IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2019-485-436
[2019] NZHC 1942

BETWEEN	NGĀTI MUTUNGA O WHAREKAURI IWI TRUST Plaintiff
AND	THE MINISTER FOR TREATY OF WAITANGI NEGOTIATIONS First Defendant
	HOKOTEHI MORIORI TRUST Second Defendant

Hearing: 8 August 2019

Appearances: T J Castle and T M Stevens for the Plaintiff
C D Tyson and C J C Pouwells for the First Defendant
D Laurenson QC and T Bennion for the Second Defendant

Judgment: 9 August 2019

JUDGMENT OF COOKE J
(Interim relief)

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[1] By application dated 5 August 2019 the plaintiff has applied for interim orders under s 15(2) of the Judicial Review Procedure Act 2016. It seeks a declaration that neither the first defendant, or any other Crown agency, should take any action in the exercise of power to make decisions including, particularly, not to initial, sign or otherwise confirm a draft or final deed of settlement between the Crown and the second defendant. The application was filed with a statement of claim and notice of proceeding of the same date, together with an affidavit of Thomas McClurg also sworn 5 August 2019.

[2] At the conclusion of the hearing of the application on 8 August 2019 I indicated that the application would be dismissed and that reasons would follow later in the day. These are my reasons.

Background

[3] Counsel for the plaintiff first alerted the Court of the possibility of an application on Friday 2 August 2019. The application was filed, and then called before me at 2.15 pm on Monday 5 August 2019. At that stage counsel for the plaintiff advised that the defendants had not been given notice of the hearing that had been scheduled notwithstanding that there had been a meeting between the plaintiff and representatives of the first defendant that morning. As I indicated in the minute issued that day I was surprised by that, and I indicated that I would not give any definitive indication as to how the application was to be dealt with without the defendants being notified and heard. I directed that the matter would be called again on Friday 9 August 2019, and that by that stage I expected the application to be served, submissions filed, and it would be reviewed whether the application would be heard, at least on a Pickwick basis.

[4] Two further affidavits were filed on 7 August 2019, a further affidavit from Mr McClurg and an affidavit from Anthony Tumoana both sworn Wednesday 7 August 2019. Submissions were subsequently filed by counsel for the plaintiff yesterday afternoon, Thursday 8 August 2019. The Crown was able to file an affidavit sworn by Ms Lillian Anderson, the Acting Chief Executive of the Office of Maori Crown Relations, and written submissions later the same day. The second defendant has also filed an affidavit from Maui Solomon and written submissions, also dated 8 August 2019.

[5] It is appropriate to record that when a party is applying to the Court for interim relief, or an interim injunction, informal notice should be given to the opposing parties before the applicant is called before the Court if service cannot be affected. In the present case, it would have been appropriate for the defendants to have been advised of the hearing and given an opportunity to be heard when the application was first called so that they could provide advice on the stance being adopted, and be heard on

the procedure for the hearing of the application. Hearings in the total absence of such notice are only permitted in the circumstances referred to in r 7.23 of the High Court Rules 2016 which sets out significant prerequisites. Those requirements are important.[1]

Context and basis of the applications

[6] The general context of the application is set out in the two affidavits of Mr McClurg, the affidavit of Ms Anderson, and the affidavit of Mr Solomon.

[7] Ngāti Mutunga o Wharekauri (Ngāti Mutunga) claim mana whenua over the whole of the Chatham Islands (Wharekauri, or Rekohu and Rangihaute). Similar claims are made by Moriori who are represented by the Hokotehi Moriori Trust (Moriori), the second defendant. The Crown has been in negotiation with both Ngāti Mutunga and Moriori for many years.

[8] More detail of the nature of the claims made by Ngāti Mutunga and Moriori can be found in the report of the Waitangi Tribunal into the claims made by Moriori.[2] The Tribunal concluded, inter alia, that the decision in 1870 by the Native Land Court to recognise customary title by Māori on the basis of conquest was not justified.[3] But the issues have been controversial. Negotiations with both Ngāti Mutunga and Moriori have continued over the years.

[9] Offers were made by the Crown to both groups in December 2018. Mr Solomon attached a copy of the AIP provided to Moriori showing the proposed terms of settlement to his affidavit. A letter dated 12 December 2018 from Ngāti Mutunga to the Honourable Andrew Little, the Minister for Treaty Negotiations, illustrates that Ngāti Mutunga strongly opposed the offers, including because of what was to be offered to Moriori. The letter stated:

> However, your offer clearly signals to us that you are not approaching us as a respected Treaty partner. An offer that expects us to compromise our mana so that Moriori interests can be elevated by the Crown above our own in our own

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1 See *Craig v Craig* [2019] NZHC 414.
2 Rekohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands (Wai 64, 2001).
3 See summary in *Kamo v Minister of Conservation* [2018] NZHC 1983, [2018] NZAR 1334 at [20].

> Islands is historically misconceived, and contrary to the Articles and Principles of the Treaty of Waitangi. It will have disastrous effect within the Chatham's community. We are deeply concerned that you seem to think that this is acceptable.

[10] It is not necessary to go into the details of the offers. It is sufficient to say that the Crown was proposing to return certain lands to Moriori, or that lands be given a classification that recognised an interest of Moriori. This was strongly objected to by Ngāti Mutunga given their claims over such lands.

[11] What Ngāti Mutunga say, however, is that there was a subsequent change in stance by the Crown. Mr McClurg describes being invited to meet urgently with the Minister and Ms Anderson on 19 June 2019. Mr McClurg says that at that meeting it was acknowledged that the Crown approach to Ngāti Mutunga to date had been inflexible, and that a fresh approach was required. He understood that a new Crown negotiator would be appointed. He says that after that meeting he felt an overwhelming sense of relief as matters would now change.

[12] Mr McClurg's optimism was dashed when he then received a letter from the Minister of Treaty Negotiations on 23 July 2019, which he described as a bombshell. That letter referred to the meeting on 19 June 2019 and stated:

> At our meeting I advised you I would shortly be taking final overlapping interest decisions regarding contest and redress proposed for inclusion in the Moriori settlement package. These decisions have been delayed for some time as I have sought to work with you personally to address the deeply felt concerns you expressed on behalf of Ngāti Mutunga o Wharekauri. I want to continue to work with you on a resolution to Ngāti Mutunga o Wharekauri's concerns, but I cannot delay decisions on overlapping interests any further. I write to inform you of my decisions.

[13] The letter then set out what had been decided, which included transfer of some sites to Moriori, and formal recognition of other sites. These include sites over which Ngāti Mutunga claim mana whenua. The letter concluded:

> My final decisions on the Moriori settlement package are with Moriori for consideration. Subject to their agreement to my final decisions, I am scheduled to initial a Deed of Settlement with Moriori shortly.
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> I am aware initialling the Deed of Settlement with Moriori will affect Ngāti Mutunga o Wharekauri. I am available to meet with you to continue our discussion on next steps for Ngāti Mutunga o Wharekauri.

[14] Ngāti Mutunga claim that this stance is inconsistent with legitimate expectations that arose as a consequence of what had been said at the 19 June 2019 meeting.

[15] The statement of claim for judicial review seeks a declaration that the Crown ought not to proceed with a Deed of Settlement with Moriori until the promised review takes place, together with other relief. The statement of claim does not clearly state what the reviewable decisions being made are, or what grounds of judicial review are advanced, although paragraph [12] claims the approach of the Crown is in breach of the plaintiff's legitimate expectations, and also that the decisions are otherwise unreasonable and demanding of judicial review.

Approach to interim relief

[16] The approach to interim relief under what is now s 15 of the Judicial Review Procedure Act 2016 was summarised by the Supreme Court in *Minister of Fisheries v Antons Trawling Company Ltd* by reference to the earlier decision of the Court of Appeal in *Carlton and United Breweries v Minister of Customs* in the following terms:[4]

> [3] Before a Court can make an interim order under … it must be satisfied that the orders sought is reasonably necessary to preserve the position of the applicant. If that condition is satisfied the Court has a wide discretion to consider all of the circumstances of the case, including the apparent strengths or weaknesses of the applicant's claim for review, and all the repercussions, public or provide, of granting interim relief.

Analysis

[17] Applying this approach, and contrary to Mr Tyson's written submissions, I first accept that there is a position for Ngāti Mutunga to preserve under s 15. If the relief sought is not granted the Crown will enter a settlement with Moriori that promises to transfer certain lands to Moriori, or give acknowledgements over certain lands. Ngāti Mutunga claims mana whenua over those lands. So the ability for Ngāti Mutunga to have their claims to mana whenua recognised in such lands will be irretrievably compromised.

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4 *Minister of Fisheries v Antons Trawling Company Ltd* [2007] NZSC 101; (2007) 18 PRNZ 754, *Carlton and United Breweries v Minister of Customs* [1986] 1 NZLR 423.

[18] The real issue in this case is the exercise of the discretion under s 15, and the balancing of all the relevant considerations. It seems to me that in this context the nature and strength of Ngāti Mutunga's claim is a key consideration.

Nature of the challenge

[19] The challenge here is to a step in a Treaty settlement processes. The decision of the Supreme Court in *Ngāti Whatua Orakei Trust v Attorney-General* involved a shift in the way that the Courts have previously dealt with challenges to Treaty settlement decision making.[5] In the case law prior to this decision there was greater emphasis on the idea that the Treaty settlement process was non-judiciable as any challenge effectively involved a challenge to Parliamentary process given that settlements were ultimately given effect to by legislation. The Courts tended to strike out such proceedings. Having said that, what I have just said involves a generalisation, as individual decisions took different approaches to these issues.[6] Ellen France J for the majority held:

> [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. 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 a challenge to the legislative proposal for the transfer of the specified properties. Nor was it correct to find that the only impact on Ngati Whatua Orakei will be through the proposed legislation. Rather, there are live issues

5 *Ngāti Whatua Orakei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.
6 As described at [38]–[47].

> as to the nature and scope of the rights claimed which Ngati Whatua Orakei should be permitted to pursue in the usual way.

[20] Claims of mana whenua over lands are effectively claims to customary title, which are recognised legal rights.[7] Parties are entitled to come to the Court when there are disputes about legal rights. That includes the ability to bring judicial review proceedings when the Crown is exercising reviewable powers in a manner that is unlawful.

[21] So the Court held it was wrong for the Court to strike out the proceedings in their entirety in that case. The Court held that decisions under s 120 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, which concerned land with respect to which there was right of first refusal, could be the subject of judicial review.[8]

[22] I nevertheless accept there is force in Mr Tyson's submission that the present challenge involves a challenge to the legislative process in "a manner inconsistent with accepted comity principles". In *Ngāti Whatua* the Supreme Court concluded that some of the claims for relief in that case should be struck out as being inconsistent with the principle of non-interference with Parliamentary proceedings.[9] These included the claims that the entry of Deeds of Settlement was unlawful.[10] In that case one Deed had been signed, and the other was in the process of being signed.[11] As is the usual practice, a Bill that would give legislative effect to the settlement was being prepared alongside the Deed of Settlement. The point is that the entry of a Deed of Settlement, and the introduction of a Bill to implement it, were inextricably interlinked.

[23] I am advised that that is the case here, although the evidence currently before me on that point does not spell that out. It may well be, however, that the current claim does cross the line, and does involve an application for the Court to make orders, or grant declarations, in a manner the intrudes into Parliamentary proceedings.

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7 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [2], [10] and [46].
8 At [60]–[66].
9 At [65]–[66].
10 At [29] (e) and (f).
11 At [19], noting footnote 12.

[24] The second point relied upon by the Crown relates to the reviewability of these decisions. This was discussed by the Supreme Court in *Ririnui v Landcorp Farming Ltd*. Arnold J said for the majority:[12]

> [89] While the modern view is that courts have the power to review all exercises of public power whatever their source, 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 or involving issues of national defence or national security or involving national political or policy considerations 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. 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. 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.

[25] Whilst this passage, and some of the earlier authorities refer to the concept of judiciability, reference to that concept may be misleading. It suggests that judicial review is excluded altogether. The decisions of the Supreme Court in *Ririnui v Landcorp Farming Ltd* (where the review was successful) and *Ngāti Whatua* (where they were not struck out) demonstrates that this is not so. The key concept is that mentioned in the last sentence of paragraph [90] of *Ririnui*. In the context of Treaty negotiations the grounds of judicial review are limited, and the Court can only interfere if there has been a breach of a principle of public law.

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12 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 623, [2016] 1 NZLR 1056 (footnotes omitted).

[26] By their nature Treaty negotiations involve issues of compromise. They are underpinned by issues relating to Treaty rights, and legal rights, but the negotiations themselves do not involve the determination of rights but matters of policy and pragmatism. So the scope for public law wrongs is reduced. But it is not eliminated. In *Ririnui* itself the reviewable decision was the Ministers' decision not to intervene in a sale by Landcorp Farming Ltd. In doing so the Ministers had acted on the basis of a fundamental error — advice had been given that Ngāti Whakahemo had settled their Treaty claim when that was not true. The error was significant as the Ministers had intervened on behalf of another iwi, Ngāti Makino. This was held to be a public law error allowing successful review.

[27] What is necessary, therefore, is a close consideration of the decision that is challenged to ascertain whether it involves a public law error of the kind that is properly corrected by the Court on judicial review. That requires a close consideration of what Ngāti Mutunga's judicial review claim is.

The challenge here

[28] Here Mr Castle emphasised that Ngāti Mutunga's claim was based on breach of legitimate expectation only. He did not suggest that the judicial review proceedings involved any question of declaratory relief in relation to the customary rights held by Ngāti Mutunga. Rather he argued that what the Minister had said at the meeting on 19 June 2019 had created a legitimate expectation that there would be no settlement with Moriori before the promised fresh process to consider Ngāti Mutunga's claims had been put in place.

[29] The approach to claims for breach of legitimate expectation is not in dispute.[13] There are two related difficulties with Ngāti Mutunga's claim here.

[30] First it is not apparent from the evidence that there was any representation, express or implied, made at the meeting on 19 June 2019 that the Crown would not proceed in entering a Deed of Settlement with Moriori. Indeed Ngāti Mutunga's own notes of that meeting records the following:

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[13] See *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137.

> [Minister:] Moriori posturing but not too far apart. Need to maintain coherency between the two settlements.
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> McClurg: Moriori are further advanced than Ngati Mutunga o Wharekauri due to previous negotiations with Crown. Need to bring them together.
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> [Minister:] Reluctant to pause negotiations. Perceived exercising of veto by one iwi over another.

[31] That is consistent with Ms Anderson's evidence of the meeting. She says:

> 26. The Minister stated that he did not think it fair to hold up negotiations with Moriori or impact on their settlement or timeframes. Mr McClurg responded this was not Ngati Mutunga's intention.
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> …
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> 30. Contrary to the affidavit of Mr McClurg, at no time in the 19 June or 5 July meetings was it stated or suggested that a consequence of the proposed process was that negotiations with Moriori would be paused or suspended.

[32] I accept that Mr McClurg formed the view that the Crown would not proceed with the proposed settlement with Moriori given the new spirit he understood was being adopted in the negotiations. But that was only because of a general sense that the Crown was changing its approach. It is perhaps unfortunate that Mr McClurg was given such an optimistic impression. It appears from the evidence that, even at the time of the 19 June 2019 meeting, discussions with the Crown on the entry of a Deed of Settlement with Moriori were well advanced. Nevertheless the point is that no clear promise was given that the Crown would not settle with Moriori until the new spirit manifested itself in a new process of a kind that would provide a basis for a claim for breach of legitimate expectation.

[33] The lack of clarity over the suggested representation was reflected in Mr Castle's oral submissions, as he was initially reluctant to contend that there was a representation that the Crown would not enter a Deed Settlement with Moriori, but ultimately accepted that this was Ngāti Mutunga's case. In addition the reasonableness of any such expectation depends on the context, and it is noteworthy that in other circumstances the Crown have set out much clearer representations on the process to be followed in the negotiations. For example, by letter dated 27 June 2016 from the Crown's chief negotiator to Mr Solomon and others, the following was stated:

- Where the Crown becomes aware that the mandated representatives of another claimant group has expressed an interest in potential settlement assets or redress in which Hokotehi Moriori Trust have also expressed an interest, the Crown, before finally offering the particular redress or asset for inclusion in settlement, will:

    - notify Hokotehi Moriori Trust of the shared interest; and

    - facilitate a discussion between the relevant mandated representatives in order to attempt to resolve, at an early stage, any potential conflicts between claimant groups about the potential redress

[34] The evidence is that a letter in equivalent terms was sent to Ngāti Mutunga. This is a much clearer set of representations, made in writing, about the negotiation process. It contrasts with the less clear representations now said to have been made orally. Ngāti Mutunga does not suggest that this written representation in 2016 has been breached.

[35] Secondly, whilst there is room for legitimate expectation of substantive outcomes, it is usually the case that a legitimate expectation will simply mean that the decision maker cannot change its position without giving the person who has the expectation the right to be heard. Here I see little basis for Ngāti Mutunga to have any greater right than this. Given that the Minister's letter has been sent before the signing, which is not due to occur until next Tuesday 13 August 2019, and it invites Ngāti Mutunga to discuss the situation, it seems to me that Ngāti Mutunga has been given the right to be heard before any change of position was implemented.

[36] In effect Ngāti Mutunga are saying no more than the Minister's letter of 23 July 2019 has put them back in the position they were in before the meeting on 19 June 2019. Mr Castle did not suggest that Ngāti Mutunga had any claim prior to that point.

[37] For those two related reasons it seems to me that the claim that Ngāti Mutunga advance has very little prospect of success.

Other relevant circumstances

[38] There are other circumstances that are relevant to the exercise of the Court's discretion, albeit that they are closely related to the lack of strength in the challenge

itself. They relate to the appropriateness of the Court making orders in relation to Treaty settlement processes even if the claim had more merit.

[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. Here the Crown has apparently reached a settlement with the Hokotehi Moriori Trust which involves lands over which Ngāti Mutunga claim mana whenua. But it is inevitable that Ngāti Mutunga would not receive back all lands over which it claims mana whenua. Indeed it claims mana whenua over the whole of the Chathams. What the settlement with Hokotehi Moriori Trust will mean, however, is that the terms of any future settlement with Ngāti Mutunga will now need to be different. But that does not mean that a settlement of Treaty grievances is not still achievable. So the prejudice to Ngāti Mutunga is only of a particular kind.

[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.

[41] Finally, it is relevant that Ngāti Mutunga have only approached the Court at a late stage. The negotiations have gone on for many years. They have included discussions about the overlapping claims of mana whenua. As indicated, Treaty settlement negotiations can involve underlying claims of right, and it may be that the Court can be called upon in relation to those claims. Treaty negotiations are an alternative way forward, however, that may be more likely to be fruitful. It may not

be appropriate for the Court to be approached at the last moment because a claimant is unhappy with the outcome of this process.

Conclusion

[42] For the above reasons the application for interim relief was dismissed.

[43] If there is any issue relating to costs memoranda may be filed.

Cooke J

Solicitors:
Burley Attwood Law, Tauranga for Plaintiff