IN THE COURT OF APPEAL OF NEW ZEALAND

CA448/2015
[2016] NZCA 387

BETWEEN	LEWIS ATA TŪRĀHUI for and on behalf of ĀRAUKŪKŪ HAPŪ Appellant
AND	THE WAITANGI TRIBUNAL First Respondent
AND	THE ATTORNEY-GENERAL Second Respondent
AND	NGĀ HAPŪ O NGĀRUAHINE IWI INCORPORATED Third Respondent
AND	TE RUNANGA O NGĀTI RUANUI TRUST Fourth Respondent

Hearing:	19 July 2016
Court:	Harrison, Kós and Toogood JJ
Counsel:	T H Bennion and E A Whiley for Appellant G L Melvin and E P Chapple for Second Respondent H J P Wilson and T N Ahu for Third and Fourth Respondents
Judgment:	10 August 2016 at 11.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Toogood J)

[1] Mr Lewis Tūrāhui represents Āraukūkū,[1] a border hapū between two adjoining iwi of southern Taranaki: Ngāruahine[2] and Ngāti Ruanui. The hapū can trace descent from both iwi and it appears to have had mana whenua interests within the boundaries of both.

[2] Claims under the Treaty of Waitangi Act 1975 (the Treaty Act) based on alleged breaches of Te Tiriti ō Waitangi, which Āraukūkū made as a hapū of Ngāti Ruanui, were settled fully and finally by the Ngati Ruanui Claims Settlement Act 2003.[3] It is not disputed that, because of the way in which they have been handled, the hapū's claims pursuant to its Ngāruahine whakapapa will be settled by Ngāruahine's impending settlement legislation, the Ngāruahine Claims Settlement Bill 2015 (the Ngāruahine Bill), which was introduced into Parliament on 14 July 2015 and given its Second Reading on 28 June 2016.[4] We understand the Bill is likely to be passed into law before the end of the year. But Āraukūkū says that the Ngāruahine-based claims will be settled without the involvement of the hapū in the relevant settlement negotiations.

Application to the Waitangi Tribunal for urgency

[3] On 3 February 2015, after the Ngāruahine settlement but before the Ngāruahine Bill was introduced, Mr Tūrāhui applied to the Waitangi Tribunal for an urgent remedies hearing or, alternatively, an urgent inquiry into Āraukūkū's claims under the Treaty Act. The Tribunal was sympathetic to the hapū's position and was critical of the Crown's representatives for their part in a process which has created apparent injustice for Āraukūkū, but it declined the applications.[5] Mr Tūrāhui applied to the High Court for judicial review of the Tribunal's decision.[6]

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1 Also referred to in the proceeding as Ahitahi/Āraukūkū.

2 We adopt the practice of Williams J, in the judgment under appeal, of using the common short form of the iwi's full ancestral name.

3 Ngati Ruanui Claims Settlement Act 2003, ss 13–15.

4 Ngāruahine Claims Settlement Bill 2015, cls 13–14.

5 Waitangi Tribunal *Application for urgent hearing by the Wai 552 claimant on behalf of the Āraukūkū hapū* (Wai 522, #2.35, 7 May 2015) [*Decision of Sir Douglas Kidd on Urgency*], under delegated authority from the Chairperson of the Waitangi Tribunal pursuant to cl 8(2) of sch 2 of the Treaty of Waitangi Act 1975. For convenience, we refer to Sir Douglas Kidd as "the Tribunal".

6 *Tūrāhui v Waitangi Tribunal* [2015] NZHC 1624.

The High Court

[4] Williams J held that it was not the function of the High Court on review to weigh the merits of the Tribunal's decisions, but to assess their legality.[7] The Judge found that the Tribunal was correct in law to determine that there was no right to an urgent remedies hearing, because there had been no finding by the Tribunal that the hapū's claims were well-founded.[8] It is clear that, in considering the Tribunal's approach to the broad discretion to grant an urgent claim inquiry, Williams J understood that, as a consequence of what had occurred, the hapū's claims under Te Tiriti through its Ngāruahine whakapapa would be settled by a process in which its grievances had not been heard. The Judge also recognised, as the Tribunal had recognised, that granting urgency to Āraukūkū might assist in remedying one apparent injustice but that it would create another in requiring the Ngāruahine settlement to be revisited with consequent delay.

[5] Williams J observed that the Tribunal's decision was one which could have been decided in the opposite way by another Tribunal member, but he held that the Tribunal's challenged decision was one which took into account relevant considerations, disregarded irrelevant considerations and correctly construed the Tribunal's powers in reaching a rational decision. Mr Tūrāhui seeks to persuade us that Williams J was wrong to hold that view.

Background

[6] The somewhat complex background to the proceeding is explained in the Tribunal's decision[9] and by Williams J in the High Court judgment[10] and we have considered it carefully. For the purposes of this appeal, however, we need to give only a brief summary, principally because events have overtaken the application for urgent consideration of the hapū's claims by the Tribunal.

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7 At [95].
8 At [68], relying on s 8A of the Treaty of Waitangi Act, discussed at [11] of this judgment.
9 *Decision of Sir Douglas Kidd on Urgency*, above n 5, at [16]–[41].
10 *Tūrāhui v Waitangi Tribunal*, above n 6, at [4]–[37].

[7] The Āraukūkū claim before the Tribunal, designated Wai 552, was filed on 4 October 1995, after the completion of the hearings into the large-scale claims under Te Tiriti by many Taranaki iwi, but before the Tribunal had prepared its report. An additional claim was added after the Tribunal released the first part of an interim report on 11 June 1996 (the 1996 Taranaki Report).[11] The claim as amended concerns principally:[12]

(a) The Waipuku-Patea Block, in particular concerning a deed of cession through which the Crown purchased the block in an area that had previously been confiscated.

(b) The Taranaki Combined Cycle Power Station (the Stratford power station), located within the Waipuku-Patea Block that the claimants seek to have returned to Āraukūkū ownership by resumption under ss 27B and 27C of the State-Owned Enterprises Act 1986.

(c) A 700-acre reserve within the Waipuku-Patea Block that was meant to be set aside for Āraukūkū, who instead were forced to accept an alternative block of land of lower value.

(d) The failure by the Crown to provide an adequate land base for Āraukūkū through reserves on the Tirotiromoana Block as promised.

(e) Illegal purchases and confiscation under the takoha system that robbed Āraukūkū of their link to their tūpuna (ancestor), Taranaki Maunga.[13]

(f) An area comprising 8,540 acres of the Mangaotuku Block, brought on behalf of the hapū Ngāti Turi (added to the Wai 522 claim in July 1997).

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11 Waitangi Tribunal *The Taranaki Report-Kaupapa Tuatahi* (Wai 143, 1996).
12 See *Decision of Sir Douglas Kidd on Urgency*, above n 5, at [18].
13 Mount Taranaki.

[8] The hapū seeks financial compensation for their loss of land, mana and people in the Crown's land wars in Taranaki in the 1860s. In the 1996 Taranaki Report, the Tribunal found that land confiscations in Taranaki in the 1860s, and the supporting legislation, were in breach of the principles of Te Tiriti. It found, further, that various purchases of land, including that of the Waipuku-Patea Block which is subject to part of the Wai 552 claim, could be discounted as valid acquisitions in Treaty terms because none came near to satisfying the necessary standards of honesty and good faith that Te Tiriti required.[14]

[9] Āraukūkū participated in the settlement of the parts of its claim based on Ngāti Ruanui whakapapa between 1998 and 2003, and it is represented on the body responsible for implementation. Negotiations between the Crown and Ngāruahine began in about 1997. Issues over the mandate of the claimant negotiators in the Ngāruahine claim, Āraukūkū being one of the objectors, were not finally resolved until August 2010. We refer to subsequent events more fully below.[15]

The application for an urgent remedies hearing

[10] Āraukūkū's February 2015 application for urgency was declined by the Tribunal in May 2015. In considering as a first question whether it should grant an urgent remedies hearing (which would bypass the need for any further inquiry into the validity of the hapū's claims), the Tribunal held it to be necessary for the hapū to show that:[16]

(a) the Tribunal had found the hapū's claims to be well-founded;

(b) they would suffer significant and irreversible prejudice if a remedies hearing was not urgently convened;[17]

(c) there was no alternative remedy that could reasonably be exercised; and

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14 Waitangi Tribunal *The Taranaki Report-Kaupapa Tuatahi*, above n 10, at 173.
15 At [17]–[19] and [21] of this judgment.
16 *Decision of Sir Douglas Kidd on Urgency*, above n 5, at [116].
17 On this issue the Tribunal referred at [116] of its decision to the principles discussed by the Supreme Court in *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [29].

(d) they were ready to proceed with a hearing.

[11] This approach applied s 8A of the Treaty Act, which governs the Tribunal's powers with respect to the Stratford power station land. Section 8A(2) provides that the Tribunal "may" recommend under s 6(3) that the subject land be returned to Māori ownership if it finds:

(a) that the claim is well-founded; and

(b) the "action to be taken" under s 6(3) to compensate for or remove the prejudice should include return of the land to Māori ownership.

[12] In support of their claim for an urgent remedies hearing, Āraukūkū relied on what it says were findings of the Tribunal in the 1996 Taranaki Report that their claims were well-founded. On appeal from the High Court, we direct our attention to whether Williams J was right to hold that the Tribunal did not err in law in its decision that Āraukūkū had failed to cross the threshold of establishing that, in the 1996 Taranaki Report, the Tribunal had found the claims to be well-founded.

[13] Nothing in the material before us on appeal, or in the careful submissions of Mr Bennion on behalf of Āraukūkū, persuades us we should disagree with that view. The Tribunal's findings in the Taranaki Report were expressly qualified by reference to the need for specific claims to be made out against the background of the Crown's generalised concessions and the Tribunal's high-level view. We do not detect any error of law in that part of the High Court decision and agree with the conclusions of Williams J, for the reasons he gave at [69]–[73]:

> *Preliminary findings are not enough*
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> [69] The Tribunal noted in the preface to the Taranaki Report that the report contained "preliminary views" and "initial opinions only" in order to expedite negotiations. The Tribunal cautioned:
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> > The Crown has yet to be heard on many matters raised and all others must respond before final conclusions are drawn.
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> [70] The Tribunal advised that it had taken the unusual step of providing an interim report because replies to the claimants' cases from the Crown and

other parties would unnecessarily "consume more years in preparation and presentation" in light of the Crown's acceptance of key headline conclusions. But this meant, the Tribunal said, no recommendations were possible in terms of s 6 of the Act because "no final conclusions can be given".

[71] Here, the Tribunal states more or less explicitly that the report should not be construed as containing findings that the claims of the Taranaki tribes are well-founded.

Interim findings are too general

[72] The Tribunal made general (provisional) findings about Treaty-breaching activities of the Crown in Taranaki from engaging in war in breach of the Treaty, to land confiscation to the use of tākoha. But no specific findings were made with respect to Āraukūkū's claim. Some lands in which Āraukūkū claimed an interest had been the subject of interim findings — for example, the Crown's acquisition of the Waipuku Patea block — but the Tribunal made no assessment of the extent of Āraukūkū interests involved (if any at all). Indeed, the Tribunal specifically noted "hapū losses are not considered in the present report".

[73] Rather, the Tribunal in its conclusions considered that "a separate accounting" would be necessary for particular groups in a second report, because these groups "are not the same, were affected differently and have different aspirations for the future". It follows that the Tribunal has reached no final conclusion on the question of whether Āraukūkū "is or is likely to be prejudicially affected" by relevant Crown actions in breach of the principles of the Treaty of Waitangi, because no assessment has yet been unde1taken of the effect of the Crown's Treaty-breaching action on Āraukūkū. For example, the Tribunal has made no assessment of the extent of Āraukūkū's interests in the rohe [land area] claimed by the hapū.

(Footnotes omitted.)

The application for an urgent inquiry

[14] The fall-back position for Āraukūkū is that, if an urgent remedies hearing is not available, the hapū should at least be given the opportunity, urgently, to present the evidence supporting its particular grievances and its claims to resumption and other remedies. The High Court Judge observed that, if the Tribunal made an additional inquiry by way of assessment of the Crown's response to the extent of Āraukūkū's interests in the rohe or area of land which is the subject of the hapū's

claim, it "could well quickly come to a final finding that the Āraukūkū claim is well-founded."[18]

[15] That view may be open to question. While it seems clear that the majority of the hapū's claims have been, or will be, settled by the Ngāti Ruanui and Ngāruahine settlement legislation, it was apparent to us from counsel's submissions that there may be a residual argument about the part of the claim brought on behalf of the hapū Ngāti Turi, which was added in July 1997. The extent to which the claims in Wai 552 have been settled by the Ngāti Ruanui settlement or will be settled by the Ngāruahine settlement, and what avenues for claim may remain open to Āraukūkū, are not free from complications.

[16] It is apparent from the Tribunal's decision and the High Court judgment that the hapū has been disadvantaged by the way in which the mandated negotiating entity, Ngā Hapū o Ngāruahine Iwi Inc (Ngā Hapū), and the Crown handled the negotiations and settlement of the Ngāruahine claim. It is common ground that the Deed of Mandate executed in May 2010, by which Ngā Hapū received its authority to negotiate with the Crown, did not include Āraukūkū as a hapū of Ngāruahine. It is also not disputed, however, that the Āraukūkū claim brought by Mr Tūrāhui was listed as one of the claims to be settled in part, even though the Tribunal reference number for the Wai 552 claim was misstated as "Wai 557". Nevertheless, the lead negotiator for Ngā Hapū and Ngāruahine, Mrs Daisy Noble, believed that Āraukūkū had aligned themselves to the Ngāti Ruanui settlement, as they were represented on the post-settlement body. She considered, however, that individuals claiming Ngāruahine whakapapa could benefit from the Ngāruahine settlement in due course if they chose to do so.

[17] This view was shared by the Crown's representatives in the Office of Treaty Settlements. In May 2011, they warned Āraukūkū's representatives that the claim based on Ngāruahine whakapapa would be settled by the negotiations and encouraged them to engage with Ngāruahine about participation in the settlement process. The Minister for Treaty of Waitangi Negotiations repeated the warning in May 2013, after the Crown and Ngā Hapū had signed an agreement in principle.

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18 *Tūrāhui v Waitangi Tribunal*, above n 6, at [74].

Āraukūkū appears to have maintained its position that Wai 522 should not be included in the Ngāruahine settlement; it had taken no part in the negotiations. The Tribunal found the hapū had produced no evidence it had engaged directly with Ngā Hapū and could have made a more concerted effort to do so.[19]

[18] On 30 July 2014, the Crown informed Āraukūkū that the initialled deed of settlement, which by then had been ratified, settled the Wai 522 claim insofar as it related to Ngāruahine. It appears, however, that by an oversight the ratified document did not mention the Wai 522 claim. The omission was addressed in the formal Deed of Settlement which was signed on 1 August 2014 and which included Wai 552 as a settled claim.

Delay

[19] In response to the urgency applications before the Tribunal, Mrs Noble expressed eloquently the concerns about the effect on Ngāruahine if the Tribunal granted Āraukūkū an urgent remedies hearing or inquiry:[20]

> 18.1 I find it very frustrating that nearly 7 years on since the establishment of Nga Hapu and after many many years of negotiations, with all the hard work and effort that has gone into this process, after all the hui, consultation, ratification hui and information packages to all possible beneficiaries, that this matter should arise now as an *urgent* matter.
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> …
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> 18.4 At this very late stage at the very point when the settlement can finally be realised, we cannot see how we can be expected to have a key foundation of our negotiations and settlement changed.

[20] The Tribunal found Āraukūkū at fault in raising its objections to the settlement process solely with the Crown. It acknowledged they had raised the matter by taking steps to oppose the mandate, but said that the Crown's advice to engage with Ngā Hapū, while unreasonably slow, was something the hapū should have been undertaking in any case. Āraukūkū had not previously attempted to engage with Ngā Hapū to explain the grounds on which they had entered the Ngāti

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19 *Decision of Sir Douglas Kidd on Urgency*, above n 5, at [179]–[181].

20 Signed Statement of Evidence of Tihi Anne Daisy Noble (24 March 2015) Wai 552 Record of Inquiry Papers #A5.

Ruanui settlement; their preference for remaining with Ngāruahine; and the extent of support for this position amongst the Āraukūkū hapū. The Tribunal also found that applicants could have pursued another avenue, through the Tribunal, that would have enabled them to demonstrate whether they had attempted to engage with Ngā Hapū, but that they had chosen not to follow that course until making the urgency application in February 2015.[21]

[21] We agree with Williams J that that was a relevant consideration in the exercise of the Tribunal's discretion and adopt the views at [89] of his judgment:

> … Āraukūkū had not only failed to test its case in the appropriate forum in the lead up to Ngāruahine's settlement, it had not discussed the matter with Ngāruahine, the source of its problems. Āraukūkū is the applicant. It would be expected to set out the steps it has taken to avoid suffering significant and irreversible prejudice. The more extensive those steps, the more powerful the applicant's case. The reverse will also be true. An applicant that has sat on its hands is less likely to succeed. Āraukūkū had, in [the Tribunal's] view, sat on its hands. That conclusion is difficult to fault.

Conclusion

[22] Williams J was right to hold that, in exercising a broad discretion regarding the application for an urgent inquiry, the Tribunal's decision on the merits — which required it to weigh the consequences for both Ngāruahine and Āraukūkū of either granting or refusing the application — was open to it. The assessment of what priority should be given to which claims, in the allocation of its limited resources, is fundamentally a matter for the Tribunal. As the Judge said:[22]

> … a standing commission of inquiry with a finite register of claims and limited resources should … be able to decide the order in which claims are heard. The Tribunal could not operate effectively without the ability to control the queue of claims to be addressed.

[23] Notwithstanding that another Waitangi Tribunal member might have come to a different decision in such a finely balanced case, the Judge concluded that it was not the function of the High Court on judicial review to determine the merits of the application but to assess its legality. That was the correct view.

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21 *Decision of Sir Douglas Kidd on Urgency*, above n 5, at [181].
22 *Tūrāhui v Waitangi Tribunal*, above n 6, at [86].

[24] While we acknowledge Mr Bennion's submission that applying for urgency can involve delicate timing issues, we agree that the hapū's delay in engaging with the Tribunal over urgency was a highly relevant tipping factor. We are not persuaded that the Tribunal or Williams J erred in the approach taken to the issues and the appeal must be dismissed for that reason.

Legislative intervention

[25] There is another reason, in any event, why Āraukūkū's continued plea for urgency must fail on the merits. The passage of the Ngāruahine Bill into law will formally settle Āraukūkū's claims to the extent they are based on Ngāruahine whakapapa, including the claim for resumption of the Stratford power station land that had been confiscated. It was subsequently awarded to Āraukūkū by the Crown for reserve, but is now privately owned. The Tribunal no longer has jurisdiction to consider such claims.[23] Although there may be aspects of the hapū's claims which remain within the Tribunal's jurisdiction, events have overtaken any argument that they require urgent consideration.

[26] There may be some comfort for Āraukūkū in the sympathetic views of the Māori Affairs Committee, expressed in the Commentary to the Bill when it was reported back to the House of Representatives. Among other things, the Committee called on the Crown to acknowledge, in public statements, the history of the reserve awarded to Āraukūkū, including the power station land, and explain why the land has not been returned through the Treaty settlement process. The Committee said:[24]

> We are concerned that Araukuku are treated fairly in the settlement negotiations [during the post-settlement implementation process], and that Araukuku individuals with Ngāruahine whakapapa are able to benefit from the Ngāruahine settlement. Ngāruahine has assured the Crown that this will be the case.
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> Unfortunately, this claims settlement process does not allow us to address to our satisfaction the issues some Araukuku individuals have raised. However, we will monitor the situation for these people through the Post Settlement Commitments Unit.

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23 Treaty of Waitangi Act, s 6(6).

24 Ngāruahine Claims Settlement Bill 2015 (45-2) (select committee report) at 4.

Result

[27] We dismiss the appeal.

[28] As agreed by the parties, there is no order as to costs.

Solicitors:
Bennion Law, Wellington for Appellant
Crown Law Office, Wellington for Second Respondent
Kensington Swan, Wellington for Third and Fourth Respondents