Treaty of Waitangi settlements and the principle of non-interference with parliamentary proceedings – *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84

Dr Dean R Knight*

Published: [2019] Public Law 218-220

In *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, the Supreme Court of New Zealand said the courts should be less reluctant to assess the propriety of executive policy decisions intended to be implemented by legislation and signalled that the principle of non-interference in parliamentary proceedings should be applied more narrowly than in the past. In particular, the Supreme Court ruled that the courts could consider the rights and interests of iwi and hapū (Māori tribes) in relation to Crown-owned land where that land was intended to be transferred to other iwi and hapū in settlement of historic grievances under the Treaty of Waitangi; the fact the settlement and transfers were to be implemented by legislation did not, in itself, prevent the court from granting declaratory relief about the overlapping claims by iwi and hapū to that land.

For a number of years the government has been engaged in negotiations to settle historic grievances from iwi and hapū under the Treaty of Waitangi, often relating to the confiscation or improper acquisition of ancestral land by the Crown. These Treaty settlements usually involve acknowledgement of Crown wrongdoing, along with mix of cultural and commercial redress, such as the return of (or right to purchase) ancestral land. Settlement negotiations typically culminate in a settlement deed being agreed between the Crown and particular iwi or hapū, the terms of which are later implemented through legislation.

Overlapping claims from iwi and hapū to Crown-owned land in these Treaty settlement negotiations is especially acute and vexed in Tāmaki Makaurau/Auckland given the number of iwi and hapū and their competing interests, along with the scarcity and value of Crown-owned land in the region. A previous attempt to settle claims with Ngāti Whātua Ōrākei was revisited after the Waitangi Tribunal had ruled the Crown's approach to negotiations with it had been unfair to other iwi and hapū in the region. After negotiations reopened, the Crown sought to negotiate individual and collective settlements with iwi and hapū, with the intention that the collective settlement with all interested iwi and hapū would provide a mechanism for addressing the land subject to overlapping claims. Ngāti Whātua Ōrākei subsequently settled with the Crown and its settlement was implemented by the Ngāti Whātua Ōrākei Claims Settlement Act 2012. A collective settlement was agreed, amongst other things, providing a framework for the

* Senior Lecturer, Faculty of Law; Co-Director, New Zealand Centre for Public Law; Victoria University of Wellington (dean.knight@vuw.ac.nz).

shared exercise of rights of first refusal in relation to the Crown-owned land, and was implemented by the Ngā Mana Whenua o Tamaki Makaurau Collective Redress Act 2014. Subsequently, the Crown proposed to transfer some of the land subject to overlapping claims to other iwi and hapū (Ngāti Paoa and Marutūāhu Iwi Collective) in the course of their separate individual settlement negotiations, in both cases in settlements that would be implemented by legislation.

Ngāti Whātua Ōrākei objected to the proposed transfers and sought declaratory relief by judicial review. It sought declarations about its rights and interests in relation to the land, including its ahi kā (ongoing relationship establishing rights to the land) and mana whenua (customary authority) in relation to the land; consequentially, it alleged the government's decision to transfer this land to other iwi and hapū without resolving and respecting Ngati Whatua Ōrākei's rights and interests in relation to those properties would be unlawful.

The High Court and Court of Appeal struck out the claim as non-justiciable essentially because (a) the claim undermined the principle of non-interference with parliamentary proceedings; and (b) absent implementing legislation, the decisions would not affect Ngāti Whātua Ōrākei's rights. This reluctance to entertain challenges to Treaty settlements, where those settlements would be implemented by legislation, was consistent with a line of authority which emphasised the only impact on claimants' rights was as result of legislation and thus beyond the reach of the courts on judicial review.[1]

The Supreme Court allowed the appeal and remitted the claim back to the High Court for hearing, subject to striking out two aspects of declaratory relief and requiring the repleading of some other aspects of the declaratory relief.

Ellen France J, for the majority, said the lower courts were wrong to characterise the claim as merely as challenge to a legislative proposal to transfer the land or that the iwi would only be affected by the proposed legislation; there were 'live issues as to the nature and scope of the rights' that Ngāti Whātua Ōrākei should be allowed to pursue, 'in the usual way'.[2] In particular, the majority was concerned that the principle of non-interference with parliamentary proceedings had been cast too broadly, which they considered was not offended by most of the declaratory relief sought in the claim. The majority did not consider it was necessary to 'resolve the exact metes and bounds' of the principle but strongly doubted that the mere fact that a decision may, potentially, be the subject of legislation prevented judicial supervision of decision or advice leading up to that decision.[3] It is the function of the courts, the majority repeatedly noted, 'to make declarations as to rights'.[4] However, two aspects of declaratory relief which effectively challenged the legality of transferring the particular land by legislation, albeit based on some prior lack of process, were problematic; thus, claims that transferring the properties in this way was inconsistent with tikanga, the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples were struck out.

1 *Milroy v Attorney-General* [2005] NZAR 562 (CA) and *New Zealand Maori Council v Attorney-General* [2007] NZCA 269; [2008] 1 NZLR 318; cf *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181; *Te Ohu Kai Moana Trustee Ltd v Attorney*-General [2016] NZHC 1798; [2016] NZAR 1169.

2 *Ngāti Whātua Ōrākei,* at [48].

3 *Ngāti Whātua Ōrākei,* at [46].

4 *Ngāti Whātua Ōrākei,* at [34] and [46].

Elias CJ, in separate reasons largely in agreement but partly dissenting, even more strongly disapproved the apparent 'creep' in the principle of non-interference in parliamentary proceedings and would have reinstated all aspects of the declaratory relief. Any suggestion that it was inappropriate for the courts 'to determine existing rights or to declare what the existing law is where the executive has indicated it intends to ask Parliament to change the law', she said, was 'an unwarranted extension of proper principle'.[5] The Chief Justice was more forthright than the majority: as long as the court did not attempt to preclude parliamentary consideration of a matter, the 'determination of present right of itself' could not constitute an interference with proceedings in Parliament.[6] In other words, statements by the executive that the law would be changed did not mark out 'no-go areas' for the courts; unless Parliament changes the law, 'the courts must be open to citizens to seek to have their existing legal interests and rights determined'.[7]

So, the Supreme Court pushed back against attempts to shroud Treaty negotiations and settlements in the cloak of non-justiciability, merely because legislation might be in the offing. Yet, other than signalling that the principle of non-intervention in parliamentary proceedings must be applied more narrowly, the decision provides little clarity about the definitive limits of the principle, especially because the majority accepted there were times at which it might come into play. Lurking throughout both judgments, though, is a strong reflexive sense of the inviolable judicial function: the determination or declarations of 'rights', whether or not judicial intervention may or may not affect the legal order. The fact that the claim raised question of 'rights' was sufficient to catalyse judicial supervision and dispel arguments of non-justiciability and institutional comity. Yet, the rights in play in this case were not explored or developed in any detail beyond their characterisation as rights, perhaps due to the nature of the preliminary strike out application. But exposing the claimed rights – some of which were quite novel in this context – to judicial determination and declaratory relief will make for an interesting sequel.

5 *Ngāti Whātua Ōrākei*, at [104].

6 *Ngāti Whātua Ōrākei*, at [115].

7 *Ngāti Whātua Ōrākei*, at [116] and [119].