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

SYNOPSIS OF SUBMISSIONS FOR SECOND DEFENDANTS IN SUPPORT OF APPLICATIONS TO STRIKE OUT THIS PROCEEDING; AND FOR COSTS; AND OTHER INTERLOCUTORY ORDERS AS NECESSARY

Dated: 20 October 2023

Judicial Officer:	Justice Isac
Next event date:	By Hearing: 1 November 2023

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MAY IT PLEASE THE COURT:

Introduction

1. The second defendants herein, sued personally as the trustees of Ngāti Mutunga o Wharekauri Iwi Trust (NMOW), apply to strike out all parts of the plaintiffs' claims: that is to strike out **both** causes of action pleaded in the statement of claim herein dated 28 March 2023; and as to **all** aspects of them.

2. The grounds on which the orders are sought are as follows:

   (a) Strike Out

      (i) The decision(s) of the Crown by the Attorney-General (or otherwise) to enter into an Agreement in Principle with Ngāti Mutunga o Wharekauri is not reviewable by, or justiciable before, the High Court.

      (ii) The cause(s) of action pleaded disclosed no reasonable cause of action.

      (iii) The cause(s) of action pleaded disclose no case appropriate to the nature of the pleading.

      (iv) The proceeding herein and its determination is likely to cause prejudice or delay to the second defendants in their negotiation of a settlement with the Crown of the second defendants grievances arising from the Crown's breach of the provisions and principles of the Treaty of Waitangi.

      (v) The pleading, in its entirety, is frivolous and vexatious.

      (vi) The pleading in its entirety is otherwise an abuse of the process of the court.

The statement of claim

3. The strike out application calls for a robust scrutiny of the statement of claim. Upon such careful review the second defendants contend that nothing of it can survive. Counsel reserves, with respect, that if any aspect of the statement of claim survives, this strike out, comprehensive re-pleading with accompanying particulars will be required.

4. There are two causes of action pleaded in the plaintiffs' statement of claim:

   (a) The **first**: described as "Judicial Review"; (commencing at para 39);

   (b) The **second**: described as "Application for Declaratory Judgement"; (commencing at para 49).

5. The statement of claim itself is (respectfully) a confusing pleading.

6. The "First Cause of Action – Judicial Review" comprises two parts:

   (a) Part A: **Grounds for Review** – Paras 40-47; and

   (b) Part B: **Remedies** – Para 48 et seq. applying to the first cause of action. This aspect of the statement of claim is expressed as follows:

      i. an order setting aside what is pleaded as "the reviewable decision"; (see para 32): the entering into on 25 November 2022 by the Crown and NMOW of an Agreement in Principle (AIP) to settle historical claims under the Treaty of Waitangi of 1840; and

      ii. declarations pleaded in discursive text which are in essence, descriptions of what are contended as Crown

obligations exclusively to Moriori by and under the **Treaty** of Waitangi, by which a **Treaty** settlement between the Crown and NMOW would be unlawful; and

iii. costs.

7. The "Second Cause of Action – Application for Declaratory Judgment" repeats paragraphs 4-47 of the statement of claim (that is, not including the Remedies section pleaded as part of the first cause of action) and pleads further:

(a) an anticipation that the Crown intends to undertake the (next) step (in terms of its Treaty Settlement with NMOW) (namely a Deed of Settlement) providing for redress (including acknowledgements and cultural redress) expressly foreshadowed in the AIP (and set out in paragraphs 33 to 35 of the Statement of Claim).

(b) That granting to NMOW redress expressly covered in the AIP would (no particulars of how this would occur are given):

i. breach the rights of Moriori under the Treaty;

ii. breach international law;

iii. breach the common law; and

iv. breach tikane Moriori.

8. The remedy sought to appease the pleaded consequences of an expected Deed of Settlement between NMOW and the Crown is:

(a) binding declarations of right under s 2 Declaratory Judgments Act 1908; and the inherent jurisdiction of the Court "… in the terms pleaded at paragraph 48b of the Statement of Claim".

9. Therefore, returning to the pleading at para 48b, the remedy sought for the second cause of action is transparently (and obviously) premised upon (as with the first cause of action) the setting aside of the AIP (the reviewable decision). For example, paras 48b(b) and (c) rely upon a pleading, and finding, as to Crown obligations to Moriori under Article II of the Treaty; and in para 48b(e) reliance is placed upon the Crown's inclusion in the AIP with NMOW of Treaty redress to/for NMOW.

10. It is the position of the second defendants for strike out, that so inextricably linked with, and founded upon, the AIP (the judicial review of which is not a justiciable cause of action) are the nature of the declarations sought in the second cause of action that that cause of action must also be struck out. That the second cause of action is pleaded separately, as a claim for relief by way of declaratory judgment, is a contrivance.

11. It is artificial to describe or view the pleading as anything other than an alternative challenge (and a thinly disguised one at that) to the entering into by the Crown of an AIP with NMOW.

Facts pleaded assumed to be true: Moriori are not Māori

12. Because the applicable legal principles on strike out (to which counsel will come, in due course, include that: 'pleaded facts are assumed (or to be taken as) true, it is helpful, for the application of such a principle and for context, to consider certain key aspects of the plaintiffs pleading.

13. The plaintiffs' plead (paragraph 5) that:

    - 'Moriori are a separate Polynesian people indigenous to the Rēkohu group'; and

- 'They are not Māori'.

14. These are unequivocal assertions of fact and are to be assumed true for the Courts consideration at this interlocutory (strike out) stage.

15. It is the second of these assertions which:

    (a) informs the entire claim pleaded by the plaintiffs;

    (b) provides a precise foundation for the entire claim, namely that Moriori are non-Māori;

    (c) might, technically allow for Moriori to apply for declarations as to their 'rights' as non-Māori, in any legally permissible way and pursuant to any instrument or other framework for which rights for non-Māori are provided, but in no circumstances entitles Moriori as non-Māori to access or rely upon a Treaty, or any instruments, covenants, universal declarations, or such other, which confirm guarantee or otherwise protect, recognise and/or enshrine rights of Māori.

16. It follows that on the plaintiffs' own pleading, that they are not Māori, they/Moriori cannot claim the benefit of the provisions or principles of the Treaty of Waitangi. As the preamble to the Treaty of Waitangi Act 1975 proclaims: "On 6 February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Māori people of New Zealand."

17. It is not a Treaty between Her late Majesty and non-Māori. It does not endure for the benefit of non-Māori in respect of Treaty grievance claims; or for the settlement of same even though it appears Moriori:

    (a) were content to rely on the provisions of that Treaty to secure a Treaty Settlement in 2021;

(b) plead herein that, as a matter of law, (as distinct from fact), their entitlement to have applied to them terms of the Treaty such as "te tino rangatiratanga' as expressed in Article II of the Treaty notwithstanding that this expression is applicable only to Māori and cannot be available to or relied on by non-Māori. There are two texts of the Treaty – one in English; and one in the Māori language.

18. It is fanciful that the plaintiffs call in aid the Treaty to contend that by reference to it, NMOW as Māori, shall not have their Treaty Settlement; and further that the AIP as a step in the process of resolving under the Treaty of Waitangi claims be set aside at the whim of non-Māori.

19. Under the Treaty of Waitangi Act, 'Māori' means "... a person of the Māori race of New Zealand and includes any descendant of such person". It does not include non-Māori.

Affidavits for the second defendants

20. The second defendants rely on the two affidavits filed herein on their behalf. Both are depositions of highly experienced NMOW adviser, Thomas McClurg dated 20 June 2023 and 25 July 2023.

21. These depositions provide the foundation for counsel's submission that this Solomon/Moriori proceeding is deeply divisive. It will inevitably have a profoundly chilling effect on relationships and relations on Wharekauri. It seems deliberately to distract and deter the Crown from continuing and fulfilling its Treaty obligations to NMOW. It is not a proceeding to legitimately have the Court rule on issues of rights as affecting Moriori which might well be available to Moriori if so-minded without being premised upon the setting aside of that to which NMOW as Māori is fully entitled – its AIP.

Ngāti Mutunga o Wharekauri AIP: Key Crown Acknowledgements

22. The AIP between NMOW and the Crown contains solemn acknowledgements upon which in the Treaty settlement process NMOW is entitled to rely (and does rely):

    (a) The Crown acknowledges Ngāti Mutunga o Wharekauri as tangata whenua of Wharekauri (the Chatham Islands);

    (b) The Crown acknowledges that its annexation of Wharekauri in 1842 was carried out without any effort to consult with Ngāti Mutunga o Wharekauri. This represented a profound failure to give appropriate recognition and respect to the mana and te tino rangatiratanga of Ngāti Mutunga o Wharekauri. The Crown further acknowledges that its failure to seek the consent of Ngāti Mutunga o Wharekauri did not meet the standards of conduct set out in the instructions given to Governor Hobson when he was sent from England to establish sovereignty over New Zealand;

    (c) The Crown acknowledges that the undertakings it made to Māori in te Tiriti o Waitangi/the Treaty of Waitangi apply and have always applied to Ngāti Mutunga o Wharekauri from the date of annexation;

    (d) The Crown acknowledges that:

        i. it introduced the native land laws, which provided for the individualisation of title to Ngāti Mutunga o Wharekauri lands previously held in collective tenure, without consulting Ngāti Mutunga o Wharekauri;

        ii. in 1870 the Native Land Court awarded title to a number of Wharekauri (Chatham Islands) land blocks, each to ten or fewer Ngāti Mutunga o Wharekauri individuals who

were able to act as absolute owners, rather than for or on behalf of Ngāti Mutunga o Wharekauri;

iii. the native land laws did not prevent the alienation of much Ngāti Mutunga o Wharekauri land without the consent of the wider community of rights-holders who were thereby dispossessed of their interests in these lands;

iv. it did not take effective steps to prevent this dispossession before most of these lands had been alienated; and

v. this meant the operation of the native land laws on Wharekauri (the Chatham Islands) did not reflect the Crown's obligation to actively protect the interests of Ngāti Mutunga o Wharekauri in lands they may otherwise have wished to retain, and this was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles;

(e) The Crown further acknowledges that the operation and impact of the native land laws, in particular the awarding of land to individuals rather than to iwi or hapū, was inconsistent with tikanga Ngāti Mutunga o Wharekauri, and made Ngāti Mutunga o Wharekauri lands more susceptible to partition, fragmentation, and alienation. This contributed to the erosion of the tribal structures of Ngāti Mutunga o Wharekauri, which were based on collective iwi custodianship of land. The Crown's failure to actively protect the iwi structures of Ngāti Mutunga o Wharekauri was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles;

(f) The Crown acknowledges that it promoted legislation which, between 1953 and 1974, empowered the Māori Trustee to compulsorily acquire Ngāti Mutunga o Wharekauri interests in

lands which the Crown considered uneconomic. This deprived some Ngāti Mutunga o Wharekauri individuals of their tūrangawaewae, further undermined tribal structures, and was a beach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles; and

(g) The Crown acknowledges that it failed to actively protect te reo Māori and encourage its use by iwi and Māori, which had a detrimental impact on te reo Māori on Wharekauri (the Chatham Islands), and this was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

Precis of Argument for Second Defendants

23. Throughout Aotēaroa New Zealand, the parties to the Treaty, that is Māori and the Crown, have undertaken, since the late 1980s and early 1990s in particular, a series of negotiations, some for Pan-Māori settlements and others on an Iwi/Hapū Māori basis, negotiations to settle historical grievances of Māori under the Treaty of Waitangi. For that process, the Crown has long since established a series of settlement policy and practical protocols.

24. The policy underpinning Treaty Settlement negotiations reflects desirable recognition of Māori grievances, of Crown error and omission contrary to the principles and provisions of the Treaty, in particular the Article II rights of Māori. The provision of acknowledgements, apology and redress including cultural, financial and commercial redress, represent an endeavour by the Crown to remedy prejudice, disadvantage and injustice suffered by Iwi/Hapū Māori from the failure on the part of the Crown to comply with the principles of the Treaty and fulfil its guarantees under it.

25. A fundamental foundation for Treaty of Waitangi settlement negotiations and the ultimate settlement is that the Treaty settlements will be enduring; and will provide for an ongoing Treaty relationship between the Treaty parties, that is Māori and the Crown. The Treaty parties negotiate with each other for the purposes of completing a settlement of grievances on the basis that a line is drawn underneath those settlements so that they may be full and final. On each occasion of settlement, amendments are made to a raft of legislative enactments reflecting the settlement and its finality.

26. The policy and the practice observed and adopted by the Crown and Iwi/Hapū Māori involves negotiation in good faith and with goodwill in an endeavour to secure an acceptable agreement for Treaty grievance resolution. The starting point for those negotiations is the establishment of a mandated body on behalf of Iwi/Hapū Māori to negotiate with the Crown; then, an acceptance of that mandate and mandated body by the Crown for negotiation purposes; and then, the entering into of a fully disclosed series of steps for a negotiated Treaty grievance settlement to be concluded.

27. The last step in this published process is the enactment of legislation by Parliament in the form of a Treaty Settlement Act. The steps leading up to that legislative enactment, to pass into law the settlement achieved, commence (once mandating arrangements have been fulfilled) with an Agreement in Principle. This is an important first step which leads to identifiable additional steps through to and including the last of them which is by Parliament's enactment of a Settlement Act.

28. All settlements conclude with that scrutiny by Parliament through Select Committee stages and final enactment. The first steps taken beginning with the AIP are all directed to fulfil a process, step by step, the last of which is the word of Parliament.

29. The Solomon proceeding interferes with a policy delivery framework for Treaty Settlements. The step of concluding an AIP is not a public law decision. Judicial review of it is plainly untenable.

Legal principles: strike out for abuse of process

30. The guiding principles for strike out are well known:

    (a) Pleaded facts are assumed to be true.

    (b) The causes of action must be so clearly untenable that the Court can be certain they cannot succeed.

    (c) The Court's jurisdiction to strike out is one to be exercised sparingly, and only in clear cases.

    (d) The fact that an application raises difficult questions of law and requires extensive argument does not preclude striking out that application.

    (e) Where a claim involves a developing area of the law, the Court should be particularly slow to strike out the claim.

    (f) This approach also applies for judicial review.

31. The comity principle that the Court should not interfere with Parliamentary processes applies in this case. The clear authority for this position is the oft referred to Supreme Court decision in *Ngāti Whātua Orākei Trust v Attorney-General* (2018) NZSC 84. It does not matter that the legislative proposal within the Parliamentary process is some distance (and a number of predetermined steps) away. It is not permissible to encroach on the Parliamentary domain which is what this proceeding threatens. The fundamental claim to judicially review and have set aside the AIP between NMOW and the Crown is not justiciable. The causes of action are so intimately and intricately

inter-related – at the heart of which is to set aside the AIP – are so clearly untenable that the Court can be certain they cannot succeed. This is a clear case for the exercise of a strike out jurisdiction.

32. In argument at the hearing of the strike out applications, counsel will refer to other authorities all of which connect back to the *Ngāti Whātua Orākei* decision.

33. Strike out pursuant to either the inherent jurisdiction of the High Court or Rule 15.1 of the High Court Rules, engage overlapping considerations of concepts of frivolousness, vexatious and abuse of the process of the Court. It is not necessary to rely on one of the applicable provisions of Rule 15 in a way which precludes application of the others of the provisions under that Rule. Neither of the two causes of action are reasonable for the purposes of Rule 15.1 and the applicable law. In this instance, the Second Defendants rely on both the inherent jurisdiction and all (taken together) the separate considerations arising under Rule 15.1.

34. It is not unhelpful to consider (and for the sake of completeness) an instance of recent judicial commentary on Rule 15.1(1)(d). In the Court of Appeal in *Gibbston Community Water Company 2014 Limited v Tomanovich Holdings Limited* [2019] NZCA 7, the Court (12 February 2019) allows for consideration under Rule 15.1(1)(d) a "*collective*" or "*global analysis*" of the grounds on which strike out for abuse of process of the Court should be factored into consideration. Counsel does not particularly resist that contemplated broad analysis: see the language of Gendall J. against whom the appeal to the Court of Appeal in that case was unsuccessfully pursued. When assessing whether the proceeding was or was not an abuse of process under Rule 15.1(1)(d), His Honour said:

> *The sum of the factors discussed above lead me to conclude, but only by a reasonably fine margin, that this proceeding is not an abuse of process ... .*

35. Here, the specific as well as the global or collective analysis upon which the second defendants rely is with particular regard to the fact that the plaintiffs' principal (first cause of action) claim – which colours also the second cause of action as to declarations (being sought consequentially) – remains one which is directed at setting aside the NMOW/Crown AIP.

36. The Court of Appeal has more recently observed in *Sutcliffe v Tarr* [2018] NZCA 135 at [27] that the circumstances in which proceedings may amount to an abuse of process are varied. *Sutcliffe v Tarr* was referred to in the Judgment of Associate Judge P.J. Andrew of 11 March 2020 in *Hu v Chen, Shi and Tiew* [2020] NZHC 485. (See paragraph [27] therein.) The facts of that case are quite different from the present; counsel includes it for the principal purpose of respectfully ensuring that this Court, on this application, accepts that the categories of cases in which the circumstances justify strike out on the basis of an abuse of process of Court are not closed.

37. Abuse in the context of Rule 15.1(1)(d) has been held to include a misuse of the judicial process which tends to produce unfairness and to undermine confidence in the administration of justice. See *Reid v NZ Trotting Conference* [1984] 1 NZLR 8 (CA). The duty of the Court to prevent abuse is not limited to fixed categories: *Chamberlains v Lai* [2006] NZSC 70; [2007] 2 NZLR 7. In *Waterhouse v Contractors Bonding Limited* [2013] NZSC 89 at [30] and following, the Court held that the power under the High Court Rules (or by its inherent powers) to stay a proceeding for abuse of process is not limited to the "**narrow tort of abuse of process**". The same must be said in respect of an application to strike out based upon Rule 15.1(1)(d).

Survival of any part of the Plaintiffs' claims in the Statement of Claim

38. Should any aspect of the Plaintiffs' claim prevail against the strike out applications, significant repleading will be required. This will necessarily require accompanying sufficiency of particulars and adequacy of initial disclosure.

39. Security for costs which is sought by the Second Defendants might usefully be best considered against any repleaded claim if permitted.

Dated at Wellington this 20th day of October 2023.

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T J Castle
Counsel for second defendants