

OFFICIAL

Wai 2562, #2.5.3
Wai 2565, #2.5.5
Wai 2567, #2.5.4

IN THE WAITANGI TRIBUNAL

Wai 2562
Wai 2565
Wai 2567

CONCERNING

the Treaty of Waitangi Act
1975

AND

applications for an urgent hearing by Tira Peehi, the trustees and beneficiaries of the Taurewa Forest Settlement Trust (Wai 2562), Geraldine Taurerewa (Wai 2565), Kevin Amohia and Nyree Hurst (Wai 2567).

DECISION OF THE DEPUTY CHAIRPERSON
ON APPLICATIONS FOR AN URGENT HEARING

1 Hui-tanguru 2017

Introduction

1. The Wai 2562, 2565 and 2567 applications for urgency concern the actions of the Crown in relation to Deeds of Settlement that were entered into with the Taurewa Forest Settlement Trust in relation to parts of the Central North Island (CNI) Forests (particularly the Taurewa Forest Lands).

Wai 2562, the Taurewa Forest Deed of Settlement claim

2. On 23 May 2016, Tira Pehi and the trustees and beneficiaries of the Taurewa Forest Settlement Trust (the Trust) filed a statement of claim and an application for urgency concerning the Crown's role in the ratification of its agreements to resolve the interests of the Whanganui iwi in the Taurewa Crown Forest Licensed land (Wai 2562, #1.1.1).

Wai 2565, the Taurewa Forest Deed of Settlement (Taurerewa) claim

3. On 21 July 2016, Geraldine Taurerewa filed a statement of claim and an application for urgency concerning the Crown's alleged failure to protect her interests in the Taurewa Forest following the Central North Island Settlement in 2008 (Wai 2565, #1.1.1). The claimants allege that the Crown has breached its duties of good faith and active protection by failing to conclude the Taurewa Forest Settlement in the manner agreed to by the Trust and the Crown.

Wai 2567, the Taurewa Forest Deed of Settlement (Amohia and Hurst) claim

4. On 29 July 2016, Kevin Amohia and Nyree Hurst filed a statement of claim and an application for urgency concerning the Crown's failure to protect the claimant's interests in the Taurewa Forest following the Central North Island forests settlement in 2008 (Wai 2567, #1.1.1). The claimants allege that the Crown has breached its duties of good faith and active protection by failing to conclude the Taurewa Forest Settlement in the manner agreed to by the Trust and the Crown.

Background

5. On 25 June 2008, the Crown entered into a Deed of Settlement (the Deed) with a number of iwi in the Central North Island (CNI) in relation to the CNI Forests Land. This settlement was enacted by the passage of the Central North Island Forests Land Collective Settlement Act 2008 (the CNI Settlement Act) and vested the CNI Forests Land in, and transferred the accumulated rentals to, CNI Iwi Holdings Limited.
6. The iwi and hapū of Whanganui were not expressly included in the Deed or the CNI Settlement Act, nor were they represented by the CNI Iwi Collective. However, a percentage of beneficial interests in the CNI forest lands was provided for under the 2008 Act for 'other CNI claimants' who were not represented by the iwi collective. This included Whanganui iwi and hapū. The beneficial interest was to be held by the Crown for a 6 year period (the Crown Initial Period). If other CNI claims to the CNI forests land were not settled by the end of the 6 year period, any value remaining would be transferred to a Trust for the benefit of CNI iwi generally.
7. Following the enactment of the CNI Act, the Crown began a process of identifying the 'other CNI claimants' referred to in the CNI Settlement Act, and entered into settlement

discussions with the groups it identified. One such group was the Whanganui iwi and hapū who the Crown determined as the claimants of the Taurewa Forest block (a parcel of the CNI forests land).

8. In 2015, the Crown progressed discussions with a group of Whanganui claimants with customary interests in the Taurewa forest lands. Subsequently, a group who represented Whanganui iwi and hapū interests was formed, and not long after the Taurewa Forest Settlement Trust (the Trust) was established to represent the group.
9. The Trust entered into discussions with the Crown and eventually entered into two deeds of settlement:
 - a) A deed of settlement with the Crown on 11 June 2015 (the Whanganui Deed); and
 - b) A deed with the CNI Forests Iwi Collective and CNI Iwi Holdings Ltd on 11 June 2015.
10. The Trust's deed with the Crown was conditional upon ratification. This condition was included due to the extreme shortness of time to achieve a final settlement before the Crown Initial Period expired. The Whanganui Deed set out that ratification had to have occurred by 1 June 2016, or by such later date as may be agreed, or the deed would terminate and the funds would be paid back to the CNI Collective as per the Crown's instructions.
11. When delays appeared to be an issue, the Trust entered into discussions with the Crown regarding extensions to the deadline. A draft ratification strategy was provided to the Trust on 5 April 2016. On 6 May 2016 the Crown advised that no such extensions would be granted.
12. On 10 and 11 May 2016 the Trust completed a draft ratification strategy, drafted a ratification information document for distribution to beneficiaries, drafted public notices to be advertised in national and regional newspapers, completed a ratification information presentation and organised an independent returning officer to count ratification votes. OTS agreed to urgently review the ratification material. The draft ratification strategy was provided to Te Puni Kōkiri (TPK) and to OTS officials to consider.
13. However, on 12 May 2016 the Trust received a letter from the Crown which advised that they would not approve the ratification strategy due to the Crown's concern around time left to complete ratification and that the proposal did not meet a number of ratification criteria.
14. As a result, the Crown indicated that it did not intend to take any steps to fulfil the Deed signed with the Trust in June 2015, and consequently there would be no settlement monies transferred to the Trust.

The Applicants' Position

Wai 2562 (Wai 2562, #1.1.1; #3.1.1; #3.1.6)

15. The applicants claim that between the signing of the Whanganui Deed and 1 April 2016, the Trust struggled to obtain any helpful response to its requests about the ratification process from the Crown. The applicants submit that the actions of Crown officials were inconsistent with the Crown's duty to act in good faith. Specifically, the applicants allege that the Crown failed in the following respects:

- a) to provide sufficient staff or resources to allow the ratification process to be undertaken in a timely way;
- b) to develop, discuss or agree to a workable ratification process;
- c) to progress matters previously agreed upon which included;
 - i. to undertake internal OTS work to progress the Crown position on the ratification process and advising the Trust on the outcomes of any internal meetings;
 - ii. to advise the Trust on the Crown's concerns regarding the Deeds of Settlement (e.g claimant definition);
 - iii. to actively pursue any alternative options in the event that ratification could not be completed in time or agreeing to any extension of time;
 - iv. to review the suitability of the Whanganui Deed according to the Crown's post-settlement criteria or respond back to the Trust on the Deed; and
 - v. to advise on the level of ratification required by the Crown of the Trust.

16. The applicants allege that the Crown's actions will lead to immediate, significant and irreversible prejudice to the Trust and its beneficiaries:

- a) After the deadline, Taurewa forest land beneficiaries will not be able to settle their interests in the Taurewa forest;
- b) There is no prospect that after the deadline CNI Iwi Holdings will be prepared to negotiate the settlement of Whanganui specific interests in the CNI Deed of Settlement with the Trust. The funds will then revert to a Trust for the benefit of the CNI Iwi Collective as a whole which does not include Whanganui. The beneficiaries' interests in the forest will therefore be defeated;
- c) There is no guarantee in the foreseeable future that Whanganui will be in a position to settle its historical claims with the Crown and subsequently there is no certainty that settlement will ever eventuate; and
- d) The Crown's proposals are uncertain and they entail significant legal complications that may not be workable which will result in significant and irreversible prejudice. More specifically it is very unlikely that a post-settlement governance entity will represent the same beneficiaries as those with beneficial interest in the Taurewa Forest.

17. The applicants submit that no other alternative remedy is reasonable for them to seek. Without an urgent hearing the Crown will refuse to agree to an extension.

18. The applicants submit that they are ready to proceed to an urgent hearing and that no additional research is required.

Wai 2565 (Wai 2565, #1.1.1; 3.1.1)

19. The applicant alleges that the Crown's failure to conclude the Taurewa Forest Settlement in the manner agreed to by the Trust and the Crown is a breach of the Crown's duties of good faith and active protection.

20. The applicant submits that the failure of the Crown to assist in the ratification of the Whanganui Deed and subsequently not ratifying the Deed by the deadline was a breach of good faith.
21. It is the applicant's view that she will suffer significant and irreversible prejudice as a result of the Crown's actions, and neither of the two options the Crown has proposed to resolve the matter will remove or alleviate such prejudice.
22. Finally, the applicant alleges that the Crown has failed to adequately resource and fund the Trust, consider alternative deadlines, negotiate time extensions, provide assistance to the Trust and deal with Trust in a fair and reasonable manner.

Wai 2567 (Wai 2567, #1.1.1; #3.1.1)

23. The applicants allege that the Crown's failure to conclude the Taurewa Forest Settlement in the manner agreed to by the Trust and the Crown was a breach of the Crown's duties of good faith and active protection.
24. The applicants submit that the Crown's failure to assist in the effective ratification of the Whanganui Deed and subsequently their inability to ratify the Deed by the deadline was a breach of good faith.
25. The applicants state that the two options proposed by the Crown to resolve the matter since the deadline has passed, will neither remove or alleviate the prejudice to the applicants. The applicants say that once the proceeds revert to CNI iwi, the applicants will be denied their ability to benefit from the settlement.
26. It is the applicants' view that the Crown's suggestion that it has sufficient capacity to provide substitute redress, gives no reassurances to the applicants who feel that the Crown has previously denied them redress.
27. The applicants oppose the Crown's position that any Crown asset (such as money) can be substituted for ngahere and whenua; furthermore, they assert that to separate Ngati Haaua from the whenua amounts to a breach of the Treaty.
28. Finally, the applicants oppose the Crown's assertions that procedural failures which caused the ratification deadline to expire were due in part to the Trust. The applicants assert that the Crown is responsible for failing to adequately resource and fund the Trust, consider alternative deadlines, negotiate time extensions, provide assistance to Trust and deal with the Trust in a fair and reasonable manner.

The Crown's Position

29. On 7 June 2016, 29 July 2016 and 22 August 2016 the Crown filed responses to all three urgency applications (Wai 2562, #3.1.4; Wai 2565, #3.1.4 & Wai 2567, #3.1.3). The Crown opposes all three urgency applications (Wai 2562, Wai 2565 & Wai 2567).
30. The Crown submits that the applicants' have failed to identify a current or pending Crown action for the Tribunal to inquire into. The Deeds, which are the subject of the three urgency applications, have now expired. It is the Crown's view that it was the effluxion of time and the inability to satisfy conditions that caused the 2015 agreements to expire, not inaction by the Crown. The Crown submits that the trustees were aware that the arrangement was conditional on the agreements being ratified, and if the condition was not satisfied by 1 June 2016 the agreements could be terminated. The Crown says that all reasonable steps to facilitate the satisfaction of the conditions imposed by the Deeds were taken.

31. The Crown submits that they facilitated the ratification process in good faith, through the allocation of “exceptional circumstances” funding to meet costs associated with the ratification process, by assisting through the provision of draft ratification strategies, by assisting the Trust to obtain a bank account, and undertaking an urgent review of the proposed ratification strategy in May 2016.
31. The Crown was concerned at the lack of formal processes of the Trust. The Crown alleges that the Trust was not able to show it was a suitable entity to hold the funds held on trust for the beneficiaries.
32. The agreement of CNI Iwi Holdings Ltd and the CNI Collective was sought in relation to an extension of time for ratification, but a satisfactory agreement was not able to be reached.
33. The Crown proposed two options when it became clear that the Trust was not going to be able to achieve ratification:
 - That the ratification requirement be removed and the \$1.8m that was held on trust continue to be held for the benefit of a Whanganui PSGE once established; or
 - That the arrangement be allowed to expire, with the Crown’s acknowledgment that Whanganui claims to Taurewa forest would still need to be addressed in future comprehensive settlements with Whanganui.

These options were rejected by the applicants.

34. The Crown acknowledges that the interests of Whanganui remain to be addressed, but submits that the Crown retains capacity to provide sufficient redress when Whanganui iwi settle their historical claims.
35. The Crown alleges that the applicants’ have failed to provide sufficient evidence as to the degree of support, either from other trustees or members of Whanganui hapū. The Crown submits that the lack of demonstrated support is the reason why the conditions in the Deeds of Settlement could not be satisfied.

Urgency Criteria

36. The Tribunal’s *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Discussion

Wai 2562, Wai 2562 and Wai 2567 applications for urgency

37. The Wai 2562, 2565 and 2567 applicants seek an urgent hearing and findings from the Tribunal that the Crown breached its Treaty obligations through its actions during the ratification of the Deeds of Settlement concerning Central North Island Forests Land.
38. To support the grant of an urgent hearing, the applicants must first show that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies. The applicants argue that they will suffer prejudice because the money that was held on trust by the Crown and that was available for settlement of the Taurewa claims by 'other CNI claimants', has reverted to CNI Iwi Holdings Ltd. It is alleged that this has occurred because the Crown did not act in a timely manner, and did not support the ratification process.
39. The prejudice alleged by the applicants includes the proposition that any redress for the Taurewa claimants is no longer guaranteed because it may now be distributed among the whole Whanganui iwi rather than the Taurewa claimants alone. The applicants' view is that it is unfair that the proportion of the CAP that was set aside has now reverted to the CNI Iwi Holdings Ltd. They argue that the Crown should have supported an extension of time for ratification, an option provided for in the Whanganui Deed itself. The applicants' view is that if an extension of time had been allowed, ratification would have been achieved. They see the Crown's actions in suggesting alternative processes to settle the claim (as discussed above at paragraph 33) as inadequate and claim that the Crown has breached its fiduciary obligations and its duties of good faith and active protection in the processes it has followed.
40. Whether these claimants receive redress for the Taurewa forest and the form that redress would take are issues that now remain to be determined during negotiations for the settlement of the Whanganui claim. I understand that the *He Whiritaunoka: The Whanganui Land Report* was published in 2015 and it is my understanding that the Crown is currently engaged with claimant groups in the Whanganui area. While it is true that the claimants may not receive redress in the same manner as contemplated in the Whanganui Deed, it cannot be said that they will be prejudiced if they were to receive appropriate redress via a different path. I note that the definition of the group entitled to redress in recognition of their interest in the Taurewa forest may be an issue that needs to be addressed during the Whanganui negotiations.

41. The expiration of the Whanganui Deed does not prevent the applicants from pursuing their interests in the Taurewa Forest and negotiating an adequate settlement with Crown. I therefore do not consider that at this stage it can be said that it is likely that the applicants will suffer significant and irreversible prejudice as a result of the Crown's actions during the ratification of the Deeds of Settlement and its decision not to extend the time allowed for ratification of the Whanganui Deed.

42. I also note that the asset that is the subject of the current applications for urgency is money; this is not a claim for resumption of land. The Crown has given an assurance of its ability to compensate should that be required (Wai 2562, #3.1.4 at [45.1.3]). I urge the Crown to be mindful of the Taurewa claimants' position during the process of settling the Whanganui claims in order to avoid any prejudice arising.

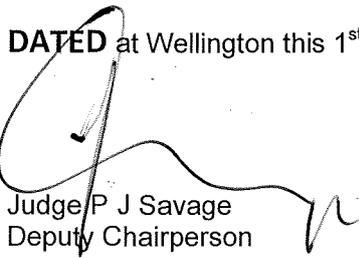
43. The applications for urgency are declined.

Applications to revive previous claims for urgency in relation to the CNI settlement

44. As part of these proceedings, the Tribunal also received two applications to "revive" urgent applications in relation to the CNI settlement that were previously adjourned in 2008 (Wai 2562, #3.1.14 & 3.1.19).¹ The CNI Settlement Act 2008 may serve to operate as a bar to revival of these applications as they are currently framed, especially given that the CAP is no longer in existence following its expiry in 2015. Additionally, and as discussed above, I have found that there is insufficient cause in the current case to grant an urgent hearing to the Wai 2562, Wai 2565 and Wai 2567 applications. There would be no utility in allowing the adjourned applications to be revived in this context.

The Registrar is to send a copy of this direction to counsel for the applicants, Crown counsel and those on the notification lists for Wai 2562, the Omarukaikuru (Shelly Bay) Claim, Wai 2565, the Taurewa Forest Deed of Settlement (Taurewa) Claim and Wai 2567, the Taurewa Forest Deed of Settlement (Amohia and Hurst) Claim.

DATED at Wellington this 1st day of February 2017


Judge P J Savage
Deputy Chairperson

WAITANGI TRIBUNAL

¹ According to the memoranda of counsel seeking to revive the applications (Sykes and McGhie) this includes Wai 1029, and Wai numbers 836, 843, 954, 1073, 1089, 1191, 1072, 1197 and 1738.