
IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2022-485-650

UNDER	The Judicial Review Procedure Act 2016 and the Declaratory Judgments Act 1908
BETWEEN	Te Rūnanga o Ngāi Tahu Plaintiff
AND	Te Ohu Kai Moana Trustee Ltd First Defendant
AND	Minister for Oceans and Fisheries Second Defendant

MEMORANDUM OF COUNSEL FOR THE FIRST DEFENDANT:
(A) PROPOSING APPOINTMENT OF COUNSEL ASSISTING
(B) SEEKING PERMISSION TO PUBLISH PLEADINGS ON WEBSITE

2 December 2022

Judicial officer: unknown
Next event date: Judge's List Monday 12 December 2022 at 10am

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May it please the Court:

1. This memorandum is filed on behalf of the first defendant, Te Ohu Kaimoana, along with the first defendant's statement of defence. Te Ohu Kaimoana proposes that at the next call of this matter on 12 December, the Court consider appointing a counsel assisting to act as contradictor on certain issues where neither defendant can appropriately respond to the plaintiff's claim.
2. Te Ohu Kaimoana also seeks the Court's permission to publish on its website the pleadings in this proceeding, this memorandum and any Minutes issued by the Court, as a central source of information for the mandated iwi organisations.

The application for judicial review

3. This application for judicial review challenges the actions of Te Ohu Kaimoana in the conduct of an SGM of iwi beneficiaries in August 2016, and in reporting to the Minister in September 2016 and August 2017 about a particular resolution passed by a close majority of iwi at the SGM.
4. The resolution proposed that if Te Ohu Kaimoana was to distribute surplus funds to iwi beneficiaries, it should do so on an equal basis between iwi rather than on an iwi population basis. Giving effect to the resolution would require amendments to the Maori Fisheries Act 2004. The plaintiff's claim against the second defendant (the Minister) seeks declarations challenging any proposals to enact such amendments.
5. The Ministry for Primary Industries released for consultation an 'exposure draft' of proposed amendments to the Act including this proposal in August 2022. The Minister has since announced that he does not intend to proceed with the proposal and will recommend to Cabinet that the amending legislation provide for surplus funds to be distributed on a population basis.
6. It is understood that the plaintiff nonetheless intends to proceed with this claim, which is scheduled for hearing on 6 – 8 March 2023. A relatively

compressed timetable for the exchange of evidence and submissions is in place.

The claim extends beyond the scope of the defendants' proper roles

7. The plaintiff's statement of claim dated 1 November 2022 alleges breach of natural justice by Te Ohu Kaimoana in the conduct of the SGM, and alleges that advising the Minister of the resolution was an unlawful exercise of Te Ohu Kaimoana's powers under the Maori Fisheries Act. Te Ohu Kaimoana acknowledges that any iwi beneficiary is entitled to challenge the lawfulness of Te Ohu Kaimoana's actions as trustee: it is today filing a statement of defence and will proceed to defend those claims.
8. However, the plaintiff's central theme in its statement of claim appears to be that *the resolution itself*, if enacted into amendments to the Maori Fisheries Act, would be contrary to the principles of the Treaty, the 1992 Fisheries Settlement, the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the purpose and scheme of the Maori Fisheries Act, and Ngāi Tahu's (alleged) legitimate expectation that any surplus funds would be distributed on a population basis.
9. The plaintiff seeks *as against Te Ohu Kaimoana* substantive declarations from the Court to that effect (see statement of claim, prayer for relief following [58], at (c), and the prayer for relief following [60]).
10. These are matters of debate and dispute between the iwi beneficiaries, and as trustee Te Ohu Kaimoana necessarily takes a neutral position on the substance of the resolutions approved by iwi beneficiaries at their SGM. Te Ohu Kaimoana is not the correct respondent for these substantive declarations, and it is constitutionally unable to act as a contradictor to Ngāi Tahu's substantive claims on these matters without compromising its fundamental neutrality.
11. Nor is the Minister or the Attorney-General able to represent or speak for iwi beneficiaries. The Crown's response to the claim against the Minister

will reflect the Crown's position on these issues, not those of iwi who may take a different view.

12. These are however matters of significant importance for the future of the fisheries settlement. Whether or not it is lawful for iwi beneficiaries to even consider and propose adjustments to the allocation model reflected in the Maori Fisheries Act has far reaching implications for all iwi.
13. Te Ohu Kaimoana's purpose and functions are engaged in supporting the achievement of an enduring settlement of the claims and grievances in the 1992 settlement, and it is concerned that fundamental issues such as those raised by Ngāi Tahu's proposed declarations require careful consideration. Te Ohu Kaimoana recognises that Ngāi Tahu's proposed declarations would impact not only those iwi who are presently in favour of equal distribution, but would also affect the potential legitimacy of future debates about the allocation model, especially as it relates to new matters not so far expressly addressed in the legislation.
14. At Te Ohu Kaimoana's request Justice Palmer on 14 November directed that all mandated iwi organisations (MIOs) and representative iwi organisations (RIOs) be served with the proceeding and invited to file memorandum by Friday 9 December if they wished to be heard in response to Ngāi Tahu's claims. It is understood that service was effected by the close of 16 November. It is not yet known whether any iwi will step forward, or if so on what basis.
15. Te Ohu Kaimoana's position is that the substantive challenges to the resolution raised by Ngāi Tahu are primarily matters that for iwi to resolve, and would be best addressed by iwi engaging directly with each other outside the Court process, and then engaging with the Crown. However, if the Court is to enter into these issues it is critical that the process be fair to all iwi, and, equally importantly, that the Court have the benefit of a comprehensive response to Ngāi Tahu that fully canvasses the relevant issues. Given the compressed timetable and the resourcing implications of

engaging in litigation of this nature, it may not be fair or reasonable to expect individual iwi to take on that role.

16. In this highly unusual context, Te Ohu Kaimoana respectfully asks the Court to consider the appointment of independent counsel who could assist the Court by providing a comprehensive response to Ngāi Tahu's claims that relate to the resolution itself (rather than Te Ohu Kaimoana's actions, which Te Ohu Kaimoana can appropriately respond to).
17. The appointment of counsel assisting is grounded in the Court's inherent jurisdiction, and it is generally recognised that counsel may be appointed to assist where there is a danger that an important and difficult point will otherwise require determination without having the focus of full argument. Counsel in such cases may be appointed to ensure that the Court has an effective contradictor.¹ Respectfully, that is the case here, and there is a strong public interest that the issues raised by Ngāi Tahu's substantive declarations are fully canvassed if the Court is to address them.
18. Te Ohu Kaimoana recognises that the Court may not wish to make a final assessment on this proposal until after Friday 9 December when iwi memorandums are due to be filed. However, given the compressed timetable and the proximity to the holidays it will be important that if a direction is to be made, counsel assisting should be appointed as soon as possible and preferably before the end of the year to reduce the risk of jeopardising the hearing date. Ideally a direction would be made at the conference on 12 December, hence Te Ohu Kaimoana seeks to give the Court and all interested parties notice of its position by filing this memorandum at this time.
19. Counsel would however be grateful for an earlier indication of the Court's view on the request to publish court documents on Te Ohu Kaimoana's

¹ See for example the discussion in *Erwood v Holmes* [2017] NZHC 1278, [2017] NZAR 971 at [31] – [40].

website, if possible, given the importance of clear information for the MIOs.

Dated: 2 December 2022

Victoria Casey KC
Counsel for the first defendant