



**Supreme Court of New Zealand
Te Kōti Mana Nui**

17 September 2018

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NGĀTI WHĀTUA ŌRĀKEI TRUST v ATTORNEY-GENERAL

(SC 135/2017) [2018] NZSC 84

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Background

This appeal arises in the aftermath of Ngāti Whātua Ōrākei’s settlement of historical Treaty of Waitangi claims in 2012 and in the context of proposed settlement of historical Treaty claims between the Crown and Ngāti Paoa Iwi Trust (Ngāti Paoa) and the Crown and Marutūāhu Rōpū Limited Partnership (Marutūāhu).

Before the settlement between the Crown and Ngāti Whātua Ōrākei was finalised, other iwi and hapū of Tāmaki Makaurau brought a claim to the Waitangi Tribunal on the basis their interests were adversely affected by the process adopted by the Crown in its negotiations with Ngāti Whātua Ōrākei. The claim was successful. Subsequently there were discussions with the relevant iwi and hapū to try to resolve the issues. After these discussions, the Crown entered into a collective settlement involving all iwi and hapū of Tāmaki Makaurau, including Ngāti Whātua Ōrākei. The collective settlement contemplated that there would be complementary settlements with individual iwi and hapū in the future. The proposed settlements with Ngāti Paoa and Marutūāhu reflected this background.

The collective settlement was effected by the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Collective Redress Act). One aspect of the collective settlement was a right of first refusal relating to Crown-owned property in the Auckland area in favour of an entity representing the collective. Under the Collective Redress

Act, a property can be withdrawn from the right of first refusal if the property is required as redress in the settlement of a Treaty claim by an individual iwi or hapū.

As part of the proposed settlements with Ngāti Paoa and Marutūāhu, properties in central Auckland to which the right of first refusal in the Collective Redress Act applies would be withdrawn from the right of first refusal and transferred to Ngāti Paoa and Marutūāhu. The proposed settlements are conditional on the passage of legislation which is yet to be introduced.

Ngāti Whātua Ōrākei brought judicial review proceedings challenging decisions by the Minister for Treaty of Waitangi Negotiations relating to the proposed transfer of commercial properties in central Auckland to Ngāti Paoa and Marutūāhu as part of their settlement packages. Ngāti Whātua Ōrākei objects to the proposed transfer of these properties on the basis that it maintains mana whenua and ahi kā in relation to the areas of central Auckland including the commercial properties in issue, which, it says, makes it inappropriate for them to be transferred to another iwi or hapū. Ngāti Whātua Ōrākei also says it was owed various process rights including consultation before such decisions relating to the transfer of properties in central Auckland to other iwi or hapū can be made by the Minister. Various declarations to this effect were sought in relation to both proposed settlements although prior to the Supreme Court hearing Ngāti Whātua Ōrākei noted that it had abandoned the relief sought against Ngāti Paoa.

The Attorney-General sought to strike out the claim because, he claimed, it was an attempt to directly challenge a decision to legislate and so engaged the principle of non-interference with parliamentary proceedings. This was because the proposed withdrawal of the relevant properties from the right of first refusal and their transfer to Ngāti Paoa or Marutūāhu would be effected by legislation. This meant that the decision of the Minister for Treaty of Waitangi Negotiations in relation to the proposed transfer of the properties was a decision to propose legislation for the consideration of Parliament.

The High Court struck out the claim finding that, amongst other things, the declarations sought related to decisions made in the context of the development and preparation of legislation and were not justiciable.

The Court of Appeal upheld the High Court decision. The Court similarly considered the principle of non-interference with parliamentary proceedings was engaged because there was no proposal that would affect Ngāti Whātua Ōrākei's rights other than a legislative one.

The Supreme Court granted leave to Ngāti Whātua Ōrākei on whether the Court of Appeal should have allowed the appeal.

The Supreme Court decision

A majority of the Supreme Court, comprising Justices William Young, O'Regan, Ellen France and Arnold, has allowed the appeal in large part. This means that Ngāti Whātua Ōrākei can pursue its claim against the Crown in the High Court, although the claim will require some repleading. The majority considered the claim was primarily about what rights Ngāti Whātua Ōrākei had in relation to the land in question, rather than, as the Court of Appeal had found, a challenge to legislative proposals.

The majority identified four broad claims in the present statement of claim that should be allowed to proceed to trial. These were first claims about rights arising out of either the Treaty of Waitangi or customary rights relating to the land in issue. Second, a claim arising from the legislation effecting the settlement with Ngāti Whātua Ōrākei (the Ngāti Whātua Ōrākei Claims Settlement Act 2012). Third, a claim about the future application of the Crown's policy for dealing with overlapping claims. Finally, a claim concerning the approach to aspects of the Collective Redress Act.

The majority found however that two of the claims related only to the specific decision to transfer the specified properties. The decision to strike out that part of the pleading was upheld on the basis the claim in this limited respect was an interference with parliamentary proceedings. The majority noted some caution about the extent to which some of the earlier cases had applied the principle of non-interference to decisions made prior to the introduction of legislation.

Finally, the majority noted the existence of the proceedings is not a bar to the introduction of the proposed settlement legislation to the House of Representatives.

The Chief Justice would have allowed the appeal in its entirety. She considered a proposal to implement a decision through legislation did not prevent the Court making declarations as to rights, provided it did not prevent or inhibit Parliament's consideration of legislation. This was not such a clear case that it should be struck out, though amendments to the pleadings may be necessary. Finally, the Chief Justice considered that the case had broader application in any event to the Crown's post-settlement obligations to iwi.

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