
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 FIRST DEFENDANT IN SUPPORT OF APPLICATION UNDER RULE
7.49 OF THE HIGH COURT RULES

1 February 2023

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May it please the Court

1. This memorandum is filed in support of the application by the first defendant, Te Ohu Kai Moana Trustee Ltd, for orders under Rule 7.49 of the High Court Rules to rescind or vary the directions made by her Honour Justice Gwyn recorded in the Minute dated 27 January 2023.
2. Gwyn J's Minute granted the plaintiff's application to vacate the fixture on 6 – 8 March 2023, revoke the timetable directed by the Court and stay its proceeding. Her Honour directed that the plaintiff by 28 July 2023 to file a memorandum updating the Court on the progress of the Māori Fisheries Amendment Bill through the House and the plaintiff's intentions in relation to this proceeding, and reserved leave to the plaintiff to bring on the proceeding, including its application for urgency, on 48 hours' notice.
3. A summary of this case and the first defendant's position in opposition to the plaintiff's application to vacate the fixture and stay the proceeding are set out in the first defendant's memorandum dated 18 January 2023. This memorandum addresses the grounds which the first defendant relies on to support its application under Rule 7.49 of the High Court Rules.
4. The first defendant respectfully submits that the directions made by her Honour on 27 January are wrong and ought to be rescinded or varied, for the following reasons.

Ground 1: error of process, determination on the papers contrary to reasonable expectation of parties

5. As the procedural steps leading to the directions on 27 January show, there was a reasonable expectation (which the first defendant apprehends was shared by all parties) that the plaintiff's application for stay and to vacate the upcoming fixture would be determined only after the Court heard from counsel. In summary:
 - 5.1 The plaintiff by way of memorandum filed on the afternoon of 23 December 2022 sought an order staying its proceeding, vacating the fixture scheduled for 6 – 8 March, revoking the timetable and

reserving leave for it to bring the proceeding (including its application for urgency) on 48 hours notice.

- 5.2 The plaintiff had approached the defendants on 22 December to consent to these proposed directions, which had been declined. The defendants' position conveyed to the plaintiff was that it was appropriate for the hearing to go ahead as scheduled, unless the plaintiff chose to withdraw its claim.
- 5.3 Justice Isac issued a Minute later in the afternoon of 23 December recording that other counsel had not yet responded and there did not appear to be a need for urgency. His Honour declined to make the directions sought at that time and referred the matter to be dealt with at the next call, then scheduled for 27 January.
- 5.4 Based on Isac J's directions it was anticipated that the plaintiff's application would be in the first instance considered at a judicial teleconference where the parties would have the opportunity to present oral submissions on how the application should be determined.
- 5.5 The defendants subsequently agreed with the plaintiff that it would be appropriate to seek earlier determination by the Court given the implications of the timetable, but the plaintiff opted not to pursue that course.
- 5.6 The first and second defendants filed memoranda on 18 and 20 January respectively in response to the plaintiff's application and in anticipation of the judicial teleconference on 27 January. The plaintiff responded on 20 January proposing that a stay could be limited to six months.
- 5.7 On 24 January the Deputy Registrar advised that the Court was unable to convene the teleconference on 27 January and also vacated the fixture on the mistaken basis that it was common ground that the hearing was not required. Counsel for the first

defendant requested that any decision regarding the applicant's application be deferred until the Court was able to hear from the parties. The Deputy Registrar indicated that he would refer the matter to the Duty Judge.

5.8 There was no indication given to the parties that the plaintiff's application was to be determined on the papers.

6. Respectfully, had the first defendant been on notice that the application was to be determined on the papers, counsel would have requested the Court to hear oral argument given the significance of the proposed deferral and the prejudice to the first defendant. Had that been declined, leave would have been sought to file more extensive written submissions. These would have addressed, for example, the range of factors relevant to the Court's discretion to vacate a fixture, whether there were sufficient grounds to do so in the present case, addressing the Court on the terms of any proposed stay (including responding to the plaintiff's newly proposed six month term) and addressing the Court in more detail on the implications of an indeterminate stay (noting by way of illustration the issues posed for the upcoming Te Ohu Kaimoana AGM).

7. It is also noted that counsel assisting (whose role relates to the interests of smaller Mandated Iwi Organisations who may have a different view from the plaintiff) has not been heard on whether any issues arise from his perspective.

Ground 2: error in approach to vacating fixture

8. Justice Gwyn's Minute of 27 January records at [31] that "the most efficient course is to stay the proceeding ... I do not think doing so will unduly prejudice the defendants." Her Honour on this basis directed that the fixture be vacated.

9. The Court has discretion to adjourn a fixture under Rule 10.2 of the High Court Rules. While the discretion is wide the principles are well established:¹ the question is not whether the defendants have demonstrated that they would be prejudiced by a stay, rather the Court is required to assess whether an adjournment is necessary in order to do justice between the parties, and whether it is overall in the interests of justice to grant the adjournment.
10. The adjournment sought in this case was not necessary to do justice between the parties, and nor has the plaintiff suggested otherwise: all parties would be able to fully and fairly present their case at the March fixture. Nor has the plaintiff pointed to any basis why an adjournment of the fixture is necessary in the interests of justice overall: it has simply changed its mind from the position it took when it filed the proceeding and from the position that it conveyed to the Court on 12 December (that even if legislation is introduced in the terms foreshadowed by the Minister (which it was), the plaintiff wished to proceed with the expedited hearing it had asked for).²
11. Respectfully, by delaying the hearing and resolution of serious claims against the first defendant trustee and preventing it from defending the claims made against it, and delaying determination of live issues of parliamentary privilege affecting a matter currently before the House, the adjournment is not in interests of justice.

Ground 3: error in assessing prejudice to the first defendant

12. While her Honour acknowledged there was prejudice to the first defendant in having the claims against it left unresolved, the Minute records at [31] and [32] that: “However, I am persuaded that a six month stay of the proceeding is not unreasonable in the overall circumstances of the case. ...I do not think doing so will unduly prejudice the defendants.”

¹ See for example *Body Corporate 348047 v Auckland Council* [2019] NZHC 1738, (2019) 20 NZCPR 499 at [6]; *McKay Builders Ltd (in liq) v McKay* [2017] NZHC 934 at [25]; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 628 at [38] – [39].

² As recorded in Palmer J’s Minute of 15 December 2022.

13. However, the effect of directions made is not for a stay limited to six months, but rather a deferral of the hearing for an indeterminate period that appears likely to be considerably longer than six months. The directions provide for the hearing to be vacated and for the plaintiff to advise its intentions regarding the proceedings by 28 July. At the same time, her Honour has made it clear at [33] that there is no commitment to the timing of another fixture if the plaintiff wishes to resume the proceeding. Realistically, if another fixture is not to be allocated until late July, then the matter might not be heard until late 2023 or even 2024.
14. There is genuine prejudice to the first defendant in these claims being left undetermined, as outlined in the first defendant's memorandum of 18 January. That prejudice is made more extreme by deferring the hearing for an indefinite but clearly lengthy period, and then only to be brought on at the plaintiff's election. Respectfully, if an adjournment is to be granted, then it should be to a firm fixture within a reasonable timeframe: if such a fixture is not available then that would be relevant to the exercise of the Court's discretion to vacate the March fixture.

Ground 4: error in suggesting that defendants should have treated the plaintiff's 23 December memorandum as effective to vacate the fixture

15. At [32] of the Minute her Honour expressed the view that following the plaintiff's advice that it no longer wished to proceed with the hearing, and Isac J's Minute (which was explicit that the defendants' views had not been considered) "it was tolerably plain that the fixture would not be proceeding on 6 March and the application by the first defendant for an urgent order is therefore unnecessary."
16. Respectfully, the first defendant did not make an application for an urgent order. In its memorandum of 18 January, filed in advance of the conference then scheduled for 27 January, the first defendant asked that the Court direct the plaintiff to advise within 24 hours whether it proposed to proceed with its claim. Counsel regrets if this was not clear, but the request was that the direction be made at the conference, and the 24 hour period was to run from when the direction was made. No urgent separate application was

intended, and counsel apprehends that the plaintiff understood that position correctly.

17. More generally however, it cannot be the case that a plaintiff can in practical terms suspend a timetable directed by the Court and vacate a fixture simply by advising the parties that it no longer wishes to proceed (especially when already aware that the defendants are opposed the proposed adjournment). Unless and until the Court directed otherwise, the fixture allocated by the Court and the timetable directed by the Court on 14 November and confirmed on 15 December remained in place, and it was both necessary and reasonable for the defendants to continue to work towards compliance with it. Respectfully, any suggestion that the defendants should have simply conceded their opposition to the plaintiff's proposed stay, or any criticism of the defendants for continuing to work to comply with the timetable, would not be warranted.

Directions sought

18. The first defendant's application seeks orders:
 - 18.1 Rescinding the directions recorded in her Honour's Minute of 27 January;
 - 18.2 Convening an teleconference for all parties to be heard on the plaintiff's application and/or on the terms of any stay;
 - 18.3 Such other orders as the Court deems just.
19. The first defendant seeks prompt consideration of its application under Rule 7.49, and, if granted, prompt reconsideration of the plaintiff's application for a stay and to vacate the fixture. It is respectfully submitted that sufficient time remains for the fixture on 6 – 8 March to be achievable, and that it is in the interests of justice for the case to proceed at that time.
20. Counsel is available for a teleconference at short notice.

Dated: 1 February 2023

A handwritten signature in blue ink, appearing to read "Victoria Casey", is centered on a light blue rectangular background.

Victoria Casey KC
Counsel for the first defendant