



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

WAIRARAPA MOANA KI POUĀKANI INC v MERCURY NZ LTD (SC 93/2021)

GRIGGS AND ANOTHER v WAITANGI TRIBUNAL (SC 127/2021)

[2022] NZSC 142

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

In 2010 the Waitangi Tribunal released its report on the historical claims of Ngāti Kahungunu and Rangitāne of the Wairarapa region. The Tribunal largely upheld those claims. The Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua Settlement Trust (Ngāti Kahungunu Settlement Trust) reached agreement with the Crown for the settlement of all Ngāti Kahungunu ki Wairarapa claims. Despite this, two entities affiliated to Ngāti Kahungunu ki Wairarapa applied to the Tribunal for compulsory resumption of certain land in which they claimed a Treaty interest.

Wairarapa Moana ki Pouākani Inc (Wairarapa Moana) is a Māori land incorporation. The shareholders of Wairarapa Moana are the descendants of southern Wairarapa hapū communities. At the beginning of the 20th century, the hapū reached agreement with the Crown to exchange their customary rights in Lakes Wairarapa and Ōnoke for Crown land at Pouākani (the Pouākani land). The land is in the traditional rohe of Raukawa and Ngāti Tūwharetoa. In 1949 the Crown compulsorily acquired 787 acres of that land as a site for the Maraetai Power Station. The Station is now owned and operated by Mercury NZ Ltd.

Wairarapa Moana applied to the Waitangi Tribunal for resumption of the 787 acres.

Ryshell Griggs and Mark Chamberlain are members of Ngāi Tūmapūhia-ā-Rangi, a hapū of Ngāti Kahungunu ki Wairarapa. They applied, on behalf of the hapū, for resumption of

10,313.8 hectares of Crown forest licence land located in the Ngāumu forest in Wairarapa. The hapū hold customary interests in the forest.

The Ngāti Kahungunu Settlement Trust then cross-applied for resumption of the same parcels of land.

Mercury applied to the Tribunal for leave to adduce evidence and make submissions in relation to the application for resumption of the Pouākani land. The Tribunal found that it was precluded from hearing from Mercury by s 8C of the Treaty of Waitangi Act 1975.

The Tribunal delivered “preliminary determinations” on the resumption applications on 24 March 2020; that is, determinations that were to feed into a continuing iterative process for final resolution of the applications. The Tribunal indicated that it was minded to grant resumption of the Pouākani land and the Ngāumu forest but not to either Wairarapa Moana or Ngāi Tūmapūhia-ā-Rangi. The Tribunal considered the Treaty-breaching prejudice suffered by these smaller claimant groups was insufficient to justify resumption and would result in unfairness to other claimants who would not benefit. Rather, prejudice suffered on an iwi-wide scale and in relation to the entire tribal estate, would provide a firmer justification for resumption. The fact that Raukawa and Ngāti Tūwharetoa held mana whenua over the Pouākani land did not preclude a recommendation for resumption of that land.

Additionally, the Tribunal found that the Crown was responsible for the nearly 30-year delay in resolving Ngāi Tūmapūhia-ā-Rangi’s Ngāumu forest claim. This meant that the Crown’s liability to pay interest on compensation under the Crown Forest Assets Act 1989 would begin at the earliest possible time under the Act — four years after the Ngāi Tūmapūhia-ā-Rangi claim was filed. The claim was filed in 1988.

High Court

Mercury sought judicial review of the Tribunal’s determination that it lacked standing. Raukawa (supported by Ngāti Tūwharetoa) and the Crown each sought judicial review of the Tribunal’s preliminary determinations on resumption and the related forest compensation. The High Court found that:

- (a) The Tribunal had misinterpreted its resumption powers. The Tribunal could not use resumable land as a remedial “land bank” for unrelated Treaty breaches.
- (b) The Tribunal breached tikanga and Treaty principles when it determined that the Pouākani land could be resumed by an iwi without mana whenua as this would conflict with the rights of the iwi that do have mana whenua.
- (c) When the Tribunal set the trigger date for liability to pay interest on compensation for resumed Crown forest land, it did not take into account all relevant matters and took into account irrelevant matters.
- (d) The Tribunal was correct to determine that Mercury did not have standing in relation to the Pouākani resumption applications.

Leave to appeal

Wairarapa Moana and Ngāi Tūmapūhia-ā-Rangi were then granted leave to bring direct appeals to this Court. The approved question was whether the High Court’s decision was correct. This Court also granted Mercury leave to cross-appeal on the question of standing.

Issues before the Supreme Court

The Court addressed the following five issues:

- (a) Did the Tribunal's determination (albeit preliminary) that Wairarapa Moana is not a suitable recipient for resumption of the Pouākani land, render its appeal moot?
- (b) Did the fact that Ngāti Kahungunu ki Wairarapa lacks mana whenua in relation to the Pouākani land, count decisively against resumption in favour of any Ngāti Kahungunu interests, however configured?
- (c) What historical Treaty prejudice is relevant to the exercise of the Tribunal's resumption jurisdiction?
- (d) Did the Tribunal take into account all relevant matters when it determined (for the purposes of the Crown's interest liability) that the post-1992 delay in resolving the Ngāumu forest claim was entirely attributable to the Crown?
- (e) Did the Tribunal correctly apply s 8C of the Treaty of Waitangi Act when it refused to hear from Mercury in the Pouākani application?

Result

This Court has, by a majority (Winkelmann CJ, Glazebrook and Williams JJ), allowed Wairarapa Moana's appeal in part. William Young and O'Regan JJ dissented in part. The Court has unanimously dismissed Ngāi Tūmapūhia-ā-Rangi's appeal and Mercury's cross-appeal.

The Court unanimously agreed that the Pouākani applications are not moot. Winkelmann CJ, Glazebrook and Williams JJ reasoned that the Tribunal's determinations were preliminary, no application for resumption is required by legislation in any event, and the High Court's unchallenged finding was that the Tribunal had wrongly broadened the scope of relevant prejudice. The Tribunal is therefore bound to reconsider the applications afresh. For slightly different reasons, William Young and O'Regan JJ agreed that the appeal is not moot. O'Regan J considered there is no legal impediment to the Tribunal changing its mind about the suitability of Wairarapa Moana as a recipient of the land. For his part, William Young J accepted that applicants could either amend their applications or file new ones.

On the issue of mana whenua, the majority has allowed the appeal in part. The majority held the High Court was wrong to find that granting resumption to an iwi without mana whenua over the land is inconsistent with tikanga and Treaty principles. The majority held that there are other relevant tikanga principles that may be brought to bear in considering whether to grant resumption and to whom. In the case at hand, there is as yet no final determination on whether mana whenua should prevail over those other tikanga considerations. Nor have the interested communities explored tikanga processes for the achievement of whaka-ea (the restoration of balance) between mana whenua and Ngāti Kahungunu-based interests (however configured). It is too soon for the High Court to reach definitive findings about whether tikanga or Treaty principles have been or would be breached.

On the relevant prejudice issue, William Young J considered that resumption is available only where the land directly affected was acquired in breach of Treaty principles. The majority noted that there is no appeal against the High Court's finding that the relevant prejudice for the Pouākani resumption applications includes the acquisition of the Wairarapa lakes and the subsequent land exchange in Pouākani, but does not include wider iwi prejudice. That must

therefore remain the basis upon which these applications are considered going forward. Nevertheless, the majority made some comments on this approach based on the nature of historical Treaty claims and the procedures adopted in the Tribunal to deal with them. This is because the relevant prejudice issue was not treated in the High Court as completely separate from the mana whenua issue and because William Young J accepted the Crown's submission that a narrower approach should have been taken. This may be an issue in future resumption cases. O'Regan J considered the Court should not engage with the issue since it was not the subject of direct appeal.

As to the Crown's interest liability, the Court unanimously agreed with the High Court that the Tribunal's approach to the calculation of the amount was in error. The Tribunal had proceeded on the basis that the Crown should have set about identifying all claims which might result in resumption of Crown forest land and funded the Tribunal to process such claims promptly. The Tribunal had failed to consider all factors when deciding not to extend the four-year holiday on interest. These factors included the reasonableness of the Crown's approach to settlements, any delay on the part of the Tribunal, other reasonable calls on public funding and the delay in application for resumption of the Ngāumu forest.

On the issue of Mercury's standing, the Court agreed unanimously with the High Court that Mercury did not have standing. Section 8C of the Treaty of Waitangi Act, considered in light of the legislative history, the purpose of the Act, and the preamble of the Treaty of Waitangi (State Enterprises) Act 1988, clearly precluded an entitlement to be heard.

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