cause of action, against the Tribal Authority Trustees and the Settlement Trust Trustees, Tahi sought an injunction restraining "unjust use of the settlement assets" inconsistently with the Agreements.

[43] The final two causes of action were concerned with Ms Lee's claims against Mr Taua relating to the Mangere property. In the fifth cause of action, Ms Lee sought specific performance (or damages in lieu thereof), from members of Te Kawerau Ā Maki, the Tribal Authority Trustees, and the Settlement Trust Trustees.

[44] In the sixth cause of action, Ms Lee sought damages and an order for specific performance against Mr Taua, relating to the alleged breaches by him of his obligations under the agreements relating to the Mangere property.

Statements of defence to the March 2018 claim by the Tribal Authority Trustees and the Settlement Trust Trustees

The Tribal Authority Trustees' defence

[45] The Tribal Authority Trustees note that the 2007 Agreement was entitled "Heads of Joint Venture Agreement", and it recorded that one of the parties was "Te Kawerau A Maki". They plead that "Te Kawerau A Maki" was not and is not a legal entity. They also plead that as trustees (of the Tribal Authority) they can only act unanimously, and that at no time have they ever unanimously novated, adopted or ratified the 2007 Agreement as varied by the Variation Agreement. The Tribal Authority Trustees further contend that the 2007 Agreement (as so varied) is unenforceable because it is champertous and/or void for uncertainty, or because it has been validly cancelled.

[46] In response to a pleading in the March 2018 claim that Mr Taua and Ms Taylor had the authority of Iwi members to execute the 2007 Agreement, the Tribal Authority Trustees deny the allegation and plead:

> They say further that, while the first defendants had the authority to represent Iwi members, they did not, and could not, have the authority to contract for such Iwi members, and Tahi knew, or, on enquiry – as would have been reasonable for a person in the shoes of Tahi – should have known this.

[47] They make a similar response to the plaintiffs' allegations directed to the Variation Agreement.

[48] The Tribal Authority Trustees contend that it is not legally possible for a person to be a trustee of an Iwi, and that neither Mr Taua nor Ms Taylor had authority as agent to contract on behalf of the members of the Iwi to pledge their credit or incur liabilities on their behalves.

[49] In respect of the Variation Agreement, the Tribal Authority Trustees repeat the contention that Te Kawerau Ā Maki was and is not an entity capable of contracting. They acknowledge that the Tribal Authority did exist as at the date of the Variation Agreement, but say that Tahi elected not to invite the-then Tribal Authority Trustees

to participate in the variation. They deny that the-then Tribal Authority Trustees were parties to the Variation Agreement.

[50] In their first affirmative defence, the Tribal Authority Trustees contend that the Agreements were illegal. They say that the plaintiffs had no prior interest in the Iwi's Waitangi Tribunal claims, and that the Agreements, if enforced, would entitle Tahi to a 35 per cent share of future profits generated from the development of any settlement assets ad infinitum, and that any returned (settlement) assets could only thereafter be developed with Tahi, to the exclusion of all others. The Agreements, if enforced, would also (i) enforce the assignment to Tahi of four per cent of the assets returned to the Iwi, and (ii) render a group of individuals (Iwi members) who did not sign the Agreements personally liable in damages to Tahi. In those circumstances, the enforcement of the Agreements would be contrary to public policy.

[51] The Tribal Authority Trustees' second alternative defence pleads entitlement to cancel the Agreements because of Tahi's failure to make timely payment of the final payment of $700,000 that was payable under the Agreements within four months of the full ratification of the Deed of Settlement in Parliament. They say that Ms Lee told Mr Taua on or about 28 December 2012 that Tahi would not pay the $700,000.

[52] The Tribal Authority Trustees' third and fourth affirmative defences also rely on alleged entitlement to cancel the Agreements. The third affirmative defence pleads certain alleged misrepresentations made to Mr Taua by Mr Tuku Morgan on behalf of Ms Lee. The fourth affirmative defence alleges certain breaches of an alleged duty on the plaintiffs to act in good faith in their dealings with the defendants. These allegations all appear to be directed at certain activities of Ms Lee's husband, Mr Martin Li, who was a director of Tahi.

The Settlement Trust Trustees' defence

[53] The Settlement Trust Trustees refer to the plaintiffs' pleading that the plaintiffs sue them as representatives of Te Kawerau Ā Maki Iwi. They say that that pleading can no longer stand in the light of the representation judgment, which was not the subject of appeal or any other challenge. They further say that they cannot be liable

in their capacities as trustees of the Settlement Trust, because the Settlement Trust was not settled until 21 February 2014.

[54] The Settlement Trust Trustees plead a number of the same defences pleaded by the Tribal Authority Trustees, including that the Agreements are champertous and unenforceable, and/or void for uncertainty.

The plaintiffs' replies

[55] In their reply to the Tribal Authority Trustees' statement of defence, the plaintiffs generally deny the affirmative allegations made against them. They admit that they did not seek confirmation of mandate from the Tribunal Authority Trustees (other than Mr Taua), but they say that it was not necessary for them to do so in order to legally contract with the Tribunal Authority Trustees.

[56] They deny that the letter of 27 September 2016 was effective to cancel either of the Agreements, and say that there was no basis for the purported cancellation. They deny that the Agreements or either of them was champertous or void for uncertainty.

[57] They admit that the parties to the Agreements owed each other duties of good faith (arising from the terms of the Agreements and the fiduciary nature of the relationship), but they deny the allegations that they acted in breach of those duties. They say that the matters pleaded by the Tribunal Authority Trustees relating to Mr Martin Li are the subject of a full and final settlement agreement entered into between Mr Li and the Tribunal Authority Trustees on 20 October 2016.

[58] In their reply to the Settlement Trust Trustees' statement of defence, the plaintiffs admit that the Settlement Trust was not settled until 2014, but say the Settlement Trust Trustees are not sued as principals to the Agreements. They admit that this Court held (in the representation judgment) that they were not entitled to sue the Settlement Trust Trustees as representatives of members of the Iwi, but they deny any abuse of process in continuing the claims against the Settlement Trust Trustees, saying that their claim will be amended (once the defendants have disclosed the register of Iwi members) to make it clear that the Settlement Trust Trustees are no longer sued as representatives of Iwi members.

[59] The plaintiffs admit that they have no interest in the Iwi's Treaty claim, and that they did not apply to the Waitangi Tribunal or this Court for review of the arrangements proposed under the Agreements or under the agreement with Mr Taua relating to the Mangere property. They say that no such application was required.

[60] They deny the Settlement Trust Trustees' allegations of unlawful maintenance or champerty, and they deny that enforcement of the Agreements or the alleged agreement relating to the Mangere property would be contrary to public policy.

[61] Otherwise, the plaintiffs generally deny the affirmative allegations in the Settlement Trust Trustees' statement of defence.

The Settlement Trust Trustees' strike-out application

[62] On 11 June 2018 the Settlement Trust Trustees applied to strike out the plaintiffs' claims against them. They referred to the representation judgment, in which the Court had refused the plaintiffs' application to sue them as the representatives of the Iwi members, and contended that the March 2018 claim did not plead any viable cause of action against them. In addition, the Settlement Trust Trustees contended that the Agreements were illegal and unenforceable, inter alia on the grounds of champerty.

[63] The plaintiffs filed a notice of opposition to the strike-out application on 26 June 2018, denying that the Settlement Trust Trustees have been improperly or mistakenly joined. They denied that their claims are champertous, or precluded by the representation judgment, and contended that good causes of action have been pleaded against the Settlement Trust Trustees. They contended that their claims could not be heard and adjudicated without the Settlement Trust Trustees being parties to the proceeding

The Draft Claim

[64] The Draft Claim, submitted by Mr Salmon at the hearing before me, contained two blank schedules. Schedule 1 would be completed with the names of "the Contracting Iwi Members", being all members of the Iwi who were over 18 years of age at 27 June 2007. The Contracting Iwi Members would become the fourth

defendants in the proceeding. Schedule 2 would be completed with the names of all members of the Iwi from time to time ("the Benefitting Iwi Members"). The Benefitting Iwi Members would become the fifth defendants.

[65] The Draft Claim alleges that the Contracting Iwi Members were parties to the Agreements. Mr Taua and/or Ms Taylor are said to have had actual authority from the Contracting Iwi Members to execute the 2007 Agreement on their behalf, that authority being "express or … to be implied from the authority of the signatories as a matter of custom (which custom as a matter of common law will be informed by tikanga").

[66] The Contracting Iwi Members are also said to have been parties to the Variation Agreement: Mr Taua and/or Mrs Ewe are said to have had authority to enter into the Variation Agreement on their behalf. Again, the authority is said to have been actual authority, whether express or implied as a matter of custom/tikanga.

[67] The plaintiffs then plead that Mr Taua and/or Ms Taylor (in respect of the 2007 Agreement) and Mr Taua and/or Mrs Ewe (in respect of the Variation Agreement) executed the Agreements in an additional capacity, namely as trustees for the Benefitting Members. The Contracting Iwi Members are also said to have entered into the Agreements as trustees for the Benefitting Iwi Members.

[68] The plaintiffs further contend that Mr Taua and/or Ms Taylor had the authority of the Contracting Iwi Members to manage the Iwi's interests under the 2007 Agreement, and that Mr Taua and/or Mrs Ewe had similar authority under the Variation Agreement.

[69] The plaintiffs also say that Mr Taua executed the Variation Agreement as agent of the Tribal Authority Trustees, and that in entering into the Variation Agreement the Tribal Authority Trustees also became a party to the 2007 Agreement. They contend that Mr Taua also had the authority (actual authority, being either express or implied by custom/tikanga) of the Tribal Authority Trustees to manage the Tribal Authority's interests under the Agreements.

[70] The plaintiffs say that the $2 million Tahi was to pay under the Agreements was to be paid to the Contracting Iwi Members.

[71] Tahi's third cause of action, in which it seeks to be subrogated to certain trustees' rights of indemnity out of trust assets, is now proposed to be made only against the Benefitting Iwi Members. The plaintiffs allege that the first defendants and Ms Taylor, the Contracting Iwi Members, the Tribal Authority Trustees, and the Settlement Trust Trustees, hold the settlement assets for the Benefitting Iwi Members, and to the extent the defendants are liable to Tahi and are entitled to indemnity from the settlement assets in respect of that liability, Tahi is entitled to be subrogated to the defendants' indemnity rights, and to a charge on the interest of the Benefitting Members in the settlement assets.

[72] The Draft Claim does not contain the fourth cause of action pleaded in the March 2018 Claim, in which injunctive relief was sought relating to the use of the settlement assets.

[73] The penultimate cause of action in the Draft Claim is equivalent to the fifth cause of action in the March 2018 Claim, in which Ms Lee sought specific performance (or damages in lieu) on the alleged agreement with Mr Taua relating to the Mangere property (and in particular, her claim that she is entitled to an assignment of four per cent of the settlement assets). This claim is now made by Ms Lee against the Benefitting Iwi Members (as well as the Tribal Authority Trustees and the Settlement Trust Trustees).

[74] The last cause of action in the Draft Claim is Ms Lee's claim against Mr Taua for unpaid rent on the Mangere property.

The plaintiffs' discovery application

[75] The following orders are sought:

> (a) Orders under r 8.20(2) (or alternatively under r 8.4(4)) that the [Tribal Authority Trustees and the Settlement Trust Trustees] file and serve on the [plaintiffs] affidavits stating:

(i) Whether they have or have had in their control registers of members of Te Kawerau a Maki, and

(ii) If any such documents have been but are no longer in their control, their best knowledge and belief as to when such documents ceased to be in their control and who now has control of them;

(b) Orders under r 8.20(2) (or alternatively under r 8.4(4)) that the [Tribal Authority Trustees and the Settlement Trust Trustees] make any such documents in their control available for inspection, in accordance with r 8.27, to the applicants;

(c) Such other ancillary orders as the Court deems appropriate; and

(d) Costs.

The Trustees' notice of opposition

[76] The notice of opposition says:

(a) That the causes of action pleaded in the Draft Claim are either not tenable or are speculative as:

(i) they depend on the first defendants, Mr Taua and Ms Tamaariki, being constituted as the agents of the intended defendants to incur liability on their behalves and pledge the personal credit of the intended defendants;

(ii) not all the intended defendants were born, or were over the age of 18, at the time one or both of the Agreements were executed;

(iii) Ms Lee's evidence as to agency deposes that the authority of Mr Taua and Mrs Ewe to bind the intended defendants was based on Mr Taua's oral representation to Ms Lee as to that authority;

(iv) the Agreements give rise to claims against the intended defendants that are illegal. That is because they are champertous and the plaintiffs never applied to the Court for

approval of the funding terms for the advancement of litigation against the Crown.

[77] The Trustees acknowledge that there exists a register of members. They say it is in the custody, power, possession and control of the Tribal Authority Trustees, not the Settlement Trust Trustees. Further, the register does not evidence any "mandate" of any of the defendants on behalf of the intended defendants.

[78] The Trustees also say that personal information held in the register as to the names and addresses of Iwi members (the intended defendants) was gathered and held with a written statement that the information would be private and was sought for certain defined purposes (which did not include later being used by the plaintiffs to sue the Iwi members). That created a reasonable expectation that Iwi members' personal details would not be disclosed to third parties without their individual prior consents.

[79] There was one affidavit in opposition, that of Ms Collette Fenton, a secretary employed by the solicitors for the Trustees. Ms Fenton attached a copy of the Tribal Authority's membership registration form.

Do the rules referred to by the plaintiffs confer jurisdiction to make the orders sought?

[80] The plaintiffs relied primarily on r 8.20. That rule provides:

> **8.20 Order for particular discovery before proceeding commenced**
>
> (1) This rule applies if it appears to a Judge that—
>
> (a) a person (the **intending plaintiff**) is or may be entitled to claim in the court relief against another person (the **intended defendant**) but that it is impossible or impracticable for the intending plaintiff to formulate the intending plaintiff's claim without reference to 1 or more documents or a group of documents; and
>
> (b) there are grounds to believe that the documents may be or may have been in the control of a person (the **person**) who may or may not be the intended defendant.
>
> (2) The Judge may, on the application of the intending plaintiff made before any proceeding is brought, order the person—

(a) to file an affidavit stating—

(i) whether the documents are or have been in the person's control; and

(ii) if they have been but are no longer in the person's control, the person's best knowledge and belief as to when the documents ceased to be in the person's control and who now has control of them; and

(b) to serve the affidavit on the intending plaintiff; and

(c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the intending plaintiff.

(3) An application under subclause (2) must be by interlocutory application made on notice—

(a) to the person; and

(b) to the intended defendant.

(4) The Judge may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

[81] The application also referred to r 8.4(4). That subrule provides:

8.4 Initial disclosure

…

(4) If a party fails to comply with subclause (1) or (3), a Judge may make any of the orders specified in rule 7.48.[6]

[82] Mr Salmon did not rely on this subrule in his submissions, and I cannot see how it could assist the plaintiffs.

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[6] Rule 7.48 materially provides:

7.48 Enforcement of interlocutory order

(1) If a party (the party in default) fails to comply with an interlocutory order or any requirement imposed by or under subpart 1 of Part 7 (case management), a Judge may, subject to any express provision of these rules, make any order that the Judge thinks just.

(2) The Judge may, for example, order—

(a) that any pleading of the party in default be struck out in whole or in part:

(b) that judgment be sealed:

(c) that the proceeding be stayed in whole or in part:

(d) that the party in default be committed:

(e) if any property in dispute is in the possession or control of the party in default, that the property be sequestered:

(f) that any fund in dispute be paid into court:

(g) the appointment of a receiver of any property or of any fund in dispute.

…

[83] It has not been possible for the plaintiffs to comply with r 8.20(3)(b) which requires service on the "intended defendant" (in this case, the Contracting Iwi Members and the Benefitting Iwi Members, whose identities the plaintiffs are seeking to ascertain). While the Trustees did not take any point about that in their notice of opposition or in Mr Crossland's submissions at the hearing, I later came to the view that non-compliance with the service requirement in r 8.20(3)(b) might affect my jurisdiction to make an order under the rule. I accordingly invited counsel to make post-hearing written submissions on the effect of the service requirement in r 8.20(3)(b). Counsel duly filed memoranda, and I have taken their further submissions into account in this judgment.

[84] The plaintiffs did also refer to the Court's inherent jurisdiction, and to the House of Lords decision in *Norwich Pharmacal Co v Customs & Excise Commissioners*, where orders were made against the Commissioners requiring them to disclose the names of persons unknown to the intending plaintiff who had been unlawfully importing into the UK products that infringed the plaintiff's patent.[7] In my minute inviting further submissions on the effect of r 8.20(3)(b), I also invited further submissions from counsel on one aspect of *Norwich Pharmacal* and the cases (primarily in the United Kingdom) that have followed it. Further submissions on that issue have been received and considered.

The parties' arguments on the issue of jurisdiction under r 8.20

The plaintiffs

[85] Counsel submitted that the requirement for service is not mandatory, and cannot apply in cases where the purpose of the application is to identify the intended defendant.

[86] Rule 8.20 has its origins in the *Norwich Pharmacal* jurisdiction, and in *British Markitex Ltd and Markitex (New Zealand) Ltd v Johnston* Wylie J noted that, however sound the reasons for restricting so-called equitable discovery to the somewhat narrow

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7 *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133 (HL); [1993] UKHL 6.

confines discussed in *Norwich Pharmacal*, those limitations have not been imported into rr 299 and 301 (the forerunners of the present r 8.20).[8]

[87] In response to a reference by the Court to r 8.20(3)(b) appearing to contemplate the intended defendant having a right to be heard under the rule, the plaintiffs submitted that it cannot be said that the intended defendants in this case have not had the opportunity to exercise that right. Counsel referred to the representation judgment, and also to an exhibit to Ms Lee's affidavit sworn in June 2018, being a public notice (dated after the date of the plaintiffs' present application) recording communications from the Settlement Trust Trustees to all of the intended additional defendants. The notice is signed by Mr Taua on behalf of the Trustees. Counsel submitted that, while formal service has not occurred, it is inevitable that the Contracting Iwi Members and the Benefitting Iwi Members have had notice of the application.

[88] Alternatively, counsel for the plaintiffs invited me to invoke r 1.6. That rule provides:

> **1.6 Cases not provided for**
>
> (1) If any case arises for which no form of procedure is prescribed by any Act or rules or regulations or by these rules, the court must dispose of the case as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case.
>
> (2) If there are no such rules, it must be disposed of in the manner that the court thinks is best calculated to promote the objective of these rules (*see* rule 1.2).

[89] They submitted that, if r 8.20 does not provide jurisdiction in a case where the purpose of the application is to identify intended defendants, then the Court is required by r 1.6 to dispose of the application as nearly as practicably with the principles relating to r 8.20. They submit that the same outcome results.

The Trustees

[90] For the Trustees, counsel submitted that the effect of r 8.20(3)(b) is that the rule cannot apply at all to the present application. They pointed out that the former

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8 *British Markitex Ltd and Markitex (New Zealand) Ltd v Johnston* (1987) 2 PRNZ 535 at 540.

r 299 was amended in 1993 to add the requirement of service on the intended defendants, and submitted that the authorities decided before the 1993 amendment, including *British Markitex*, are inapplicable. They acknowledged that the commentary on r 8.20 in *McGechan on Procedure* does suggest that the rule may be used to identify the intended defendants, but submitted that the authorities cited in support were all cases decided under the old r 299. The commentary is accordingly inapplicable in light of the amendment requiring service.

[91] Counsel submitted that the 1993 amendment to the rule represented a conscious change, and the service requirement is expressed in mandatory terms. The result is that, if an intending plaintiff does not know the identity of the intended defendant, the intending plaintiff must have recourse to the *Norwich Pharmacal* jurisdiction, where a more stringent test for the discovery is required (including a higher requirement on the intending plaintiff to show that the intended cause of action has merit).

[92] Counsel submitted that the application cannot be saved under r 1.5 (non-compliance with the rules) or r 1.6. The latter rule was designed to avoid injustice as a result of technicalities, but the failure to serve in this case cannot be considered a technicality. The plaintiffs have simply used the wrong rule. That said, counsel acknowledged that the Court might consider curing the defect in the application by treating it as one made under the *Norwich Pharmacal* jurisdiction, rather than one under r 8.20.

[93] In response to the plaintiffs' submission that the Contracting Iwi Members and the Benefitting Iwi Members have had notice of the application in any event, counsel submitted that there is insufficient evidence for the Court to be satisfied that all of them were made aware of the application.

My conclusions on the r 8.20 jurisdiction issue

[94] I accept the Trustees' submissions on this issue. Subrule (3) is expressed in mandatory terms (for example, in the use of the word "must"). And some purpose must be given to the 1993 amendment, in which the service requirement was

introduced. Cases decided on the old r 299 as it stood before the 1993 amendment cannot assist.

[95] I accept that the *Norwich Pharmacal* jurisdiction clearly existed in New Zealand before the 1993 rule change — that is clear from the decision of the Court of Appeal in *Exchange Commerce Corp Ltd v NZ News Ltd*.[9] Somers J expressly referred to the jurisdiction in that case, noting that not much difficulty would arise in the case of an intending plaintiff who makes it appear that he or she is entitled to claim relief against another, but cannot formulate the claim without reference to a particular document or class of document. His Honour said: [10]

> Not much difficulty can arise in the case of an intending plaintiff who makes it appear to the Court that he [or she *may be*] *entitled* to claim relief against another but cannot formulate [a] claim without reference to a particular document or class of document. This must we think embrace circumstances where the actual defendant is not known as well as cases where some date, figures or other fact or circumstance is necessary in order to plead the claim as the rules require. This part of the rule postulates that the plaintiff has a claim but cannot adequately formulate it or name the defendant.
>
> (Emphasis added.)

[96] I do not consider that the 1993 amendment was intended to deprive the Court of its equitable jurisdiction, recognised by the Court of Appeal in *Exchange Commerce Corp*, to make *Norwich Pharmacal* orders where the justice of the case so requires. Something more than the mere addition of a service requirement would have been expected if the intention had been to completely remove part of the Court's jurisdiction. The effect of the change was, in my view, simply to provide separate "tracks" for (i) cases where the identity of the intended defendant was known, but for other reasons it was impossible or impracticable for the intending plaintiff to formulate its claim (the r 8.20 track), and (ii) cases where the justice of the case required the Court in its equitable jurisdiction to intervene, to require someone who has been more than a mere witness to the activities of an alleged wrongdoer (whose identity the intending plaintiff does not know) to disclose the identity of the alleged wrongdoer (the *Norwich Pharmacal* track).

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9 *Exchange Commerce Corporation Ltd v NZ News Ltd* [1987] 2 NZLR 160.
10 At 164.

[97] That is consistent with the view expressed by John Katz QC in an article published in the New Zealand Intellectual Property Journal in 2010.[11]

[98] For those reasons, I conclude that the *Norwich Pharmacal* jurisdiction is available in New Zealand, but in a case such as this r 8.20 is not. I will accordingly treat this application as one made in the Court's inherent jurisdiction, guided by the principles applied by the Courts in *Norwich Pharmacal* and the cases in which it has been followed. I see no possible prejudice to the Trustees in so doing — *Norwich Pharmacal* was referred to in the application, and both parties presented argument on it.

The *Norwich Pharmacal* jurisdiction

[99] The so-called "Norwich Pharmacal order" had its origins in the old equitable "bill of discovery" procedure, but by the 1970's it appears to have fallen into disuse. That may have been because of the existence of the "mere witness" rule, under which a person who was no more than a bystander, or "mere witness" to the wrongdoing of which the plaintiff complained, could not be compelled to provide discovery by way of a pre-trial order designed to identify the wrongdoer.

[100] In *Norwich Pharmacal*, the House of Lords held that the "mere witness" rule remained in existence, but would not prevent an order against a third party directing the third party to disclose the identity of the wrongdoer if the third party had some qualifying relationship, or association or connection, with the alleged wrongdoer, which created a duty to assist the person who had been wronged by disclosing the identity of the wrongdoer. As Lord Reid put it, an otherwise innocent person who, through no fault on its part, becomes "mixed up in" the tortious acts of another, comes under a duty to assist the person who has been wronged by disclosing the identity of the wrongdoer.[12] In the case before the Court in *Norwich Pharmacal*, the Commissioners' statutory powers with respect to the imported goods while the goods were in Customs' control were considered sufficient to give rise to the duty of disclosure, notwithstanding that there was no cause of action against Customs itself.

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11 John Katz, "*Norwich Pharmacal Orders: 35 Years On*", (2010) NZIPJ 610.

12 *Norwich Pharmacal Co v Customs & Excise Commissioners*, above n 7, at [175].

[101] Subsequent decisions of the Courts in the United Kingdom have arguably lessened the requirement that the respondent to the discovery application must have been "mixed up in" the wrongdoing before discovery of the wrongdoer's identity will be ordered. For example, in *The Coca Cola Company v British Telecommunications Plc* Neuberger J considered that Lord Reid had put the test for association, or connection, with the wrongdoer's activities higher than some of the other law lords had done.[13] His Honour referred to the speech of Lord Morris of Borth-y-Gest in *Norwich Pharmacal*, where his lordship referred to the respondent having actual involvement, or actual concern, in a transaction or arrangement, as a result of which the respondent acquired the information. Neuberger J considered that the "transactions or arrangements" there referred to must be transactions or arrangements which are to be the subject matter of the main proceeding.[14]

[102] Neuberger J identified the following propositions:

(i) the intending plaintiff must show that it has or may have a good case against the alleged wrongdoer (in some cases an honest belief that a tort has been committed may suffice);

(ii) the respondent must have become mixed up, in some real way, in the transaction concerning which the discovery is required;

(iii) any order made should be made with a view to trying to enable justice to be done;

(iv) the plaintiffs' interests in pursuing their case must be balanced against the natural concern of BT not to open the floodgates to a raft of similar discovery applications (BT was merely the service provider for a mobile telephone used by the alleged wrongdoer in the course of carrying out the alleged unlawful activity (trade mark infringement and passing off)).

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13 *The Coca Cola Company v British Telecommunications Plc* [1999] FSR 518 at 522.
14 At 522.

[103] Neuberger J was satisfied that the justice of the case justified the making of the order sought, notwithstanding the unwitting nature of BT's involvement in the alleged unlawful activity.

[104] The *Norwich Pharmacal* jurisdiction was considered again by the United Kingdom Supreme Court in *The Rugby Football Union v Consolidated Information Systems Ltd*.[15] The principal judgment, in which all other members of the Court concurred, was given by Lord Kerr. His Lordship noted that the essential purpose of the *Norwich Pharmacal* remedy is to do justice. That will involve the exercise of the discretion by a careful and fair weighing of all relevant factors. His Lordship noted that the following factors have been identified as relevant by the authorities:[16]

> (i) the strength of the possible cause of action contemplated by the applicant for the order;
>
> (ii) the strong public interest in allowing an applicant to vindicate his legal rights;
>
> (iii) whether the making of the order will deter similar wrongdoing in the future;
>
> (iv) whether the information could be obtained from another source;
>
> (v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing, or was himself a joint tortfeasor;
>
> (vi) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result;
>
> (vii) the degree of confidentiality of the information sought;
>
> (viii) the privacy rights under art.8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identify is to be disclosed;
>
> (ix) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed; and
>
> (x) the public interest in maintaining the confidentiality of journalistic sources, as recognised in s 10 of the Contempt of Court Act 1981 and art.10 ECHR.
>
> (Citations omitted.)

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15 *The Rugby Football Union v Consolidated Information Systems Ltd* [2012] UKSC 55; [2013] FSR 23.

16 At [17].

[105] There appears to be no authority on the application of *Norwich Pharmacal* in this Court, but I think the approach applied by the Courts in New Zealand to applications under r 8.20 must to some extent inform the exercise of the Court's *Norwich Pharmacal* discretion. For example, it seems to me from some of the earlier cases on the old r 299, including *Exchange Commerce Corporation Ltd*, that the rule had its origins in the *Norwich Pharmacal* line of cases, and that the "is or may be entitled to claim" wording in the rule was probably intended to reflect the threshold an applicant for a *Norwich Pharmacal* order was required to meet before a discovery order could be made. It will therefore be appropriate to refer briefly to some of the New Zealand authorities on r 8.20.

The cases decided under r 8.20

[106] What is required under r 8.20 is that the plaintiff must have a real, as opposed to a speculative, claim. There must be a "sufficient" substratum of fact … some basis of fact which takes matters beyond mere fishing; mere trawling or speculation, hoping something useful may be caught.[17]

[107] In *Welgas Holdings Ltd v Petroleum Corp of NZ Ltd*, McGechan J referred to the Court of Appeal decision in *Exchange Commerce*, noting that there must be a sufficient "substratum of fact" to take the application beyond a mere fishing expedition, where the applicant is hoping that something useful may be caught. His Honour considered that the Court in *Exchange Commerce* was looking for some threshold so as to avoid speculative fishing.

[108] McGechan J considered that a claim that which was "plainly hopeless" would not be regarded as one of sufficient substance to justify disclosure, but the Court could not generally be expected to reach "any real probability of success" conclusion on an interlocutory application such as a pre-commencement discovery application.[18] The issue is one of substance as opposed to speculation.[19]

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17 *Welgas Holdings Ltd v Petroleum Corp of NZ Ltd* (1991) 3 PRNZ 33 (HC) at 43.
18 At 43.
19 At 50.

[109] In *Hetherington Ltd v Carpenter*[20] the Court of Appeal referred with approval to the statement of McGechan J in *Welgas* that the essential concern in such cases was to sort out the real from the fishing, rather than to prejudge the merits of the case at a preliminary stage.

[110] In *Hetherington*, the Court of Appeal framed the test in the following terms:[21]

> There must be some foundation established such as will make it just that the respondents should be put to the trouble and suffer the intrusion on their affairs which an order will involve … but the focus … is on the probable existence of a claim, not on the probability of a claim being established at trial … the Court cannot be intended, at the stage of pre-commencement discovery, to reach any conclusion as to the likelihood of ultimate success at trial. … If the proposed claim, even if particularised, would be struck out as having no basis in law, then clearly discovery should not be granted. There must be more, however, than the mere ability to make allegations which avoid being struck out. Counsel's duty to the Court requires some basis before allegations are made and proceedings issued, although the evidence at that stage may be insufficient to establish the case.

[111] On the issue of what is meant by "impossible or impracticable" in r 8.20, the Court of Appeal has held that the words refer to an inability to plead the claim in accordance with the requirements of the rules. It is the formulation of the claim which must be impossible or impracticable, not its pursuit to finality.[22]

The parties' arguments

The plaintiffs

[112] Counsel for the plaintiffs submitted in their post-hearing memorandum that the *Norwich Pharmacal* requirement that the respondent be somehow involved in, or "mixed up in", the wrongdoing of the intended defendant simply does not apply where the respondent is itself a defendant in an existing proceeding, and the discovery is sought for the purpose of identifying additional defendants who will be added in that proceeding.[23] They submitted that the Court's jurisdiction to make the orders sought, exercising the *Norwich Pharmacal* jurisdiction, is therefore not constrained by any

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20 *Hetherington Ltd v Carpenter* [1997] 1 NZLR 699 at 704.
21 At 704.
22 *Exchange Commerce Corp Ltd v NZ News Ltd*, above n 9 at 164, and *Hetherington Ltd v Carpenter*, above n 20 at 705.
23 Referring to *Norwich Pharmacal Co v Customs & Excise Commissioners*, above n 7.

requirement that the Trustees be associated with, or mixed up in, the wrongdoing alleged against the Contracting Iwi Members and the Benefitting Iwi Members (although such a requirement would be met in any event — see, for example, the plaintiff's first cause of action, where the Tribal Authority Trustees and the Contracting Iwi Members are both said to be liable to Tahi for breach of the Agreements).

[113] In his submissions for the hearing, Mr Salmon pointed out that the Agreements were made expressly between Tahi and the Iwi. The Iwi comprises its membership, determined by whakapapa, including collective groups and individuals.

[114] Mr Salmon referred to the Deed of Settlement between the Iwi, the Settlement Trust Trustees, and the Crown, which was given statutory effect by the Te Kawerau Ā Maki Claims Settlement Act 2015. The Deed of Settlement was also an agreement entered into by the Iwi through its agents, and it defined the Iwi as comprising its membership, determined by whakapapa, including collective groups and individuals. The Deed of Settlement purports to bind all members of the Iwi, whether living at the time of execution or in the future.

[115] Mr Salmon submitted that the ability of the Contracting Iwi Members to enter into the Agreements through their agents, and the ability of the Contracting Iwi Parties to enter into the Agreements as trustees for the Benefitting Iwi Members, is in no essential way different from the ability of the Iwi to enter into the Deed of Settlement with the Crown. In both cases, enforceable legal relationships have been created as a matter of common law, informed by tikanga.

[116] Mr Salmon further noted that Mr Taua was a signatory to the Deed of Settlement with the Crown, and that he was recorded in it as the mandated negotiator for the Iwi in the settlement of its Treaty of Waitangi claims.

[117] In Mr Salmon's submission, the claims involve straightforward application of contract law to the Agreements. The "substratum of fact" establishes the "real

probability of the existence of a claim against" Contracting Iwi Members, and any dispute about the extent of any signatories' authority is a matter for trial.[24]

[118] Mr Salmon submitted that it must have been the case that the Contracting Iwi Members entered into the Agreements as trustees for the Benefitting Iwi Members. That must have been so, as the historical Treaty claims were collective, and the Deed of Settlement with the Crown binds future members of the Iwi. The Deed of Settlement was signed "for and on behalf of Te Kawerau Ā Maki" by mandated signatories, and those signatories must have signed as agents of the members of the Iwi having legal capacity at that time. In turn, those members thereby entered into the Deed of Settlement as trustees for all present and future members of the Iwi. Those considerations apply equally to the Agreements.

[119] On the proposed joinder of the Benefitting Iwi Members, Mr Salmon submitted that, where a third party claimant issues a proceeding seeking to be subrogated to a trustee's right of indemnity out of trust assets, the trust beneficiaries should be joined. That is because the claim will seek direct enforcement against trust property without recourse to the trustee.[25] In this case, the subrogation claim is based on a straightforward application of the Agreements with reference to appropriate legal principles.

[120] With reference to Ms Lee's claims relating to the Mangere property, and the assignment of Mr Taua's four per cent interest in the settlement assets to Ms Lee, Ms Lee seeks to enforce her claim to the four per cent interest against those who currently hold the settlement assets legally and beneficially. Mr Salmon noted that the settlement assets are now held by the Tribal Authority Trustees and the Settlement

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[24] To the extent that, contrary to his principal submission, the authority issue may be a relevant consideration on the present application, Mr Salmon pointed to the form and content of the Agreements (which on their face are agreements between Tahi and the Iwi), Tahi's performance of its obligations under the Agreements for the benefit of the Contracting Iwi Members, the Iwi's history of entering into collectively binding agreements through agents, the New Zealand common law's recognition of tikanga (in *Takamore v Clarke* [2011] NZCA 587; *Takamore v Clarke* [2012] NZSC 116), and the Court's recognition of the ability of rangatira and kaumatua to act on behalf of, and to represent, collective groups (*Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, per Elias CJ at [494], per Glazebrooke J at [673], per Arnold and O'Regan JJ at [807]; *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2007] 2 NZLR 80 (PC)).

[25] Referring to Lynton Tucker, Nicholas Le Poidevin, James Brightwell *Lewin on Trusts* (19th ed, Thomson Reuters, Wellington, 2018) at [21-053].

Trust Trustees for the benefit of the Benefitting Iwi Members. Again, Mr Salmon submits that the claim involves a straightforward application of the law relating to assignments, and is enforceable by Ms Lee under s 130 of the Property Law Act 1952.

[121] On the issue of the plaintiffs' inability to formulate their claims against the Contracting Iwi Members and the Benefitting Iwi Members, Mr Salmon submitted that the test is obviously met. The plaintiffs are unable to formulate claims against people whose identities they do not know. Pre-commencement discovery orders can and should be made to disclose the names and addresses of prospective defendants.[26]

[122] Mr Salmon noted that it is not disputed that the register of Iwi members exists, and is in the possession and control of either or both of the Tribal Authority Trustees and the Settlement Trust Trustees.

[123] On the issue of agency, Mr Salmon emphasised that the plaintiffs rely on alleged actual authority to bind the Contracting Iwi Members, including authority arising from the status of the signatories as rangatira and kaumatua of the Iwi. To the extent that any of the Benefitting Iwi Members may be minors, or otherwise incapacitated, appropriate arrangements can be made under the rules for their defence of the proceeding. But at this stage those matters are academic, as there is no evidence of the ages of the members who would be sued, nor of any having other disabilities.

[124] Mr Salmon submitted that the champerty argument is novel in this situation. The Agreements did not relate to pursuing litigation in the Courts: they referred to claims before the Waitangi Tribunal, which is a commission of enquiry. The Waitangi Tribunal does not award damages, and accordingly no issue arises over the validity of an agreement to divide the spoils of litigation. Champerty is concerned with the due and proper administration of *Court* business, and the settlement of Treaty Claims is not Court business but Crown business. Further, the Supreme Court has rejected the proposition that it is the role of the Courts to act as general regulators of litigation funding arrangements.[27] In this case, the Agreements did not involve the assignment

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26 *Norwich Pharmacal Co v Customs & Excise Commissioners*, above n 7.
27 *Waterhouse v Contractors Bonding Ltd* [2014] 1 NZLR 91; [2013] NZSC 89.

of any causes of action, and no right was conferred on Tahi to exercise control over the Iwi's pursuit of its Treaty claims.

[125] In any event, even if the Agreements were found to be champertous that would not deprive the plaintiffs of a cause of action. Under s 76 of the Contract and Commercial Law Act 2017, it would only go to the relief available.

[126] On the issue of the entitlement of individual Iwi members to privacy, the plaintiffs say that privacy concerns cannot be sufficient reason to withhold discovery of the identities of the proposed additional defendants. Privacy Principle 11, in s 6 of the Privacy Act 1993, specifically provides for disclosure of personal information for the purposes of proceedings before a court.

The Trustees

[127] In his post-hearing memorandum, Mr Crossland took the plaintiffs' argument on the *Norwich Pharmacal* jurisdiction to be that the jurisdiction is limited to cases where the person required to provide discovery is a non-party to the proceeding (or proposed proceeding). He submitted that that proposition is incorrect.[28] He then went on to consider the Draft Claim, and submitted that no wrongdoing by the Contracting Iwi Members or the Benefitting Iwi Members is sufficiently pleaded. No evidence has been provided to show that Mr Taua had express authority to enter into the Agreements, and the claims based on implied authority are speculative or nebulous. The claims against the Contracting Iwi Members that they have been unjustly enriched cannot succeed, as they have not benefitted personally from the disputed funds, and beneficial receipt is a required element of the cause of action in restitution.

[128] In respect of the Benefitting Iwi Members, Mr Crossland first submitted that there can be no claim against them in "subrogation": subrogation is not a wrongdoing, but a form of relief. Nor can Ms Lee possibly succeed against the Benefitting Iwi Members on the claim that there has been a failure to pay her the four per cent of the Settlement Assets which she says was promised to her by Mr Taua. The Settlement Assets are not held by the Benefitting Iwi Members: they are held by the Settlement

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[28] Referring to *Wobben Properties GmbH v Siemens Plc* [2014] EWHC 3173 at [25].

Trust Trustees, and the Benefitting Iwi Members have no ability to compel the Settlement Trust Trustees to make the payment claimed by Ms Lee.

[129] In his submissions for the hearing, Mr Crossland submitted that the critical element affecting all of the causes of action against the proposed additional defendants is the absence of any authority in Mr Taua, Ms Taylor and Mrs Ewe to bind all members of the Iwi. It was not enough for Mr Taua to tell Ms Lee that he had the necessary authority. Mr Taua may have been rangatira of the Iwi, but the plaintiffs have provided no particulars and provided no evidence of any customary right of a rangatira to alienate an iwi's property rights.

[130] Further, such evidence as has been provided is against the theory that only one person could "call the shots" as Mr Taua purported to do when he claimed to have authority to enter into the Agreements on behalf of the Iwi. The treaty settlement process entered into with the Crown shows that numerous people were involved on behalf of the Iwi — indeed, approximately 150 "other witnesses/members of Te Kawerau Ā Maki who support the settlement" signed the Deed of Settlement.

[131] Mr Crossland referred to a number of Waitangi Tribunal reports, including the 1996 Taranaki Report which he submitted raised similar issues to those raised in this case. The question there was whether individuals could presume to alienate Māori land, or whether a collective decision of the relevant iwi was required. The Tribunal considered that any disposition that could introduce outsiders to the iwi community affected everyone; accordingly, a community decision was required, as expressed through the rangatira.

[132] Consistent with that approach, Mr Crossland submitted that it would be very odd if a senior figure of an iwi could, without any discussion within the iwi community, alienate four per cent of the iwi's settlement assets and grant 35 per cent control of its profits going forward. There was and is no chiefly authority over the private property interests of members of a given iwi, and a chief cannot pledge the personal credit of members without their express authority and consent. Furthermore, the Settlement Trust trust deed provided that, subject to the provisions of the Deed, the Settlement Trust Trustees are to control and supervise the business and affairs of the

Settlement Trust in such manner as they in their sole discretion see fit.[29] And cl 13.12 of the same Deed provides for voting procedures to deal with the Settlement Trust property. Similarly the Tribal Authority trust deed, which was executed nine days before the Variation Agreement, was signed by seven initial trustees, who had full power in respect of the trust fund.

[133] These documents, and the mandate procedure required by the Crown before the Iwi's treaty claims could be settled, are inconsistent with Mr Taua having the authority to bind individual Iwi members for which the plaintiffs contend.

[134] Mr Crossland then referred to the Privacy Act 1993, noting that the Tribal Authority and the Settlement Trust qualify as "agencies" subject to that Act, and that the information sought is "personal information" as defined in s 2. When Iwi members registered their names and addresses, they did so on a form that contained the following:

> **Privacy of Information**
>
> - The information supplied is confidential within the terms of the Privacy Act 1993, and for the lawful use of the Te Kawerau Iwi Tribal Authority.
> - A person may only access their own personal information.

[135] In circumstances where the plaintiffs' claims are speculative, and disclosure could chill tangata whenua registering with iwi authorities (leading to less participation in elections, and hindering the development of whakapapa records), allowing the discovery sought would be contrary to the public interest. For those reasons, there is no justification for abrogating Iwi members' entitlement to privacy in this case.

[136] If those submissions are not accepted, Mr Crossland submitted that it was responsible for the Trustees to decline to supply the register without a Court order. It the Court does order production, it should therefore do so without any order for costs. Also, a person's address is not required by a litigant to formulate a claim: if the Court

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[29] At cl 3.7.

orders production of the register it should order the redaction of both the names of all Iwi members aged under 18 on 27 June 2007, and the addresses of all Iwi members.

[137] On the cause of action in which Tahi seeks to be subrogated to the Trustees' rights to indemnity out of trust assets, Mr Crossland initially submitted that subrogation is a form of relief, and the cause of action is merely parasitic on the first cause of action. He noted in his written submissions that the Court held in the representation judgment that "the issue of subrogation will necessarily be considered in the context of relief that the Court may grant *after* the Court has made its primary findings in relation to the issue of liability".[30] And to the extent this cause of action seeks a charge on the settlement assets, Mr Crossland noted that they are held by the Settlement Trust Trustees, who are the legal owners. Even if there existed a cause of action called subrogation, the charge sought would be otiose to the Iwi members. In those circumstances, it is unnecessary to know the names of the people on the register, as the claim was only properly pleaded against the Trustees. In Mr Crossland's submission, this cause of action should be struck out, and the Court should do that of its own motion.

[138] At the hearing, Mr Crossland acknowledged that it is a general principle of trust law that trustees (such as the Trustees) acting within their powers under the relevant trust instruments are entitled to indemnity out of the trust assets for any personal liabilities they incur while so acting. He indicated that the denial of that right in his clients' statements of defence would be amended to admit that general right of indemnity. However, he maintained the submission that the courts will not join trust beneficiaries in a claim by a creditor of the trustee seeking to enforce a charge over trust assets, unless such joinder is necessary (for example, where the trustee is bankrupt or cannot be found). In this case, judgment against the Benefitting Iwi Members is not necessary, because they do not hold legal ownership of the trust assets and the trustees are available to be sued (and have been sued).

[139] On the fourth cause of action in the Draft Claim, Mr Crossland noted that the settlement assets were owned by the Crown at the time of the purported assignment of

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30 *Tahi Enterprises Ltd v Taua*, above n 1, at [46].

four per cent of those assets by Mr Taua to Ms Lee. The relief sought on this cause of action is an order for specific performance (or damages in lieu) against all members of the Iwi. The relief sought accordingly contemplates that the Iwi members would be ordered to transfer four per cent of the settlement assets to Ms Lee, even though they do not own the settlement assets: they are only beneficiaries under the Settlement Trust, with no power of disposition. They could not force the Settlement Trust Trustees to do anything. It is unimaginable in those circumstances that a Court would order individual members of the Iwi to pay damages if the Settlement Trust Trustees did not transfer four per cent of the settlement assets to Ms Lee (even if the claim were viable against the Settlement Trust Trustees, who were not parties to the assignment on which Ms Lee relies).

[140] In the representation judgment, the Court held that there was no need for the Settlement Trust Trustees to represent Iwi members in relation to this cause of action. The plaintiffs have not appealed the representation judgment, and they are now estopped from contending that this cause of action may be continued against the Benefitting Iwi Members. Nor does the last cause of action in the Draft Claim, relating to Ms Lee's claims against Mr Taua for unpaid rent on the Mangere property, affect the Contracting Iwi Members or the Benefitting Iwi Members. There is accordingly no claim to be formulated against the Iwi members on the plaintiffs' last two causes of action in the Draft Claim, and disclosure of the register of members for those causes of action is unnecessary.

[141] Mr Crossland briefly addressed the defences of maintenance and champerty in his written submissions, while submitting that argument on that issue might better be heard in the context of the strike-out application filed by the Settlement Trust Trustees. He noted that if the maintenance/champerty argument is upheld, and the Agreements are illegal, there would be no claims against the defendants (or the Iwi members).

[142] He submitted that it remains the law in New Zealand that, as between the maintainer and the maintained in litigation, champertous agreements are illegal.[31] He rejected the distinction the plaintiffs seek to draw between litigation in Court (where

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[31] Stephen Todd *The Law of Torts in New Zealand* (7th ed, Wellington, 2016) at [18.4.01], *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [67]-[82].

the law of champerty might apply) and a Waitangi Tribunal claim (where the plaintiffs say that law does not apply). Illegality of champertous agreements is informed by public policy concerns, not taxonomy. Further, public policy considerations behind the doctrine of maintenance do not remain static over time.

[143] Mr Crossland acknowledged that promotion of access to justice is widely touted to support conditional fees or third-party funding agreements. However, considerations such as access to justice must be balanced against an unconscionable exploitation of vulnerable litigants. He submitted that it is this feature that renders the Agreements illegal. He referred to the expressed wish of New Zealand Courts to be appraised of litigation funding arrangements, in the context of cases where groups of litigants are to be involved, before the litigation starts. Doing that guards against unduly exploitative arrangements.[32] In this case, what the plaintiffs seek in return for the $1.3 million they have paid is remarkable, exploitative, and would continue ad infinitum.

[144] Finally, Mr Crossland submitted that if I was inclined to make the discovery orders sought by the plaintiffs, execution of the orders should be stayed pending the hearing and determination of the Settlement Trust Trustees' strike-out application.

Plaintiffs' submissions in reply

[145] Mr Salmon submitted that the issue of customary authority is a matter for argument at a later date — it is not an issue which should affect the plaintiffs' right to the discovery they seek. That said, he submitted that the mandate procedures adopted in the Treaty claim negotiations with the Crown cannot inform the customary authority issue: it was a process required by the Crown, not the Iwi. Mr Taua was a rangatira and the chief negotiator for the Iwi in its Treaty claim. He was the chair of the Tribal Authority. There is a sufficient factual foundation for the discovery that is sought.

[146] There has been no alienation of land in this case.

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[32] *Gulf Cooperation Ltd (In Receivership) v CFL (NZ) Ltd* HC Auckland CIV-2010-404-5466, 3 November 2011, at [29]-[46], and [78]-[85].

[147] Any concern under the Privacy Act cannot trump the plaintiffs' entitlement to discovery orders which are necessary for them to identify parties against whom they are entitled to legal redress.

[148] Finally, Mr Salmon opposed the suggestion that any discovery order be stayed pending the hearing and determination of the strike-out claim.

DISCUSSION AND CONCLUSIONS

[149] First, there is no issue over the existence of the document or documents the plaintiffs will need to identify the fourth and fifth defendants they wish to join. The register of Iwi members which the plaintiffs seek is acknowledged by the Trustees to be in the control of the Tribal Authority Trustees. Also, the trust deed of the Settlement Trust provides at cl 5.1 that the Settlement Trust Trustees are to take such steps and institute such policies as are necessary to ensure that the register of Iwi members is maintained in a condition that is as up to date, accurate and complete as possible. In those circumstances it seems more likely than not that a copy of the register of Iwi members is also within the power of the Settlement Trust Trustees.

[150] On the issue of jurisdiction to make a *Norwich Pharmacal* order, I do not consider the "mere witness" rule can apply in the Trustees' favour in this case. As Lord Cross noted in *Norwich Pharmacal*, someone involved in the transaction in question is not a mere witness.[33] Lord Cross further noted that "In this field it was settled that if a party was properly made a defendant to a bill of relief the petitioner was entitled to discovery from him of the existence or whereabouts of other persons not parties in order that they might be made parties.[34]

[151] In this case, the Tribal Authority Trustees, chaired by Mr Taua, are alleged to have been a party to the Variation Agreement along with the Contracting Iwi Members, and the Settlement Trust Trustees are alleged to have failed or refused to pay to Ms Lee the four per cent of the settlement assets that she says were assigned to her by Mr Taua.

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33 *Norwich Pharmacal*, above n 7, at 188.
34 At 192.

So it is at least alleged that the Trustees were involved in events or transactions relevant to the relief to be claimed against the proposed fourth and fifth defendants.

[152] I think the principal question in this case will be whether the justice of the case requires the making of the order sought.[35] That will require some consideration of the strength of the plaintiffs' case,[36] although I note that in some cases it will be enough that the applicant has an "honest belief" that the unknown party has been guilty of the alleged wrongdoing,[37] or a belief that he or she has a "bona fide claim" against the person whose identity is sought to be ascertained, and there is no other appropriate remedy.[38]

[153] On the exercise of the Court's discretion, Mr Crossland's principal submission was that the plaintiffs have not produced a sufficient factual and/or legal foundation to justify the making of the order sought. They have not shown that Mr Taua, Ms Taylor and Mrs Ewe had authority to bind the members of the Iwi when they entered into the Agreements. I think Mr Crossland was correct in identifying the authority point as central on the issue of the strength of the plaintiffs' case. Have the plaintiffs put forward sufficient on the question of Mr Taua's authority to show that their claims are bona fide and more than merely speculative, such that the need to identify and join the proposed fourth and fifth defendants justifies application?

[154] Mr Crossland made certain other submissions, and it will be convenient to address them first, before I deal with the question of whether the plaintiffs are or may be entitled to make the claims they wish to make against the proposed fourth and fifth defendants.

[155] First, I do not think the Trustees' arguments based on alleged maintenance or champerty provide a sufficient basis to refuse the orders sought. The plaintiffs are not required to show that their claims against the proposed fourth and fifth defendants will

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35 One of the considerations identified by Neuberger J in *The Coca Cola Company v British Telecommunications Plc*, above n 13, referred to at [101](iii) of the judgment.

36 *The Rugby Football Union v Consolidated Information Systems Ltd*, above n 15, at [17].

37 *The Coca Cola Company v British Telecommunications Plc*, above n 13, at 523.

38 *Orr v Diaper* (1876) 4 Ch.D 92 at 157 per Bale CJ and Finnemore J.

succeed, but merely to put up a sufficient basis of fact to show that the claims are bona fide, and are not purely speculative.

[156] Mr Salmon draws a distinction between maintaining litigation in a Court proceeding, and providing funding to an iwi to assist it to pursue a claim under the Treaty of Waitangi (in exchange for which the funder will take a proportion of the fruits of a successful Treaty claim). Also, Mr Salmon points to s 76 of the Contract and Commercial Law Act 2017, under which the Court has jurisdiction to grant relief if a contract has been found to be illegal. I accept that the maintenance/champerty defence goes to the issue of whether the plaintiffs' claims are likely to succeed rather than to the question of whether the plaintiffs have shown that they have a bona fide belief in their claims, and that their claims go beyond the purely speculative. The defence is not suitable for determination on this application, and in my view it cannot provide a bar to the making of the order sought.

[157] Mr Crossland next submitted that the register of members of the Iwi constitutes "information" about individual members of the Iwi, which is governed by the Privacy Act 1993. He submitted that both the Tribal Authority and the Settlement Trust are "agencies" as defined in that Act. Mr Salmon did not take issue with either of those propositions. Mr Crossland then submitted that individuals registering as members of the Iwi did so for specific purposes set out in the Tribal Authority's membership registration form (for example, participation in Iwi elections, involvement in shaping the direction of the Iwi, accessing beneficiary entitlements, and building the Iwi whakapapa database). The membership form contains a prominent heading "Privacy of Information", under which the Tribal Authority states that the information supplied will be kept confidential within the terms of the Privacy Act and will be for the lawful use of the Tribal Authority.

[158] The Privacy Act sets out at s 6 a number of "privacy principles", and it contains provisions providing for an individual who considers that an agency has breached one of the privacy principles to make a complaint to the Privacy Commissioner.

[159] Principle 10 provides that an agency that holds personal information that was obtained in connection with one person shall not use the information for any other

purpose unless the agency can point to one or more of the grounds set out in subparagraphs (a) to (g) of the Principle. One of those grounds is where non-compliance is necessary for the conduct of proceedings before any Court or Tribunal.

[160] Principle 11 provides that an agency that holds personal information shall not disclose the information to a person or body or agency unless the agency reasonably believes that certain grounds for disclosure exist. Again, one of the exceptions is "for the conduct of proceedings before any Court or Tribunal…".

[161] The exceptions relating to the conduct of proceedings in any Court or Tribunal are given force by s 11(2) of the Privacy Act, which provides:

> **11 Enforceability of principles**
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> …
>
> (2) Subject to subsection (1), the information privacy principles do not confer on any person any legal right that is enforceable in a court of law.

[162] Mr Salmon relied on s 11(2), submitting that the privacy principles cannot affect any right the plaintiffs may have to the pre-commencement discovery order they seek.

[163] I accept Mr Salmon's submission on that point. The individual members of the Iwi do not have any privacy rights that would be enforceable in this Court, and if I conclude that the justice of the case requires the making of the order the plaintiffs seek, the disclosure will in any event be necessary for the conduct of this proceeding.

[164] In the alternative, Mr Crossland argued that, if the register is to be disclosed, the addresses of individual Iwi members should be redacted. He submitted that a valid statement of claim could be filed by the plaintiffs without the inclusion of the addresses of the intended fourth and fifth defendants. I do not accept that submission. Rule 5.11(1)(g) of the High Court Rules 2016 requires the plaintiff to show in the statement of claim "the full name, and the place of residence and occupation, of every

plaintiff and defendant, so far as they are known to the party presenting the document for filing".

[165] Mr Crossland also submitted that the names and addresses of any Iwi members who were minors as at the date of the 2007 Agreement should be redacted, on the basis that Tahi could not have entered into a valid contract with a minor. Mr Salmon submitted that that is something to be dealt with downstream, and should not affect the ambit of any order for disclosure of the register which is now made. I accept Mr Crossland's submission on this point as far as it goes, but there will be some Iwi members who were under the age of 18 on 27 June 2007, who could not thus be "Contracting Iwi Members", but who would nevertheless qualify as "Benefitting Iwi Members". The issue in respect of those Iwi members would appear to be whether the plaintiffs may be entitled to claim against the proposed fifth defendants (ie the Benefitting Iwi Members). I will address the question of the redaction of the names and addresses of minors from the register (whether they were minors as at 27 June 2007 or now) later in this judgment, when I deal with the principal issue, namely whether the plaintiffs have shown that they have a bona fide non-speculative claim against the proposed fourth and fifth defendants.

[166] Subject to that, I reject Mr Crossland's submissions based on the Privacy Act.

[167] Mr Crossland suggested at the hearing that a determination of this application should await the hearing and determination of the Settlement Trust Trustees' strike-out application, in which the legality of the Agreements will be in issue. But the strike-out application has not been brought by the Tribal Authority Trustees, so the claims against them will not be struck out. And it is not clear that any success of the Settlement Trust Trustees on the strict illegality issue would necessarily have the effect of also bringing the claims against the Tribal Authority Trustees to an end. There might, for example, be issues of relief under the Contract and Commercial Law Act 1977 to still be addressed. Mr Salmon also submitted that the proposed fourth and fifth defendants, if joined, should have the opportunity to be heard on the strike-out application. In all of those circumstances, and having regard to the fact that the discovery application has been fully argued, I am not prepared to adjourn this application for hearing with or after the strike-out application.

[168] Mr Crossland also submitted that the effect of the representation judgment is that the plaintiffs are estopped from pursuing their fourth cause of action against the Benefitting Iwi Members. I note first that if and to the extent that access to the register of Iwi members should be given to the plaintiffs in order to permit them to formulate their claims (including identifying defendants) on the first cause of action, it will be academic whether or not the plaintiffs' other causes of action are good, at least insofar as the Contracting Iwi Members are concerned.

[169] I now consider the bona fides and apparent strength or otherwise of the plaintiffs' claims. In the first cause of action, Tahi contends that those who signed the Agreements did so as agent or trustee for the proposed fourth and fifth defendants (among others). Ms Lee provided an affidavit saying that Mr Taua told her that he had authority to sign the Agreements on behalf of all Iwi members.

[170] Mr Crossland submitted that Mr Taua could never have had that authority, and that Tahi and Ms Lee should have been aware of that fact.

[171] Mr Taua's pleading on the authority issue may best be described as opaque. In his statement of defence filed in June 2017, he admitted that he signed the Agreements, but denied that the Agreements are binding. He pleaded affirmatively that he "had the authority to represent Iwi members", but denied the plaintiffs' allegation that he and Ms Taylor executed the 2007 Agreement as agents of the Iwi members and/or as trustees for the Iwi. He also pleaded that the 2007 Agreement is void for uncertainty of terms.

[172] In respect of the Variation Agreement, Mr Taua repeated the pleading that he "had the authority to represent Iwi Members", and the denial that any party is bound by the document. He denied that he and Mrs Ewe executed the Variation Agreement as agents of the Iwi members and/or as trustees for the Iwi. In response to a pleading that he executed the Variation Agreement as the agent of the Tribal Authority, he pleaded that he had the authority to represent the Tribal Authority, but otherwise denied the allegation.

[173] Mr Salmon relied on Mr Taua's authority as rangatira, and submitted that there is a sufficient factual foundation at this stage for the Court to find that he may establish at trial that he had implied authority, substantially derived from tikanga, to bind the Iwi members. Mr Taua did after all have authority as lead negotiator with the Crown in the Treaty claim negotiations, and he was chairman of the Tribal Authority. Beyond that, Mr Salmon submitted that the extent of Mr Taua's authority, and in particular, whether he had implied authority to bind individual Iwi members, is a matter for trial. The Court should not be concerned with it now.

[174] The parties to the 2007 Agreement were Tahi and "Te Kawerau Ā Maki". In the representation judgment, Lang J took the plaintiffs' claim to extend to individual members of the Iwi, even though they were not named as parties to the proceeding. His Honour assumed that the claim was against only those Iwi members who were over the age of 18 as at the date of the 2007 Agreement.[39] Later in the representation judgment, Lang J declined the representation order sought by the plaintiffs, substantially on the ground that "the plaintiffs can proceed against the members of the Iwi by adding them as respondents and arranging for them to be served…". His Honour said that "[the plaintiffs] have no option now but to prove that each member of the Iwi authorised those who signed the Agreements on behalf of Te Kawerau Ā Maki to do so".[40]

[175] Lang J noted in the representation judgment that the position might be different if the plaintiffs relied upon the status of the signatories to the Agreements as cloaking them, within the Iwi, with implied authority to bind individual members. The learned Judge went on to say that, in that event, "it might be possible to establish an agency relationship regardless of the state of knowledge held by individual members of the Iwi. A claim based on implied authority might therefore prevent individual members from defending the claim on the basis that they did not know of or consent to the signatories entering into the [Agreements] on their behalf."[41]

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39 *Tahi Enterprises Ltd v Taua*, above n 1, at [43].
40 At [50].
41 At [53].

[176] At that stage, the plaintiffs were not pleading agency based on implied authority. Now they are, and to that extent the position is different from that with which Lang J was concerned in the representation judgment.

[177] In my view the plaintiffs have produced sufficient to show that Tahi's proposed claim on its first cause of action against the Contracting Iwi Members is bona fide, and has a sufficient substratum of fact to be more than purely speculative. Tahi entered into written contracts with "Te Kawerau Ā Maki", and I agree with Lang J that it is reasonably arguable for Tahi that that meant those members of the Iwi who were of age, and thus legally able to enter into a contract. If that is right, Mr Taua, Ms Taylor and Mrs Ewe signed the Agreements representing undisclosed principals (the adult individual Iwi members, whose identities were not disclosed). The ordinary rule is that, where an agent enters into a contract for an undisclosed principal, the party contracting with the agent may sue the principal when the identity of the principal is discovered.[42]

[178] The issue then, is whether Mr Taua had express or implied authority to bind the individual (adult) members of the Iwi. On an interlocutory application such as this it is impossible to resolve that issue, but the starting point must be that, on the face of it, Mr Taua, Ms Taylor and Mrs Ewe presumably all considered when they signed one or both (in Mr Taua's case) of the Agreements that they had the necessary authority to enter into the Agreements on behalf of Iwi members. And while denying that the Agreements were signed as agents for the Iwi members, Mrs Ewe's estate did join in the pleading in Mr Taua's statement of defence that Mr Taua "had the authority to represent Iwi Members".

[179] I have already referred to the opaque nature of the first defendants' statement of defence on the issue of authority to enter into the Agreements, and I think the most the plaintiffs can probably take from the first defendants' statement of defence is that it is not just Mr Taua saying that he had some sort of authority to represent Iwi members — Mrs Ewe's estate has endorsed that view, and Ms Taylor presumably did

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42 Burrows, Finn & Todd, *Law of Contract in New Zealand* (5th ed, Lexis Nexis, Wellington, 2016) at 16.3.1(b).

too. Beyond that, I do not think it is possible to take much from the first defendants' statement of defence.

[180] I acknowledge Mr Crossland's submission that Mr Taua's own statements cannot provide reliable evidence that he had authority to bind all adult Iwi members when he and his co-signatories signed the Agreements. I accept too that there are real questions over the plaintiffs' claims based on implied authority/tikanga. However, I do not consider those matters raise any issue of the bona fides of the plaintiffs' claims, or that they are sufficient to tip the claims into speculative, or "fishing", territory. The facts are that Tahi entered into the Agreements which, on their face, appeared to be made on behalf of the Iwi members, and it then paid a total of $1.3 million under the Agreements. It appears to have received no benefit in exchange for the payments it made. So far then, nothing that could be called "speculative". The question is the extent to which matters raised in defence, that may not be in the "king hit" category, should preclude the making of a discovery order. McGechan J accepted in *Welgas*, one of the leading cases under r 8.20, that it would not be appropriate to make an order where the proposed claim was "plainly hopeless". I accept that that must also be the position where the Court is asked to exercise its *Norwich Pharmacal* jurisdiction. But I do not think I can say that that is the position in this case, on the strength only of the affidavit evidence filed on this interlocutory application.

[181] The Court of Appeal decision in *Takamore v Clarke* acknowledges that Māori customary law may be recognised as part of the common law in certain circumstances, and that applies to the customary law (tikanga) of a particular iwi.[43] I have no direct evidence here of the relevant tikanga of Te Kawerau Ā Maki, other than some oblique references to the authority of rangatira in the "Historical Account" included within the Deed of Settlement between the Iwi and the Crown. That Historical Account appears to acknowledge that rangatira have on occasion alienated Iwi land, although little is said about any processes that the tikanga of Te Kawerau Ā Maki may have required (hui, mandate etc) before that could occur.

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43 *Takamore v Clarke* [2012] 1 NZLR 573 at [170]-[174].

[182] Looking beyond Te Kawerau Ā Maki, some recent decisions appear to have endorsed the customary authority of an acknowledged kaumatua or rangatira to take at least certain steps on behalf of the iwi — see for example *Proprietors of Wakatu v Attorney-General*, where a rangatira was held entitled to bring a representative claim without the need for a representation order. As the Chief Justice observed: "Chiefs of high standing have long advanced such collective claims".[44]

[183] In this case, I do not have before me details of any communications there may have been between Mr Taua and Iwi members before the Agreements were signed. If there were no such communications, or if the communications were only to a limited number of Iwi members, then the Tribal Authority Trustees would presumably have been aware of that fact, and it would have been a relatively simple matter for them to have provided an affidavit stating that that was the position. They did not do so. Nor did they provide an affidavit explaining what they knew of the payments made by Tahi, and, to the extent they were aware of them, what they thought Tahi expected to receive in return for its payments.

[184] I accept that it was for the plaintiffs to show that they have a bona fide claim which is more than merely speculative, but Tahi and Ms Lee having produced contracts (the Agreements) which on their face were entered into by Mr Taua, Ms Taylor and Mrs Ewe on behalf of the Contracting Iwi Members, the claimed lack of authority was either an affirmative defence or it was at least an issue on which the knowledge of what occurred would largely have been held (at least at the time of the Variation Agreement) by the Tribal Authority Trustees rather than the plaintiffs.

[185] Similarly, I have no evidence of Te Kawerau Ā Maki tikanga that would be enough to show that the claims have not been brought bona fide, or have no real prospect of success.

[186] Providing the discovery sought will not be onerous (only the register of members is sought), and the matters raised in opposition (on the "lack of authority"

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[44] *Proprietors of Wakatu v Attorney-General* [2017] 1 NZLR 423 at [494]. See for example: *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC); *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321 (CA); and *Wi Parata v Bishop of Wellington* (1879) 1 NZLRLC 14 (SC).

issue) are in my view insufficient for me to exercise my discretion against the making of the order sought, at least on the first cause of action. I accordingly conclude that the register of members should be discovered on the basis of the proposed claims in the first cause of action, in respect of Iwi members who were 18 years of age or older as at 27 June 2007. I will consider below whether Iwi members who were not 18 as at that date should have their names and addresses redacted from the register.

[187] Two of the causes of action against the defendants[45] are breach of contract causes of action. I will consider them first, and in particular whether they appear to plead viable claims against those Iwi members who had not reached the age of 18 as at 27 June 2007.

[188] Those Iwi members who were either not born or under 18 as at 27 June 2007 (for convenience, I will call this group "the under 18s") could not have been parties to the Agreements — those who entered into the Agreements could not have done so as agents for either minors or non-existent principals. The first cause of action in the Draft Claim could accordingly only affect the under 18s on the basis that those who entered into the Agreements did so as trustees for the under 18s. But a party entering into a contract with a trustee does not normally have a right to sue the beneficiaries of the trust for breach of contract. The first cause of action being for breach of contract, it does not appear that it could provide a good cause of action against the under 18s.

[189] The fourth cause of action in the Draft Claim appears also to be a breach of contract cause of action, and I think similar considerations must apply. Ms Lee entered into a contract on 28 November 2007 with Mr Taua, under which he agreed to sell her "his 4% interest in the Treaty claims settlement". Any entitlement Mr Taua had to receive an interest in the Settlement Assets must have been conferred on him by agreement made for or on behalf of the Iwi members prior to that date, and Ms Lee's right to enforce Mr Taua's promise to pay the four per cent was presumably enforceable (if it was enforceable at all) only against those who had agreed with Mr Taua to confer that interest on him. The under 18s could not have agreed to confer

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45 The first and fourth causes of action.

that interest on Mr Taua, as they were either too young to validly do so or they were not yet born.

[190] Again, to the extent that the under 18s may be affected at all by any agreement to confer on Mr Taua an interest in the Settlement Assets, they would only be affected if and to the extent that those who made the agreement with Mr Taua did so acting in their capacities as trustee or trustees for the Iwi as a whole (including the under 18s). In such circumstances I think Ms Lee's action would be against the trustee(s), not against those such as the under 18s who were (or would become) mere beneficiaries of the trust that would ultimately receive the Settlement Assets.

[191] In addition to those considerations, there should still be substantial assets held by the Settlement Trust Trustees, who are defendants on the fourth cause of action, with which to meet any entitlement Ms Lee might have to the four per cent interest she claims.[46]

[192] For the foregoing reasons, I exercise my discretion against ordering discovery for the purpose of enabling joinder of the under 18s as defendants on either of the first or the fourth causes of action.

[193] The second cause of action in the Draft Claim is pleaded in the alternative to the first cause of action. It is a claim for unjust enrichment or equitable compensation, and it proceeds only if the Court should find the Agreements unenforceable. The claims on this cause of action are claims against parties who are said to have received cash from Tahi, including as trustees for the Benefitting Iwi Members (and therefore the under 18s). However, Mr Crossland made it clear in his submissions that the Benefitting Iwi Members have not received the Settlement Assets, and I do not understand the claims to be claims *in rem* against the Settlement Assets (in which the under 18s do have an equitable interest). The $1.3 million paid by Tahi has presumably been spent, and the cause of action proceeds only on the basis that the arrangements under which Tahi paid its money (the Agreements) have failed, and

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[46] Assuming any parties who made the agreement with Mr Taua acting in their capacities as trustees for (inter alia) the under 18s, were acting within their authority under the relevant trust or trusts and were entitled to indemnity from the Settlement Trust assets.

cannot be enforced. Again, the proper claim appears to be against those who allegedly entered into the Agreements in their capacities as trustees for (inter alia) the under 18s, and not direct against the under 18s.[47]

[194] I note also (as a factor going to the exercise of my discretion) that this is a cause of action where there appears to be no need for Tahi to join the under 18s. The Settlement Trust Trustees have been joined as a party on this cause of action, and they were the recipients of the Settlement Assets. It appears that there remain sufficient Settlement Assets in the hands of the Settlement Trust Trustees to meet any valid claim Tahi might have on its second cause of action, and that there would be little point in granting the discovery necessary to allow the under 18s to be added as defendants (it is difficult to imagine circumstances where the under 18s could have a direct liability to Tahi on this cause of action which was not also a liability of the Settlement Trust Trustees).

[195] For those reasons, I decline to order discovery of the register, insofar as it discloses the identities of the under 18s, on the basis of the second cause of action in the Draft Claim.

[196] The third cause of action in the Draft Claim proceeds on the basis that the Benefitting Iwi Members (including the under 18s) are necessary parties to Tahi's claim to be subrogated to the rights of those with whom it contracted in their capacities as trustees, to be indemnified out of trust assets (and to enforce a trustee's lien over trust assets).

[197] There will be an obvious first question as to whether those who may have entered into the Agreements as trustee will be entitled to indemnity out of the assets of the relevant trust or trusts, in respect of any liability they may be found to have to Tahi under the Agreements. However, I do not think it necessary to answer that question on this application.

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47 The principle that a trustee is liable for all liabilities the trust incurs in carrying out the trust is well established (see Andrew Butler, *Equity & Trusts in New Zealand*, (Thomson Reuters, Wellington, 2009) at 16.6.1). This is subject to two exceptions: (a) where the trustee is the agent of the beneficiaries and (b) where a lender has agreed to limit the trustee's liability. Neither of those exceptions are applicable in this case.

[198] As the learned authors of *Lewin on Trusts* note, the right of subrogation prevents the beneficiaries from avoiding liabilities which properly fall on the trust fund by having a trustee who is a man of straw.[48] But in this case there is no evidence that the Settlement Trust Trustees are insolvent, and nothing to suggest they would not exercise any right they might have to claim indemnity from relevant trust assets. And it is apparent from Mr Crossland's submissions that the under 18s themselves do not have possession of, or control over, the Settlement Assets.

[199] The learned authors of *Lewin on Trusts* say:[49]

> Plainly, the person in whom the relevant property is vested will need to be joined as a party. In an ordinary case, a trustee, though personally liable, is entitled to meet a liability to a creditor directly from the trust property, and there appears to be no practical problem such as justifies the creditor or other claimant in bringing proceedings against the beneficiaries so as to enforce the claim against the trust property. It may therefore be the case that the court will make an order in favour of a creditor or other claimant who claims to be subrogated to the trustee's right of indemnity only where the trust is being administered by the court, or where there is good reason for the creditor or other claimant to bring proceedings against the beneficiaries, as where the creditor or other claimant is unable to enforce the personal liability of the trustee, or the trustee's right of indemnity is disputed by the beneficiaries and it is consequently reasonable to allow the creditor or other claimant to establish the right of indemnity so as to enable his claim to be met from the trust fund should he succeed in establishing the right of indemnity. (Citations omitted.)

[200] It appears that no part of the "relevant property" is vested in the under 18s, so their joinder as parties could not be required on that account. Nor is it arguably necessary to join the under 18s on the basis that the Settlement Trust Trustees are unavailable to meet any personal liability they may be found to have (there is no evidence of that). The real issue, it seems to me, is the possibility (likelihood even) that the rights of those who may be found to have entered into the Agreements as trustees for (inter alia) the under 18s to indemnity out of the Settlement Assets, will be challenged by some Iwi members, on the basis that they had no authority to enter into the Agreements.

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48 Lynton Tucker et al *Lewin on Trusts* (Thomson Reuters, 19th Ed) at 21-052.
49 At 21-053.

[201] But the conduct of any such challenge would presumably be carried by those Iwi members who were adult members of the Iwi at the times the Agreements were made and who are alleged to have (expressly or impliedly) conferred the required authorities on Ms Taylor, Mr Taua and Mrs Ewe — the Contracting Iwi Members. I have already held that the register of members is to be disclosed for the purposes of provided the names and addresses of the Contracting Iwi Members, so there would appear to be no need for additional disclosure of the names and addresses of the under 18s to ensure that any trustees' claims to indemnity out of the Settlement Assets can be properly tested.

[202] I note also that Lang J considered in the representation judgment that the issue of subrogation would necessarily be considered in the context of any relief that the Court might grant after the Court has made its primary findings on issues of liability.[50] Whether or not that will be the position I need not say — it is enough for present purposes to say that if the learned Judge was correct that would provide another ground pointing against the need for, or desirability of, ordering discovery at this stage of the names and addresses of the under 18s.

[203] I observe too that it seems likely that at some point the Court will need to return to the question of the need for representation orders. If, having ascertained their identities, the plaintiffs apply to join the 400 or so Contracting Iwi Members as fourth defendants, consideration will presumably have to be given to the making of representation orders at that point, to ensure that the proceeding is efficiently managed. That will be a matter for counsel to consider in due course, but for now it seems likely that there could be at least two differing interest groups among the Contracting Iwi Members, namely those who accept that Mr Taua, Ms Taylor and Mrs Ewe had the authority to enter into the Agreements on behalf of all Iwi members, and those who do not. There may be other groups with different interests that would have to be represented, but that is a question for another day. Its present relevance is only that it suggests the possibility that the Court might consider it appropriate in the future to appoint counsel (or some other representative) to represent the under 18s in the proceeding, at least if it appeared that their interests might differ from those of any

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50 *Tahi Enterprises Ltd v Taua*, above n 1, at [46].

Contracting Iwi Members taking the position that the Agreements are not binding or that the plaintiffs are not entitled to the relief they seek for any other reason.

[204] I take into account also the fact that a number of the considerations identified as relevant to the exercise of the *Norwich Pharmacal* jurisdiction in *The Rugby Football Union* [51] point against the making of an order for disclosure of the identities of the under 18s. First, they are clearly not "wrongdoers" in any sense of the word, and there is no question of the making of an order for the disclosure of their identities somehow deterring wrongdoing. The making of such an order clearly would result in the revealing of the names of innocent persons, and in such circumstances the need for disclosure must be greater (if it is to trump the right of a wholly innocent person to his or her right to privacy). In this case, I do not think the need for disclosure is that great, particularly where the identities of the Contracting Iwi Members will be disclosed and the public interest in the plaintiffs being allowed to vindicate any legal rights they may have can be satisfied by that joinder (considered with the fact that the Settlement Trust Trustees apparently still hold the Settlement Assets, and the Court's ability in due course to appoint a representative for the under 18s if that proves to be necessary and appropriate).

[205] All of those considerations lead me to conclude that the plaintiffs have not made out a sufficient case for *Norwich Pharmacal* discovery of the register of Iwi members insofar as it discloses the names or addresses of the under 18s. In the exercise of my discretion, I decline to order that disclosure.

[206] It is not necessary for me to refer to Mr Crossland's other arguments in opposition to the orders sought insofar as they affect the under 18s.

Application to stay any order pending the hearing and determination of the Settlement Trust Trustees' strike-out application

[207] Mr Crossland asked that, in the event of an order for discovery being made, the Court should stay execution of the order pending the hearing of the strike-out application. I am not prepared to do that, substantially for the same reasons I was not

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51 *The Rugby Football Union v Consolidated Information Systems Ltd*, above n 15.

prepared to defer giving judgment on the discovery application.[52] The parties have fully argued the discovery issues, and the disclosure ordered will not be onerous.

Result

[208] I make the following orders:

(1) Within 30 working days of the delivery of this judgment the Tribal Authority Trustees are to make available for inspection by the plaintiffs the register of members of the Te Kawerau Ā Maki Iwi referred to at paragraph 3 of the Trustees' notice of opposition dated 3 May 2018, together with any other registers of the Iwi members the Tribal Authority Trustees may have in their control. The register or registers is to be made available for inspection as aforesaid with the names of all Iwi members who were either unborn or under the age of 18 as at 27 June 2007 redacted.

(2) Within 30 working days of the delivery of this judgment, the Settlement Trust Trustees are to file and serve an affidavit stating whether they have or have had in their control a register or registers of members of Te Kawerau Ā Maki.

(3) Within 30 working days of the delivery of this judgment, the Settlement Trust Trustees are also to make available for inspection by the plaintiffs any register or registers of Iwi members discovered by them pursuant to order (2) above. Again, the register or registers of members is/are to be made available for inspection as aforesaid with the names of all Iwi members who were either unborn or under the age of 18 as at 27 June 2007 redacted.

(4) If such a register or registers has/have been but is/are no longer in the control of the Settlement Trust Trustees, they are to state in their affidavit their best knowledge and belief as to when such register or

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[52] Paragraph [167] of this judgment.

registers ceased to be in their control, and who now has control of it/them.

(5) Costs — I do not think this is a case for either increased costs or no costs. Mr Crossland submitted that there should be no order for costs, on the basis that the Trustees have acted responsibly in opposing the application in order to protect the privacy of Iwi members. But I think the Trustees did more than that. They mounted strenuous opposing arguments which, if successful, would have precluded the plaintiffs from taking the course contemplated by Lang J in the representation judgment, namely suing the individual Contracting Iwi Members. In those circumstances, the plaintiffs would normally be entitled to an award of costs, and I see no reason to differ from that broad approach in this case. However, I see no basis for an award above scale costs, and the Trustees have been partially successful (in opposing the application insofar is it related to the under 18s, and in submitting that r 8.20 could not apply). In the end, I think the justice of the case will be met if the plaintiffs are awarded costs on a 2B basis, reduced by 25 per cent to reflect the factors just mentioned, plus disbursements as fixed by the Registrar. I make orders accordingly.

Associate Judge Smith