IN THE COURT OF APPEAL OF NEW ZEALAND

CA8/04

	BETWEEN	THE PROPRIETORS OF MATAURI X INCORPORATION Appellant
	AND	BRIDGECORP FINANCE LIMITED Respondent

Hearing: 26 October 2004

Court: McGrath, Hammond and Chambers JJ

Counsel: D A Watson for Appellant
P J Dale for Respondent

Judgment: 3 May 2005 at 2005

JUDGMENT OF THE COURT

A The appeal is allowed.

B The declaration and the order for costs made in the High Court are set aside.

C The proceeding is remitted to the High Court for further consideration of the following arguments:

(a) the effect of s 271 of the Te Ture Whenua Maori Act 1993;

(b) the effect of registration of the mortgage under the Land Transfer Act 1952;

(c) the respondent's cause of action based on money had and received.

D Costs with respect to the High Court proceeding under appeal and in this court are reserved.

REASONS

(Given by Chambers J)

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The powers of a Maori incorporation

[1] This appeal raises interesting questions concerning the powers of a Maori incorporation to borrow money and to mortgage its land. The committee of management of Matauri X, a Maori incorporation, borrowed over $3 million from Bridgecorp Finance Ltd for the purpose of investing in a water bottling business. Matauri gave as security a mortgage over its land at Matauri Bay. Matauri X cannot now repay the loan and Bridgecorp seeks to rely on its security. Matauri X now argues that the loan was void, having being beyond its powers.

[2] At first instance, that argument was rejected. Fisher J, in a judgment now reported at [2004] 2 NZLR 792, held that the loan was valid and that Matauri X had the power to enter into it. Matauri X challenges that conclusion. This judgment is concerned with determining the extent of Matauri X's borrowing powers.

The essential facts

[3] Matauri X was incorporated on 7 March 1967 by order of the Maori Land Court acting pursuant to s 271 of the Maori Affairs Act 1953. The order incorporated multiple Maori interests in 544.3 ha of land surrounding a beautiful beach at Matauri Bay in Northland. The objects of Matauri X were specified in the order of incorporation.

[4] Matauri X, like all Maori incorporations, was managed by a committee of management: Te Ture Whenua Maori Act 1993, s 270(1). In 2001, Matauri X's management committee had Hemi-Rua Rapata as chairperson and six others as members, one of whom, Ngaire Pera, was also secretary. Matauri X was asset rich and cash poor. Although its Matauri Bay land was worth $9 million or more, there was little income with which to pay rates. With the support of other members of the committee, Mr Rapata was keen to raise funds for investment in off-site business ventures. He planned to use the Matauri Bay land as security for the loans.

[5] Mr Rapata was an acquaintance of Waari Ward-Holmes, who had previously been chief executive officer of the Maori Development Corporation. Mr Ward-Holmes and a Mr Nathan York had set up an investment company, MTech Investments Limited ("MTech"). MTech's function was to locate businesses and investments in which it would invest by way of joint venture with Maori incorporations. The concept was that MTech would provide the opportunities and Maori incorporations the capital raised on the security of their land.

[6] The first two MTech proposals for Matauri X came to nothing. The third was the "Eternal Springs" proposal. The proposal was to acquire and operate a water bottling plant at Whakatane as a joint venture. The joint venture partners were to be MTech, Matauri X, and an engineer, Janusz Kubs, in equal shares. Matauri X was to borrow $2.5 million, the loan being secured by a first mortgage over its land. After expenses and prepaid interest, the loan would yield $2 million. Of the $2 million, $1 million would be used to purchase one third of the shares in the new investment company. The other $1 million would be advanced to the new investment company by way of loan. MTech was to contribute $300,000 for its shares. Mr Kubs was to

make no cash contribution. The inequality of cash contribution was to be offset by MTech's finding and promotion of the project and Mr Kubs's provision of critical knowledge and trade contacts. MTech estimated that in return for the investment of approximately $2 million, Matauri X would gain $11.5 million within two years.

[7] The management committee determined to go ahead with the venture. There is some dispute as to whether correct procedures were followed, but we find it unnecessary to deal with that argument in this judgment, for reasons which follow. Matauri X borrowed $2.55 million from Bridgecorp. Matauri X purported to grant Bridgecorp a first mortgage over its land. On 9 July 2001, Mr Rapata and Ms Pera attended the office of Matauri X's solicitors. There they signed the detailed term loan contract, mortgage, and other documents. They signed as chairperson and secretary, witnessing the affixing of the common seal of Matauri X. Bridgecorp advanced the loan money the following day. The mortgage was subsequently noted in the Maori Land Court records, pursuant to s 255 of the Te Ture Whenua Maori Act. The mortgage was registered in the Land Registry Office on 6 August 2001.

[8] At the Matauri X annual general meeting on 29 September 2001, the shareholders voted by 2,509 votes to 1,800 to support the committee of management's decision to invest in Eternal Springs.

[9] Unfortunately the Eternal Springs project did not prosper. When more cash was needed Matauri X borrowed another $750,000 from Bridgecorp, but before long the venture failed altogether. The joint venture company was put into receivership. Matauri X has not repaid the loan or paid interest.

Matauri X's power to borrow money from Bridgecorp

[10] As already indicated, Matauri X was incorporated in 1967 under s 271 of the Maori Affairs Act 1953. It has continued in existence to the present day, even though the relevant legislation has changed twice. The first change was in 1967 when Parliament passed the Maori Affairs Amendment Act. Part IV of that Act introduced a new part (from 1 April 1969) dealing with Maori incorporations. Then in 1993 the position changed again with the passage of the Te Ture Whenua Maori

Act. The 1953 and 1967 Acts continue to have relevance with respect to the principal issue with which we are concerned in this case. For that reason, we shall explore the relevant powers of Maori incorporations under all three Acts.

Matauri X's power to borrow money under the Maori Affairs Act 1953

[11] Part XXII of the 1953 Act permitted owners of Maori freehold land to apply to the Maori Land Court for an order of incorporation. By s 271(2), the order of incorporation had to define the object or objects for which the body corporate was established. Every object had to "relate exclusively to the land to be vested in the body corporate by the order of incorporation".

[12] In the case of Matauri X, the original objects as defined by the Maori Land Court were:

> (a) To occupy and manage as a farm the land or any portion of the land proposed to be vested in the body corporate and to carry on any agricultural or pastoral business thereon.
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> (b) To use the land or any part thereof for the growing of timber, to engage in the felling and marketing of timber, to establish and carry on timber mills, to engage in any other operations, for the production, utilisation, or sale of timber, or to grant licences to cut and recover timber.
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> (c) To engage in coal mining or other mining operations on the land or to grant leases or licences for the production of coal or other minerals.
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> (d) To arrange for the alienation by sale, lease or otherwise of the land or of any portion thereof.
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> (e) To carry on the business of shopkeepers, hotel keepers (whether licensed or unlicensed), motel proprietors, motor camp proprietors and owners of travel courts, lodges, meeting houses and other accommodation whether residential or likewise, including all types of businesses required to be licensed under the Sale of Liquor Act 1962, and for those purposes to build and acquire any buildings.
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> (f) To develop the resources of the land or any part thereof by building, reclaiming, clearing, draining and otherwise improving, subdividing, roading, planting, working deposits of stone, metal or minerals, providing water on any terms which may be considered advisable, and for those purposes to obtain any consents, give any bonds, employ any persons and otherwise do all things necessary or expedient to carry out such objects.

[13] Section 278 gave to every incorporation "such powers as may be necessary for the purpose of carrying into effect its objects as defined in the order of incorporation". That power was extended by s 288(1), under which every incorporation was empowered to "borrow money for any of its objects" and, to that end, to grant a mortgage as security.

[14] There can be no doubt that, had the 1953 Act still been in force, Matauri X's proposed investment in the Eternal Springs project at Whakatane would have been unlawful, being beyond the objects and powers of Matauri X. Likewise, borrowing money to enable such an investment to proceed would have been unlawful, as would granting a mortgage as security for such unlawful borrowing.

Matauri X's power to borrow money under the Maori Affairs Amendment Act 1967

[15] By s 68 of the 1967 Act, Maori incorporations established under Part XXII of the 1953 Act continued in existence in accordance with the provisions of Part IV of the 1967 Act. To that end, ss 25-66 of the 1967 Act – Part IV of the Act, less transitional provisions – applied to Part XXII incorporations (like Matauri X): see s 68(7) of the 1967 Act.

[16] Maori incorporations continued to have objects under the 1967 Act. Section 28 of the 1967 Act permitted incorporations to apply to the Maori Land Court for orders redefining objects or adding "any other objects specified in or authorised by section 27". Section 27 contained the standard list of objects previously contained in s 270 of the 1953 Act. Matauri X in fact utilised s 27 in 1989 when it applied for (and was granted) an additional object:

> To permit the Committee of Management to grant licences to shareholders and Maori and to the Housing Corporation and other agencies for the purposes of providing housing for shareholders and Maori.

[17] Section 43 conferred on the incorporation "such powers as may be necessary for the purpose of carrying into effect its objects as defined in the order of incorporation" (an obvious successor to s 278 of the 1953 Act). The incorporation's

power to borrow was unchanged from under the 1953 Act: s 49(1) mirrored the former s 288(1). But there was a new s 48(1) which read as follows:

> Whether or not any such power is specifically included in its objects of incorporation, a Maori incorporation shall, acting by and through its committee of management, have power to alienate, mortgage, charge, or otherwise dispose of or deal with the assets from time to time vested in it in the same manner as if it were a private person of full capacity:
>
> Provided that the incorporation shall not sell any land except pursuant to a resolution of a general meeting of shareholders.

[18] It is clear that in this context at least "alienate" did not include "mortgage", in the same way that in object (d) (in s 270 of the 1953 Act and s 27 of the 1967 Act and in Matauri X's objects) "alienation" did not include "mortgage" – mortgaging land could never be an object in itself. It is also clear that ss 48 and 49 must be read together. Section 48 was concerned with empowering a Maori incorporation's committee of management to, among other things, grant mortgages, but clearly only in circumstances where the mortgage was security for a debt incurred in furtherance of the incorporation's objects. Section 48 did not authorise borrowing or mortgaging for extraneous purposes, as that would conflict with s 49(1). In the borrowing/mortgaging context, s 49(1) was concerned with the purposes for which borrowing/mortgaging was permitted and s 48(1) with who was empowered to make the decision to borrow or mortgage.

[19] An investment like Eternal Springs and a loan like the Bridgecorp loan would have been no more permissible under the 1967 Act than under the 1953 Act.

Matauri X's power to borrow money under the Te Ture Whenua Maori Act 1993

[20] The 1993 Act came into force on 1 July 1993. Parliament promptly amended it, first by the Te Ture Whenua Maori Amendment Act 1993 and later in the same year by the Te Ture Whenua Maori Amendment (No 2) Act ("the No 2 Amendment Act"). The latter Act in particular is of critical importance in this case because of an important transitional provision it introduced. Section 18 of the No 2 Amendment Act inserted a new s 358A. It is clear from Fisher J's judgment that counsel did not refer him to s 358A.

[21] The Te Ture Whenua Maori Amendment Bill (No 2), which became the No 2 Amendment Act, was introduced into the House of Representatives on 21 September 1993: see 538 NZPD 1817. The Bill was introduced into the House by the Honourable Douglas Graham, the Minister of Justice, on behalf of the Minister of Maori Affairs. It is clear from the Minister's speech that all the amendments contained in the Bill arose from monitoring of the 1993 Act since it came into force on 1 July that year. The amendments made by the Bill were described as "urgent" and "required to ensure the efficient and effective operation of the Act". The amendments were supported by the Opposition. The Bill proceeded through all three readings on 21 September, and received the Royal Assent on 28 September. By s 8 of the Acts Interpretation Act 1924, the No 2 Amendment Act accordingly came into operation on 28 September. It is not necessary to look in detail at what Matauri X's powers were in the period between 1 July and 28 September 1993, as Matauri's powers with respect to the Bridgecorp loan must be evaluated under the 1993 Act as amended by the No 2 Amendment Act. Fisher J determined this case effectively as if the No 2 Amendment Act had not been passed, because no one referred him to s 358A as inserted.

[22] Part 13 of the 1993 Act provided for the incorporation of Maori incorporations. As before, these incorporations were constituted by order of the Maori Land Court: s 247(1). The terms of the order were set out in s 248. Significantly, as originally enacted, the Act did not provide for "objects" as the 1953 and 1967 Acts had done. Instead, the powers of incorporations were expressed in general terms. The critical section was s 253. As originally enacted, it read:

> Subject to this Act, and any other enactment, and the general law, and to any express limitations or restrictions imposed by the Court in the order of incorporation, every Maori incorporation has, both within and outside New Zealand, in addition to the powers expressly conferred on it by this Part of this Act, -
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> (a) Full capacity in the discharge of the obligations of the trust in the best interests of the shareholders, to carry on or undertake any business or activity, do any act, or enter into any transaction; and
>
> (b) For the purposes of paragraph (a) of this section, full rights, powers, and privileges.

[23] A restriction on those general powers imposed by the Act was contained in s 254. That section restricted an incorporation's powers of alienation of its land; the details do not matter for present purposes.

[24] It is interesting that s 253 provided for the general power of competency to be "subject…to any express limitations or restrictions imposed by the Court in the order of incorporation". Section 248 did not expressly empower the court to impose "limitations or restrictions" as part of the order of incorporation, but clearly the court must have such powers, given the wording of s 253. Much of the discussion in Fisher J's judgment revolved around whether the objects of Matauri X represented an "express limitation or restriction" for the purpose of s 253. Indeed, Fisher J considered that the case turned on "the scope of the words 'express limitation or restriction' in s 253": at [44]. He said that the question was whether an existing incorporation's set of objects was intended to fall within that phrase. He concluded that it was not. We agree with him.

[25] It seems clear, however, that someone quickly appreciated that a general power of competency might not always be appropriate. (That "someone" may have been the Maori Land Court, the Maori Trustee, the Federation of Maori Authorities, or practitioners in the field, all of whom, according to Mr Graham, had made comments since the 1993 Act came into force, giving rise to the amendments contained in the No 2 Amendment Act: 538 NZPD 1818.) It would appear that a general power of competency was seen as requiring qualification in two areas:

> (a) Shareholders of an incorporation might well want to restrict the powers of their incorporation, and in particular the powers of their incorporation's committee of management;
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> (b) Owners of Maori freehold land who had previously agreed to their land being managed by a Maori incorporation had done so on a specific basis, namely that the incorporation's powers were restricted by the incorporation's objects. Their rights were affected by the passage of the 1993 Act which, as initially enacted, did not contain any relevant transitional provisions. Part 13

of the 1993 Act applied to existing incorporations, "unless the context otherwise [required]": 1993 Act, s 4, definition of "Maori incorporation".

[26] These two perceived defects in the 1993 Act were dealt with in the No 2 Amendment Act. The first defect was dealt with by ss 10 and 11 of the No 2 Amendment Act. Section 10 amended s 253 of the 1993 Act by inserting, after the words "imposed by the Court in the order of incorporation", the words "or included in its constitution pursuant to section 253A of this Act". Section 11 inserted the new s 253A:

> The shareholders of a Maori incorporation may from time to time, at a general meeting of the incorporation, by resolution passed in such manner as may be prescribed by the constitution of the incorporation, -
>
> (a) Include in that constitution provisions imposing limitations or restrictions or both on the powers conferred on the incorporation by section 253 of this Act:
>
> (b) Omit from that constitution, or vary, any provisions included in that constitution pursuant to paragraph (a) of this section.

[27] The effect of those amendments was to empower incorporations, whether incorporated before or after the 1993 Act, to pass resolutions limiting or restricting the general power of competency. This amendment does not have direct relevance to the present case as it is common ground that Matauri X has not, so far as we are aware, ever passed a resolution under s 253A.

[28] The second defect was dealt with by s 18, the heading to which read "Transitional provisions in relation to objects of Maori incorporations". It inserted s 358A, which reads as follows:

> (1) This section applies to every Maori incorporation established under, or continued in existence by, the provisions of Part 4 of the Maori Affairs Amendment Act 1967.
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> (2) The Court may from time to time, upon application made to the Court by or on behalf of a Maori incorporation to which this section applies, make –
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> (a) An order redefining the objects for which the incorporation was established, or adding any other objects; or
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> (b) An order omitting from the order of incorporation the object or several objects specified in the order of incorporation as the

> object or the several objects for which the incorporation is established.
>
> (3) Subject to any order made under subsection (2)(a) of this section, and to any order made, before the commencement of this Act, under section 28 of the Maori Affairs Amendment Act 1967, where an order has not been made under subsection (2)(b) of this section in relation to a Maori incorporation to which this section applies, the object or the several objects of that incorporation shall, until the making of such an order, continue to be the object or the several objects specified in its order of incorporation.
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> (4) An application under this section may be made only pursuant to a resolution passed at a general meeting of the shareholders of the incorporation by or on behalf of which the application is made.

[29] Section 358A applied to Matauri X, as it was a "Maori incorporation…continued in existence by the provisions of Part IV of the Maori Affairs Amendment Act 1967". The effect of s 358A was to preserve the objects of an existing incorporation, until such time as the shareholders of that incorporation resolved to get rid of the objects and the Maori Land Court sanctioned such resolution. The shareholders of Matauri X have never passed a resolution dispensing with their objects. The incorporation accordingly remains bound by them. The general power of competency conferred by s 253 was expressed to be "subject to this Act". After s 358A was inserted, it became the predominant section, the general power of competency being restricted by it.

[30] The focus of the enquiry should therefore be on the purpose and effect of s 358A in the context of the Act as a whole. As we have already observed, this aspect received no attention from Fisher J, as obviously counsel had overlooked s 358A when arguing the case before him. Ms Watson did, however, put s 358A at the forefront of her argument before us. Mr Dale, for Bridgecorp, did not refer to this aspect of Ms Watson's written submissions when filing his own. He simply sought to uphold the judgment on the grounds that had appealed to Fisher J.

[31] We consider that the effect of s 358A was to restrict Matauri X's powers to its objects. Obviously, if it needed to borrow money for any of its objects and if it needed to grant a mortgage to secure such borrowing, that would be within Matauri X's powers, just as it would have been under the 1953 and 1967 Acts. The problem is, however, that this borrowing was not for any of its objects: it was

borrowing for an extraneous purpose, namely investment in shares in an offsite company.

[32] Fisher J concluded this part of his judgment as follows (at [58]):

> My conclusion is that the effect of s 253 of Te Ture Whenua Maori Act was to allow existing incorporations to act in ways which went beyond their empowering objects. Only if the order of incorporation went on to directly and specifically state that the incorporation was not permitted to carry out a named activity would there be an "express limitation or restriction" for the purposes of s 253.

[33] That conclusion may have been accurate for the short period between the 1993 Act coming into force and the No 2 Amendment Act coming into force. It is not accurate, however, with respect to the period after the No 2 Amendment Act came into force. Section 358A reimposed the importance of the existing incorporation's objects. Those objects, preserved as they were by s 358A, trumped the general power of competency, not because they were "express limitations or restrictions imposed by the Court", but rather because s 253 of the Act was subject to other provisions in the Act, one of which was s 358A.

[34] Fisher J's primary view, therefore, was that the Bridgecorp loan was lawful because of the general power of competency conferred for the first time by s 253. He went on, however, to consider what the position would be if he were wrong on that. He dealt with this fallback argument briefly:

> [60] Even if I were wrong in that view, there remains the fact that object (d) authorises the sale of the whole of the land. At least that aspect of para (d) could not be ancillary to one of the other land use objects. And if complete sale of the land qualifies as a principal object, it would be difficult to argue that a lesser form of "alienation", such as a mortgage, should be treated more restrictively. Raising of money on the security of the land could never be an end in itself but the same is true of selling the whole of the property.
>
> [61] I conclude that it was within the power of Matauri X to raise money by way of mortgage over its land for use in an off-site investment such as the Eternal Springs project. The transactions involving Bridgecorp were not ultra vires Matauri X.

[35] We do not agree with that view. Object (d) as contained in s 270 of the 1953 Act, s 27 of the 1967 Act, and in Matauri X's objects did not include, as an object, alienation in the sense of mortgaging. To suggest that providing a mortgage could

be an object in its own right is inconsistent with s 288 of the 1953 Act and ss 48 and 49 of the 1967 Act. Those sections sought to restrain borrowing: only borrowing *for an object* was permissible and only mortgaging *as security for such borrowing* was permitted. Such restrictions would be meaningless if mortgaging was in itself an object. It appears that Fisher J was not referred to s 288 of the 1953 Act or s 49 of the 1967 Act. The meaning of Matauri X's object (d) must be and has been constant since its adoption.

[36] We therefore disagree with Fisher J's fallback argument. It is not correct that sale of the land "could never be an end in itself". It could be. Were it not specified as an object, the incorporation would never be able to sell its land or part of it. But object (d) does not include the granting of mortgages in circumstances where Parliament has expressly limited borrowing and mortgaging powers.

[37] It follows that we accept Ms Watson's primary argument. Fisher J was, with respect, wrong when he found that borrowing money for the Eternal Springs investment was within the powers of Matauri X. We stress, however, that Fisher J came to his conclusion per incuriam. He was not referred to s 358A, which was of fundamental importance.

The "indoor management" rule

[38] Ms Watson submitted that, if we accepted her submission that the loan and the mortgage were unauthorised, then both were "null and void and [could not] be ratified". She drew an analogy with the doctrine of ultra vires in company law, citing in support *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653.

[39] We think, however, that Bridgecorp may possibly have an answer to the finding that the loan was unauthorised. We have noted s 271 of the 1993 Act. The relevant parts of that section read as follows:

> (1) A Maori incorporation shall be bound by every act of its committee of management, and no person dealing with the incorporation shall be concerned to inquire in relation to any such act whether the

> committee is authorised or restricted by any resolution of the shareholders, or as to the terms and conditions of any such resolution. …
>
> (3) No person lending money to a Maori incorporation shall be concerned to inquire as to the necessity for the loan or as to the application of the proceeds of it.

[40] Those provisions, which had forerunners in the earlier Acts, seem to us to be statutory codifications of the common law principle known as "the indoor management rule" or the rule in *Turquand's* case: *Royal British Bank v Turquand* (1856) 6 E & B 327; 119 ER 886. Under that rule, a person dealing with a company was entitled to assume that the company's internal requirements had been complied with and that the company's officers were acting lawfully.

[41] We have considered whether we should form a view on that. We have decided that that would not be appropriate without hearing further submissions from the parties. We have considered whether to call for further submissions, but in the end have decided that this question should be referred back to the High Court for further determination.

[42] We have concluded that for the following reason. Counsel were agreed that, if we found in Matauri X's favour on the "powers" argument, then the case would have to be referred back to the High Court for further determination. That was because there were two lines of argument which had not been argued in the High Court but which had been left for further argument (if required). The first argument concerned the effect of the Bridgecorp mortgage having been registered under the Land Transfer Act 1952. The second matter was Bridgecorp's cause of action based on money had and received.

[43] Instead of then this court now embarking on the potential "indoor management" argument, we think it better to refer that argument to the High Court along with the other outstanding arguments.

Result

[44] We decline to make any declaration at this stage, as the overall position of the parties has not been fully explored. Obviously, however, the declaration made in the High Court will need to be set aside. It is premature to declare that the mortgage is valid and enforceable.

[45] The High Court will now need to consider the three outstanding matters in light of the opinion expressed in these reasons for judgment.

[46] No doubt the parties or one of them will now seek a judicial conference in the High Court to plot the future course of this proceeding.

[47] There may be issues of costs both in the High Court and in this court. The issue of costs is complicated by the fact that, while Matauri X has had a victory in this battle, it may yet lose the war. It may be better for costs to be determined when the final outcome of this case is known. At this stage, we reserve costs. If it is necessary to deal with costs, we shall deal with them by memorandums in the normal way.

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