

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-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 LIMITED First Defendant
AND	MINISTER FOR OCEANS AND FISHERIES Second Defendant
AND	TE WHAKAKITENGA O WAIKATO INC Interested Party

On the Papers

Counsel: J D Every-Palmer KC, J W J Graham and X Y Lau for the
Plaintiff
V Casey KC for the First Defendant
N C Anderson and J B Watson for the Second Defendant
J W S Baigent and A Birkinshaw for Te Whakakitenga o Waikato
Inc, Interested Party
A Butler KC, counsel to assist

Minute: 27 January 2023

**MINUTE OF GWYN J
(Application for stay of proceeding)**

[1] This matter came before me today as Duty Judge.

[2] An expedited hearing has been set down for these proceedings for 6-8 March 2023 and timetable directions made accordingly.¹

Background

[3] The application for judicial review concerns a resolution passed by a close majority of Mandated Iwi Organisations at an SGM of Te Ohu Kai Moana in August 2016. The resolution proposed that if Te Ohu Kai Moana was to distribute surplus funds to iwi beneficiaries, it should do so on an equal basis between iwi rather than on a notional iwi population basis. Giving effect to the resolution would require amendments to the Māori Fisheries Act 2004 (Act). The Ministry for Primary Industries released for consultation an ‘exposure draft’ of proposed amendments to the Act, including this “equal sharing” proposal, in August 2022.

[4] In the proceeding, the plaintiff alleges against Te Ohu Kai Moana that the August 2016 SGM was conducted in breach of natural justice and/or that Te Ohu Kai Moana should have declined to advise the Minister of the “equal sharing” resolution passed at the meeting. The plaintiff’s claim against the second defendant (the Minister for Oceans and Fisheries) seeks declarations challenging any proposals to enact such amendments.

[5] The plaintiff also seeks against both defendants substantive declarations that the “equal sharing” resolution, if enacted into amendments to the Māori 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 Māori Fisheries Act and Ngāi Tahu’s legitimate expectation that any surplus funds would be distributed on a population basis.

[6] Before the proceeding was filed, the Minister advised the plaintiff that he did not intend to implement the equal distribution proposal. On 16 November 2022, the Minister formally confirmed his position that, following consultation, he did not intend to proceed with the “equal sharing” proposal and would recommend to Cabinet

¹ Minute of Palmer J 15 December 2022.

(likely in mid-December) that the amending legislation provide for surplus funds to be distributed on a population basis.

[7] Justice Palmer recorded in his minute of a judicial telephone conference on 12 December 2022 the plaintiff's confirmation that it intended to proceed with the March hearing and that urgency was still required "so that if a Bill is introduced into the House of Representatives, Parliament will have the benefit of the Court's views on the issues".²

[8] The Māori Fisheries Amendment Bill (Amendment Bill) was introduced in the House on Tuesday 20 December 2022 and, as signalled by the Minister, provides for surplus funds to be distributed on a population basis.

[9] On 22 December 2022 counsel for the plaintiff proposed that the parties jointly agree to stay the proceeding, revoke the timetable, vacate the fixture and reserve leave to the plaintiff to bring on the proceedings, including its application for urgency, on 48 hours' notice. Both defendants declined to agree to the directions sought.

[10] The plaintiff then sought directions from the Court on 23 December 2022 (the application). Justice Isaac in his minute of that date recorded that other counsel had not responded and there did not appear to be a need for urgency. The Judge declined to make the directions sought at that time and deferred the matter to the next call, then scheduled for 27 January 2023.

[11] In fact, no call occurred on 27 January 2023.

[12] The timetable directed by Palmer J requires the defendants to file evidence on 3 February 2023.

The parties' positions

[13] Both the first and second defendants have now filed memoranda opposing the plaintiff's proposal to vacate the fixture and stay the proceeding. Both defendants

² Minute 15 December 2022 at [8].

submit that if the plaintiff does not wish to proceed with the scheduled fixture then the proceeding should be withdrawn. Accordingly, they seek a direction that the plaintiff promptly decide and advise the parties and the Court whether it will continue the proceeding in accordance with the current timetable or discontinue its claim.

Te Ohu Kaimoana

[14] For the first defendant, Te Ohu Kai Moana, Ms Casey KC notes that the proceeding is a significant claim against Te Ohu Kai Moana by one of its iwi beneficiaries. The claim raises serious allegations about how the trustee has conducted its duties. While any beneficiary is entitled to challenge the trustee's performance through the courts, it is not appropriate, nor in the public interest, for such challenges to remain unresolved for an indeterminate period of time. Te Ohu Kai Moana, and its relevant personnel, have the right to present their defence and to have the case against them determined in a timely manner. It is also in the best interests of all the beneficiaries and the ongoing operation of the trust to have the dispute resolved promptly one way or another.

[15] Counsel also notes that the claims made by the plaintiff have clear precedent impact on the future operations of the trust: Ngāi Tahu makes a general claim that resolutions proposed from the floor and passed in accordance with the trust's Constitution are nonetheless in breach of natural justice and that Te Ohu Kai Moana not only has the power, but the duty, to vet and in certain cases override resolutions properly passed at the meeting of the beneficiaries. These claims have significant implications for the trustee and for all beneficiaries and should either be promptly resolved or withdrawn.

[16] Ms Casey also notes Te Ohu Kai Moana's concern that keeping the proceedings on foot so that they can be brought on in the event that the equal sharing proposal is brought back into consideration as the Bill passes through the House, appears to be an attempt to influence what happens in Parliament and to deter other iwi beneficiaries who might wish to support that proposal through the Select Committee process.

[17] The first defendant relies on *Ngāti Mutunga o Wharekuri Asset Holding Company Ltd v Attorney-General*³ to submit that a stay in circumstances such as this is inappropriate.

Minister for Oceans and Fisheries

[18] For the second defendant, the Minister, Mr Anderson notes that the claim against the Crown is practically moot and breaches parliamentary privilege and related principles. The Amendment Bill introduced to the House on 20 December 2022 reflects the status quo – that is, that the first defendant’s surplus funds must be distributed to mandated iwi organisations in accordance with a notional iwi population formula set out in the Māori Fisheries Act 2004. The equal distribution proposal has not been pursued.

[19] The Minister has also formally decided and recorded in the Cabinet Paper introducing the Amendment Bill that he would only be “willing to consider this matter again in the future if further dialogue among iwi demonstrates there is widespread support (approaching consensus) for a change to the distribution model of surplus funds (including demonstrable support from larger iwi)”. It follows from that, counsel says, that the plaintiff’s case against the second defendant has been overtaken by events. It is practically moot and, following the introduction of the Amendment Bill, infringes parliamentary privilege and the principle of non-interference by the courts in parliamentary process.

[20] As counsel notes, staying the proceeding would leave it “hovering” over Parliament, to be reactivated if in the course of the legislative process Parliament determines that the equal distribution process should be reflected in the Amendment Bill.

Te Whakakitenga o Waikato Inc

[21] Counsel for the interested party Te Whakakitenga o Waikato Inc, have also filed a memorandum supporting the plaintiff’s request for a stay of the proceedings.

³ *Ngāti Mutunga o Wharekuri Asset Holding Company Ltd v Attorney-General* [2020] 3 NZLR 1 at [46].

The interested party submits that no party would be prejudiced by the stay of the proceedings and the proposed directions are a practical and efficient way of dealing with the proceedings in circumstances where it may yet be necessary to seek the views of the Court on the proposed distribution methodology. The interested party agrees with the plaintiff that, at this stage, it is premature to declare the claim “practically moot”.

Plaintiff’s reply

[22] Mr Every-Palmer KC, counsel for the plaintiff, has responded to the defendants’ memoranda.

[23] Counsel submits that there is nothing improper in the proceedings being stayed while the Amendment Bill passes through the House. Whether the claim is moot remains to be seen.

[24] Nor is the plaintiff attempting to deter other iwi beneficiaries from being involved in the Select Committee process for the Amendment Bill.

[25] The plaintiff also says that a substantive hearing would be necessary to assess the defendants’ claim that the proceeding infringes the principles of Parliamentary privilege, in light of the decisions in *Ngāti Mutunga O Wharekauri Asset Holding Co Ltd v Attorney-General*⁴ and *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd*,⁵ and having regard to the possibility of amending the pleadings.

[26] Finally, the plaintiff says the defendants would not be prejudiced by a stay. Conversely the plaintiff would be required to go through the cost and time of refileing the proceedings, with all associated steps and it may be difficult to secure a fixture. Staying the proceeding preserves the plaintiff’s rights and is efficient.

⁴ *Ngāti Mutunga o Wharekauri Asset Holding Company Ltd v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1.

⁵ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142.

Discussion

[27] I accept that the proceedings are not inevitably moot. As then Chief Justice Elias observed in *Ngāti Whatua Orakei v Attorney-General*:⁶

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, it cannot properly give any assurance to the court that the legislation it proposes will be passed.

(footnotes omitted)

[28] As counsel for the plaintiff notes, the legislation before the House is on a swift timetable. The plaintiff has been advised by the Ministry for Primary Industries that the Select Committee process is expected to begin in February 2023 and the Minister suggested a truncated Select Committee timeframe in his Cabinet paper. The stay sought is for a finite duration – six months.

[29] I also accept that while there may be a prima facie argument that the proceeding infringes the principles of Parliamentary privilege, it is not appropriate to attempt to determine that question on an interlocutory application on the papers.

[30] I have also had regard to the first defendant's submission that the serious allegations made against the Trust (and its personnel) ought to be resolved promptly or withdrawn. I agree that it would be unreasonable to have such serious allegations, with potential precedent effect for the operation of the Trust, hanging over the Trust indefinitely. However, I am persuaded that a six month stay of the proceedings is not unreasonable in the overall circumstances of the case.

[31] Having regard to all of the submissions, I conclude that the most efficient course is to stay the proceedings, as proposed by the plaintiff. I do not think doing so will unduly prejudice the defendants.

[32] Finally, I note there is some force in the submission for the plaintiff that, in light of its advice to the parties and the Court on 23 December 2022 that it no longer sought an expedited fixture, and that the timetable could be revoked, together with the

⁶ *Ngāti Whatua Orakei v Attorney-General* [2019] 1 NZLR 116 at [114].

terms of Isac J's minute of that date, it was tolerably plain that the fixture would not be proceeding on 6 March 2023 and the application by the first defendant for an urgent order is therefore unnecessary.

[33] I am prepared to grant the plaintiff's application, noting that the Court cannot at this stage make any commitment as to hearing time if, after six months or at some earlier point the plaintiff's wishes to resume the proceeding.

Directions

[34] Accordingly, I make the following directions:

- (a) The 6-8 March 2023 fixture is vacated.
- (b) The present timetable for evidence and submissions is revoked.
- (c) The proceedings are stayed until 28 July 2023 at which time the plaintiff is to file and serve a memorandum updating the progress of the Bill and the plaintiff's intentions in relation to these proceedings.
- (d) The plaintiff is granted leave to bring on the proceedings, including its application for urgency, on 48 hours' notice.
- (e) Leave is reserved for any party to make application to the Court for directions in the intervening period.

Costs

[35] Costs are reserved.

Gwyn J

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