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 (NO. 2) OF THOMAS McCLURG FOR SECOND DEFENDANTS IN SUPPORT OF INTERLOCUTORY APPLICATIONS DATED 28 JULY 2023

Dated: 25 July 2023

Judicial Officer:	Not known
Next event date:	Not yet fixed

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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

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

2. 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-a-Tara to Wharekauri.

3. Ngāti Mutunga o Wharekauri is today an umbrella term which 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 1957.

4. 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. More recently I have given strategic governance and management advice to Iwi/Hapū Māori throughout the country.

5. 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 Māori 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 the Ministry of Fisheries – 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.

Purpose of this Affidavit

7. This is my second affidavit relating to these proceedings. The first identified some immediate adverse impacts upon, and the immediately apparent and troubling implications for, Ngāti Mutunga o Wharekauri arising from the mere fact that this proceeding has been filed at this particular moment in our history. This affidavit expands upon the first by providing information on how the proceeding is presently impacting the Iwi as time allows deeper consideration of its content and process.

8. In essence, this affidavit is sworn in support of the application by the second defendants for orders striking out the statement of claim herein; and other orders as may be necessary or desirable.

9. The first section of this affidavit describes the impact and stress on Ngāti Mutunga o Wharekauri people as we attempt to engage with the content of the Statement of Claim of Maui Solomon and others made against Deena Whaitiri and others as second defendants. Although the proceeding names the individual trustees of Ngāti Mutunga o Wharekauri Iwi Trust as defendants, those individuals are trustees appointed by the Iwi, who have given their time to serve the best interests of the iwi and have the full support of the iwi. A legal attack on them which requires the expense and stress of preparing a legal defence of themselves as named individuals is regarded by Iwi members as an attack on the Iwi and all of its members – personally and collectively. Iwi members are therefore trying to understand the precise nature of the attack represented by this proceeding and what the appropriate response might be.

10. The second section of the affidavit outlines some of the consequences for Ngāti Mutunga o Wharekauri if the current Treaty negotiations between Ngāti Mutunga o Wharekauri and the Crown, which have been proceeding since May 2016, and have passed the milestone of an Agreement in Principle (AIP) in November 2022, were to be terminated or delayed as a consequence of this proceeding. Of particular concern is the delay to, or non-delivery of, the agreed historical account within a Ngāti Mutunga o Wharekauri Treaty Settlement now that it is known that a strike out hearing is unlikely before the end of October 2023 (at the earliest),

The Solomon and Others Statement of Claim

11. Ngāti Mutunga o Wharekauri are attempting to make sense of the statement of claim dated 28 March 2023. This is a very stressful task that requires engagement with abstruse legal arguments alluded to (but not well-developed) in the claim that are far removed from the day-to-day concerns or discussions of trustees or iwi members. In contrast, the remedy sought by the claim is far from abstruse. It would deny further development of the Ngāti Mutunga o Wharekauri AIP – which would have severe negative consequences for all Ngāti Mutunga o Wharekauri people now and in future.

12. The claim has a vexing lack of specificity at key points that frustrates efforts to understand it clearly and therefore to provide a focussed and relevant response. Without this necessary specificity or detail, it comprises a collection of elements and assertions that present themselves to Ngāti Mutunga o Wharekauri as contradictory, nonsensical or irrelevant.

13. The claim identifies **the reviewable decision** as "*on 25 November 2022, the Crown entered into an Agreement in Principle (AIP) with NMOW to settle the historical claims of that iwi.*" (para. 32).

14. "*The reviewable decision was the exercise of prerogative power*" (para. 39).

15. However, the claim asserts that: "*the prerogative to negotiate the settlement of a claim under the Treaty must be exercised in accordance with law, including:*

- *The Treaty;*
- *International law;*
- *Common law and*
- *Tikane Moriori as the first law of the Rēkohu Group. (para. 41).*

Our Māori cultural lens

16. As its natural starting point, Ngāti Mutunga o Wharekauri approach these asserted **grounds for review** of the decision to enter into an AIP first and foremost through a Māori cultural lens. The Ngāti Mutunga o Wharekauri perspective on the Treaty of Waitangi is a conventional Māori perspective which is that the Treaty of Waitangi was negotiated between two parties (the Crown and Māori) who recognised the mana and the sovereignty of each other.

17. In the terminology of the claim, the negotiation and signing of the Treaty of Waitangi was an exercise of prerogative power by both parties to the Treaty: prerogative power embodied in the Crown manifest as British sovereignty on one side and prerogative power embodied in mana Māori, manifest as te tino rangatiratanga, on the other. Under Article I, Māori ceded kawanatanga (the right to govern and make laws) to the Crown. Under Article II the Crown confirmed and guaranteed te tino rangatiratanga. The mutual concessions made within the Treaty leave the prerogative powers of both the Crown and Māori intact. The Treaty relationship was established by prerogative power and resides in the realm of prerogative power then, now and always.

18. It is important to recognise and acknowledge that te tino rangatiratanga of which the Treaty speaks is not an invention or product of the Treaty. Rather, te tino rangatiratanga existed both conceptually and in reality, culturally, before the Treaty; long before. It is the case that by the terms of the Treaty the Crown confirmed and guaranteed the existing te tino rangatiratanga to Māori. On the other hand, kawanatanga, ceded by Māori, is a product of the Treaty. It did not exist until the Treaty was signed. It follows that te tino rangatiratanga sits above the notion and concept of kawanatanga. Te tino rangatiratanga and kawanatanga are not twin concepts. Kawanatanga is subsidiary to, and a product of, an agreement made under the mantle of the pre-existing mana of the two parties who brought the Treaty into existence. Under the Treaty te tino rangatiratanga defined the scope of kawanatanga and disciplines its exercise. Kawanatanga and everything that emanates from it, including statutes and the judiciary, sit below the Treaty partnership, not above it.

19. The view of Ngāti Mutunga o Wharekauri is that, fundamentally, the Treaty relationship is a relationship that resides and operates at the highest possible level between the Crown and Māori and that from a Māori perspective, the first principle of the Treaty of Waitangi is the mutual recognition of the mana of both parties. In Te Ao Māori, mana is power: temporal and spiritual power that is a fundamental characteristic of Māori. It is a power that originates within Māori people. It is an expression of what it means to be Māori and it is subject to no external control or definition, either by the law or by non-Māori.

20. Accordingly, we find ourselves in instinctive cultural agreement with the proposition that entering into an AIP was an exercise in prerogative power by the Crown and equally a reciprocal exercise in prerogative power (te tino rangatiratanga) by Ngāti Mutunga o Wharekauri. That is how we view our AIP: it is our Treaty relationship in action and the details of the Treaty relationship between the Crown and an Iwi with te tino rangatiratanga is

exclusively a matter for those two parties to agree. Furthermore, it follows to us that it is exclusively within the powers of the two parties to amend or adjust that relationship if that is what they agree. That is what prerogative power means to us; it is certainly what te tino rangatiratanga means to us.

21. However, our understandings of prerogative power, te tino rangatiratanga and the Treaty of Waitangi do not permit challenge by the four grounds of review within the claim. We do not believe the 'reviewable decision', as defined in the statement of claim, is reviewable by the Courts. Nor, looking at the Attorney-General's statement of defence, does the Crown.

22. The pleaded grounds are a challenge to our mana as Māori, our mana as Treaty partners and to the status of the Treaty of Waitangi itself. The frustration and angst felt by Ngāti Mutunga o Wharekauri at present arises in part because this is plainly a challenge to all Māori and to the Treaty of Waitangi itself that must somehow be met and defended by a small, remote iwi.

23. The claim is based upon a degradation of the Treaty of Waitangi from a mana to mana relationship that is supra-legal in its essence to a battered infra-legal arrangement hedged about on all sides by various poorly explained local, international, legal and other constraints expressed by the plaintiffs. Our view is that the Treaty of Waitangi is simply not located where Maui Solomon and others would have us look for it. As such, the four grounds in the claim do not touch the Treaty relationship, including the refreshment of that relationship between the Crown and Ngāti Mutunga o Wharekauri in 2022 in the form of an AIP.

24. Even approached in their own terms, the four grounds as outlined in the claim do not provide us with a sufficiently coherent set of arguments to respond to. They do not allow an understanding of how or why the Treaty of Waitangi should be (or has been) displaced from its pre-eminent status and trimmed and downgraded so that it can be force-fitted into the lowly

legal space where Maui Solomon and others require it to be for the purposes of their claim.

25. This 'down-grade' debases both te tino rangatiratanga and the pre-emptive powers of the Crown. To us, the claim that a prerogative power must be 'exercised in accordance with law' is a simple contradiction. In our common understanding, the thing that distinguishes prerogative powers from other powers is that they do not have be so exercised.

26. Similarly, the process by which the over-arching and supreme prerogative powers necessary to negotiate and sign the Treaty of Waitangi have somehow become subsidiary to that Treaty (as a matter of law) has escaped our attention in the remote Chatham Islands. What were the particulars of this process, if it indeed occurred?

27. The Treaty of Waitangi was not subject to international law when it was agreed and signed in 1840. To our knowledge, the only relevant factors to that arrangement were considerations of British sovereignty and te tino rangatiratanga by the owners and exercisers of those respective powers. The Treaty relationship today is not subject to international law. For example, in announcing its support for to the Declaration on the Rights of Indigenous Peoples at the United Nations in 2010, Dr Peter Sharples stressed that the Treaty of Waitangi was the framework through which New Zealand will give effect to the Declaration.

28. The prerogative power to negotiate and sign the Treaty of Waitangi and to negotiate and sign an AIP are not powers subject to the common law. The common law resides in the realm of kawanatanga, which (as we have explained above) we regard as being below the mana-to-mana Treaty relationship, not above it.

29. Finally, the assertion that the prerogative powers of the Crown and te tino rangatiratanga of Ngāti Mutunga o Wharekauri must be exercised in

accordance with tikane Moriori is simply preposterous. Ngāti Mutunga o Wharekauri tikanga and the way in which we choose to exercise te tino rangatiratanga o Ngāti Mutunga o Wharekauri are matters exclusively under the control of Ngāti Mutunga o Wharekauri. It is an egregious over-reach by Maui Solomon and others to assert that the Crown and Ngāti Mutunga o Wharekauri either separately (or jointly in the negotiation of an AIP) are in any way obliged to apply Moriori tikane. This is, in fact, even more offensive now that it is revealed that Moriori have openly and unconditionally pleaded they are not Māori; and therefore, Moriori tikane cannot be, and is not, Māori tikanga.

30. This leads to a second point about para 41.4 of the statement of claim. Not only are Ngāti Mutunga o Wharekauri not subject to Moriori tikane but we reject the notion that non-Māori are entitled to simply pretend they are, or declare themselves to be, Māori for some purpose (for instance, the purposes of getting a Treaty settlement) but for other purposes declare themselves to not be Māori (for instance, to deny Māori in general and/or Ngāti Mutunga o Wharekauri in particular their Treaty settlement). Neither are non-Māori entitled to re-define and re-name Māori terms used in the Treaty of Waitangi to create fictional arguments that the common Māori term and meaning has been displaced and can no longer be applied. The Treaty is a bi-lateral agreement with two parties, two languages and two cultures. 'Te tino rangatiratanga' in the Treaty means what Māori say it means. What a co-opted and modified version of that term means to anybody else is irrelevant.

31. The statement of claim states "*the exclusive customary ownership / tino rangatiratanga of Moriori over all of the henu in the Rekohu group has never been lawfully extinguished.*"(para 42.1). Non-Māori cannot have te tino rangatiratanga – a Māori attribute - but otherwise, Ngāti Mutunga o Wharekauri agree with this statement because it is not possible to extinguish something (whether legally or otherwise) that does not exist.

32. It is a fact of history that Ngāti Mutunga o Wharekauri conquered and subjugated Moriori and established complete control over the entirety of Wharekauri in 1836. Ngāti Mutunga o Wharekauri did not use the term 'conquest' to describe the takahi of 1836 but Naera Pomare stated plainly to the Native Land Court in 1870 "*we took their mana"... " we caught them (Moriori) and made them subservient to our will*" Rakatau also stated before the Court "*having arrived in Whangaroa we took possession of the land in accordance with our customs and we caught the people. We caught all the people not one escaped. Some ran away from us these we killed and others were killed but what of that, it was according to our custom.*"

33. The plaintiffs might assert that Moriori had both tino rangatira and sovereignty before the arrival of Ngāti Mutunga o Wharekauri. However, this seems to us to probably entail some cultural appropriation that does not reflect the true Moriori position. Regardless, what cannot be debated is that the appropriation of the concepts of sovereignty and tino rangatiratanga does not allow their re-definition into something unrecognisable to their original owners. Both sovereignty and te tino rangatiratanga are terms that describe power and (in both cases) power that can be lost or destroyed if it cannot defend itself against a competing or hostile power.

34. By November 1842, when the Chatham Islands were annexed by the Crown, Moriori did not retain any power recognisable by nations as sovereignty or recognisable by iwi as rangatiratanga – let alone te tino rangatiratanga. Ngāti Mutunga o Wharekauri had taken their mana, the necessary attribute to engage in the mana-to-mana negotiation of accession to the Treaty of Waitangi or the negotiation of something similar.

35. In the Moriori settlement legislation, there is no acknowledgement by, or statement from, the Crown that Moriori possess (or possessed) rangatiratanga. Neither is there any proposition from the Crown that Moriori should have rangatiratanga recognised at some future time. There are completely sound reasons why these acknowledgements do not exist in

the Moriori Settlement but are a central component of the 2022 Ngāti Mutunga o Wharekauri AIP.

36. These reasons will be made plain in the agreed Ngāti Mutunga o Wharekauri historical account which is under development as part of the routine process of proceeding from an AIP to a Deed of Settlement. It is of great concern that this process will be disrupted by this proceeding – even if the plaintiffs are unsuccessful. The suspicion is widespread within Ngāti Mutunga o Wharekauri that this disruption is a calculated motivation for seeking a declaratory judgement based upon a claim that requires such significant explication before it can be made comprehensible.

The Ngāti Mutunga o Wharekauri Agreed Historical Account

37. The agreed historical account is recognised by Ngāti Mutunga o Wharekauri as one of the most important components of the Treaty Settlement under negotiation. Treaty negotiations between iwi and the Crown are notoriously difficult processes for the participants and ours have proved to be unusually difficult for three reasons:

38. First, the historiography of the Chatham Islands is unusually slender and many of the sources that exist have clear agendas that should discount their uncritical acceptance as historical fact. Achieving mutual agreement about the 'facts' of Chatham's history, particularly history earlier than the second half of the nineteenth century, is challenging.

39. Second, the Crown has embarked on negotiations with an iwi (Ngāti Mutunga o Wharekauri) and an imi (Moriori) who have completely overlapping areas of interest. Dealing with overlapping claims and interests is a fraught aspect of all Treaty Settlements but there are no other negotiations where the overlap is absolutely ubiquitous.

40. The third factor arises from the interaction of the first two. The dual Chathams Treaty negotiations have an underlying dynamic of

competitiveness; redress provided to either iwi or imi can be regarded as being at the expense of the other. In these circumstances it is very regrettable, but not unpredictable, that historiographical fragility is taken advantage of and historical assertions (if allowed to stand) drive narrative, which in turn, drives redress.

41. Recovery from evolving chaos caused by this proceeding can be effected by the Crown and Ngāti Mutunga o Wharekauri revisiting the same period of Chathams history that featured in the Moriori settlement but from a more rigorous and less polemical perspective and to place that history within a clear and robust Treaty framework.

42. From a Ngāti Mutunga o Wharekauri perspective, therefore, a very important part of the current Treaty negotiation process is the finalisation of an agreed historical account that would be a basis for a Deed of Settlement. This is a 'work in progress' that is on track for completion later this year. This historical account is not a comprehensive Ngāti Mutunga o Wharekauri history but an agreed summary of the historical interactions between Ngāti Mutunga o Wharekauri and the Crown after the annexation of the Chatham Islands which took place through a unique (and from a Ngāti Mutunga o Wharekauri perspective) very unsatisfactory process in November 1842. The focus of the agreed historical account pays special attention to the failures of the Crown to meet its obligations towards Ngāti Mutunga o Wharekauri under the Treaty of Waitangi as has already been captured in our AIP signed last year.

43. The Ngāti Mutunga o Wharekauri agreed historical account, albeit incomplete and in draft, contains some significant departures from the presumptions that pervaded the Waitangi Tribunal Report WAI 64 and which also suffused the Moriori Deed of Settlement and the statement of claim lodged by Maui Solomon and others in these proceedings. Actions by the Crown based upon the historical inaccuracies and misrepresentations contained within WAI 64 are regarded by many Ngāti Mutunga o

Wharekauri people as contemporary Treaty grievances. Redress for contemporary grievances is excluded from the current Treaty settlement negotiation, but the active participation of the Crown in formulating a more accurate and balanced historical account is a critical action to minimise the perpetuation and expansion of such grievances at the expense of any future relationship between the two Treaty partners that would be animated by a Treaty settlement.

WAI 64 The Rekohu Report

44. The Rekohu Report was published by the Waitangi Tribunal in 2001. It states that it is "a report on Moriori and Ngāti Mutunga Claims in the Chatham Islands". However, its 329 pages reveal a primary concern with the recognition of Moriori issues in Moriori terms and the covering letter dated 25 May 2001 from the chair of the Waitangi Tribunal to Government Ministers that accompanied the completed report concluded "The Tribunal considers that this report's recommendations are vital for the survival of the Moriori as a people."

45. This 'concern' for the survival of an entire 'people' reaches far beyond the appropriate (and usual) scope of a Tribunal report and the covering letter and the Report itself describes its recommendations as being founded in an over-arching imperative to "ensure justice for all people". Whether there are, or are not, over-riding considerations that might compel the Crown to set aside or repudiate the Treaty of Waitangi is not a question internal to our particular and current settlement negotiations. However, the Ngāti Mutunga o Wharekauri position is crystal clear: there is nothing, and there can be nothing, in the Moriori settlement (or anywhere else) that can impede the delivery of Crown responsibilities to Ngāti Mutunga o Wharekauri under the Articles of the Treaty of Waitangi or to interfere with the Treaty relationship existing between the Crown and Ngāti Mutunga o Wharekauri.

46. Notwithstanding the urgency with which its Moriori recommendations were presented, the Rekohu Report itself was a long time in production. That process commenced in 1990 when Judge P.J Trapski gave directions to the Tribunal that one of its staff research officers prepare a preliminary report on the issues raised by three Chatham Island claims (54, 64 and 65). That preliminary report was to be available to the Tribunal by 20 December 1990. It was eventually completed in 1992 and provided a Moriori centric framework for the fourteen Tribunal hearings of Chathams claims that were held between May 1994 and March 1996. The partisanly titled Rekohu report was not completed and published until 2001 (approximately five years after the last hearing). As we know, the Moriori Claims Settlement Act was not enacted until December 2021. In all, this represents more than thirty years of uncertainty for Moriori and (given this proceeding) an even longer period of uncertainty for Ngāti Mutunga o Wharekauri.

47. WAI 64 addressed three claims (54, 64 and 65). The current Ngāti Mutunga o Wharekauri Settlement negotiations are mandated to attempt to settle five claims (65, 460, 1382, 2279 and 2403). The addition of the four more recent claims means that there is nothing in the Rekohu Report that addresses them specifically.

48. Moreover, the over-riding focus on Moriori issues and 'justice' as opposed to the provisions and principles of the Treaty of Waitangi make WAI 64 an unsatisfactory starting point for the current negotiations between Ngāti Mutunga o Wharekauri and the Crown. In fact, those negotiations are carefully re-visiting a number of historical and cultural misconceptions and inaccuracies which were repeated within it.

49. Some of the major misconceptions and inaccuracies include:

- The inference that the rapid decline in Moriori population during the nineteenth century was the result of killing of Moriori by Ngāti Mutunga o Wharekauri. The Moriori population was already in

rapid decline in 1835 (the year of arrival of Ngāti Mutunga o Wharekauri). There were killings in 1836 during the conquest and subjugation of Moriori by Ngāti Mutunga o Wharekauri but the primary cause of Moriori mortality (as it was for Māori at the time) was exposure to European diseases including influenza and measles.

- The suggestion that Ngāti Mutunga o Wharekauri pursued a policy towards Moriori that amounted to genocide.

- The suggestion that Moriori were enslaved in a form of human bondage that necessitated their 'emancipation' by the Crown. This suggestion relies on the inapt application of a European concept of slavery to the Chathams in a way that would not be recognised by customary Māori and was not implemented by Ngāti Mutunga o Wharekauri.

- The suggestion that Ngāti Mutunga o Wharekauri tikanga was not Māori tikanga but an anomalous version of it.

50. It is not only important to Ngāti Mutunga o Wharekauri that these, and many other, falsehoods and vilifications are carefully reviewed and corrected to the extent that a limited historiography allows in the Treaty Settlement negotiation process; it is important for all New Zealanders to have available a more accurate and nuanced version of Wharekauri history than WAI 64 delivers. That history affirms te tino rangatiratanga of Ngāti Mutunga o Wharekauri over the entirety of Wharekauri along with the full set of associated rights and responsibilities secured and guaranteed by the Treaty of Waitangi that follow from it.

Conclusion

51. We believe this proceeding represents an abuse of the process of the Court; that it is frivolous and vexatious; that the act or decision of the Court to enter into an AIP with Ngāti Mutunga o Wharekauri is not reviewable; that it

discloses no reasonable cause of action; and that therefore it must be struck out in its entirety.

52. If this proceeding was to halt the present negotiations between the Crown and Ngāti Mutunga o Wharekauri, then all of the redress foreshadowed in the AIP would be denied the iwi. This includes $13 million of commercial redress and a further $3 million of cultural strengthening funding. However, a purpose of this affidavit is to explain one of the less obvious but most concerning potential consequences of such a halt. From a Ngāti Mutunga o Wharekauri perspective, this would be any interference with the joint careful re-examination of Chatham history presently underway.

53. It would be an absurdity if any such interference or halt was to be based upon WAI 64. For all of its shortcomings, WAI 64 recognised Ngāti Mutunga o Wharekauri as Māori, as tangata whenua of Wharekauri with legitimate Treaty grievances against the Crown on which the Tribunal in WAI 64 made recommendations about redress. It is a travesty and an absurdity to present a Waitangi Report with this content as "initial disclosure" and as providing a reason not to give effect to its very contents as they relate to Ngāti Mutunga o Wharekauri.

54. As Voltaire has stated "*Certainly, anyone who has the power to make you believe absurdities has the power to make you commit injustices*" (Questions sur au Miracles, 1765). The proposal to use WAI 64 to deny Ngāti Mutunga o Wharekauri a Treaty settlement negotiation is an absurdity and would undoubtedly result in an injustice to Ngāti Mutunga o Wharekauri.

SWORN at Wellington this)
25 day of July 2023)
before me:)

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A Solicitor of the High Court of New Zealand

Polly Kate Euphemia Scott
Solicitor of the High Court of New Zealand
Morrison Kent Lawyers
Wellington