IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 135/2017
[2018] NZSC 84

BETWEEN	NGĀTI WHĀTUA ŌRĀKEI TRUST Appellant
AND	ATTORNEY-GENERAL First Respondent
	NGĀTI PAOA IWI TRUST Second Respondent
	MARUTŪĀHU RŌPŪ LIMITED PARTNERSHIP Third Respondent

Hearing:	14 and 15 May 2018
Court:	Elias CJ, William Young, O'Regan, Ellen France and Arnold JJ
Counsel:	J E Hodder QC, J W J Graham and R M A Jones for Appellant D J Goddard QC and D A Ward for First Respondent P F Majurey for Third Respondent P A Joseph, T D Smith and R L Goss for Interveners
Judgment:	17 September 2018

JUDGMENT OF THE COURT

A **The appeal is allowed in part. The claim is reinstated apart from paragraphs (e) and (f) of the declaratory relief sought. The proceeding is remitted to the High Court for hearing.**

B **The first and third respondents must pay the appellant one set of costs of $25,000 plus usual disbursements. We allow for second counsel.**

C **The costs orders in the High Court and Court of Appeal are set aside. If costs in those Courts cannot be agreed they should be set by the Court of Appeal and High Court respectively in light of this judgment.**

REASONS

WILLIAM YOUNG, O'REGAN, ELLEN FRANCE AND ARNOLD JJ
(Given by Ellen France J)

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Introduction

[1] Ngāti Whātua Ōrākei Trust challenges various decisions on the basis that the Crown breached or will breach its rights in relation to the central Auckland region. The claim arises in the context of proposed settlements of historical Treaty of Waitangi (Treaty) claims between the Crown and Ngāti Paoa Iwi Trust and between the Crown and Marutūāhu Rōpū Limited Partnership. It is intended the settlements will be implemented by legislation.

[2] Ngāti Whātua Ōrākei's claim was struck out in the High Court. Davison J considered, amongst other matters, that the relief sought directly related to the development of legislative proposals and granting the declarations sought would breach the principle of non-interference by courts in parliamentary proceedings.[1] The decision to strike out was upheld in the Court of Appeal on the basis the relief sought

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1 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516 [*Ngāti Whātua Ōrākei* (HC)].

would comprise an interference with parliamentary proceedings.[2] Ngāti Whātua Ōrākei was given leave to appeal to this Court on the question of whether the Court of Appeal should have allowed the appeal.[3] The principal issue for determination on the appeal is whether the claim should be permitted to proceed on the basis that it is properly characterised as a claim for the recognition of various rights rather than as a challenge to the decision to legislate.

[3] For the reasons which follow, we consider the appeal should be allowed in part with the result that Ngāti Whātua Ōrākei can largely pursue its claim for declarations as to its rights. As we shall also explain Ngāti Whātua Ōrākei cannot, as its counsel accepted, ask the Court to declare that the proposed decisions to legislate to implement the settlement with Ngāti Paoa and with Marutūāhu are invalid. In the present proceeding that means Ngāti Whātua Ōrākei cannot pursue the challenge to the proposed decision to transfer specified properties which is to be implemented by legislation. Some re-pleading will accordingly be necessary. We add that the existence of the proceeding does not prevent the responsible Minister from introducing the proposed settlement legislation to the House of Representatives or provide any basis for deferral of consideration and passage of the settlement legislation.

[4] To put the issues on appeal in context, it is first necessary to set out the background.

Background

[5] The description of the factual narrative which follows focuses on the recent history and matters relevant to the current proceedings. It is helpful to preface that discussion by noting the Waitangi Tribunal's observations that the situation in Tāmaki Makaurau (Auckland) is "very particular".[4] The position is captured in this passage

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2 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648 (Kós P, Cooper and Asher JJ) [*Ngāti Whātua Ōrākei* (CA)].

3 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 24. The second respondent, Ngāti Paoa Iwi Trust, abided the decision of the Court. Ngāi Te Rangi Settlement Trust and Ngāti Kuri Trust Board were given leave to appear as interveners. A memorandum in support of the appellant and the interveners was filed on behalf of Te Whakakitenga o Waikato Inc.

4 Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 13.

from the Tribunal's report into the process adopted by the Crown in its negotiations with Ngāti Whātua Ōrākei:[5]

> Auckland is now a highly urbanised area with very valuable real estate. In the pre-contact era, Tāmaki was likewise seen by Māori as a desirable place to live, no doubt because of its warm climate, multiple harbours, and good volcanic soil. Unsurprisingly, successive waves of invaders competed for dominance there down the centuries, and the early establishment of Pākehā settlement on the shores of the Waitematā only added to its attractions. Thus, it was – and remains – an intensively occupied part of the country, where constant habitation by changing populations of Māori as a result of invasions, conquests, and inter-marriage has created dense layers of interests. The disposition of those interests as between the various groups identifying as tangata whenua there in 2007 is the subject of controversy.

[6] The recent factual narrative is set out in detail in the decisions of the lower Courts.[6] We draw heavily on those descriptions in the summary which follows.

Narrative of events

[7] For present purposes, it is sufficient to start with the signing of an agreement in principle to settle historical Treaty claims entered into between Ngāti Whātua o Ōrākei Māori Trust Board and the Crown in June 2006. The agreement recorded the parties' in principle agreement to work together, in good faith, towards a deed of settlement. The deed and the agreement would be subject to the passage of legislation.

[8] The relevant feature of the agreement in principle was a clause giving Ngāti Whātua Ōrākei a right of first refusal over various properties, including Crown-owned properties, across an area extending over the Auckland isthmus from the Waitematā Harbour in the north to the Manukau Harbour in the south, across to Avondale in the west and including parts of Onehunga, Ellerslie and Remuera to the east (the 2006 right of first refusal land). The area includes an area transferred to the Crown in October 1840 which encompassed some 3,000 acres between Hobson Bay (Matahaharehare) in the east, Cox's Creek (Opou/Opoututeka) in the west and Mount Eden (Maungawhau) in the south (the 1840 transfer land).

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5 At 13.

6 *Ngāti Whātua Ōrākei* (HC), above n 1, at [10]–[78]; and *Ngāti Whātua Ōrākei* (CA), above n 2, at [5]–[54].

[9] The terms of the 2006 agreement in principle caused concern among other iwi and hapū of Tāmaki Makaurau. In particular, they considered their interests had been adversely affected by the process adopted. A claim was filed with the Waitangi Tribunal. In 2007 the Tribunal undertook an urgent inquiry into the process adopted by the Crown in its negotiations with Ngāti Whātua Ōrākei. As the Court of Appeal observed:[7]

> The Tribunal concluded in its report of 12 June 2007 that as regards [other tangata whenua groups in Tāmaki Makaurau], the Crown's policy and practice had been unfair, both as to process and as to outcome. It recommended that the proposed settlement with Ngāti Whātua Ōrākei not proceed at that stage, and that instead, the Office of Treaty Settlements should work with other groups to negotiate settlements for them. Once that had been done, it would be possible to arrive at a situation where appropriate redress could be offered to Ngāti Whātua Ōrākei and all the relevant groups.

[10] There was then a break in the negotiations with Ngāti Whātua Ōrākei. The Rt Hon Sir Douglas Graham was asked by the Minister for Treaty of Waitangi Negotiations (the Minister) to facilitate discussions with all of the interested parties. Sir Douglas carried out a series of meetings with the relevant iwi and hapū.[8] The discussions culminated in an agreement on 12 February 2010 referred to as the Ngā Mana Whenua o Tāmaki Makaurau and Crown Framework Agreement (the Framework Agreement). The members of Ngā Mana Whenua o Tāmaki Makaurau were:

(a) Ngāti Whātua Rōpū, referred to in the Framework Agreement as the hapū of Ngāti Whātua with spiritual, traditional and historical interests in respect of any of the maunga;

(b) Tāmaki Rōpū, listed in the Framework Agreement as Te Kawerau ā Maki, Ngāti Te Ata, Ngāti Tamaoho, Te Ākitai and Ngāi Tai ki Tāmaki; and

(c) Marutūāhu Rōpū, listed in the Framework Agreement as Ngāti Paoa, Ngāti Maru, Ngāti Whanaunga and Ngāti Tamaterā.

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7 *Ngāti Whātua Ōrākei* (CA), above n 2, at [10].

8 Mr Majurey for Marutūāhu described the report produced by Sir Douglas following this process as the "blueprint" for the steps which followed.

[11] The Framework Agreement recognised that each of the members had "legitimate spiritual, ancestral, cultural, customary and historical interests within Tāmaki Makaurau". The agreement went on to provide for the vesting of the Crown-owned parts of 11 maunga and for their governance. Relevantly, for present purposes, the Crown offered members a right of first refusal over a period of 170 years in relation to all land held by core Crown agencies over a defined area.[9]

[12] At the same time, on 12 February 2010, Ngāti Whātua o Ōrākei Māori Trust Board and the Crown entered into a supplementary agreement to the 2006 agreement in principle. The purpose of this further agreement was to detail how the 2006 agreement in principle could be amended so negotiations on a deed of settlement could be finalised. The supplementary agreement deleted the provisions in the 2006 agreement in principle relating to the right of first refusal. It was noted that the Framework Agreement provided redress with respect to the right of first refusal redress.

[13] The Crown and Ngāti Whātua Ōrākei entered into a deed of settlement of historical Treaty claims on 5 November 2011. At this point, it is only necessary to note the acknowledgement in cl 4.9 of the deed that development of commercial redress in cl 4.8[10] "under the Tāmaki Makaurau collective deed will be in accordance with … [the] Framework Agreement [of] 12 February 2010". The settlement with Ngāti Whātua Ōrākei was implemented by the Ngāti Whātua Ōrākei Claims Settlement Act 2012 (the 2012 Settlement Act).

[14] Following further negotiations, on 8 September 2012 Ngā Mana Whenua o Tāmaki Makaurau and the Crown entered into a collective redress deed. The Court of Appeal described this as "effectively the successor to the Framework Agreement, and … a more formal expression of the matters agreed in it".[11] The

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9 Comprising land in the north from a line between south of Muriwai and Okura, that is south of West-Harbour, Whenuapai, Hobsonville, Greenhithe, Cuthill and Glenvar, and in the south by a line between just north of the Waikato Confiscation Line in Port Waikato to Miranda with some specific exclusions (including certain Crown Forests land).

10 Clause 4.8 acknowledged the deed did not provide for particular cultural and commercial redress to be addressed through the collective deed. Clause 4.8.4 said the commercial redress was "the participation of Ngāti Whātua Ōrākei in a right of first refusal over land in Tāmaki Makaurau for a period of 170 years".

11 *Ngāti Whātua Ōrākei* (CA), above n 2, at [29].

collective redress deed was implemented by the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Collective Redress Act). Section 120 of that Act addresses the process to be followed where land covered by the right of first refusal was required for another Treaty settlement.

[15] The Crown has since continued to negotiate the settlement of Treaty claims with other iwi. In July 2011, an agreement in principle "equivalent" was signed with Ngāti Paoa. The agreement made reference to properties at 71 Grafton Road and 136 Dominion Road as sites over which Ngāti Paoa sought to obtain commercial redress. Both properties are within the area of the 2006 right of first refusal land and the 1840 transfer land.

[16] The Marutūāhu Iwi collective, comprising Ngāti Maru, Ngāti Paoa, Ngāti Tamaterā, Ngāti Whanaunga and Te Patukirikiri, reached agreement with the Crown in a "Record of Agreement in Relation to Marutūāhu Iwi Collective Redress" in May 2013. The properties the Crown was obliged to transfer under the agreement included "up to 13 Ministry of Education sites".

[17] The first decision involved a decision to transfer properties at 71 Grafton Road and 136 Dominion Road to Ngāti Paoa. In a letter dated 17 August 2015, the Minister informed Ngāti Whātua Ōrākei of his "preliminary decision" to transfer these properties to Ngāti Paoa. In that letter the Minister gave Ngāti Whātua Ōrākei two weeks to provide any information on Ngāti Paoa's "historical or contemporary interests or any other information" that Ngāti Whātua Ōrākei wished for him to take into account. On 27 August 2015, Ngāti Whātua Ōrākei filed judicial review proceedings seeking review of that preliminary decision as a wrongful exercise of power under s 120 of the Collective Redress Act. Subsequently, on 21 May 2016 the Minister revised his decision, determining that he would propose legislation to Parliament that would provide for the transfer of the properties to Ngāti Paoa. This was communicated to Ngāti Whātua Ōrākei in a letter dated 8 July 2016.

[18] The second decision which prompted the initiation of the present proceedings was a decision to transfer properties to the Marutūāhu Iwi Collective. On 13 May 2016, the Minister wrote to Ngāti Whātua Ōrākei Trust. The letter recorded what was

described as a "final" decision to include in the redress offer to Marutūāhu Collective one cultural redress property (the Fred Ambler Lookout Site) and the opportunity to purchase up to nine commercial properties in Tāmaki Makaurau. A later (20 May 2016) letter from the Crown Law Office on behalf of the Minister noted the intention was that this transfer decision would be implemented only through settlement legislation.

[19] Finally, in terms of the current status of the settlement proposals, we were told that the Ngāti Paoa negotiators had initialled the settlement deed but that the ratification process had not begun. Further, we were advised that there are ongoing discussions with Marutūāhu and that the settlement deed had not yet been initialled. Significant progress has been made in relation to the drafting of legislation to implement both deeds.[12]

The claim

[20] The second amended statement of claim (the statement of claim) is a claim for judicial review alleging illegality and a failure to consider mandatory relevant considerations. Various declarations are sought.

[21] The pleadings begin with a statement of Ngāti Whātua Ōrākei's status namely that, as at the signing of the Treaty on 6 February 1840, Ngāti Whātua Ōrākei "was an established hapū" in the central Auckland region. It is averred that despite the alienation of its land, Ngāti Whātua Ōrākei has maintained its ahi kā in areas of the central Auckland region including the 2006 right of first refusal land and the 1840 transfer land.

[22] The pleadings then canvass aspects of the factual narrative as outlined above, namely, Ngāti Whātua Ōrākei's settlement with the Crown, the Tāmaki Makaurau collective arrangements and the decisions relating to Ngāti Paoa and Marutūāhu. Particulars are given for what are described, respectively, as the "Ngāti Paoa Decision", the "Revised Ngāti Paoa Decision" and the "Marutūāhu Decision" (the

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[12] There was evidence that, as a matter of practice, the drafting of legislation to give effect to a deed of settlement occurs in parallel with the drafting of the deed.

Ngāti Paoa and Marutūāhu decisions). The Ngāti Paoa Decision is the preliminary decision of 17 August 2015 to transfer land at 71 Grafton Road and 136 Dominion Road to Ngāti Paoa. The Revised Ngāti Paoa Decision is the decision of 8 July 2016, referred to above, to offer the two properties to Ngāti Paoa as part of its redress to be included in the proposed settlement legislation. The Marutūāhu Decision is the decision of 13 May 2016 to transfer the listed properties to Marutūāhu as part of the settlement with Marutūāhu.

[23] The statement of claim identifies a number of constraints said to apply to the Crown's exercise of powers relating to the Ngāti Paoa and Marutūāhu decisions and "any similar decisions". These constraints are identified as requirements to act:

> 22.1 in accordance with tikanga;
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> 22.2 in accordance with its commitment in clause 3.10 of the [deed of settlement between the Crown and Ngāti Whātua Ōrākei] to repair and maintain in future its relationship with Ngāti Whātua Ōrākei based on mutual trust, co-operation and respect for the Treaty of Waitangi and its principles;
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> 22.3 in accordance with its commitment in [s] 7 of the [2012] Settlement Act to repair and maintain in future its relationship with Ngāti Whātua Ōrākei based on mutual trust, co-operation and respect for the Treaty of Waitangi and its principles;
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> 22.4 with appropriate acknowledgement of the ahi kā of Ngāti Whātua Ōrākei;
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> 22.5 in a manner which does not erode the mana whenua of Ngāti Whātua Ōrākei;
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> 22.6 consistently with the Treaty of Waitangi, its principles, and the honour of the Crown in this context; and
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> 22.7 in a manner which upholds and is consistent with the rights and freedoms affirmed in the United Nations Declaration on the Rights of Indigenous Peoples (to which Aotearoa New Zealand is a signatory).

[24] Paragraph 23 of the statement of claim sets out processes it is said must be followed so that the Crown fully informs itself of the matters set out in the excerpt from paragraph 22 of the statement of claim, above. Those processes include full and proper consultation with Ngāti Whātua Ōrākei before developing and considering the Ngāti Paoa and Marutūāhu decisions and any similar decisions, and accommodating the mana whenua of Ngāti Whātua Ōrākei by "not transferring nor unilaterally

developing proposals involving the transfer of land within the 2006 [right of first refusal] Land or the 1840 [t]ransfer [l]and" where certain conditions are met.[13]

[25] It is said that the Ngāti Paoa and Marutūāhu decisions are not in accordance with the matters identified in paragraph 22 of the statement of claim. It follows, the pleadings say, that without relief the Crown will or may continue to conclude settlements involving the transfer of other land within the 2006 right of first refusal land or the 1840 transfer land which do not satisfy the requirements pleaded.

[26] The next part of the statement of claim addresses the Crown's overlapping claims policy, that is the policy by which the Crown resolves claims by two or more iwi to the same area of land. That policy is said not to address the matters in paragraph 22 and, as a result, reflects a failure of the Crown to meet its obligations.

[27] The pleading then asserts the various rights of Ngāti Whātua Ōrākei (and the corresponding obligations of the Crown) pursuant to Ngāti Whātua Ōrākei's settlement deed with the Crown, the 2012 Settlement Act, tikanga, the Treaty, the honour of the Crown, and the United Nations Declaration on the Rights of Indigenous Peoples.

[28] The first ground of review pleads illegality arising from the Minister misdirecting himself in making the Ngāti Paoa and Marutūāhu decisions, as to the matters in paragraphs 22 and 23. The second ground of review is based on the failure to take into account, as mandatory relevant considerations, the matters in paragraphs 22 and 23. In addition, it is said that to meet its pleaded obligations the Crown had to respect Ngāti Whātua Ōrākei's rights as pleaded.

[29] The relief sought is as follows:

> (a) a declaration that Ngāti Whātua Ōrākei has ahi kā and mana whenua in relation to the 2006 RFR [right of first refusal] Land and the 1840 Transfer Land;

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[13] These conditions include the transfer being offensive to Ngāti Whātua Ōrākei as a matter of tikanga or where transfer would "unjustifiably erode the mana whenua of Ngāti Whātua Ōrākei" in the 2006 right of first refusal land or the 1840 transfer land.

(b) a declaration that when applying its overlapping claims policy to any land within the area of the 2006 RFR Land and the 1840 Transfer Land the Crown must act in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga;

(c) a declaration that Crown development and making of offers to include land in the 2006 RFR Land and the 1840 Transfer Land in a proposed Treaty settlement with iwi who do not have ahi kā in respect of that land must be made in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga;

(d) a declaration that in order to comply with tikanga when contemplating, developing or making decisions under its overlapping claims policy to offer any interest in land within the 2006 RFR Land or the 1840 Transfer Land as part of a proposed Treaty settlement with an iwi which does not have ahi kā in respect of those lands, the Crown must:

(i) appropriately consult with Ngāti Whātua Ōrākei as the iwi having ahi kā;

(ii) acknowledge the ahi kā of Ngāti Whātua Ōrākei as the iwi having ahi kā;

(iii) decline to include the land in the proposed settlement if there is evidence that the transfer of the land would unjustifiably erode the mana whenua of Ngāti Whātua Ōrākei as the iwi having ahi kā;

(iv) decline to include the land in the proposed settlement where the land has previously been the subject of a gift to the Crown unless Ngāti Whātua Ōrākei, the gifting iwi, has provided its consent to the transfer;

(e) a declaration that the Ngāti Paoa Decision, the Revised Ngāti Paoa Decision and Marutūāhu Decisions have been developed and made inconsistently with Crown's obligations to make those decisions in accordance with tikanga; and

(f) a declaration that the Ngāti Paoa Decision, the Revised Ngāti Paoa Decision and Marutūāhu Decisions have been developed and made inconsistently with the Treaty of Waitangi and its principles, and Ngāti Whātua Ōrākei's rights as affirmed by the United Nations Declaration on the Rights of Indigenous Peoples.

The judgments in the High Court and the Court of Appeal

[30] In the High Court, Davison J found the claim was not consistent with the process and agreements which followed the Waitangi Tribunal report leading to the enactment of the Collective Redress Act. In addition, the Judge said that the claim concerned decisions made in the context of the development and preparation of legislation which, if passed, would provide for the lawful transfer of the properties in

issue. Davison J also saw the decision in issue as a "quintessentially political" decision against which there was no "legal yardstick" to measure.[14] On this basis, the claim could not possibly succeed and was struck out.

[31] The Court of Appeal said the Judge was wrong to make factual findings about the effect of the collective arrangements at the strike-out stage but found the judgment did not turn on those factual findings. Rather, the critical factors were the impact of the proposed legislation and the non-justiciable nature of the decisions.

[32] The Court of Appeal considered that the principle of non-interference with parliamentary proceedings was engaged. That was primarily because the challenged proposal was not that the properties be transferred to Ngāti Paoa and Marutūāhu "but that there be legislation authorising that to occur".[15] The Court said it was "wrong in principle for a court to declare unlawful an outcome intended to be secured only if authorised by Parliament".[16] The Court accepted that the declaratory relief sought did not put the challenge in exactly those terms. But, the Court said, "added together, the declarations sought would have that effect".[17] Although the pleadings gave the appearance of looking to the future:[18]

> … if made now in the course of a process already under way and with legislation intended to be introduced, it could only be read as a decision by the Court that the intended legislation to give effect to the disputed decisions would breach Ngāti Whātua Ōrākei's rights.

[33] The Court also considered that the only point of the declarations sought would be related to the development of legislative proposals. That was because, "in the absence of legislation they would otherwise be an empty gesture declaring unlawful something that was not intended to happen".[19] Finally, the Court said that putting the matter in another way, "there is no proposal that will affect Ngāti Whātua Ōrākei's rights other than a legislative one".[20]

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14 *Ngāti Whātua Ōrākei* (HC), above n 1, at [141] and [142].
15 *Ngāti Whātua Ōrākei* (CA), above n 2, at [100].
16 At [100].
17 At [101].
18 At [102].
19 At [104].
20 At [105].

The appeal

[34] It is common ground that the function of the courts includes making declarations as to rights. Nor is there any dispute that it may be possible for Ngāti Whātua Ōrākei to advance a claim in relation to customary rights. Where the parties take issue is as to whether Ngāti Whātua Ōrākei's current claim is properly characterised as a claim about its rights or whether, as the Crown and Marutūāhu contend and the lower Courts found, the claim is a challenge to legislative proposals. The parties' submissions sufficiently appear in the discussion of the issues which follows.

Discussion

[35] The focus in the judgments below and in argument on the principle of non-interference in parliamentary proceedings means it is helpful to begin with some discussion of that principle.

Some principles

[36] Some propositions as to the scope of the principle are not challenged. The first is the proposition, accepted in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* (*Sealords*), that a court would not make an order to prevent the introduction of a Bill to the House of Representatives.[21] The second is the proposition that the courts should not try to "dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament".[22]

[37] In addition, the cases provide some clear illustrations of what comprises the impeachment of the proceedings in Parliament. For example, the House of Lords in *British Railways Board v Pickin* rejected a challenge to legislation based on the claim

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21 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) [*Sealords*] at 307–308.

22 At 308. See also *Comalco Power (New Zealand) Ltd v Attorney-General* [2003] NZAR 1 (HC) (successful strike-out application on the basis it was not possible to obtain a declaration that the introduction and passage of legislation is a breach of contract); *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [98]: "the Courts should not interfere so as to frustrate the powers of the House to enact legislation"; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 530–534; and see David McGee "The Legislative Process and the Courts" in Philip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 84 at 93–94.

Parliament was misled by means of a false recital in the preamble of an Act.[23] That claim was seen to involve the impeachment of proceedings in Parliament.[24] There are also cases illustrating that legislation can be proposed that would cut across rights.[25]

[38] Following on from that last point, New Zealand authorities in the Treaty context have also attached significance to the question of whether what is sought is a declaration of rights or whether the only impact on rights is as a result of legislation. An illustration of that approach is *Milroy v Attorney-General*, relied on by the Crown in this case.[26] In *Milroy* the Court of Appeal dealt with a challenge to a settlement agreement between the Crown and Ngāti Awa which would remove forest land from the reach of Tūhoe. Tūhoe were described as cross-claimants in relation to that land. The transfer was to be implemented by legislation and the appellants sought to challenge the advice by officials preparatory to the legislation.

[39] The Court considered that the claim was an attempt "to draw the Court into an examination of the accuracy and completeness of the advice of officials in the course of the formulation of government policy even though no rights" were affected by the advice.[27] This was seen as taking the courts into "the very heart of the policy formation process of government" in a situation where the decision that would impact on Tūhoe's rights was the resulting legislation and executive acts.[28]

[40] The approach in *Milroy* was applied in *New Zealand Maori Council v Attorney-General*.[29] The Crown had entered into a deed of settlement with

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23 *British Railways Board v Pickin* [1974] AC 765 (HL).

24 See also *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 at 330.

25 *New Plymouth District Council v Waitara Leaseholders Assoc Inc* [2007] NZCA 80; (2007) 2 NZTR ¶17-005; leave to appeal declined: *Waitara Leaseholders Assoc Inc v New Plymouth District Council* [2007] NZSC 44.

26 *Milroy v Attorney-General* [2005] NZAR 562 (CA). For a recent illustration of this approach see: *Motairehe Whanga Te Uri o Rangihokaia ko Ngātiwai Ki Aotea Inc v MacDonald* [2018] NZHC 1231.

27 At [11]. A similar approach was taken in *Canada (Governor General in Council) v Misikew Cree First Nation* 2016 FCA 311, (2017) 405 DLR (4th) 721. De Montigny JA (with whom Webb JA agreed) rejected a claim the Crown had an obligation to consult the Misikew Cree when contemplating changes to legislation that might affect the rights of the Misikew Cree. Pelletier JA agreed in the result but considered the idea the legislative process was "indivisible" from the point of policy formation to assent might be "problematic" in some cases: at [87]. The Supreme Court of Canada gave leave to appeal from this decision and has heard the appeal. Judgment is yet to be delivered.

28 At [11].

29 *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

Te Arawa. The New Zealand Maori Council and others claimed that the Crown had acted in breach of certain guarantees predating the Crown Forest Assets Act 1989 and in breach of the Crown's statutory duties under that Act by entering into the deed and that the transfer of Crown forest land under the deed was contrary to fiduciary duties. The relief sought included declarations relating to obligations under the settlement deed and as to the fulfilment of fiduciary duties.

[41] The Court agreed with the appellants that the 1989 Act did not contemplate the proposed arrangements provided for in the deed with Te Arawa. Nonetheless, the Court said it was not appropriate to make a declaration that a future Act of Parliament would, if passed, override an earlier one. Further, the other declarations sought were seen as predicated on the proposition that the Crown had bound itself to so act. But that was not so because the agreement was conditional on legislation. Accordingly, the only commitment made under the deed was a commitment to introduce a settlement Bill. That brought the case into line with cases like *Rothmans of Pall Mall (NZ) Ltd v Attorney-General*[30] and *Sealords*. Further, the ability of the Crown to propose legislation to alter its contractual obligations had similarities to *Comalco Power (New Zealand) Ltd v Attorney-General*,[31] *Westco Lagan Ltd* and the *New Plymouth District Council v Waitara Leaseholders Assoc Inc*[32] as well as *Milroy*. Accordingly, the decision as to whether the settlement deed should become unconditional was seen as one for Parliament.

[42] By contrast to *Milroy* and the *New Zealand Maori Council* case, the claim in *Port Nicholson Block Settlement Trust v Attorney-General* was permitted to proceed.[33] The declarations sought in that case focused on consistency between the Taranaki Whānui deed and the Ngāti Toa deed. That was not seen as crossing the line because it did not attempt to intervene in the legislative process. The challenge was characterised as "a less problematic process of construing the promises the Crown made to Taranaki Whānui in its Deed and comparing those to the promises made to Ngāti Toa in its Deed".[34] Further, Williams J said:

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30 Above n 24.
31 Above n 22.
32 Above n 25.
33 *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181.
34 At [60].

> [62] There are additional considerations. Unlike the way the case appears to have been pitched in *Milroy*, there are rights at issue here. If Taranaki Whānui is correct in the assertions made, then they have rights and interests under the Settlement Deed and Act that are, or may be, justiciable. There is a satisfactory legal yardstick that a court can utilise in resolving the controversy.
>
> [63] Provided they are careful not to cross the boundary into the domain of Parliament or the executive's role in advancing legislation, it would be wrong in principle and dangerous in practice for the courts to leave the Crown to "acquit itself as best it may" as the "sole arbiter of its own justice", where the controversy raises justiciable issues of statutory or deed interpretation *or indeed of customary law if properly pleaded*.
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> (footnotes omitted, emphasis added)

[43] A different remedy was adopted in *Te Ohu Kai Moana Trustee Ltd v Attorney-General* in which the High Court dealt with a challenge to the Kermadec Ocean Sanctuary Bill 2016.[35] The plaintiffs in that case characterised their claim as seeking a declaration as to their existing rights, for example, to quota arising out of the Treaty of Waitangi Fisheries settlement. The Attorney-General sought, and was granted, a temporary stay of the proceeding.[36]

[44] The Judge approached the matter on the basis "that there may be a spectrum and it is a matter of assessing on which side of the line a particular proceeding falls".[37] The mere fact that there was legislation in the House was not seen as able to "operate as a ban on consideration of all related issues".[38] Simon France J accepted that the proceeding was not solely directed at the Kermadec Bill. But, given there was now a Bill moving through the House, the "comity" principle required some respect.[39] It was also seen as relevant that what was sought was "a temporary lull" to allow Parliament to complete its process.[40]

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35 *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2016] NZHC 1798, [2016] NZAR 1169.

36 A stay was also granted in relation to other proceedings relating to the Kermadec Ocean Sanctuary Bill in *Ngāti Mutunga O Wharekauri Asset Holding Co Ltd v Attorney-General* [2017] NZHC 2482, [2018] NZAR 18. Clark J found the claim engaged s 11 of the Parliamentary Privilege Act 2014. Section 11 prevents the offering of evidence and so on in a court or tribunal concerning proceedings in Parliament for various stated purposes.

37 At [24].

38 At [24], citing, to illustrate, *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 (CA).

39 At [26]. The comity principle is usefully discussed in *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC), and see Parliamentary Privilege Act, s 4(1)(b).

40 At [26].

[45] The Judge noted that there were aspects of the case that could continue at the same time as the legislative process. Whether the source of the plaintiff's quota shares in the waters around the Kermadec Islands, namely the Treaty of Waitangi and the Fisheries settlement, carries with it "particular obligations before the Crown institutes steps to (arguably) lessen the value of the settlement" was seen as "a matter capable of exploration".[41] But, there was no suggestion of severing aspects of the claim and other aspects did cross over into the impermissible.[42]

[46] From the cases to date, there remain questions about the exact scope, qualifications and basis of the principle of non-interference in parliamentary proceedings.[43] As will become apparent, it is not necessary in the present case to resolve the exact metes and bounds of the principle. It is, nonetheless, appropriate to sound a note of caution at the extent to which the principle of non-interference in parliamentary proceedings has been held to apply to decisions somewhat distant from, for example, the decision of a minister to introduce a Bill to the House or from debate in the House. It would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice to take the advice leading up to that decision out of the reach of supervision by the courts. That would be to ignore the function of the courts to make declarations as to rights. In that respect, it is relevant that the observations in *Milroy* were made in the context of acceptance by counsel for the appellants that the officials' advice did not affect the rights of any person or have the potential to do so.

[47] The Court of Appeal in *Milroy* described the test as to what amounts to interference in parliamentary proceedings as one of function, rather than "remoteness in time or evolution".[44] However, it may not be appropriate to discount out of hand the relevance of timing in determining the reach of the principle of non-interference

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41 At [27]. To similar effect see *Morrison v Treaty of Waitangi Fisheries Commission* [2004] 1 NZLR 419 (HC) (plaintiffs could challenge validity of certain aspects of the Treaty of Waitangi Fisheries Commission's proposed allocation plan but Court could not make an order stopping the introduction of legislation to implement the plan). Contrast: *Potaka-Dewes v Attorney-General* [2009] NZAR 248 (HC).

42 The claim for a declaration that the terms proposed by the Crown breached the Crown's duty of good faith was seen as crossing the line because those terms were only a reference to the terms of the Bill.

43 See *Sealords*, above n 21, at 307–308.

44 At [17].

in parliamentary proceedings. As the Court of Appeal in *Sealords* observed, the principle of non-interference with parliamentary proceedings can be characterised as "the corollary" of the "implied right to freedom of expression in relation to public and political affairs [that] necessarily exists in a system of representative government".[45] That suggests a rather more direct temporal link to what occurs in the House than was the case in *Milroy*.

[48] As foreshadowed, it is not necessary to finally resolve these questions here. That is because it is possible to identify in the present claim public law decisions which can be the subject of challenge (whatever their ultimate merits) without interference with parliamentary proceedings. On that basis, the Court of Appeal was wrong to characterise the relief sought as confined to a challenge to the legislative proposal for the transfer of the specified properties. Nor was it correct to find that the only impact on Ngāti Whātua Ōrākei will be through the proposed legislation. Rather, there are live issues as to the nature and scope of the rights claimed which Ngāti Whātua Ōrākei should be permitted to pursue in the usual way.

[49] We turn then to consider the pleadings and identify the aspects of the claim that should be allowed to proceed applying the principles applicable to a strike-out application.[46] We preface this discussion by noting that the pleadings will require some re-working to reflect the discussion which follows.[47]

Application of the principles to the present case

[50] Underlying the statement of claim is the assertion of Ngāti Whātua Ōrākei's rights arising either out of the Treaty of Waitangi or customary rights in relation to the 2006 right of first refusal land and the 1840 transfer land. Second, there is some reference to rights arising from the 2012 Settlement Act. Third, it is possible to discern a challenge to the application in future cases of the Crown's overlapping claims policy. Fourth, there is a claim raising issues about the approach to be taken to the giving of

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45 At 308.

46 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [32]–[33] per Elias CJ and Anderson J. See also Richardson P's summary of principles in *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267–268; and *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [146] per Blanchard, McGrath and William Young JJ.

47 The written submissions for the appellant set out revised declarations but we address the form of the pleading in the second amended statement of claim: see the relief sought outlined at [29] above.

a notice under s 120 of the Collective Redress Act. Finally, there are associated claims to particular processes which are said to flow from the asserted rights. We discuss each of these heads of claim in turn.

[51] The first aspect identified is reflected in the first of the declarations sought (paragraph (a)), namely, that Ngāti Whātua Ōrākei has ahi kā and mana whenua in relation to the 2006 right of first refusal land and the 1840 transfer land. No doubt the Ngāti Paoa and Marutūāhu decisions were the catalyst for the proceeding and aspects of the claim are directed primarily to those specific decisions. That said, on its face, this aspect of the claim is not directed solely to those decisions. This point was recognised by Davison J in the High Court.[48] The Judge said the declaration sought in paragraph (a) did not itself raise an issue in terms of the non-interference principle. Rather, the problems foreseen by the Judge concerning paragraph (a) related to the fact the Tribunal had considered the question and a perceived absence of utility.

[52] As to the first concern referred to by the Judge, no doubt it will be argued at trial that any rights Ngāti Whātua Ōrākei had have been conceded by the process leading up to and including the enactment of the Collective Redress Act. Marutūāhu, for example, argue that Ngāti Whātua Ōrākei expressly agreed to the removal of the only measure in its Treaty settlement that reflected the exclusivity now asserted. But these are questions for trial, as the Court of Appeal said. Further, in terms of the concern about utility expressed by the Judge, and re-iterated in the submissions for the Crown and Marutūāhu, declarations of rights as sought would be relevant to the ongoing relationship between Ngāti Whātua Ōrākei and the Crown.

[53] The issue also remains live because there may well be other claimant groups who seek redress from the Crown in the form of interests in land in the 2006 right of first refusal area or the 1840 transfer land. If current policies are pursued, any settlement with those other groups may ultimately be the subject of legislation. But it is not inevitable that settlements or all aspects of a settlement will be implemented by legislation. In any event, where there are potentially rights in issue, it must be open to Ngāti Whātua Ōrākei to seek to clarify its status in the area over which it claims

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[48] *Ngāti Whātua Ōrākei* (HC), above n 1, at [134].

rights short of a challenge to the particular decisions to transfer the specified properties.[49]

[54] The Crown also questions whether the current form of the proceeding, styled as a claim against the Crown, is an appropriately constituted proceeding to deal with customary rights. Directions as to service on other members of Ngā Mana Whenua o Tāmaki Makaurau were, however, made at an earlier point by Wylie J and we understand those directions have been complied with.[50] This is not a basis for striking out the proceeding.

[55] As to the second aspect, that is, a claim based on the 2012 Settlement Act, the statement of claim refers to the acknowledgement by the Crown in 2012 of Treaty breaches and their effect on the ability of Ngāti Whātua Ōrākei to exercise mana whenua. The option of re-pleading to encompass this aspect directly should be given to the appellant. In terms of this and the first aspect of the claim identified, there are analogies with the *Port Nicholson* case because of the claims to rights and as to compliance with the settlement deed.

[56] Turning then to the third aspect of the claim that may proceed, that is, the challenge to the application of the overlapping claims policy to land within the area of the 2006 right of first refusal land and the 1840 transfer land. The declaration sought would state that the application of the policy in those areas must confirm with tikanga (paragraph (b)).

[57] To put this part of the discussion in context, the relevant part of the overlapping claims policy states:[51]

> The Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. These groups are able to negotiate their own settlements with the Crown. Nor is it intended that the Crown will resolve the question of which claimant group has the predominant interest in

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49 Woolf and Woolf observe that declaratory proceedings "have always played an important part in determining status": Lord Woolf and Jeremy Woolf *Zamir and Woolf: the Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at [3-116].

50 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2016] NZHC 347.

51 Office of Treaty Settlements *Healing the past, building a future; A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington, 2018) [the Red Book] at 53.

a general area. That is a matter that can only be resolved by those groups themselves.

[58] At the heart of the complaint on this aspect, it is said that the Crown is wrong to say that tikanga and Treaty rights do not have to be determined prior to the making of a settlement offer.

[59] The same points made about the form of the declaration sought in paragraph (a) apply here. Ngāti Whātua Ōrākei has an ongoing, live, interest in how the policy is applied in these areas. It is the case that Ngāti Whātua Ōrākei will have to establish that the policy provides a basis for a reviewable decision[52] but it cannot be said it is certain that claim would fail. The claim should be permitted to proceed.

[60] The fourth aspect of the claim identified arises from the declaration sought in paragraph (c) dealing with the process to be applied by the Crown to offers to include land in the 2006 right of first refusal land and the 1840 transfer land in Treaty settlements with other iwi. The Crown's submission is that such a declaration would cut across Parliament's ability to consider legislative proposals because it would result in limits on what can be brought before Parliament. A similar point is made in relation to the form of relief sought in paragraph (d) dealing with the processes Ngāti Whātua Ōrākei say should apply in order to comply with tikanga in making various decisions under the overlapping claims policy. However, both declarations are framed generally and would have application to future decisions. In addition, both paragraphs can be construed as raising issues about s 120 of the Collective Redress Act and, in particular, about the process to be followed before a notice is given under s 120.

[61] Section 120 provides as follows:

> **120 Land required for another Treaty settlement ceasing to be RFR [right of first refusal] land**
>
> (1) The Minister for Treaty of Waitangi Negotiations must, for RFR land required for another Treaty settlement, give notice to both the RFR

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52 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 (HL) at 192–194 per Lord Bridge and 206 per Lord Templeman; *Attorney-General v Refugee Council of New Zealand* [2003] 2 NZLR 577 (CA) at [27], [30], [40], and [46] per Tipping J, on behalf of himself, Blanchard and Anderson JJ, at [106] and [120]–[121] per McGrath J and see [293] per Glazebrook J; see also Mark Elliott and Jason NE Varuhas *Administrative Law: Text and Materials* (5th ed, Oxford University Press, Oxford, 2017) at 524–528.

landowner and the Limited Partnership that the land ceases to be RFR land.

(2) The notice may be given at any time before a contract is formed under section 127 for the disposal of the land.

(3) In this section, **RFR land required for another Treaty settlement** means RFR land that is to be vested or transferred as part of the settling of historical claims under the Treaty of Waitangi, being the historical claims relating to acts or omissions of the Crown before 21 September 1992.[53]

[62] In *Ngati Te Ata v The Minister for Treaty of Waitangi Negotiations* Whata J concluded decisions under s 120 are reviewable.[54] In doing so, the Judge rejected arguments these decisions were not reviewable because of the principle of non-interference with parliamentary proceedings and on the basis the decisions were "quintessentially policy driven".[55] Whata J said:

> [52] It is well settled that matters contemporaneously before Parliament are non-justiciable. But as Mr Kinsler quite properly noted, the Crown elected to use the early transfer procedure rather than give effect to transfer through the Ngāti Tamaoho Settlement Bill. While the transfers form part of the background to the Bill, they are not subject to the Parliamentary process, so the standard principle of non-justiability based on non-interference with Parliamentary processes has no obvious application.
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> (footnote omitted)

[63] There was no dispute that decisions under s 120 are reviewable but Mr Goddard QC for the Crown maintained the challenge here was directed to the particular decisions and, on that basis, engaged the principle of non-interference with parliamentary proceedings.[56] However, a challenge to the way in which s 120 is applied which is independent of the particular decisions triggering the proceeding can be identified in the claim and is still relevant. That is so even though Ngāti Paoa and Ngāti Whātua Ōrākei, we were told, have settled the dispute between themselves over the two properties.[57]

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53 RFR land is defined in s 118 of the Collective Redress Act.

54 *Ngati Te Ata v The Minister for Treaty of Waitangi Negotiations* [2017] NZHC 2058.

55 At [51](b).

56 Mr Goddard QC argued that s 120 is a machinery provision and not the source of a power to transfer properties.

57 In its application for leave to appeal to the Supreme Court Ngāti Whātua Ōrākei said that accordingly relief was no longer sought in relation to the transfer of the Ngāti Paoa properties.

[64] It is not certain that a claim by Ngāti Whātua Ōrākei that there are some process obligations arising in relation to the s 120 notice deriving from the interests or rights claimed in the area would fail. That is because it is quite possible that the Crown will seek to remove other land from the relevant areas other than through legislation as, in fact, was initially proposed for Ngāti Paoa.

[65] The foregoing analysis addresses all but paragraphs (e) and (f) of the relief sought. As currently drafted, paragraphs (e) and (f) are problematic in terms of the principle of parliamentary non-interference. The relief sought in paragraph (e) is a declaration that the particular decisions, that is, the Ngāti Paoa and Marutūāhu decisions, "have been developed and made inconsistently with the Crown's obligations to make those decisions in accordance with tikanga". Paragraph (f) seeks a declaration the particular decisions have been made inconsistently with the Treaty and its principles, and with Ngāti Whātua Ōrākei's rights as affirmed by the United Nations Declaration on the Rights of Indigenous Peoples.

[66] Both paragraphs are framed as challenges to process which may be broader. But the processes are described as relating only to the Ngāti Paoa and Murutūāhu decisions, as specifically defined. In context, the relief sought can only be characterised as a challenge to the decision which has been made to legislate to transfer the relevant properties albeit the illegality is said to arise because of some prior lack of process. To this extent we agree with the approach taken in the Court of Appeal. We would accordingly strike out these two paragraphs. This would also require re-pleading of other aspects of the current pleading which are directed towards the transfer of these particular properties.

Result

[67] In accordance with the view of the majority, the appeal is allowed in part. We reinstate the claim apart from paragraphs (e) and (f) of the declaratory relief sought. The proceeding is remitted to the High Court for hearing.

[68] Given that the appellant has substantially succeeded in this Court, we order that the first and third respondents must pay the appellant one set of costs of $25,000 plus usual disbursements. We allow for second counsel. Further, as the strike-out

proceedings have failed, the costs orders in the High Court and Court of Appeal are set aside. If costs in those Courts cannot be agreed they should be set by the Court of Appeal and High Court respectively in light of this judgment.

ELIAS CJ

[69] Ngāti Whātua Ōrākei Trust appeals a decision of the Court of Appeal affirming orders of the High Court striking out its application for declaratory relief as to its rights and interests in central Auckland.[58] The declarations were sought by Ngāti Whātua Ōrākei after the Minister for Treaty of Waitangi Negotiations advised that he intended to transfer some Crown-owned properties in central Auckland to Ngāti Paoa and the Marutūāhu iwi,[59] in part-settlement of their claims for relief against the Crown for historical Treaty breaches. Ngāti Whātua Ōrākei contended that the transfer by the Crown of these properties, in respect of which it claims mana whenua, is contrary to tikanga recognised in New Zealand law and a breach of the Treaty settlement already entered into between Ngāti Whātua Ōrākei and the Crown.[60] In addition, it claims that a published policy of the Crown that it is unnecessary to resolve "overlapping claims" before it enters into Treaty settlements is wrong in law.

[70] The Crown's proposal for transfer of the properties to Ngāti Paoa was originally to be implemented by administrative action. Several months after Ngāti Whātua Ōrākei filed its claim, the Minister announced that the transfer would instead be implemented by legislation and that any agreement for the transfer of the land would be conditional until the legislation was passed. The respondents then applied to strike out Ngāti Whātua Ōrākei's claim on the basis that, since the properties in issue are to be vested by legislation, Ngāti Whātua Ōrākei's interests are not affected and cannot found a claim to judicial review before the enactment of legislation

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58 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516 (Davison J) (referred to throughout as *Ngāti Whātua Ōrākei* (HC)); *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648 (Kós P, Cooper and Asher JJ) (referred to throughout as *Ngāti Whātua Ōrākei* (CA)).

59 Marutūāhu comprises Ngāti Maru, Ngāti Paoa, Ngāti Tamaterā, Ngāti Whanaunga and Te Patukirikiri.

60 In the Courts below relief was sought in respect of both the properties transferred to Ngāti Paoa and those transferred to the Marutūāhu iwi. In its application for leave to appeal to the Supreme Court, however, Ngāti Whātua Ōrākei said that it has reached agreement with Ngāti Paoa and it no longer seeks any relief in respect of the transfer of the Ngāti Paoa Properties. Ngāti Paoa abided by the decision of the Court.

removes them. They contended that judicial review in the circumstances would constitute impermissible interference by the Court with proceedings in Parliament. These arguments were accepted in the High Court and in the Court of Appeal. They are the basis on which the Ngāti Whātua Ōrākei claim has been struck out.

[71] The Ngāti Whātua Ōrākei claim was precipitated first by Crown proposals to transfer properties in Grafton and Dominion Road in central Auckland to Ngāti Paoa and, later, to transfer further central Auckland properties to the Marutūāhu iwi. But Ngāti Whātua Ōrākei's statement of claim makes it clear that its concern is also because the Crown's stance sets a precedent for the transfer of further land in central Auckland (including under statutory powers) to other iwi in the future in settlement of historical Treaty claims, without reference to it and without its approval. That, it says, is in breach of tikanga and would constitute unjustifiable erosion of its mana whenua. The Crown is currently in negotiations with a number of iwi in relation to redress in the central Auckland area, as it confirmed in the High Court.[61] If the present proceeding cannot be maintained, Ngāti Whātua Ōrākei will be deprived of a forum in which it can seek to have its rights authoritatively established.

[72] The Crown's policy that it is unnecessary to resolve competing claims before using Crown-owned land in Treaty settlements is one of general application. As a result, Ngāi Te Rangi Settlement Trust and Ngāti Kuri Trust Board, representing iwi from Tauranga and Northland respectively, sought and were granted leave to appear at the appeal. The interveners say that their rights and interests in relation to land in which they have mana whenua is adversely affected by comparable Crown proposals for settlement of historical claims by other iwi and by the same "overlapping claims" policy by which the Crown considers it is unnecessary to resolve such claims before dealing with land in settlements.

[73] The Court has also received a memorandum from Te Whakakitenga o Waikato Incorporated, a representative tribal authority for the hapū of Waikato-Tainui which have overlapping interests in the Auckland isthmus. Whakakitenga's application for joinder in the High Court proceedings was deferred until after consideration of the

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61 *Ngāti Whātua Ōrākei* (HC) at [88].

strike-out application and it did not seek intervener status in the Supreme Court. It records its position that the Crown's approach to overlapping claims is wrong and says it is challenging it in the Waitangi Tribunal and considering challenge in the High Court. It supports the position taken by Ngāti Whātua Ōrākei in the present appeal that the proceedings ought not have been struck out on the grounds advanced by the respondents. Whakakitenga makes the point that the Supreme Court determination in the present appeal "has significant wider importance in terms of both the Treaty relationship between the Crown and iwi and hapū and the constitutional relationship between the Courts, the executive and the legislature in Aotearoa".

[74] The Crown's general approach in recent years, explained in an affidavit by the Minister for Treaty of Waitangi Negotiations, has been to implement Treaty settlements by legislation. In general, agreement as to the terms of settlement is expressed to be conditional on the passage of the implementing legislation. If the decisions in the lower Courts and the Crown arguments in the appeal are correct, hapū and iwi will not be able to obtain access to courts for authoritative determination of their present rights and interests according to law when settlement proposals which may affect those interests are to be implemented by legislation. The supervisory jurisdiction of the High Court will also be substantially excluded in relation to the Crown conduct of Treaty settlements and adoption of policies in relation to such settlements. The implications of the decisions of the High Court and Court of Appeal therefore affect the New Zealand legal order and its scope.

The "overlapping claims" policy

[75] Treaty settlements for historical grievances are resolved according to published policies and processes established by the Office of Treaty Settlements. These policies and processes are not adopted or organised under legislative powers but they may give rise to legitimate expectations and may be challenged by judicial review including for unreasonableness or unfairness to those whose rights and interests recognised by law

are affected.[62]

[76] The overlapping claims policy is described in the Office of Treaty Settlement's publications. It is an approach by which the Crown does not seek to resolve competing claims before settling with the different claimant groups:[63]

> The Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. These groups are able to negotiate their own settlements with the Crown. Nor is it intended that the Crown will resolve the question of which claimant group has the predominant interest in a general area. That is a matter that can only be resolved by those groups themselves.

[77] The difficulty faced by those hapū and iwi who claim rights according to tikanga or custom is that settlements by the Crown with other claimant groups may be inconsistent with their rights and interests according to tikanga. Rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation.[64] The overlapping claims policy means that such questions of status are not required to be authoritatively resolved before Treaty settlements which affect them are entered into.

[78] Where claims of right or legal interest are made in our constitutional order, it is the function of the courts to determine them. Occasion to make such determination may arise in a number of ways, including in claims for redress for infringement of rights, in claims to restrain the exercise of public powers which impact upon rights, or under the jurisdiction of the High Court to declare what the law is. In the case of declaratory relief the parties sought to be bound by the determination will be joined

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62 *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (CA); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL). Although the procedure under the Judicature Amendment Act 1972 (now the Judicial Review Procedure Act 2016) is available only in respect of the exercise of a statutory power, judicial review of other executive action is available at common law: *Burt v Governor-General* [1992] 3 NZLR 672 at 676 and 678 per Cooke P for the Court. See also *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL) and *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 at [29]–[31] in respect of statements of policy.

63 Office of Treaty Settlements *Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018) at 53.

64 See for example *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ and [150] per McGrath J for himself and Tipping and Blanchard JJ; and the Resource Management Act 1991 and Te Ture Whenua Maori Act 1993. Where appropriate, questions of tikanga may be referred to the Māori Appellate Court: Te Ture Whenua Maori Act, s 61.

and, because of the questions of status entailed, it may be appropriate for the Attorney-General to be joined to represent the wider public interest as well as because of Treaty of Waitangi implications.

The Ngāti Whātua Ōrākei Treaty settlement and the Collective Redress Act

[79] The background to the appeal includes Ngāti Whātua Ōrākei's own Treaty settlement and its history. The settlement, eventually enacted by legislation in 2012, provided for historical redress including for Treaty breaches arising out of the alienation of Ngāti Whātua Ōrākei land in the Auckland isthmus.

[80] An initial Crown acquisition of 3,000 acres of land in central Auckland to establish the town of Auckland was made in September 1840. This first acquisition included what is now the central business area and port and Herne Bay, Ponsonby, Newmarket and Parnell. Subsequent alienations to the Crown followed in 1841, 1842, 1847 and 1855. In the initial exchanges the Crown, exercising the right of pre-emption obtained under the Treaty of Waitangi, treated directly with Ngāti Whātua Ōrākei as owners of the land. These exchanges included a Crown purchase of 13,000 acres to the west of the original 1840 lands in 1841. Further extensive alienations to private purchasers followed waiver of the Crown's right of pre-emption by Governor Fitzroy in the years 1844–1845, without protection of Ngāti Whātua Ōrākei's interests and without expected reservation of one tenth of the land for the benefit of Ngāti Whātua Ōrākei. Overall 47,000 acres were alienated during the waiver of pre-emption across the central isthmus to Onehunga (including Maungakiekie), parts of West Auckland, the upper Waitematā Harbour and northern Manukau Harbour areas. By 1845 more than 78,000 acres had been alienated. Further transactions with the Crown between 1847 and 1855 led to the alienation of Remuera, Mount Smart and West Auckland, estimated as entailing more than 50,000 acres. The land comprised in the alienations described is land in respect of which Ngāti Whātua Ōrākei asserts mana whenua. It includes the properties the Crown has agreed to transfer to Ngāti Paoa and the Marutūāhu iwi.

[81] The circumstances of the historical alienations were eventually the subject of Crown apology in the Ngāti Whātua Ōrākei Claims Settlement Act 2012. The Act

acknowledges that the dealings "left Ngāti Whātua Ōrākei virtually landless by 1855", with "devastating consequences for the social, economic and spiritual well-being of Ngāti Whātua Ōrākei that continue to be felt today".[65] In the Act the Crown acknowledges its Treaty breaches in the alienations. It acknowledges that the land alienation "has diminished the ability of Ngāti Whātua Ōrākei to exercise mana whenua".[66]

[82] A 2006 "agreement in principle" between the Crown and Ngāti Whātua Ōrākei would have given Ngāti Whātua Ōrākei redress for its historical grievances and particular rights in respect of three maunga: Maungakiekie (One Tree Hill), Maungawhau (Mount Eden) and Puketāpapa (Mount Roskill). It also provided to Ngāti Whātua Ōrākei a right of first refusal for 100 years over all Crown-owned land which became surplus to Crown needs in an area encompassing much of central Auckland, extending from the Waitematā Harbour in the north to the Manukau Harbour in the south, to Avondale in the west and embracing parts of Onehunga, Ellerslie and Remuera to the east. This right of first refusal was treated in the agreement as the provision of future "commercial" opportunity, distinct from the Crown apology and cultural and other redress provided in the settlement of historical grievances. It was designed to allow Ngāti Whātua Ōrākei to expand over time its commercial interests in the Auckland area. The area of first refusal land included but extended beyond the boundaries of the land acquired by the Crown in 1840. It included much of what is now the central Auckland suburbs, but was not nearly as extensive as the land purchased from Ngāti Whātua Ōrākei at 1855. It did not for example cover West Auckland beyond Avondale and Blockhouse Bay or any of the North Shore.

[83] The agreement in principle was the subject of Waitangi Tribunal claim by other iwi with interests in the Auckland region. A particular focus of these claims were the exclusive interests accorded to Ngāti Whātua Ōrākei in the three maunga and in the right of first refusal on disposal of surplus Crown lands within the area identified.

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65 Section 7(7).
66 Section 6(13).

[84] The Waitangi Tribunal report[67] was critical of the process adopted in respect of the 2006 agreement in principle. The Tribunal considered that the Auckland isthmus provided a particular challenge in the settlement of historical treaty claims. That was not only because of the overlapping interests of different iwi, but also because the land had not been the subject of Native Land Court investigation in the 19th century which might have resolved or reconciled the competing claims.[68] The Waitangi Tribunal nevertheless was of the view that the need to progress settlements for iwi with interests in the Auckland region should not be at the expense of understanding the overlapping interests.[69]

[85] Following a facilitated negotiation involving iwi with interests in the Auckland isthmus, a Collective Redress Deed was entered into in September 2012 to resolve the competing claims of the different iwi groups in relation to the maunga and motu of the isthmus and the commercial redress provided by the Crown through the opportunity to exercise rights of first refusal over the disposal of surplus Crown land. The Collective Redress Deed is a more formal expression of a Framework Agreement entered into by iwi and the Crown in February 2010. The Collective Redress Deed was conditional on the enactment of implementing legislation. The arrangement was later enacted as Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. It provided for legal interests in and shared management of 14 maunga in the Auckland isthmus. Ngāti Whātua Ōrākei[70] participates in the collective along with the Hauraki-affiliated Marutūāhu rōpū (Ngāti Maru, Ngāti Paoa, Ngāti Tamaterā, Ngāti Whanaunga and Te Patukirikiri) and those in the Tainui-affiliated Waiohua Tāmaki rōpū (Te Kawerau ā Maki, Ngāti Te Ata, Ngāti Tamaoho, Te Ākitai Waiohua and Ngāi Tai ki Tāmaki).

[86] The Collective Redress Deed and the legislation which enacted it also set up a shared system of rights of first refusal of Crown-owned land under collective control exercised by the Whenua Haumi Roroa o Tāmaki Makaurau Limited Partnership,

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67 Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007).
68 At 13–14.
69 At 103–108.
70 Ngāti Whātua o Kaipara are specifically included, alongside hapū of Ngāti Whātua "whose members are beneficiaries of Te Rūnanga o Ngāti Whātua, including Te Taoū not descended from Tuperiri"; see s 9.

comprised of the three rōpū recognised under the Act. Under the legislation, the Partnership has rights to first refusal when the Crown or Crown entities wish to dispose of surplus land.[71] There are some exceptions, including for land held by tertiary institutions.[72] And, under s 120 of the Collective Redress Act (which is discussed further below), the Crown can give notice of withdrawal of land from the area of first refusal if the land is required in the settlement of historical Treaty grievances.

[87] The area in which rights of first refusal are provided under the legislation is much more extensive than the area in which the 2006 agreement had given Ngāti Whātua Ōrākei exclusive rights of first refusal for commercial purposes. The Collective Redress area of first refusal extends from just south of Muriwai and Okura in the north to a line just to the north of the Waikato raupatu confiscations from Port Waikato to Miranda in the south. The extension of the boundaries of the area in which the rights of refusal operate covers the wider area in which all three rōpū have interests, with the Tainui-affiliated iwi having particular connections in the south and west, and the Hauraki-affiliated iwi having particular connections in the east and the motu, although there is overlap in a number of respects.

[88] The Partnership may exercise the right of first refusal either on its own behalf or on behalf of one of the three rōpū entities[73] (which if acting jointly may set up a special purpose vehicle to acquire the land). It seems that among themselves, the three rōpū have the opportunity of first refusal on a rotating and default basis.[74]

[89] In summary, the collective rights enacted through the Collective Redress Act were the mechanism by which the overlapping interests in Tāmaki Makaurau in relation to the maunga and motu and the commercial opportunities on Crown disposal of surplus land were adjusted. It set up a system of shared authority in relation to the maunga which had been a principal grievance in the Waitangi Tribunal claim in relation to the 2006 settlement with Ngāti Whātua Ōrākei. And it set up the system of first refusal by which surplus Crown lands in the isthmus could be released for

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71 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 121.

72 Land occupied by tertiary institutions is excluded from the definition of RFR land: s 118(1)(a)(i).

73 Section 126.

74 The matter is covered in an unsigned partnership agreement, the status of which is not clear on the material before the court.

purchase to allow the three iwi groupings to maintain and expand their commercial interests in the isthmus.

[90] With the maunga and the commercial redress by way of rights of first refusal dealt with under the Collective Redress Deed by collective solution, the Ngāti Whātua Ōrākei settlement of its historical Treaty grievances was able to be concluded. The Ngāti Whātua Ōrākei settlement contained in the 2006 agreement in principle was amended in February 2010. A Deed of Settlement was entered into in November 2011. The new agreement set out in the Deed was conditional on the enactment of implementing legislation. It was eventually enacted as the Ngāti Whātua Ōrākei Claims Settlement Act in November 2012.

[91] The other iwi with interests in the isthmus were also at the same time left to negotiate separate settlements of their historical grievances with the Crown while participating in the collective arrangements for the maunga and the rights of first refusal in relation to surplus Crown lands in the isthmus. It may be noted that the reservation of authority to the Crown to withdraw land required for settlement of historical grievances from the first refusal regime was a necessary measure given the breadth of the area covered if the other iwi were to obtain land redress as part of their settlement of historical grievances in areas in which they assert mana whenua and other interests according to tikanga. The present litigation arises out of the settlement negotiations with Ngāti Paoa when in 2015 Ngāti Whātua Ōrākei became aware that redress for Ngāti Paoa's historical grievances would in part be met by the transfer of land to it in central Auckland.

[92] Although the matter is not able to be resolved at strike-out stage, there is no necessary inconsistency between Ngāti Whātua Ōrākei's claim and the Collective Redress Act, as appears to have been suggested in the High Court decision.[75] The Collective Redress Act deals with opportunities for commercial investment, not specific redress for historical grievances involving harm to customary interests protected by the Treaty of Waitangi. The ability to withdraw land required for settlement of historical grievances in the legislation is explicable by reference to the

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75 *Ngāti Whātua Ōrākei* (HC) at [135]–[138].

claims for redress of such grievances by the other iwi which remained to be addressed by the Crown when the Collective Redress Act was enacted. Without express reservation from the scope of the rights of first refusal in that Act, provision of land redress from land held by the Crown where appropriate to meet the claims would have been precluded. There is no necessary implication from the legislation that such historical redress might be appropriate from land within the Ngāti Whātua Ōrākei alienations in which Ngāti Whātua Ōrākei claims mana whenua. The area of first refusal under the Collective Redress Act extends beyond the area in which priority of interest according to tikanga is claimed by Ngāti Whātua Ōrākei. It may be assumed to include land in which other iwi in the collective have particular claims according to tikanga and which it is appropriate to use as redress for their historical grievances.

The claim

[93] Section 120(1) of the Collective Redress Act provides for land to be removed from the pool required to be offered to the collective, upon notice to the collective, if it is "required for another Treaty settlement".[76] Land required for another Treaty settlement is defined in s 120(3) as "land that is to be vested or transferred as part of the settling of historical claims under the Treaty of Waitangi, being the historical claims relating to acts or omissions of the Crown before 21 September 1992".

[94] The present case does not entail any complaint about the operation of the Collective Redress Act in its own terms. Ngāti Whātua Ōrākei does not suggest that the system it has agreed to with the other rōpū within the collective is in breach of tikanga. That system of commercial opportunity, in which it participates, was adopted with its agreement and is consistent with its exercise of mana whenua.

[95] Ngāti Whātua Ōrākei takes the view that the matter is however quite different if the Crown, without Ngāti Whātua Ōrākei's agreement, provides land in which Ngāti Whātua Ōrākei claims mana whenua in settlement of historical grievances another iwi has with the Crown. That it treats as being inconsistent with its tikanga and with its legal rights and an unreasonable erosion of its mana whenua. It seeks declarations in

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[76] Section 118(2)(d) accordingly provides that land ceases to be RFR land if notice is given under s 120 that it is required for another Treaty settlement.

the proceedings as to its legal rights and the lawfulness of the Crown's actions and policies. It says it is not reasonable for the Crown to treat its claim to mana whenua as irrelevant. The Minister in confirming the provision of properties in central Auckland to Ngāti Paoa and to the Marutūāhu iwi said that he had "determined" that these iwi had "interests in the central Tāmaki region" which made the redress appropriate. Ngāti Whātua Ōrākei seeks access to the Court to challenge that determination by obtaining a declaration of what it says are its legal rights according to tikanga which are inconsistent with the imposition on it of the Crown's redress.

[96] At the time the claim was initiated by Ngāti Whātua Ōrākei, the Minister for Treaty of Waitangi Negotiations proposed to withdraw the properties intended to be transferred to Ngāti Paoa from the right of first refusal available to the collective, it seems using the powers under s 120 of the Collective Redress Act. Several months after the claim was filed, the Minister advised that the transfer would be effected by legislation vesting the land in Ngāti Paoa. The settlement later proposed for Marutūāhu Rōpū Limited (which was joined as a third defendant to the litigation) was also conditional upon legislation.

[97] If the Minister had given notice under s 120 to remove land from the pool required to be offered to the collective, his decision to do so could have been directly challenged on grounds such as unreasonableness, inconsistency with legal obligations, improper purpose, failure to consider a relevant matter, unfairness or breach of legitimate expectations. In such a claim, the Crown's settlement with Ngāti Whātua Ōrākei and its acknowledgements and the purpose and terms of the Collective Redress settlement would be important context. So too would be the basis and correctness of the Minister's determination that the other iwi had interests in central Auckland which made the provision of land in settlements of their historical grievances appropriate. Important context would also have been Ngāti Whātua Ōrākei's claim to mana whenua in central Auckland and the implications of such status as a matter of tikanga.

[98] These are however also questions of current right and status which have implications for Ngāti Whātua Ōrākei whether or not the particular properties are vested by legislation. The issue on appeal is whether the declaratory relief Ngāti Whātua Ōrākei seeks in relation to its interests and rights and the Crown obligations

in respect of them under the Treaty and in law is not available because the Crown proposes legislation to vest the properties directly in Ngāti Paoa and the Marutūāhu rōpū.

The respondents' strike-out application

[99] The fact that the settlements with Ngāti Paoa Iwi Trust and Marutūāhu Rōpū Limited were to be implemented by legislation was the basis on which the respondents applied to strike out Ngāti Whātua Ōrākei's claim. The grounds on which orders striking out the claim were made were that the claim could not succeed because it disclosed no reasonable cause of action and was frivolous and vexatious in circumstances where the Crown's "policy decisions" that the properties would be transferred were to be given effect by legislation and would not be implemented "unless and until that transfer is authorised by Parliament". The application for strike-out claimed accordingly that the policy decisions to make the land available in the proposed Treaty settlements with Ngāti Paoa and Marutūāhu Rōpū only by legislation meant that the decisions "are not amenable to judicial review".

[100] The claim by Ngāti Whātua Ōrākei was struck out by Davison J in the High Court. The Judge expressed the view that Ngāti Whātua Ōrākei's claim to mana whenua and to a resultant priority of interest according to tikanga could not be reconciled with the settlements it had entered into with the Crown which did not recognise any exclusive interest in the land in central Auckland. He considered that the Collective Redress arrangements entered into in respect of the Auckland maunga and rights of first refusal on Crown disposal of surplus lands indicated acknowledgement of shared interests with Ngāti Paoa and the Marutūāhu iwi.[77]

[101] In any event, the Judge considered that "irrespective of any interests of Ngāti Whātua that may have been affected or infringed", the fact that the settlements were to be implemented only through legislation meant that the decisions were "not justiciable". They depended on policy determinations turning on "political and fiscal factors". There was "no legal yardstick" against which they could be assessed when "the decisions made by the Minister involved the subjective consideration of political

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[77] *Ngāti Whātua Ōrākei* (HC) at [135]–[138].

and fiscal factors, and were in any case preparatory to legislation, without which they would be of no effect".[78] The Judge took the view that even if Ngāti Whātua Ōrākei had been right in the contention that it was seeking to clarify and determine its position for the future and not "to interfere with the legislative process", the Court would not "embark on a process that necessarily involves consideration of declarations that are directed at imposing obligations or constraints on the Crown in relation to the preparation of legislation to be submitted for the consideration of Parliament". The Court in those circumstances "would not grant the declaratory relief sought".[79]

[102] On appeal, the Court of Appeal was critical of aspects of the High Court decision which turned on assessments of pleaded fact which could not be properly considered on a strike-out application and which should have been assumed on the basis of the pleadings for the purposes of strike-out.[80] Despite that view, however, the Court of Appeal considered that the High Court judgment had not turned on the factual determinations. Rather the conclusion the claim could not succeed "rested on the non-justiciable nature of the disputed decisions and the fact that any adverse effect on Ngāti Whātua Ōrākei would arise, not as a consequence of the decisions, but as a result of the enactment of legislation that was necessary to transfer the properties".[81]

[103] On this point, dispositive of the appeal, the Court of Appeal agreed with Davison J. It considered the decisions had been made "in the development of legislative proposals".[82] No "justiciable rights" were affected by the decisions.[83] Only the proposed legislation would affect them. The Court considered that the decisions were "squarely within" the principle applied in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* that "Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite Parliament to consider".[84] It was of the view that *Te Runanga o Wharekauri Rekohu* and the subsequent decisions of the Court of Appeal in *Milroy v Attorney-General*[85] and

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78 At [142].
79 At [143].
80 *Ngāti Whātua Ōrākei* (CA) at [75]–[83].
81 At [84].
82 At [85].
83 At [95].
84 At [95], referring to *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 308 per Cooke P delivering the judgment of the Court.
85 *Milroy v Attorney-General* [2005] NZAR 562 (CA).

New Zealand Maori Council v Attorney-General[86] presented "a fatal obstacle to Ngāti Whātua Ōrākei's claim". It was "wrong in principle for a court to declare unlawful an outcome intended to be secured only if authorised by Parliament".[87] The Court considered that the declarations sought, added together if not expressly put, would have that effect.[88] Such declaration of rights, even if "ostensibly" looking to the future, could not be made "without breaching the established principle of non-interference by the courts in parliamentary proceedings".[89] There was "no proposal that will affect Ngāti Whātua Ōrākei's rights other than a legislative one":[90]

> This is territory that the courts will not enter in accordance with the principle of non-interference.

Interference with proceedings in Parliament?

[104] Settlements with the Crown of Treaty grievances are often concluded by the enactment of legislation, to still all actual and potential controversies which are the subject of the settlement. Questions have arisen in recent cases as to the availability of court determinations of existing legal rights when a Treaty settlement is intended to be enacted.[91] It has been suggested that it is inappropriate to determine existing rights or to declare what the existing law is where the executive has indicated it intends to ask Parliament to change the law because to do so would encroach upon the legislative function. This creep in restriction of established constitutional obligations of courts not to interfere in proceedings in Parliament is put on the basis that it observes appropriate "comity" between the courts and the legislature. I consider it to be an unwarranted extension of proper principle. It is necessary to explain why.

[105] Although the Treaty settlements of recent years have provided a new context, it is well-established that the courts cannot interfere in proceedings in Parliament. The limitation is the subject of the statutory privilege contained in art 9 of the Bill of Rights 1688. It is also based on a wider (and pre-existing) common law protection against

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86 *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.
87 At [100].
88 At [101].
89 At [102].
90 At [105].
91 See *Milroy v Attorney-General*; and *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

interference with matters within the exclusive jurisdiction of Parliament.[92] *Te Runanga o Wharekauri Rekohu* acknowledges an "established principle of non-interference by the Courts in parliamentary proceedings" (whether as a matter of jurisdiction or practice was not resolved).[93] It affirms the effect as being to prevent the courts prohibiting a Minister from introducing a Bill into Parliament.

[106] It is for the courts to determine what matters are within the statutory and common law privileges, as was established by the great case of *Stockdale v Hansard*.[94] Parliament may however extend the privilege by legislation, as it has done in New Zealand recently in the Parliamentary Privilege Act 2014. The scope of the exclusive jurisdiction of Parliament has also changed with the practices of Parliament as it has over time relinquished jurisdiction to the ordinary courts (for example in relation to contractual disputes involving officers of Parliament and in relation to crimes committed within Parliament).

[107] The purpose of art 9 of the Bill of Rights was described by Lord Browne-Wilkinson in *Pepper v Hart*:[95]

> It ensures the ability of democratically elected Members of Parliament to discuss what they will (freedom of debate) and to say what they will (freedom of speech) … .
>
> In my judgment, the plain meaning of article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed.

[108] Beyond art 9, which is principally concerned with freedom of speech and debate in Parliament itself, the wider principle of non-interference is not a matter of etiquette or deference (as reference to "comity"[96] may misleadingly suggest), but is similarly concerned with the function of Parliament. It reaches matters which are so

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92 *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684 at [13] and [63]–[78] per Lord Phillips.

93 *Te Runanga o Wharekauri Rekohu* at 307.

94 *Stockdale v Hansard* (1839) 9 A & E 1, 112 ER 1112 (QB).

95 *Pepper v Hart* [1993] AC 593 (HL) at 638.

96 Neither the Privy Council in *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) nor the Court of Appeal in *Te Runanga o Wharekauri Rekohu* refer to the principle of non-interference as based on "comity". Compare *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229; *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2016] NZHC 1798, [2016] NZAR 1169; and, in a different context, s 4(1)(b) of the Parliamentary Privilege Act 2014.

connected to Parliament's function that they too must be similarly privileged, as explained in *R v Chaytor*. As Lord Phillips suggested, in considering the scope of the principle of non-interference it is necessary to consider whether, without similar privilege, the core of essential business of Parliament will be adversely affected.[97]

[109] In similar vein McGechan J in *Westco Lagan Ltd v Attorney-General*, in rejecting the submission that the parliamentary privilege is limited to the deliberative function conducted within the "four walls" of Parliament, included all "ancillary matters" such as the introduction of Bills and the submission of Bills for Royal Assent (at least where there was no "manner and form" restriction on an enactment which might justify intervention before Royal assent).[98] In Canada too the wider principle of non-interference with the functions of Parliament has been held to apply to an attempt to prevent Parliament's consideration of legislation which was said to breach duties of consultation.[99]

[110] We are not in the present case concerned with procedural conditions for validity such as might be found in the entrenched provisions of the Electoral Act 1993 or with any other limits on the competence of Parliament.[100] In relation to such challenges Cooke P in *Te Runanga o Wharekauri Rekohu* said that the time to mount them could only be after enactment because of the principle of non-interference with the business of Parliament.[101] It was, he thought, impossible to suppose that a Minister might be "judicially prevented from presenting to a representative assembly a measure

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97 *R v Chaytor* at [47].

98 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [79] and [97]–[100].

99 *Canada (Governor General in Council) v Mikisew Cree First Nation* 2016 FCC 311, (2016) 405 DLR (4th) 721, a case which has since been appealed to the Supreme Court of Canada. The case turns principally on the statutory conditions on which judicial review was available.

100 Such as those considered in *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong* [1970] AC 1136 (PC).

101 A position taken in Canada in *Re Resolution to Amend the Constitution* [1981] 1 SCR 753 at 785 per Laskin CJ, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ. In *Westco Lagan*, McGechan J was prepared to allow that in the case of "manner and form" invalidity it might be that the courts would intervene to prevent non-complying legislation receiving the Royal Assent, on the basis that in such cases it could be "in the public interest to move earlier", rather than waiting for enactment, pointing to discussion to this effect in the Australian case-law: at [93].

for consideration" or that the courts would "compel a Minister to present a measure to a representative assembly for consideration":[102]

> Surely in a democracy it would be quite wrong and almost inconceivable for the Courts to attempt to dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament. … [P]ublic policy requires that the representative chamber of Parliament should be free to determine what it will or will not allow to be put before it. Correspondingly Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite the House to consider.

[111] As this passage suggests, the wider principle, like the narrower freedom of debate in art 9, exists to ensure that Parliament is free to consider what it will and Ministers are free to put before it suggestions for it to consider. It is not a wider notion of "comity" between the courts and Parliament (although there is an equivalent obligation on Parliament not to interfere in court proceedings). In *Westco Lagan* McGechan J, while referring to "comity", made it clear that in doing so he meant the same principle of non-interference with parliamentary consideration (of which the art 9 concern with what happens within the "four walls" of Parliament is part only), rather than a wider notion of institutional deference:

> [98] … Its essence is that the Courts should not interfere so as to frustrate the powers of the House to enact legislation. Whether it is a matter of jurisdiction or practice, and I prefer the latter, there is a constitutional boundary to observe. Sometimes this principle is called "comity" as it reflects a reciprocal principle that Parliament should not intervene in the conduct of the Courts in relation to particular cases. The boundaries involved in non-interference in the conduct of Parliament are not determined on any fixed basis or by some bright line. The decision is a matter of judgment and common-sense. Boundaries may evolve and modify as times and circumstances dictate, as long as the underlying principle is kept in mind.

[112] These authorities do not suggest any wider inhibition of court function simply because if legislation is enacted it may affect the issue before the court. If the relief sought in the proceeding is discretionary (as declaratory relief is) the fact that the court determination is likely to be overtaken or that the subject matter of the litigation is under active consideration in Parliament may well be relevant in considering whether the relief sought should be granted, although a decision to decline relief in exercise of discretion will often not be a matter capable of assessment on preliminary inquiry.

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102 *Te Runanga o Wharekauri Rekohu* at 308.

I discuss the declaratory relief sought under the final heading of these reasons. For present purposes however it is enough to reject the suggestion that a Bill before Parliament constitutes a bar to the jurisdiction of the court.

[113] It seems to me that some of the recent restatements of the principles of non-interference are unacceptably broad and are not supported by the principal authorities. I am unable to agree with suggestions in the High Court in *Ngati Te Ata* that "[i]t is well settled that matters contemporaneously before Parliament are non-justiciable".[103] It is not entirely clear that the statement was intended to suggest that the courts cannot consider disputes touching on the subject-matter of a Bill. But if so, *Te Runanga o Wharekauri Rekohu*, which is cited in *Ngati Te Ata*, does not support anything as loose. *Milroy v Attorney-General*, relied on by the Crown, was a case in which it was conceded that no rights were in issue.[104] In any event, it may be doubted that the more developed Treaty settlement processes and the post-settlement relationships now in place can properly be regarded as policy development which is not amenable to the supervisory jurisdiction of the court. I would regard cases which suggest as much with some scepticism in 2018.

[114] I consider that the Court of Appeal in the present case mischaracterised the claim when it said that its effect was to declare the authorisation to be obtained through Parliament as "unlawful" and in breach of Ngāti Whātua Ōrākei's rights "if made now in the course of a process already under way and with legislation intended to be introduced".[105] Parliament speaks to the courts only through enacted legislation. Whether the enactment proposed will proceed and, if so, the form it will take is uncertain because it is a matter for Parliament. Just as the executive cannot bind itself by contract to introduce and pass legislation,[106] it cannot properly give any assurance to the court that the legislation it proposes will be passed.[107]

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103 *Ngati Te Ata v Minister For Treaty of Waitangi Negotiations* [2017] NZHC 2058 at [52], citing *Te Runanga o Wharekauri Rekohu* at 307–308.

104 *Milroy v Attorney-General* at [12].

105 *Ngāti Whātua Ōrākei* (CA) at [100] and [102].

106 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 328–329 per Robertson J.

107 A point made by McGechan J in *Westco Lagan.*

[115] Provided that the court does not seek to preclude parliamentary consideration, I cannot see that any determination of present right of itself constitutes an interference with proceedings in Parliament. Indeed, in some cases it may provide information that Parliament may want to consider. That is not, in my view, interference with proceedings in Parliament. Parliament remains free to legislate to modify or abrogate any existing rights. It is free to legislate without inquiring into the existence of rights or waiting for court determination of them. The courts will do nothing to prevent Ministers from introducing legislation with that effect for Parliament's consideration. The freedom of debate and the freedom of speech in Parliament is not affected.

[116] The constitutional functions of the courts are not enlarged by this approach. Rights in issue in the courts may always be changed by legislation. The prospect does not deflect the courts from carrying out their present responsibilities. Nor are they deflected by statements of government policy that legislative change will be sought. Such statements cannot mark out no-go areas for the courts.

[117] That is illustrated in New Zealand by *Fitzgerald v Muldoon*.[108] There, the plaintiff sought injunctions and mandamus against the Prime Minister arising out of his purported suspension of payments to the New Zealand Superannuation Fund. An application for priority fixture was made so that the matter could be heard before the date on which Parliament had been summonsed.[109] It was opposed on the basis that, since it was clear that the matter would be dealt with by retrospective legislation, "the Court's time will be involved with what may be a dead issue".[110] The Crown argued in support of its opposing application for adjournment until after Parliament was in session that "the proper course was to allow the issue to be dealt with in the forum of Parliament". It suggested that the purpose of the plaintiff was to "beat Parliament to the draw" by taking "what is essentially a political action".[111]

[118] Beattie J rejected the Crown's argument and granted the priority fixture. He pointed out that the remedy sought by the plaintiff was "to support a statute still in force". He considered that the plaintiff was entitled to have his case heard rather than

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108 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).
109 *Fitzgerald v Muldoon* SC Wellington A118/76, 19 May 1976 per Beattie J.
110 At 3.
111 At 3.

to face its being "stifled at birth".[112] Beattie J accepted that the trial Judge might want to know Parliament's intentions before granting relief that would be discretionary, but he thought it was important that the doors of the court should be open to its citizens. Government interests in orderly planning had to be "balanced against the rights of an individual to have his case heard".[113]

[119] I do not think the circumstance that the plaintiff in *Fitzgerald v Muldoon* sought to uphold statutory obligations is reason not to apply the same approach. Until Parliament changes the law, the courts must be open to citizens who seek to have their existing legal interests and rights determined. The rights recognised in s 27 of the New Zealand Bill of Rights Act 1990 to natural justice and to bring proceedings against the Crown on equal terms would not otherwise be fulfilled. Parliamentary freedom of debate and in its proceedings is unaffected by the judicial responsibility to hear and determine rights and interests protected by law.

[120] In *Te Runanga o Wharekauri Rekohu* the Courts had been asked to prevent the Minister introducing legislation. The conclusion refusing relief was therefore inevitable on the reasoning of the Court. Similarly, in *Westco Lagan* the proceeding sought an injunction to prevent a Bill being presented to the Governor-General for assent. In *Comalco Power (New Zealand) Ltd v Attorney-General*[114] the claim that the introduction of legislation was anticipatory breach of contract may be seen as an attempt, within the principle discussed by Cooke P in *Te Runanga o Wharekauri Rekohu*, "to dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament".[115] The Courts in these cases were not concerned with declarations of existing legal right without coercive effect as to what could be placed before Parliament. The reference in *Te Runanga o Wharekauri Rekohu* to declaration or damages or other relief is a reference to dictating what can be placed before Parliament. The case does not suggest that determination of present legal entitlement constitutes impermissible interference with proceedings in Parliament.

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112 At 4.
113 At 5.
114 *Comalco Power (New Zealand) Ltd v Attorney-General* [2003] NZAR 1 (HC).
115 At 308.

[121] The Court of Appeal in the present case reasoned that, since Ngāti Whātua Ōrākei's rights would not be affected other than by legislation, the proceeding was inevitably an interference with the proceedings in Parliament. That is not reasoning I can accept. Parliament remains free to act. But Ngāti Whātua Ōrākei should equally not be deprived of the opportunity to have its case heard. Even if the proposed legislation is enacted, it is not clear to me that there is no continuing live issue concerning Ngāti Whātua Ōrākei's status in relation to central Auckland, whatever the outcome of the settlements now being implemented with other iwi. These are matters for consideration at a substantive hearing.

The declaratory relief sought

[122] The relief claimed by Ngāti Whātua Ōrākei in the proceeding includes declarations as to the status of Ngāti Whātua Ōrākei in relation to land in central Auckland and Crown obligations arising from that status.[116] The declarations sought in the second amended statement of claim are set out in full at [29] of the reasons given by Ellen France J. At the hearing counsel submitted further modifications. In accordance with the principles applicable in considering strike-out applications, further amendment cannot be ruled out.[117] Nor is it possible to be confident at this preliminary stage that after full hearing such relief will be inappropriate. Claims of right arising out of tikanga and Crown Treaty obligations raise novel and perhaps developing law which prompt caution.[118]

[123] In the present case the questions of status in issue remain to be developed both because the Crown's own overlapping claims policy has made it unnecessary to do so

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116 As Pelletier JA pointed out in his concurring opinion in *Mikisew Cree First Nation* at [73], citing *Ward v Samson Cree Nation No 444* (1999) 247 NR 254 (FCA) at [35]–[36], "[d]eclaration and judicial review are not coterminous" and applications for declaration are not limited to circumstances where judicial review is available. In New Zealand, s 2 of the Declaratory Judgments Act 1908 makes clear the High Court retains the power to grant freestanding declarations. There does not need to be an existing dispute or lis: *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [9] per Elias CJ and [82] per Blanchard, Tipping, McGrath and William Young JJ.

117 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [123]–[124] per Blanchard, Tipping and McGrath JJ; see also *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC) at 323–324 per Tipping J; and A C Beck and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HR15.1.08].

118 *Couch v Attorney-General* at [33] per Elias CJ and Anderson J; and *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [146] per Blanchard, McGrath and William Young JJ.

for its purposes and because the peremptory challenge to the claim based on the principle of non-interference in proceedings in Parliament did not require it in the lower Courts.

[124] The historical and tikanga claims and the impact on them of the settlement legislation is not straightforward, as the justified doubts expressed by the Court of Appeal about the inferences drawn by the High Court illustrate. We heard almost no argument about the inferences properly to be drawn from the Ngāti Whātua Ōrākei Claims Settlement Act as to the Crown's on-going obligations in relation to Ngāti Whātua Ōrākei in relation to the acknowledged damage to its mana whenua, for which the Crown apologises. Nor did we hear any justification of the reasonableness of the Crown approach to the provision of the properties to Ngāti Paoa and the Marutūāhu iwi or the reasonableness and lawfulness of its published general policy on overlapping claims. Such policy may well constitute practice amenable to judicial review as indeed may be the case with the wider system of settlements conducted by the Office of Treaty Settlements.[119] If so, and if rights are affected by such policies and systems, cases like *Milroy v Attorney-General* (where it was conceded that no rights were affected) would be distinguishable. These arguments were not developed because the case has proceeded on the basis that the conduct of the Crown is irrelevant because the transfers of property will be implemented by legislation. For the reasons given I do not accept that the prospect of legislative implementation is a talisman effective against court determination of rights where the courts do not seek to prevent parliamentary consideration.

[125] The arguments which might justify some of the declarations sought and the context in which they arise have not been developed in argument in the courts before whom the case has come because of the narrow grounds on which strike-out of the claim was made. The Courts below took the view that the claim itself was not justiciable in circumstances where legislation was proposed. In those circumstances it is I think inappropriate for this Court as a matter of first and last impression to strike out any of the declarations sought. That would not preclude further application to the High Court if proper grounds are advanced.

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[119] See above at n 62.

[126] This is not, of course, to say anything about whether the discretion should be exercised to grant relief. A court can withhold discretionary relief when there are reasons to think that it is inappropriate.[120] I do not think however that the courts should be quick to see inappropriateness where there are claims of rights to be determined, especially if the parties will otherwise not be able to have them resolved. As Beattie J said in *Fitzgerald v Muldoon*, the plaintiff is entitled to have access to the courts. And in the particular case the questions of status and continuing Crown obligation are of more lasting and substantial importance than the plaintiff's direct interest in *Fitzgerald v Muldoon.* Nor is it clear what consequences failure to resolve some of the claims of right might have for the appellants quite apart from what happens to the particular properties in issue. Courts should not be too sensitive about suggestions that there may be appearances of "jockeying and political advantage"[121] if there are real issues for determination which affect real people. It should not be assumed that determination of the legal interests claimed do not matter. More importantly, matters going to the exercise of discretion in relief are not appropriately peremptorily resolved on truncated hearing on strike-out application except in clear cases.

[127] I do not consider this is a clear case, even in respect of declarations (e) and (f) which other members of the Court would strike out (although it may be that amendment to remove the references to Ngāti Paoa is now appropriate[122] and it may be that a further application on proper grounds fully argued could yet see those claims struck out). Whether the Crown's processes have been in breach of obligations in law to observe tikanga, the Treaty of Waitangi, and consistently with the rights affirmed by the United Nations Declaration on the Rights of Indigenous Peoples is a question likely to recur in the Crown's post-settlement dealings in respect of lands in which Ngāti Whātua Ōrākei claims mana whenua, whether under s 120 of the Collective Redress Act or in its inevitable continued dealings with Ngāti Whātua Ōrākei and other iwi. There remains a continuing Treaty relationship which means Ngāti Whātua Ōrākei has a continuing interest in how the Crown conducts itself. The approach taken by the Crown sets a pattern I would not at this stage of the proceedings prevent Ngāti Whātua Ōrākei from challenging.

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120 See *Rediffusion (Hong Kong) Ltd* at 1155 per Lord Diplock.
121 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* at 330.
122 See above at n 60.

Result

[128] I would allow the appeal and reinstate the claim.

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