
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 OPPOSING STAY OF
PROCEEDINGS AND SEEKING FURTHER DIRECTIONS

18 January 2023

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May it please the Court:

1. This memorandum is filed on behalf of the first defendant, Te Ohu Kaimoana, in response to the plaintiff's memorandum filed on the afternoon of 23 December 2022 seeking a stay of its proceeding, vacation of the hearing scheduled for 6 – 8 March 2023, revocation of the timetable and leave to bring the proceedings (including an application for urgency) on 48 hours' notice.
2. The first defendant is opposed to these directions. The first defendant's position is that the nature of these proceedings make it inappropriate for them to be deferred indefinitely, and that if the plaintiff does not wish to proceed with the hearing then the claim should be withdrawn.

The application for judicial review and events so far

3. This application for judicial review concerns a resolution passed by a close majority of Mandated Iwi Organisations at an SGM of Te Ohu Kaimoana in August 2016. 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 a notional iwi population basis. Giving effect to the resolution would require amendments to the Maori Fisheries Act 2004. 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. The plaintiff alleges against Te Ohu Kaimoana that the August 2016 SGM was conducted in breach of natural justice, and/or that Te Ohu Kaimoana 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) 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 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. Counsel assisting (Dr Andrew Butler KC) was appointed in accordance with directions made by Palmer J on 15 December 2022 to act as contradictor to the plaintiff's claim on this point as it concerns other iwi beneficiaries, given Te Ohu Kaimoana's neutral stance as trustee.¹

6. The plaintiff issued this proceeding on 1 November, and sought and obtained a relatively compressed timetable and a hearing on 6 – 8 March 2023.
7. Before this proceeding was filed the Minister advised the plaintiff that he did not intend to implement the equal distribution proposal.² The Minister formally confirmed his position on 16 November, that following consultation he did not intend to proceed with the 'equal sharing' proposal and would recommend to Cabinet (likely in mid-December) that the amending legislation provide for surplus funds to be distributed on a population basis.
8. As recorded by Palmer J in his Minute of the judicial teleconference on 12 December, despite issues of Parliamentary privilege and concerns raised by the defendants, the plaintiff confirmed 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."³
9. The Māori Fisheries Amendment Bill was introduced in the House on Tuesday 20 December 2022, and provides for surplus funds to be distributed on a population basis as signalled by the Minister. Counsel for the parties had been kept informed of the progress of the proposed Bill through Cabinet and the likely timing of its introduction.

¹ See Te Ohu Kaimoana's Memorandum dated 2 December, Minute Palmer J 15 December 2022.

² Crown Memorandum 4 November 2021.

³ Minute 15 December 2022 at [8].

10. On the afternoon of Thursday 22 December counsel for the plaintiff proposed to the defendants that the parties jointly agree to stay the proceeding indefinitely, revoke the timetable, vacate the fixture and reserve leave to the plaintiff to bring on the proceeding, including its application for urgency, on 48 hours' notice. Both defendants responded that day declining to agree to the directions sought. Counsel for Te Ohu Kaimoana advised that in its view the proposal to stay the proceeding such that it hovers continually was not reasonable, and asked the plaintiff to decide by 6 January whether the proceeding would be continued or discontinued, noting that after that date substantial costs in preparing evidence would be incurred.
11. The plaintiff did not respond directly but filed its memorandum seeking the same directions on a unilateral basis on the afternoon of 23 December. Justice Isaac issued a Minute that afternoon recording that other counsel had not responded and there did not appear to be a need for urgency. His Honour declined to make the directions sought at that time and deferred the matter to the next call, then scheduled for 27 January.
12. The timetable directed by the Court requires the defendants to file evidence on 3 February. Te Ohu Kaimoana has been working with its witnesses and collating its evidence in preparation for compliance with that timetable.

Te Ohu Kaimoana's reasons for opposing a stay

13. As explained in communications with counsel for the plaintiff, Te Ohu Kaimoana has a number of reasons for opposing the stay.
14. The first is that this proceeding is a significant claim against Te Ohu Kaimoana by one of its iwi beneficiaries, raising serious allegations about how the trustee has conducted its duties. Any beneficiary is of course entitled to challenge the trustee's performance through the courts, but it is not appropriate nor in the public interest for such challenges to remain unresolved for an indeterminate period of time. Te Ohu Kaimoana and its personnel whose conduct is being criticised have a right to present their defence and to have the case against them determined in a timely matter, and it is also in the best interests of all the beneficiaries and the ongoing

operation of the trust to have this dispute resolved promptly one way or another.


15. The need for a timely determination of the claim is particularly important in the present context where the claims made by the plaintiff have clear precedent impact on the future operations of the trust: it is apparent from the evidence filed that Ngāi Tahu makes a general claim that resolutions proposed from the floor and passed in accordance with the Constitution are nonetheless in breach of natural justice, and that Te Ohu Kaimoana has not only the power but the duty to vet and in certain cases override resolutions properly passed at a meeting of the beneficiaries. Both of these claims have significant implications for the trustee and for all beneficiaries, and they need to be either promptly resolved by the Court or withdrawn.
16. More generally, Te Ohu Kaimoana is concerned at what appears to be the plaintiff's intention to keep these 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. This 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. Te Ohu Kaimoana is concerned at the constitutional propriety of that, and for that reason and also as a trustee owing duties to all beneficiaries equally, it does not consider that it can support this proposal.

Directions

17. Te Ohu Kaimoana accepts that it cannot force the plaintiff to go ahead with the fixture, but it opposes the proposal to vacate the fixture and stay the proceeding for an indeterminate period. Its position is that if the plaintiff does not wish to proceed with the scheduled fixture then the proceeding should be withdrawn.
18. Te Ohu Kaimoana accordingly seeks a direction that the plaintiff decide and advise the parties and the Court within 24 hours whether it will continue the

proceeding in accordance with the current timetable or discontinue its claim. It reserves its position on costs.

Dated: 18 January 2023

A handwritten signature in blue ink, appearing to read "Victoria Casey". The signature is written in a cursive style with a large initial 'V' and a long, sweeping tail on the 'y'.

Victoria Casey KC
Counsel for the first defendant