IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY
[TE KOTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE]

CIV-2023-485-162

UNDER	Part 30 of the High Court Rules
AND UNDER	Section 2 of the Declaratory Judgments Act 1908 and the inherent jurisdiction of the Court
IN THE MATTER OF	an application for judicial review of a decision made by or on behalf of the Minister for Treaty of Waitangi Negotiations

AND IN THE MATTER OF an application for a declaratory judgment

BETWEEN	**SOLOMON and others** Plaintiffs
AND	**ATTORNEY-GENERAL** First Defendant
AND	**WHAITIRI and others** Second Defendants

AFFIDAVIT OF THOMAS McCLURG FOR SECOND DEFENDANTS IN SUPPORT OF DIRECTIONS TO BE SOUGHT AT CASE MANAGEMENT CONFERENCE ON 26 JUNE 2023

Dated: 20 June 2023

Judicial Officer:	Not known
Next event date:	26 June 2023 CMC: Judges Chambers list at 10:00 am

Solicitors for the Plaintiffs:
Chris Ritchie
Barrister and Solicitor
PO Box 2068, DXSP26512
Wellington
Telephone 472 9223
Email: mail@chrisritchielaw.co.nz

Counsel for the Plaintiffs:
T J CASTLE
Barrister
PO Box 10048
Wellington 6143
Telephone: 021 419323
Email: tim.castle@capitalchambers.co.nz

I, **THOMAS McCLURG** of Wellington, swear:

Pepeha

Ko Te Moana-nui-a-Kiwa, te moana

Ko Wharekauri te motu

Ko Ngāti Mutunga o Wharekauri, te iwi

Ko Whakamaharatanga, te marae

Ko Ngahiwi Dix, ko Wikitoria Kawhe, ko Te Matoha Daymond oku tupuna

Ko Tom McClurg ahau

Introduction

2. I am a registered member of both Ngāti Mutunga o Wharekauri and Ngāti Mutunga Iwi. I am a Director of the respective asset holding companies of both iwi.

3. Ngāti Mutunga people are Māori who trace descent to an eponymous ancestor, Mutunga. Ngāti Mutunga o Wharekauri members are also Māori but with a more diverse whakapapa reflective of the composition of the people aboard the two voyages of the 'Rodney' in late 1835 from Whanganui-ā-Tara to Wharekauri.

4. Ngāti Mutunga o Wharekauri is today an umbrella term that embraces descendants of people who might originally have identified themselves as Ngāti Mutunga, Ngāti Tama, Kekerewai, Haumia or by their hapu names. I am a descendent of Wikitoria Kawhe, Ngahiwi Dix and Te Matoha Daymond. My father was born at Owenga, Chatham Islands in 1925. I was born in Burwood, Christchurch in 1957.

5. I am a director of Toroa Strategy Limited in which capacity I offer independent business and strategic advice to organisations operating in a

range of sectors, particularly organisations concerned with seafood, fishing and fisheries management. I founded Toroa Strategy Limited in 2009 and (amongst others) have carried out contracts for Seafood New Zealand, Aotearoa Fisheries Limited, Te Ohu Kai Moana Trust Limited, Tainui Group Holdings Limited, Pare Hauraki Asset Holdings Limited, the World Bank, The Parties to the Nauru Agreement Office and the Maori Trustee (Te Tumu Paeroa).Between 2009 to the present, in addition to the consulting activities above, I have been appointed to the following directorships: I am Chairman of Commercial Fisheries Services Limited (Fishserve) and (since 2010) a director of Ngāti Mutunga o Wharekauri Asset Holding Company Limited which is a wholly owned subsidiary of Ngāti Mutunga o Wharekauri Iwi Trust Limited. I am also a director of Port Nicholson General Partnership (2012) and Koura Inc General Partner Limited (2015). In 2016 I was appointed as a director of Ngā Kai Tautoko Limited, which is the Asset Holding Company for Ngāti Mutunga (Taranaki).

6. My qualifications and experience are as follows:

6.1 I have a Master of Science Degree with first class honours in Natural Resource Management from the Centre of Resource Management at Canterbury University and Lincoln College (1986);

6.2 Between 1991 and 1994, I was Manager Strategic Policy for MAF Policy.

6.3 Between 1994 and 1999, I was General Manager of Policy and Operations at the Treaty of Waitangi Fisheries Commission (Te Ohu Kai Moana).

6.4 Between 1999 and 2004, I was a Principal, Corporate Finance with Ernst & Young.

6.5 Between 2004 and 2008, I was General Manager Strategy and Planning for Aotearoa Fisheries Limited.

Context of this proceeding filed by Moriori

7. The Moriori Claims Settlement Bill was passed in 2021 following two periods of negotiation between the Crown and Moriori. The first proceeded from 2004-2008 before mandate and representation issues within Moriori necessitated a halt. Negotiations were later recommenced – in 2016 – with both Moriori and Ngāti Mutunga o Wharekauri. The Crown was represented by the same Chief Crown Negotiator, Dame Fran Wilde, in both negotiations.

8. Ngāti Mutunga o Wharekauri were strongly supportive of a process of Treaty negotiation which would be advanced in parallel and be designed to achieve settlements that comprised an integrated package of measures to provide a foundation for harmonious and co-operative future relationships within the Chathams community generally. Notwithstanding the fact that many Chatham Islanders share both Māori and Moriori whakapapa, the historic processes of the 1992 (legislated in 2004) pan-Māori Treaty Fisheries settlement, and the first set (2004-2008) of Moriori negotiations were fundamentally competitive and divisive for community relations on-Island.

9. Contemporaneous Treaty settlements beginning in 2016 therefore presented an opportunity to put decades of competitive and divisive processes behind us; to start afresh with renewed relations on-Island and between the Island and the Crown. This positive approach to the negotiations by Ngāti Mutunga o Wharekauri was evidenced by, amongst other things, agreement to equal ownership of the bed of Te Whānga lagoon on the Chathams; equal representation on the proposed planning committee; and joint development of a new set of customary fishing regulations.

10. The Ngāti Mutunga o Wharekauri pragmatic position since 2016 has been that Moriori are assumed to be Māori with historical and cultural interests on the Chathams. However, such interests are of a very different nature to the rights and interests of Ngāti Mutunga o Wharekauri secured and

guaranteed by the Treaty of Waitangi. On this basis, Ngāti Mutunga o Wharekauri, in our April 2021 submission to the Māori Affairs Select Committee, gave support to the Moriori Claims Settlement Bill.

Consequences of this proceeding filed by Moriori

11. When served 'out of the blue', this proceeding came as a shock to Ngāti Mutunga o Wharekauri. There was no forewarning of the proceeding. Since being served on individuals of the second defendants, and as its content has been digested by Ngāti Mutunga o Wharekauri, its implications have become more and more unsettling and offensive.

12. The first concern is that the mere existence of the proceeding might cause the Crown to halt the current agreed work programme to develop a draft Deed of Settlement (iDOS) for Ngāti Mutunga o Wharekauri historical Treaty breaches by the Crown by the end of 2023. This would build upon the Agreement in Principle signed between Ngāti Mutunga o Wharekauri and the Crown in November last year. Fortunately, the Chief Crown Negotiator, Sir Brian Roche, acting in accordance with the wishes of the Minister for Treaty of Waitangi Negotiations, Hon. Andrew Little, has assured us unequivocally (on more than one occasion) that our Treaty settlement negotiations, and iDOS work programme and timetable, will continue, unaffected by the proceeding.

13. This proceeding also raises other practical considerations of great concern, including an implied repudiation of all of the joint redress provisions contained in the Moriori Claims Settlement Act 2021 and in our Agreement in Principle. These arrangements pre-suppose the existence of Ngāti Mutunga o Wharekauri Treaty rights that are now being, by this proceeding, denied in their entirety.

14. Deeper again is the offence occasioned by the assertion that the Crown should not conduct Treaty negotiations with Ngāti Mutunga o Wharekauri on the grounds that Ngāti Mutunga o Wharekauri have no Treaty rights on

Wharekauri. This is an assertion that no-one has thought to make in 188 years. Ngāti Mutunga o Wharekauri were settled on Wharekauri for around seven years before the Islands were annexed by the Crown, and became subject to the provisions of the Treaty of Waitangi, in November 1842.

15. Then there is a quite extraordinary statement in the claim: the declaration by Moriori in their proceeding that "they are not Māori". The full implications of this are, initially, quite difficult to fathom. They require certain presumptions held by Ngāti Mutunga o Wharekauri to be set aside, including that Moriori are Māori; that the Moriori language is a dialect of te Reo Māori; and that, although Moriori have a unique history, at base level, there are common cultural concepts and values held by both iwi and imi on the Chathams.

16. In essence these presumptions have been completely repudiated in the claim. The plaintiffs now unequivocally assert that they are not Māori.

17. Relationships underpinning this proceeding appear to be, now, viewed by the plaintiffs, not as between two iwi with considerable shared whakapapa but, instead, between Māori and non-Māori. Within te Ao Māori there are common processes and values to support co-operative ventures and the resolution of conflicts between iwi. It is essentially asserted by Moriori now that these shared cultural processes and values no longer exist, leaving huge uncertainty about what processes might take their place.

18. This uncertainty is already undermining existing and proposed shared activities on Wharekauri. The hope of Ngāti Mutunga o Wharekauri that dual Treaty settlements would pave the way for improved iwi/imi relations has been dashed by the growing realisation that the Moriori perspective is that the Chathams settlements are with non-Māori (first) and Māori (never). In the view of Moriori, the prior settlement with 'non-Māori' precludes a Treaty Settlement with Māori (Ngāti Mutunga o Wharekauri).

19. The suggestion that Ngāti Mutunga o Wharekauri should not have a Treaty settlement is regarded within the iwi as outrageous and, it bears repeating,

deeply offensive. Even if the Crown keeps its promise to continue our negotiations to their conclusion, the unknown implications of having overlapping Treaty settlements with Māori, and non-Māori, exposes Ngāti Mutunga o Wharekauri to a high level of uncertainty (and accompanying angst) that Treaty settlements are intended to alleviate.

Purpose of this Affidavit

20. The second defendants have received legal advice that the acts of the Crown (and, where applicable, Ngāti Mutunga o Wharekauri) in relation to the signing of the Agreement in Principle between the Crown and Ngāti Mutunga o Wharekauri in November 2022 (and those now being undertaken to progress the Ngāti Mutunga o Wharekauri iDOS, with others to be progressed further to legislative settlement) are not justiciable in the High Court. On instructions, our solicitor has put solicitors for the plaintiffs' on notice accordingly; and signalled that an application to strike out the proceeding will be made if this proceeding is not immediately withdrawn. I attach as Exhibit **"A"** a letter dated 2 June 2023 from the second defendants' solicitors to such effect. For completeness, I attach as Exhibit **"B"** a letter dated 12 June 2023 from Bennion Law, solicitors for the plaintiffs', in reply.

21. Advice received is that the steps (strike out etc) foreshadowed by our solicitor (Mr Ritchie) will be necessary. This affidavit is to support the Court making directions for such purpose. It is intended that a memorandum of counsel will be also filed ahead of the call-over for this proceeding next Monday, 26 June 2023.

SWORN at Wellington this

20th day of June 2023 before me: .....

.....

A Solicitor of the High Court of New Zealand

Olivia Rose Smith
Solicitor of the High Court of New Zealand
Morrison Kent Lawyers
Wellington

"A"

Chris Ritchie

Barrister & Solicitor

Level 8, Sovereign House, 22-28 Willeston St, PO Box 2068, Wellington, New Zealand 6140
Telephone 04-472-9711, Facsimile 04-472-9223
mail@chrisritchielaw.co.nz

2 June 2023

Bennion Law

1 Ghuznee Street

PO Box 25433

Wellington 6140

This is the exhibit marked **"A"** referred to in the annexed affidavit of **Thomas McClurg** sworn at Wellington this 20th day of June 2023 before me:

A Solicitor of the High Court of New Zealand

Olivia Rose Smith
Solicitor of the High Court of New Zealand
Morrison Kent Lawyers
Wellington

Attention: Emma Whiley

By Email: emma@bennion.co.nz

CC:: cgriggs@bcomm.nz

Re: Solomon & Ors v Attorney-General and Whaitiri & Ors: CIV 2023-485-162

I have been instructed as solicitor for the second defendants. This letter is on their behalf.

1. Service of the pleadings in this case on individual trustees of Ngāti Mutunga o Wharekauri Iwi Trust is acknowledged. It is noted that no letter before action heralding

the intention of Moriori trustees M Solomon, P Solomon, T Lanauze, G Legros and S Wadsworth to sue individual trustees of Ngāti Mutunga o Wharekauri was sent to those against whom action has now been taken. No invitation for dialogue or korero with the second defendant or the trust of which they are trustees preceded Moriori trustees filing suit as individuals against the second defendants. The action taken has come as a complete surprise.

2. Nor according to my instructions was there any invitation for a cooperative approach to facilitate service of the legal proceeding prior to service having been effected. This meant that service of the proceeding referred to was effected, it would appear by planned surprise, on the NMOW trustees, one by one, beginning on the eve of Easter – that is the day before Good Friday.

3. Quite why the plaintiffs have elected to issue their proceeding in their individual names, and to sue individual trustees as second defendants, is not completely clear. However, what is clear enough is that the plaintiffs have taken joint and several responsibility, individually, for their case: their proceeding and their pleading. In the event this proceeding continues, the second defendants will jointly and severally make application to the High Court under Rule 5.45, High Court Rules that the Moriori

trustee individuals put up security for costs in respect of the proceeding. That step which is foreshadowed by this letter will become unnecessary if the plaintiffs do as this letter in the succeeding paragraphs invites them so to do.

4. The second defendants have instructed counsel as you know. This letter of advice in relation to your clients proceeding represents the second defendants position, having taken counsel's advice.

5. In general reaction, the second defendants find the issue of the 28 March 2023 proceedings by your clients' as trustees against the second defendants, deeply offensive. Among other things, that the plaintiffs have now filed a formal proceeding in the High Court challenging the authenticity, integrity and validity of formal Treaty of Waitangi grievance settlement processes for Ngāti Mutunga o Wharekauri with the Crown, being processes (which include provisions for joint Moriori/Ngāti Mutunga o Wharekauri redress) of a like kind to that which Moriori has completed with the Crown is considered a gross hypocrisy and discourtesy. Regard is had to the fact that such a step with such consequences has been taken with no prior endeavour from the plaintiffs to engage with the second defendants or Ngāti Mutunga o Wharekauri (or the Crown for that matter) on the allegations and assertions now pleaded by the plaintiffs. Such action

is considered to offend against tikanga Māori including in particular tikanga o Ngāti Mutunga o Wharekauri. The plaintiffs proceeding is underscored by their own pleading that they are not Māori. There is no challenge to that statement from Ngāti Mutunga o Wharekauri and the very action the plaintiffs have taken demonstrates that they are not Māori. It appears, however, that the plaintiffs have previously asserted to the Crown and to Parliament that they are entitled to a settlement pursuant to Treaty of Waitangi grievance settlement processes (that under the Treaty of Waitangi Act 1975 are limited to the settlement of claims by Māori) and, having done so, and achieved so, now purport to deny a legitimate Māori Treaty party and partner, the benefits of the same Treaty of Waitangi grievance settlement processes.

6. This letter is formal notice to you and your clients that the second defendants consider the proceeding as pleaded and filed by the plaintiffs, by reference to the statement of claim dated 28 March 2023 (CIV 2023-485-162) is fundamentally misconceived and fatally flawed, so much so that it could not possibly succeed before the Court. This letter is to be taken please as formal invitation to the plaintiffs that they immediately, that is, forthwith, discontinue the subject proceeding. If the plaintiffs forthwith discontinue the proceeding the issue of costs thereon will arise for separate and further

consideration. Such considered review on the issue of costs upon discontinuance can take place after that event.

7. In the event the plaintiffs do not discontinue forthwith, the second defendants will have no option or reasonable alternative action available to them other than to apply for the Solomon & Ors v Attorney-General and Whaitiri & Ors proceeding to be struck out either pursuant to Rule 15.1 of the High Court Rules or by calling in aid the High Court's inherent jurisdiction. Full indemnity costs of the second defendants will be sought from the plaintiffs upon that application. Rule 15.1 provides the Court with a discretion to dismiss (strikeout) or stay a proceeding if it:

   i. Discloses no reasonably arguable cause of action; or

   ii. Is frivolous and/or vexatious; or

   iii. Is otherwise an abuse of the process of the Court.

8. Subject to additional observations as to the law which will be set out in later paragraphs in this letter, the starting point for invocation of the Court's jurisdiction both inherently and under Rule 15.1 is, as has already been observed, to be found in the plaintiff's pleading itself. In paragraph 5 of the statement of claim the plaintiffs assert (seemingly

after they have represented to the Crown and to Parliament to the contrary): "**They are not Māori**". On a strike out application of the kind the second defendants contemplate as being necessary if the plaintiffs do not discontinue the proceeding, the statement just cited will be taken by the Court as a true statement. The plaintiffs will not be able to depart from it nor from the consequences which must follow from its pleading – as a matter of tikanga, as a matter of common law and, for completeness, as a matter of constitutional principle and jurisprudence. The attention of the plaintiffs is respectfully drawn to well-established principles of law for strikeout as for instance set out in *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267, approved by the Supreme Court in *Couch v Attorney-General* [2008] NZSC 45 at [33], as being invariably relevant. Careful attention will also be paid to the context in which the plaintiffs claim is made. Although it is recognised that the jurisdiction to strikeout is to be exercised sparingly, where the causes of action are so clearly untenable that they cannot possibly succeed, the Court should not refrain from striking out. Although facts pleaded are ordinarily assumed to be true on a strikeout application, that does not extend to allegations which are self-evidently speculative or false, or plainly unsupportable or without foundation. See for instance also, *Tamihere v Commissioner of Inland Revenue*

[2017] NZHC 2949; the decision with which the plaintiffs solicitors will be familiar know as *Ngāti Pāhauwera Strikeout*; and *Seimer v Judicial Conduct Commissioner* [2013] NZHC 1853.

9. The second defendants consider that the pleading by the plaintiffs coincidentally fails to comply with the requirements as to pleading particulars, fails to correctly plead facts and retreats to the point of pleading propositions of law (which are inappropriate as the Attorney-General has already pointed out). For such a profoundly non-compliant statement of claim, there can be no obligation on the part of the second defendants to plead to what the plaintiffs have filed. For completeness, initial discovery by the plaintiffs is considered to be wholly inadequate.

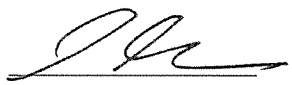
10. The plaintiffs do not plead how they had or could have acquired the uniquely tikanga Māori cultural status of tino rangatiratanga (expressly acknowledged for Māori in the Treaty of Waitangi), only that Moriori "continued to hold tino rangatiratanga". Despite no pleading or particular nor my reference to anything provided by way of initial discovery, the plaintiffs insist, in effect, notwithstanding they are not signatory to the Treaty and are non-Māori, they can somehow obtain exclusive rights available and promised by the Crown to Māori under Article II of the Treaty, consequently then able

to bar Māori, in this case Ngāti Mutunga o Wharekauri from settling their grievances with the Crown upon the Crown's failure to deliver and fulfil the promises to Ngāti Mutunga o Wharekauri under that same Article II. Put another way, the plaintiffs contend upon the basis of inherently flawed propositions that Māori, in this case Ngāti Mutunga o Wharekauri, who have Article II rights on Wharekauri, can nevertheless be excluded from them by non-Māori. The plaintiffs would have the Court set aside the agreement in principle between the Crown and Ngāti Mutunga o Wharekauri on the basis that Article II rights are exclusively for Moriori even though they are not Māori.

11. Even the pleading by the plaintiffs that the "reviewable decision" (as defined in their pleading) is "in breach of the Treaty", is not a pleading saviour for the plaintiffs. A particular relied upon for such purpose is that "non-Māori" can co-opt the cultural concept of tino rangatiratanga as derived from the Treaty between the Crown and Māori, then hold against the Māori parties to the Treaty by reason of that the cultural concept of te tino rangatiratanga is exclusive for non-Māori. The inherently contradictory nature of the pleading stemming from a very clear assertion by the plaintiffs that Moriori are not Māori, is the foundation premise upon which it can irrefutably be demonstrated that as non-Māori, Moriori are simply not entitled to

prevent, exclude or deny Māori from receiving redress and remedy from the Crown's failure to honour the promises to Māori under the Treaty. These promises included the promise under Article II to secure and guarantee the Māori cultural concept of te tino rangatiratanga as held and exercised by Ngāti Mutunga o Wharekauri following the conquest of Wharekauri by Ngāti Mutunga o Wharekauri in 1835 and the extension of Treaty of Waitangi promises to them following the subsequent annexation of Wharekauri by the Crown in 1842.

12. In all these circumstances and for all these reasons, you are invited to forthwith discontinue the proceeding CIV 2023-485-162.



C E Ritchie
Email: mail@chrisritchielaw.co.nz

"B"

Bennion LAW Barristers and Solicitors
Thomas Bennion (LLB Hons / BA)
Emma Whiley (LLB / BSc)
Odette Ford Brierley (LLB / BSc)

BENNION LAW

This is the exhibit marked **"B"** referred to in the annexed affidavit of **Thomas McClurg** sworn at Wellington this 20th day of June 2023 before me:

A Solicitor of the High Court of New Zealand

Olivia Rose Smith
Solicitor of the High Court of New Zealand
Morrison Kent Lawyers
Wellington

12 June 2023

Chris Ritchie Law
PO Box 2068
WELLINGTON 6140

Attention: Chris Ritchie
By email: mail@chrisritchielaw.co.nz

Dear Chris

RE: CIV 2023-485-162: *Solomon and ors v Attorney-General and ors*

We acknowledge receipt of your letter of 2 June 2023.

As you know, we act for the plaintiffs in the abovementioned proceeding, who explicitly sue in their capacities as trustees of the Moriori Imi Settlement Trust for and on behalf imi Moriori. Suit is brought against the Crown and your clients, explicitly in their capacities as trustees of the Ngāti Mutunga o Wharekauri Iwi Trust for and on behalf of Ngāti Mutunga o Wharekauri. That is the orthodox manner for a trust to sue another trust. We find it a little perplexing that you have taken the point you have in that respect.

Unfortunately, the arguments made in your letter are based on fundamental errors of law and fact. Those arguments are not accepted by our clients.

Accordingly, our clients will not be discontinuing the abovementioned proceeding.

Yours faithfully

Tom Bennion
027 277 6751
tom@bennion.co.nz

Emma Whiley
027 201 9696
emma@bennion.co.nz