IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2022-485-650
[2023] NZHC 302

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
	MINISTER FOR OCEANS AND FISHERIES Second Defendant
AND	TE WHAKAKITENGA O WAIKATO INCORPORATED Interested Party

Hearing: 21 February 2023

Counsel: J D Every-Palmer KC and K Grant for the Plaintiff
V E Casey KC and B Boxall for the First Defendant
N C Anderson for the Second Defendant
J W S Baigent for Te Whakakitenga o Waikato Inc, Interested Party

Judgment: 27 February 2023

JUDGMENT OF GWYN J
(Application to rescind direction staying proceeding)

---

[1] This application concerns whether the current stay of the plaintiff's proceeding is appropriate and, if so, the conditions of the stay.

Background

[2] On 27 January 2023 I issued a minute in which I granted the plaintiff's application of 23 December 2022, and made the following directions:[1]

(a) Vacating the fixture scheduled for 6–8 March 2023.

(b) Revoking the timetable for evidence and submissions.

(c) Staying the proceedings until 28 July 2023, at which time the plaintiff is to file and serve a memorandum updating the progress of the Māori Fisheries Amendment Bill 2022 (222-1) (Amendment Bill) and the plaintiff's intentions in relation to these proceedings.

(d) Granting leave to the plaintiff to bring on the proceedings, including its application for urgency, on 48 hours' notice.

(e) Reserving leave for any party to make application to the Court for directions in the intervening period.

(the directions)

[3] The first defendant then applied under r 7.49 of the High Court Rules 2016 (Rules) for orders:

(a) rescinding the directions;

(b) convening a teleconference for all parties to be heard on the plaintiff's application and/or on the terms of any stay of the proceedings; and

(c) any other orders required.

---

1 *Te Rūnanga o Ngāi Tahu v Te Ohu Kai Moana Trustee Ltd* HC Wellington CIV-2022-485-650, 27 January 2023 (Minute No 2).

[4] I convened a telephone conference of all parties on 7 February 2023. As I recorded in a minute of that telephone conference,[2] I had not been aware on 27 January 2023 of the first defendant's specific request to be heard on the plaintiff's application for a stay of the proceeding and vacation of the fixture, and decided the application on the parties' written submissions. Given that, it was appropriate that the Court hear oral submissions from the parties on whether the stay of proceedings is appropriate and, if so, the conditions of such a stay. As the minute also noted, my earlier direction that proceedings are stayed until 28 July 2023, and the procedural directions that followed, remain on foot, subject to possible revocation after hearing from the parties.[3]

[5] The background to the plaintiff's substantive proceeding is set out in the Court's earlier minute of 27 January 2023:[4]

> [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

---

2 *Te Rūnanga o Ngāi Tahu v Te Ohu Kai Moana Trustee Ltd* HC Wellington CIV-2022-485-650, 7 February 2023 (Minute No 3) at [5].

3 At [8(c)].

4 Minute No 2, above n 1, at [3]–[12].

and would recommend to Cabinet (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".[5]

[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 Isac 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.

Submissions on whether the stay should be rescinded

The first defendant's submissions

[6] As a preliminary matter, Ms Casey KC for the first defendant, took issue with the plaintiff's framing of the question for the Court as "stay or discontinuance". The real question, in her submission, is a stay or no stay; the question of the discontinuance only comes later.

[7] Ms Casey also emphasised what is meant by a stay. What has occurred is that a fixture, which the defendants had wanted to maintain, has been vacated and the timetable leading up to that fixture revoked. In counsel's submission, what is now being "stayed" is the opportunity for the defendants to bring the matter to Court and have the claims against them heard in a timely way, as they were prepared to do before the fixture was vacated.

---

5 *Te Runanga o Ngai Tahu v Te Ohu Kai Moana Trustee Ltd* HC Wellington CIV-2022-485-650, 15 December 2022 (Minute No 1) at [8].

[8] Ms Casey submits that the correct question for the Court as whether it is necessary to do justice between the parties to maintain the stay. Counsel advances a number of reasons why it is not in the interests of justice.

[9] First, the claims made by the plaintiff against the first defendant, the corporate trustee of Te Ohu Kai Moana Trust (Trustee), are serious claims by one of its iwi beneficiaries. The plaintiff makes serious allegations about how the Trustee has conducted its duties, including that it breached principles of natural justice and breached its own statutory requirements. Those alleged procedural and legal errors by the Trustee then provide a platform for the plaintiff's substantive allegation about how the surplus funds should in fact be distributed. While the claims are extant, but unresolved, they cast doubt on the powers and obligations of the Trustee. The claims affect particular individual members of the Trustee who also have an interest in and a right to present their defence to the claims.

[10] The claims are not simply historic. The operation of the Trust is an essential part of implementation of the Fisheries Settlement and the claims have ongoing relevance for how the Trustee acts and thus for beneficiaries. 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 a meeting of the beneficiaries. Given the significant implications of the claims they should either be promptly resolved or withdrawn.

[11] Ms Casey acknowledges that any beneficiary is entitled to come to Court to challenge a decision of the Trustee, but says the effect of the litigation is to cause, or exacerbate, a significant division among iwi. The plaintiff is a beneficiary of the Trust, not an external party. Such internecine litigation is divisive and destructive and requires a timely resolution for the benefit of all beneficiaries of the Trust. It is necessary to resolve the Court process so the Trustee and iwi can work on restoring harmony. Effectively "freezing" the situation as it is, if the stay is maintained, hinders that restoration of relationships.

[12] Ms Casey notes that the declaration sought by the plaintiff in relation to the third ground of review against the first defendant goes to the substantive underlying issue as to how surplus funds should be distributed, and effectively seeks a ruling on the merits. The declaration sought is that the Trustee's proposed amendment (that surplus funds be distributed on an equal basis) is inconsistent with the principles of the Treaty of Waitangi, the terms of the Fisheries Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (1992 Settlement Act), the purpose of the Maori Fisheries Act 2004. The plaintiff also alleges a breach of the Trustee's fiduciary duties as trustee and the rights of the plaintiff Ngāi Tahu.

[13] Finally, Ms Casey submitted that if the Court were minded to maintain the stay then the proceeding ought to be adjourned to a fixed date with a timetable set. The first step of that timetable would be for the plaintiff to advise its position and leave ought to be reserved to all parties to bring the matter on for earlier hearing. Otherwise the defendants are potentially prejudiced, if the plaintiff were to attempt to bring the claim on short notice – for example, if the select committee were to make changes to the Amendment Bill. The first defendant ceased its preparation for trial in January, following vacation of the fixture, so its time for preparation would be compressed.

The second defendant's submissions

[14] Mr Anderson for the Minister did not press his earlier submission about mootness of the claim, accepting that it is not possible to predict the progress of the Amendment Bill, nor about prejudice to the defendants if the claim is stayed. Rather, the second defendant's focus is on the question of parliamentary privilege.

[15] Mr Anderson says the plaintiff's claim against the Minister infringes Parliamentary privilege and the principle of non-interference by the Courts in the parliamentary process.

[16] Sections 4 and 11 of the Parliamentary Privilege Act 2014 are relevant. Section 4 provides:

> **4 Interpretation of this Act**
>
> (1) This Act must be interpreted in a way that—

(a) …

(b) promotes the principle of comity that requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges; and

(c) …

[17] Section 11 provides:

> **11 Facts, liability, and judgments or orders**
>
> In proceedings in a court or tribunal, evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, all or any of the following:
>
> (a) questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament:
>
> (b) otherwise questioning or establishing the credibility, motive, intention, or good faith of any person:
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament:
>
> (d) proving or disproving, or tending to prove or disprove, any fact necessary for, or incidental to, establishing any liability:
>
> (e) resolving any matter, or supporting or resisting any judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

[18] Mr Anderson accepts that the Court is entitled to make declarations in relation to the plaintiff's existing rights. The existence of the Amendment Bill before the House does not change that. But, he submits, this case concerns what Parliament proposes to do about those rights. While the claim refers to proposals in the August 2017 Report,[6] these are in fact legislative proposals. The "Exposure Draft" of the Amendment Bill, which the plaintiff alleges to be inconsistent, is draft legislation. The declarations sought by the plaintiff against the Minister relate to legislative proposals, now before the House.

[19] The claim against the Minister can only realistically be considered as a challenge to legislation, impugning the Minister's action in taking the legislation to

---

6 Te Ohu Kai Moana Trustee Ltd *Report to the Minister of Primary Industries* (August 2017).

the House. This is about the Minister's conduct in developing legislation and about the legislative process. Mr Anderson relies on the decision in *Ngāti Mutunga v Attorney-General* where the Court of Appeal said: "… [declarations] may not relate to the rights-consistency of proposed legislation."[7]

[20] Counsel submits this case is different from the pleaded declarations that the Supreme Court allowed to proceed in *Ngāti Whātua Ōrākei v Attorney-General*. Those declarations were:[8]

> (a) a declaration that Ngāti Whātua Ōrākei has ahi kā and mana whenua in relation to the 2006 RFR [right of first refusal] Land and the 1840 Transfer Land;
>
> (b) a declaration that when applying its overlapping claims policy to any land within the area of the 2006 RFR Land and the 1840 Transfer Land the Crown must act in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga;
>
> (c) a declaration that Crown development and making of offers to include land in the 2006 RFR Land and the 1840 Transfer Land in a proposed Treaty settlement with iwi who do not have ahi kā in respect of that land must be made in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga;
>
> (d) a declaration that in order to comply with tikanga when contemplating, developing or making decisions under its overlapping claims policy to offer any interest in land within the 2006 RFR Land or the 1840 Transfer Land as part of a proposed Treaty settlement with an iwi which does not have ahi kā in respect of those lands, the Crown must:
>
> (i) appropriately consult with Ngāti Whātua Ōrākei as the iwi having ahi kā;
>
> (ii) acknowledge the ahi kā of Ngāti Whātua Ōrākei as the iwi having ahi kā;
>
> (iii) decline to include the land in the proposed settlement if there is evidence that the transfer of the land would unjustifiably erode the mana whenua of Ngāti Whātua Ōrākei as the iwi having ahi kā;
>
> (iv) decline to include the land in the proposed settlement where the land has previously been the subject of a gift to the Crown unless Ngāti Whātua Ōrākei, the gifting iwi, has provided its consent to the transfer;
>
> …

---

7 *Ngāti Mutunga v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1 at [27].

8 *Ngāti Whātua Ōrākei v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [29].

[21] Rather, Mr Anderson says, the declarations sought here are analogous to those refused by the Supreme Court in *Ngāti Whātua Ōrākei,* which were:[9]

> (e) a declaration that the Ngāti Paoa Decision, the revised Ngāti Paoa Decision and Marutūāhu Decisions have been developed and made inconsistently with the Crown's obligations to make those decisions in accordance with tikanga; and
>
> (f) a declaration that the Ngāti Paoa Decision, the revised Ngāti Paoa Decision and Marutūāhu Decisions have been developed and made inconsistently with the Treaty of Waitangi and its principles, and Ngāti Whātua Ōrākei's rights as affirmed by the United Nations Declaration on the Rights of Indigenous Peoples.

[22] Mr Anderson also distinguishes the present case from *Thompson v Treaty of Waitangi Fisheries Commission*.[10] As the Court of Appeal noted in *Ngāti Mutunga,* the *Thompson* case was different in two respects: the declarations sought by the plaintiffs were primarily against an allocation proposal developed by Te Ohu Kaimoana, rather than the Māori Fisheries Bill 2003 which was to give effect to it. Second, *Thompson* predated the Parliamentary Privilege Act. As the Court of Appeal said in *Ngāti Mutunga*:[11]

> Had that case arisen today, the Court would plainly have been precluded by s 11 [of the Parliamentary Privilege Act] from inquiring into the subject matter of the Māori Fisheries Bill or granting relief in respect of it.

[23] Mr Anderson also addressed the possibility of the plaintiff repleading its claim against the Minister to avoid any issue in relation to parliamentary privilege. In counsel's view, that would require a substantial reworking of the claim. Discontinuance is preferable.

Plaintiff's submissions

[24] Mr Every-Palmer KC for the plaintiff opposes the application to rescind the stay. Counsel notes that the issues in the proceedings are not restricted to the Bill, although that was the catalyst. The issues involve how the Trustee conducts the activities of the Trust in the future and the Crown's responsibilities in advancing proposals it has reached with iwi.

---

9 *Ngāti Whātua Ōrākei v Attorney-General*, above n 8, at [29].
10 *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 (CA).
11 *Ngāti Mutunga v Attorney-General,* above n 7, at [30].

[25] There are real merits to a stay rather than discontinuance: much of the preparation for trial has occurred, including, for example, notification of interested parties and appointment of counsel to assist (Mr Butler KC) in relation to other iwi. While bringing a new proceeding would be simpler than starting completely afresh, nevertheless it would use up weeks of time which, if the Select Committee were to propose a change to the Bill, might make a difference between the plaintiff's claim being heard and it being "timed out".

[26] What is proposed is not an "indefinite" stay as the defendants suggest (although the defendants have no *right* to a resolution of the claim). In addition, there are procedural pathways to an earlier resolution if that is what the defendants wish. They could apply for a defendant's summary judgment or seek to strike out some or all of the claim, or bring counterclaims for declaratory relief.

[27] In response to the first defendant's submission, Mr Every-Palmer says that there is no real difference between a stay and a discontinuance – the issues raised by the plaintiff remain live issues. Either way, the first defendant will have to make decisions as to how to act in the future. Mr Every-Palmer notes that the next annual general meeting of the Trust is in late March. On either alternative (stay or discontinuance) the Trustee will not have certainty about the issues raised in the proceeding as at that date. It will have to reach its own view as to how to act if and when serious issues are raised. The legal uncertainty is the same, whether it arises from the pleaded claim or the knowledge that the proceedings could be recommenced in the future. In that sense a stay compared to discontinuance is a distinction without a difference. There is no real downside for the first defendant if the proceeding remains stayed.

[28] Mr Every-Palmer says that if, as Ms Casey submits, the claim is unmeritorious, then her argument about the issues "hanging over the trustee" holds little weight.

[29] In response to the second defendant's submissions regarding parliamentary privilege, Mr Every-Palmer acknowledges the common starting point which is that the

existence of a bill before the House does not remove all matters from the Court's purview.[12]

[30] The plaintiff says that the dividing line is between proceedings which seek declarations of existing right, interest or entitlement, whether or not there is a bill before the House that may affect them in some way,[13] and inquiry into the potential rights impact of a bill before the House.[14] The plaintiff refers to the more "permissive" approach in *Ngāti Whātua Ōrākei Trust*,[15] referred to in the Ngāti Mutunga decision in the following terms:[16]

> … the reasoning of both the majority and Elias CJ in *Ngāti Whātua* is consistent with the proposition that the courts may make declarations of existing right, interest or entitlement whether or not there is a bill before the House which may affect them in some way. Such relief is not "in relation to parliamentary proceedings", in the sense provided for by in the Parliamentary Privilege Act. It does not amount to an interference by the courts in Parliament's "proper sphere of influence and privileges" because such declarations would be about existing rights, interests or entitlements, and not what Parliament may be proposing to do in relation to them. The terms of s 4(1)(b) of the Parliamentary Privilege Act are apposite here. Comity is a principle of "*mutual* respect and restraint" between the legislative and judicial branches as to their respective constitutional functions. It is the function of courts to adjudicate on rights and entitlements.

[31] In *Ngati Whatua Ōrākei* the Court allowed the claimant to seek declarations regarding the claimant's status and how the Crown must conduct itself (including consultation obligations and substantive limits), as these were of general relevance. The only declarations struck out by the Supreme Court related to whether specific decisions regarding land for Ngāti Paoa and Marutūāhu were inconsistent with the Crown's obligations.[17]

[32] Although the Amendment Bill was the "catalyst" for the plaintiff seeking declarations, that does not of itself offend comity. Mr Every-Palmer says the current claim is similar to that permitted in *Ngāti Whātua Ōrākei* but, in any event, it could be repleaded consistently with the narrower approach in *Ngāti Mutunga* by limiting

---

12 *Ngāti Whātua Orakaei Trust v Attorney-General,* above n 8, at [46] and [115]–[116].
13 *Ngāti Mutunga v Attorney-General,* above n 7, at [33].
14 At [25].
15 *Ngāti Whātua Orakaei Trust v Attorney-General,* above n 8, at [29] and [51]–[64].
16 *Ngāti Mutunga v Attorney-General,* above n 7, at [33] (footnotes omitted and emphasis original).
17 The terms of those declarations are set out at [21] above.

declarations to Ngāi Tahu's rights arising out of the Fisheries Settlement and 1992 Settlement Act (specifically the distribution of assets by iwi population) and whether, in light of the principles of the Treaty, these rights could be altered without its consent.

[33] Mr Every-Palmer also makes the point that the claims against the first defendant do not relate to "proceedings in Parliament" and s 11 of the Parliamentary Privilege Act therefore has no application to those claims. That means that a discontinuance of the entire proceedings on the basis of parliamentary privilege would not be in the interests of justice.

[34] While it is correct that a stay of the proceeding allows the plaintiff to guard against the risk of the Bill changing while in Select Committee (or being withdrawn), it does no more than that. The implicit message that the plaintiff will, if necessary, pursue its claim, exists whether or not the proceeding is adjourned/stayed or discontinued.

The interested party's submissions

[35] Ms Baigent appeared for Te Whakakitenga o Waikato Inc to support the plaintiff's position that a stay of the proceedings should remain in place.

[36] Ms Baigent's submission is that, as one of the largest iwi, Tainui has a keen interest in the matters pleaded. The outcome will have a significant impact on Tainui. In response to the first defendant's submissions, counsel notes that the impact on iwi and the inter-iwi tensions referred to by Ms Casey arise from the underlying question of how to resolve distribution of surplus funds. Those issues will not dissipate while the Bill is in Parliament, notwithstanding any discontinuance or stay. Both of those options leave the underlying issues unresolved.

[37] In Ms Baigent's submission, the cost, time and efficiency benefits referred to by the plaintiff favour the maintenance of a stay of the proceedings.

Discussion

Relevant principles

[38] The first defendant relies on r 7.49 of the High Court Rules 2016 which provides:

> **7.49 Order may be varied or rescinded if shown to be wrong**
>
> (1) A party affected by an interlocutory order (whether made on a Judge's own initiative or on an interlocutory application) or by a decision given on an interlocutory application may, instead of appealing against the order or decision, apply to the court to vary or rescind the order or decision, if that party considers that the order or decision is wrong.
>
> …

[39] There is no question that the Court in this case has the power to rescind the stay order contained in the 27 January 2023 minute.[18]

[40] In terms of the substance of this application, the first defendant relies on r 10.2:

> **10.2 Adjournment of trial**
>
> The court may, before or at the trial, if it is in the interests of justice, postpone or adjourn the trial for any time, to any place, and upon any terms it thinks just.

[41] The "interests of justice" test in r 10.2 was considered extensively in *Body Corporate 348047 v Auckland Council*[19] and *McKay Builders Limited (in liq) v Madsen-Reis*.[20] Justice Dunningham summarised the approach under r 10.2 in some detail in *McKay Builders*:[21]

> [25] Rule 10.2 of the High Court Rules confers the Court a very wide discretion to grant adjournments. The Court may, before or at the trial, if it is in the interest of justice, postpone or adjourn the trial for any time, to any place, and upon any terms it thinks just. Recently in *Cygnet Farms Ltd v ANZ Bank New Zealand Ltd*, Palmer J held:
>
> > In assessing the interest of justice I consider justice to all litigants – not only the parties here but the parties in the two similar cases which may be influenced by the outcome of this case as well the parties in

---

18 Minute No 2, above n 1.
19 *Body Corporate 348047 v Auckland Council* [2019] NZHC 1738, (2019) 20 NZCPR 499.
20 *McKay Builders Limited (in liq) v Madsen-Reis* [2017] NZHC 934.
21 At [25]–[28]. Footnotes and citations omitted.

> cases in the queue that will suffer further delays and the public interest in achieving the most efficient use of court resources.

[26] Palmer J further cited *O'Malley v Southern Lakes Helicopters Ltd*, where Tipping J held:

> … the essential question which the Court always has to consider when asked for an adjournment is whether or not that is necessary in order to do justice between the parties. One must not overlook that not only is it necessary to do justice to the party who is seeking the adjournment but also justice to the party who wishes to retain the benefit of the fixture. It is essentially a balancing exercise.

[27] Furthermore, in *Gray v Thom* Penlington J said:

> I recognise, as did the learned Judge, that the administration of justice is a relevant factor. An adjournment affects not only the party opposing the adjournment, but also the other patient litigants waiting in the queue. The opponent of an adjournment is inevitably delayed in getting a resolution of the matter to which he or she is a party. Likewise, waiting litigants are deprived of the opportunity of using the Court time because of inadequate lead time to get ready for trial. An adjournment disrupts the Court programme. It sometimes leads to a wastage of a scare resource, judicial time.

[28] Therefore, in guiding my discretion to grant an adjournment, I must consider whether it is in the interests of justice to do so, taking into account any prejudicial effect the decision may have on the party applying for adjournment and on the party wishing to retain the benefits of the fixture. I must also take into account the scarce resource of judicial time, the court programme, and the other litigants in the queue waiting for their cases to be heard.

[42] While r 10.2 is not entirely apt in a situation where the fixture has been vacated, dealing as it does with the discretion to grant adjournments at any time before or at trial, the parties accept that the "interests of justice" test is the appropriate one.

[43] As a preliminary to considering the merits of the submissions, I accept the submission for the defendants that it is not appropriate to shift the onus for advancing the plaintiff's claim onto the defendants, by way of, for example, a defendant's summary judgment application or an application to strike out the claim. Prosecution of the claim is ultimately the plaintiff's responsibility.

[44] As is clear from the *McKay Builders* and *Body Corporate 348047* cases, the court has a very broad discretion in balancing the interests of, and doing justice between, the parties.

[45] In this case there is no issue about wasting Court and judicial time. The fixture has been vacated and other cases scheduled to fill the gap. The question comes down to the competing interests of the parties.

Claims against the first defendant

[46] Mr Every-Palmer is no doubt correct in his submission that the Trustee will not have "certainty" even if the claim is discontinued. The Trustee is now aware of the deficiencies in process alleged by the plaintiff and the same or similar claim could be recommenced if circumstances change. Given that, the Trustee will no doubt have sought, or will seek, legal advice on the issues, regardless of whether the current proceeding remains on foot.

[47] However, the Trust must continue to carry out its business (for example, the scheduled AGM in March) and I am persuaded that extant, unresolved allegations — even if, as the first defendant says, they are unmeritorious — may nevertheless have a chilling effect, both for the Trustee as an entity, but also for individual Trust members whose actions are being scrutinised.

[48] Further, to at least a limited extent, a discontinuance of the proceeding rather than a stay would allow the Trustee to attempt to deal with the underlying substantive issues with iwi members.

[49] On the other hand, I accept that as, Mr Every-Palmer says, there will, be some disadvantages to the plaintiff if it discontinues this proceeding but circumstances subsequently require it to initiate a new proceeding. There will of course be further costs in refiling and serving proceedings, but those costs are relatively insignificant in the context of litigation of this type, involving these parties. As for all parties, the plaintiff will need to review and "refresh" its evidence and submissions.

[50] However, I do not see those disadvantages as significant. In my view they are outweighed by the disadvantages for the first defendant, as outlined by Ms Casey, and I rescind the stay on that basis.

Claims against second defendant

[51] For completeness, I will address the arguments in respect of the claim against the Minister.

[52] As noted already, Mr Anderson does not argue that there is prejudice to the second defendant, if the claim remains stayed. Rather, the second defendant's focus is on the question of parliamentary privilege — any hovering claim against the Crown, in its current form, would contravene settled principles concerning the relationship between the courts and Parliament. For that reason, the claim against the second defendant should be discontinued or struck out.

[53] As I noted in the minute of 27 January 2023,[22] it is difficult to determine the question whether the proceeding against the second defendant infringes the principles of parliamentary privilege on an interlocutory application. I also acknowledge Mr Every-Palmer's submission that the plaintiff would have no right of appeal against a decision in this application rescinding the stay on the ground that the claim against the second defendant infringes parliamentary privilege. That can be contrasted with a situation where the Crown successfully sought strike-out of the claim, which would be appealable. I agree that for that reason also it is not appropriate to reach a definitive conclusion on the question of infringement of parliamentary privilege.

[54] However, in light of the plaintiff's acknowledgement that an amendment of the claim might be necessary to avoid such issue, I signal a preliminary view.

[55] The declarations sought by the plaintiff against the second defendant are couched in the following terms:

> (a) a declaration that in considering proposals from the Trustee, the Crown through its Ministers must act consistently with:
>
> (i) the Fisheries Settlement and 1992 Settlement Act;

---

22 Minute No 2, above n 1.

(ii) the purpose of the Maori Fisheries Act; and

(iii) the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga; and

(iv) Ngāi Tahu's rights … .

(b) a declaration that in order to comply with its obligations under the Treaty and Fisheries Settlement, the Crown through its Ministers must:

(i) have due regard to the need to protect and uphold the Fisheries Settlement; and

(ii) appropriately consult with Ngāi Tahu, as a mandated iwi organisation and party to the Fisheries Settlement;

(c) a declaration that the Crown through its Ministers will not comply with its obligations, or respect the rights of Ngāi Tahu …, by adopting proposals which are inconsistent with:

(i) the Fisheries Settlement and 1992 Settlement Act;

(ii) the purpose of the Maori Fisheries Act; and

(iii) the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga; and

(iv) Ngāi Tahu's rights … .

(d) a declaration that to the extent the Exposure Draft gives effect to the Amended Surplus Funds Resolution, it is inconsistent with:

(i) the Fisheries Settlement and 1992 Settlement Act;

(ii) the purpose of the Maori Fisheries Act; and

(iii) the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga; and

(iv) Ngāi Tahu's rights … .

[56] The "proposals" referred to in declarations (a) and (c) are now embodied in the Amendment Bill before the House. The "Exposure Draft" referred to in declaration (d) is the Amendment Bill.

[57] I am persuaded by Mr Anderson's submissions that the declarations sought by the plaintiff against the Minister — at least declarations (a), (c) and (d) — on their face go further than declarations of existing rights, interests or entitlements and relate to the specific legislative proposals now before the House. To that extent, they do not appear to fall within the "permitted" category, as in *Ngāti Whātua Ōrākei*, but rather fall within the category noted in *Ngāti Mutunga*, where the Court of Appeal said:[23]

> The simple point is, courts may declare rights, and these may relate to the rights-consistency of government action, and even proposed government action. But they may not relate to the rights-consistency of proposed legislation. For example, a government proposal to exercise an existing lawful power in a particular way may be the subject of court declarations. The difficult area is where the proposed government action is really a proposal to legislate. In principle, declaratory proceedings of this nature are simply not permitted…

Orders

[58] The direction of 27 January 2023 staying the proceeding is rescinded.

---

[23] *Ngāti Mutunga v Attorney-General* above n 7, at [27]. *Ngāti Mutunga* was upheld in *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [47], where the Court noted that the appeals in question did not put the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Bill 2022 (100-2) in issue in any way. They therefore involved no conflict with the terms of s 11 of the Parliamentary Privilege Act 2014, nor any breach of the common law principle of non-interference. The Court cited *Ngāti Mutunga* as a decision that "captures the essential points" at [47].

[59] The plaintiff has previously indicated that, if the stay no longer remains in place, it will discontinue the proceeding. For the avoidance of doubt, I direct that in the absence of a discontinuance, the plaintiff is required to seek a priority fixture for the proceeding.

[60] Leave is granted to all parties to reapply in relation to any consequential matters.

Gwyn J

Counsel/solicitors
J D Every-Palmer KC, Wellington
V E Casey KC, Wellington
A Butler KC, Wellington
Chapman Tripp, Auckland
Crown Law Office, Wellington
Simpson Grierson, Auckland