IN THE COURT OF APPEAL OF NEW ZEALAND

CA122/2017
[2017] NZCA 554

BETWEEN	NGĀTI WHĀTUA ŌRĀKEI TRUST Appellant
AND	ATTORNEY-GENERAL First Respondent
	NGĀTI PAOA IWI TRUST Second Respondent
	MARUTŪĀHU RŌPŪ LIMITED PARTNERSHIP Third Respondent

Hearing:	7 and 8 June 2017
Court:	Kós P, Cooper and Asher JJ
Counsel:	J E Hodder QC and JWJ Graham for Appellant D A Ward and C C McKay for First Respondent D J Goddard QC and L Theron for Second Respondent P F Majurey for Third Respondent
Judgment:	4 December 2017 at 10.30 am

JUDGMENT OF THE COURT

A **The third respondent's application to adduce further evidence is granted.**

B **The appeal is dismissed.**

C **The appellant must pay each of the respondents costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.**

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] The Minister for Treaty of Waitangi Negotiations has proposed that land in central Auckland be offered to Ngāti Paoa (represented in this proceeding by the Ngāti Paoa Iwi Trust) and Marutūāhu (represented in this proceeding by the Marutūāhu Rōpū limited partnership) in partial settlement of claims for historic breaches of the Treaty of Waitangi. The proposals are in the course of documentation. A deed of settlement with Ngāti Paoa has been initialled and is in the process of ratification. A similar process is being followed with respect to Marutūāhu. The land will not be transferred unless legislation is passed that authorises that to occur.

[2] The land is located in areas over which Ngāti Whātua Ōrākei claims to have mana whenua. The Ngāti Whātua Ōrākei Trust commenced a proceeding in the High Court contending the transfer of the properties would breach obligations owed to it by the Crown and that it would unjustifiably erode its mana whenua.[1] It sought extensive declaratory relief.

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[1] We refer to Ngāti Whātua Ōrākei to embrace both the iwi and the Trust or other entities associated with it.

[3] The respondents, defendants in the High Court, applied to strike out the claim. The application to strike out was advanced on two grounds: first, that the Crown had made policy decisions that the land should be offered as components of the settlement of Treaty claims, but does not intend to transfer the properties until the transfers are authorised by legislation; and second, that the policy decisions are not amenable to judicial review. It was said that in these circumstances the claim disclosed no reasonable cause of action, could not succeed and was frivolous or vexatious.

[4] The High Court granted the strike out application.[2] This is an appeal from that judgment. Although in the end we consider the case can be decided on the relatively narrow ground that there will be no transfers unless they are authorised by legislation and it is inappropriate for the courts to make a declaration that intended legislation would breach a claimant's rights, the arguments presented and the importance of the issues require us to give some detail about the context of the dispute.

Narrative

[5] In October 2002, the Crown recognised the statutory mandate of the Ngāti Whātua o Ōrākei Māori Trust Board to negotiate the settlement of the historical treaty claims of Ngāti Whātua Ōrākei. After a period of negotiation, the Trust Board and the Crown entered into an agreement in principle (the AIP) on 9 June 2006 for the settlement of the historical claims. The AIP provided that following its signing, the parties would work together in good faith to develop, as soon as reasonably practicable, a deed of settlement. The deed of settlement was to include the full details of the redress to settle the claims.

[6] The AIP contained an acknowledgement that its terms were not binding and were not intended to create legal relations. It was acknowledged that the AIP and the deed of settlement would be subject to the passing of legislation to give effect to parts of the settlement, and to Ngāti Whātua Ōrākei supporting the passage of such legislation.

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2 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516.

[7] Among the clauses in the AIP was one providing Ngāti Whātua Ōrākei a right of first refusal (RFR) over certain properties. Among these were Crown-owned properties within the RFR area, shown in an attachment to the AIP (the 2006 RFR land). That area may broadly be described as extending across the Auckland isthmus from the Waitemata Harbour in the north to the Manukau Harbour in the south, to Avondale in the west and embracing parts of Onehunga, Ellerslie, and Remuera to the east.

[8] The 2006 RFR land was referred to in the statement of claim as land over which Ngāti Whātua Ōrākei has maintained ahi kā since 1840 and has mana whenua.[3] The 2006 RFR land includes an area transferred to the Crown on 22 October 1840 comprising approximately 3,000 acres between Hobson Bay (Matahaharehare) in the east, Cox's Creek (Opou\Opoututeka) in the west and Mount Eden (Maungawhau) in the south (the 1840 transfer land).

[9] As the High Court found, the terms of the AIP gave rise to widespread discontent among other iwi and hapū of Tāmaki Makaurau.[4] They complained that their interests had been adversely affected by the process followed. They considered that the Crown had accepted an historical account that overstated Ngāti Whātua Ōrākei's historical role and presence, and implementation of the AIP would impinge on their ability to negotiate fair settlements of their own Treaty claims.

[10] In 2007 the Waitangi Tribunal conducted an urgent inquiry into the process that had been followed by the Crown in negotiating with Ngāti Whātua Ōrākei.[5] The inquiry had been initiated by groups within Tāmaki Makaurau with whom the Crown was not yet in a settlement process. The interests of other tangata whenua groups in Tāmaki Makaurau were also affected by the AIP and these groups were unhappy about how they had been treated. The Tribunal concluded in its report of 12 June 2007 that as regards those groups, the Crown's policy and practice had been unfair, both as to process and as to outcome. It recommended that the proposed

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3 Except where otherwise stated, references to the statement of claim are to the second amended statement of claim, on which the hearing in the High Court took place. "Mana whenua", "ahi kā", and other principles of tikanga relied on in the statement of claim were detailed in the pleadings as quoted below at [59].

4 *Ngāti Whātua Ōrākei Trust*, above n 2, at [17].

5 Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007).

settlement with Ngāti Whātua Ōrākei not proceed at that stage, and that instead, the Office of Treaty Settlements should work with the other groups to negotiate settlements for them. Once that had been done, it would be possible to arrive at a situation where appropriate redress could be offered to Ngāti Whātua Ōrākei and all the relevant groups. In this way, "the mana of all would be upheld, relationships would be restored, and reconciliation would be possible".[6]

[11] It is unnecessary to record the basis of the Tribunal's findings in any detail. It is sufficient to quote two of the paragraphs from its report. First, the Tribunal said:[7]

> The use of "predominance of interests" as a basis for giving exclusive rights in cultural sites to one group — even when other groups have demonstrable interests that have not been properly investigated — is a Pākehā notion that has no place in Treaty settlements. Where there are layers of interests in a site, all the layers are valid. They derive from centuries of complex interaction with the whenua, and give all groups with connections mana in the site. For an external agency like The Office of Treaty Settlements to determine that the interests of only one group should be recognised, and the others put to one side, runs counter to every aspect of tikanga we can think of. It fails to recognise the cultural resonance of iconic sites, and the absolute imperative of talking to people directly about what is going on when allocation of exclusive rights in maunga is in contemplation …

[12] In addition, the Tribunal said:[8]

> Although others have customary interests in the Ngāti Whātua o Ōrākei Right of First Refusal Area, Ngāti Whātua o Ōrākei's right of first refusal is not framed so as to take account of those: they have exclusive rights there in respect of any of the Crown's properties that become surplus. This has consequences for groups who may have cultural ties to those sites. The Crown has not accounted for this possibility in its framing of redress for Ngāti Whātua o Ōrākei …

[13] Receipt of the Tribunal's report caused the Crown to pause in its negotiations with Ngāti Whātua Ōrākei. In March 2009, the Minister for Treaty of Waitangi Negotiations asked the Right Honourable Sir Douglas Graham to act as a facilitator for the purpose of furthering discussions with all of the interested parties. His involvement was accepted by all. He embarked on a series of meetings with the relevant iwi and hapū over a period of weeks.

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6 At x.
7 At 96–97.
8 At 99.

[14] As a result of those discussions, an agreement was made on 12 February 2010, referred to as the Ngā Mana Whenua o Tāmaki Makaurau and Crown Framework Agreement (the Framework Agreement). The iwi and hapū members of Ngā Mana Whenua o Tāmaki Makaurau were:

(a) Ngāti Whātua Rōpū. These were referred to in the Framework Agreement as the hapū of Ngāti Whātua who have spiritual, traditional and historical interests in respect of any of the maunga;

(b) Tāmaki Rōpū, listed as Te Kawerau ā Maki, Ngāti Te Ata, Ngāti Tamaoho, Te Ākitai and Ngāi Tai ki Tāmaki; and

(c) Marutūāhu Rōpū, listed as Ngāti Paoa, Ngāti Maru, Ngāti Whanaunga and Ngāti Tamaterā.

[15] The Framework Agreement recognised that each of the iwi and hapū has "legitimate spiritual, ancestral, cultural, customary and historical interests within Tāmaki Makaurau". The Crown recognised that each member had such interests, in particular, in the maunga (mountains) of Tāmaki Makaurau and offered to vest in fee simple the Crown-owned parts of 11 listed maunga, to be held in trust and managed for the common benefit of the mana whenua and the people of Tāmaki Makaurau. The vesting was to be in the "collective membership". It was envisaged that there would be a Ngā Mana Whenua o Tāmaki Makaurau entity, whose name would appear on the title to the land. In respect of each maunga, a notation would show the name of a particular iwi or hapū who wished its spiritual, ancestral, cultural, customary and historical interests with the maunga to be recognised in that way. Other provisions of the Framework Agreement provided that the maunga would be governed by a statutory board comprising equal membership from Ngā Mana Whenua o Tāmaki Makaurau and the Auckland Council.

[16] The Crown agreed to explore whether further redress or recognition could be developed to recognise the interests of iwi in other maunga, and in respect of motu (islands) in Tāmaki Makaurau.

[17] In addition, by cl 20 of the Framework Agreement, the Crown offered members of Ngā Mana Whenua o Tāmaki Makaurau a RFR to operate for 170 years from the date of the agreement in respect of all land held by core Crown agencies in the Tāmaki Makaurau area. This area was very extensively defined in cl 23 as comprising land bounded in the north by a line between just south of Muriwai and Okura, and in the south by a line between just north of the Waikato Confiscation Line in Port Waikato to Miranda.[9] This RFR would be exercised by the members of Ngā Mana Whenua o Tāmaki Makaurau through their three rōpū, that is, those of Ngāti Whātua, Tāmaki and Marutūāhu. There was a general description of the agreed RFR process:

> 25. The process for the RFR will be conducted on the same basis in general terms as in other RFRs offered by the Crown in recent Treaty settlements.
>
> 26. The general process for the exercise of this RFR was agreed by Ngā Mana Whenua o Tāmaki Makaurau on 29 November 2009 and is described below.
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> 27. The collective body will administer the exercise of the RFR by its members.
>
> 28. If the rōpū with the RFR option chooses not to purchase the property from the Crown, then a right of second refusal will be offered to either of the other rōpū or any of the iwi/hapū members of Ngā Mana Whenua o Tāmaki Makaurau, either individually or collectively. This right of second refusal will be decided by way of a bidding process, with the highest bid winning the right to purchase. The final structure of the bidding process is yet to be determined.

[18] Also on 12 February 2010, Ngāti Whātua o Ōrākei Māori Trust Board and the Crown entered into what was referred to as a "Supplementary Agreement to the Agreement In Principle for the Settlement of the Historical Claims Of Ngāti Whātua o Ōrākei". Among the recitals to the Supplementary Agreement was recognition of a process of discussion that had taken place with other iwi and hapū groups claiming interests in the Auckland area, including the discussions that had been facilitated by Sir Douglas Graham. The purpose of the Supplementary Agreement was to record how the AIP could be modified to enable negotiations to be concluded through a deed of settlement and appropriate legislation to be passed by Parliament.

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[9] There were exclusions for specific areas (the Waiuku North and South Blocks and East Wairoa Block raupatu lands), as well as "Crown land … acquired under Treaty settlements between the Crown and specific iwi/hapū groups".

[19] The Supplementary Agreement proceeded by way of making deletions from and insertions to the AIP. Relevantly for present purposes, the Supplementary Agreement deleted the provisions of the AIP dealing with the RFR land. The explanation was that: "Clauses 20–29 of the Ngā Mana Whenua o Tāmaki Makaurau — Crown Framework Agreement provide redress relating to the Right of First Refusal (RFR) redress."

[20] On 5 November 2011, the Crown and Ngāti Whātua Ōrākei (together with Ngāti Whātua Ōrākei Trustee Ltd) entered into a Deed of Settlement of Historical Claims (the NWDS), which reflected extensive negotiations that followed the Supplementary Agreement.

[21] Clauses 2.4–2.10 were under the heading "Ngāti Whātua Ōrākei Statement of Its Own Position". This section dealt in very general terms with the origin of Ngāti Whātua Ōrākei and addressed the concepts of ahi kā, social organisation, political relations with neighbouring iwi and contact with the Europeans. Ngāti Whātua o Ōrākei's Treaty claim was described in cl 2.9:

> Ngāti Whātua claim that the Crown by its actions in certain cases, including the abrogation of the Crown's right of pre-emption, by its failure to act in certain other cases, and by its failure to fulfil explicit promises made to Ngāti Whātua, breached its Treaty guarantee to protect the exercise of their rangatiratanga over their lands, estates and other valued necessities of life, or "taonga".

And then, in the following clause, concerning loss of land and control:

> In particular, Ngāti Whātua claim that the Crown obtained their agreement to enter into contracts about which they were ignorant and the outcome of which left them virtually landless and their fisheries and waterways polluted. In the spirit of the Treaty, this was contrary to the expectation in Ngāti Whātua's invitation to the Crown to share in the use of their land in Tāmaki, a sharing however, which would leave intact their collective rangatiratanga, their mana whenua.
>
> Finally, from having been in control of the Tāmaki Isthmus at time of their signing of the Treaty, Ngāti Whātua claim that they were thereafter denied any constitutional role in the civil government exercised over the Isthmus, any way in which they might have averted the disastrous social, economic and cultural consequences of their land loss which they suffered throughout the remainder of the 19th and the 20th century still to come.

[22] Clauses 2.11–2.107 were under the heading "Agreed Historical Account". These were introduced by the statement in cl 2.11 that: "The Crown's acknowledgement and apology to Ngāti Whātua Ōrākei are based on this agreed historical account."

[23] It would overburden the judgment to set out these provisions of the NWDS in any detail. It is sufficient for present purposes to note that it was recorded that as at 1840, the three hapū of what is now Ngāti Whātua Ōrākei occupied settlements and used resource areas across the Tāmaki isthmus, the North Shore, the upper Waitamata Harbour and the Waitakere area. Those groups had gained rights in those areas from approximately 1740 "by way of conquest and ahi kā". While they temporarily relocated as a result of inter-tribal conflicts in the 1820s, settlements were re-established in Ōrākei and other places in the Tāmaki isthmus from about 1835. In September 1840, government officials travelled to the Waitemata Harbour and negotiated with Ngāti Whātua Ōrākei for the transfer of land for the site of a town. On 20 October 1840, a formal deed was drawn up for the transfer of the land described above at [8] as the 1840 transfer land. Clause 2.21 in this agreed historical account stated:

> The deed signed by the parties recorded that £50 in coin and goods amounting to approximately £215 were "te utu mo taua wahi wenua koia tenei". This was translated into English as "the payment for the said land". From Ngāti Whātua's point of view, the term "utu" in 1840 represented a broader concept of reciprocity, ongoing mutual obligation and the maintenance of balance between groups.

[24] This transaction enabled the establishment of the town of Auckland and it was recorded that Ngāti Whātua Ōrākei and the Crown had entered into the transaction with a view to a "mutually beneficial and enduring relationship".

[25] An apology by the Crown was set out at cl 3.10. It provided as follows:

> The Crown makes this apology to Ngāti Whātua Ōrākei and to their ancestors and descendants:
>
> The Crown recognises that from 1840, Ngāti Whātua Ōrākei sought a close and positive relationship with the Crown and, through land transactions and other means, provided lands for European settlement.

> The Crown profoundly regrets and is deeply sorry for its actions which left Ngāti Whātua Ōrākei virtually landless by 1855. This state of landlessness has had devastating consequences for the social, economic and spiritual well-being of Ngāti Whātua Ōrākei that continue to be felt today.
>
> The Crown unreservedly apologises for not having honoured its obligations to Ngāti Whātua Ōrākei under the Treaty of Waitangi. By this settlement the Crown seeks to atone for its wrongs, so far as that is now possible, and begin the process of healing. The Crown looks forward to repairing its relationship with Ngāti Whātua Ōrākei based on mutual trust, co-operation and respect for the Treaty of Waitangi and its principles.

[26] Clause 4.6 noted that the settlement legislation would be the means by which Ngāti Whātua Ōrākei's historical claims would be settled. In cl 4.8, the parties acknowledged and agreed that the Deed did not provide for particular cultural and commercial redress that is to be provided through the "Tāmaki Makauru collective deed".[10] Clause 4.8.4 described the commercial redress referred to as "the participation of Ngāti Whātua Ōrākei in a right of first refusal over land in Tāmaki Makaurau for a period of 170 years from the date on which the right becomes operative".

[27] As to the Tāmaki Makaurau collective deed, cl 4.9 said:

> Ngāti Whātua Ōrākei and the Crown acknowledge and agree that the development of the redress, referred to in cl 4.8, under the Tāmaki Makaurau collective deed will be in accordance with the provisions of a Framework Agreement dated 12 February 2010 between Ngā Mana Whenua o Tāmaki Makaurau and the Crown.

[28] Further, cl 4.13 contained an acknowledgement by the Crown that even though the historical claims were settled by the NWDS and the settlement legislation:

> 4.13.1 Ngāti Whātua Ōrākei will not have received full redress until Ngāti Whātua Ōrākei enters into an arrangement with the Crown, either through the Tāmaki Makaurau collective deed or otherwise, providing:
>
> (a) redress in relation to maunga, motu and harbours; and
>
> (b) a right of first refusal over land owned by the Crown in the primary area of interest; and

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[10] The Tāmaki Makaurau collective deed did not then exist as a formal deed, but its provisions were in the course of being settled.

[29] After further negotiations, Ngā Mana Whenua o Tāmaki Makaurau and the Crown entered into a collective redress deed (the CRD) on 8 September 2012. This was effectively the successor to the Framework Agreement, and was a more formal expression of the matters agreed in it.

[30] The CRD contained provisions setting out agreements that had been reached as to the ownership and management of the maunga and motu, referring to provisions that would appear in the "Tāmaki Makaurau collective legislation". Of most relevance for present purposes, cl 6 of the CRD referred to a limited partnership that would have a right of first refusal in relation to the disposal by the Crown of RFR land. Clauses 6.3 and 6.4 provided that:

> 6.3 The iwi and hapū of Ngā Mana Whenua o Tāmaki Makaurau record their agreement that the RFR is not to apply to any land (including a cultural redress property or land used for financial or commercial redress) that is required for the settling of historical claims under the Treaty of Waitangi, being those relating to acts or omissions of the Crown before 21 September 1991.
>
> 6.4 To give effect to that agreement, the Tāmaki Makaurau collective legislation will, as provided by s 119 of the draft bill, provide for the removal of any land required for another Treaty settlement.

[31] Reference should also be made to cl 9 of the CRD, which covers the effect of the Deed. Clause 9.1 provided that the CRD did not settle any of the historical claims of the iwi and hapū. Clause 9.2, however, noted that it provided collective Treaty redress for historical claims in respect of the "shared interests of the iwi and hapū".

[32] On 19 November 2012, Parliament enacted the Ngāti Whātua Ōrākei Claims Settlement Act 2012, implementing the NWDS. On 31 July 2014, Parliament enacted the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Collective Redress Act) to give effect to the provisions of the CRD. Section 120 of the Collective Redress Act is in the following terms:

> **120 Land required for another Treaty settlement ceasing to be RFR land**
>
> (1) The Minister for Treaty of Waitangi Negotiations must, for RFR land required for another Treaty settlement, give notice to both the RFR landowner and the Limited Partnership that the land ceases to be RFR land.

(2) The notice may be given at any time before a contract is formed under section 127 for the disposal of the land.

(3) In this section, **RFR land required for another Treaty settlement** means RFR land that is to be vested or transferred as part of the settling of historical claims under the Treaty of Waitangi, being the historical claims relating to acts or omissions of the Crown before 21 September 1992.

[33] In the meantime, the Crown has continued to negotiate the settlement of Treaty claims with other iwi. In July 2011, Ngāti Paoa signed what was described as an "Agreement in Principle Equivalent" (the Ngāti Paoa Agreement). Amongst other things, Appendix 3 to the Ngāti Paoa Agreement listed a number of properties, including 71 Grafton Road and 136 Dominion Road, as sites over which Ngāti Paoa sought to negotiate commercial redress.

[34] On 17 May 2013, the Marutūāhu Iwi collective, comprising Ngāti Maru, Ngāti Paoa, Ngāti Tamaterā, Ngāti Whanaunga and Te Patukirikiri also reached agreement with the Crown in a "Record of Agreement in Relation to Marutūāhu Iwi Collective Redress" (the AMCR). It recorded agreements reached to that point in a process of negotiation that began in 2009 towards a deed of settlement that would provide collective and iwi-specific redress for historical Treaty claims in respect of the iwi. It envisaged that the iwi would obtain further redress under the CRD. It was made clear that any deed of settlement would be conditional on legislation coming into force.

[35] Among the provisions of the AMCR was a clause providing that the deed of settlement would oblige the Crown to transfer to the Marutūāhu governance entity on settlement date the properties described in sch 3, unless otherwise agreed. The properties included "up to 13 school sites".

The challenged decisions

[36] The decisions challenged by Ngāti Whātua Ōrākei are described in the statement of claim as the revised Ngāti Paoa decision and the Marutūāhu decision, both made by the Minister for Treaty of Waitangi negotiations.

The revised Ngāti Paoa decision

[37] The revised Ngāti Paoa decision was made on 21 May 2016, but communicated to Ngāti Whātua Ōrākei in a letter dated 8 July 2016. It followed earlier discussions and correspondence concerning a proposal made on 17 August 2015 for the transfer of the land at 136 Dominion Road and 71 Grafton Road to Ngāti Paoa.

[38] The Minister's letter of 17 August 2015 to Ngāti Whātua Ōrākei was in the following terms:

> **Preliminary decision in regards to proposed redress for Ngāti Paoa**
>
> Thank you for your engagement in relation to the proposed redress offer to Ngāti Paoa of the opportunity to purchase 71 Grafton Road and 136 Dominion Road.
>
> You have raised several concerns with me and my officials in relation to the provision of redress for other iwi within your core area of interest. I understand your concerns to be primarily about, but not limited to, the Crown's application of the "layers of interest" concept as referenced in the 2007 Tāmaki Makaurau Report.
>
> As you know, the "layers of interest" concept was a consideration in the Tāmaki Collective negotiations, focused on the maunga and the area-wide Right of First Refusal, resulting in the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act (2014). I consider the concerns you have raised require further thought and, once I have had an opportunity to do this, I would like to discuss this issue further with you.
>
> Notwithstanding that, in relation to Ngāti Paoa, this offer of redress is not guided by the concept of "layers of interest". Rather the redress offer is based on considering Ngāti Paoa's historical interests in this region, and providing an appropriate and fair offer of redress. Based on the information the Crown has received, I have determined that Ngāti Paoa have interests in the central Tāmaki region and accordingly my preliminary decision is to confirm the redress offer of the opportunity for Ngāti Paoa to purchase 71 Grafton Road and 136 Dominion Road.
>
> In my view you have not this far presented any historical or contemporary evidence to suggest that Ngāti Paoa do not have interests in this region which would change my decision to offer the proposed redress.
>
> If you have any information on Ngāti Paoa's historical or contemporary interests or any other information you wish me to take into account in making my final decision, please advise by **Monday 31 August 2015**. I intend to make a final decision shortly thereafter.

[39] The Minister wrote to representatives of Ngāti Paoa on the same day. In its substance, the letter was to similar effect, recording that the Minster had made a

preliminary decision to confirm the redress offer of the two properties on the basis of Ngāti Paoa's historical and contemporary interests, including an interest in the central Tāmaki region. This decision was forthwith challenged by the commencement of the present proceeding, in which the preliminary decision was referred to as the Ngāti Paoa decision.[11]

[40] The letter of 8 July 2016, addressed to the Chair and Deputy Chair of Ngāti Whātua Ōrākei Trust was in the following terms:

> **Final decision in regards to the offer of 136 Dominion Road and 71 Grafton Road landbank properties for Ngāti Paoa**
>
> On 17 August 2015 I wrote to you with my preliminary decision on overlapping claims between Ngāti Paoa and Ngāti Whātua Ōrākei in relation to the Crown's redress offer of 136 Dominion Road and 71 Grafton Road landbank properties (the properties) to Ngāti Paoa.
>
> You raised several concerns with me and I provided you with two weeks up to 31 August 2015 to provide me with more information to consider for my final decision.
>
> On 26 August 2015 your counsel filed papers in the Auckland High Court in relation to the Crown's process for negotiating Treaty settlement redress in Tāmaki in particular in relation to overlapping claims.
>
> On 21 May 2016 I revised my preliminary decision. I decided the Crown would not sell the properties. Rather, it would be for Parliament to authorise any transfer and proposed that settlement legislation would provide that Ngāti Paoa be given a right to purchase the properties at settlement date. Given the properties will not be alienated from the Crown prior to settlement date and unless Parliament permits it, I consider I am able to proceed to a final decision on the revised redress proposal. I note the final decision relates simply to the offer of redress: Ngāti Paoa may or may not accept.
>
> I have decided that there are no overlapping claims that prevent further work on reaching an agreement with Ngāti Paoa, to be implemented by legislation. I intend proposing that settlement legislation would constitute a right to purchase the properties at settlement date. I have instructed officials to continue negotiations with Ngāti Paoa and to continue parallel drafting of legislation.

[41] It should be emphasised that the revised decision communicated in the letter of 8 July 2016 meant that the properties would not be transferred to Ngāti Paoa unless and until legislation was passed. It was no longer a proposal to transfer the properties

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[11] The cause of action challenging the Ngāti Paoa decision was pursued in the High Court, but has been abandoned on appeal. It was clearly overtaken by the Minister's revised decision of 2016.

by means of what was effectively an agreement for sale and purchase. Instead, legislation would be introduced that, if passed, would confer a right to purchase.

[42] Ngāti Whātua Ōrākei commenced judicial review proceedings of the Minister's preliminary decision in mid-2015, which was the genesis of the proceeding now before this Court.

The Marutūāhu decision

[43] The second impugned decision was contained in a letter dated 13 May 2016, again addressed to the Chair and Deputy Chair of the Ngāti Whātua Ōrākei Trust. In that letter the Minister recorded a final decision to make offers in respect of named properties as redress to the Marutūāhu Collective.

[44] Once again, the decision was made following earlier discussions, and there was a preliminary decision by the Minister (communicated by letter dated 22 April 2016) to make a redress offer of one cultural redress property and the opportunity to purchase up to nine commercial properties in Tāmaki Makaurau for the Marutūāhu Collective. In the letter of 22 April 2016 to representatives of Ngāti Whātua Ōrākei the Minister wrote:

> You have raised several concerns with me and my officials in relation to the provision of redress for other iwi within your core area of interest. I understand your concerns to be primarily about the 2006 Ngāti Whātua Ōrākei Agreement in Principle exclusive Right of First Refusal Area (the **"2006 proposed RFR area"**) and the Crown's application of the "layers of interest" concept as referenced in the 2007 Tāmaki Makaurau Settlement Process Report.
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> The "2006 proposed RFR area" referred to was rescinded during the Ngāti Whātua Ōrākei settlement negotiations and after consideration of the Waitangi Tribunal's 2007 Tāmaki Makaurau Settlement Process Report.
>
> The 2006 proposed RFR area was not included in the 2010 Ngāti Whātua Ōrākei refined Agreement in Principle[12] or the 2011 Ngāti Whātua Ōrākei Deed of Settlement.
>
> The crown has not recognised an exclusive area of interest for Ngāti Whātua Ōrākei and has never given undertakings that redress would not be provided to other iwi in this area.

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12 We take the reference to the "2010 Ngāti Whātua Ōrākei refined Agreement in Principle" as being a reference to what we have referred to above as the Supplementary Agreement (footnote added).

[45] The letter continued by noting that this stance of the Crown had been communicated to Ngāti Whātua Ōrākei by a memorandum from the former Chief Crown Negotiator on 27 September 2016 before Ngāti Whātua Ōrākei initialled their Deed of Settlement. The letter also pointed out that the provision of redress to other iwi was also contemplated in that s 120 of the Collective Redress Act enables land to be removed from the Ngā Mana Whenua o Tāmaki Makaurau RFR land if required for another Treaty settlement.

[46] The Minister's letter of 13 May 2016 stated:

> **Final decision in regards to one cultural property and the opportunity to purchase up to nine commercial properties for the Marutūāhu Collective**
>
> I wrote to you on 22 April 2016 with my preliminary decision on overlapping claims between the Marutūāhu Collective and Ngāti Whātua Ōrākei in relation to the Crown's redress offer to the Marutūāhu Collective of:
>
> a) the Fred Ambler lookout site, as a cultural redress property;
>
> b) deferred selection over the Boston Road Probation Centre, 3 Garfield Street, and 35 Grafton Road;
>
> c) five school sites available for selection as deferred selection properties subject to specified selection criteria and leaseback; and
>
> d) deferred purchase of New Zealand Transport Agency land at Waipapa.
>
> My letter provided you two weeks up to 6 May 2016 to consult with the Marutūāhu Collective to reach a resolution or provide me with information to consider for my final decision. Neither of these has occurred and accordingly I have made a decision.
>
> *Final decision*
>
> My final decision is to confirm the redress offer of one cultural redress property and the opportunity to purchase up to nine commercial properties in Tāmaki Makaurau for the Marutūāhu Collective.
>
> *High Court proceedings regarding Ngāti Paoa redress*
>
> Your counsel, Mr Nick Wells, wrote to me about my preliminary decision on 1 April 2016. His letter refers to the current High Court proceedings concerning my preliminary decision to offer Ngāti Paoa an opportunity to purchase two properties in central Tāmaki Makaurau prior to settlement date.
>
> The Crown's assurance that it will not make a final decision on the sale and purchase of those two properties prior to settlement date remains in place. However, I do not regard it as inappropriate to continue to engage with the Marutūāhu Collective and Ngāti Paoa in negotiations towards the full and final settlement of their respective historical claims.

> Nor do I consider the current High Court proceedings concerning Ngāti Paoa and the two "early release" properties are relevant to my preliminary or final decisions on the offers to the Marutūāhu Collective. The two processes are distinct, and deal with proposed redress in differing ways.

[47] In a letter dated 19 May 2016, Chapman Tripp acting for Ngāti Whātua Ōrākei wrote to the Crown Law Office pointing out that all of the properties the subject of the Minister's decision were within the rohe of Ngāti Whātua Ōrākei, in which it "claims exclusive ahi kā through mana whenua". The letter rejected the Minister's claim that the High Court proceedings were not relevant to this decision: the High Court proceedings alleged that this sort of decision was unlawful, and Ngāti Whātua claimed "an identical interest in the Marutūāhu Properties" as it did in the proceeding concerning the Ngāti Paoa properties. The letter noted an amended statement of claim had been filed challenging the Marutūāhu decision and sought an assurance that it would not be implemented pending the conclusion of the legal challenge.

[48] Crown Law replied for the Minister on 20 May 2016. The letter noted that the Crown intended that the Marutūāhu decision would be implemented only through settlement legislation, and although negotiations would continue with a view to initialling a deed of settlement, that would not alter Crown ownership of the properties. Further, "[t]he Crown will not transfer the properties prior to settlement legislation being enacted".

The Minister's approach

[49] The Minister at the time explained the background to the two decisions in an affidavit filed in the High Court. He emphasised that legislation would be the means by which any settlement was implemented. The Minister also explained in general terms the process followed in Treaty settlement negotiations.

[50] The Minister referred to a Crown practice of encouraging claimant groups to discuss their interests with the neighbouring group in an endeavour to reach agreement in the case of overlapping claims. However, in the absence of agreement, he acknowledged that the Crown may have to decide whether it is "satisfied that the overlapping claims had been addressed" to the point that redress may be included in

any settlement. In deciding whether to offer a particular property as redress, he noted three general principles that guide the Crown:

(a) its wish to reach a fair and appropriate settlement with the claimant group;

(b) its wish to maintain its ability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims; and

(c) its wish to ensure that redress offered to a claimant group in negotiations strikes a balance between the Crown's obligations to that group and its obligations with "overlapping settled groups".

[51] The Minister observed:

> The Treaty settlement process is not intended to, and does not, establish or definitively recognise claimant group boundaries according to tikanga. Settlements may recognise areas of interest, but iwi and/or settling groups may have overlapping areas of interest. … the settlement process does not create or confirm any exclusive status, such as exclusive mana whenua or ahi kā. Such matters can only be decided between claimant groups themselves.
>
> The vesting of a particular site as redress should not be seen as a signal that the Crown is making such determination. Rather, it is simply a recognition that the Crown accepts that a claimant group has a level of interest that the Crown considers makes the particular grant of redress appropriate in light of all other circumstances.

[52] The Minister referred to the difficulty of Treaty negotiations, describing them as "quintessentially political processes requiring compromises on all sides". Among other things, proposals have to take into account the location and value of the properties, whether they are being sought for commercial or cultural redress, and the balance of the settlement packages available to each group.

[53] The Minister also gave evidence confirming that the drafting of legislation to give effect to a deed of settlement is now a standard part of Crown–Māori engagement over Treaty settlements. A settlement deed is not legally binding until it receives

legislative approval from Parliament and the settlement of historical claims in a deed of settlement is now ordinarily conditional on such legislation being passed.

[54] In the balance of this judgment we refer to the revised Ngāti Paoa decision and the Marutūāhu decision as the disputed decisions, unless it is necessary to distinguish the two. While use of the word "decision" is helpful for the purpose of addressing the arguments of the parties, the question of whether the Minister's letters constituted decisions for the purposes of judicial review is one of the issues in the appeal.

The claims in the High Court

[55] Ngāti Whātua's claim in the High Court was for declarations. If granted, the declarations as formulated in the prayer for relief would state, amongst other things, that:

(a) Ngāti Whātua Ōrākei has ahi kā and mana whenua in relation to the 2006 RFR land and the 1840 transfer land;

(b) when applying its overlapping claims policy to that land the Crown must act in accordance with tikanga and in particular Ngāti Whātua Ōrākei tikanga;

(c) the Crown's development and making of offers concerning that 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; and

(d) in order to comply with tikanga when contemplating, developing or making decisions under its overlapping claims policy to offer interests in that land to other iwi, the Crown must:

(i) appropriately consult with Ngāti Whātua Ōrākei;

(ii) acknowledge Ngāti Whātua Ōrākei's ahi kā;

(iii) decline to include land in the proposed settlement if there is evidence that the transfer would unjustifiably erode Ngāti Whātua Ōrākei's mana whenua; and

(iv) decline to include the land in a proposed settlement where the land has previously been the subject of a gift to the Crown unless Ngāti Whātua Ōrākei has provided its consent.

[56] Declarations were also sought that the disputed decisions were developed and made inconsistently with: the Crown's obligation to make those decisions in accordance with tikanga; 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.

[57] These declarations were sought on the basis of pleadings alleging that the Crown is required to exercise "any powers" to make the disputed decisions: in accordance with Tikanga; so as to acknowledge appropriately Ngāti Whātua Ōrākei's ahi kā and not erode it; consistently with the Treaty and the honour of the Crown in this context; and so as to uphold the rights and freedoms affirmed in the United Nations Declaration on the Rights of Indigenous Peoples.

[58] In paragraph [31] of the amended statement of claim, said by Mr Hodder QC for Ngāti Whātua Ōrākei to be at the heart of the claim, it was alleged that pursuant to the NWDS, the Ngāti Whātua Ōrākei Claims Settlement Act, the honour of the Crown and the United Nations Declaration on the Rights of Indigenous Peoples, Ngāti Whātua Ōrākei has rights, and the Crown has corresponding obligations, to:

(a) be fully consulted regarding proposals on treaty redress involving the 2006 RFR land or the 1840 transfer land;

(b) have the Crown acknowledge the ahi kā of Ngāti Whātua Ōrākei; and

(c) prevent the Crown from transferring or unilaterally developing proposals involving that land for the purposes of treaty settlements if

that would be offensive to Ngāti Whātua as a matter of tikanga, unjustifiably erode its mana whenua in the land, or, in the case of the 1840 transfer land, without the consent of Ngāti Whātua Ōrākei.

[59] The particulars of tikanga relied on for the purposes of the claim were pleaded as follows:

> 22.8 the principles of tikanga relied on for the purposes of paragraphs 22.1, 22.4 and 22.5 above are:
>
> (a) *ahi kā* or *ahi kā roa* — the concept of keeping the home fires lit, more broadly understood as intergenerational (usually three generations) continuous occupation, use and control of land;
>
> (b) *mana whenua* — the ability to influence and exercise control over land through mana, recognised in statutory definitions as customary authority exercised by iwi or hapū in a defined area;
>
> (c) *take tuku* — traditional principles applying to the gifting of land, including an expectation of return of gifted land instead of alienation, and of an ongoing relationship and reciprocal obligations;
>
> (d) *tuku whenua* — the gifting of land with the inherent requirement of respect for the mana of the gifting party by the recipient, such that the land in question is never truly or completely alienated, and the expectation of an ongoing relationship and reciprocal obligations.

[60] The statement of claim alleged that the Crown had not complied with its obligations. It was alleged that in making the disputed decisions (and in adopting the overlapping claims policy) the Minister had erred in law by misdirecting himself as to the obligation he had to act in accordance with tikanga and the other duties alleged. A second cause of action alleged a failure to take into account the same matters as mandatory relevant considerations.

[61] Davison J rejected these arguments. He considered that Ngāti Whātua's claim to exclusive and preeminent rights was "wholly inconsistent" with the formal legal steps it had taken following release of the Waitangi Tribunal's report in 2007 — *The Tāmaki Makaurau Settlement Process Report*.[13] This was a reference to the

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13 *Ngāti Whātua Ōrākei Trust*, above n 2, at [135].

Supplementary Agreement, the NWDS and the CRD. He considered that in this process, Ngāti Whātua Ōrākei had effectively relinquished the exclusive RFR provisions contained in the AIP, which were replaced by the collective arrangements applying to land throughout Tāmaki Makaurau set out in the CRD.

[62] The Judge also considered that the disputed decisions had been made in the context of the development and preparation of legislation, which, if enacted, would provide a lawful basis for the transfer of the properties concerned.[14] The decisions had been made having regard to government policy for dealing with overlapping Treaty claims. The Minister had made a "quintessentially political decision" as part of a process of offering redress in circumstances where overlapping claims had been made and the iwi were themselves unable to reach agreement.[15] The proposal to implement the decisions by legislation meant that, irrespective of any interests of Ngāti Whātua Ōrākei that may have been affected or infringed by the Minister's actions, those actions were not justiciable. There was no "legal yardstick" against which to examine and assess whether the disputed decisions were made pursuant to a lawful exercise of public power.[16]

[63] In these circumstances, the Court would not grant declaratory relief directed at imposing obligations or constraints on the Crown in relation to the preparation of legislation to be submitted for the consideration of Parliament.[17] This conclusion was clearly based on the extensive discussion, earlier in the judgment, of authorities relied on in support of the strike-out application, said to establish that the courts will not restrain or otherwise interfere with decisions by Ministers as to proposed legislation, to enter into agreements to take action subject to authorising legislation, or to take steps preliminary to such legislation and such agreements.[18]

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14 At [139].
15 At [141].
16 At [142].
17 At [143].
18 The cases discussed included *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [*Sealord*] [1993] 2 NZLR 301 (CA); *Comalco Power (New Zealand) Ltd v Attorney-General* [2003] NZAR 1 (HC); *Milroy v Attorney-General* [2005] NZAR 562 (CA); *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318; and *Waitara Leaseholders Association Inc v New Plymouth District Council* [2007] NZSC 44, (2007) 2 NZTR 17-011.

[64] For these reasons, the Judge considered Ngāti Whātua Ōrākei's claim could not possibly succeed and the application to strike it out should succeed.

The appeal

Ngāti Whātua Ōrākei's submissions

[65] In advancing the appeal, Mr Hodder accepted that the Court's role is to resolve disputes by reference to legal criteria and does not extend to resolving political issues, in particular, the merits of political decisions and legislation. Further, he accepted that the policy merits of a Treaty settlement package involved a political decision and there is no legal yardstick able to be used by the courts to determine whether there should be a settlement, with whom and on what terms.

[66] He also accepted that the principle of comity or non-interference in parliamentary processes is well-established. He submitted, however, that the comity principle was not an answer to the claims pleaded by Ngāti Whātua Ōrākei. These were designed to obtain resolution of *legal* claims against the Crown, and which the Crown had denied. Those claims were both general and specific.

[67] At the general level, Ngāti Whātua Ōrākei's claim is that it had exclusive mana whenua in central Auckland, arising from its relationship with that land since 1740. The various allegations about ahi kā and tikanga pleaded in the statement of claim were such as to create ongoing legal rights and corresponding legal obligations of the Crown. At the more specific level, the rights and obligations were relevant to specific properties within Ngāti Whātua Ōrākei's rohe, which the Minister had decided in the disputed decisions should be available for Treaty settlements. On this approach, even if the specific claims were to be negated by legislation, the general level claims would remain as ongoing legal issues. Mr Hodder submitted the Crown has a continuing legal obligation to recognise Ngāti Whātua Ōrākei's mana whenua in formulating decisions about dealing with land in the central Auckland area otherwise than under the collective RFR processes.

[68] Mr Hodder submitted that the High Court had wrongly extended the comity principle so as to prevent the Court responding to declarations designed to clarify

obligations of the Crown. The Court's failure to clarify the Crown's obligations in applying its overlapping claims policy overlooked the fact that Ngāti Whātua Ōrākei alleged that the policy was invalid. It was inappropriate to apply the comity doctrine so as to prevent inquiry into matters of legal obligation of the Crown, in what the Court itself described as a "pre-legislative context".[19]

[69] Mr Hodder also sought to emphasise that in the context of the present strike-out application, Ngāti Whātua Ōrākei's evidence-based pleadings, including its assertions of mana whenua and about tikanga must be taken as able to be proved. He referred to paragraph [31] of the amended statement of claim (summarised above at [58]), which he said was at the heart of Ngāti Whātua Ōrākei's case. Mr Hodder submitted that the High Court erred in that, instead of taking the key allegations as matters capable of proof, it had in effect held that the allegations were incorrect. This was inappropriate in a strike-out context and the claims should have been allowed to proceed to trial.

The respondents' submissions

[70] Mr Ward, for the Attorney-General, submitted that the disputed decisions formed part of the development of legislative proposals and were not amenable to judicial review as a consequence. Ministers must remain free to propose any legislation to the House, even if the Bill would authorise what would otherwise be unlawful. The freedom to propose legislation was dependent on an ability to develop proposals and there was no basis in principle to distinguish the present case from others in which the principles of comity had been applied.

[71] Mr Ward also submitted that the Minister's decision as to what redress should be provided was a highly political matter involving consideration of a range of fiscal and political factors. There was no yardstick that the Court could use for the purposes of reviewing the merits of those decisions. Further, the disputed decisions did not affect Ngāti Whātua Ōrākei's rights or interests. Any effect would only arise if and when legislation were passed.

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19 *Ngāti Whātua Ōrākei Trust*, above n 2, at [123].

[72] Similar submissions were advanced by Mr Goddard QC, counsel for Ngāti Paoa, and Mr Majurey, counsel for Marutūāhu. Both emphasised that the agreements to transfer the properties will not have effect, and no transfers will occur, unless they are authorised by legislation, at which stage they will be, by definition, lawful.

[73] Mr Goddard submitted it is clear as a matter of basic principle that even if it would be unlawful to decide to transfer the properties in the absence of authorising legislation, it could not be unlawful for Ministers to decide that it would be in the public interest to transfer the properties if authorising legislation is enacted, to prepare and propose legislation to that effect, and to enter into an agreement providing for the transfer to occur subject to the enactment of the authorising legislation.

[74] He submitted further that there are no legal requirements enforceable through the courts concerning the content of proposals for legislation (or proposals for steps to be taken if authorised by legislation) or concerning the process by which such proposals may be developed by the Executive. Focusing in particular on the pleading in paragraph [31] of the statement of claim, Mr Goddard argued that the duties asserted could not be relied on in respect of the disputed decisions because it is clear that they will not be implemented except by legislation.

Analysis

Approach

[75] A strike-out application is to be approached in accordance with the principles summarised by this Court in *Attorney-General v Prince*.[20] The Court is required to assume that the facts pleaded in the statement of claim are true, whether or not they are admitted. Before a court can strike the proceedings out, the causes of action must be so clearly untenable that they cannot possibly succeed; the jurisdiction is to be exercised sparingly and only in a clear case where a court is satisfied it has the requisite material. However, the fact that the application raises difficult questions of law, and requires extensive argument, does not exclude the strike-out jurisdiction.

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[20] *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

[76] In *Couch v Attorney-General* the Chief Justice emphasised the care necessary where the law is confused or developing.[21] In the present case, Davison J accepted a submission made by Mr Hodder that this is the first judicial review concerning Crown conduct after the settlement of a Treaty claim, and was novel for that reason.[22]

Mana whenua

[77] Mr Hodder referred to the allegations in the statement of claim that Ngāti Whātua Ōrākei has continuously maintained ahi kā in areas of the central Auckland region, that through ahi kā it has mana whenua in the central Auckland region, and that the disputed properties are within the areas over which it has maintained ahi kā since 1740 and over which it has mana whenua. He complained that instead of accepting those allegations of fact, the High Court had made findings which effectively found they were wrong. He identified five findings in particular:

(a) First, the statement that the Waitangi Tribunal had already considered the question of overlapping and coexisting mana whenua of a number of other iwi in relation to the 2006 RFR land and the 1840 transfer land.[23] In addition, the Judge went on to refer to the claims of other iwi who also asserted mana whenua over the Tāmaki isthmus and central Auckland area.[24]

(b) Second, the finding that the effect of the collective arrangements represented by the CRD and the Collective Redress Act were to settle the historical claims by iwi including Ngāti Whātua Ōrākei and the other iwi to which the collective arrangements applied.[25]

(c) Third, the finding that the collective arrangements recognised the mana whenua of other iwi in the 2006 RFR land and the 1840 transfer land.[26]

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21 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
22 *Ngāti Whātua Ōrākei Trust*, above n 2, at [84].
23 At [134].
24 At [135].
25 At [135]–[136].
26 At [134].

(d) Fourth, that Ngāti Whātua Ōrākei acknowledged those claims by participating in the collective arrangement,[27] and in so doing knowingly and voluntarily relinquished the claims to rights in the 2006 RFR land and the 1840 transfer land it now sought to pursue.[28]

(e) Finally, the finding that Ngāti Whātua Ōrākei's claim in this proceeding is "wholly inconsistent with the formal legal steps taken by Ngāti Whātua" Ōrākei following the Waitangi Tribunal's 2007 report.[29]

[78] Mr Hodder submitted that by making these determinations the Judge had departed from the required approach. If the pleaded claims in relation to mana whenua, the area of primary interest and the ongoing risk to Ngāti Whātua Ōrākei's interests were assumed to be provable, as they should have been, the Judge was wrong to find that Ngāti Whātua Ōrākei did not have a preeminent interest in the 2006 RFR land and the 1840 transfer land. The finding that the entry into the collective arrangements had effectively extinguished Ngāti Whātua Ōrākei's mana whenua was a clear and factual finding made without the necessary factual inquiry.

[79] We consider there is merit in Mr Hodder's criticisms of this aspect of the judgment. We understand the reasons that may have led the Judge to make the findings that he did based on the terms of the agreements reached and the process following the Waitangi Tribunal's 2007 report. On the face of it, at least insofar as the documents are concerned, Ngāti Whātua Ōrākei was prepared to submit to the collective arrangements entered into for the purpose of settling Treaty claims across Tāmaki Makaurau in substitution for the position it had achieved in 2006. Clause 4.8 of the NWDS specifically stated that both cultural and commercial redress would be provided through the CRD, not the NWDS. That expressly included Ngāti Whātua Ōrākei's participation in a right of first refusal over land in Tāmaki Makaurau. The CRD, as has been seen, gave no right to exclusivity in respect of any particular area. And it remains clear that Ngāti Whātua Ōrākei's claims to a preeminent interest in central Auckland are disputed by Ngāti Paoa and Marutūāhu.

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27 At [134].
28 At [135] and [138].
29 At [135].

[80] Mr Majurey sought leave to produce a document at the hearing in this Court that had not been in evidence in the High Court. This was a copy of a memorandum dated 27 September 2011 sent to Ngāti Whātua Ōrākei, Marutūāhu and Ngāi Tai ki Tāmaki by the Crown's Chief Negotiator, Mr Mike Dreaver. Mr Hodder was opposed to us receiving the document on the basis that it did not add anything, but having reflected on some of the arguments presented we have decided to grant Mr Majurey's application. In the memorandum, Mr Dreaver recorded he had been asked whether the Crown would agree to a veto right for other groups over redress offered to Ngāti Whātua Ōrākei, or to a veto right in favour of Ngāti Whātua Ōrākei over redress to be offered to other groups. He recorded the Crown was not prepared to do either. It would instead prefer to make a careful assessment of appropriate iwi-specific settlement offers after considering the views of all other groups with an interest. Ngāti Whātua accordingly signed the NWDS and the CRD knowing that neither gave it an exclusive right in respect of any of the land available for commercial redress.

[81] However, it must be remembered that the area embraced by the CRD is much more extensive than the area in which Ngāti Whātua Ōrākei assert maintenance of ahi kā and mana whenua rights. The area extends from Muriwai in the north-west to Miranda in the south-east. From the point of view of Ngāti Whātua Ōrākei there was accordingly scope for the interests of other iwi to be met outside the area in which Ngāti Whātua Ōrākei claimed to have preeminent rights.[30] Further, their entry into the CRD and acceptance of the provisions in the Collective Redress Act did not necessarily establish that they accepted the appropriateness of any particular proposal for any of the 2006 RFR land to be transferred to another iwi.

[82] As Mr Hodder pointed out, the collective arrangements did not purport to settle the historical claims of those comprising Ngā Mana Whenua o Tāmaki Makaurau and the preamble to the Collective Redress Act expressly provided that the historical claims of the iwi and hapū constituting the collective would be subject to individual settlements with the Crown. Consistently with this, neither the CRD nor the Collective Redress Act contained acknowledgements or apologies in respect of breaches of the Treaty, nor any agreed historical account in respect of the appropriate

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[30] Whether use of land outside that area to settle the claims of other iwi would in fact have been appropriate is not the present question.

redress. Mr Hodder claimed that so far as Ngāti Whātua Ōrākei was concerned, it had entered into the CRD as an exercise of its mana whenua only intending to be bound to the extent of the express term of the arrangements. It would have declined to participate had there been any suggestion that by doing so it was agreeing to abandon its mana whenua.

[83] We consider the judgment's conclusions on these issues demonstrate why disputed factual allegations in a statement of claim must be accepted in the context of a strike-out application. Had the claim been left to proceed to trial, the matters that Mr Hodder was left to address in argument about Ngāti Whātua Ōrākei's intentions in entering into the collective arrangements and how it considered those arrangements could be implemented while respecting its mana whenua could have been the subject of evidence. In the result, Ngāti Whātua Ōrākei have been left with findings that it has abandoned its strongly asserted relationship with the 2006 RFR land, which it considers are wrong, when the proper course to have followed was simply to assume that the key factual matters asserted in the statement of claim could all be substantiated.

[84] Notwithstanding that conclusion, however, we do not think the High Court judgment turned on these factual findings, which we consider should not have been made. The conclusion the claim could not succeed rested on the non-justiciable nature of the disputed decisions and the fact that any adverse effect on Ngāti Whātua Ōrākei would arise, not as a consequence of the decisions, but as a result of the enactment of legislation that was necessary to transfer the properties.

Justiciability and comity

[85] The essence of Ngāti Whātua Ōrākei's case is that the disputed decisions should not have been made and the overlapping claims policy should not have been applied to the properties in question because of breaches of Ngāti Whātua Ōrākei's rights. The analysis of those propositions, however, is inevitably framed by the fact that the decisions are to be implemented by legislation. That is plain from a reading of the letters of 20 May 2016 (the Marutūāhu decision) and 8 July 2016 (the revised Ngāti Paoa decision). The disputed decisions have no life or effect outside this

context. We do not consider it inappropriate or wrong to describe the decisions as having been made in the development of legislative proposals.

[86] In *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* (*Sealord*) negotiations between Māori interests and the Crown had resulted in a deed that provided for the Crown to provide Māori with capital to participate in a joint venture to purchase Sealord Products Ltd, a company that held 26 per cent of the total fishing quota.[31] Iwi and other Māori groups opposed to the deed commenced a proceeding in the High Court. Part of the agreement reached was that the Crown would introduce legislation to give effect to various parts of the deed and to amend the Treaty of Waitangi Act 1975. This Court was critical of the wording insofar as it implied that the Crown had agreed to introduce legislation with a "described effect". This could not have any legal effect.[32] The Court described the deed as a "compact of a political kind, its subject-matter so linked with contemplated Parliamentary activity as to be inappropriate for contractual rights".[33] However, Parliament was free, if it saw fit, to make the legislative changes the deed envisaged: "Parliament was free to do so before the deed and remains free to do so afterwards."[34]

[87] The most important aspect of the case for present purposes is the passage in which the Court dealt with what it described as the "established principle of non-interference by the Courts in parliamentary proceedings".[35] While the exact scope and its exact basis were open to debate:[36]

> However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill into Parliament.
>
> …
>
> … public policy requires that the representative chamber of Parliament should be free to determine what it will or will not allow to be put before it. Correspondingly Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite the House to consider.

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31 *Sealord*, above n 18.
32 At 308.
33 At 308.
34 At 309.
35 At 307.
36 At 308.

[88] On the basis of this reasoning, this Court concluded that the proceeding commenced in the High Court had no realistic prospect of success and struck out the proceedings as disclosing no reasonable cause of action.[37]

[89] In *Milroy v Attorney-General* the Crown had entered into a deed with Ngāti Awa to settle claims found by the Waitangi Tribunal to have been made out.[38] The proposed settlement described in the agreement would include the transfer of certain Crown forest land in respect of which there were cross-claimants including representatives of Tūhoe. They sought to challenge part of the settlement involving the transfer of about 9,300 hectares to Ngāti Awa before Tūhoe's own claim could be heard and determined by the Waitangi Tribunal. The concern raised was that if the transfer to Ngāti Awa went ahead, the land would no longer be available to be returned to Tūhoe in the event of their claim being successful. That result would be contrary to the terms of an agreement and deed earlier entered into and given effect in the Crown Forests Assets Act 1989.[39]

[90] The Deed of Settlement between the Crown and Ngāti Awa provided for the agreement to be conditional upon the proceeding being dismissed or abandoned. Further, it provided for the transfer of the relevant lands upon settlement, which was to be effected in accordance with legislation the Crown had undertaken to introduce within six months. It was only if and after the proposed legislation was passed that the lands would be transferred.[40]

[91] There had been an attempt to settle by withdrawing from the settlement approximately 25 per cent of the land in which Tūhoe claimed an interest, but they rejected that proposal. The Minister in Charge of Treaty of Waitangi negotiations nevertheless decided to proceed with the amended settlement proposal, which was approved by Cabinet on 20 May 2002. The High Court dismissed an application for review on the basis that neither the Minister's decisions nor the Cabinet approval of her decisions were reviewable in the courts.

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37 At 309.
38 *Milroy v Attorney-General*, above n 18.
39 At [2].
40 At [3].

[92] The statement of claim had pleaded seven causes of action, all directed to the Minister's decision. On appeal, counsel for the appellants acknowledged that neither the Cabinet decision of 20 May 2002 nor legislation proposed to implement the decision were reviewable. Counsel submitted, however, that the advice received by the Minister could be challenged and that it had tainted the decision she made on the basis of it. It was alleged the advice was incomplete and inaccurate, and failed to identify all relevant considerations for the Minister.

[93] Counsel for the appellant had contended in argument that officials were under a legal duty to advise according to law and that the case was a conventional attack on orthodox judicial review grounds on the process leading up to the Minister's involvement and her decision-making. In rejecting that argument, Gault P, writing for the Full Court, said:

> [11] In reality the argument outlined represents an attempt to draw the Court into an examination of the accuracy and completeness of the advice of officials in the course of the formulation of government policy even though no rights are affected by the advice. This would take the Courts into the very heart of the policy formation process of government. We were not referred to any authority for such a course.

[94] Gault P recorded that counsel had been driven to accept that the provisions of the advice did not affect the rights of any persons or even have the potential to do so. It would be the resulting legislation and Executive acts in accordance with it that would have that impact.[41] Then, after referring to passages in *Sealord*, Gault P said:

> [14] The circumstances of the case in which those remarks were made are indistinguishable in principle from those presented in this case. The advice of officials is a mere preliminary having no legal effect: *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140, at p 160. The formulation of government policy preparatory to the introduction of legislation is not to be fettered by judicial review. The position can be no different merely because government or Crown actions pursuant to legislation, when passed, would be contrary to law without that legislation.

[95] Pausing there, it seems to us that the disputed decisions in this case are clearly within a category that do not affect the justiciable rights of any person or have the potential to do so. It will only be legislation when it is enacted that could have any possible effect on Ngāti Whātua Ōrākei. While the expression "formulation of

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41 At [12].

government policy preparatory to the introduction of legislation" may not aptly be applied to the disputed decisions, that is only because the decisions represent a phase closer to legislative implementation than would be the case with policy formulation. But the disputed decisions are squarely within the statement in *Sealord* that Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite Parliament to consider.

[96] It is also instructive to see how the Court in *Milroy* dealt with an argument presented by the appellant that the closer to the introduction of legislation the more reluctant the courts would be to intervene, accepting that reluctance should be greater where the matter challenged is of high policy or constitutional content.[42] That approach was dismissed as unacceptably vague, and not supported by authority. It was said that it would blur the boundaries between the role of the Executive and that of the courts, inviting "curial review of research, advice and opinion for which no objective justiciable guidelines are available".[43]

[97] Gault P then referred to this Court's judgment in *Curtis v Minister of Defence* in which it was said:[44]

> [27] A non-justiciable issue is one in respect of which there is no satisfactory legal yardstick by which the issue can be resolved. That situation will often arise in cases into which it is also constitutionally inappropriate for the Courts to embark.

[98] Gault P continued:[45]

> [17] The established test is not by reference to remoteness in time or evolution but by function. The formulation of legislative proposals is part of the business of government.
>
> [18] The importance of the process for addressing claims in respect of breaches of the Treaty is fully recognised. Where that involves the exercise by the Executive of statutory or prerogative powers, lawfulness can be challenged on established grounds for judicial review. But where the action challenged does not itself affect the rights of any persons and is undertaken in the course of policy formulation preparatory to the introduction to Parliament of legislation, the Courts will not intervene. Proposed legislative conduct of the Crown said to depart from a previous stance and to be inconsistent with

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42 At [15].
43 At [16].
44 *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA).
45 *Milroy v Attorney-General*, above n 18, at [17]–[18].

> Treaty rights may be within the jurisdiction of the Waitangi Tribunal and may be the subject of representations to the Select Committees of Parliament. But, as Goddard J said, the Courts cannot help.

[99] Similar issues arose in *New Zealand Maori Council v Attorney-General*.[46] In that case, again, there was a settlement deed in which the Crown undertook to introduce legislation to give effect to the settlement described and other iwi groups sought declaration that a proposed transfer of Crown forest land was inconsistent with a fiduciary duty of the Crown, and in breach of contractual obligations and the Crown's statutory duties. The settlement was conditional on the legislation coming into force, other than the obligation assumed by the Crown to introduce the settlement legislation. This Court followed and applied its earlier decisions in *Sealord* and *Milroy*. Writing for the Court, O'Regan J said:

> [60] If the legislation is passed, therefore, what is proposed in Part 12 will be lawful. If the legislation is not passed, what is proposed in Part 12 will not happen. Either way, there is no action or proposed action of the Crown, other than the introduction of the legislation, which could be the subject of a declaration. And as both the *Sealords* case and *Milroy* establish, the courts will not grant relief which interferes or impacts on actions of the Executive preparatory to the introduction of a Bill to Parliament, because to do so would be to intrude into the domain of Parliament. For these reasons we decline to make the declaration set out at para [9](b) above.

[100] We see these authorities as presenting a fatal obstacle to Ngāti Whātua Ōrākei's claim. Mr Hodder seeks to distinguish them on the basis that there is in fact a "yardstick" that could be applied for the purposes of reviewing the disputed decisions, namely the rights asserted by Ngāti Whātua in the statement of claim if they were upheld. But the answer to that proposition is simply that the proposal is not that the properties be transferred, but that there be legislation authorising that to occur. We consider it would be wrong in principle for a court to declare unlawful an outcome intended to be secured only if authorised by Parliament.

[101] While the declaratory relief is not couched expressly in such terms, added together, the declarations sought would have that effect. At the hearing of the appeal, Mr Hodder offered proposed revised declarations that he suggested would be better than those contained in the amended statement of claim. However, we can underline

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46 *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

the point just made by referring to one of the proposed new declarations, which reads as follows:

> … a declaration that it is inconsistent with the Crown's obligations under law to Ngāti Whātua Ōrākei for the Crown to consider and/or take steps to develop any proposal to include any land within the 2006 RFR Land and the 1840 Transfer Land in a proposed Treaty settlement with any iwi which does not have ahi kā in respect of those lands unless such consideration and/or step is undertaken in accordance with Ngāti Whātua Ōrākei tikanga principles;

[102] While that declaration would ostensibly look to the future, if made now in the course of a process already under way and with legislation intended to be introduced, it could only be read as a decision by the Court that the intended legislation to give effect to the disputed decisions would breach Ngāti Whātua Ōrākei's rights. We do not consider such a declaration could be made without breaching the established principle of non-interference by the courts in parliamentary proceedings. The same can be said of the general declarations sought.

[103] There is a fundamental difference between this case where a proceeding has been brought prior to Parliament enacting legislation and a case such as *Attorney-General v Taylor* where issues are raised subsequent to enactment.[47] This distinction is noted in *Sealord* where the Court said: "As held in *Eastgate*, the proper time for challenging an Act of a representative legislature, if there are any relevant limitations, is after the enactment."[48]

[104] Mr Hodder also sought to distinguish between the acts of the legislature and those of the Crown suggesting that in a case such as this the latter could be the subject of declarations without affecting the former. However, the reality is that the bulk of Parliament's work consists in responding to legislative initiatives taken by the Executive. That is true in the field of Treaty negotiations, as in any other. The regular process now followed is that although the Crown enters into agreements with iwi, those agreements are made contingent on the enactment of legislation. As the observations made in *Sealord* explain, it is not competent for the Crown to contract that legislation will be passed. All that can be said is that the government agrees to introduce legislation. And even then, such an undertaking would not be compellable

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47 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24.
48 *Sealord*, above n 18, at 308.

in the sense that it could be enforced by order of the Court.[49] In the present case, the arrangements agreed in respect of the disputed decisions is for legislation to be introduced that would give authority for the land to be referred. But if that does not occur, or the legislation is introduced but not enacted, the disputed properties will not be transferred. In the meantime, declarations such as those sought by Ngāti Whātua Ōrākei would inevitably and directly relate to the development of legislative proposals. That would be their only point: in the absence of legislation they would otherwise be an empty gesture declaring unlawful something that was not intended to happen.

[105] Putting this another way, there is no proposal that will affect Ngāti Whātua Ōrākei's rights other than a legislative one. This is territory that the courts will not enter in accordance with the principle of non-interference.

[106] These conclusions apply regardless of the source of the unlawfulness alleged, whether it be a breach of the Treaty, of Ngāti Whātua's mana whenua, tikanga and customary rights, the honour of the Crown, or rights derived from the United Nations Declaration of the Rights of Indigenous Peoples. They mean the claim was properly struck out. This is not to make the Crown the "sole arbiter of its own justice", a phrase borrowed from a now-rejected colonial jurisprudence mentioned in *Port Nicholson Block Settlement Trust v Attorney-General*.[50] In that case, declarations had been sought focusing on an alleged inconsistency between one Treaty settlement deed and Act, and a different deed. Williams J found that the declaratory relief sought in that case did not cross the line of attempting to intervene in the legislative process. We have reached a different view in the circumstances of this case.

[107] The result of this approach is to place these proposed Treaty settlements in the hands of Parliament. We accept as a matter of practicality that it is likely that legislation introduced into Parliament by the Minister implementing the disputed decisions will be passed. But it would be inappropriate as a matter of principle for the Court to proceed on the basis that that is a foregone conclusion, or that the

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49 *New Zealand Maori Council v Attorney-General*, above n 46, at [45], citing *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC).

50 *Port Nicholson Block Settlement Trust v The Attorney-General* [2012] NZHC 3181 at [63], quoting from *Wi Parata v The Bishop of Wellington* (1878) 3 NZ JUR 73 (NS) 3 (SC) at 78.

Parliamentary process is less than satisfactory. That would be speculative, and inappropriate. The legislative process offers scope for submissions and affords an opportunity for any proposed legislation to be referred to the Waitangi Tribunal for a report on whether any of the provisions are contrary to the principles of the Treaty.[51]

Result

[108] Marutūāhu's application to adduce further evidence is granted.

[109] The appeal is dismissed.

[110] Ngāti Whātua Ōrākei must pay each of the respondents costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
Chapman Tripp, Wellington for Appellant
Crown Law Office, Wellington for First Respondent
Meredith Connell, Auckland for Second Respondent
Atkins Holm Majurey Limited, Auckland for Third Respondent

[51] Treaty of Waitangi Act 1975, s 8.