IN THE COURT OF APPEAL OF NEW ZEALAND

CA336/2014
[2015] NZCA 160

BETWEEN	THE ATTORNEY-GENERAL Appellant
AND	MITA MICHAEL RIRINUI Respondent

CA337/2014

AND BETWEEN	LANDCORP FARMING LIMITED Appellant
AND	MITA MICHAEL RIRNUI Respondent

CA29/2015

AND BETWEEN	LANDCORP FARMING LIMITED Appellant
AND	MITA MICHAEL RIRINUI Respondent

Hearing:	10 February 2015
Court:	Harrison, Stevens and French JJ
Counsel:	D J Goddard QC, J R Gough and S J Humphrey for the Attorney-General S A Barker and B Gnanalingam for Landcorp Farming Ltd A N Isac and J B Orpin for Mita Ririnui
Judgment:	12 May 2015 at 2.15 pm

JUDGMENT OF THE COURT

A **The appeals in CA336/2014 and CA337/2014 are allowed and the interim orders made in the High Court are set aside.**

B **The cross-appeals in CA336/2014 and CA337/2014 are dismissed.**

C **The appeal in CA29/2015 is allowed.**

D **The cross-appeal in CA29/2015 is dismissed.**

E **The costs order made in the High Court is set aside and the proceeding is remitted to that Court to fix costs in accordance with the terms of this judgment on both the interim and final applications.**

F **The respondent is ordered to pay one set of costs including both its appeal and cross-appeal to each of the Crown and Landcorp for a standard appeal on a band A basis and usual disbursements.**

REASONS OF THE COURT

(Given by Harrison J)

Contents

Introduction

[1] As its name suggests, Landcorp is a landholding state-owned enterprise: its activities are subject to the State-Owned Enterprises Act 1986 (the SOE Act) and its shareholders are two Ministers of the Crown. In 2013 Landcorp advertised for sale by public tender one of its dairy farms at Whārere in the Bay of Plenty. Before taking this step, the corporation received advice from the Office of Treaty Settlements (OTS), an agency within the Ministry of Justice responsible for negotiating the settlement of historical Treaty of Waitangi claims, that Whārere was not of potential interest to the Crown for a future settlement. OTS' advice was based upon an erroneous assumption that all Treaty claims to the farm had been settled. In fact the Ngāti Whakahemo tribe had an extant but unsettled claim.

[2] In 2014 Landcorp agreed to sell the farm to the highest tenderer, Micro Farms Ltd. The Ngāti Whakahemo Claims Trust immediately challenged the sale: its objective was to set the sale aside. Through its chair, Mita Ririnui, the Trust applied to the High Court to judicially review a number of decisions made by the Crown and Landcorp relating to the sale and for interim preservation orders.[1] While the Trust obtained interim orders against OTS, Ministers of the Crown and Landcorp,[2] including a temporary stay of settlement of the sale which remains in force, its substantive claim for permanent relief was later dismissed.[3] The Crown and Landcorp were ordered to pay the Trust's costs.

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1 In this judgment we refer to the relevant party interchangeably as "the Trust", "Ngāti Whakahemo" or "the tribe".
2 *Ririnui v Landcorp Farming Ltd* [2014] NZHC 1128 [*Ririnui* Interim Judgment].
3 *Ririnui v Landcorp Farming Ltd* [2014] NZHC 3402 [*Ririnui* Final Judgment].

[3] The Crown and Landcorp appeal against the interim judgment: the Trust cross-appeals against the High Court's dismissal of its application to set aside the sale. Landcorp appeals against the costs order: the Trust cross-appeals against the dismissal of its substantive claim. Both the appeals and the cross-appeals raise a multiplicity of issues which we will address within a composite framework.

Facts

[4] In 2012 Landcorp and OTS entered into a non-legally binding protocol. Its purpose was to facilitate OTS' ability to negotiate Treaty settlements while protecting Landcorp's commercial approach to its business. In summary, the protocol provided for Landcorp to give OTS early warning of its intention to sell any properties located within specifically scheduled areas where Treaty settlements had not been completed and which may be identified as being of potential interest for future settlements: if OTS indicated an interest in acquiring a notified property, Landcorp agreed to set it aside for the Crown to purchase according to a price setting mechanism.

[5] In August 2013 Landcorp advised OTS under the protocol that it was considering the sale of Whārere, a scheduled property. In September 2013 OTS responded that the farm was not of potential interest to the Crown for a future Treaty settlement. On 30 October 2013, Landcorp's board resolved to sell Whārere by public tender. Tenders were to close on 4 December 2013.

[6] On 18 November 2013 the Trust's solicitors wrote to Landcorp advising of the tribe's claim to Whārere and confirming that a memorial had been noted against the farm's title under s 27B of the SOE Act. A memorial is a statutory notice to purchasers that the land may be resumed by order of the Waitangi Tribunal for transfer to Treaty claimants in settlement of claims. In OTS' view, communicated to Landcorp on 19 November 2013, Ngāti Whakahemo's Treaty claims had been fully settled in accordance with the Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008. It is now common ground that OTS' opinion was wrong.

[7] On 4 December 2013 Ngāti Whakahemo filed on notice to the Crown and Landcorp a resumption application with the Waitangi Tribunal known as Wai 1471 – that is, for a binding recommendation that Whārere be returned to the tribe.

[8] On 18 December 2013 Landcorp cancelled the sale process following discussions with the Minister for Treaty of Waitangi Negotiations ("the Minister"). He had intervened because of concerns expressed about the sale by another tribe, Ngāti Mākino. As a result Landcorp informally granted Ngāti Mākino a two month option to purchase Whārere, expiring on 28 February 2014.

[9] In February 2014 representatives of Ngāti Whakahemo and Ngāti Mākino met to discuss a commercial proposal to purchase Whārere. However, the two tribes were unable to agree on which one would lead a purchase. Ngāti Whakahemo later threatened to injunct any sale by Landcorp to Ngāti Mākino.

[10] On 28 February 2014 Landcorp's board resolved to re-enter into negotiations to sell Whārere to Micro, the highest bidder in the public tender process, "for not less than $19 million". On 4 March 2014 Landcorp signed an unconditional agreement to sell the farm to Micro for $19 million. Earlier that day, Ngāti Whakahemo had asked the Minister and Landcorp's shareholding Ministers to undertake that a sale would not proceed pending resolution of the tribe's resumption application. On 6 March the Minister advised Ngāti Whakahemo that no undertaking would be given.

[11] On 7 March 2014 the Trust applied to the High Court for interim orders restraining the sale. Its application for judicial review was given a priority fixture for hearing in the High Court on 15 and 16 April 2014. With commendable expedition, Williams J issued his interim judgment on 26 May 2014. Its terms will be the subject of further consideration. But for now we note that the interim relief granted included an order staying settlement of the agreement from 30 May 2014, the agreed date, for two months. That order has since been extended and as a result of the final judgment delivered by Williams J on 22 December 2014 settlement is stayed pending our determination of the appeals and cross-appeals.

High Court

[12] The Trust's application for judicial review challenged: (1) Landcorp's decision to enter into the agreement to sell Whārere to Micro; (2) OTS' decision that Whārere was not of potential interest for a future Treaty settlement; and (3) a decision by the shareholding Ministers in Landcorp – the Ministers of Finance and of State-Owned Enterprises – not to intervene in the sale process.

[13] In his interim judgment, Williams J (1) declared that OTS' decision to disclaim any interest in the farm was invalid and of no effect;[4] (2) dismissed the Trust's application to review Landcorp's decision to sell Whārere whether based on a breach of s 9 of the SOE Act[5] or a legitimate expectation said to arise from an email exchange between the parties in early March 2014;[6] (3) ordered the Minister (a) to reconsider whether the farm should be dealt with wholly or partly under the protocol in the light of Ngāti Whakahemo's existing Treaty claim for Whārere; and (b) to consult with Ngāti Whakahemo about the tribe's possible acquisition of the farm, whether outright or in joint venture with other interests;[7] (4) declined to set aside the agreement[8] but stayed its completion for two months to enable the consultation process to proceed;[9] and (5) directed a further hearing to determine the Trust's substantive application.[10]

[14] Even though the Crown filed an appeal, the Minister complied with the interim order to reconsider and consult. This was, if we may say so, a practical and sensible step. After meeting with the Trust's chair and other representatives and taking into account a range of relevant factors, the Minister concluded that the farm was not in whole or in part of potential interest to the Crown for a future Treaty settlement. Other core Crown properties within Ngāti Whakahemo's area of interest were available for use in settlement of the tribe's claims. Also, on a preliminary

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4 *Ririnui* Interim Judgment, above n 2, at [63]–[97] and [164(a)].
5 At [98]–[109].
6 At [110]–[114].
7 At [115]–[146] and [164(b)]–[164(c)].
8 At [147]–[163].
9 At [164(d)].
10 At [164(e)].

assessment, the value of the farm would have exceeded the value of any settlement with the tribe by 40 times.[11]

[15] At the hearing of its substantive application the Trust did not challenge the validity of the Minister's reconsidered decision. Instead the Trust shifted the point of its attack to an allegation that Landcorp acted in bad faith by misleading Ngāti Whakahemo's representatives during communications about the sale in early March 2014.[12] Leave was granted to amend the Trust's statement of claim for this purpose.

[16] The Trust's claim of bad faith by Landcorp was the only live issue remaining for determination at the substantive hearing. Williams J recited events in some detail before finding that the Trust's allegation of bad faith was not established.[13] Decisively, also, he found that even if bad faith was proved it could not have had any effect on the tendering process or the result.[14] Williams J dismissed Ngāti Whakahemo's substantive claim accordingly.[15] Nevertheless he ordered the Crown and Landcorp to pay Ngāti Whakahemo's costs on a 2B basis and certified for second counsel.[16]

Appeals and cross-appeals

[17] As noted, the Crown and Landcorp appealed against the interim judgment before final judgment was delivered. Williams J's dismissal of the Trust's substantive application against both the Crown and Landcorp would normally render those appeals moot. However, Mr Goddard QC is correct that the interim orders are relevant to costs awarded or to be awarded in the High Court and in any event the grounds on which the interim orders were made against the Minister are of significance for the Crown.

[18] Apart from costs, the three substantive issues arising for our determination on the Trust's appeal against Williams J's dismissal of its claims are that Landcorp acted

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11 *Ririnui* Final Judgment, above n 3, at [8]–[14].
12 At [25] and [28]–[30].
13 At [83].
14 At [85]–[87].
15 At [88].
16 At [90]–[92].

in breach of s 9 of the SOE Act, inconsistently with Ngāti Whakahemo's legitimate expectations and in bad faith.

[19] The appeals and cross-appeals against the interim and final judgments have introduced a degree of complexity which must not be allowed to divert our inquiry. Two factors require emphasis from the outset. One is to repeat that the Trust's application was for judicial review of what are said to be three correspondingly separate decisions. These decisions are the starting point for our analysis, which will include consideration of the second factor: that is, the Trust's application is based upon three discrete events, each occurring within a narrow and factually unexceptional compass. Those events are respectively a statement made by OTS in a letter to Landcorp in September 2013; some communications between representatives of Landcorp and the Trust within a short timeframe in early March 2014; and a refusal on 6 March 2014 by the Minister and the shareholding Ministers in Landcorp to give an undertaking as requested.

[20] We emphasise these factors because the extensive body of evidence filed for the Trust and its case as argued both in the High Court and this Court have ranged widely, suggesting an expansion of the claim beyond its true relationship to the events complained of and an attempt to challenge the substance or merits of relevant decisions rather than the process by which they were reached.

High Court interim judgment

(a) Office of Treaty Settlements decision

(i) High Court

[21] The Trust sought declarations that: (1) OTS' advice to Landcorp in September 2013 that Whārere was not of potential interest for a future Treaty settlement was materially affected by an error of law; (2) OTS' advice to Landcorp in November 2013 that the Trust's claim to the land was settled was wrong as a matter of law; and (3) "the decisions as well as the agreement for sale and purchase of Whārere are invalid".

[22] Williams J granted a declaration that OTS' decision to disclaim any interest in Whārere was invalid and of no effect. He acknowledged that the protocol is a non binding creature of policy; and that OTS was not exercising a statutory power of decision.[17] Thus any decisions made under the protocol cannot be subject to review under the Judicature Amendment Act 1972. Nevertheless, he found that OTS' decision to:[18]

> clear [the farm] for sale was amenable to judicial review on the wider ground that it was exercising a public power having consequences for Ngāti Whakahemo's interests under the Treaty of Waitangi and the Treaty settlement process.

[23] In support of this conclusion Williams J referred to his earlier observation that, while it was unaware of the protocol's existence, Ngāti Whakahemo may have secured an advantage if the Crown had advised Landcorp of its interest in acquiring Whārere for Treaty settlement purposes. In particular the Trust would have been spared from applying to the Waitangi Tribunal for resumption against the background that the Tribunal had never made such an order.[19]

[24] Williams J found that by its legal error in concluding that Ngāti Whakahemo's claim had been settled, OTS had failed to take into account a mandatory relevant consideration. That was to know before "clearing" the land for sale whether any tribes had claims in the area such that the land might reasonably be required for use in some way to settle.[20] Accordingly, the Judge held that the clearance itself must be considered invalid.

(ii) Justiciability

[25] The threshold question requiring determination on the Crown's appeal is whether Williams J correctly assumed that the High Court had jurisdiction to review OTS' decision. The answer largely turns on whether given that it was not exercising a statutory power of decision OTS was exercising nevertheless a public power within the category which has been held amenable to judicial review.

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17 *Ririnui* Interim Judgment, above n 2, at [63].
18 At [64].
19 At [32].
20 At [89].

[26] The justiciability of OTS' decision must be evaluated within its legal framework. Certain factors are decisive. Landcorp, not the Crown, owned Whārere. The title was, as noted, subject to a standard resumption memorial. The land could be resumed at any time irrespective of the identity of the owner if the Tribunal made an order. Landcorp had no legal obligation to give notice to the Crown or any other party if it wished to sell a scheduled property.

[27] Within this broad framework, the protocol was simply a commitment to a consultative process between Landcorp and the Crown about issues affecting each other's responsibilities. One particular issue was where the corporation proposed to sell a property subject to a memorial giving notice of a claim. In that event, OTS had three months to advise whether a property was "of potential interest for a future settlement". If so, as earlier noted, the Crown had a further period of three months within which to purchase.

[28] In accordance with the protocol Landcorp gave notice of its intention to sell. In response OTS advised the corporation in its letter dated 12 September 2013:

> As requested by clause 6, OTS has assessed the property. The property is not of potential interest for a future Treaty settlement. In accordance with this clause, OTS waives its interest in the Whārere farm.

[29] OTS' decision to disclaim an interest in buying Whārere was said to be justiciable. However, OTS was simply acting in accordance with a legally non binding protocol and its decision was not actionable. The decision did not affect Landcorp's rights because Landcorp was always free to sell Whārere. And it did not affect the Crown's rights because the Crown was always free to acquire the property irrespective of which party owned it.

[30] Furthermore OTS' decision did not adversely affect Ngāti Whakahemo's indirect rights or have the potential to do so.[21] Its rights to Whārere were already protected by the resumption memorial. Section 27B of the SOE Act protected the tribe, allowing for resumption and redress for Treaty breaches if the Tribunal was satisfied that the statutory criteria were met. It is irrelevant either that the Tribunal

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[21] *Milroy v Attorney-General* [2005] NZAR 562 (CA) at [11]–[12], cited in *Ririnui* Interim Judgment, above n 2, at [84].

has never made a resumption order or that an affirmative decision by OTS to acquire the farm may have possibly spared the Trust from filing a resumption application, as it did on 5 December 2013. Despite Williams J's comparative ranking of it as "second best to a Protocol-based acquisition",[22] the purpose of the existing statutory regime was to protect Ngāti Whakahemo's rights as a Treaty claimant.

[31] In effect, the protocol was no more than a mechanism for the parties to communicate about potential land sales, giving the Crown an opportunity to exercise an informal option to purchase for a fixed period. The protocol was designed to facilitate the relationship between the Crown and Landcorp relating to Treaty issues. It did not give any rights to or impose obligations upon either party. And the fact that a decision made in accordance with the protocol might have conferred an incidental benefit on a third party does not vest that party with rights of review.[23]

[32] Mr Orpin sought to address this jurisdictional difficulty by relying on the authority of *Peters v Davison,*[24] affirming that as a matter of constitutional principle courts are not limited to reviewing errors of law where "there are rights and duties of, and owed between, relevant parties."[25] Thus courts have a wider jurisdiction to review a Commission of Inquiry's errors of law where the errors "may have real practical consequences"[26] – that is, the error or errors must materially affect a matter of substance relating to a finding or decision (for instance, relating to the Commission's terms of reference).[27] On Mr Orpin's submission, Ngāti Whakahemo's claim falls squarely within the *Peters v Davison* principle because the subject matter of OTS' advice was *about* Ngāti Whakahemo's rights. The erroneous advice was said to be material because it caused the iwi to lose "the opportunity to be treated, prior to the sale, as a claimant with an unsettled Treaty claim in relation to [the] farm."

[33] However, even if for the purposes of argument the subject matter of OTS' decision was about Ngāti Whakahemo's rights, we repeat that those rights were

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22 At [145].
23 See *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 198; and *Wellington City Council v Woolworths NZ Ltd* [1996] 2 NZLR 537 (CA) at 546.
24 *Peters v Davison* [1999] 2 NZLR 164 (CA) at 187–188.
25 At 191.
26 At 192.
27 At 193 and 201–204.

unaffected by OTS' decision; that the tribe's right to pursue a claim against Whārere remained undiminished; and that the Crown could always acquire the land, even if it was sold to Micro, if the Waitangi Tribunal so directed. It follows that we reject Mr Orpin's submission that OTS' advice caused significant prejudice to Ngāti Whakahemo. Its admitted error of law was not material to any matter of substance.

[34] In any event, *Peters v Davison* was decided in a very different legal and factual context. A Commission of Inquiry was reporting to Parliament following a lengthy public inquiry. The Commission's report might have wide practical consequences for public administration akin to those of a Court decision, and on individual reputations. The Court considered this factor was of "central relevance" in that case and in the authorities on which *Peters v Davison* relied.[28] None of these factors are present in this case.

[35] OTS' decision was not justiciable for another reason, emphasised by Mr Goddard. The decision whether to settle a claim is of an entirely political nature for the Minister to be made taking account of a range of factors. One of particular relevance is whether the likely amount payable in settlement of a claim would be too small to warrant the Crown's acquisition of a property.[29] It is common ground that a decision whether to acquire the farm or offer it for settlement is unreviewable. It must follow that, if the substantive decision is unreviewable, so too is a step which might be taken in the process leading up to that decision. The Trust has no enforceable rights at any stage in what is an executive decision on whether to settle a Treaty claim made for political or policy reasons.

[36] We add that Mr Orpin did not seek to support Williams J's rationale for review. The Judge found OTS had failed to take account of a mandatory relevant consideration, namely that before clearing the farm for sale OTS was required to know whether Ngāti Whakahemo had a claim to land which it might reasonably use to settle that claim. He held that the incorrect legal assessment by OTS amounted to a failure to take that consideration into account.[30] It is not in dispute, however, that

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28 At 188–192.
29 *Ririnui* Interim Judgment, above n 2, at [93].
30 See at [89] and [97].

OTS considered whether Ngāti Whakahemo did have a claim: it erred in law in advising to the contrary. That is a different legal concept.

(iii) Relief

[37] Moreover, even if the Court had jurisdiction to review OTS' decision, we agree with Mr Goddard that no purpose would be served by declaring it to be invalid and of no effect. As just noted, the decision was incapable of having any legal effect and was thus not of any real practical consequence to Ngāti Whakahemo.

[38] A declaration of invalidity and ineffectiveness was, with respect, itself ineffective. The declaration was granted after Landcorp had entered into a binding agreement to sell the farm to Micro. A decision made by a non-contracting party could not invalidate an agreement entered into by third parties some six months later without notice of OTS' error. OTS could not take any legally effective steps to interfere with or set aside the agreement after it was signed. This factor also serves to illustrate why OTS' original decision was not justiciable.

[39] Mr Orpin sought to support the declaration on a further ground. He relied on the Trust's pleading that OTS' advice to Landcorp on 19 November 2013 that Ngāti Whakahemo's Treaty claims had been fully settled was independently reviewable. He referred to authority, including *Peters v Davison*, for the principle that public reports, advice, guidance and the like are reviewable for error of law. Courts are justified in interfering given their constitutional function to rule on questions of law and ensure that public authorities do not err in that respect. However, this generally applicable proposition cannot save the argument which fails for the reasons already given, not least of all the lack of materiality.

(iv) Summary

[40] In summary we are satisfied that:

(1) OTS' decision was not justiciable because it did not affect any contractual or third party rights.

(2) Alternatively OTS' decision was not justiciable because it was but one step in and part of a decision making process of a political or policy nature.

(3) Even if we were wrong on those two findings, no purpose was served by a declaration that OTS' decision was invalid and of no effect.

[41] It follows that in our judgment Williams J erred in declaring that OTS' decision to disclaim an interest in Whārere was invalid and of no effect.

(b) Minister's decision

(i) High Court

[42] The Trust applied to review the Minister's decision made on 6 March 2014 for himself and the Ministers of Finance and State-Owned Enterprises not to offer an undertaking in the terms requested by the Trust's solicitors on 4 March. The undertaking sought was that Landcorp would not enter into an agreement to sell Whārere without giving Ngāti Whakahemo 20 working days notice of its intention. The purpose was to preserve Ngāti Whakahemo's interest under Wai 1471 and in Whārere farm. In rejecting the Trust's request the Minister explained:

> Shareholding Ministers cannot make the undertaking you seek. The powers of Landcorp's shareholding Ministers are set out in the [SOE Act]. The Act is designed so that these powers are exercised at a high level (e.g. relating to the Statement of Corporate Intent or the State-Owned Enterprise's objectives) or in a light-handed way. The Courts have also confirmed that the Act is part of a light-handed regulatory regime that cannot countenance "heavy-handed" ministerial or parliamentary control of the State-Owned Enterprise's trading activity.
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> Intervening to provide an undertaking, particularly when Landcorp have declined to do so, is clearly inconsistent with the provisions of the Act.

[43] The Trust alleged that the Ministers erred in law in that:

(1) Their position (that they are powerless to stop a breach of the principles of the Treaty of Waitangi) was contrary to s 9 of the SOE Act, which expressed a broad constitutional principle and authorised

the Ministers to give the undertaking sought or otherwise prevent a breach of the principles of the Treaty.

(2) As holders of 100 per cent of the shares in Landcorp, a decision by the shareholding Ministers about Landcorp would be binding on it under the company law doctrine of informal unanimous consent.

(3) Their position was inconsistent with the Crown's past practice.

The Trust sought various declarations together with an order staying settlement of the agreement.

[44] Section 9 of the SOE Act was the foundation for the Trust's argument. It simply provides that:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

[45] Williams J relied on the unanimous informal shareholder assent rule known as the *Duomatic* principle as the basis for finding that the Minister erred in failing to intervene in Landcorp's sale where it might be inconsistent with Treaty principles.[31] Leaving aside any question about whether it survives the enactment of the Companies Act 1993, there can be no doubt that the *Duomatic* principle otherwise reflects the law of New Zealand.[32] The question is whether the Judge correctly applied it here.

[46] When addressing a proposition that the *Duomatic* principle does not apply where the requirements relating to the subject decision are designed to protect the interests of a party other than the shareholders, such as Landcorp, the Judge held in the interim judgment:

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31 *Ririnui* Interim Judgment, above n 2, at [124]–[146]; *In re Duomatic Ltd* [1969] 2 Ch 365 (Ch) at 373.

32 See for example *Levin v Ikiua* [2010] NZCA 509, [2011] 1 NZLR 678 at [46]; *Westpac Securities Ltd v Kensington* [1994] 2 NZLR 555 (CA) at 564–565; *Wairau Energy Centre Ltd v First Fishing Co Ltd* (1991) 5 NZCLC ¶96-498 (CA) at 67,382–67,383; *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA) at 249.

> [129] If that is indeed the law in New Zealand (the principle expressed at trial level in England, has not been applied here), then it seems to me that allowing Ministers to avail themselves of an opportunity to ensure that the Crown complies with its Treaty obligations, is in fact for the benefit of the Crown. As is often said in these contexts, the honour of the Crown is in play, and it is in the Crown's interests that honour may be maintained.
>
> [130] *Thus, if Landcorp were a privately owned company, its shareholders could have stepped in and imposed a decision on the Board.* …
>
> (Emphasis added.)

[47] In Williams J's judgment the *Duomatic* principle empowered the shareholding Ministers and Landcorp to intervene and prevent the sale if to allow it to proceed would have breached the principles of the Treaty of Waitangi;[33] the shareholding Ministers ought to have properly apprehended the Crown's obligations to deal with unsettled claims relating to the land in question and take time to explore ways of satisfying those obligations[34] and the High Court was empowered to set aside the agreement because it was tainted by both the OTS' advice and the Minister's failure to intervene, undermining the integrity of the sale process.[35] However, in exercising his discretion he declined to set the agreement aside at that interim stage to enable completion of the ministerial reconsideration process.[36]

[48] In this respect Williams J's conclusion that the shareholding Ministers could have stepped in and imposed a decision on Landcorp's board appears to assume a continuous failure by the Ministers of an obligation to intervene at any stage after the OTS' decision. But the Trust correctly sought review of an affirmative decision – the Minister's refusal on 6 March 2014 to give an undertaking not to sell without notice – and we note that the interim order was made against the Minister, the relevant decision maker. We shall proceed accordingly.

(ii) Re Duomatic

[49] The *Duomatic* principle has been expressed in a number of authoritative ways since 1969 including its recent articulation in these terms:[37]

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33 At [136].
34 At [146].
35 At [155].
36 At [162].
37 *EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch) at [122].

> … where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.

[50] In a different factual and legal context, the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* referred to the principle that where all the shareholders in a solvent company unanimously decide something which the company under its constitution has power to do, that decision should be the company's decision.[38] In reliance on this authority Williams J concluded that the *Duomatic* principle was of wider scope than ratification of procedurally flawed decisions or actions, and applied generally in all company business.[39]

[51] In this Court Messrs Goddard and Isac agreed that, at least under the Companies Act 1955, *Meridian* is authority for the principle that shareholders were lawfully able to make decisions on management issues which the constitution allocates to the board. Mr Barker argued for a more restrictive approach relying on the *Duomatic* principle. In his submission the informal unanimous consent rule is limited to ratifying or waiving internal technical errors, and does not authorise shareholders to make operational decisions for a company unless the constitution or the Companies Act 1993 specifically confer that power. Mr Goddard also argued that the *Duomatic* principle has not survived the enactment of the Companies Act 1993.[40]

[52] It is unnecessary for us to determine these differences and in particular whether the *Duomatic* principle survives the 1993 Act. That is because we are satisfied that, whatever path is followed, neither *Duomatic* nor *Meridian* – to the extent that they expound differences – could be invoked as the jurisdictional basis to

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38 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 11–12.

39 *Ririnui* Interim Judgment, above n 2, at [127].

40 See Susan Watson "Allocation of Power Within the Company" in John Farrar and Susan Watson (eds) *Companies and Securities Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2013) 247 at 268–274; but compare Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (LexisNexis, Wellington, 2011) at 281–287.

find that the Ministers should have stepped in and imposed a decision on Landcorp's board. In our judgment Williams J's conclusion cannot be justified by reliance on the *Duomatic* principle or any analogous principle of company law. In its orthodox application as argued by Mr Barker, the *Duomatic* principle is a rule of ratification, preventing a company from relying on its failure to comply with constitutional formalities to justify it in resiling from a binding obligation lawfully assumed by its agent.[41] The principle permits corrections of technical non-compliance, to formalise an extant substantive decision which has the shareholders' unanimous if informal consent. Its purpose is to bar a company from relying upon failures of formality as a means of avoiding its legal obligations.[42] Its sensible rationale is that in these circumstances it "would be idle to insist upon formality".[43]

[53] It follows that we must reject Mr Isac's argument in support of the more expansive approach favoured by Williams J based on the ground that a company's shareholders have the power to make management or operational decisions normally reserved for directors. Strictly speaking, that argument does not rely on the *Duomatic* principle. Its foundation is the broader proposition found in *Meridian* that the shareholders' acts will be the company's acts, providing the shareholders act unanimously. On Mr Isac's argument, its logical extension is that the shareholders acting unanimously must also have been empowered on or about 6 March 2014 to delay a disposition of Landcorp's property for 20 working days.

[54] In our judgment Mr Isac's extended principle cannot authorise shareholders to override an otherwise internally compliant decision by the company's directors, especially where intervention causes the company to breach its legal obligations to a third party.[44] The *Duomatic* principle allows shareholders acting unanimously to ratify a decision made informally by the company. The *Meridian* principle attributes

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41 Watts, Campbell and Hare *Company Law in New Zealand*, above n 40, at 284. See also Andrew Barton "Dispensing with formalities: the *Duomatic* principle" (2000) 21 Company Lawyer 186 at 186–187.

42 *Westpac Securities v Kensington*, above n 32, at 563.

43 *Re New Cedos* [1994] 1 BCLC 797 (Ch) at 814g–h; *Atlas Wright (Europe) Ltd v Wright* [1999] BCC 163 (CA) at 174G.

44 See *Nicholson v Permakraft*, above n 32, at 250 (unanimous shareholder assent is not enough to justify a breach of duty to third parties, such as creditors). See also Watson, above n 40, at 274 (unanimous shareholder ratification generally is not available if it would affect the interests of another group of stakeholders); and Watts, Campbell and Hare, above n 40, at 285 (unanimous shareholder assent cannot justify dispersal of funds inconsistently with a third party security).

to a company a decision made by its shareholders, again acting unanimously, to bind the company to doing anything that it has constitutional power to do including making operational decisions. As Mr Isac himself recognised, either principle must always be subject to the limitation that the relevant act is one which the company is lawfully able to perform.[45] Landcorp did not have the constitutional power to act in breach of its legal obligations to third parties.

[55] While the constitution vested the directors with the appropriate powers to bind Landcorp, it did not empower the shareholders to interfere with the directors' lawful exercise of those powers. Rules of ratification or attribution cannot be used to justify that result. Moreover, a third party such as Ngāti Whakahemo which had no proprietory or other interest in Landcorp had no right to demand that the corporation's shareholders intervene in its lawful activities.

(iii) The SOE Act

[56] We add our agreement with Messrs Goddard and Barker that in any event the relevant provisions of the SOE Act exclude any scope to apply the *Duomatic* or *Meridian* principles here for a number of reasons.

[57] First, the policy underpinning the Act, as summarised in the explanatory note to the State-Owned Enterprises Bill, is the separation of roles and powers between shareholding Ministers and the boards of corporations.[46] The Ministers' powers are those traditionally reserved to shareholders, to appoint and dismiss directors and determine broad guidelines through the statement of corporate intent.[47] Otherwise, within the agreed framework of that statement, directors are to be free to manage a corporation's operations free of ministerial or political control. This statutory philosophy is consistent with an essential premise of company law – that a company is a separate legal personality from its shareholders who have no proprietary or other interests in any of its assets.

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45 *The Attorney-General for the Dominion of Canada v The Standard Trust Co of New York* [1911] AC 498 (PC) at 504.

46 State-Owned Enterprises Bill 1986 (71–1) (explanatory note) at [7], [11], and [19]–[24].

47 State-Owned Enterprises Act 1986, s 13.

[58] Second, the SOE Act requires that all decisions relating to a state-owned enterprise's operations are to be made by or pursuant to the board's authority in accordance with the statement of corporate intent.[48] The board is accountable to shareholding Ministers but provision for their involvement is only made in the very limited circumstances provided for in pt 3 of the Act or in the corporation's constitution. All this is consistent with the principal objective of every state-owned enterprise to operate as a successful business and to this end be as profitable and efficient as comparable businesses which are not owned by the Crown.[49]

[59] Third, this plain objective, as identified by Mr Goddard, of excluding Ministers from operational decision making and thus accountability for a corporation's actions would be directly undermined by requiring the shareholding Ministers to intervene when and wherever they decided that intervention was in the interests of the Crown, not necessarily of the corporation.

[60] Even if, contrary to our conclusion, the shareholding Ministers had the power to intervene, we agree with Mr Goddard that s 9 of the SOE Act would not have provided a proper legal basis to do so. Section 9 prohibited the Crown from acting in a manner inconsistent with the Treaty principles. In refusing to give an undertaking, there was no evidence that the responsible Ministers were materially impairing the Crown's ability to provide appropriate redress if the Trust's claim was upheld.[50]

[61] We disagree with Williams J that the Minister was bound to explore ways in which any unsatisfied Treaty obligations might have been satisfied and whether Whārere might be incorporated in a resolution.[51] There is nothing to suggest that the Crown was or would have been unable to satisfy its Treaty obligations to Ngāti Whakahemo, or that the Trust would be materially impaired by not acquiring the farm if the Trust's claim was upheld. It was for the Crown, and the Crown alone, to decide the means by which it would give redress for such a claim.

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48 Section 5(2).
49 Section 4(1)(a).
50 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [88]–[89].
51 *Ririnui* Interim Judgment, above n 2, at [146].

(iv) Summary

[62] In summary we are satisfied that:

(1) Neither the Minister nor the shareholding Ministers in Landcorp were authorised by any principle of common law to intervene and override Landcorp's decision to sell Whārere to Micro.

(2) Alternatively, the relevant provisions of the SOE Act exclude the operation of any common law principle which might have enabled the shareholding Ministers to intervene in Landcorp's decision.

(3) The Minister was not under a duty to Ngāti Whakahemo to explore all available means to incorporate Whārere within a resolution of any unsatisfied Treaty claims.

[63] Accordingly, the orders requiring the Minister to reconsider whether Whārere should be dealt with wholly or partly under the protocol and either personally or through OTS to consult with Ngāti Whakahemo about its possible acquisition of the farm must be set aside.

(c) Setting aside agreement

[64] On the two premises that the decisions by OTS and the Ministers were justiciable,[52] Williams J found that the Court had power to set aside the agreement for sale and purchase.[53] However, he declined to make an order to this effect because there was no nexus between the basis for the Trust's success and the relief sought.[54] The Trust cross-appealed against this refusal to grant relief and Mr Orpin advanced careful argument in support.

[65] Given our finding that Williams J erred and that neither of the subject decisions were reviewable, this ground for the Trust's cross-appeal must fall away, leading to its dismissal.

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52 At [147].
53 At [157].
54 At [163].

High Court final judgment: Landcorp

(a) Section 9 of the SOE Act

[66] The Trust's application to review Landcorp's agreement to sell Whārere to Micro was originally based on breaches of s 9 of the SOE Act and of a legitimate expectation. Williams J dismissed both claims in the interim judgment. As noted, he refused to make an interim order setting aside the agreement. Nevertheless he ordered Landcorp to stay completion of the sale for a period of two months. The jurisdictional basis for the order was not explained and does not appear to exist.

[67] The Trust cross-appealed against Williams J's dismissal of its original causes of action and, independently, his subsequent dismissal of its new claim for bad faith. We shall deal first with the s 9 argument before addressing successively the bad faith and legitimate expectation claims. Our conclusion on the former will necessarily determine the latter, given their factually overlapping nature.

[68] Ngāti Whakahemo alleged that Landcorp was bound by the prohibition contained in s 9 on the Crown acting in a manner which was inconsistent with Treaty principles. It alleged that Landcorp's agreement to sell Whārere was inconsistent with Treaty principles, in particular the Crown's obligation to act with utmost good faith towards Māori. The Trust's case was that Landcorp should be treated as the Crown for the purposes of preventing a Treaty breach occurring on the sale.

[69] Mr Isac did not press this ground of appeal in argument. We are satisfied that Williams J's reasoning and ultimate conclusion that Landcorp could not be equated with the Crown for the subject purpose was correct. The SOE Act was structured upon identifying and maintaining a legal separation between a state-owned enterprise and its owner, the Crown.

[70] This legal separation of the two entities is confirmed by these provisions:

(1) The SOE Act defines "the Crown" as "Her Majesty the Queen in right of New Zealand".[55] A state-owned enterprise is separately identified as one of those enterprises listed in sch 2 including Landcorp.

(2) The Crown is obliged to enter into an agreement with a state-owned enterprise where the former wishes the latter to provide goods or services to any persons in return for payment.[56] It is trite that a legal entity cannot contract with itself. And it seems most unlikely that the Act intended that state-owned enterprises would be treated as the Crown for some but not other purposes.

(3) The shareholding Ministers are authorised – on behalf of the Crown – to subscribe for shares in a state-owned enterprise.[57] To emphasise this distinction between the owning and owned entities, the statement of statutory objectives requires a state-owned enterprise to operate as a successful business and as profitably and efficiently "as comparable businesses that are not owned by the Crown".

[71] We respectfully agree with Williams J that to treat Landcorp as the Crown for the purposes of s 9 would be contrary to the underlying philosophy and text of the SOE Act.[58] This ground of appeal must fail.

(b) Bad faith

(i) The Trust's claim

[72] The Trust alleged that Landcorp's entry into the agreement with Micro to sell Whārere was tainted by its bad faith in dealings with Ngāti Whakahemo about the sale. It relied particularly on the conduct of Traci Houpapa, Landcorp's deputy chair, when communicating with its representatives on two occasions.

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55 Section 2, definition of "Crown".
56 Section 7.
57 Section 10.
58 *Ririnui* Interim Judgment, above n 2, at [108]; *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 (HC) at 117–119.

[73] First, on 1 March 2014 Ms Houpapa scheduled a meeting with Ngāti Whakahemo's representatives for 7 March 2014. The Trust says this communication led it to believe that it had an opportunity to purchase Whārere at a time when Ms Houpapa knew Landcorp had already resolved to accept Micro's offer and Ngāti Whakahemo was asserting a right to apply for an interim injunction to prevent or delay the sale if its claim to the land was not determined first. Second, in a telephone conversation on 4 March Ms Houpapa advised a Ngāti Whakahemo negotiator that the tribe needed to offer a price in the vicinity of $23 million to purchase Whārere. The Trust says she knew that Landcorp's board had resolved to accept "not less than $19 million" from Micro; and that but for Ms Houpapa's representations it would have applied to the High Court for an interim injunction restraining the sale.

[74] Mr Ririnui and others filed extensive affidavits in support of the Trust's application. While much of their evidence was discursive, irrelevant and thus inadmissible, the evidence on the brief exchanges between Ms Houpapa and its representatives is in documentary form and was not challenged or denied by Landcorp. The Corporation elected not to produce affidavits from Ms Houpapa and its chair, Steven Carden. Williams J was critical of both directors for not giving evidence, even voicing his suspicions that Ms Houpapa engaged in deceitful conduct which her silence was designed to protect.[59]

(ii) High Court

[75] However, the Judge ultimately found in his final judgment:

> [85] Even if Ngāti Whakahemo had succeeded in proving bad faith, or something akin to it, it would ultimately have provided them little comfort. Ngāti Whakahemo constructed its case on the basis that Landcorp's bad faith had prevented them from getting to Court on time to stop the sale to Micro Farms/Wheyland. If Landcorp's bad faith could have provided a basis to set aside the sale and purchase agreement, what arguments would be available to them in Court if they were now given a clean slate to argue their case afresh? Ngāti Whakahemo cannot argue for a right to negotiate a purchase with Landcorp. There is no basis for such a right and less still for a right to purchase. And I have already rejected the argument that s 9 applies to Landcorp directly. So, at the core of its case, Ngāti Whakahemo has no particular rights or expectations vis a vis Landcorp at all.

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[59] *Ririnui* Final Judgment, above n 3, at [82].

> [86] In the end, Ngāti Whakahemo's case is constructed on the existence of a Treaty-based interest pursuant to which the Crown should assist it in the acquisition from Landcorp of the farm. That interest (or perhaps expectation) was lost with the Minister's reconsideration under the Protocol. In short, therefore, even if Ngāti Whakahemo could prove that Ms Houpapa acted in bad faith, this was never going to assist their case. Their success depends not on Landcorp's actions, but on the Minister's attitude to their claim. Had the Minister taken a view more consistent with Ngāti Whakahemo's interests, then a finding of bad faith against Landcorp could well have been a powerful factor in support of setting aside the agreement with Micro Farms/Wheyland. But without Ministerial support, Ngāti Whakahemo's position is, on my analysis, hopeless.

(iii) Relevant principles

[76] Our consideration of Mr Isac's careful argument in support of the Trust's appeal starts with a brief summary of the principles governing its claim.

[77] Landcorp carries on its business under the SOE Act and its constitution in the interests of the public rather than for any private interests or benefit. Nevertheless, its decisions are in principle justiciable whether under the Judicature Amendment Act or the common law if as Mr Isac recognised they may "adversely affect the rights and liabilities of private individuals without affording them any redress".[60] That is the reason why the courts retain a right to review the decision making process, even where the decision is to enter into a commercial contract. Such a decision is unlikely to be the subject of judicial review, however, in the absence of fraud, corruption or bad faith or analogous circumstances causing the integrity of the contracting process to be undermined.[61]

[78] In order to succeed the Trust must satisfy a high evidential burden[62] of proving that Ms Houpapa was motivated by ill-will, dishonesty or fraud towards the Trust, and that she knew what she was doing was unlawful.[63]

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60 *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 388.

61 *Mercury Energy*, above n 60, at 391; *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [91].

62 *WEL Energy Trust v Waikato Electricity Authority* HC Hamilton CP69/93, 31 August 1994 at 105–106 ("clear" proof required); *Donovan v Graham* HC Auckland CP1908/89, 24 February 1992 at 47 (finding of bad faith is "not lightly to be made").

63 See Graham Taylor *Judicial Review A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [15.80]–[15.83]. In the United Kingdom, see: H W R Wade and C F Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 355–356; Harry Woolf and others *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at [5–089]–[5–090]; and Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing,

(iv) Analysis

[79] The Trust's appeal must be addressed within the framework of its allegedly justiciable decision. Landcorp's board decided to offer Whārere for sale by public tender. Ngāti Whakahemo was invited to participate but declined to submit a bid. Micro submitted the highest tender. Landcorp did not then accept Micro's offer because of the Minister's informal intervention. In response the corporation suspended the tender process by allowing Ngāti Mākino a two month option to purchase.

[80] Landcorp decided to accept Micro's offer. Once that period had expired without a formal offer from Ngāti Mākino, its board formally resolved on 28 February 2014:

> To authorise the Chief Executive to enter into negotiations for the sale of Whārere for not less than $19 million (plus GST if any) with the highest bidder in the December 2013 with settlement no later than 31 May 2014

[81] The resolution noted Ngāti Whakahemo's threat to issue injunction proceedings to delay or prevent the sale and Ms Houpapa's agreement with it. The resolution also noted Ms Houpapa's disappointment that iwi were unable or not prepared to meet the market and her proposal to explain Landcorp's position at a meeting with Ngāti Whakahemo.

[82] The board's resolution embodied its formal decision on 28 February 2014 to sell subject only to Micro's agreement to pay a minimum stipulated price. In terms of justiciability that was Landcorp's operative or reviewable decision. Landcorp's chief executive was authorised to negotiate and settle the terms of sale to Micro within that mandate without further reference to the board. While the parties were not formally bound until the agreement was executed on 4 March, the contract simply implemented a decision already made by the board.

London, 2012) at [P52]. In Australia, see Mark Aronson and Matthew Groves *Judicial Review of Administrative Action* (5th ed, Lawbook Co, Sydney, 2013) at [5.480]; and Matthew Groves and H P Lee *Australian Administrative Law* (Cambridge University Press, Melbourne, 2007) at 209–211. In Canada, see Sara Blake *Administrative Law in Canada* (5th ed, LexisNexis, Ontario, 2011) at 101–102.

[83] Mr Isac argued, however, that Ms Houpapa's conduct when communicating with Ngāti Whakahemo after 28 February rendered justiciable the entire contracting process, right up to execution of the agreement. He submitted that her actions infected the legitimacy of Landcorp's decision making process.[64]

[84] However, the Trust does not allege any impropriety by Landcorp in the public process leading to its board's decision on 28 February to accept Micro's offer. And we are satisfied that the authorities, including those on which Mr Isac relied, confirm that the judicial inquiry is limited to events occurring before the binding decision is made. The inquiry does not extend to events occurring while that decision, having already been made, is implemented.

[85] Nevertheless, even if Mr Isac were correct that the decision making process extended to execution of the contract on 4 March, his argument must still fail. In this respect Mr Isac took us in considerable detail through each exchange between Ms Houpapa and the tribe's representatives, both before and after 4 March, and a number of other communications between individuals which do not bear upon the issue of Ms Houpapa's bad faith. It is unnecessary for us to embark upon the same analytical exercise. That is because the essential facts available to support a claim of bad faith are not, as Mr Barker emphasised, in dispute.

[86] On 1 March Ms Houpapa emailed a Trust representative. She advised that Landcorp's board had met and "decided not to extend the timeframe". The Trust must have inferred that she was referring to the sale process. She suggested a meeting on 7 March. On 3 March Landcorp's solicitors rejected a request from the Trust's solicitors for an undertaking to give 20 working days notice of any proposed sale.

[87] Early on 4 March a Trust representative emailed Ms Houpapa to accept her invitation to meet on 7 March. He also confirmed his understanding that Landcorp was now re-engaging with the highest bidder for Whārere. Philip McKenzie, a senior Landcorp manager, confirmed that he and the corporation's former secretary

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64 See now *De Smith's Judicial Review*, above n 63, at [5–087].

executed the agreement on 4 March. At around 5 pm on 4 March Micro's solicitors forwarded the duly executed agreement to Landcorp's solicitors.

[88] Shortly afterwards on the same day Ms Houpapa advised a Trust representative that Ngāti Whakahemo would need to make an offer to purchase Whārere for an amount in the vicinity of $23 million to justify consideration. Further discussions ensued that evening about whether the price included stock. On 6 March Ngāti Whakahemo learned at a judicial conference before the Waitangi Tribunal that Landcorp had sold Whārere on 5 March.

[89] There is no evidence that Ms Houpapa's advice to Ngāti Whakahemo on 4 March preceded the formal completion of the agreement. Whatever she wrote after the agreement was executed was of no consequence because the contractual process was at an end. However, assuming favourably for the Trust that there was contrary evidence, can an inference be drawn in these circumstances that Landcorp through Ms Houpapa was acting in bad faith?

[90] Landcorp's board's resolution on 28 February recorded Ms Houpapa's disappointment that the corporation had decided to sell to a party other than an iwi. She wanted to explain Landcorp's position to Ngāti Whakahemo. Obligations of board confidentiality would have obviously prevented her from disclosing to the Trust any details of the board's decision before an agreement was concluded with Micro.

[91] There was nothing improper in Ms Houpapa's email to the Trust on 1 March, advising that the board had "decided not to extend the timeframe" and suggesting a meeting if the Trust wished on 7 March. Ngāti Whakahemo might have inferred from it that Landcorp would favourably consider an offer to purchase if made at that time. However, at least by 3 March and in even clearer terms on 5 March the Trust was informed that Landcorp was refusing to undertake to give notice of any proposed sale and was re-engaged in negotiations with the highest bidder; that Landcorp was free at any time to enter into a binding agreement for sale of the farm; and that Ngāti Whakahemo was entitled to apply to the High Court for injunctive relief. Landcorp through Ms Houpapa had not communicated anything on 1 March

which might validly be construed as a representation that the corporation would not agree to sell Whārere to a third party before receiving a favourable offer from the Trust.

[92] Without question, Ms Houpapa misrepresented Landcorp's position in her next communications with the Trust on 4 March. By indicating that the corporation might be interested in an offer from Ngāti Whakahemo to purchase Whārere in the vicinity of $23 million she failed to disclose that submission of an offer would be a pointless exercise. The Trust took some preparatory steps to arrange finance for an offer at $23 million but soon learned of the concluded sale. But Ms Houpapa's misrepresentation was spent by the meeting on 7 March because by then the Trust knew that Landcorp had sold Wharere to a third party.

[93] In the absence of an explanation on oath from Ms Houpapa, we agree with Mr Isac that an adverse inference can be drawn about her conduct.[65] But such an inference is limited to a conclusion that Ms Houpapa acted irrationally and untruthfully when speaking to the Trust representative on 4 March. Those factors do not, however, prove bad faith: people can act irrationally and untruthfully without intending to damage the interests of others. Mr Isac did not identify any evidence to suggest that Ms Houpapa was motivated by ill-will towards Ngāti Whakahemo; to the contrary, she was apparently sympathetic to the Trust's cause. And he did not refer to any evidence to support his submission that Ms Houpapa's purpose was to deceive the Trust into not applying for injunctive relief. While she may have known of its threat, Mr Isac was unable to point us to the factual foundation necessary to link her knowledge to that objective. When Ms Houpapa's conduct is examined objectively, and in context, it cannot justify the importance which the Trust now ascribes to it.

[94] We can only infer that when communicating with the Trust Ms Houpapa entertained some misplaced or misguided hope or even expectation that, despite

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65 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA) at 346; *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 554 and 567. See also Matthew Smith *New Zealand Judicial Review Handbook* (Thomson Reuters, Wellington, 2011) at [29.5.2]–[29.5.3]. See generally *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at [153].

Landcorp's decision to sell to a third party, Ngāti Whakahemo may have been able to buy Whārere by bidding at a price that would be irresistible to Landcorp's board. But that conduct fell well short of showing that Ms Houpapa was motivated by ill-will, knew what she was doing was unlawful, and was thus guilty of bad faith in her dealings with the Trust. We cannot find a basis in the evidence for the adverse motive which Williams J attributed to Ms Houpapa for not swearing an affidavit or for his separate criticism of Mr Carden's conduct at the meeting with the Trust's representatives on 7 March.[66]

[95] However, we agree with Williams J that, even if it was shown Ms Houpapa acted in bad faith attributable to Landcorp, the Trust did not suffer any prejudice. The factual chronology excludes the possibility that Ms Houpapa's bad faith, if any, jeopardised the integrity of the contracting process. As we noted earlier, the decision to sell to Micro had already been made and was simply being implemented. By the time of Ms Houpapa's 4 March communication the decision had been implemented.

[96] Decisively, Mr Isac accepted that Ngāti Whakahemo could not have argued for a right as against Landcorp to purchase the property. As earlier noted, decisions of a state-owned enterprise are only justiciable on the basis that they may adversely affect the rights of third parties without affording them any redress. Ngāti Whakahemo's rights of recourse, such as they were before completion of the agreement, were against the Crown alone, not Landcorp.

[97] Consistently with his acceptance that Ngāti Whakahemo did not have an enforceable right against Landcorp to purchase the property, Mr Isac did not identify any ground upon which the Trust might have been entitled to injunct Landcorp from entering into an agreement with Micro before 4 March. The Trust later succeeded in obtaining interim orders principally against the Crown. It succeeded only indirectly against Landcorp on a conceptual basis which the Judge did not explain and which does not withstand scrutiny. It follows from our analysis of the Trust's substantive claim for judicial review that it did not have a right to injunctive relief against Landcorp before 4 March 2014.

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[66] At [90].

[98] We add that Ngāti Whakahemo knew on 1 March 2014, or at the latest 3 March, that Landcorp was negotiating with a third party to sell Whārere; and by 3 March had refused its request to undertake to give notice of a sale. Without a binding commitment from Landcorp, the Trust if acting prudently and in protection of its own interests and with proper and lawful grounds could have applied for injunctive relief. Responsibility for its failure to do so cannot be attributed to any acts or omissions by Landcorp through Ms Houpapa's conduct. The Trust cannot say that it acted reasonably in relying on Ms Houpapa's communications in deciding not to apply for injunctive relief.

(v) Summary

[99] In summary we are satisfied that the Trust has failed to prove that Landcorp acted in bad faith for the reasons that:

(1) Landcorp's operative or reviewable decision to sell the property to Micro was made on 28 February 2014 subject only to settlement of the purchaser's agreement to pay a specified price, and it preceded any acts by Ms Houpapa which might constitute bad faith.

(2) Alternatively, even if the decision making process was reviewable throughout the period up until the contract was executed on 4 March 2014, there is no evidence that any impugned conduct by Ms Houpapa preceded that event.

(3) Even if Ms Houpapa's impugned conduct occurred following completion of the agreement, the available inferences did not constitute bad faith.

(4) In any event, Ms Houpapa's conduct did not adversely affect Ngāti Whakahemo's rights because it did not amount to a binding commitment by Landcorp not to sell to a third party; the Trust did not have any rights enforceable by an application for injunctive relief; and, if it did have such rights, it was responsible for taking all necessary steps to protect them.

[100] It follows that this ground of appeal by the Trust must fail.

(c) Legitimate expectation

[101] Ngāti Whakahemo argued alternatively that it had a legitimate expectation that Landcorp would not enter into an agreement to sell Whārere farm until after it met with Landcorp as scheduled on 7 March 2014. This claim was based principally upon, first, the Crown's advice to the Waitangi Tribunal that iwi would have an opportunity to make a formal commercial offer for Whārere, and, second, Ms Houpapa's advice that Ngāti Whakahemo would need to make an offer of about $23 million in order to purchase Whārere farm and her agreement to meet with the Trust on 7 March.

[102] Williams J dismissed this claim. He was satisfied that there was no unequivocal offer made in clear, unambiguous and unqualified terms which might give rise to a legitimate expectation of the type pleaded.[67] Our findings on the Trust's bad faith argument confirm that the basis for that finding was correct. This ground of appeal also fails.

(d) Costs

[103] In his final judgment Williams J ordered Landcorp and the Crown to pay the Trust costs on a 2B basis for these reasons:

> [90] Although Ngāti Whakahemo has not, in the end, succeeded, this is a case in which the tribe's costs ought to be met by the defendants. I am of that view because that fairly reflects the tribe's success at the interim stage having exposed a reviewable error in the Minister for Treaty of Waitangi Negotiations, and in light of Landcorp's actions – particularly those of Ms Houpapa and Mr Carden – in the period between 1 and 7 March.
>
> [91] I have not accepted the plaintiff's pleading of bad faith, but even on that basis, I was struck by the fact that, on the evidence, Ms Houpapa and Mr Carden maintained the ruse of a $23 million purchase price at the meeting of 7 March. An award of costs against Landcorp is also appropriate.

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[67] At [114]; see *Green v Racing Integrity Unit Ltd* [2014] NZCA 133, [2014] NZAR 632 at [13]–[15]; *Comptroller of Customs v Terminals (NZ) Ltd* [2014] 2 NZLR 137 (CA) at [121]–[127]; *Talley's Fisheries Ltd v Cullen* HC Wellington CP287/00, 31 January 2002 at 48.

[104] While we appreciate that costs awards are discretionary decisions,[68] the order against Landcorp cannot be upheld.[69] Williams J dismissed the Trust's substantive claim. Any alleged misconduct of Landcorp's chair and deputy chair after the agreement was concluded is an irrelevant factor and in any case we disagree with the factual basis for the Judge's findings. There was no reason to depart from the standard principle that costs should follow the event. Accordingly, the costs order against Landcorp must be set aside and costs are to be fixed in the High Court on the basis that they follow the event of success.

[105] The Crown did not appeal against the final costs order, although its appeal against the interim judgment sought costs in the High Court. We do not know whether this omission was intentional or inadvertent but the terms of the final judgment on costs are ambiguous. Williams J referred to the order being against "the defendants" but the only identifiable ground related to Landcorp and he made no specific reference to the Crown, other than referring to the Trust's success on the interim application. However, our quashing of the interim orders eliminates any ground for awarding costs against the Crown. Accordingly we must set aside the costs order made in the High Court and remit the proceeding to that Court to fix costs in accordance with the terms of this judgment on both the interim and final applications.

Result

[106] In the result:

(1) The appeals in CA336/2014 and CA337/2014 are allowed and the interim orders made in the High Court are set aside.

(2) The cross-appeals in CA336/2014 and CA337/2014 are dismissed.

(3) The appeal in CA29/2015 is allowed.

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[68] High Court Rules rr 14.1(1) and 14.2; *Lewis v Cotton* [2001] 2 NZLR 21 (CA) at 35; *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA) at 529.

[69] *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [15].

(4) The cross-appeal in CA29/205 is dismissed.

(5) The costs order made in the High Court is set aside and the proceeding is remitted to that Court to fix costs in accordance with the terms of this judgment on both the interim and final applications.

(6) The respondent is ordered to pay one set of costs including both its appeal and cross-appeal to each of the Crown and Landcorp for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Crown Law Office, Wellington for the Attorney-General
Buddle Findlay, Wellington for Landcorp
Koning Webster, Papamoa for Mita Ririnui