IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-435
[2018] NZHC 516

BETWEEN	TAHI ENTERPRISES LIMITED First Applicant
	DIANNE LEE Second Applicant
AND	TE WARENA TAUA AND MIRIAMA TAMAARIKI as executors of the Estate of Hariata Arapo Ewe First Respondents
	TE WARENA TAUA, GEORGE HORI WINIKEREI TAUA, NGARAMA WALKER, HAMUERA TAUA and MIRIAMA TAMAARIKI as trustees of the Te Kawerau Iwi Tribal Authority Second Respondents
	TE WARENA TAUA, GEORGE HORI WINIKEREI TAUA, NGARAMA WALKER, HAMUERA TAUA and MIRIAMA TAMAARIKI as trustees of the Te Kawerau Iwi Settlement Trust Third Respondents

Hearing:	26 and 27 February 2018
Appearances:	M Heard and C Upton for Applicants J S Langston for Second and Third Respondents First Respondents abide decision of the Court
Judgment:	26 March 2018

JUDGMENT OF LANG J
[on application for representation orders under r 4.24 of the High Court Rules]

This judgment was delivered by me on 26 March 2018 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] In this proceeding the plaintiffs advance several causes of action. All arise out of dealings the second plaintiff, Ms Lee, had with members of the Te Kawerau ā Maki Iwi (the Iwi) during 2007 and 2008.

[2] The plaintiffs now seek an order under r 4.24 of the High Court Rules 2016 appointing the third defendants, the trustees of the Te Kawerau Iwi Settlement Trust (the Settlement trustees), to represent the members of the Iwi in this proceeding.

[3] The Settlement trustees initially consented to the order being made. Subsequently, however, they reconsidered their position. They now oppose any order being made appointing them as representatives of the Iwi for the purpose of this proceeding.

[4] The current version of the statement of claim contains six causes of action. Four of these relate to two joint venture agreements the first plaintiff, Tahi Enterprises Ltd (Tahi), entered into with members of the Iwi in 2007 and 2008. Ms Lee is the sole shareholder and director of Tahi.

[5] The remaining causes of action are based on transactions between Ms Lee and the first-named first respondent, Mr Te Warena Taua (Mr Taua). These relate to a house property situated at 517 Oruarangi Road, Māngere (the Māngere property).

A. The claim based on the two joint venture agreements

The parties

[6] The plaintiffs allege that Mr Taua is the Chairman and Rangatira/Chief of Te Kawerau ā Maki. Mr Taua and Mrs Ewe, another senior member of the Iwi, were claimants on behalf of the Iwi in three claims filed in the Waitangi Tribunal. Mrs Ewe died on 13 August 2009. The second-named first respondent, Ms Miriama Tamaariki, is the executor of Mrs Ewe's estate.

[7] The second respondents are the trustees of the Te Kawerau Iwi Tribal Authority (the Tribal Authority trustees), a charitable trust established on behalf of the Iwi under the Charitable Trusts Act 1957 by deed dated 13 July 2008. The trust was established

for purposes including the negotiation and settlement of all historical Treaty of Waitangi claims on behalf of the Iwi. The trust deed requires the Tribal Authority trustees to manage any settlement assets derived from treaty claims for the benefit of the members of the Iwi. Mr Taua is the Chairman of the Tribal Authority Trust.

[8] The third respondents are the trustees of the Te Kawerau ā Maki Settlement Trust (the Settlement trustees). This was established by deed dated 21 February 2014 for purposes including the receipt and administration of assets received by the Iwi after its settlement of treaty claims with the Crown. These were settled under the Te Kawerau ā Maki Claims Settlement Act 2015 and the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. Mr Taua is also the Chairman of the Settlement Trust. The amended statement of claim states that the Settlement trustees are to represent all members of the Iwi who were over the age of 18 years as at 27 June 2007.

[9] Neither the Iwi as a group nor individual members are named as respondents, but the statement of claim contains allegations against the Iwi and the plaintiffs seek relief against them. The statement of claim describes the Iwi as:

> The collective group comprised of individuals who are descended from an ancestor of Te Kawerau ā Maki (as further defined in s 12 of the Te Kawerau Claim Settlement Act 2015) and includes those individuals.

The joint venture agreements

[10] The first of the two joint venture agreements is dated 27 June 2007 (the 2007 agreement), and the parties to that agreement are Tahi and "Te Kawerau ā Maki". It was signed by Ms Lee on Tahi's behalf, and by Mr Taua and Mr Piki Taylor on behalf of Te Kawerau ā Maki.[1]

[11] Under this agreement, Tahi agreed to provide funding of up to $2 million "in support of Te Kawerau's Treaty claims process". Tahi was required to pay $1 million within three working days of execution of the agreement. The balance of the money was to be paid "within 2 months after the signing of the Agreement in Principal with the Crown".

---

[1] Mr Taylor is not a party to the proceeding.

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

[13] The second agreement was signed on 22 July 2008 (the 2008 Agreement), and purported to vary the 2007 agreement. The parties were again Tahi and "Te Kawerau ā Maki". On this occasion the agreement was signed by Ms Lee on behalf of Tahi and by Mr Taua and Mrs Ewe on behalf of Te Kawerau. The agreement recorded that they had "authority to sign this agreement on behalf of Te Kawerau".[2]

[14] Under the 2008 agreement, Te Kawerau ā Maki was defined as "Te Kawerau ā Maki iwi tribal authority". The agreement confirmed that this group comprised:

> i) The collective group comprised of persons:
>
> (a) Who descend from the following ancestors:
>
> (i) Tawhia ki te Rangi (also known as Te Kawerau ā Maki); and
>
> (ii) Mana; and
>
> (iii) Te Au o Te Whenua; and
>
> (iv) Kowhatu ki te Uru
>
> ii) Every whanau, hapu or group of persons to the extent that the whanau, hapu or group includes persons referred to 4.i and
>
> iii) Every person referred to in clause 4.i.

[15] In addition, the 2008 agreement contained the following clause:

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

[16] Under the 2008 agreement Tahi agreed to "provide total funding up to and not exceeding NZ$2,000,000 … in support of the Te Kawerau's Treaty claims process".

---

2 Clause 15.

The parties acknowledged that Tahi had already paid the sum of $1 million. The balance was to be paid in instalments on the occurrence of specified events during the treaty claims settlement process.

[17] Importantly for present purposes, Te Kawerau was to repay the sums advanced under the agreement in accordance with the following clause:

> 13) As soon as Te Kawerau or any related entities receive any cash settlement (including and not limiting 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.

[18] The 2008 agreement reiterated that all profits and interests arising from "future business endeavours" were to be shared as to 65 per cent to Te Kawerau and 35 per cent to Tahi. It also recorded that, save as varied by the 2008 agreement, the 2007 agreement was to "remain in full force and effect".

Subsequent events

[19] The statement of claim alleges that the Tribal Authority trustees entered into an agreement with the Crown on 7 August 2008 setting out the terms of negotiation of the Iwi's Treaty of Waitangi treaty claims. On 5 September 2008, Tahi paid the sum of $200,000 into a bank account nominated by Mr Taua as required by the 2008 agreement. On 2 October 2008, Tahi paid a further sum of $100,000 into the same account.

[20] Then, on or about 12 February 2010, the Crown and the Iwi entered into a written agreement in principle to settle the Iwi's treaty claims. The terms of the agreement in principle were set out in a letter dated 12 February 2010 from the Attorney-General and Minister of Māori Affairs to Mr Taua. Ten days later, on or about 22 February 2014, the Crown entered into a deed of settlement with Te Kawerau ā Maki and the Settlement trustees setting out the terms for settlement of the Iwi's treaty claims.

[21] The Te Kawerau ā Maki Claims Settlement Act 2015 came into force on 15 September 2015 and took effect 14 days thereafter. Under this Act the Iwi's treaty claims were settled on the basis that the Crown would transfer nominated properties to the Settlement Trust and would also make certain payments to it. In addition, the Crown granted the Settlement trustees the option to purchase several parcels of land, and the right of first refusal to purchase other parcels of land.

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

[23] By letter dated 27 September 2006 the solicitors acting for the respondents purported to cancel the 2007 and 2008 agreements. Tahi and Ms Lee then filed this proceeding in response.

Representation orders

[24] Rule 4.24 of the High Court Rules provides:

> **4.24 Persons having same interest**
>
> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
>
> (a) with the consent of the other persons who have the same interest; or
>
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[25] The courts have traditionally taken a liberal approach to representative proceedings because they often assist in achieving the objective set out in r 1.2, which is to secure "the just, speedy and inexpensive" determination of proceedings. A proliferation of separate proceedings involving the same subject matter would obviously be contrary to that object.

[26] The leading authorities in relation to representation orders made under 4.24 are the judgments of the Court of Appeal in *Saunders v Houghton*[3] and that of the Supreme Court in *Credit Suisse Private Equity LLC v Houghton*.[4]

[27] Delivering the judgment of the majority in *Credit Suisse*, Glazebrook J noted that the principal purpose of a representative proceeding is the promotion of efficiency and economy of litigation.[5] The rule should therefore be applied in a flexible manner so as to achieve the overall objective as set out in r 1.2.[6] There is room for continual development in this area so long as defendants are not compromised.[7]

[28] The Chief Justice, writing for herself and Anderson J, summarised the approach now taken in New Zealand as follows:

> [53] Because it is recognised that representative actions may be oppressive and may work injustice, use of representative form is subject to the three conditions ultimately derived from the judgment of Vinelott J in *Prudential Assurance*, although Vinelott J's requirement of a "common element" in each cause of action is more restrictive than [the] modern approach taken in such cases as *Carnie* and *R J Flowers*. The approach now taken in New Zealand is that:
>
> (a) the order cannot confer a right of action on a member of the represented class who would not otherwise have been able to assert a claim in separate proceedings and cannot bar a defence otherwise available in a separate action;
>
> (b) there must be a common issue of fact or law of significance for each member of the class represented; and
>
> (c) it must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.
>
> (footnotes omitted)

[29] The Chief Justice then observed:

> [55] The representative procedure was introduced to simplify previous recourse to joinder of claims and thereby achieve savings in effort. In its modern form it does not require identity of claim or even the same cause of action. As the language of r 4.24 indicates, it is enough that there is "the same interest in the *subject matter* of the proceeding". When the common issues

---

3 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331.
4 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541.
5 At [147].
6 At [129]-[130].
7 At [152].

> are resolved, it may be necessary to organise the hearing of the remaining issues according to subcategories or even on a devolved individual basis. Representative form does not prevent later severance should that be necessary to deal with particular issues relating to the individual circumstances of those within the representative action nor does it prevent sequencing of hearing in the manner adopted by French J through directions.
>
> (footnotes omitted)

[30] This passage demonstrates that the key issue for present purposes is whether the parties who will be subject to the proposed order have "the same interest in the subject matter of the proceeding". That may arise where there is a common issue to be tried that affects all members of the represented group. The Chief Justice saw nothing wrong with the courts using case management techniques to conduct staged trials once common issues have been resolved. This means that an initial trial may be held in which the issue of liability on one or more issues is determined. Thereafter the issue of relief, or damages, may be determined through a series of subsequent trials designed to ensure that the differences between individuals within the represented group are recognised.[8] It is also important to bear in mind, however, that the rule cannot be used to create an injustice.[9]

[31] In this context care needs to be taken with a passage relied on by the plaintiffs from *McGechan on Procedure.* The learned authors of that text point out that earlier case law suggested a representative proceeding would be inappropriate "where members could be subject to different defences".[10] They express the view that the liberal approach approved in *Saunders v Houghton* and *Credit Suisse* means "that the availability of different defences applicable to different defendants is no bar to a representative proceeding".[11] That may be so, but it needs to be remembered that those cases were concerned with actions brought by representative plaintiffs. The quotation relied upon relates to the fact that a claim may be brought by representative plaintiffs even where the defendants may have defences to claims brought by some but not all plaintiffs. In cases where the plaintiff seeks the appointment of a representative

---

8 At [59].

9 *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 271, cited in *Credit Suisse*, above n 4 at [61].

10 Andrew Beck and others *McGechan on Procedure* (online loosleaf ed, Brookers) at [HR 4.24.05] relying on *R J Flowers Ltd v Burns*, above n 9. In that case McGechan J held (at 270) that members of the class to be represented all had to be able to claim as plaintiffs in separate actions in respect of the event in question, with no defences applicable to some only of the class.

11 At [HR 4.24.05].

defendant, the courts must be vigilant to ensure that administrative convenience does not come at the cost of injustice to the persons whom that person is appointed to represent.

[32] The authority often cited in this context is the decision of the House of Lords in *London Association for Protection of Trade v Greenlands Ltd.*[12] In that case there had been no application for an order appointing a representative defendant to defend a libel proceeding brought against an unincorporated association. Lord Parker of Waddington observed, however, that such an application would not have been successful because "there might be separate defences open to some members of the association and not to others, and if this were so there would be no common interest within the rule."[13] The English rule permitting the appointment of representative plaintiffs and defendants at that time was in similar terms to r 4.24.

[33] Lord Parker's obiter observation in *Greenlands* was subsequently cited in both English and New Zealand cases. In *Derby v Pukeikura,* the plaintiff sought a declaration that sawn timber cut from a block of Māori land was his property, as he claimed he had a licence to cut timber on the land.[14] The plaintiff applied for an order under r 79 of the then Code of Civil Procedure appointing a single defendant to represent between 40 and 48 owners of the land. That person had represented some of the owners in earlier negotiations with the plaintiff. Fair J noted that the defences of one group of owners would be different to those of another. In addition, the defences of persons within one of the two groups could vary according to the extent they had stood by while the plaintiff had cut timber on the land. Fair J then observed:[15]

> I have considered all the authorities cited by counsel, but I think it is necessary to refer to two cases only. The judgment of Lord Parker in *London Association for Protection of Trade v. Greenlands Ltd, ...* decides that in such circumstances the provisions of Order 16, r. 9 of the Rules of the Supreme Court (Eng.) – which are, as to the words to be construed in this application, identical with those of r. 79 of our Code – do not authorise a person in the position of the present defendant being appointed to represent either the first or the second group. It was there said: "In other words, there might be separate defences open to some members of the Association and not to others, and if this were so there would be no common interest within the rule."

---

12 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 (HL).
13 At 39.
14 *Derby v Pukeikura* [1935] GLR 205 (SC).
15 At 206.

> That statement was approved by the High Court and the Court of Appeal in *Hardie and Land Ltd. v. Chiltern and Others* ... where the authorities are collected and the limitations of the rule indicated.
>
> Upon these authorities, in my view, it will be necessary, upon the evidence before me, for all persons in the first group to be joined as separate defendants.
>
> (footnotes omitted)

[34] In *Barker v Allanson,* the plaintiff sought to recover the cost of goods supplied to various members of the Chilton Colliery Lodge of the Durham Miners' Association at the Lodge's request.[16] The plaintiff initially obtained an order from the Registrar that four members of the Lodge be appointed to represent the general body of members of the Lodge. A Judge set the order aside, and the English Court of Appeal confirmed he had been correct to do so. The Court of Appeal observed:[17]

> It is plain that all the defendants by representation have not the same interest in the cause. The majority of these defendants would, if they had been named as defendants, have been entitled to prove that the goods were not ordered by them or with their authority, as they were not members of the Lodge in 1921, others might have been able successfully to plead the Statute of Limitations by proving that they had no part or lot in the payments that were made from time to time, while others might have no answer to the claim. The present case is one to which the law as laid down by Lord Parker of Waddington in his speech in the *London Association for Protection of Trade v. Greenlands, Ld.*, is certainly applicable, where he said: "In other words, there might be separate defences open to some members of the association and not to others, and if this were so there would be no common interest within the rule. …
>
> (footnote omitted)

[35] The Court also said:[18]

> Before deciding in any particular case whether a representative order under Order xvi., r. 9, should be made in regard to defendants, it is necessary to consider two questions: (1) What is the cause of action? and (2.) What is the precise class of potential defendants who are to be represented by the defendants on the record for the purpose of imposing liability on them if judgment is given for the plaintiff? The vital thing to remember is that judgment against representative defendants means judgment against each individual person covered by the representation. It is because of this consequence of a representative judgment that the conditions upon which an order to represent may be made are those laid down by Lord Parker in the passage from his opinion in *London Association for Protection of Trade v. Greenlands, Ld.* which Greer L.J has quoted.

---

16 *Barker v Allanson* [1937] 1 KB 463 (CA).
17 At 473-474.
18 At 475.

(footnote omitted)

[36] In *Campbell v Thompson,* a cleaner employed by an unincorporated club fell down some stairs whilst at work.[19] She sued the assistant honorary secretary and the chairman of the club's house committee, both of whom were members of the club, in a representative capacity. Pilcher J held this to be appropriate, and observed:[20]

> I am well satisfied in the present instance that all the members of the City Livery Club have both as employers of the plaintiff and as technical occupiers of the club premises the same common interest in resisting the plaintiff's claim. I am told that the club membership is about 2,500. It is clear that as a practical matter it would be impossible to have 2,500 defendants, and it is equally clear that the club cannot be sued by name.

[37] Practical considerations were to the fore in *Talley's Fisheries Ltd v Minister of Immigration.*[21] At issue in that case was the validity of permits issued to the crew of foreign fishing vessels. The plaintiff sought an order appointing a New Zealand fishing company to represent the interests of foreign crew members. McGechan J held this to be appropriate because New Zealand fishing companies had a sufficiently similar interest in the validity of the permits to justify an order being made.[22] Furthermore, the plaintiff could not "be expected to join 4,500 assorted individuals comprising a shifting pool, many of whom speak no English, and would have even less interest in becoming involved in legal proceedings in this country".[23]

[38] Similarly, in *Whakatane District Council v Keepa* Paterson J made an order appointing one of more than 500 landowners to represent all the landowners in a case relating to the rateability of the land that they owned.[24] All of the landowners had the same interest in the outcome of the proceeding, and none could advance a defence that did not apply to the others.

[39] These cases demonstrate that the courts are likely to approve the appointment of representative defendants in cases where individual members of the represented group are unlikely to have different defences to the plaintiffs' claim. Where that is not

---

19 *Campbell v Thompson* [1953] 1 QB 445 (QB).
20 At 451.
21 *Talley's Fisheries Ltd v Minister of Immigration* (1994) 7 PRNZ 469 (HC).
22 At 471.
23 At 470.
24 *Whakatane District Council v Keepa* HC Rotorua M7/00, 27 June 2000.

the case, the interests of justice will generally require the plaintiff to proceed against the individuals who comprise the group.

Decision

Identification of the group to be the subject of the proposed order

[40] The Crown dealt with the Iwi as a group in settling the treaty claims, and the Settlement trustees now hold the treaty assets for the benefit of that group. The trustees also maintain a current register of members of the Iwi who are beneficiaries of the settlement.

[41] I therefore proceed for present purposes on the assumption that it would be possible to identify those persons whom it is proposed the Settlement trustees are to represent. They are the persons who are listed on the register held by the Settlement trustees and who were more than 18 years of age as at 27 June 2007. Those persons, who counsel advise me number approximately 400, will obviously now be over 27 years of age.

The subject matter of the proceeding

The first and third causes of action

[42] I deal with these together because they are intertwined. I consider the subject matter of the first cause of action to be the nature and legal effect of any arrangement the two joint venture agreements may have created. The plaintiffs assert that the "Iwi Parties" and "Variation Iwi Parties" have breached the two agreements, and seek an order requiring both to perform their obligations under the agreements. In the alternative, the plaintiffs seek an enquiry into damages against those parties. Any damages are likely to include the sums that the 2008 agreement required the Iwi parties to repay once they received the treaty settlement assets.

[43] The amended statement of claim defines "Iwi Parties" and "Variation Iwi Parties" as the counterparties to the two joint venture agreements. The counterparty to both agreements with Tahi was the entity described as Te Kawerau ā Maki. I

therefore take the plaintiffs' claim to extend to individual members of the Iwi even though they are not named as parties to the proceeding.[25]

[44] The first cause of action appears to contain claims based in both contract and equity because, as currently pleaded, it is based on an allegation that the persons who signed the two agreements on behalf of Te Kawerau (the Te Kawerau signatories) did so in their capacity as either the agents or trustees of members of the Iwi. This appears from the following paragraphs of the amended statement of claim:

> 19. The 2007 Joint Venture Agreement was executed for the Iwi Members by Mr Taua and Piki Taulor.
>
> 20. Mr Taua and Piki Taylor had the authority of the Iwi Members to execute the 2007 Joint Venture Agreement.
>
> 21. Mr Taua and Piki Taylor executed the 2007 Joint Venture Agreement as agents of the Iwi Members and/or as trustees of the Iwi.
>
> …
>
> 23. Mr Taua and Piki Taylor had the authority of the Iwi Members to manage the Iwi's interests under the 2007 Joint Venture Agreement.
>
> 24. By written agreement dated 22 July 2008 Tahi and the Iwi Members agreed to vary the 2007 Joint Venture Agreement (2008 Variation). The 2008 Variation is relied upon as if pleaded in full.
>
> 25. By the 2008 Variation the Tribal Authority became, with the Iwi Members, a party to the 2007 Joint Venture Agreement.
>
> 26. The 2008 Variation was executed for Tahi by its sole director Dianne Lee.
>
> 27. The 2008 Variation was executed for the Iwi Members by Mr Taua and Mrs Ewe.
>
> 28. Mr Taua and Mrs Ewe had the authority of the Iwi Members to execute the 2008 Variation.
>
> 29. Mr Taua and Mrs Ewe executed the 2008 Variation as agents of the Iwi Members and/or as trustees for Te Kawerau ā Maki.
>
> 30. Mr Taua also executed the 2008 Variation as the agent of the Tribal Authority.
>
> 31. Mr Taua had the authority of the Tribal Authority to execute the 2008 Variation.

---

[25] Although the statement of claim does not make this clear, I proceed on the basis that this pleading extends only to persons who were over the age of 18 years as at 27 June 2007. Any other approach will lead to difficulties for the plaintiffs in terms of s 6(1) of the Minors' Contracts Act 1969.

> 32. Mr Taua had the authority of the Tribal Authority Trustees to manage the Tribal Authority's interests under the 2007 Joint Venture Agreement.
>
> …
>
> 34. In clause 14 of the 2008 Variation "assets" means all assets held by the Iwi Members and related entities for the collective benefit of the Iwi Members.
>
> 35. Mr Taua and Mrs Ewe had the authority of the Iwi Members to manage the Iwi's interests under the 2007 Joint Venture Agreement (as varied).

[45] If the Te Kawerau signatories signed the two agreements in their capacity as trustees, they would ordinarily be liable in that capacity but members of the Iwi would not have any personal liability. There would be no need for representation orders to be made in relation to this aspect of the plaintiffs' claim because it is not advanced against the Iwi and relief could not be sought against them.

[46] If the Te Kawerau signatories are held liable as trustees, they may have a right of indemnity against the assets of the trust. For that reason Mr Heard submitted for the plaintiffs that a representation order would be appropriate because the third cause of action seeks an order that the plaintiffs be subrogated to any right of indemnity the trustees might have against trust property. I do not accept this submission because I consider the issue of subrogation will necessarily be considered in the context of any relief that may be granted after the Court has made its primary findings in relation to the issue of liability. If a representation order was required at that point it could still be made.

[47] The statement of claim does not specify the precise basis on which the plaintiffs allege the Te Kawarau signatories signed the joint venture agreements as the authorised agents of the Iwi. During the hearing, Mr Heard confirmed the plaintiffs will allege they had the actual authority of all members of the Iwi to sign the agreements on their behalf. Actual authority may be express or implied.[26] I understood Mr Heard to be saying the plaintiffs will allege Te Kawarau signatories

---

[26] *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA) at [40]; see also Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency* (21st ed, Thomson Reuters, London, 2018) at [3-003].

had the express authority of the Iwi to enter into the joint venture agreements. This will require the plaintiffs to prove that each member of the Iwi knew of the proposed venture and authorised the Te Kawerau signatories to sign the agreements on their behalf.

[48] Each member of the Iwi would therefore be entitled to defend the claim on the basis that he or she did not know of the proposed venture and/or did not authorise the Te Kawerau signatories to sign the agreements on his or her behalf. The positions of individual members will obviously differ according to the extent to which they were aware of what was occurring in 2007 and 2008. Common sense suggests, however, that it is likely some Iwi members had no knowledge of the negotiations with Ms Lee. Given that likelihood I do not consider it appropriate to require the Settlement trustees to be responsible for ensuring the interests of all members of the Iwi are properly protected. They cannot be expected to know or make enquiries as to whether individual members had sufficient knowledge of the proposal to give their informed consent to the Te Kawerau signatories signing the agreements on their behalf.

[49] The ability to advance different defences is an extremely important issue in the present case because the plaintiffs are endeavouring to hold individual members of the Iwi personally liable for damages that could amount to $1.3 million together with costs and interest. Those persons should have the ability to make their own decisions as to how they should conduct their defences. 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.

[50] Furthermore, I do not consider the making of a representation order would serve the usual purpose of removing the need for a multiplicity of proceedings. There is no need for any other proceeding to be filed. The plaintiffs can proceed against the members of the Iwi by adding them as respondents and arranging for them to be served. The scope of the evidence the plaintiffs will be required to adduce at trial will

also remain the same because they have no option now but to prove that each member of the Iwi authorised Te Kawerau signatories to sign the agreements.

[51] In addition, the plaintiffs have suggested orders that would require the Settlement trustees to serve copies of all documents and Minutes from the proceeding on all members of the Iwi currently shown on the register as being more than 18 years of age as at 27 June 2007. This means the same amount of administrative effort will be required as would be the case if the Iwi members were named as respondents. The burden of that effort would, however, shift from the plaintiffs to the Settlement trustees. I do not see that as achieving any economy of effort or expense.

[52] All of these factors persuade me that it would not be appropriate to make the representation orders that the plaintiffs seek.

[53] The position might be different if the plaintiffs relied upon the status of the signatories within the Iwi as cloaking them with implied authority to bind individual members. In that event it might be possible to establish an agency relationship regardless of the state of knowledge held by individual members of the Iwi. A claim based on implied authority might therefore prevent individual members from defending the claim on the basis that they did not know of or consent to the signatories entering into the agreements on their behalf.

[54] As the pleadings currently stand, however, the plaintiffs do not allege agency based on implied authority. In addition, the affidavit Ms Lee filed in support of the application does not provide an evidential basis to suggest such a claim may be tenable. The only evidence touching on this point relates to assertions made by Mr Taua regarding his ability to bind the Iwi. These are contained in the following paragraphs from Ms Lee's affidavit:

> 4. Prior to signing the 2007 Joint Venture Agreement Mr Taua assured me and my husband on many occasions that he had the authority to execute the 2007 Joint Venture Agreement on behalf of the Iwi Members and that the Iwi Members would be bound by the 2007 Joint Venture Agreement. He also assured us that Mrs Taylor was an important kuia or senior member of the Iwi, and that she signed the 2007 Joint Venture Agreement in that capacity and did so representing the Iwi Members. Mr Taua was (and still is) the chairman and rangatira/chief of Te Kawerau a Maki and Mrs Taylor was a senior member of the Iwi. Mr

> Taua was also lead negotiator with the Crown for the Treaty Settlement, and the lead claimant in the Iwi's claims in the Waitangi Tribunal.
>
> …
>
> 6. On 22 July 2008 Tahi and the Iwi Members agreed to vary the 2007 Joint Venture Agreement (**2008 Variation**). I executed the 2008 Variation on behalf of Tahi, and Mr Taua and Mrs Hariata Arapo Ewe (**Mrs Ewe**) executed it on behalf of the Iwi Members. At the time of the execution of the 2008 Variation, Mr Taua emphasised again that he had the authority to bind the Iwi Members. He explained that he was signing as rangatira/chief of the Iwi. He also explained that Mrs Ewe was a senior member of the Iwi, and co-claimant in the Wai 470 claim to the Waitangi Tribunal, and that as such she had the authority to bind the Iwi Members.

[55] As it presently stands Ms Lee's evidence is arguably insufficient to establish a claim based on implied authority. The focus in such a claim is on the relationship between the principal and the agent. Authority may be implied from a course of dealing or from the position of the agent vis-à-vis the principal.[27] Generally speaking, however, self-authorisation by the agent alone will not be sufficient to establish a claim based on implied authority.

[56] For those reasons, and because I have not heard argument on the point, I would not be prepared to make representation orders on the basis of a claim founded on implied authority.

The second cause of action

[57] Under the second cause of action the plaintiffs allege the defendants were unjustly enriched when they received the funds from Tahi. They seek equitable compensation from the defendants as a result.

[58] The plaintiffs allege that Tahi paid, and the Iwi Parties and Variation Iwi Parties received, the monies payable under the two agreements on the basis that Tahi would be the Iwi's joint venture partner on the terms set out in the 2007 agreement. Unlike the first cause of action, however, the prayer for relief in this cause of action does not seek redress from the Iwi Parties and the Variation Iwi Parties. Instead it seeks an

---

[27] See Peter Watts and FMB Reynolds, above n 26, at [3-003]; *Freeman & Lockyer v Buckhurst Park Properties Ltd* [1964] 2 QB 480 (CA) at 502-503.

order requiring the defendants to pay equitable compensation. This no doubt reflects the fact that the plaintiffs acknowledge it is unlikely that individual members of the Iwi would have received the funds paid by Tahi.

[59] It follows that there is therefore no reason to make representation orders in relation to this cause of action.

The fourth cause of action

[60] Under the fourth cause of action the plaintiffs seek an injunction against the Tribal Authority trustees and the Settlement trustees preventing them from developing the assets acquired through settlement of the treaty claims with any party other than Tahi. This cause of action does not contain allegations against Iwi members and does not seek relief against them. There is therefore no reason to make representation orders in relation to it.

Conclusion

[61] For the reasons set out above I decline to make a representation order in relation to the first to fourth causes of action.

B The claims in relation to the Māngere property

[62] The fifth and sixth causes of action relate to the Māngere property. Mr Taua has resided in that property throughout the period with which this proceeding is concerned.

[63] The claim under the fifth cause of action arises because Ms Lee contends Mr Taua told her the Iwi had agreed to give him a sum equivalent in value to at least four per cent of any assets received from the treaty settlement. This was to recognise the commitment and sacrifice Mr Taua and his father had made to the Iwi's cause and, in particular, the role they played in pursuing treaty claims on the Iwi's behalf.

[64] On 28 November 2007, Ms Lee and Mr Taua signed an agreement under which Ms Lee agreed to purchase the Māngere property from a company called El Salvador

Ltd. She agreed to pay the sum of $220,000 for the property in two instalments, the first to be paid by 31 December 2007 and the second on a date to be agreed.

[65] For his part Mr Taua agreed to assign to Ms Lee his right to receive a share of the treaty settlement assets. In return, Ms Lee agreed she would transfer the Māngere property to Mr Taua as soon as she received those assets.

[66] In November 2007 Ms Lee entered into an agreement with El Salvador to purchase the Māngere property for $220,000 and she completed the purchase on 31 January 2008. By that time Ms Lee had entered into a further agreement with Mr Taua under which she leased the Māngere property to Mr Taua for $360 per week. In May 2011, the parties renewed the tenancy agreement and Mr Taua agreed to pay rent in the sum of $400 per week.

[67] Ms Lee has never received the share of the treaty settlement assets Mr Taua purported to assign to her under the agreement dated 28 November 2007. Under the fifth cause of action Ms Lee seeks an order requiring the Iwi, the Tribal Authority trustees and/or the Settlement trustees to perform that agreement or pay damages in lieu of specific performance.

[68] Ms Lee also alleges Mr Taua is now significantly in arrears with the rental payable for the Māngere property. Under the sixth cause of action she seeks judgment against Mr Taua in respect of unpaid rental.

[69] I consider these causes of action involve only Mr Taua and Ms Lee. Ms Lee must enforce any claim she may have to Mr Taua's share of treaty assets against him and not the Iwi. Alternatively, she may amend her claim to allege that the Settlement trustees and/or the Tribal Authority trustees hold a proportion of the treaty settlement assets on trust for her.

[70] Similarly, any outstanding rental is owing by Mr Taua and not the Iwi.

[71] There is therefore no need for representation orders to be made in relation to the fifth and sixth causes of action.

Result

[72] The application is dismissed.

Costs

[73] The second and third respondents are the successful parties and would ordinarily be entitled to an award of costs on a category 2B basis together with disbursements as fixed by the Registrar. If counsel cannot reach agreement regarding costs they should file succinct memoranda as soon as possible and I will determine that issue on the papers.

Lang J

Solicitors:
Lee Salmon Long, Auckland
Shieff Angland, Auckland