IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA160/2019
[2020] NZCA 639

BETWEEN	TE WARENA TAUA, GEORGE HORI WINIKEREI TAUA, NGARAMA WALKER, HAMUERA TAUA AND MIRIAMA TAMAARIKI AS TRUSTEES OF THE TE KAWERAU IWI TRIBAL AUTHORITY First Appellants
	TE WARENA TAUA, GEORGE HORI WINIKEREI TAUA, NGARAMA WALKER, HAMUERA TAUA AND MIRIAMA TAMAARIKI AS TRUSTEES OF THE TE KAWERAU IWI SETTLEMENT TRUST Second Appellants
AND	TAHI ENTERPRISES LIMITED First Respondent
	DIANNE LEE Second Respondent

Hearing:	9 June 2020
Court:	Cooper, Gilbert and Courtney JJ
Counsel:	K J Crossland, J S Langston and M K Mahuika for Appellants M Heard and C Upton for Respondents
Judgment:	11 December 2020 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondents costs calculated for a standard appeal on a band A basis and usual disbursements.

C The cross-appeal is dismissed.

D The cross-appellants must pay the cross-respondents' costs calculated for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] This appeal is about discovery. The issue raised is whether the High Court was correct to order the disclosure of the names of members of an iwi for the purposes of allegations intended to be made against them of breaches of contract, unjust enrichment and related claims.

[2] The proceeding commenced by Tahi Enterprises Ltd (Tahi) and Ms Dianne Lee[1] alleges that Te Kawerau ā Maki, the first appellants and Mr Te Warena Taua wrongly purported to cancel a joint venture agreement executed in June 2007. Under that agreement, Tahi made various payments totalling $1.3 million to support the advancement of claims for redress by Te Kawerau ā Maki under the Treaty of Waitangi. As an alternative, Tahi alleges unjust enrichment and seeks equitable compensation.

[3] Ms Lee is the sole shareholder and director of Tahi. In a separate cause of action she alleges breach of a residential property agreement in respect of which she seeks specific performance or damages in lieu of specific performance. She also advances a separate claim solely against Mr Taua for arrears of rental and specific performance.

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[1] We refer to Tahi and Ms Lee collectively as Tahi in respect of claims brought by both parties, and to Ms Lee alone in respect of claims in which she is the sole plaintiff.

[4] Tahi's claims are pleaded against the named first and second appellants as trustees of the Te Kawerau Iwi Tribal Authority and the Te Kawerau Iwi Settlement Trust respectively. We will refer to them collectively as the Trustees or, where it is appropriate to distinguish between them, as the Tribal Authority Trustees and the Settlement Trust Trustees. In a second amended statement of claim, which was before the High Court in draft form, those parties were respectively the second and third defendants. The first defendants were Mr Taua and Miriama Tamaariki as executor of the estate of Hariata Arapo Ewe. The first defendants did not participate in the interlocutory application in the High Court that has given rise to this appeal.

[5] The draft second amended statement of claim also advanced claims against fourth and fifth defendants. They were persons unable to be named. It was envisaged that when their names had been ascertained, they would be listed in two schedules to be attached to the statement of claim. The draft second amended statement of claim described the fourth defendants collectively as the "Contracting Iwi Members" defined as meaning all members of the iwi who were over 18 years old as at 27 June 2007 when the joint venture agreement was signed. The fifth defendants were described as the "Benefitting Iwi Members", defined as meaning "all members of the iwi from time to time". The fifth defendants comprised all members of the iwi, including those who were under the age of 18 at 27 June 2007 and born subsequently.

[6] Tahi and Ms Lee sought an order that the names of the intended fourth and fifth defendants be disclosed. Associate Judge Smith granted that application in a judgment delivered on 18 December 2018, but excluded those iwi members who were under 18 years of age as at 27 June 2007 from the ambit of the order.[2] The Trustees appeal against that judgment, claiming that the Judge should not have granted the application. Tahi and Ms Lee cross-appeal. They say the Judge should not have excluded the iwi members under the age of 18. The Judge gave leave to bring the appeal and cross-appeal in a judgment delivered on 29 March 2019.[3]

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2 *Tahi Enterprises Ltd v Taua* [2018] NZHC 3372 [High Court judgment].
3 *Tahi Enterprises Ltd v Taua* [2019] NZHC 630 [High Court leave judgment].

Context

[7] We set out some matters of context which frame the issues to be addressed.

[8] We begin with Te Kawerau ā Maki. As is now set out in the Te Kawerau ā Maki Claims Settlement Act 2015 (the Settlement Act), Te Kawerau ā Maki is a collective group of individuals descended from an ancestor of Te Kawerau ā Maki. The expression "ancestor of Te Kawerau ā Maki" is itself defined in s 12(2)(a), which we set out below.[4] They are persons who exercised customary rights in relation to an area which may broadly be described as West Auckland.

Joint Venture Agreement

[9] On 27 June 2007 a document described as "Heads of Joint Venture Agreement" was executed (the Joint Venture Agreement). The parties were Te Kawerau ā Maki and Tahi. Recitals to the agreement recorded the understanding of the parties that the iwi had grievances with the Crown over the loss of its tribal land and resources and that it was seeking redress for breaches of the Treaty of Waitangi before the Waitangi Tribunal. The parties agreed to establish:

> … a long-term business relationship to work together in good faith to develop the resources of the tribe for mutual financial benefit and for the betterment of the Te Kawerau a Maki tribe.

[10] Other recitals referred to Tahi providing financial support to assist Te Kawerau ā Maki with its administration costs, Treaty claims and negotiations, and operating costs. In exchange for that financial support, it was recorded that Te Kawerau ā Maki entered into the agreement with Tahi to "commercially develop assets returned or granted through current Treaty claims".

[11] Clauses within the agreement dealt with profits arising from future joint venture endeavours. These were to be shared as to 65 per cent for Te Kawerau ā Maki and 35 per cent for Tahi. Other clauses concerned the funding to be provided by Tahi. There was reference to Tahi providing total funding of up to $2 million (including GST, if any) in support of Te Kawerau ā Maki's Treaty claims process. Upon the

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4 Below at [21].

execution of the agreement, an amount of $1 million was to be deposited into Te Kawerau ā Maki's bank account within three working days. The balance of $1 million was to be paid within two months after the signing of an agreement in principle with the Crown. Under another clause, Te Kawerau ā Maki agreed not to enter into any other agreement of a like nature or effect with any other party, or to grant any party other than Tahi any rights or concessions such as those given to Tahi in the agreement.

[12] Another clause recorded that the parties would deal with each other in good faith, establish and maintain a productive working relationship and act in a supportive, cooperative, transparent and honest way. Another clause provided that the agreement and its contents were to be kept confidential to the parties. The final clause provided that the agreement could be amended or varied only by written consent, signed by both parties. The agreement was signed by Ms Lee on behalf of Tahi and by Mr Taua, under whose name was typed "Claimant WAI 470, Chairman", and Piki Taylor on behalf of Te Kawerau ā Maki.

[13] The Judge gave these further details about the parties in the High Court proceeding:[5]

> [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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> [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. …
>
> [7] The third defendants are the trustees of a trust known as the Te Kawerau Iwi Settlement Trust (the Settlement Trust). The Settlement Trust

5 High Court judgment, above n 2 (footnote omitted).

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.[6] Mr Taua is the chairman of the Settlement Trust.

Variation

[14] There was a written variation to the Joint Venture Agreement which was signed on 22 July 2008 (the Variation). Recitals to that agreement acknowledged, amongst other things, that Tahi had fulfilled its obligation under the Joint Venture Agreement (referred to in the Variation as the "Principal agreement") by depositing $1 million into Te Kawerau ā Maki's nominated bank account after the Joint Venture Agreement was signed. Another recital recorded Te Kawerau ā Maki's expressed wish to vary the Joint Venture Agreement to better meet its current financial needs in pursuing a successful claim against the Crown. In the Variation there was a definition of Te Kawerau ā Maki (there had not been one in the Joint Venture Agreement). That definition was as follows:

> **Definition of Te Kawerau a Maki**
>
> 3) Te Kawerau a Maki means Te Kawerau a Maki iwi tribal authority
>
> 4) Te Kawerau a Maki is:
>
> I) The collective group composed of persons:
>
> (a) who descend from the following ancestors:
>
> (i) Tawhia ki te Rangi (also known as Te Kawerau a 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.[7]

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

7 Although not significant for present purposes we think the intended reference was clearly to cl 4)I).

> 5) 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.

[15] Other provisions of the Variation preserved the 65:35 per cent profit and interest shares and gave details of what future business endeavours might be undertaken. Another clause dealt with the payments from Te Kawerau ā Maki, again recording that $1 million had already been paid. A further $200,000 was to be payable "within one month of signing of the Terms of Negotiation with the Crown". A further $100,000 would be payable within two months after the signing of an agreement in principle with the Crown in respect of Te Kawerau ā Maki's Treaty claims. A further payment of $700,000 was payable within four months of the full ratification of the deed of settlement in respect of the Treaty claims.

[16] Provision was also made for repayment of the $2 million to Tahi. The relevant clause read as follows:

> 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 $2,000,000, Te Kawerau agrees to ensure the prompt repayment of the sum of $2,000,000 capital back to Tahi Enterprises. Payment to be made within two months of receipt.

[17] Another clause stated that the "signatory/signatories of this agreement … has the authority to sign this agreement on behalf of Te Kawerau".

[18] Finally, the Variation contained an acknowledgement by the parties that the Joint Venture Agreement remained in full force and effect except as it had been varied. Once again, the Variation was signed by Ms Lee on behalf of Tahi. The signatories for Te Kawerau ā Maki were Mr Taua and Ms Ewe.

Treaty claims settlement

[19] Te Kawerau ā Maki's Treaty settlement claims were resolved by the Settlement Act, which received Royal assent on 14 September 2015 and came into force on the following day. Amongst other things, the Settlement Act contains an

apology in which the Crown expresses its profound regret for its breaches of the Treaty and its principles, which resulted in the alienation of much of Te Kawerau ā Maki's land by 1856.[8] Other provisions of the Settlement Act deal extensively with the cultural and commercial redress which was to be provided in accordance with the settlement. For the purposes of the detailed provisions of the Settlement Act, there are definitions of the terms "deed of settlement" and "Te Kawerau Iwi Settlement Trust". The former definition refers to the deed of settlement dated 22 February 2014 and lists the names of those who had signed it. Apart from representatives of the Crown, the signatories referred to are:

> …
>
> (ii) George Hori Winikeri Taua, Hamuera Taua, Miriama Tamaariki, and Ngarama Walker, for and on behalf of Te Kawerau ā Maki; and
>
> (iii) Te Warena Taua, George Hori Winikeri Taua, Hamuera Taua, Miriama Tamaariki, and Ngarama Walker, being the trustees of the Te Kawerau Iwi Settlement Trust; …
>
> …

[20] The definition of the Te Kawerau Iwi Settlement Trust refers to a trust of that name established by a trust deed dated 21 February 2014.

[21] As already mentioned, the Settlement Act provides a definition of Te Kawerau ā Maki. The full definition is as follows:

> **12 Meaning of Te Kawerau ā Maki**
>
> (1) In this Act, **Te Kawerau ā Maki**—
>
> (a) means the collective group composed of individuals who are descended from an ancestor of Te Kawerau ā Maki; and
>
> (b) includes those individuals; and
>
> (c) includes any whānau, hapū, or group to the extent that it is composed of those individuals.
>
> (2) In this section and section 13,—
>
> **ancestor of Te Kawerau ā Maki** means an individual who—

[8] Te Kawerau ā Maki Claims Settlement Act, s 9(2).

(a) exercised customary rights by virtue of being descended from 2 or more of the following ancestors:

(i) Tawhiakiterangi (also known as Te Kawerau ā Maki):

(ii) Mana:

(iii) Te Au o Te Whenua:

(iv) Kowhatu ki te Uru:

(v) Te Tuiau:

(vi) any other recognised ancestor of a group referred to in part 8 of the deed of settlement; and

(b) exercised the customary rights predominantly in relation to the area of interest at any time after 6 February 1840

area of interest means the area shown as the Te Kawerau ā Maki area of interest in part 1 of the attachments

customary rights means rights exercised according to tikanga Māori, including—

(a) rights to occupy land; and

(b) rights in relation to the use of land or other natural or physical resources

descended means that a person is descended from another person by—

(a) birth; or

(b) legal adoption; or

(c) Māori customary adoption in accordance with Te Kawerau ā Maki tikanga.

[22] Section 14(1) states that "[t]he historical claims are settled". The settlement included redress of $6.5 million, used to purchase approximately 86 per cent of Riverhead Forest; the transfer of rights as licensor of parts of Riverhead Forest; accumulated rentals from the Riverhead Forest land; options to purchase other properties and a right of first refusal in respect of other land.

[23] Te Kawerau ā Maki was also one of the thirteen iwi groups whose rights to redress were subject of the grant of collective redress under the terms and processes set out in the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014

(the Collective Redress Act). It is not necessary here to go into detail about redress under that Act. It is sufficient for present purposes to note that there has been a settlement of Te Kawerau ā Maki's Treaty claims which is reflected in the terms of both the Settlement Act and the Collective Redress Act.

High Court representation judgment

[24] We mention next an interlocutory judgment of Lang J delivered on 26 March 2018 in which he rejected an application made by Tahi and Ms Lee for an order under r 4.24 of the High Court Rules 2016 appointing the Settlement Trust Trustees to represent all members of the iwi in the proceeding.[9] The Judge dealt with the application on the basis that the claims for breach of the Joint Venture Agreement and the variation were claims advanced both against both Te Kawerau ā Maki and the individual members of the iwi, even though neither were named as parties.[10] He noted that the first cause of action appeared to comprise claims based both in contract and equity with allegations that the Te Kawerau ā Maki signatories signed as either the agents or trustees of members of the iwi.[11] He said that if they had signed as trustees, they would ordinarily be liable in that capacity but individual members of the iwi would not have personal liability. Lang J considered that there would be no need for representation orders to be made in relation to that aspect of the claim, because it was not advanced against the iwi members and relief could not be sought against them.[12]

[25] If the signatories were held liable as trustees, Lang J noted they might have a right of indemnity against the assets of the trusts. Although Tahi referred to a possible right of subrogation in those circumstances, the Judge considered that issue could be reached after the Court had made its primary findings on the issue of liability. A representation order, if required, could be made at that point.[13]

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9 *Tahi Enterprises Ltd v Taua* [2018] NZHC 516 [High Court representation judgment].
10 At [9].
11 At [44].
12 At [45].
13 At [46].

[26] If, on the other hand, the liability of the signatories was based upon agency, individual members of the iwi would be entitled to defend the claim on the basis that they did not know of the Joint Venture Agreement and did not authorise the signatories to sign it on their behalf.[14] The position of individual members of the iwi would differ according to the extent to which they were aware of what had occurred in 2007 and 2008. In the circumstances, the ability of individuals to advance different defences militated against making a representation order. Lang J said:[15]

> I acknowledge that the Court has the ability to make ancillary orders permitting individual members to "opt in" and defend the proceeding themselves. I have a concern, however, that members of the Iwi may not take that option even though they may have a good defence. The only way to alleviate this concern is to require the plaintiffs to add individual members of the Iwi as respondents and serve the pleadings on them. This is likely to ensure those persons understand the gravity of their position.

[27] For these and other reasons which we need not address, Lang J declined to make the representation order.[16]

The application in the High Court

[28] Tahi and Ms Lee sought orders under r 8.20(2) of the High Court Rules requiring the Tribal Authority Trustees and the Settlement Trust Trustees to file and serve affidavits stating:

(a) whether they had in their control registers of members of Te Kawerau ā Maki; and

(b) if any such documents had been but were 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.

[29] They also sought orders 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.

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14 At [48].
15 At [49].
16 At [61].

[30] Rule 8.20 of the High Court Rules provides as follows:

> **8.20 Order for particular discovery before proceeding commenced**
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> (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.

[31] It was in the nature of the application made by Tahi and Ms Lee that they were not in a position to serve the intended fourth and fifth defendants, whose names were unknown. In the circumstances, the Judge raised a concern about r 8.20(3)(b).[17]

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[17] High Court judgment, above n 2, at [83].

He noted that the sub-rule was expressed "in mandatory terms".[18] Further, counsel for the Trustees pointed out that the rules had been amended to add the requirement of service on the intended defendant.[19] The Judge considered that cases decided under the predecessor of r 8.20 (r 299, as it stood before the amendment which took effect in 1993) could not assist.[20] He upheld the submission of the Trustees that there was no jurisdiction under r 8.20 to make the order sought.[21]

[32] Nevertheless, the Judge considered an order of the kind sought could be made under the Court's inherent jurisdiction, applying the principles set out by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* and cases in which that decision had been applied.[22]

[33] The Judge noted that the Trustees acknowledged the register of iwi members sought by Tahi and Ms Lee was in the control of the Tribal Authority Trustees. Further, the terms of the Te Kawerau Iwi Settlement Trust obliged the Settlement Trust Trustees to ensure that the register of iwi members was maintained in a condition as up to date, accurate and complete as possible. In the circumstances, the Judge considered it was more likely than not that a copy of the register of iwi members was also within the power of the Settlement Trust Trustees.[23]

[34] The Judge considered the main issue he needed to address was whether the justice of the case required the making of the orders sought.[24] He concluded that Tahi and Ms Lee had produced sufficient evidence to show that Tahi's proposed claim against the Contracting Iwi Members was "bona fide", and had "a sufficient substratum of fact to be more than purely speculative".[25] Tahi had entered into written agreements with "Te Kawerau ā Maki", and it was reasonably arguable for Tahi to claim that meant those members of the iwi who were of age, and thus legally able to

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18 At [94].
19 High Court Amendment Rules (No 2) 1992, r 4.
20 High Court judgment, above n 2, at [94].
21 At [94].
22 At [96]–[98], citing *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (HL). The Judge later referred to *The Coca-Cola Company v British Telecommunications Plc* [1999] FSR 518 (Ch); and *Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liq)* [2012] UKSC 55, [2012] 1 WLR 3333.
23 High Court judgment, above n 2, at [149].
24 At [152].
25 At [177].

enter into a contract. If that was right, Mr Taua, Ms Taylor and Ms Ewe signed the agreements representing undisclosed principals, namely the adult individual iwi members whose identities had not been disclosed.[26]

[35] The next question was whether Mr Taua had express or implied authority to bind the individual adult members of the iwi. That was an issue which could not be resolved in an interlocutory application. However, the starting point in the Judge's view was that on the face of it Mr Taua, Ms Taylor and Ms Ewe apparently considered they had the necessary authority to enter into the Joint Venture Agreement and Variation on behalf of the iwi members when signing those agreements. While denying that the agreements had been signed as agents for the iwi members, Ms Ewe's estate had joined in the pleading in Mr Taua's statement of defence that he "had the authority to represent the Iwi Members".[27]

[36] Tahi and Ms Lee having produced agreements which on their face were entered into by Mr Taua, Ms Taylor and Ms Ewe on behalf of the Contracting Iwi Members, the claimed lack of authority was either an affirmative defence or an issue on which the knowledge of what occurred would largely have been held by the Tribal Authority Trustees as opposed to Tahi and Ms Lee.[28] The Judge concluded:

> [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" 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.

[37] He then considered whether the names of iwi members who were not 18 when the Joint Venture Agreement was executed on 27 June 2007 should be disclosed. In respect of the causes of action which were based in contract the Judge decided that the names of those under 18 at the relevant date should not be disclosed.[29] Essentially that was because he thought that Mr Taua, Ms Taylor and Ms Ewe could not have

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26 At [177].
27 At [178].
28 At [184].
29 At [192].

signed the agreements as agents for minors (or persons not then born). Further, such persons could be affected only if Mr Taua, Ms Taylor and Ms Ewe had signed as trustees, and it would be unusual to contemplate a cause of action directly against the beneficiaries of a trust.[30]

[38] Further, insofar as the claim for unjust enrichment or equitable compensation was concerned, the Judge again considered that the proper claim was against those who allegedly entered into the agreements in their capacities as trustees, including for those under 18, as opposed to a claim directly against those persons.[31] He thought it significant also that there appeared to be no need for Tahi to join those under 18: the Settlement Trust Trustees had been joined as a party to this cause of action, and they had received the settlement assets. There were sufficient assets still in the hands of the Settlement Trust Trustees to meet any valid claim Tahi might have on this cause of action so there would be little point in making the disclosure order necessary to allow those under 18 to be added as defendants.

[39] Similar considerations led the Judge to reject the possibility of a claim against those under 18 at the relevant time under the third cause of action, in which Tahi sought to be subrogated to the rights of those with whom it contracted in their capacities as trustees to be indemnified out of the trust assets.[32] He also took into account the considerations referred to by the Supreme Court of the United Kingdom in *Rugby Football Union v Consolidated Information Systems Ltd (formerly Viagogo Ltd (in liq)*.[33] Those considerations pointing against the making of an order for disclosure of the names of those under 18 at the relevant time included the fact they were clearly not "wrongdoers" in any sense of the word, and disclosing their identities would not have any effect of deterring wrongdoing.[34] Rather, it would be revealing the names of innocent persons. The Judge considered that would not be appropriate, particularly where the identities of the Contracting Iwi Members would be disclosed and the public interest in the plaintiffs being allowed to vindicate any legal rights they might have could be satisfied by that joinder.

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30 At [188].
31 At [193].
32 At [200]–[201]
33 *Rugby Football Union v Consolidated Information Systems Ltd*, above n 22.
34 High Court judgment, above n 2, at [204].

[40] In the result, the Judge made the following orders:[35]

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

The appeal

[41] The Trustees now appeal. Mr Crossland first submits that by finding Tahi had provided sufficient evidence to show that the intended claims against the iwi members were "bona fide" and had a "sufficient substratum of fact to be more than purely speculative",[36] the Judge applied a lower threshold to assess the causes of action against the iwi members than was required by *Norwich Pharmacal*.

[42] Rather, what Mr Crossland says is required is for the plaintiff to show it has or may have a good case against the alleged wrongdoer. Mr Crossland relies on the decision of the High Court of England and Wales in *Ramilos Trading Ltd v Buyanovsky*

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35 At [208].
36 At [177].

in which it was held that the proper test for establishing wrongdoing for the purposes of a *Norwich Pharmacal* order is the same as that used to assess whether freezing orders should be made.[37] In that case, Flaux J held that the proper test was whether the plaintiff had shown a "good arguable case".[38] On this approach, it was necessary to show that there was a case more than barely capable of serious argument, although it would not be necessary to demonstrate a better than 50 per cent chance of success. A good and honest belief that wrongdoing had occurred would be insufficient. Mr Crossland submits that on this basis the Judge should not have made the disputed order.

[43] Mr Crossland also argues that on either test, the claims against the iwi members do not meet the requisite standard. He maintains the Judge was wrong to have concluded that Tahi's claims were not speculative on the basis that the agreements had been entered into on behalf of the iwi. In this regard, Mr Crossland claims the pleading seeks to sidestep the principle that a defendant must have legal personality at common law. That could not be said of an iwi.

[44] Mr Crossland also argues that there had been insufficient evidence before the Judge to establish express or implied authority on the part of Mr Taua, Ms Taylor and Ms Ewe to enter into the agreements. There was no expert evidence before the Court about Te Kawerau ā Maki tikanga concerning the authority of a rangatira or senior kaumātua to contractually bind individual iwi members. Mr Crossland contends the Judge was wrong to find the absence of such evidence meant that he could not conclude the claims had not been brought bona fide or had no real prospect of success.

[45] As to the claim in unjust enrichment, Mr Crossland submits the Judge failed to analyse the merits of the cause of action, as he had not evaluated whether Tahi had a good arguable case as to whether individual iwi members over 18 were unjustly enriched at Tahi's expense. He notes that individual iwi members (regardless of age) were not recipients of the settlement assets, which were held by the Settlement Trust

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37 *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) at [14].
38 At [17].

Trustees, and that the claim effectively seeks to make individual iwi members liable when they have not received the benefit which is at the heart of the claim.

[46] Similarly, in relation to the third cause of action, in which Tahi seeks an order charging the interest of all iwi members in the settlement assets, Mr Crossland argues the Judge again failed to analyse the cause of action against iwi members in accordance with the requirements of *Norwich Pharmacal.* Mr Crossland says there was no wrongdoing, so the first condition for exercising the *Norwich Pharmacal* jurisdiction has not been satisfied.

[47] As to Ms Lee's cause of action alleging a breach of the property agreement, Mr Crossland submits the Judge had wrongly assumed that Ms Lee's contention that iwi members over 18 at the relevant date agreed to Mr Taua receiving a portion of the settlement assets was correct, without assessing any evidential foundation for it. The Judge assumed the same considerations that arose for the first cause of action applied in this case as well. That was incorrect. Accordingly, Mr Crossland contends that this claim too does not meet the *Norwich Pharmacal* threshold of a good arguable case.

[48] Mr Crossland also notes that in the High Court he had argued that the information in the register of iwi members was private. The information in the register had been collected on a confidential basis, and for the purpose of using it to enable iwi members to participate in iwi elections, be involved in shaping future conduct, access beneficiary entitlements, assist in communicating with members of the iwi and build an iwi whakapapa database. Mr Crossland submits that iwi member's whakapapa collected for the iwi is tapu. Individuals were tasked with holding the collective private information on behalf of iwi, whānau and hapū. They should be seen as guardians of tikanga and mātauranga. The management and dissemination of that information were matters for the discretion of those holding it. In the circumstances, Mr Crossland maintains the confidentiality of the information was a factor which should have heavily weighed against ordering disclosure.

[49] In its cross-appeal Tahi challenges the Judge's decision to exclude from the order for disclosure the names and addresses of iwi members under the age of 18

or unborn as at 27 June 2007. It also challenges the Judge's decision to reduce the costs award he made in favour of the Tahi by 25 per cent.

Analysis

[50] The starting point for our analysis is the allegations made in the second amended statement of claim.

[51] We begin with the first cause of action. It is advanced against the "Iwi Parties" and the "Variation Iwi Parties". It alleges that, by purporting to cancel and refusing to perform the Joint Venture Agreement (as varied), the Iwi Parties and Variation Iwi Parties breached the agreement. An inquiry into damages is sought against those parties.

[52] The key allegations made in the second amended statement of claim include the following:

(a) Mr Taua and/or Ms Taylor executed the Joint Venture Agreement as agents of the Contracting Iwi Members and/or as trustees of the Benefitting Iwi Members.

(b) Mr Taua and/or Ms Ewe executed the Variation as agents of the Contracting Iwi Members and/or trustees of the Benefitting Iwi Members.

(c) The Contracting Iwi Members entered into the Joint Venture Agreement and Variation as agents and/or trustees of the Benefitting Iwi Members.

(d) Under the Joint Venture Agreement, the Iwi Parties expressly warranted that they would procure that any entity receiving assets as part of the iwi's Treaty settlement would honour the agreement. Alternatively, such a warranty is implied as a matter of "business efficacy".

(e) Mr Taua and/or Ms Taylor had the authority of the Contracting Iwi Members to manage the iwi's interests under the Joint Venture

Agreement. The claim is that the authority was actual. The pleading records Tahi's allegation that it was "express or is 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)". Similar allegations are made with respect to the Variation.

(f) Mr Taua had the authority of the Tribal Authority Trustees to manage the Tribal Authority's interests under the Joint Venture Agreement. It is again alleged that the authority was actual and was express or to be implied from Mr Taua's authority as a matter of custom, informed by tikanga.

(g) Tahi performed its obligations under the Joint Venture Agreement and Variation, in particular by making the various payments.

(h) Te Kawerau ā Maki's historical Treaty claims have been settled.

(i) There was no basis for the cancellation of the Joint Venture Agreement. By purporting to cancel and refusing to perform the agreement (as varied), the Iwi Parties and Variation Iwi Parties breached that agreement.

[53] As we have noted, the Judge decided that the application made by Tahi and Ms Lee could not be granted under r 8.20 of the High Court Rules because of the requirement that applications under that rule must proceed on notice to the intended defendant.[39] We agree that the application could not rely on the rule for that reason, despite Mr Heard's argument to the contrary in this Court. In that respect, we note that in the United Kingdom, the rule which covers similar ground to r 8.20 is r 31.16 of the Civil Procedure Rules 1998 (UK), which states clearly that it applies where an application is made to the court "for disclosure before proceedings have started".[40] Authorities decided under that rule suggest it can be invoked only prior to

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39 High Court judgment, above n 2, at [94] and [98].
40 Civil Procedure Rules 1998 (UK), r 31.16(1).

the commencement of proceedings.[41] It is possible that the words "intending plaintiff" in r 8.20(1)(a) of the High Court Rules suggest a similar limitation, but this point does not need to be decided for present purposes. More importantly, r 8.20 does not contemplate discovery against a defendant in an existing proceeding. Such a defendant is not an "intended defendant" for the purposes of r 8.20(1)(a), nor a "person" within the meaning of r 8.20(1)(b).

[54] It was because of his conclusion that r 8.20 did not apply, that the Judge decided to invoke the principle set out in *Norwich Pharmacal*.[42] It is important to recognise the context in which the principle has been applied. Persons are not obliged to disclose information to others except pursuant to a legal duty.[43] The *Norwich Pharmacal* principle was designed to define circumstances in which a non-party might have an obligation to provide information in advance of proceedings. The relevant principle was stated as being that:[44]

> … if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

[55] As noted in *Zuckerman on Civil Procedure*, the wrongdoing justifying an order of disclosure will be wrongdoing supporting a cause of action, whether in tort, breach of contract or some other unlawful act, whether civil or criminal.[45] The rationale for that rule is said to be that:[46]

> … it would be unjust for a person who facilitated, or was involved in, a wrong against another to deny the wronged victim information he requires in order to seek vindication of the wrong. In order to obtain an order under this jurisdiction, the applicant must establish that he has suffered wrongdoing by the person whose identity he is seeking to establish.

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41 See for example *Personal Management Solutions Ltd v Gee 7 Group Ltd* [2015] EWHC 3859 (Ch), [2016] 1 WLR 2132 at [14]–[18]; and *Anglia Research Services Ltd v Finders Genealogists Ltd* [2016] EWHC 297 (QB) at [5.1].

42 *Norwich Pharmacal Co v Customs and Excise Commissioners,* above n 22.

43 Adrian Zuckerman *Zuckerman on Civil Procedure" Principles of Practic*e (3rd ed, Sweet & Maxwell, London, 2013) at [15.149].

44 *Norwich Pharmacal Co v Customers and Excise Commissioners,* above n 22, at 175.

45 Zuckerman, above n 43, at [15.150].

46 At [15.150].

[56] As was observed by Lord Wolf CJ in *Ashworth Hospital Authority v MGN Ltd,* the requirement of an involvement by the person from whom disclosure is sought is important, because it distinguishes that party from someone who is a mere onlooker or witness.[47] Further, in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd*, a case to which we were referred by Mr Crossland, the Court summarised the three prerequisites of *Norwich Pharmacal* relief as:[48]

> (a) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
>
> (b) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
>
> (c) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

[57] However, for reasons we now explain we do not consider this is an appropriate case to discuss the requirements that must be satisfied in New Zealand for the making of a *Norwich Pharmacal* order. We add that the wide terms of r 8.20 may mean that there is no need to resort to the *Norwich* principles at all.

[58] The respondents have pleaded claims, relevantly, in contract and unjust enrichment against a background in which a joint venture agreement was entered into, apparently on behalf of iwi members and in anticipation of the settlement of claims under the Treaty of Waitangi. The settlement in fact eventuated. The statement of claim has been formulated and causes of action against the intended fourth and fifth defendants have been pleaded in draft form. The case is not one of the kind which typically necessitates a *Norwich Pharmacal* order, where the plaintiff needs further information in order to define the basis of its claim, or to ascertain whether it has in fact been wronged and if so by whom. Here all that is lacking is the names of the intended defendants. Although their names are not presently known to the respondents, they are ascertainable as members of an identified class.

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47 *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033 at [58].
48 *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), [2005] 3 All ER 511 at [21].

[59] The names of the intended fourth and fifth defendants are necessary not so as to establish the basis of their potential liability, but so they can be brought to the Court to answer the already formulated claims. The alleged causes of action intended to be brought against them may or may not succeed, but this is not a case in which it is necessary to weigh competing rights of plaintiffs to obtain and potential defendants being compelled to provide information. The orders are not sought against the intended fourth and fifth defendants. If the claims are not genuinely arguable, they might be susceptible to being struck out. But it would be wrong in circumstances such as these to use the discovery rules as an indirect means of defeating the substantive claims.

[60] In the light of the foregoing discussion, it would be unjust if the intended fourth and fifth defendants were not before the Court. On the one hand, that would be to run the risk that findings might be made which adversely affect the interests of the iwi members concerned, in circumstances where they would have had no ability to influence the outcome or call relevant evidence. On the other hand, the idea that potential claims might not be advanced because the relevant parties were not able to be named and brought before the Court is equally contrary to the interests of justice.

[61] Further, we consider it is inappropriate to put the respondents through a process requiring them to establish a good arguable case when, if the names of the intended defendants were known, exactly the same claims could be advanced. The questions whether it is sufficient that the intended claims are "bona fide" or have a "sufficient substratum of fact to be more than purely speculative" or whether the plaintiffs should rather be required to establish a "good arguable case" are in our view the wrong questions to ask at this point. In the circumstances, we consider it was wrong to deal with the application on the basis that the *Norwich Pharmacal* principles provided the proper analytical framework.

[62] Rather, it is only necessary to apply the High Court Rules in relation to discovery. The rules provide for initial disclosure,[49] and also contemplate discovery orders whether for standard discovery or tailored discovery.

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[49] High Court Rules 2016, r 8.4.

[63] It seems that, at least initially, counsel for Tahi considered that r 8.4(4) would enable the Judge to require provision of the register: the application referred to both rr 8.20(2) and 8.4(4), in the alternative. This reflected the fact that although the proceeding had been commenced in March 2017, initial disclosure had not been given by the time the application was made.[50] It is apparent from the High Court representation judgment that, when the application for representation orders was argued before Lang J, the statement of claim did not name the iwi members although relief was sought against them.[51] In the event, when the discovery application was argued, r 8.4 was not relied on.

[64] It appears from the High Court leave judgment that no case management conference had been convened by the date that application was considered.[52] The occasion for the exercise of the Court's power to order discovery at a case management conference under r 8.5 had therefore not arisen. An order for discovery under r 8.5 can be for standard discovery, or tailored discovery.[53] Under r 8.7, standard discovery covers documents on which a party relies, documents that adversely affect that party's own case, documents that adversely affect another party's case or documents that support another party's case. It is not immediately obvious that the register of iwi members would fall within any of those categories. However, r 8.8 provides for tailored discovery. It says simply that:

> Tailored discovery must be ordered when the interests of justice require an order involving more or less discovery than standard discovery would involve.

[65] As will be apparent from what we have said to this point we consider the interests of justice do require an order requiring discovery of the register. Without it, the claims against the proposed fourth and fifth defendant cannot be pursued. We consider the interests of justice can be served only if Tahi and Ms Lee are able to advance those claims and the fourth and fifth defendants are able to take such steps as may be appropriate in relation to them.

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50 That remained the position when the High Court granted leave to appeal and cross-appeal, as noted in the High Court leave judgment, above n 3, at [20].

51 High Court representation judgment, above n 9, at [9].

52 High Court leave judgment, above n 3, at [20].

53 High Court Rules, r 8.12(1).

[66] We add to that consideration the fact that the Tribal Authority Trustees are in possession of a register of iwi members. There is no question that disclosure of the register will be onerous or disproportionate to its relevance.[54] Further, it appears likely that there is a register (possibly it is the same register) of iwi members in the control of the Settlement Trust Trustees, by virtue of the provisions of the Settlement Trust. These two documents were referred to in the orders made by the Judge.[55]

[67] The orders already made by the Judge are sufficiently precise to define the scope of what is required, although the Judge explicitly excluded names of iwi members who are either unborn or under the age of 18 as at 27 June 2007. We have already summarised the reasons given by the Judge for excluding those members of the iwi.

[68] As to Mr Crossland's submission that the Judge did not properly address the privacy implications of the orders he made, we accept that issue properly arose in considering whether an order should have been made in application of the *Norwich Pharmacal* principles. But we do not consider that privacy considerations can properly stand in the way of an order for tailored discovery made under r 8.8. That is especially so when one of the relevant interests of justice is the potential effect of allowing the claim to proceed where individual iwi members do not have an opportunity to protect their position in relation to a claim which might affect the position of the iwi as a whole. We note in any event that under r 8.30(4) a party who obtains a document by way of inspection or makes a copy of it is only entitled to use the document for the purposes of the proceeding and must not make it available to any other person except for those purposes.

[69] We turn now to the cross-appeal. In relation to the first cause of action, claiming damages for breach of the Joint Venture Agreement, Mr Heard submits that the Judge was wrong to conclude that those under 18 could not be party to the agreement. Although minors, they could be a party through ordinary agency principles. Under ss 87 and 88 of the Contract and Commercial Law Act 2017,

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54 See r 8.9(a); and *Commerce Commission v Cathay Pacific Airways Ltd* [2012] NZHC 726 at [12].
55 High Court judgment, above n 2, at [208].

the Court could inquire into the fairness and reasonableness of a contract entered into by a minor and make appropriate orders, including enforcement of the contract against the minor. Mr Heard submits it was consequently not correct for the Judge to determine that the Joint Venture Agreement and Variation were not enforceable against iwi members who were minors at the time they were entered into.

[70] We are not satisfied that the Judge was wrong on the view he took. The pleading as it currently exists does not contain a basis on which those members of the iwi under 18 might be held liable under the agreements, still less those who were then unborn. At this stage, the possibility of a claim against those under 18 at the relevant date is too contingent for their names to be properly the subject of an order for tailored discovery.

[71] Nor have we been persuaded that the Judge erred in his reasoning in refusing to order disclosure of the names of the iwi members under 18 at the relevant date as regards the other causes of action. As to the second cause of action, unjust enrichment, Tahi's claim is pleaded in the alternative, on the basis the Joint Venture Agreement (as varied) is unenforceable. The unjust enrichment is said to arise because:

> The defendants would be unjustly enriched if they were permitted to retain benefits conferred on them on the basis that the 2007 Joint Venture Agreement (as varied) would be effective and honoured on its terms.

[72] The source of the claim can therefore be traced back to the execution of the Joint Venture Agreement and the actions Tahi took on the basis the agreement would be performed. Given that, we agree with the Judge that if the Joint Venture Agreement is not enforceable, the proper claim in unjust enrichment is against those who allegedly entered into the agreement as trustees for those under the age of 18 as at 27 June 2007, not those individuals themselves, who either lacked capacity to enter into a contract at the relevant time or were unborn. We also note there is no evidence that the Benefitting Iwi Members have received any of the settlement assets. In this regard, Tahi's second amended statement of claim is pleaded on the basis that the settlement assets were received by the Settlement Trust Trustees. This also points away from ordering disclosure of the register of iwi members as regards those under the age of 18 when the agreement was entered into.

[73] In respect of the third cause of action (subrogation), we are also not convinced that tailored discovery of the names of iwi members under the age of 18 at the relevant time should be ordered. Any rights of indemnity of the Trustees against the assets of the trusts become relevant only if the Court makes a finding that the Trustees are liable. In this respect we agree with the Judge that the real issue of subrogation as regards the iwi members will be whether the Joint Venture Agreement and Variation were validly entered into on behalf of Te Kawerau ā Maki. The only individuals who could have contracted at the time the agreements were entered into were those iwi members aged 18 years or older at the relevant time. The register of iwi members is to be disclosed as regards those individuals. Accordingly, the interests of justice do not require an order for tailored discovery of the names of those iwi members under the age of 18 as at 27 June 2007.

[74] The only remaining issue that needs to be considered is the issue of costs, raised in Tahi's cross-appeal. The Judge reduced the costs he would otherwise have ordered to be paid to Tahi by 25 per cent, because the claim for discovery of the names of those under 18 or unborn at the relevant date had been successfully resisted.[56] There is no basis for us to disturb that outcome.

Result

[75] For the reasons we have given, the appeal is dismissed.

[76] The appellants must pay the respondents costs calculated for a standard appeal on a band A basis and usual disbursements.

[77] The cross-appeal is dismissed.

[78] The cross-appellants must pay the cross-respondents' costs calculated for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Shieff Angland, Auckland for Appellants
Lee Salmon Long, Auckland for Respondents

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56 At [208(5)].