IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-587
[2021] NZHC 2913

IN THE MATTER	of Te Tiriti O Waitangi
AND	an agreement between the Crown, the New Zealand Māori Council, and the Federation of Māori Authorities dated 20 July 1989
AND	the Ngāti Kahungunu Ki Wairarapa Tamaki Nui-Ā-Rua Settlement Trust Deed dated 30 March 2017
BETWEEN	RYSHELL GRIGGS AND MARK CHAMBERLAIN ON BEHALF OF NGĀI TŪMAPŪHIA-Ā-RANGI HAPŪ Plaintiffs
AND	THE ATTORNEY-GENERAL First Defendant
AND	THE MINISTER FOR TREATY OF WAITANGI NEGOTIATIONS Second Defendant
AND	NGĀTI KAHUNGUNU KI WAIRARAPA TĀMAKI NUI-Ā-RUA SETTLEMENT TRUST Third Defendant

Hearing: 28 October 2021

Appearances: F E Geiringer and P V Cornege for the Plaintiffs
V L Hardy and C Tyson for the Attorney-General
M G Colson QC for Ngāti Kahungunu Ki Wairarapa Tāmaki Nui-Ā-Rua Settlement Trust
J E Hodder QC, L L Fraser and R M A Jones for Mercury NZ Limited
M K Mahuika and T N Hauraki for the Wairarapa Moana Ki Pouakani Incorporation
F B Barton and A L Clark-Tahana for the Ruakawa Settlement

Trust
R A Siciliano for the Trustees of the Rangitane Tu Mai Ra Trust

Judgment: 29 October 2021

JUDGMENT OF COOKE J
(Interim injunction)

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[1] By interlocutory application dated 27 October the applicants sought an interim injunction in the following terms:

(a) until further order of the Court, the third defendant in this proceeding (The Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust) is enjoined from signing a deed of settlement with the Crown; and

(b) the Court declares that, were the Crown to sign a deed of settlement which purported to include Wai 429 without waiting for a final determination by the Waitangi Tribunal of the Wai 429 application for resumption under section 8HB of the Treaty of Waitangi Act 2021, including any resultant reviews and appeals before the senior courts, it would breach the Crown's commitments under Te Tiriti o Waitangi and the Crown Forest Agreement.

[2] After being assessed by the Executive Judge I was allocated to hear the application given my familiarity with the background as a consequence of being the trial Judge in *Mercury NZ Ltd and Ors v The Waitangi Tribunal and Ors*.[1] The Supreme Court has recently granted leave to appeal to directly appeal that judgment to that Court.[2] Following an urgent telephone conference the hearing was scheduled for 2.15 pm on 28 October. At the conclusion of the hearing I indicated that I would advise on the outcome of the application given that the deed of settlement to which it related was to be signed the following day (that is today) and that my reasons would

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1 *Mercury NZ Ltd and Ors v The Waitangi Tribunal and Ors* [2021] NZHC 654.
2 *Wairarapa Moana Ki Pouakani Inc v Mercury NZ Ltd* [2021] NZSC 134.

follow. I advised that the application for an injunction would be dismissed. These are my reasons.

[3] After advising of that outcome Mr Geiringer applied on behalf of the plaintiffs for leave to appeal as the decision was an interlocutory one for which leave was required. That was opposed by the defendants. After briefly considering that matter after the hearing I advised that the application for leave would be granted with reasons to follow. These are also the reasons for granting that leave.

Background

[4] I will seek to describe the background as concisely as possible. More detail is set out in the earlier judgment on the broader judicial review claims.[3]

[5] The applicants are of the Ngāi Tūmapūhia-ā-Rangi Hapū which is a hapu of Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua (Ngāti Kahungunu). Following an enquiry the Waitangi Tribunal released its 2010 report concluding that the Crown had engaged in a series of Treaty breaches in the Wairarapa.[4] Included within its conclusions were findings that the Crown had engaged in a series of breaches in relation to the acquisition of lands in the Wairarapa, including the Ngāumu Forest.[5]

[6] Following the Tribunal's report Treaty settlement negotiations were undertaken, initially by the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Trust (the Original Trust), and subsequently the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust (the Settlement Trust — the third defendant). Applications were also filed by the plaintiffs, and then by others, that the Tribunal exercise its powers of resumption arising under ss 8A and 8HB of the Treaty of Waitangi Act 1975 including in relation to the Ngāumu Forest. In effect these sections give the Tribunal an adjudicative function to require the land be returned to Māori when there are well-founded claims for Treaty breaches in relation to that land.

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3 *Mercury NZ Ltd and Ors v The Waitangi Tribunal and Ors*, above n 1.
4 Waitangi Tribunal *Wairarapa ki Tararua Report* (Wai 863, 2010).
5 Chapters 2 and 3A.

[7] By decision dated 24 March 2020 the Tribunal issued a preliminary determination on the resumption applications made to it.[6] The Tribunal indicated its preliminary view that Ngāi Tūmapūhia-ā-Rangi had well-founded claims for Treaty breaches relating to the Ngāumu Forest, and that the Hapū had mana whenua over the Forest. It said, however:[7]

> 283 We have also determined that we should not recommend the return of land to Ngāi Tūmapūhia-ā-Rangi. While it would be possible to find proportionality between the prejudice that Ngāi Tūmapūhia experienced and return to them of part of the land, it is not possible to return land under the Crown Forest Assets Act 1989 without the associated compensation. It is to the wider breaches of the Crown we must look to find proportionality between prejudice and the value of the land together with associated compensation.

[8] The preliminary determination of the Tribunal was then challenged by way of judicial review. In the subsequent judgment I upheld the judicial review challenge on the basis that, inter alia, the Tribunal had misunderstood its resumption powers. I directed the Tribunal to reconsider the applications for resumption in light of the judgment. By a judgment dated 11 October 2021 the Supreme Court granted leave to appeal that judgment directly to that Court. One of the successful applicants for leave to appeal was the plaintiffs.

[9] In the meantime Treaty settlement negotiations have continued between the Crown and the Settlement Trust. The Crown has agreed to increase its settlement offer, and the Trustees of the Settlement Trust have agreed to accept that settlement, following formal processes to obtain the consent of the Ngāti Kahungunu beneficiaries. The outcome of the vote by beneficiaries in favour of entering the Deed of Settlement was advised on 30 August 2021.

[10] On 21 October the plaintiffs and others were advised that the Settlement Deed would be signed within the month. On 26 October the plaintiffs were advised that the Settlement Deed would be signed on 29 October. Legislation implementing the Settlement Deed is anticipated to be put before the House of Representatives on 15 November.

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6 Waitangi Tribunal *Determinations of the Tribunal Preliminary to Interim Recommendations under Sections 8A and 8HC of the Treaty of Waitangi Act 1975* (Wai 863, 2020).

7 Footnote omitted.

[11] Under the terms of the proposed settlement the resumption applications made to the Tribunal by the plaintiffs and others are to be settled, with that settlement given legal effect by the proposed settlement legislation. Against that background the plaintiffs have applied for an interim injunction to prevent the Deed of Settlement being signed. I note that the proposed terms of settlement involve the return of the remaining available parts of the Ngāumu Forest land to the Settlement Trust.

[12] The application for an injunction is supported by Wairarapa Moana Ki Pouakani Inc, who also represent beneficiaries of the Settlement Trust, and whose separate resumption application for lands at Pouakani will be compromised by the proposed settlement (and who is also a successful applicant for leave to appeal). It is also supported by the Trustees of the Rangitāne Tū Mai Ra Trust who also object to the terms of the settlement as they say it is inconsistent with redress given to Rangitāne in their own settlement. The position of the defendants opposing the injunction is supported by other parties who will benefit from the settlement including the Raukawa Settlement Trust and Mercury Energy NZ Ltd.

Approach to interim injunction

[13] The plaintiffs' claim is not a claim for judicial review. Rather the plaintiffs seek to bring private law claims, and they apply for an interim injunction under r 7.53 of the High Court Rules 2016. The approach to the grant of an injunction is well established involving three interrelated questions:[8]

(a) whether the plaintiff has disclosed a serious question to be tried;

(b) whether the balance of convenience is in favour of the grant of an interim injunction; and

(c) whether the overall justice favours the grant of an interim injunction.

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8 *NZ Tax Refunds Ltd v Brooks Honey Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12].

Comity and the role of the Court

[14] It is not uncommon for the Court to be approached in the context of Treaty settlements, with applications being made by parties seeking that the settlement be stopped. When this has arisen it has been recognised that there is a difficult underlying issue. The Treaty settlement process can be considered, at least in part, to be a political process. Ultimately Treaty settlements become binding through an act of Parliament. There has accordingly been a concern, reflected in a number of decisions, that the Court should not be drawn into ruling upon, or making orders in relation to, matters that are to be placed before Parliament to decide.[9] One way of expressing the concern is that it engages a "comity" principle — that is that the Court should respect that there are certain matters that are for Parliament, and not for the Court.

[15] The position was most recently reviewed by the Supreme Court in *Ngāti Whātua Ōrākei Trust v Attorney-General*.[10] Ellen France J held for the majority:

> [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.[11] 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.
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> …
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> [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

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9 See *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA); *Milroy v Attorney-General* [2005] NZAR 562 (CA); *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318; *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181.

10 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

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

> 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.

[16] Assistance is also gained from the decision of the Supreme Court in *Ririnui v Landcorp Farming Ltd*.[12] There Arnold J said for the majority:

> [89] While the modern view is that courts have the power to review all exercises of public power whatever their source,[13] the courts accept that some exercises of public power are not suitable for judicial review because of their subject matter. Decisions about the allocation of national resources[14] or involving issues of national defence or national security[15] or involving national political or policy considerations[16] have been held to be not reviewable by the courts, although courts in recent times have been more willing to review decisions in areas previously regarded as inappropriate for review, the most obvious example being decisions in relation to national security.[17] Courts have treated decisions about Treaty of Waitangi settlements as inappropriate for judicial review, not simply because they often involve legislation but also because the issues involved in settlements – such as the nature, form and amount of redress – are quintessentially the result of policy, political and fiscal considerations that are the proper domain of the executive rather than the courts.
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> [90] That does not mean, however, that any decision having some Treaty context is inappropriate for judicial review.[18] In the present case, Ministers did decide to intervene on behalf of Ngāti Mākino, with telling effect, while almost at the same time advising Ngāti Whakahemo that such intervention was not possible. There is no indication in the record before the Court that the Ministers' decision not to intervene on behalf of Ngāti Whakahemo was based on anything other than the Crown's mistaken view as to the settlement of Ngāti Whakahemo's historical claims (a concluded settlement was, of course, not a disqualifying consideration in the case of Ngāti Mākino). That is, it does not appear that there were any additional policy or similar considerations involved. This being so, if the Ministers' non-intervention decision breached some principle of public law, the fact of the Treaty context should not preclude review.

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12 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

13 See, for example, *Wilson v White* [2005] 1 NZLR 189 (CA) at [21].

14 See, for example, *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 641 (PC) at 655–656.

15 *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [22]–[28].

16 See, for example, *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 197–198 per Richardson J and *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA) at 38 per Cooke P and 46 per Richardson J.

17 See, for example, Jonathan Auburn, Jonathan Moffett and Andrew Sharland *Judicial Review Principles and Procedure* (2013, Oxford University Press, Oxford) at [2.84] and following.

18 Compare the position taken by the Court of Appeal in *Ririnui* (CA), above n 12, at [35].

[17] It seems to me that the guiding principle that is being identified in these two decisions centres on the separate constitutional functions of Parliament and the Courts. It is the constitutional function of the Court to rule upon questions of legal rights when they are in dispute. It is not the function of the Court to intrude into the laws that are considered for enactment by Parliament. Because a deed of settlement is normally the precursor to anticipated Parliamentary enactment there is a danger that the Court is being invited to consider the merits of matters that are for Parliament, and not the Courts, to address. But in the same way it would be constitutionally inappropriate for the Court not to adjudicate on a matter that is properly within its jurisdiction to determine, even if that includes a question associated with the entry of a Deed of Settlement. If the Court did not do so then the Court fails in its essential function of upholding the rule of law. That line of analysis is essentially the same as I outlined in *Ngāti Mutunga o Wharekauri Iwi Trust v the Minister for Treaty of Waitangi Negotiations* where I declined an application for interim relief in similar circumstances.[19]

[18] This distinction is demonstrated by one of the issues in the present case. One of the plaintiffs' arguments is that the Trustees of the Settlement Trust are acting unlawfully in entering the Deed of Settlement because the Trustees only have power to do so if a special resolution of the beneficiaries has been passed. The plaintiffs say that this is a requirement of the Settlement Trust Deed, and no such resolution has been passed. If that allegation is correct it seems to me that the Court's jurisdiction under ss 126 and 127 of the Trusts Act 2019 would be engaged, and that the Court must exercise its constitutional function of determining the legality of the proposed actions of the Trustees in accordance with the requirements of that Act. I do not accept the submission of Ms Hardy, supported by Mr Hodder QC that the comity principle would mean that the Court should not inquire into that matter given that the settlement contained in the proposed Settlement Deed is a step along the path leading to the enactment of legislation.

[19] Before the Court can properly adjudicate on matters, including in an application for an interim injunction, there must be an issue raised about legal rights

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[19] *Ngāti Mutunga o Wharekauri Iwi Trust v the Minister for Treaty of Waitangi Negotiations* [2019] NZHC 1942.

properly to be adjudicated upon by the Court. A complication arises when a party seeks declaratory relief, as there is no requirement for a legal dispute or lis before declaratory relief can be granted.[20] Here the Court's discretion in relation to declaratory relief becomes important, and should still be exercised on the basis just described. That is, if the application for declaratory relief properly concerns a matter of legal rights to be determined by the Court then declaratory relief may be appropriate. But declaratory relief should not be granted if the Court is being drawn into a matter that involves the merits of matters that are ultimately for Parliament to decide.

[20] I address the claim for an interim injunction, including the question whether there is a serious question to be tried, against that background.

Requirements for special resolution

[21] I deal first with whether there is a serious question to be tried on the plaintiffs' second cause of action as it more clearly raises a dispute that may be properly considered by the Court. The plaintiffs allege that the entry of the Deed of Settlement is a major transaction requiring a special resolution, and no such special resolution was passed here so that the proposed entry of the Deed of Settlement by the Trustees is unlawful.

[22] A resolution authorising the trustees to enter the Settlement Deed has been voted on by the eligible beneficiaries. The result was that 68.02 per cent of those voting voted in favour. 31.05 per cent of eligible voters voted. There does not appear to be any dispute that, had the special resolution procedures required by cl 2.8 and the eighth schedule of the Settlement Trust Deed been required the resolution would not comply. In accordance with the prescribed definitions a special resolution requires no less than 75 per cent of valid votes of adult registered members of Ngāti Kahungunu.

[23] There can also be no real doubt that the entry by the Trustees into the Deed of Settlement would be a "major transaction" as defined by the Settlement Trust Deed as it would involve both the acquisition and disposition of assets reflecting more than 20

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[20] *Mandic v The Cornwell Park Trust Board (Inc)* [2011] NZSC 135, [2012] 2 NZLR 194.

per cent of the value of the Trust assets prior to the transaction. The settlement contemplates the Crown providing assets valued at more than $115 million, and even the resumption applications settled in return by themselves involve claims for assets worth hundreds of millions of dollars. The real issue is whether the special resolution procedures in the Settlement Trust Deed were in fact required.

[24] The answer to the suggestion was provided by Mr Colson QC in his submissions. Although the Settlement Trust is a post-settlement settlement trust, it was also established to operate as a pre-settlement settlement trust. The function of concluding the settlement negotiations was transferred from the Original Trust to the Settlement Trust. The Settlement Trust Deed provides (emphasis added):

> **2.10 Transfer of Mandate to negotiate the settlement of Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua Historical Claims**
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> The mandate to negotiate the settlement of the Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua Historical Claims with the Crown will transfer from the Trustees of the Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua Settlement Trust to the Trustees on the date of establishment of this Trust. **From the date of establishment of this Trust the Trustees shall be bound by the terms of the Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua Deed of Mandate**.

[25] Significantly this clause not only confers on the Settlement Trust Trustees the mandate to negotiate, but also imposes the obligations that are in the Deed of Mandate. Clauses 6.12 and 6.13 of the Deed of Mandate provide that certain decisions can only be made by a special resolution, including approval of a deed of settlement (cl 6.12.4). The special resolution process is in the fourth schedule of the "Trust Deed" (cl 6.13). That, of course, is the Original Trust Deed. They include the following terms:

> **3. VOTING**
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> In order for a Special Resolution to be passed, it must receive the approval of not less than 70% of those Registered Adult Members who validly case a vote in accordance with this Schedule with the exception of a special resolution for the approval of a Post Settlement Governance Entity or any Deed of Settlement in which case whether or not a sufficient degree of approval has been given will be agreed as between the Trustees and the Crown following the completion of this special resolution procedure.

[26] The proviso in cl 3 means that there was no requirement for the 75 per cent in the Settlement Trust Deed, or the 70 per cent in the Original Trust Deed for a special

resolution in order to enter the Deed of Settlement. The resolution that was passed by 68.02 per cent in the present case was eligible for consideration under the proviso, and the Trustees and the Crown have agreed that it is sufficient to provide consent to the entry into the Deed of Settlement. Mr Geiringer argued that that percentage was lower than had been the case for other settlements, but it remained open for the Trustees and the Crown to consider it sufficient.

[27] There remains an interpretation issue. As Mr Geiringer said there are essentially two special resolution procedures, and he argued that the one in the Settlement Trust Deed was the applicable one. I do not accept this, at least for assessing the strength of the argument at this interlocutory stage. The more particular requirements relating to the entry of the settlement, rather than the more general provisions for major transactions would seem to be applicable as a matter of interpretation. The more general provisions are more appropriate for controlling decisions by the Trustees after the settlement assets have been obtained. They control the operation of the post-settlement governance entity.

[28] There is a remaining issue, however. It appears that the procedures set out in the fourth schedule of the Original Trust Deed were not followed, and it appears from cl 3 that those processes need to be followed before the decision of the Crown and the Trustees is made. Put another way it may be that the wrong procedures had been adopted for obtaining beneficiary approval for entering the settlement.

[29] I accept Mr Colson's argument that the steps that were taken met the requirements in a substantive sense. There was a formal resolution as contemplated by cl 1 of the fourth schedule, there was notice given to the eligible voters in a manner consistent with cl 6, voting and counting occurred in accordance with cls 3 and 7–9, and there were additional hui of the kind contemplated by cl 5.

[30] Mr Geiringer argued that there was not a special general meeting of the kind contemplated by cl 4 however. It provides:

4. SPECIAL GENERAL MEETING REQUIRED

> A special general meeting of the Trust must be called for the purposes of considering one or more Special Resolutions. No other business may be transacted at such a special general meeting.

[31] No such step appears to have been taken. For that reason I accept the plaintiffs have an arguable case that the actions of the Trustees in entering the Deed of Settlement is potentially inconsistent with the requirements to obtain a special resolution in the required way.

[32] But I see the point as a somewhat technical one given the steps that were taken to get approval of the eligible beneficiaries of the Trust, particularly given the long background to these matters, the previous interactions with the beneficiaries, and the approvals obtained from them. Mr Geiringer argued that this was not a technical matter, and that for Māori direct personal meetings is of critical significance. It is only at these occasions that the kanohi ki te kanohi discussions take place. But that is not what was missing in the process here. A special general meeting may have been required, but it may be that this could have taken place remotely. The series of hui that did take place were meetings on a kanohi ki te kanohi basis. They are the kind of discretionary additional hui contemplated by cl 5 of the special procedures. Unfortunately they did not take place as planned in the areas most affecting Ngāi Tūmapūhia-ā-Rangi. But that was because of the effects of COVID-19, and it is not an implication of a failure to follow the mandated processes.

[33] The upshot is that I accept that the plaintiffs have an arguable case that the Trustees are acting inconsistently with the formal requirements that are required before the entry into the Deed of Settlement, but I accept that processes that have been followed are substantively similar to the mandated processes. So much depends on the balance of convenience and the overall justice of the case which I address below.

[34] I do not accept that the plaintiffs have an arguable case in relation to the remaining aspects of the second cause of action. Mr Geiringer argued that the decision of the Trustees could be challenged on the basis that they had failed to properly recognise and protect the interests of Ngāi Tūmapūhia-ā-Rangi in agreeing to enter the Deed of Settlement. That criticism was formulated in a number of different ways. But

the objects of the Settlement Trust set out in cl 2.5 seem to me to contemplate the Trustees reaching a settlement for the benefit of the beneficiaries, and the iwi overall. It has a collective flavour. Even the particular sub-clause relied upon by Mr Geiringer has that quality. It includes within the purposes of the Trust to:

> (e) Represent and promote the specific interests of all Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua claimants during negotiation of a settlement of the Historical Claims, Contemporary Claims and Takutai Moana Claims and in the implementation and management of the settlement;

[35] This seems to me to contemplate all the claimants in a collective way rather than involving an obligation to maximise the interests of particular claimants. This collective concept is contemplated by the very next sub-clause which provides:

> (f) Undertake any other steps necessary to effect the best collective outcome for the settlement of Historical Claims, Contemporary Claims and Takutai Moana Claims including court proceedings and/or a remedies application to the Waitangi Tribunal;

[36] On that basis it seems to me that it would be very difficult to contend that the decision to enter the Deed of Settlement was "not reasonably open to the trustee in the circumstances" as required by ss 126 and 127 of the Trusts Act 2019.

Challenge to Crown's decisions

[37] I next address the plaintiffs' first cause of action. It is a direct cause of action against the Crown. As pleaded it alleges that the Crown's actions in entering the settlement are a breach of the Treaty of Waitangi entered by the Crown on 6 February 1840, and a breach of the agreement between the Crown, the New Zealand Māori Council and the Federation of Maori Authorities entered on 28 July 1989 (the Crown Forest Agreement).

[38] An immediate issue arises in terms of identifying what the causes of action actually are. It has not yet been suggested that the Treaty is directly enforceable before the Courts, and the plaintiffs were not party to the Crown Forest Agreement allowing any cause of action in contract. But the matter does not turn on points of pleading, and I explored with Mr Geiringer whether there was a claim, properly adjudicated upon by the Court, that could form the basis for an interim injunction.

[39] It is plain that the plaintiffs do have recognised legal rights. Ngāi Tūmapūhia-ā-Rangi have been recognised as having mana whenua rights within Ngāumu Forest, and these are legal rights that are capable of being recognised by the Court. The plaintiffs also have the right to seek resumption, and have sought a resumption order before the Tribunal. The Tribunal has accepted that they have well-founded claims, and that Ngāi Tūmapūhia-ā-Rangi has mana whenua over the forest, but made a preliminary decision not to grant the application. That decision has been set aside by the High Court with the Tribunal directed to reconsider. The plaintiffs have now been granted leave to appeal to the Supreme Court. All these matters reflect legal rights that are properly addressed by the Courts.

[40] But none of these matters mean that there is a cause of action arising as a consequence of the Crown, or the Settlement Trust entering the Deed of Settlement. The Crown commits no identified legal wrong by entering the Deed. In the same way, and subject to the arguable point that I have addressed above, the Trustees commit no such legal wrong. I can identify no cause of action that is properly to be adjudicated on by the Courts which can provide a basis for an interim injunction.

[41] As I indicated above, the Court has the function of providing declarations when issues affecting legal rights are properly the subject of that jurisdiction. But there are two difficulties for the plaintiffs in relying on this as the source of a jurisdiction for an injunction.

[42] The first is that I doubt there is jurisdiction for the Court to grant an interim injunction in support of an application for purely declaratory relief. It may be possible for the Court to do so in its inherent jurisdiction, but it does not seem consistent with the nature of that jurisdiction to make an order to prevent a defendant from undertaking particular actions. The jurisdiction to grant declarations is limited to declaring what a legal position is.

[43] But in any event there is a more significant point. I do not accept that there is an arguable case that the act of entering the Deed of Settlement in itself compromises the plaintiffs' legal rights. It may be that the Settlement Trust Deed involves a form of authority for the Trustees to negotiate, and then compromise Treaty claims,

including those of the plaintiffs. But as Mr Geiringer submitted, the Supreme Court's decision in *Haronga v Waitangi Tribunal* found that it is open for a claimant for resumption to withdraw the mandate of such trustees and proceed with a resumption application before the Tribunal.[21] In the present case the plaintiffs may be taken to have removed the Trustees' authority to settle their claims. For that reason the decision of the Trustees to purportedly settle such claims may have no legal effect.

[44] It is not the Deed of Settlement that compromises the plaintiffs' claims, and accordingly their recognisable legal interests. It is ultimately the legislation that will do so. Once this is appreciated it can be seen that the plaintiffs' application to the Court is not an application relating to legal rights and interests that are properly adjudicated on by the Court, even when exercising its declaratory jurisdiction. It intrudes into the area of the assessments to be made by the legislature. No declaratory relief, and accordingly no injunction based on such claims is appropriate in those circumstances.

[45] Mr Geiringer argued that this was not so because it was appropriate for the Court to make findings that advised the Executive what the legal position was so that both the Executive and ultimately Parliament could proceed with a complete understanding of the implications of their actions. In support of this submission he referred to the stance that had been taken by the Crown that Ngāi Tūmapūhia-ā-Rangi's claim for resumption had no foundation as it had not been accepted by the Tribunal, and that there was no prospect of the Tribunal now reaching a different conclusion. He referred to a paragraph of the Minister's affidavit where the Minister said that the claimants "are not and could not be appropriate recipients of the resumable land". I accept that this may involve a misunderstanding. As a consequence of this Court's decision the Tribunal's decision was set aside. The Court found that the Tribunal had failed to exercise its powers reflecting the close association between the resumption remedy and mana whenua rights. Given that Ngāi Tūmapūhia-ā-Rangi's position in claiming resumption may now be stronger. And the position may change again following the appeal to the Supreme Court. To consider the claim as

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[21] *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53.

hopeless, and that Ngāi Tūmapūhia-ā-Rangi "could not be" an appropriate recipient may involve a misunderstanding.

[46] But this does not form the basis of a legal issue, properly adjudicated upon by the Courts, that can found the basis for an injunction.

[47] For these reasons I do not accept that the plaintiffs have a serious question to be tried on the first cause of action.

Balance of convenience and overall interests of justice

[48] Having concluded that there is no serious question to be tried on the first cause of action, but there is potentially a question to be tried on the second cause of action (albeit of a somewhat technical nature) I come to consider the balance of convenience and the overall justice of the case.

[49] This application is made in the context of complicated Treaty settlement discussions, and a proposed settlement. As I said when declining a similar application for interim relief in *Ngāti Mutunga o Wharekauri Iwi Trust v the Minister for Treaty of Waitangi Negotiations*:[22]

> [39] Treaty negotiations, and Treaty settlements are by their nature compromises. They are not adjudicative processes. In these processes claimants abandon claims that they have in return for an overall settlement package. The negotiations are difficult exercises, and obviously involve give and take. When different groups each claim mana whenua over the same lands they are made more difficult. …
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> [40] The difficulty in achieving Treaty settlements is also something not to be underestimated. The fact that the Crown and Hokotehi Moriori Trust have reached the point where they believe a settlement can now be entered is a significant achievement. As the Minister said at the meeting on 19 June 2019, to allow another claimant group to stop a settlement being entered suggests that others who claim rights have a veto power over settlements, or at least that the Court will recognise that their claims allow them to stop the settlement process. For the Court to make orders preventing the signature of a Deed of Settlement would only be justified when there were very compelling reasons for the Court to intervene.

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[22] *Ngāti Mutunga o Wharekauri Iwi Trust v the Minister for Treaty of Waitangi Negotiations*, above n 19.

[50] The position is the same here. Treaty settlements are ultimately compromises. In such settlements the Crown usually recognises the serious breaches of the Treaty that have occurred against the backdrop of cultural, social and economic consequences for affected Māori. The settlements are never fully restitutionary. The parties in the position of the Trustees ultimately make a pragmatic decision on whether what the Crown is offering is sufficient for the iwi to move on using the redress that is provided to address the cultural, social and economic harm that has been done. The Crown makes a similar assessment influenced by other factors such as the relativity with other Treaty settlements, and whether it has properly addressed the stain on the Crown's conscience.

[51] These are not matters that the Court has a role in addressing. And yet the order sought would have the effect of preventing the Trustees and the Crown from entering a Deed of Settlement, reached after many years of negotiation, approved by a majority of voting beneficiaries, pursuant to which both the Crown and Ngāti Kahungunu seek to move forward.

[52] Against that background I assess the plaintiffs' arguable point — that in seeking approval from the Ngāti Kahungunu beneficiaries the wrong procedures for the formal resolution were used, albeit that a process was followed that was substantively consistent with what is required. I do not see the argument to be sufficiently strong to stop the settlement process. Even if the Court were later to agree with the plaintiffs that the procedures followed were deficient, the substantive compliance might be such where the Court concluded that it was unnecessary to require further procedures to be followed.

[53] I am also concerned about the likely delay. A further fixture of this Court would be required to determine the plaintiffs' claims, and there would then be a prospect of appeals. At the very least there would be the delay occasioned by a new resolution process should the plaintiffs succeed. That would be against the background that the point being raised is a somewhat technical one, particularly given the ultimate decision to be made by the Trustees and the Crown under cl 3 on whether there was "a sufficient degree of approval" to the settlement.

[54] For these reasons both the balance of convenience and the overall interests of justice are not in favour of granting the injunction. The injunction was accordingly declined.

Leave to appeal

[55] Immediately after announcing the result Mr Geiringer applied for leave to appeal. I accepted that the decision substantively determines the proceedings, and that leave would accordingly be appropriate. It may well be that the plaintiffs will not be able to have such an appeal heard by the Court of Appeal in time. But whether it can be done or not is a pragmatic matter that can be assessed by the Court of Appeal. It is not a reason not to grant leave. For that reason I granted leave.

Outcome

[56] For these reasons the application for an interim injunction was dismissed, and leave to appeal that decision was granted.

[57] If there is any question in relation to costs memoranda may be filed.

Cooke J

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