IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-1233

BETWEEN	TE RUNANGA O NGATI MANAWA Plaintiff
AND	THE ATTORNEY-GENERAL First Defendant
AND	CNI IWI HOLDINGS LIMITED Second Defendant
AND	TE KOMITI NUI O NGATI WHAKAUE Third Defendant
AND	TUHOE ESTABLISHMENT TRUST Fourth Defendant
AND	TE MANA O NGATI RANGITIHI Fifth Defendant
AND	TUWHARETOA SETTLEMENT TRUST Sixth Defendant
AND	RAUKAWA SETTLEMENT TRUST Seventh Defendant
AND	TE PUMAUTANGA O TE ARAWA TRUST Eighth Defendant
AND	TE RUNANGA O NGATI WHARE Ninth Defendant

Hearing: 13 October 2011

Counsel: K Ertel and R Zwaan for Plaintiff
V Hardy and R Hogg for First Defendant
M Doogan for Second Defendant
J Kahukiwa for Third Defendant
F Wood for Fourth and Fifth Defendants
M Smith for Sixth Defendant
H Wilson and S Backhouse for Seventh Defendant
J Ferguson for Eighth and Ninth Defendants

Judgment: 2 November 2011

Hearing: 13 October 2011

Counsel: K Ertel and R Zwaan for Plaintiff
V Hardy and R Hogg for First Defendant
M Doogan for Second Defendant
J Kahukiwa for Third Defendant
F Wood for Fourth and Fifth Defendants
M Smith for Sixth Defendant
H Wilson and S Backhouse for Seventh Defendant
J Ferguson for Eighth and Ninth Defendants

Judgment: 2 November 2011

JUDGMENT OF WILLIAMS J

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 4:00pm on the 2nd November 2011.

A partial settlement

[1] In June 2008, the Crown and eight Central North Island (CNI) iwi managed to pull off what no-one had thought possible – a partial Treaty settlement involving transfer (to a company 90 percent owned by those iwi) of the land underlying Kaingaroa State Forest. An even more valuable pūtea of Crown forestry rentals accumulated since 1989 followed the event.

[2] This unprecedented partial settlement was made possible because the eight iwi – styling themselves the CNI Forest Collective – reached an internal agreement on two key components of the deal: their respective proportions of the rental pūtea; and a process to be completed over the next three years whereby they might divide the bulk of the underlying whenua – 176,000 hectares – among themselves. It was by no means expected that the whenua would be divided in the same proportions as

the rentals. On the contrary, Ngāti Manawa received only 3 percent of the rental pūtea, but asserts mana over a much larger area of the whenua. If however, after 35 years, no apportionment is effected, then it is considered that, by implication, the land must be divided in the same proportion as the rentals. This, it is said, will occur at the conclusion of the perpetuity period when the Trust is disestablished. It was not explained to me how this would be practically achieved on the ground.

[3] It is not possible to overstate the significance of this agreement to the eight iwi (of course); to the Treaty settlement process generally; and therefore to the country. It was a watershed. Because Kaingaroa is by far the largest Crown forest, the deal unlocked the Klondike under which the Crown forest assets component of the national Treaty settlement resource base had laboured for many years. Between 1989 – when the original Crown forest assets agreement was reached between the Crown and Māori interests – and June 2008, Crown forests and Crown forestry rentals had transferred to iwi claimants at a pace that might best be described as a trickle. The Kaingaroa agreement changed that. And it created a new model for untying the knot of inter-iwi mana whenua conflicts that had for some years further slowed the progress of Treaty settlements generally.

[4] In the Kaingaroa agreement, iwi took control of their own mana whenua disputes. This allowed them to avoid, or at least postpone, destructive internecine conflict until after agreement had been reached with the Crown.

[5] It was thought that if this model could be made to work with the eight iwi of the CNI Forest Collective, it could work anywhere. This in turn meant, perhaps for the first time, that the idea that all historical claims could be settled within the second decade of the new millennium was not only possible but realistic.

[6] For all of the foregoing reasons, it is of the utmost importance that the CNI Forest Collective land allocation process produces a wise result for all iwi in the collective in accordance with ancient tikanga as it is lived in the 21st century.

The allocation process

[7] The process as agreed is reproduced in Schedule 2 of the Central North Island Forest Lands Collective Settlement Act 2008 (2008 Act). It was originally appended as Schedule 3 to the June deed of settlement and its terms were thrashed out during the 2008 negotiations. It provides for a three stage process beginning with negotiation as stage one; if that fails mediation as stage two; and if that fails binding adjudication as stage three. Final allocation of the Kaingaroa lands was to be implemented by no later than 1 July 2011.[1]

[8] It is unnecessary, for my purposes, to delve into the detail of the Schedule 2 process except to say that it is prescriptive and detailed. Clauses 6(14) and 4(2) should be noted because they provide the relevant test for entitlement to land. Clause 6(14) provides:

> The adjudication panel will reach a decision on allocation of the disputed lands by 25 June 2011, in accordance with the mana whenua test set out at clause 4(2).

[9] Clause 4(2) in turn provides:

> The test of mana whenua is the mana that iwi traditionally held and exercised over the land, determined according to tikanga including, but not limited to, such factors as–
>
> (a) take whenua; and
>
> (b) demonstration of ahi kā roa, ahi tahutahu, or ahi mātao-tao.

Time runs out

[10] Predictably (in te ao Māori), apportionment of whenua has proved far more difficult than apportionment of the rental pūtea even though the latter was significantly more valuable in dollar terms. The three year timetable has proved impracticable. With no allocation able to be agreed through negotiation or mediation, there was insufficient time to, by the agreed deadline, appoint the stage three adjudication panel and have that panel complete the necessary inquiry over

[1] See Central North Island Forest Lands Collective Settlement Act 2008, Sch 2, cl 7.

such a vast tract of land. On seeing the writing on the wall, the panel members resigned.

[11] The proposal was then to extend the timeframe in Schedule 2 by further agreement among the eight iwi and to appoint a fresh panel. But doubt was expressed as to whether this could be lawfully done even if the collective agreed to it. An application was made for a declaratory judgment to resolve the question. By judgment dated 14 June 2011, McKenzie J confirmed that the process could be extended by agreement.[2]

[12] Notwithstanding McKenzie J's declaration, the collective still could not agree the terms upon which to grant themselves the necessary extra time.

[13] On 27 June 2011, three days before the allocation processes sunset of 1 July, Ngāti Manawa filed the present proceedings. They took the view that the CNI allocation process was dead and that its failure was the fault of CNI Iwi Holdings Ltd – the interim land holder and manager of the land allocation process – and some (but not all) of the other iwi in the collective. All further negotiation over the extension ceased at that point with each side blaming the other for the impasse.

[14] There the brave new collective agreement for Kaingaroa land allocation remains.

The allegations

[15] Ngāti Manawa says that in failing to complete the process in good time, CNI Iwi Holdings and/or five of the eight iwi have breached the agreement and related statutory duties, as well as trust and mutually owed fiduciary obligations. Ngāti Manawa wants compensation for what it says is now lost to it. It says that it only agreed to a small proportion of the rental pūtea with the larger part going to its more populous neighbours because it could rely on getting its land back by the allocation process. That was the real objective and, Ngāti Manawa says, that is now lost.

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[2] *CNI Holdings Ltd v Raukawa Settlement Trust* HC Wellington CIV-2011-485-982, 14 June 2011.

[16] Although no relief is sought specifically against the Crown, the Attorney-General has been joined in the proceeding.

[17] In essence Ngāti Manawa's case is founded on two sets of duties. The first, allegedly owed by CNI Holdings Ltd, is the duty to "govern" the agreed allocation process in a way that produced a result within the timeframe. The second, allegedly owed by the defendant iwi, is the duty to "participate" in that process, again in a way that ensured it met its deadline. These obligations, the plaintiff says, sound in each of contract (under the Deed of Settlement), the 2008 Act, as well as trust and fiduciary relationships.

[18] Ngāti Manawa says these duties have been breached causing the iwi to lose its true share of the Kaingaroa estate according to mana whenua. Ngāti Manawa now asks this court to refer the matter of its customary rights to the Māori Appellate Court for inquiry under s 61 of Te Ture Whenua Māori Act 1993. This is to be a substitute for the adjudicatory panel under the deed. The Māori Appellate Court's advice to this court would provide the basis for an award in damages equivalent (I presume) to the value of the land, the tribe would have been entitled to.

[19] Different parties respond differently to this litigation. Ngāti Whare and Te Pūmautanga O Te Arawa, I am told, have similar interests to those of Ngāti Manawa in that they claim primary right by take tupuna and ahi kā over the lion's share of the land. They have not joined as plaintiffs. Instead, they are taking a "wait and see" stance.

[20] The Crown applies to be struck out as a party, arguing it has no relevant interest in the proceeding and should not have been joined.

[21] CNI Iwi Holdings Ltd – itself a creature of the agreement – applies to strike out the contract cause of action against it reasoning that it is not a party. On other causes of action, the company seeks further particulars.

[22] Ngāti Whakaue, Ngāti Rangitihi, Ngāti Tūwharetoa, Ngāti Raukawa and Ngai Tūhoe apply to strike out all causes of action against them. Ngāti Whakaue

applies in the alternative to dismiss the proceeding for want of jurisdiction. In lieu of strike out or dismissal, all five iwi seek further particulars of the claim.

[23] With the exception of the proceedings against the Crown and the contractual cause of action against CNI Iwi Holdings, it is my view that strike out or dismissal at this stage is premature.

Dismissal

[24] Section 7 of the 2008 Act contains a privative clause as follows:

> **7 Jurisdiction of courts, tribunals, and other judicial bodies excluded**
>
> (1) Despite any other enactment or rule of law, on and from the settlement date, a court, tribunal, or other judicial body does not have jurisdiction (including the jurisdiction to inquire into or further inquire into, or make a finding or recommendation) in respect of–
>
> (a) any or all of the historical CNI forests land claims; or
>
> (b) the deed of settlement; or
>
> (c) this Act.
>
> (2) Subsection (1) does not exclude the jurisdiction of a court, tribunal, or other judicial body in respect of the interpretation or implementation of the deed of settlement or this Act.
>
> (3) Subsection (1)(a), in so far as it relates to the Waitangi Tribunal, is subject to sections 22 to 24.
>
> (4) Subsection (1)(a) does not exclude the jurisdiction of the Waitangi Tribunal in so far as it relates to the steps that are necessary for the Tribunal to complete its inquiries and report on the following:
>
> (a) the Tongariro National Park Inquiry (Wai 1130):
>
> (b) the Te Urewera Inquiry (Wai 894).

[25] The third defendant, Ngāti Whakaue, argues that this clause prevents any court inquiring into the matters raised by Ngāti Manawa's amended statement of claim because those matters relate to Ngāti Manawa's historical Kaingaroa claims, the deed and the Act (in terms of s 7(1)), but do not relate to interpretation or implementation of the deed or the Act as permitted by s 7(2).

[26] I do not agree. This proceeding is about the way the parties went about following the directives in the deed and schedule 2 of the Act, including relevant timelines. It alleges that various of the defendants have failed to comply with the implementation requirements of the deed and the schedule by the deadline referred to in them. It is clearly permissible under s 7(2).

Strike out – iwi defendants

[27] These applications are best dealt with taking a general approach to the tenor of the proceeding rather than picking through detailed pleadings. My conclusions are also subject to the issues of relief and timing, discussed below.

Contract

[28] Counsel for the applicants generally accepted that the deed created contractual obligations between the various settling iwi organisations.

[29] There was a suggestion among Ngāti Whakaue, Tūhoe and Tūwharetoa that their respective shareholding entities had not signed the deed, rather the deed had been signed by certain individuals as mandated iwi representatives. Accordingly, it was argued, the shareholding entities could not be held to obligations under the deed. I find that proposition unattractive. It seems to me wrong in principle for the shareholding entities to accept the benefit of the settlement as representative, agent or trustee of the tribe (it does not matter which for these purposes) without at the same time taking on the contractual responsibilities of that position. It would be inequitable to allow it.

[30] Once it is accepted that there are contractual obligations to implement the deed and its timelines, the question of whether these obligations have been breached and the implications of such breach will be matters of evidence. How can it be said that a cause of action based on breach of the deed stands no chance of success from the outset when there is no argument that the land allocation leg of the deed has not been implemented by the deadline and no extension of time is yet agreed?

[31] Important questions necessarily arise in terms of whether that amounts to breach entitling relief. The behaviour of the parties before and after the 1 July deadline will be relevant. Evidence will be required. But it cannot be said that the cause of action is untenable.

Statutory duty

[32] All five applicant iwi argue that the cause of action in breach of statutory duty under the 2008 Act should be struck out because it is not reasonably arguable. It is unnecessary for me to resolve this question here. Indeed, in my view it would be unwise to attempt to do so. But I do not think that such a duty can be dismissed without evidence and full argument.

[33] The Act implements the deed. It records the contract (in part) and gives effect to it where implementation is not possible without a statutory mandate. There are a number of respects in which this is the case, not least the vesting of the Kaingaroa land and the transfer of the Crown forestry rental pūtea. In light of the terms of the Treaty of Waitangi Act 1975 and the Crown Forest Assets Act 1989, parliamentary mandate was required.

[34] Given that the land allocation agreement is included as a schedule to the Act and that the relevant purpose of the Act is to "record the principles and process by which the allocation of the CNI forests and land accumulated rentals is to be achieved", it seems pre-emptive to conclude at this early stage that no statutory duties are created in the Act. I do not see any of the conclusions in McKenzie J's decision to suggest otherwise.

[35] Parliamentary intention and legislative context are all important in this question.[3] Here Parliament's intention is self evidently to implement a binding agreement. Although the land allocation mechanism did not itself require legislative mandate, Parliament nonetheless enacted it. Perhaps this was because the iwi felt that mere contractual obligations were insufficient comfort given the innovative path

[3] See for example the broad range of considerations suggested in *Select 2000 Ltd v ENZA Ltd* [2002] 2 NZLR 367 (CA) and in Todd *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 398.

they had chosen and they wanted their mutual obligations to be statutory as well. I have no idea. But the background to the enactment of the 2008 Act may well be determinative of the question. It seems to me a stretch to suggest, without any evidence on the point, that a binding agreement included in a statute can never give rise to statutory duties mirroring the contractual ones. In the end, the distinction between statutory and contractual duties may make no practical difference in this case because the plaintiff can at least rely on the latter, but I am not prepared without a body of evidence to guide me, to conclude that statutory duties are not at least arguable in the circumstances of this case.

Fiduciary obligations

[36] Ngāti Manawa says that a fiduciary obligation is created out of the deed, the Act, and the collective's own internal arrangements. The relationship, it is said, is in the nature of a joint venture or partnership in which Ngāti Manawa is vulnerable to the good intentions of the other iwi. This vulnerability, it is argued, is accentuated by the fact that Ngāti Manawa only agreed to the settlement in reliance on the efficacy of the mana whenua based process for land allocation. This aspect of the settlement was far more important to it than the limited cash payment received.

[37] The third to seventh defendants reject this analysis. They say that all rights are contractual and are articulated in the deed including the internal allocation process. They further argue that there are no vulnerabilities or power differentials as argued for by Ngāti Manawa. On the contrary, all iwi are motivated by self interest in this process and their contest is on a level playing field.

[38] Once again, in my view, discounting fiduciary obligations without further evidence is premature. It is true of course that all iwi are motivated by self interest in the process. In the contest between them, the process is indeed designed to produce a level and principled playing field. Seen from that prospective, the usual indices of fiduciary obligations appear to be absent – at least it would be so if this were merely an arms-length multilateral commercial transaction in which the parties have no relationships other than those expressed in the contract. But these

relationships are cultural too. Indeed the contract itself reflects this as cl 2(3) provides:

> (3) The iwi acknowledge their commitment to a resolution process that –
>
> (a) enhances and promotes the mana and integrity of all iwi; and
>
> (b) is open and transparent; and
>
> (c) promotes whanaungatanga, manaakitanga, and kotahitanga amongst the iwi; and
>
> (d) recognises the desirability of post-settlement collaboration between them in the collective management of assets.

[39] By its terms the iwi commit to a process that must enhance iwi mana (tribal standing), and promote whanaungatanga (the benefits and obligations of kinship), manaakitanga (the ethic of caring by putting self second), and kotahitanga (unity). These are deeply Māori values. It would be wrong to treat them as empty platitudes having no legal effect. And they are not unrelated to the fiduciary concept in Pākehā law.

[40] It remains to be seen how these values might be given effect in a contest over mana whenua. They will certainly be well tested. It may have been advisable to plead the tikanga-based obligations directly, at least in the alternative. Certainly the content and legal influence of tikanga Māori in this process has still to be assessed. But it is too early to discount as untenable, arguments that Ngāti Manawa is owed fiduciary or fiduciary-like obligations. Evidence and full argument will be needed.

The position of the Crown and CNI Iwi Holdings

[41] I agree that the disagreement at the centre of these proceedings is between the iwi of the collective. The Crown is peripheral. It is true that the Crown is a part owner in CNI Iwi Holdings but it holds that share as trustee for future iwi claimants. It was never going to be the end owner. In any event, that share is simply not in play in this conflict. I agree with the Crown that there is no basis upon which it should be drawn into this dispute.

[42] Of course if it transpires that the agreement entirely fails because the collective refuses to complete the land allocation process and the court finds that it cannot do anything about that, then the Crown will be vitally interested. At that point the parties themselves may wish to go to the Crown to seek a political, indeed legislative, fix. This became necessary in the fisheries allocation. But that does not make the Crown a necessary party to these proceedings. Its interest is political not legal.

[43] The Attorney-General will be struck out as a party accordingly.

[44] Similarly, it is wrong in principle to maintain a cause of action in contract against CNI Iwi Holdings directly on the basis of the deed. That company was never a party to the deed of settlement. It was created by the deed. The plaintiff has not pleaded any exception to the ordinary doctrine of privity, nor any collateral contract. These would be separate causes of action. This may, in the end, have little practical effect since any claim in contract is likely to be co-extensive with the claim for breach of trust, which is not included in this strike out application.

[45] This cause of action against CNI Iwi Holdings is also struck out accordingly.

Relief

[46] The second to seventh defendants all argue that the relief sought in this proceeding is untenable as utterly inconsistent with the 2008 Act and the deed. They argue that the courts were intended to be excluded from this very inquiry because that would be to usurp the agreed process for determination of entitlements. In any event, it was argued, the proceeding is premature since the collective has already agreed in principle on the extension, disagreements being only over detail.

[47] I agree that the relief sought is unorthodox. It would have been less problematic for the plaintiff to seek an order in the nature of mandamus directing each iwi to extend the term of the process for a reasonable period to allow it to be completed. That seems more direct and sensible with a much reduced risk of the court being accused of over-reaching its mandate.

[48] That said, I am not prepared, at this stage at least, to strike out the existing prayer. If the parties prove utterly unable to extend time or, if once time is extended, the process itself proves incapable of producing a result, and if the Crown is not prepared to amend the legislation on some agreed basis, then s 61 may be the last option. I am not prepared to pre-empt its availability at this stage. I realise there is an unavoidable circularity in that reasoning. That brings me to the option of a stay.

Stay

[49] The primary disconnect between Ngāti Manawa and the five opposing iwi is that Ngāti Manawa says the allocation process is dead and buried, while the five iwi say it is merely parked in order to allow the details of an extension to be worked through.

[50] In reality no-one can be certain yet which of those scenarios is accurate. Although the process is technically at an end, it can still be resuscitated as long as there is unanimity within the collective. Further time is required to determine whether the difficulties being experienced within the collective can be overcome and the process extended.

[51] Rule 15.1(3) of the High Court Rules entitles the court to stay proceedings in whole or in part as an alternative to striking out and to do so on such conditions as I consider just.

[52] I agree with the iwi defendants that this proceeding is precipitate. The law was clarified by McKenzie J on 14 June and the statement of claim was filed 13 days later. All parties seem to be agreed that they remain willing to discuss the extension option. All seem to want it, particularly, ironically, the plaintiff. The collective is entitled to a reasonable time within which to complete those negotiations.

[53] I acknowledge the argument from various of the defendants that it is inappropriate to negotiate while extant proceedings hang over the negotiation. In reality however, the allocation of the Kaingaroa land is an extremely difficult and controversial issue for all concerned. There is a need for compromise if an extension

is to be achieved. A stay provides the defendants with a moratorium. It removes the distraction of collateral conflict to allow bona fide discussions to take place. If there is a genuine will here, that ought to be enough.

[54] Thus, the appropriate course is not to strike this proceeding out as untenable but to stay it to allow negotiations to proceed unhindered.

[55] I agree with Mr Smith that the 10 weeks provided in *Hunt v Wilson*[4] is insufficient in the more complex context of CNI land allocation. On the other hand, I am heartened by the defendants' submission that there is already agreement in principle. I consider that four months will be sufficient.

[56] The applications for further particulars are adjourned accordingly and the proceeding is stayed for four months. If an extension is agreed in that time, the proceeding should be withdrawn or, in the absence of such withdrawal, further strike out applications may be entertained. If agreement is not reached, further directions will be required to set the litigation on a proper course, fully and properly pleaded. Costs are reserved to be addressed at the conclusion of the stay period.

Ko te kai a te rangatira, he kōrero

[57] Ngāti Manawa has been successful to a limited extent in this application. The defendants have also had limited success.

[58] My refusal to strike out this proceeding should not be read as support for the ready use of litigation to solve difficult tikanga questions among iwi. Nearly 20 years of conflict over Māori fisheries allocation demonstrates that litigation can destroy relationships and cripple iwi economically, while making no difference whatever to the outcome – except perhaps delaying it. The fisheries litigation cost iwi millions of dollars in legal fees and almost a generation of lost opportunities for tribal development. It is not a model for dispute resolution that should be readily followed.

[4] [1975] 2 NZLR 592 (SC).

[59] I understand that there is a great deal at stake for each iwi in this case. By agreeing to the allocation process, iwi have placed great trust in their leaders. There will be enormous fear of failure and its consequences. Resort to litigation can sometimes be seen by kaitiaki as the 'tough' thing to do when the stakes are so high. But litigation has its own negative consequences. The people on the other side of the table resent being sued, making the necessary compromises even more difficult to achieve. In litigation, the process takes over. This reduces the level of control in the hands of the chiefs who should have it. It transfers power to lawyers and Judges.

[60] During the CNI land claims hearings, various claimants argued that in the 19th century the Native Land Court destroyed their wealth and their whanaungatanga partly because it was such an expensive, divisive and time consuming process. That argument was upheld. It would be tragic indeed if, having won the 19th century argument, iwi in the 21st century then repeated that history with the compensation.

[61] Open warfare over the allocation of Kaingaroa in the mainstream courts will be massively expensive just as the Māori fisheries litigation was. None of the CNI iwi can afford it. Those costs will be a tax on the mokopuna of the collective for years to come. It is understandable then that most iwi defendants argue the courts should have no role as a matter of law in the allocation of Kaingaroa whenua. But that misses the point, with respect. It is the constitutional role of this court to hear arguable cases, even if those cases are inconvenient. Judges cannot abdicate that function. It is iwi leaders who must choose to stay out of court. Judges cannot make that choice for them.

[62] No reirā ko the kai a te rangatira, he kōrero. E aku rau rangatira kei a koutou kē te mana whakatutuki i tenei kaupapa whakahirahira. Otirā ia, ma te kōrero me te wananga. Engari me ruia te manākitanga me te whanaungatanga ki runga ki nga kōrero, kia puta ko te kotahitanga.

[63] Kei te arahi koutou i te motu. Tena arahina mai. Hei aha te kooti!

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Williams J