IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Queenstown Lakes Proposed District Plan

AND

IN THE MATTER of Hearing Stream 12 – Upper Clutha Mapping

LEGAL SUBMISSIONS FOR M BERESFORD (SUBMITTER 149)

Dated 9 June 2017

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MAY IT PLEASE THE PANEL:

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Introduction

1 These submissions are presented on behalf of Mr Michael Beresford, who is a submitter to the plan (**Submission No 149**) in respect of land zoned Rural on Planning Map 18 – Wanaka Rural, Hawea Flats known as Section 2 Blk XIV Sect 5 Lower Wanaka SD (CT OT18C/473) comprising 50.6742 hectares.

2 The land is commonly referred to as 'Sticky Forest'.[1]

Amended Relief Sought by Submitter

3 The Original Submission sought that the site be rezoned to Residential-Low Density, on the grounds that it is no longer well suited for rural activity uses, being already largely surrounded by residential development. In the process of preparing the evidence, the relief has been significantly refined, and the relief now sought is that only 20 hectares of the 50 hectare block be rezoned for residential purposes.

4 The remainder of the land (comprising approximately 31 hectares) would remain Rural with some of that subject to an ONL (**the ONL land**). The southwestern part of the block outside the ONL is also to be retained as Rural given its steeply sloping topography and high visibility. This Rural zoned land (including the ONL land) includes a significant part of the existing mountain bike trails and would be made available for recreational purposes.

5 The residential zoned land would be split between residential low density (**RLD**) and large lot residential (**LLR**) with the LLR zone being to manage the more landscape-sensitive locations and edge effects around the proposed internal residential and rural site boundaries.

"All or Nothing" Basis

6 Relief is sought on an "all or nothing" basis. Mr Beresford's proposal to retain the ONL and to make the land available for ongoing recreational activity is the 'quid pro quo' for obtaining residential development opportunities for the balance of the land.

7 The Submitter is not contesting the ONL over part of the land for the reason only that, due to its topography, it is not suited to any form of development.

[1] Despite references to the land as 'The Plantation' in the Council's legal submissions and evidence. This is factually incorrect as it is the Kirimoko Block adjoining Sticky Forest that has historically been referred to as The Plantation.

8 If the relief sought is declined, the Sticky Forest Block will remain in private ownership, in which event, there can be no certainty that continued public use of the existing bike trails will be permitted. Indeed, that is a highly unlikely scenario,[2] as the Beneficiaries are under no obligation (legal or moral) to continue to make this land available to the public.

9 Accordingly, the proposal can only be viewed as a tripartite 'win-win' solution to the extent that it will:

9.1 Enable (economic) use of the land by the Beneficiaries for a purpose that will enhance their social and economic wellbeing, in a manner, and to an extent that is consistent with the Crown's intentions in providing redress over 110 years ago;

9.2 Retain ONL over part of that land that is not suited to any form of urban development, and in that regard, is a 'win' for the environment;

9.3 Provide for public access to the retained rural land so as to enable the past informal (and unlawful) use of the land for recreational activities to continue, as well as increasing the supply of residential land in Wanaka, both being a 'win' for the wider community.

Summary of Evidence

10 Evidence is to be called in support of the submission from:

10.1 Michael Beresford (Submitter, and part landowner)

10.2 John McCartney (Civil Engineer)

10.3 Michael Copeland (Economist)

10.4 Robert Greenaway (Consultant on Recreation and Tourism)

10.5 Andrew Metherell (Traffic Engineer)

10.6 Natalie Hampson (Economic Consultant)

10.7 William Field (Landscape Architect)

10.8 Dean Chrystal (Planner)

[2] Although that might give rise to a further grievance with the Crown.

Overview of Specific Amendments

11 Mr Chrystal's evidence contains Appendices, the first of which details the specific amendments sought to be made to the plan, including site-specific objectives, policies and rules, to enable development and to facilitate a process of ensuring that the outstanding matters are addressed *prior* to any consent for subdivision of the land.

12 The amendments include:

12.1 A new site-specific Objective that addresses the 3 goals of the Sticky Forest Block Proposal, and 3 implementing policies;

12.2 Location-specific amendments to the density and other controls for the LLR Zone to address the site's sensitive location/values;

12.3 Provision for the potential retention of forestry within the area, and the provision of public cycle and pedestrian access to the Rural zoned land, through an appropriately structured mechanism which might include vesting of the land with the Council for reserve purposes, a community trust or easements created via a subdivision consent;

12.4 Non-complying activity status of any subdivision occurring prior to the implementation of a method to securing the provision of road access to the residential Rural zoned land and public cycle and pedestrian access to the Rural zoned area (including the ONL land); and

12.5 The preparation of a Structure Plan to be approved by the Council through a restricted discretionary consent process **prior to** any development, which addresses:

- Road access and internal roading layout;
- Pedestrian and cycle connections through the subdivision;
- Methods of servicing by infrastructure; and
- The extent of any specific building controls necessary to manage landscape effects, including the need for building platforms to be identified within the LLR zone.

Key Issues

13 Although the Council is opposed to the relief sought by Mr Beresford, the more controversial issues raised in the evidence relate to:

13.1 The proposed treatment (in the order of 4 hectares) of land that would qualify for ONL treatment but where LLR zoning is sought by the Submitter; and

13.2 The fact that the land is currently landlocked.

14 Although other challenges are raised with some aspects of the expert witness statements, none of them are fatal to the rezoning proposal.

15 Despite the factual matrix being unquestionably unique and highly unlikely to be replicated in the District, the Submitter's case for the relief sought is based upon the application of orthodox Resource Management Act 1991 (**RMA**) principles and standards.

Overview of Statutory Framework

16 There is no presumption in favour of the notified proposal and the Panel's task is to consider the optimum planning solution. In considering the competing zonings, the question is "what is the most appropriate zoning for the area of land?".

17 Following the analysis endorsed by the Environment Court,[3] in terms of the s32 tests,[4] in coming to an answer, the Panel will need to examine, having regard to the efficiency and effectiveness of the proposed zoning, which of the outcomes sought is the "most appropriate" method for achieving the objectives of the district plan.

18 A value judgment is required as to what is the "most appropriate", when measured against relevant objectives, and this means what is the 'more suitable' but not the 'more superior' planning outcome.

19 As to the place of Part 2 in this analysis, in light of *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd*,[5] where there are clear 'directive' higher level planning provisions, these will be deemed to be in accordance with Part 2, in which event, there may be no need for further resort to it. However, that is on the proviso that lower level provisions 'give effect to' the higher level provisions.

[3] In *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55.
[4] To be applied to each of the competing outcomes.
[5] [2014] NZSC 38.

20 I discuss the implications of the *King Salmon* decision (and the caveats to its application) further on in these submissions.

21 Suffice to say, Mr Chrystal has undertaken a detailed s32[6] analysis and that is attached as **Appendix 2** of his evidence. While I do not intend to refer to that in any great detail, it is useful to refer the Panel to the summary of his conclusion[7] that the proposed rezoning *better* enables the following benefits than the notified proposal because:

> 77 …
>
> - It enables the owners to obtain economic wellbeing in accordance with the block's compensatory purpose;
> - It enables a refined ONL boundary based on a detailed, site-specific, landscape assessment and Part 2 balancing considerations;
> - It enables the provision of further urban capacity and housing choice in a location that is surrounded by existing and proposed urban development;
> - Provides a mechanism for securing public access to the rural balance of the site;
> - Provides a mechanism for developing a Structure Plan to ensure integration with adjacent urban areas;
> - Provides a rule package to manage visual effects in sensitive locations.
>
> 78 The s32 analysis considers alternatives methods and undertakes an analysis of the objectives and policies concluding that on balance, the proposal better achieves the proposed Plan's objective framework than the zone pattern as notified and enables careful urban growth in an appropriate location whilst concurrently maintaining landscape values, securing recreational access, and enabling the interests of the site's Maori owners to be met.
>
> 79 The s.32 assessment has concluded that partial rezoning for residential use and associated rules better, and more efficiently, achieve both the strategic planning framework and Part 2 of the RMA than the proposed plans current zoning framework.

Background Context

22 This is also referred to extensively in the evidence, although the history of the ownership of this land warrants emphasis as it gives rise to important s8 and s5 issues that must be appropriately accounted for. Moreover, a complete understanding of the history establishes the correct 'starting point' for the Panel's analysis, in terms of ownership; and in respect of any existing values appropriately attributed to the land for the purpose of your evaluation.

[6] For the purpose of addressing s32AA RMA.
[7] In his para 77.

South Island Landless Natives Act 1906

23 The Land is identified in the Ngai Tahu Deed of Settlement entered into by Te Runanga O Ngai Tahu and the Crown in 1997 (**the Deed**) in satisfaction of an outstanding settlement owed by the Crown pursuant to the South Island Landless Natives Act 1906 (**SILNA**). The purpose of that Act had been to vest land in various individual identified landless Maori in order to provide them with a "tangible economic base", as redress for the Crown's wrongful taking of Maori land.

24 A large block of land (comprising 1680 hectares) in the 'neck' between Lakes Hawea and Wanaka was originally identified for transfer to the named individuals, whose whakapapa was, for the most part, linked to Ngai Tahu. However, by the time of SILNA's repeal, four outstanding blocks were left without titles having been issued, and had not been formally transferred to the named individuals. The Wanaka block was one of those outstanding blocks, and the Crown's failure to provide redress to the identified land endured for a further 90 years.

Ngai Tahu Deed of Settlement

25 As a result of a negotiated settlement of a number of claims against the Crown by Ngai Tahu,[8] the original Wanaka land was substituted for the land now commonly referred to as Sticky Forest. It was treated as a 'Substitute' block under the Deed, because by this time the Crown had alienated the original 1680 hectare SILNA block under a Pastoral Lease to private leaseholders (Run 338).

Ngai Tahu Claims Settlement Act 1998

26 The process for selection of the substitute land was specifically addressed in the Ngai Tahu Claims Settlement Act 1998 (**NTCS Act**), terms of which gave legislative effect to the Deed. This legislation dealt with settlement of two blocks of Wanaka land:

26.1 The Wanaka Plantation[9] (commonly referred to as the Kirimoko Block); and

[8] Which included the ancillary claim in relation to the SILNA land.

[9] Described by that name in Schedule 4, and legally described as all that land situated in Otago Land District, Queenstown Lakes District, comprising—

(i) 11.6017 hectares, more or less, being Sections 94, 96, 98, 99, 100, 104, and 106, Block XIV, Lower Wanaka Survey District (SO 19918, SO 22161 and SO 22162). Part Certificate of Title 367/52. As shown on Allocation Plan AS237 (SO 24734); and

(ii) 52.3761 hectares, more or less, being Part Section 3, Block XIV, Lower Wanaka Survey District (SO 963). Subject to survey, as shown on Allocation Plan AS237 (SO 24734).

26.2 The Hawea/Wanaka Substitute Land[10] (i.e. the Sticky Forest Block).

27 A key point to note is that as Sticky Forest was substituted pursuant to this settlement, the redress to the beneficiaries is confined to that land, as the NTCS Act provides that settlement is 'final' with **no** further opportunity for substitution.

28 Section 455 of NTCS Act prescribes the powers of the Minister of Maori Affairs and the Maori Land Court for the purpose of giving effect to the Deed in relation to the Hawea/Wanaka Substitute Block, inter alia, including the process of identifying the successors to the SILNA lands, and for the purpose of facilitating settlement.

Successor Identification

29 In order to complete the settlement, the Crown undertook the long and arduous task of identifying successors, commenced under the direction of the Maori Land Court and the Office of Treaty Settlements (**OTS**). Successor beneficiaries (**the Beneficiaries**) to the Hawea/Wanaka Substitute Block (referred to hereafter as **Sticky Forest**) were finally identified in 2016, some 18 years after the Settlement Date, although the process leading to the transfer of title is ongoing.

30 Mr Beresford explains the detail being worked through, and notes that although the Beneficiaries have been identified, they have **not** all yet been located. Decisions yet to be made by the Beneficiaries include future use of the land and tenure, inter alia.

No Mandate from all Beneficiaries

31 It should be said here that Mr Beresford has no mandate to pursue this rezoning proposal for all the Beneficiaries, although the Working Group he is involved with, is aware of this process, as is the OTS. However, that is of little moment, as it is not a pre-condition to his participation in an RMA process, that the express permission of all affected landowners has been provided.

32 If Mr Beresford's submission is successful, before the development opportunities can be taken full advantage of, it necessarily follows that all of the Beneficiaries will have to agree to pursue that opportunity, although at the time the PDP was notified for review, not all Beneficiaries had been identified, and as stated, they have still not all been located.

[10] See Schedule 117 – SILNA.

Relationship of Sticky Forest and the Kirimoko Block

33 When the land was identified in the late 1990's as the 'Hawea/Wanaka Substitute' block for settlement purposes, it was held in title comprising 115.4988 hectares, all of which had legal frontage (to Rata Street and Aubrey Road). At that time, the entire 115 hectares was owned by the Queenstown Lakes District Council (**the Council**).[11] The land was then subject to a 'Local Purpose' reserve for 'plantation purposes', although, for settlement purposes, in 1998 the Crown took the entire 115 hectares of land from the Council, and revoked that reserve status.

34 From 1998, the Crown held the balance land (the Sticky Forest Block) for settlement on the SILNA beneficiaries. In 2000, the Wanaka Plantation land (Kirimoko)[12] was transferred by Ngai Tahu as a "commercial property" having been selected under the deferred selection process proscribed in the NTCS Act. The Kirimoko Block[13] was later further subdivided and rezoned in 2006 by a group of landowners who acquired the land from Ngai Tahu, and it is now being progressively urbanised.

Sticky Forest Became Landlocked

35 The division of the blocks of land by the Crown was exempt from the usual subdivision provisions under the RMA, by s44 NTCS Act. Although the Kirimoko Block retained its legal access, the 'Sticky Forest' land became landlocked during that subdivision. The land remains landlocked today, although Mr Beresford and other Beneficiaries are working with the Crown to resolve that, as access has to be secured, whether or not the re-zoning outcome sought through this process is successful.

Development Potential at the Time of Settlement

36 As Mr Beresford states in his evidence, when the land was identified for redress purposes in about 1997, it was rural zoned land with *no* ONL treatment. As Mr Chrystal states, exotic forestry was also *not* prohibited, and although that activity required discretionary consent within the plan framework at the time, that was not an overly onerous activity status.

[11] As successor to the former County of Lake, which had held the land since 1953.
[12] Which has colloquially been referred to by witnesses as the Kirimoko Block, but which is referred to as the "Wanaka Plantation" in the NTCS Act, a description incorrectly attributed to the Sticky Forest Block by the Council.
[13] Or plantation land as it was formally described in the NTSC Act.

37 The land was also completely surrounded by rurally zoned land, and would most likely have been viewed by the Crown as being on the same footing as the Kirimoko Block, in terms of its development potential. At the time, either block could have been used for forestry or other rural land use activities permitted at the time, given that it was sufficiently separated from urban development to avoid reverse sensitivity issues.

38 As Mr Chrystal notes in his evidence, shortly after the Deed was finalised and the land selected, the Council began a major strategic planning exercise for Wanaka entitled 'Wanaka 2020'. This paved the way for the rezoning of the Kirimoko Block to the south and Peninsula Bay land to the west in 2007 and 2005, respectively.

39 Although the Sticky Forest land was ultimately identified in the adopted Wanaka Structure Plan Review as a "potential landscape protection area given its landscape sensitivity and its potential to contribute to open space and recreation networks", it was also initially identified in the Wanaka 2020 Structure Plan as holding the same urban development potential as Kirimoko (including in the 'final' version[14]).

40 No doubt that change of heart was influenced by the growing recreational use of the Sticky Forest land, and as a consequence of the strong advocacy on the part of the biking community that the land be protected for that purpose.[15]

Status of Recreational Values of Sticky Forest

41 As the Sticky Forest land has had no reserve status since 1998, all recreational values attributed to the land since then have no legitimacy. They have evolved (possibly) without the requisite RMA approvals, and, (certainly) without the landowners' express permission. Although evidence for Mr Beresford acknowledges the existence of recreational activity on the land (particularly that of Mr Greenaway), that evidence is for the purpose of addressing potential recreational opportunities arising from the rezoning, as opposed to describing existing (legitimate) values.

42 This state of affairs is important and appears not be to fully appreciated by the Council. However, it would be entirely inappropriate, and tantamount to an unlawful expropriation if past and current recreational activities were to be treated as giving rise to values militating against the rezoning being successful. To put it another way, any

[14] See Mr Chrystal's EIC paras 36-38.

[15] Counsel was involved in the early 2000's Kirimoko rezoning promoted by landowners and was personally aware of the representations made by the Biking Community to the Council in relation to Sticky Forest.

such values could not outweigh the social and economic benefits that would otherwise accrue to the Beneficiaries from this rezoning proposal, **unless** they are fully compensated for a loss of that property interest.

Historical Breaches by the Crown Should Not be Repeated

43 The Ngai Tahu Ancillary Claims Report 1995 (**the Claims Report**) records some of this history, and as Mr Beresford notes in his evidence, the Tribunal referred to SILNA and its implementation as "… but a cruel hoax, and … cannot be reconciled with the honour of the Crown". This was because the land initially allocated to the 57 individuals was steep and rocky and considered to be "of no conceivable use to them", despite some of it having cultural interest.

44 As the Claims Report records, that finding was also made on the assumption that all of the land set aside was in fact granted. The Tribunal went on to note that the substantial areas of land allocated to Ngai Tahu individuals but never subsequently granted:

> … further magnifies the breach of the Treaty principle requiring the Crown to act in good faith.

ONL a Significant Blow to Beneficiaries

45 The ONL treatment over much of the Sticky Forest land represents a further significant blow to the Beneficiaries. As Mr Chrystal concludes in his evidence, the ONL renders the land incapable of providing any economic use for the Beneficiaries, particularly as a continuation of exotic forestry is now a prohibited activity.

46 As an aside, it is somewhat paradoxical that the existing land use on the ONL land (exotic forestry) is now regarded as 'inappropriate development' in terms of its impact on s6(b) values, and yet it is the very existence of that forest that has led to the recreational and open space value of the land justifying the status quo protection sought by the Council.

47 It can fairly be said (once again) that this rurally zoned land, affected (in part) by an ONL, would be of no conceivable use to the Beneficiaries. It is apparent from the transcript of the hearing process, that Panel members have raised the prospect of a s85(3) application, which would not be out of the question. It is fair to say that the current treatment of the land renders the land incapable of reasonable use,[16] and creates an unfair and unreasonable burden on the Beneficiaries.

[16] In a s85 RMA sense.

Affect of Rules on Reasonable Use of Land

48 As Brookers notes, it is important to keep the burden on the private landowners in proportion to the public benefit to be gained from any restriction imposed by the rules to ensure that the restriction is not so great as to preclude reasonable economic use of the land affected. Although Mr Beresford's submission does not expressly refer to s85, that is irrelevant, and it is in any event, an implicit basis for his opposition to the Notified Proposal. It is a matter that the Panel is able to give consideration to.

49 'Reasonable use' in the s85 context means:

> … the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant.

50 As the Environment Court has held,[17] the s85(3) tests (incapable of reasonable use/unfair and unreasonable burden on landowners) must be considered in the context of the RMA and with particular reference to:

(a) The natural and physical resources in the case;
(b) Whether no reasonable use can be made of the land (the first test);
(c) Part 2 of the Act;
(d) Part 3 of the Act and the inference from s9 that real property rights prima facie meet the purpose and principles of the Act;
(e) The relevant provisions of the plan concerned;
(f) The rebuttable presumption that the proposed plan is effective and efficient;
(g) The personal circumstances of the applicants considered objectively.

51 In relation to (g), the relevant circumstances of the Beneficiaries would have to include:

51.1 Their expectations that this 'redress land' would provide them with a reasonable (and economic) use of the land, that being the Crown's original objective dating back to SILNA in 1906; and

51.2 That once title passes, the Beneficiaries will be responsible for all the landholding costs (outlined in Mr Beresford's evidence), thus increasing their burden if the notified zoning were to be confirmed by the Panel.

52 As a significant part of the land is covered by an ONL, the presence of the ONL discretionary activity rules that would apply to any proposal to develop or use the land,

[17] In considering an application made under s85(2).

would be a factor that would have to be weighed when considering that test of "unfair and unreasonable burden" to the Beneficiaries. And in the context of s85, the presence of discretionary activity rules does not lead to the result that the plan provisions cannot be unfair and unreasonable.

53 The planning regime for areas subject to an Outstanding Natural Feature (**ONF**) or ONL overlay are well understood by all practitioners in the district. Applications for any development are subject to a comprehensive set of assessment matters which have to be read in light of two guiding principles:

53.1 The overarching principle being that the criteria are to be stringently applied; and

53.2 That successful applications for resource consents will be exceptional cases.

54 As Mr Chrystal notes in his evidence, the discretionary activity regime proposed for the ONL land in the Notified Proposal sets an extremely high bar for the landowners, and it could not be assumed that any consent for development would be approved by the Council. Issue is thus raised with Mr Barr's view that (in this context) "inconvenience should not be justification for removing an ONL" for the land in these circumstances.[18]

Substantive Nature of s8 RMA Obligation

55 A second underlying misconception in the Council's case is the notion that in seeking relief,[19] Mr Beresford is requesting that the Council provide redress to the Beneficiaries for historical Treaty breaches. However, that is *not* the basis for the rezoning proposal, as the Crown has already fulfilled its obligations of redress, and as earlier stated, that settlement is final.

56 However, Mr Beresford is requesting that, as a functionary under the RMA, the Council discharge its s8 (and s5) obligations by actively protecting the Beneficiaries' interests in the redress land that has been provided to them. Put simply, Mr Beresford is seeking a planning outcome that:

56.1 In a substantive way, by making provision for reasonable use of the land, strongly accords with relevant principles of the Treaty of Waitangi; and

56.2 Which, in turn, advances the enabling aspect of s5 in terms of the social and economic wellbeing of the Beneficiaries.

[18] At para 11.35 of his rebuttal evidence.
[19] In his rebuttal evidence.

57 It is concerning that the Council appears not to have a complete understanding of what that s8 obligation entails in this context. Despite being portrayed in a very limited sense in the Council's opening legal submissions, and in Mr Barr's evidence, the s8 obligation has a *substantive positive purpose*, and is not merely procedural. Nor is it limited to a protective role where s6(e) and/or s7 values are threatened by a particular proposal.

58 As I discuss in further detail shortly, the PDP contains an express acknowledgment by the Council of its obligations to "act in accordance with the principles of Treaty of Waitangi and in partnership with Ngai Tahu".[20] Moreover, the proposed Otago Regional Policy Statement (**PORPS**) expressly states[21] that s8 requires local authorities to take into account the principles of 'Te Tiriti O Waitangi' and explains that:

> … deliberate measures need to be taken to ensure the principles are properly understood and taken into account.

59 The PORPS also emphasises that:

> … the principles are broadly expressed, so a measure of flexibility is needed.

What are the Relevant Principles?

60 There is no single set of Treaty principles,[22] although core principles have emerged from Tribunal reports which have been applied to the varying circumstances raised by claims. A relevant principle in this context is the principle of 'active protection'. This duty is not merely passive but extends to active protection of Maori people in the use of their lands and waters *to the fullest extent practicable*. The responsibilities attaching to the discharge of this duty have been described as analogous to fiduciary duties.[23]

[20] Goal 3.2.7, Chapter 5.
[21] In its explanation to Policy 2.1.2.1.2 – Treaty Principles.
[22] https://www.waitangitribunal.govt.nz/treaty-of-waitangi/principles-of-the-treaty/.
[23] Treaty Principles are also recited in the PORPS as including:
- The principle of partnership. Mutual obligations to act reasonably and in good faith.
- The principle of active participation in decision making.
- The principle of active protection of Kāi Tahu interests.
- The principle of development. The Treaty principles are not confined to customary uses or the state of knowledge as at 1840 but are to be adapted to modern, changing circumstances.

The Caselaw on s8 RMA

McGuire v Hastings District Council

61 The Privy Council (**PC**) decision *McGuire v Hastings District Council*[24] is a starting point as to the meaning of the s8 RMA references to the Treaty principles. The *McGuire* case concerned the relationship between the Te Ture Whenua Maori Act (**TTWM Act**) and the RMA. It was a judicial review case where the applicant was seeking injunctive relief. The grievance related to a designation pursued by the relevant council under the RMA in respect of land held as Maori freehold land under the TTWM Act. The basis for the claim was that the designation had a 'blighting' effect which was an "injury to the land" for the purposes of the TTWM Act which gave rise to relief under that legislation.

62 Much of the discussion related to the review jurisdiction of the PC under that legislation, although its commentary on the RMA is instructive. The PC had commented on this issue as a question that arose for its consideration was whether the Maori Land Court had jurisdiction to entertain a collateral challenge to the validity of the Council's decision to notify the requirement under the RMA on the basis that the decision amounted to an "actual or threatened trespass or other injury" to Maori freehold land for TTWM Act purposes.

63 The PC observed that the RMA contained various requirements to take Maori interests into account, and that "faithfully applied as it is to be expected", the RMA code "should provide redress and protection for the appellant if their case proves to have merit". Commencing with s5(1) of the RMA, the PC observed that the 'sustainable management' purpose of the Act is not only concerned with economic considerations, but with "the protection of the environment, social and cultural wellbeing, heritage sites" and similar matters.

64 In achieving that, the PC observed that functionaries under the RMA are bound by certain requirements which include particular sensitivity to Maori issues, notably ss 6(e), 7(a) and 8, and referred to these statutory provisions as 'strong directions' to be borne in mind at every stage of the planning process. The PC referred to the fact that the Treaty of Waitangi:

> … guaranteed Maori the full exclusive and undisturbed possession of their lands and estates, forests and fisheries and other properties which they desire to retain.

[24] [2001] NZRMA 557, at 566, para [21].

65 While holding that these provisions could not exclude compulsory acquisition with proper compensation for necessary public purposes, the PC held that the statutory provisions mean that "special regard to Maori interests and values is required" in such policy decisions as determining the routes of roads. It went on to find that:

> … for instance, their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirt of the legislation to prefer that route.

Buchanan and the Director-General of Conservation v Northland Regional Council

66 In an RMA context, *McGuire's* application of s8 has not been limited to the NOR cases, and was applied by the Environment Court in the resolution of appeals relating to a coastal permit granted to iwi, in *Buchanan and the Director-General of Conservation v Northland Regional Council*.[25] *Buchanan* involved two appeals opposed to the construction of a mussel spat farm on the basis that the proposal was contrary to various planning documents, including the NZCPS, triggering ss 6(a) and (b) values of the RMA. The evidence before the Court was that the applicant, together with a neighbouring iwi, shared mana whenua over the harbour.

67 Iwi jointly argued that by opposing the grant of permits, the Director-General's opposition to the grant of the permits ignored the provisions of ss 6(e), 8, and aspects of the overarching purpose of the Act stated in s5. The Court agreed, holding that:

> … We also agree with Mr Mathias' criticism of the evidence of Mr Riddell suggesting that the provisions of section 8 are limited to some sort of protective role. The section has a positive purpose, and the present application addresses it strongly.

68 And found further:

> [124] We agree with Mr Mathias' submission in his reply that even if it were to be considered that a mussel spat farm could not constitute the enjoyment of a fishery within the contemplation of the Treaty, such must be said to be "so linked to taonga and fisheries that a reasonable Treaty partner would recognise that Treaty principles are relevant. … such issues are not to be approached narrowly ... the principles require active protection of Maori interests" – a passage that he took from a decision of the Court of Appeal in *Ngati Kahu Maori Trust Board v Director-General of Conservation*.[26] As noted by Mr Mathias, that decision concerned section 4 of the Conservation Act 1987, but the same statutory concept emerges in section 8 of the RMA.

[25] Decision A66/2002.
[26] [1995] 3 NZLR 553, at 560, line 28.

69 In discussing the grounds for the appeals (based on s6 matters) and in upholding the grant of permits, the Court held that:

> … the positive economic, social and cultural benefits to iwi, together with the enhancement of recreational opportunities, should prevail over other matters.[27]

70 The Court referred to the evidence given by a planner for the opposing parties who had formed the view in relation to s5 matters:

> The mussel industry is recognised as a primary economic revenue source within New Zealand. I agree that this activity would contribute to the economic and social wellbeing of the economy locally. This should not however be at the expense of the environment, particularly where there are other means of providing mussel spat to the industry.[28]

Ngati Maru ki Hauraki Inc v Kruithof

71 Reference to the "partnership between the races" signified by the Treaty was also central to the Court's decision in *Ngati Maru ki Hauraki Inc v Kruithof*.[29] Of note, in that case it was held that the Council has a responsibility for delivering on the Treaty's Article 2 promise, which Parliament had, in the RMA, "delegated to the Council".

Discussion

72 The *Buchanan* case has much resonance with the issues raised in this case, and the Court's reasoning provides a compelling response to the Council's approach to the issues, in the following respects:

72.1 As to its case that, because the land is not linked to taonga (in a s6(e) sense), s8 Treaty principles are necessarily excluded; and

72.2 That in any event, s8 recognition in an RMA proceeding is otherwise limited to procedural matters (such as consultation).

73 However, and despite Mr Chrystal taking more or less the same approach in relation to s6(e) matters, in light of *Buchanan*, it cannot be overlooked that the Sticky Forest Block was only identified as a 'Substitute' block for redress purposes, because of the Crown's

[27] Reference to recreational opportunity was a reference to the potential enhancement of recreational fishing in the harbour due to the proposal.
[28] The Court found that last sentence "disappointing" and revealed a limited view on the part of the planners of the scope of the 'environment' in a s5 context, in so far as it was limited to visual aspects, contrary to the definition of the term in the Act, while the suggestion of "other means of providing mussel spat to the industry" was merely assertion with no detail or reasons of it.
[29] 11/6/04, Baragwanath J, HC, Hamilton CIV-2004-484-330.

earlier Treaty breach in alienating the intended land to third parties. That original land did have cultural value to the named individuals, who were (mostly) Ngai Tahu. In light of *Buchanan*, the fact that the Sticky Forest Block has no such association, does not entirely displace s8 in the way the Council has suggested.

74 Accordingly, and to use the Court's language in *Buchanan*, the resource in question here (Sticky Forest) is so linked to the taonga of descendants of the Beneficiaries that a reasonable Treaty partner would recognise that Treaty principles are relevant, and that the Treaty principles require active protection (by the Crown *and* the Council – as delegatee of the Crown) of the Beneficiaries' interests. As found by the Court in *Buchanan*, the outcome sought by Mr Beresford also 'strongly' addresses the purpose of s8 (and in turn, the enabling emphasis in s5(1)) in a positive (and substantive) way.

Relevance of Part 2 in this context

75 This leads into the question discussed with Counsel for the QLDC at an earlier stage of this hearing process; namely, whether the balancing of Part 2 matters remains a relevant proposition in light of the *King Salmon* judgment. The answer is yes – in some cases, as *King Salmon* has not ruled out the relevance of an overall balancing approach in every plan change situation.

76 *King Salmon* held that because the NZCPS is intended to give substance to the provisions of Part 2 of the RMA, there was no need **in that case** to refer back to Part 2 at the end of the process in considering the plan change request in question. However, that ruling was made with the following three caveats that have since been given wider RMA application beyond the NZCPS:

76.1 If there is an issue as to the lawfulness of the NZCPS, this would need to be resolved when determining whether a decision maker was acting in accordance with Part 2;

76.2 There may be instances where the NZCPS does not cover a scenario and it is necessary to refer to Part 2;

76.3 Reference to Part 2 may be justified to assist with interpretation where there is uncertainty.

77 In this context, although the subsidiary planning instrument contains some references to s8 matters, that is not so in respect of the *settled* RMA instruments, and notably, the 'higher order' Otago Regional Policy Statement.

78 Accordingly, and although there is strong policy support for the outcome sought by Mr Beresford, particularly in the proposed ORPS and PDP, it is also appropriate to refer to Part 2 for a final balancing of the competing matters arising out of Mr Beresford's submission.

What do the Plan Provisions say about Tangata Whenua Issues?

ORPS

79 There is common ground that the Operative RPS is silent on s8 references to the principles of the Treaty of Waitangi.

PORPS

80 The most complete coverage is contained in the PORPS in Policy 2.1.2 – Treaty Principles, which states:

> Ensure that local authorities exercise their functions and powers, by:
>
> a) Recognising Kāi Tahu's status as a Treaty partner; and
>
> b) Involving Kāi Tahu in resource management processes implementation;
>
> c) Taking into account Kāi Tahu values in resource management decision-making processes and implementation;
>
> d) Recognising and providing for the relationship of Kāi Tahu's culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taoka;
>
> e) Ensuring Kāi Tahu have the ability to:
>
> i. Identify their relationship with their ancestral lands, water, sites, wāhi tapu, and other taoka;
>
> ii. Determine how best to express that relationship;
>
> f) Having particular regard to the exercise of kaitiakitaka;
>
> g) Ensuring that district and regional plans:
>
> i. Give effect to the Ngāi Tahu Claims Settlement Act 1998;
>
> ii. Recognise and provide for statutory acknowledgement areas in Schedule 2;
>
> iii. Provide for other areas in Otago that are recognised as significant to Kāi Tahu;
>
> h) Taking into account iwi management plans.

81 That instrument is under appeal and is subject to further amendment, and at this point, in considering the relief sought to the PDP, the Panel is subject to the lesser statutory standard in s74(2) ("shall have regard to"). That test will ultimately be replaced by the requirement that the PDP "give effect to" the PORPS once that is operative.

82 As an aside, this policy uses the term 'Kai Tahu', which is defined in the PORPS as the "takata whenua of the Otago Region". Put simply, it is Otago dialect which means the "people of Tahu" and which includes the ancestors of the majority of the Beneficiaries:

> The Kai Tahu tribal area extends from the sub Antarctic islands in the south to Te Parinuiowhiti (White Cliffs, Blenheim) in the north and to Kahurangi Point on Te Tai o Poutini (the West Coast).

83 Mr Barr concludes that the ORPS approaches the Treaty of Waitangi principles from the s6(e) perspective. It is his view that the RPS is very much an "effects based" document, and (again) he states that it does not explicitly provide for the use of land "to achieve economic redress". Nor, in his view, does it indicate that the use of redress land might "trump over s6 matters" when considering s5 as part of the final judgement.

84 However, as earlier stated, that is far too narrow an approach to the nature of the Council's duties as a Treaty partner in an RMA context.

PDP

85 Provisions within the 'Strategic Directions' chapter of the PDP also address s8 matters:

85.1 3.2.7 Goal – Council will act in accordance with the principles of the Treaty of Waitangi and in partnership with Ngai Tahu;[30] and

85.2 3.2.7.1 Objective – provide for Ngai Tahu values, rights and interests, including taonga species and habitats, and waahi tupuna.

86 Chapter 5 contains further provisions in the Tangata Whenua Chapter, and notably Objective 5.4.4 and Policy 5.4.4.1:

> 5.4.4 Objective - Enable the sustainable use of Māori land.
>
> Policy 5.4.4.1 Enable Ngāi Tahu to protect, develop and use Māori land in a way consistent with their culture and traditions, and economic, cultural and social aspirations including papakainga housing.

87 These provisions must be construed in light of the introductory material contained in Chapter 5, including the 'Purpose' in Clause 5.1, which is that: (my emphasis)

> Queenstown Lakes District Council will recognise and provide for Ngai Tahu as a partner in the management of the District's natural and physical resources though the implementation of this District Plan. The Council will actively foster this

[30] At the beginning of the Tangata Whenua Chapter, Ngai Tahu and Kai Tahu are used interchangeably, and the footnote reference explains that in the South Island, the local Maori district uses a 'k' interchangeably with 'ng'.

> partnership through meaningful collaboration, seeking formal and informal advice, providing for Ngai Tahu's role as kaitiaki, **and protecting its values, rights and interests.**

88 Again, these PDP provisions have been narrowly construed by the Council, and in its view do not lend much (if any) support for the rezoning proposal. Mr Barr considers that the provisions are also limited to enabling the sustainable use of Maori land on the basis that it is addressing land of value to Ngai Tahu from a cultural (s6(e)) perspective. His view is that the '3.2.7.1 Objective' reference to the "Principles of the Treaty of Waitangi", is limited to consultation.

89 For this reason, Mr Barr criticises Mr Chrystal's discussion of these as "straining the intended use of the objectives".

90 However, such a limited view is not supported by the language used in Goal 3.2.7 PORPS, with its express statement of Council's intent to honour the Treaty principles and as stated in the PORPS "… treaty principles are not confined to customary uses or the state of knowledge as at 1840, but are to be adapted to modern, changing circumstances". Moreover, the PORPS further explains that as "the principles are broadly expressed and not codified, a measure of flexibility will be needed". These guiding statements contained in the PORPS must apply to the interpretation of PDP references to the Treaty obligations as this is the (inferior) instrument that (ultimately) must give effect to the ORPS (once it is operative).

91 And in light of the Environment Court approach in *Buchanan*, the narrow approach to s8 argued by the Council is not justified. The proposed provisions of the PORPS and PDP have to be construed more widely than the Council contends. Even if not able to be construed as addressing other than s6(e) values, there would be a gap that warrants resort to Part 2 on the *King Salmon* approach. However, as each of these documents are only 'proposed' documents, resort to Part 2 is in any event warranted.

92 This leads to the next section of my submissions, which deals with the competing Part 2 provisions where there are internal tensions, as there are in this case. The tensions arise in this instance as a result of the proposal to allow in the order of 4 hectares of land that warrants being included in an ONL for low density residential use. That, in Mr Chrystal's view, is where the primary tension arises, although, in the Council's case, the tension is wider than that, and arises from the proposal to allow residential development of land that is currently used by the district community for biking and other recreational activities.

Tensions and the Need to Balance – Hierarchy of Values

93 As Brookers notes, although some of the factors in ss 6-8 are mutually incompatible in some circumstances, and there are inherent tensions in the provisions of Part 2, the provisions *broadly* indicate the relative weight to be given effectively establishing a hierarchy by giving priority to matters of national importance over s8 matters.

94 However, and importantly, Justice Baragwanath in *Ngati Maru Iwi Authority Inc v Auckland CC*[31] held that in some cases "proportionality" requires that interests of a lower order of significance (in that case, s7) outweighing factors of a higher order (such as s6 values). Other cases adopting this approach include *Auckland Volcanic Cones Soc Inc v Transit New Zealand Limited*[32] where the Court held that if Part 2 matters compete, a decision-maker must have regard to the statutory hierarchy as between ss6, 7 and 8 as part of the balancing exercise, whilst recognising that the object of these provisions is to achieve the purpose of the Act in s5.

95 Notwithstanding Mr Field's analysis as to the placement of the ONL line (which the Council's expert agrees with), Mr Beresford seeks the ability to develop a small area of the ONL land (comprising approximately 4 hectares) as shown on Mr Field's Figure 13 graphic. As Mr Chrystal notes, the land here incorporates an area of low visibility, which is relatively flat and potentially developable, and well screened by existing forestry vegetation. In his view, this part of the site could absorb some development, provided it is sensitively located and managed.

96 In considering this tension, Mr Chrystal explains that he applied a wider Part 2 assessment to the final location of the ONL boundary, and that on balance, the ONL line can be justified in a location that departs from Mr Field's evidence, subject to appropriate planning controls being in place to manage potential visual effects. In that regard, it is proposed that the existing Pinus radiata trees would be retained, reducing visibility of any residential development.

97 In Mr Chrystal's view, the proposed zoning pattern confirms that ONL values are maintained by the proposal and that the proposal overall achieves the balancing of competing outcomes sought in Part 2. From the Submitter's perspective, development of this area of land will enable a yield from the entire development block that makes the development proposition economically viable.

[31] 24/10/02, HC Auckland AP18-SW01.
[32] [2003] NZRMA 54.

98 In a s5 context, Mr Copeland's opinion is that the outcome sought by Mr Beresford will:

98.1 Increase economic and social wellbeing for the Beneficiaries;

98.2 Achieve economic efficiency benefits from a more productive use of the land;

98.3 Retain existing mountain bike facilities on the land and associated retention of and possible increase of expenditure by visitors to Wanaka thus increasing economic and social wellbeing for the community;

98.4 Result in an increased supply of residential sections and an increase in the level of competition in the market for supply of land for residential development in Wanaka.

99 In his view, there are no economic externality costs associated with the proposed rezoning, and he considers that the proposed rezoning is entirely consistent with the enabling thrust of s5.

100 Mr Barr considers that although s8 RMA matters are relevant, "they do not trump over other Part 2 issues", or the broader Strategic Directions chapter. His view is further explained as being that, despite the circumstances being unique, "no exception" for the present circumstances is identified in the Strategic Objectives and Policies. He also states that the Tangata Whenua provisions (Objective 5.4.4 and Policy 5.4.4.1) do not override Chapters 4 and 6 of the PDP.

101 Mr Barr's evidence is also referred to by Counsel for the Council in submissions dated 12 May 2017, where it is said that:

> His view is that economic benefit to the beneficial owners should not outweigh other relevant Part 2 considerations.

102 It is submitted that Mr Chrystal's approach is to be preferred from Mr Barr's 'hierarchical' and less nuanced approach to Part 2 matters, which also suffers from its failure to account for the fact that the object of ss 6 and 8 is to achieve the purpose of the RMA as stated in s5, an approach that is evident in Mr Chrystal's integration of all relevant matters.

103 As succinctly stated by Mr Chrystal at para 90 of his evidence (and with reference to his preceding paras 85-88):

> In my opinion and for the above reasons the economic wellbeing of the beneficial owners and community wellbeing which are captured in section 5 outweighs the landscape values now being proposed which relate to section 6. In this context I note that the proposal still maintains an ONL across approximately half the site, with design controls on the more visually sensitive areas – so it's not that s6 is being ignored or trumped, rather it's around the margins where I lean more towards s.5 and 8, with s6 still taking prominence in the most visually significant areas.

Appropriateness of the 'Deferred' Notice Relief

104 Mr Barr opposes the proposal to provide for the provision of a Structure Plan to guide development of the land until after the rezoning is confirmed; his concerns being that this would fail to provide adequate certainty, or adequately address all potential adverse effects of the development.

105 However, road access is the key 'infrastructural' obstacle to development. A Structure Plan cannot be prepared until road linkages are secured, although Mr Metherell has identified and assessed the various options for access in the event that the land is rezoned.

106 The methods proposed by the Submitter for the deferred development of the land and provision of the structure plan should not be unfamiliar to the Council, as they were modelled on the Peninsula Bay rule in the PDP (Rule 27.8.2) which states:

> No subdivision or development shall take place within the Low Density Residential Zone at Peninsula Bay unless it is consistent with an Outline Development Master Plan that has been lodged with and approved by the Council.

107 In terms of the Strategic Chapter of the PDP, there is also no express requirement that a Structure Plan for a "greenfield site" be included in the plan at the time of the rezoning. The more relevant Strategic Objective is under Goal 3.2.2:

> The strategic and integrated management of urban growth

– which contains an objective:

> To ensure any development occurs in a logical manner … [relevantly] … to promote a compact, well designed and integrated urban form.

108 Specific policies to implement this objective require that "the form of urban development be managed within the UGBs" to ensure:

- Connectivity and integration with existing urban development;
- Sustainable provision of Council infrastructure; and

- Facilitation of an efficient transport network, with particular regard to integration with public and active transport systems.

109 There is nothing to support Mr Barr's view that this detail has to be specified in the detailed provisions of a Structure Plan when the land is rezoned; it is sufficient that the Panel can be satisfied that they are capable of being addressed, as supported by the Submitter's evidence.

110 Provision is made for the Council approval of a Structure Plan through a consent process prior to any development, and this provides ample safeguard that the requisite integration and connectivity is able to be achieved, as the Council is able to decline a (restricted discretionary activity) consent if the Structure Plan is found to be wanting in respect of those matters.

Deferred Zoning an Option

111 If the Panel prefers, a deferred zoning could be applied to the land as an alternative method of achieving the outcomes sought by Mr Beresford.

Provision for Forestry as a Second Preferred Relief if Rezoning Unsuccessful

112 Mr Chrystal refers to an alternative (but least preferred) form of relief that is sought by the Submitter in the event that the Panel is unable to support the rezoning. Mr Chrystal explains that if the rezoning is declined by the Panel, the outcome sought would be for the removal of the ONL from the site in its entirety, as this would enable a continuation of the land for commercial forestry involving exotic tree species. This would be virtually impossible, if the ONL is retained over the site, for reasons Mr Chrystal explains in his evidence.

113 The issue of scope has been raised by the Panel, although it is submitted there is ample scope to make this change, as it is an amendment to the PDP that would bring it more into line with the current operative zoning of the land. To that extent, this form of relief addresses the extent to which the PDP changes the 'status quo' under the operative plan and is on the permitted spectrum of relief between the operative district plan and the Submitter's preferred outcome.

114 Ultimately, it is up to the Panel to consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in Mr Beresford's

submission[33] although in *Johnston v Bay of Plenty RC*[34] the Environment Court held that even where the amendments to a proposed plan were not specifically requested by any submissions, it is sufficient that the submissions had, in substance, effectively raised the issue, thus the Environment Court had jurisdiction to deal with it.

115 In considering this scope issue, it should be borne in mind that the mischief to be avoided is the risk that persons potentially affected by such a change may have been denied an effective opportunity to participate in the plan change process. In considering that risk it is relevant that such amendments would be for the purpose of allowing a continuation of the existing forestry activities and are effectively, a much 'softer' version of the provisions in the Notified Proposal and which are on the spectrum between the Notified Proposal and the outcome preferred by Mr Beresford. In other words, it is fairly close to not allowing his submission. Viewed in that light it is difficult to see how any person could be disenfranchised.

If Rezoning is Allowed

116 A second scope issue arises as a consequence of the request that forestry continue to be permitted under the proposed residential zoning sought by Mr Beresford. The rationale for that is explained in Mr Chrystal's evidence; it is to enable a continuation of the existing exotic forestry on the land, its active management for that purpose, and to enable harvesting of the trees in the lead-up to the land being developed for residential activity.

117 As with the first scope issue, this aspect of relief also addresses the extent to which the PDP changes the 'status quo' under the operative plan, and is on the permitted spectrum of relief able to be sought by the Submitter.

P A Steven QC

9 June 2017

[33] *Melanesian Mission Trust Board v Auckland CC* EnvC A056/97.
[34] EnvC A106/03.

APPENDIX

Factual Errors in Council's Evidence

1 In Mr Barr's rebuttal, he makes reference to Policy 2.1.2 of the PORPS – Decision Version, which expressly requires that the district and regional plan "give effect to" the NTCS Act, inter alia. He goes on to discuss Schedule 1D of the PRPS which lists and describes Maori land reserves and he assumes that the Lake Hawea fishing easement identified in that schedule is one of the blocks discussed in the Waitangi Tribunal Report (W27) discussed in Mr Beresford's evidence.

2 However, this reserve is not land initially intended for the Beneficiaries' ancestors under SILNA, and the 'fishing reserve' referred to in the paragraph referred to by Mr Beresford was the subject of the separate claim by Ngai Tahu quite distinct from the ancillary claim made in relation to the SILNA breach.

Errors in Council's Evidence/Understanding

3 Mr Barr's evidence also contains many assertions in response to Mr Chrystal's planning assessment that are without a sound evidential basis, and particularly in respect of his understanding of the Crown's obligation as trustee of the land on behalf of the Beneficiaries. This is evident in paras 11.67 – 11.74 in particular of his rebuttal evidence, and these statements warrant comment.

4 At para 11.68, Mr Barr states:

> However, the ODP, which became operative from 2001 includes provisions that require the identification of ONL associated with development activities, require a discretionary activity resource consent for forestry, and also require a resource consent for the planting of identified wilding tree species. These factors would most likely have been known to the Crown when it cancelled reserve status and assumed ownership of the land in 1998 with the intention of using it for Treaty redress.

5 This is speculation on Mr Barr's part, and it cannot be assumed that these planning "factors" would have been known to the Crown when it cancelled reserve status and took ownership of the land in 1998, at which time the ODP was **not** an operative document.

6 I am not even sure that it is correct that the plan at the time of the Crown's selection, the plan triggered consent for the planting of identified wilding tree species, or even

whether those provisions would have had any relevance to the Crown at the time, given that the forest already existed.

7 Accordingly, Mr Barr's statement in his following paragraph that the challenges now presented by the PDP are not "… necessarily new to this site" has no evidential foundation, and it is highly unlikely that the Crown would have selected another site that it knew to be of no conceivable use to the Beneficiaries.

8 In terms of the Crown's role, at para 11.70, Mr Barr is also critical of the Crown's failure to:

> … identify and take appropriate steps to enable commercial outcomes for both the Plantation and Sticky Forest/Kirimoko land at the time.

9 He also states in para 11.71 that:

> It is unfortunate that Ngai Tahu Property Group subdivided the Kirimoko site without any provision for future road access to the Plantation site.

10 However, it was not the Crown's role to take steps to pursue commercial development opportunities when it took the land from the Council for settlement purposes. It was also the Crown, and not Ngai Tahu, that subdivided the Sticky Forest land off from the Kirimoko land, leaving it landlocked. That is an outstanding issue that is the subject of ongoing discussion between the Crown and representatives of the Beneficiaries.

11 Finally, any delay in advancing a development proposal for the Sticky Forest land since 1998, has been entirely unavoidable, and is a consequence of the Crown's historical breaches. The Crown had to put in place a process of identifying descendants of the "original 57 landless natives", taking almost 18 years to complete, and as earlier stated, even now, the *location of* all 1017 Beneficiaries has not yet been established.

12 This delay should **not** be held against the Beneficiaries.