IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE **CIV-2023-485-614**

UNDER THE	**The Declaratory Judgments Act 1908**
BETWEEN	**TE OHU KAI MOANA TRUSTEE LTD, a company with its registered office at 158 The Terrace, Wellington, together with TE OHU KAIMOANA TRUST, a trust incorporated pursuant to s 33(2) of the Māori Fisheries Act 2004**
	Plaintiff
AND	**ATTORNEY-GENERAL on behalf of His Majesty the King in the right of New Zealand**
	Defendant

STATEMENT OF DEFENCE FOR THE DEFENDANT

7 November 2023

CROWN LAW
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The defendant by his solicitor says in response to the statement of claim dated 2 October 2023, that he:

1. In relation to paragraph 1:

    1.1 admits the plaintiff:

        1.1.1 is the successor to the Treaty of Waitangi Fisheries Commission (formerly the Māori Fisheries Commission);

        1.1.2 is the corporate trustee of Te Ohu Kai Moana Trust and was incorporated in accordance with s 33(2) of the Māori Fisheries Act 2004; and

    1.2 otherwise denies paragraph 1; and

    1.3 says further the plaintiff is a company with its registered office at Floor 12, 7 Waterloo Quay, Pipitea, Wellington.

2. Is not required to plead to paragraph 2.

3. Admits paragraph 3 and relies on the text of Te Tiriti o Waitangi/Treaty of Waitangi (**Te Tiriti/the Treaty**) contained in Schedule 1 of the Treaty of Waitangi Act 1975 in its entirety.

4. In relation to paragraph 4:

    4.1 admits that:

        4.1.1 there was uncertainty and dispute between the Crown and Māori as to the nature and extent of Māori fishing rights in the modern context and whether they derived from Te Tiriti/the Treaty or common law or both (such as by customary law or aboriginal title or otherwise) and as to the import of s 88(2) of the Fisheries Act 1983 (**1983 Act**) and its predecessors;

        4.1.2 Māori claimed in proceedings in the High Court and various claims to the Waitangi Tribunal that the QMS introduced by the Fisheries Amendment Act 1986 was unlawful and in breach of the principles of Te Tiriti/the Treaty, or had no application to Māori fisheries (including commercial fisheries), and obtained from the High

Court and Court of Appeal, by way of interim relief, a declaration that the Crown ought not take further steps to bring the fisheries within the QMS; and

4.2 otherwise denies paragraph 4; and

4.3 says further that:

4.3.1 s 88(2) of the 1983 Act, which provided that "Nothing in this Act shall affect any Maori fishing rights", was repealed by s 33 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (**1992 Settlement Act**);

4.3.2 s 89 of the 1983 Act was simultaneously amended by s 34 of the 1992 Settlement Act to enable the making of regulations "recognising and providing for customary food gathering by Māori and the special relationship between tangata whenua and places of importance for customary food gathering (including tauranga ika and mahinga kai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade";

4.3.3 ss 9 and 10 of the 1992 Settlement Act address the effect of the 1992 fisheries settlement on commercial and non-commercial Māori fishing rights and interests, respectively; and

4.4 relies on ss 9, 10, 33 and 34 of the Settlement Act in their entirety.

5. Admits paragraph 5 and relies on the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) for its content and meaning.

6. In relation to paragraph 6:

6.1 admits:

6.1.1 the Crown is a party to a Deed of Settlement dated 23 September 1992 (**Settlement Deed**) between the Crown and the Māori representatives listed in the Settlement Deed;

6.1.2 the contents of the preamble to the Settlement Deed summarised in paragraphs 6.1 to 6.4; and

6.2 says further Te Ohu Kaimoana is not a party to the Settlement Deed; and

6.3 relies on the Settlement Deed in its entirety, including as to its nature and character.

7. Admits paragraph 7 and:

7.1 says further that:

7.1.1 there was no Deed of Settlement recording the terms of the interim settlement reflected in the Māori Fisheries Act 1989, which was intended (among other things) to make better provision for the recognition of Māori fishing rights secured by Te Tiriti/the Treaty and to facilitate the entry of Māori into, and the development by Māori of, the business and activity of fishing;

7.1.2 the Settlement Deed and the 1992 Settlement Act supersede the interim settlement and fully and finally settle all claims directly or indirectly based on the rights or interests of Māori in commercial fishing; and

7.2 relies on s 9 of the 1992 Settlement Act in its entirety.

8. In relation to paragraph 8:

8.1 admits paragraphs 8.1 and 8.2;

8.2 otherwise denies paragraph 8; and

8.3 says further that:

8.3.1 ss 40 to 42 of the Māori Fisheries Act 1989 provided for the transfer from the Crown to the Māori Fisheries Commission (**Commission**) of 4 instalments of 2.5 percent of the then existing total allowable catches specified under ss 28C and 28CA of the Fisheries Act 1983;

8.3.2 s 41 of the Māori Fisheries Act 1989 allowed the Commission to postpone the transfer of quota until a later date and/or request the Crown to transfer an equivalent amount of money (**quota equivalent**);

8.3.3 s 42 of the Māori Fisheries Act 1989 authorised the Crown to transfer a quota equivalent to the Commission where sufficient quota was not available;

8.3.4 the Crown agreed by way of the Deed of Settlement to pay Māori $150 million (to purchase a 50 per cent interest in Sealords Products Limited) and to introduce legislation to amend the Fisheries Act 1983 to authorise the allocation of 20 percent of any new quota, issued as a result of the extension of the QMS to fish species not included in the QMS at the date of the Settlement Deed, to the Commission for distribution to Māori;

8.3.5 s 44 of the Fisheries Act 1996 (**1996 Act**) required 20 percent of the individual transferable quota for each stock declared by notice in the *Gazette* under s 18 of that Act to be subject to the QMS to be transferred to the Commission; and

8.4 relies on the provisions of the Māori Fisheries Act 1989, the Settlement Deed and 1992 Settlement Act, and s 44 of the 1996 Act, in their entirety.

9. In relation to paragraph 9:

9.1 repeats his pleadings at paragraph 8.3 and 8.4 above;

9.2 otherwise denies paragraph 9; and

9.3 says further that:

9.3.1 quota issued under the 1983 Act and 1996 Act is issued to its holder in perpetuity subject to the provisions of the applicable legislation; and

9.3.2 none of the Māori Fisheries Act 1989, the Settlement Deed, nor the 1992 Settlement Act guaranteed that Māori would continue to hold a particular proportion of quota over time.

10. In relation to paragraph 10:

10.1 has insufficient knowledge of the content or basis of the alleged implied term and therefore denies paragraph 10; and

10.2 says further that:

10.2.1 via the Fisheries Settlement, the Crown and Māori sought and achieved a just and honourable solution in conformity with the principles of the Treaty of Waitangi;

10.2.2 the provisions of the 1992 Settlement Act are to be interpreted in a manner that best furthers the agreements expressed in the Settlement Deed (1992 Settlement Act, s 3);

10.2.3 the 1996 Act is to be interpreted in a manner consistent with the 1992 Settlement Act (1996 Act, s 5);

10.2.4 there is no express term in the Fisheries Settlement that the Crown will maintain the honour of the Settlement consistent with its obligations under Te Tiriti/the Treaty; and

10.2.5 the Settlement Deed was confirmed to embody the entire understanding and the whole agreement between the Crown and Māori and cl 1.3 of that Deed extinguished, cancelled, and excluded any previous negotiations, warranties, representations, agreements, and statements (if any) whether express or implied (including any collateral agreement or warranty) with reference to the subject matter of the Deed and the intentions of the parties to the Deed, save Te Tiriti/the Treaty itself (Settlement Deed, cl 1.3).

11. In relation to paragraph 11:

11.1 has insufficient knowledge of the content or basis of the alleged implied term and therefore denies paragraph 11;

11.2 repeats his pleadings at paragraph 10.2.1 – 10.2.3 and 10.2.5 above; and

11.3 says further there is no express term in the Fisheries Settlement that the Crown will maintain the honour of the Settlement consistent with its obligations in tikanga.

12. In relation to paragraph 12:

12.1 has insufficient knowledge of the content or basis of the alleged implied term and therefore denies paragraph 12;

12.2 repeats his pleadings at paragraphs 10.2.1 – 10.2.3 and 10.2.5 above; and

12.3 says further:

12.3.1 there is no express term of the Fisheries Settlement to the effect that Maori would be permanently apportioned a fixed proportion of total quota under the QMS;

12.3.2 to the contrary, the capacity for reduction in quota holdings by operation of law:

(a) has always been inherent in the QMS, which Māori endorsed as a lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand (clause 4.2 of the Settlement Deed refers);

(b) was inherent in the QMS when the Fisheries Settlement was signed in 1992; and

12.3.3 it was an express term of the Fisheries Settlement that the quota Māori received under the Fisheries Settlement would be subject to the QMS, including those aspects of the QMS referred to at 12.3.2 (clause 3.2 and the First Schedule of the Settlement Deed refer); and

12.3.4 the pleaded implied term is inconsistent with:

(a) the express term of the Settlement Deed referred to at 12.3.3 above;

(b) ss 23 and 308 of the 1996 Act; and

(c) ss 147A and 147B of the Māori Fisheries Act 2004.

13. Admits paragraph 13 and relies on ss 32 to 35 of the Māori Fisheries Act 2004 in their entirety.

14. In relation to paragraph 14:

14.1 repeats his pleadings at paragraphs 6.2 and 13 above; and

14.2 apprehends that paragraph 14 contains an allegation of law to which he is not required to plead.

15. In relation to paragraph 15:

15.1 repeats his pleadings at paragraphs 8 and 9 above; and

15.2 admits that:

15.2.1 where the total allowable commercial catch (**TACC**) for any stock is increased under s 20 of the 1996 Act and any person holds preferential allocation rights for that stock (**28N rights**), s 23 of the 1996 Act requires the chief executive of the administering department to first deduct shares from existing quota holders in accordance with a set formula and reallocate those shares to the 28N rights holder(s) to discharge those rights;

15.2.2 no compensation for the reduction in quota shares is provided to the existing quota holders; and

15.3 otherwise denies paragraph 15; and

15.4 says further that:

15.4.1 s 28OE of the 1983 Act had the same effect, although quota was expressed in tonnes rather than shares, at the time the Settlement Deed was executed;

15.4.2 the Māori negotiators studied the QMS very carefully before deciding to settle their claims in return for quota; and

15.4.3 the capacity for reduction in quota holdings, including as a proportion of total quota holdings, has always been inherent in the QMS and was inherent in that system when the Settlement Deed was signed in 1992.

Particulars

(a) The QMS was introduced by the Fisheries Amendment Act 1986, which inserted new Part IIA into the 1983 Act from 1 August 1986.

(b) To facilitate the operation of the QMS, Part IIA of the 1983 Act provided for the allocation, in respect of particular species or classes of fish and quota management areas (**QMAs**), of:

(i) provisional maximum individual transferable quota (**PMITQ**), based on the actual commercial catches of that species or class of fish taken by individual fishers and/or their commitment to, and dependence on, the taking of fish or that species or class in that QMA (1983 Act, s 28E);

(ii) guaranteed maximum individual transferable quota (**GMITQ**), based on a pro rata reduction of all the PMITQ for a particular QMA to match the total allowable (commercial) catch for that area (1983 Act, s 28F); and

(iii) individual transferable quota (**ITQ**), which was allocated following the resolution of any appeals and necessary reductions of PMITQ (1983 Act, s 28O).

(c) PMITQ, GMITQ and ITQ were all expressed in tonnes.

(d) To facilitate the surrender of PMITQ to match the total allowable (commercial) catch, the Crown entered into voluntary agreements with fishers under s 28L of the 1983 Act (**buy-backs**).

(e) Where buy-backs were not sufficient to reduce the total PMITQ to the total allowable (commercial) catch for a QMA, the Director-General of Agriculture and Fisheries was required to reduce each fisher's PMITQ on a proportionate basis so that the total allowable (commercial) catch was not exceeded (1983 Act, s 28N).

(f) No compensation was payable for the reductions under s 28N (s 28N(3)) but, where the total allowable (commercial) catch for any QMA was subsequently increased, quota holders who had PMITQ reduced under s 28N and continued to hold ITQ for that species or class of fish in the same QMA were entitled to be offered (on a proportionate basis and free of charge) ITQ up to the amount of PMITQ that had been reduced (1983 Act, s 28T).

(g) Until the commencement of the Fisheries Amendment Act 1990 on 1 April 1990, an increase to the total allowable (commercial) catch did not entitle the holders of ITQ to any increase (additional quota had to be purchased; s 28T(3)), but any decrease in the total allowable (commercial) catch required the Crown to

compensate the holders of ITQ for any reduction (1983 Act, s 28D(4)).

(h) From 1 April 1990, the Fisheries Amendment Act 1990 changed the QMS to a proportional (tonnage) system.

(i) Under the amended system, quota holders who had been the subject of reductions of PMITQ under s 28N were entitled to be offered (on a proportionate basis and free of charge) ITQ (in tonnes) up to the amount of PMITQ that had been reduced (1983 Act, s 28OE(1)(a)).

(j) This resulted in a permanent change to the proportion of quota held by existing quota owners.

(k) Following the redemption of any 28N rights, the holders of ITQ received (free of charge) a proportionate share in any increase to the TACC (1983 Act, s 28OE(1)(b)) but also shared in any reduction (1983 Act, s 28OD(3)).

(l) Compensation for the loss of ITQ resulting from a decrease to the TACC was only payable during a transitional period between 1 October 1989 and 30 September 1994 (1983 Act, s 28OG).

(m) These changes were intended to allocate the benefits and risks of increases and decreases to the TACC to the holders of ITQ.

(n) The 1996 Act amended the QMS (from 1 October 2001) to a proportional (share based) system under which existing ITQ was converted to quota shares (1996 Act, s 343), with the sum of all quota for each QMA totalling 100 million shares and each share being equal to one hundred-millionth of the total allowable commercial catch for the stock (1996 Act, s 42).

(o) The Commission (and subsequently Te Ohu Kaimoana) was entitled to receive 20 million shares for any new stock introduced to the QMS (1996 Act, s 44).

(p) Under the proportional (share based) system, an increase or reduction of the TACC affects the Annual Catch Entitlement (**ACE**) generated by each quota share but does not generally impact the number of shares owned by each quota holder.

(q) But where the TACC is increased in a QMA in respect of which an existing quota owner had PMITQ reduced under s 28N of the 1983 Act, s 23 of the 1996 Act requires the chief executive of the administering department to deduct shares from existing quota holders in accordance with a set formula and reallocate those shares to the 28N rights holder(s) to discharge those rights.

(r) The deduction and reallocation of shares to 28N rights holder(s) under s 23 of the 1996 Act results in a permanent change to the proportion of quota held by existing quota owners (to the same extent as s 28OE of the 1983 Act).

(s) The extent of the impact of redeeming s 28N rights under s 23 of the 1996 Act, as for s 28OE of the 1983 Act, depends on the relative size of the 28N rights entitlement to the TACC.

(t) This means that where the TACC has been reduced to low levels, the subsequent redemption of 28N rights will have a larger impact on the shares of (other) existing quota owners.

(u) There are no instances in which the TACC for a stock with unredeemed 28N rights has been reduced to zero.

16. In relation to paragraph 16:

    16.1 admits that the effect of the redemption of 28N rights on the proportion of quota held by existing quota holders, including Māori, has been a source of contention for at least 20 years;

    16.2 otherwise denies paragraph 16;

    16.3 says further that the effect of the redemption of 28N rights on the proportion of quota held by existing quota holders, including Māori, has been the same since 1 April 1990 and was apparent from the terms of the legislation at the time the Settlement Deed was executed; and

    16.4 repeats his pleadings at paragraph 15 above.

17. In relation to paragraph 17:

    17.1 admits that a joint working group comprising 4 members from Fisheries New Zealand (a business group within the Ministry for Primary Industries) and 3 members from the Seafood Industry and Te Ohu Kai Moana was established in 2018 to:

        17.1.1 evaluate the impacts of honouring 28N rights on rights holders and the broader fisheries management system;

        17.1.2 examine potential option to resolve 28N rights, including the merits and shortcomings of the status-quo, mitigating options, or buy-back approaches; and

    17.2 otherwise denies paragraph 17; and

    17.3 says further that:

        17.3.1 the joint working group was established in the context of legal proceedings challenging proposals in 2018 to adjust catch limits for stocks with 28N rights attached;

        17.3.2 discussions by the joint working group regarding legal matters were expressly without prejudice to the parties; and

17.4 relies on the "28N Rights Policy Working Group – Terms of Reference" in their entirety.

18. In relation to paragraph 18:

18.1 admits that the redemption of 28N rights under s 23 of the Fisheries Act (and s 28OE of the 1983 Act before that) has had the effect of reducing the proportion of total quota held by Māori from the point at which such quota was first transferred or allocated to Māori under the Fisheries Settlement;

18.2 repeats his pleadings at paragraphs 15 and 17.3 above;

18.3 otherwise denies paragraph 18; and

18.4 says further that:

18.4.1 the draft report of the joint working group dated 25 November 2019 does not represent government policy and was prepared in the context of an attempt to settle the (then existing) dispute between the parties;

18.4.2 the draft report of the joint working group is expressly marked as confidential; and

18.4.3 for the avoidance of doubt, the Crown does not waive privilege in the draft report of the joint working group.

19. Apprehends that paragraph 19 contains a submission to which he is not required to plead but to the extent this paragraph pleads matters of fact does not understand and therefore denies the allegation.

20. In relation to paragraph 20:

20.1 admits that:

20.1.1 the responsible Minister has continued to make sustainability decisions, including reductions and increases to the TACC, for particular stocks in accordance with the provisions of the 1996 Act;

20.1.2 the Crown is aware of the impact of s 23 of the 1996 Act on other quota holders, including Māori; and

20.2 otherwise denies paragraph 20;

20.3 says further that the effect of the redemption of 28N rights on the proportion of quota held by existing quota holders, including Māori, has been the same since 1 April 1990 and was apparent from the terms of the legislation at the time the Settlement Deed was executed; and

20.4 repeats his pleadings at paragraph 15 above.

21. In relation to paragraph 21:

21.1 admits that any reduction in the proportion of quota owned by Māori (and other quota owners) caused by s 23 of the 1996 Act, and s 28OE of the 1983 Act, involves a financial loss compared to the hypothetical scenario where the TACC is increased without such a reduction;

21.2 otherwise denies paragraph 21; and

21.3 says further that:

21.3.1 the value of quota shares fluctuates depending on the ACE associated with each quota share, so that a smaller proportion of a larger total allowable catch may be of equivalent or greater value to a larger proportion of a smaller catch;

21.3.2 the effect of the redemption of 28N rights on the proportion of quota held by existing quota holders, including Māori, has been the same since 1 April 1990 and was apparent from the terms of the legislation at the time the Settlement Deed was executed;

21.3.3 the redemption of 28N rights was a known feature of the QMS endorsed by Māori under the Settlement Deed; and

21.3.4 Māori have substantially benefited, and continue to do so, from the totality of the benefits of the Fisheries Settlement of which shares of fish stocks in the QMS form part.

22. Denies paragraph 22 and says further that:

    22.1 s 28N(3) of the 1983 Act was explicit that no compensation was payable for reductions in PMITQ under that section; and

    22.2 the change to a proportional QMS in 1990 represented a trade-off under which quota owners would receive the benefits of any increases to the total allowable commercial catch (free of charge) while sharing the impact of any associated redemption of 28N rights, or reductions to the total allowable catch.

23. Apprehends that paragraph 23 contains an allegation of law to which he is not required to plead and otherwise denies paragraph 23.

24. In relation to paragraph 24:

    24.1 repeats his pleading at paragraph 11 above;

    24.2 apprehends that paragraph 24 contains an allegation of law to which he is not required to plead; and

    24.3 otherwise denies paragraph 24.

25. Apprehends that paragraph 25 contains an allegation of law to which he is not required to plead but to the extent this paragraph pleads matters of fact does not understand and therefore denies the allegation.

26. Is not required to plead to paragraph 26.

27. Is not required to plead to paragraph 27.

28. Repeats paragraphs 1-27 and pleads by way of affirmative defences:

FIRST AFFIRMATIVE DEFENCE: NO JURISDICTION TO MAKE THE DECLARATIONS SOUGHT

29. There is no jurisdiction under the Declaratory Judgments Act 1908 or the Court's inherent jurisdiction or otherwise to grant declarations:

    29.1 that the Fisheries Act 1996 is inconsistent with the Māori Fisheries Act 1989 or the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (which is, in any event, denied); or

29.2 that expressly or impliedly criticise the conduct of the Executive and Legislature in connection with the law-making process and purport to require the Executive and Legislature to promote and enact legislation, such as the relief sought in paragraph 26 (Parliamentary Privilege Act 2014 and the principles of comity and non-interference in the law-making process refer).

SECOND AFFIRMATIVE DEFENCE: SECTION 308 OF THE FISHERIES ACT 1996

30. Section 308 of the Fisheries Act 1996, which the defendant relies on as if set out in full, is a complete bar to:

30.1 the claim for relief sought at paragraph 26.4; and

30.2 any express or implied allegation to the effect that, as a result of the operation of s 23 of the Fisheries Act 1996, the defendant has:

30.2.1 breached the Settlement Deed;

30.2.2 committed a civil wrong; or

30.2.3 must or ought to pay compensation or damages.

THIRD AFFIRMATIVE DEFENCE: SECTION 9 OF THE TREATY OF WAITANGI (FISHERIES CLAIMS) SETTLEMENT ACT 1992

31. To the extent the allegations made by the plaintiff:

31.1 do not concern the interpretation of the Settlement Deed; and

31.2 are instead (expressly or by implication) allegations that:

31.2.1 the Crown has unfulfilled obligations to Māori in respect of commercial fishing; and/or

31.2.2 the benefits provided to Māori under the Māori Fisheries Act 1989, the Settlement Deed, or Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 in return for the full and final settlement of Māori claims in respect of commercial fishing were inadequate;

applying s 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, on which the defendant relies in its entirety, the Court does not have jurisdiction to hear or determine those allegations.

FOURTH AFFIRMATIVE DEFENCE (IN THE ALTERNATIVE): LIMITATION BY STATUTE AND/OR BY ANALOGY

32. In the event the Court finds the Settlement Deed does create rights or obligations the breach of which can sound in damages, that the Crown is in breach of those obligations, and that it has jurisdiction to make an order that the Crown ought to compensate Māori for losses arising from the operation of s 23 of the Fisheries Act 2003, the defendant says:

    32.1 the plaintiff pleads events dating back to 2009 as non-exhaustive particulars of the alleged financial loss that has been caused to Māori;

    32.2 this proceeding was not brought until 2 October 2023;

    32.3 the plaintiff has not been delayed in bringing proceedings by any mistake of fact or law or by any other reasonable cause;

    32.4 the plaintiff has not been suffering under any relevant disability;

    32.5 the defendant will be materially prejudiced in its defence by the plaintiff's delay;

    32.6 the relief sought at paragraph 26.4 is, or is tantamount to, a claim for monetary relief; and

    32.7 any claims regarding the loss particularised at paragraphs 21.1 and 21.2 of the statement of claim are therefore time-barred by the Limitation Act 1950 and/or by analogous common law/equitable doctrines.

This document is filed by Nicholai Christopher Anderson, solicitor for the defendant, of Crown Law.

The address for service of the defendant is Crown Law, Level 3, Justice Centre, 19 Aitken Street, Wellington 6011. Documents for service on the defendant may be left at this address for service or may be:

(a) posted to the solicitor at PO Box 2858, Wellington 6140; or

(b) left for the solicitor at a document exchange for direction to DX SP20208, Wellington Central; or

(c) emailed to the solicitor at Nicholai.Anderson@crownlaw.govt.nz provided that the documents are also emailed to James.Watson@crownlaw.govt.nz.