IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-614
[2024] NZHC 2521

BETWEEN	TE OHU KAI MOANA TRUSTEE LIMITED together with TE OHU KAI MOANA TRUST Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing: 14 August 2024

Appearances: V E Casey KC and A K Irwin for Plaintiff
M G Colson KC, J B Watson and R M Fistonich for Defendant

Judgment: 4 September 2024

JUDGMENT OF BOLDT J

This judgment was delivered by me on 4 September 2024 at 12pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors/Counsel:
Clifton Chambers, Wellington for Plaintiff
Te Tari Ture o Te Karauna | Crown Law Office, Wellington for Defendant

Introduction

[1] This case is about the Treaty of Waitangi Fisheries Settlement (the settlement). That settlement, concluded in 1992, was a landmark in the relationship between Māori and the Crown; it was the first "modern" settlement for Crown breaches of Te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty), and paved the way for many settlements to follow. It ended numerous pieces of complex litigation.

[2] In this proceeding the plaintiff, Te Ohu Kai Moana (Te Ohu), alleges the Crown is in ongoing breach of its obligations to Māori under the settlement. It seeks a series of declarations under the Declaratory Judgments Act 1908. It does not seek mandatory or substantive relief.

[3] In July I heard Te Ohu's substantive claim, though argument on some points was reserved for supplementary written submissions, the last of which were received on 22 August. My decision on Te Ohu's substantive claim is reserved, but in train.

[4] In the meantime, Te Ohu asks me to make an interim declaration which would restrict the Minister for Oceans and Fisheries' (the Minister's) power to make certain decisions under the Fisheries Act 1996. The Minister will shortly make decisions under ss 13 and 20 of the Fisheries Act setting the total allowable catch (TAC) and total allowable commercial catch (TACC) for the "Snapper 8" fishery (SNA8).[1]

[5] The volume of snapper in SNA8 has increased over the last few years. Fisheries New Zealand (FNZ) has advised the Minister that, due to this increase, it would be open to the Minister, if he wishes, to set the TAC and TACC for the 2024/25 fishing year at levels well above where they are now.[2]

[6] For reasons I will explain as briefly as I can, and will elaborate on in my substantive decision, any increase in the SNA8 TACC will result in the permanent

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1 SNA8 covers the whole of the west coast of the North Island. Except in places where it intersects with the Snapper 7 fishery, it stretches from the coast out to the boundary of New Zealand's Exclusive Economic Zone.

2 FNZ's advice to the Minister contains five options. One is the *status quo*, while the remaining four propose TACC increases for SNA8 of between 25 and 62.5 per cent. The 2024/25 fishing year begins on 1 October 2024.

loss, without compensation, of quota shares Māori received as part of the settlement. Those shares will be lost because of a statutory relic, originally enacted to allow the repayment of private debts the Crown incurred when it set up the quota management system (QMS) nearly 40 years ago.

[7] The section in issue is s 23 of the Fisheries Act. The rights that section recognises date back to s 28N of the Fisheries Act 1983, which was among the suite of provisions that established the QMS in 1986 (hence the reference throughout this judgment to "28N rights"). Section 23 of today's Act recognises a commitment the Crown made in 1986 to compensate fishing operators whose yields fell when the new regime required them to reduce their catches and fish sustainably.

[8] For reasons I explain in more detail below, Māori stand to lose a substantial, and valuable, block of their settlement quota if the Minister increases the SNA8 TACC; Māori stand to lose between 20 and 29 per cent of their SNA8 settlement quota, depending on the size of the increase he selects.

[9] Because the substantive proceeding is still undecided, Te Ohu asks me to intervene to stop the Minister from increasing the SNA8 TACC, at least in the absence of a promise to make good the inevitable loss Māori will incur if he does. Ms Casey KC, on behalf of Te Ohu, argues that a further loss of settlement quota will compound the harm Māori have sustained since they first began losing quota in the 1990s.

[10] The Crown has declined to offer any specific assurances in the event Te Ohu is ultimately successful in this proceeding. While Mr Colson KC, on behalf of the Attorney-General, assured the Court the Crown will respond appropriately and comprehensively to a (final) determination that the 28N regime breaches the settlement, it is unwilling to single out losses associated with the SNA8 decision as warranting particular redress.

Background

[11] The background to the proceeding is technical and complex. Though the outline that follows is lengthy, it touches only lightly on some important parts of the history.

Settlement quota

[12] The concept of "settlement quota" is an essential starting point. As a first step in settling the ongoing dispute between the Crown and Māori over commercial fishing rights, the Crown transferred four tranches of fishing quota to Māori between 1989 and 1992. Those transfers — roughly 2.5 per cent of existing quota each year for four years — were later enshrined as part of the 1992 settlement, meaning that by the end of that year Māori held around ten per cent of existing fishing quota. Those quota, along with a subsequent allocation of 20 per cent of quota in any new species entering the QMS after that date, came to be known as settlement quota.

The beginning of the QMS

[13] When it was established in 1986, the QMS was hailed as a world-leading response to the problem of overfishing and the consequent, and widespread, decline in commercial fish stocks. It was a genuinely innovative system — as a first step, the Minister worked out a sustainable level at which each species, in each quota management area (or fishery), could be fished. After making allowance for non-commercial fishing (for example, recreational and traditional interests), the Minister capped the allowable catch at that newly-estimated sustainable level. Fishing operators received individual transferrable quota (ITQ) which added up to the TAC. They could catch fish up to the level of their ITQ, but no more. Each year's TAC was (and still is) designed to ensure fish stocks are fished as fully as practicable while also ensuring the resource is sustainably preserved for the future.[3]

[14] One problem the Government faced when it established the system was determining who would receive ITQ, and in what amounts. At the dawn of the QMS, many fisheries were heavily overfished, and significant catch reductions were required

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3 Fisheries Act 1996, s 8.

to ensure they remained sustainable. SNA8 was one of them, as was its east coast neighbour, SNA1. That meant there were not enough quota for operators to continue fishing at their pre-QMS levels. As a simple example, if commercial operators in a fishery were catching 150 tonnes of fish, but the sustainable yield was only 100 tonnes, 50 tonnes of catch would have to be foregone.

[15] That change posed both a practical and political challenge for the Government of the day. Even as it set about curbing the endemic overfishing of the old system, it is apparent the Government did not want the reduced catch levels to hurt fishing operators financially. Instead of simply reducing the TAC to a sustainable level, and requiring operators to absorb a proportionate reduction in their catch, the Government decided that operators whose catch entitlements were cut deserved to be compensated.

[16] The Government came up with two options. The first was for operators to take a cash payout which corresponded to the reduction in their catch. That option had the advantage of simplicity, but created an immediate financial liability.

[17] To reduce its immediate financial exposure, the Government offered a second option. It has cast a long shadow. It is the present-day manifestation of the second option which means Te Ohu stands to lose quota shares if the Minister increases the SNA8 TACC.

[18] The second option was found in s 28N of the Fisheries Act 1983, enacted as part of the Fisheries Amendment Act 1986. Rather than taking an immediate payout, operators who selected this option received a deferred entitlement to future quota. In simple terms, if an operator who was required to reduce its catch by 10 tonnes selected this option, it would receive 10 tonnes in 28N rights. Those 10 tonnes would be shelved, and allocated to the operator, free of charge, in later years as increases in TAC permitted.

The evolution of the QMS

[19] In 1986, ITQ were a new form of property right, created by statute. They were calculated on a strict tonnage basis. Quota could be bought, borrowed, sold, leased and mortgaged. In some fisheries quota became immensely valuable. And the

Government's new-found power to create and sell quota was, at least in theory, a new source of Crown revenue.

[20] In the early days if the TAC in a fishery went up, the Crown could sell the new quota.[4] If it went down, the reduction in catch would (usually) be achieved by reducing the quota held by each operator.[5] In that event, the Crown would have to pay compensation "for the fair market value of the individual quota".[6]

[21] In those early years, if TAC went up and there were unredeemed 28N rights in the fishery, the new quota would go, free of charge, to the 28N rights-holders.[7] That free allocation meant the Crown was required to forego the revenue it would otherwise have gained from selling the quota, but in doing so it was slowly paying back the compensation debt it assumed when catch levels were reduced in 1986.

[22] From the perspective of other quota holders, 28N rights were benign. If TAC went up, some operators might receive new quota free of charge, but existing quota-holders lost nothing, apart perhaps from the opportunity to purchase quota if they wished. The only party that suffered actual loss was the Crown in the form of foregone revenue.

[23] Then things changed. I will discuss the reasons the system was overhauled in more detail in my substantive decision. For present purposes, it is sufficient to let McGechan J take over the narrative:[8]

> As a pleasant complication … there was a move in 1990 to so-called "proportional ITQ". The original scheme had envisaged ITQ as a property right, alteration of which would require compensation. If the TAC went up, and new ITQ became available, it would belong to the Crown, and could be sold. If TAC went down, the Crown compensated the holder. In 1990 there was a major philosophical change. The Crown decided to shift the biological risk, i.e. the risk TAC and thus ITQ might be reduced for conservation ("biological") reasons, over onto the industry. No longer would the Crown compensate. The *quid pro quo* would be that any increase in TAC, and therefore in ITQ, would go as a bonus to ITQ holders. No doubt financial

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4 Fisheries Act 1983 (as at 1 August 1986), s 28T(3).

5 Section 28D. There were other ways of achieving the reduction which are not material here but will be covered, for completeness, in the substantive decision.

6 Subsection (4)(a).

7 Section 28T(1).

8 *New Zealand Federation of Commercial Fishermen v Minister of Fisheries* HC Wellington CP 237/95, 24 April 1997 at 22.

> considerations played a significant part. Money was in short supply in 1990. There was also an arguable economic justification. With biological risk squarely on the industry, it would be more conservation conscious.

[24] The pre-1990 system for redeeming 28N rights depended on the Crown's ability to allocate newly-available quota to 28N rights-holds instead of selling it. The "major philosophical change" described by McGechan J meant the Crown was no longer in the business of selling new quota; existing quota holders reaped the benefit, or sustained the loss, when TACC levels fluctuated.[9] In light of that change, Parliament had to devise a new mechanism for the redemption of 28N rights.

[25] Either by accident or design, Parliament responded by extinguishing the Crown's contingent liability to 28N rights holders entirely, and assigning the debt to existing quota-holders. If TACC in a fishery with 28N rights increased, the increase would not go to quota holders, but to the 28N rights holders. The effect was that the new allocation came at the expense of existing quota holding rather than the Crown. Existing quota holders did not reap the benefit of increases in TACC until the 28N rights were exhausted.[10]

[26] The Crown offloaded its 28N debt without fanfare. Indeed, one of Te Ohu's principal contentions is that the change was made so stealthily that nobody outside the Ministry of Fisheries realised it was happening. Catch entitlements fluctuated from year to year and the process by which they did so, back then, was opaque. The Crown did not publicise 28N redemptions or emphasise that they were being made at the expense of existing quota holders. Te Ohu alleges it was only after 2001, when the system became more transparent, that it realised it was losing settlement quota year on year.

[27] The Fisheries Act 1996, which came into force in 2001, replaced the proportionate-tonnage quota system with a system of shares. Every fishery was divided into 100,000,000 quota shares, which were allocated to quota holders in proportion to the share of quota they held beforehand. In other words, a fishing operator which held ten per cent of the quota in the fishery would receive 10,000,000

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9 Under the 1990s amendment, there was also a change in language from TAC to TACC when referring to fish stock subject to the QMS.

10 Fisheries Act 1983 (as at 1 April 1990), s 28OE.

shares. The volume of fish it could catch would depend on the TACC. An operator with 10,000,000 shares would receive an annual catch entitlement (or ACE) corresponding to ten per cent of the TACC. In a fishery with no 28N rights, its ACE would increase and decrease in line with changes in the TACC.

[28] It is different if there are unredeemed 28N rights in the fishery. As long as 28N rights remain unredeemed, shares, corresponding with any increase in TACC, are automatically allocated to the 28N rights-holder. And because the number of shares in each fishery always remains constant at 100,000,000, the rights-holder's shares are taken, without compensation, from existing quota-holders under s 23 of the Act. Settlement quota, which otherwise enjoy a number of special protections, are as vulnerable to being taken under s 23 as any other.

A hypothetical example

[29] Imagine two otherwise-identical fisheries — Fishery A and Fishery B. In each case the TACC is 100 tonnes and there are ten quota-holders, each of whom holds 10,000,000 shares. Each operator would receive an ACE of 10 tonnes, or ten per cent of the TACC.[11]

[30] In Fishery A, there was no overfishing at the time the QMS was established, so there are no 28N rights. If the TACC goes up to 125 tonnes in year two, each operator will receive a new ACE of 12.5 tonnes. If it drops to 80 in year three, each operator's ACE will fall to eight. And if it returns, in year four, to 100 tonnes, each operator will return to an ACE of 10 tonnes. Each operator retains its holding of 10,000,000 shares, irrespective of the changes in TACC.

[31] Fishery B, on the other hand, was heavily overfished in 1986, so there are 50 tonnes of outstanding 28N rights. For the sake of simplicity imagine those rights are held by a single operator.[12] As long as TACC remains constant at 100 tonnes,

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11 This is a deliberately oversimplified example, but it captures the essential operation of s 23, and the consequences of temporary fluctuations in TACC.

12 For ease of explanation, I am overlooking the requirement that, in order to redeem 28N rights, an operator must already hold *some* quota in the fishery; nothing turns on this.

nothing changes. Everyone continues to hold 10,000,000 shares and can catch 10 tonnes of fish.

[32] But if the TACC goes up to 125 tonnes in year two, the ACE for the existing quota holders will not increase to 12.5 tonnes, but will remain at 10. Instead, the increase is allocated to the 28N rights-holder. It receives the whole of the increased catch entitlement, and a corresponding tranche of quota shares. Section 23 of the Act provides that 2,000,000 quota shares will be permanently taken from each existing operator, and given to the 28N rights-holder.[13] Under this scenario, at the end of year two, the 28N rights holder will hold 20,000,000 quota shares, and the remaining quota holders will be down to 8,000,000 each.

[33] Further fluctuations in TACC make the anomaly even more apparent. If TACC drops to 80 tonnes in year three, the original quota holders' ACE will drop to 6.4 tonnes each (eight per cent of 80 tonnes), while the 28N rights-holder will be entitled to 16 tonnes (or 20 per cent).

[34] Now imagine TACC returns to 100 tonnes in year four. The "new" 20 tonnes of ACE will be allocated to the 28N rights-holder too. Despite TACC starting and finishing at 100 tonnes in this example, by the end of year four the original quota holders will be down to 6,400,000 shares (representing 6.4 tonnes of ACE) each, while the 28N right holder will hold 36,000,000 shares, and 36 tonnes of ACE. Most extraordinarily, if TACC in a fishery drops to zero, any subsequent increase will be allocated, in its entirety, to the 28N rights-holder. It could, in theory, end up with all the quota in a fishery, and existing quota holders could have their holdings extinguished entirely.

[35] As this example illustrates, redemption of 28N rights can have a capricious effect. The magnitude of changes to TACC, and the order in which those changes occur, become of critical importance. Share losses are permanent; they are not reversed if the TACC returns to its original level.

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[13] Fisheries Act 1996, s 23(1).

[36] As originally envisaged, 28N rights were only redeemed in the context of an expanding fishery, and existing rights holders were not prejudiced. The Crown missed out on revenue, but nobody's quota was permanently lost and nobody suffered economic harm. Now, fluctuations in TACC can wipe out large blocks of a fishing operator's holding.

[37] Today, quota holders, including Māori, risk steep losses. Parliament's attempt to adapt a system designed for a tonnage-based system to today's share-based QMS has produced a regime that is neither predictable nor proportionate. The potential for distortion is greatest if there is a large temporary reduction in TACC. If that occurs, it is possible for 28N rights holders to capture most or all of the fishery. The regime can produce a windfall for 28N rights-holders and decimate the holdings of other operators.

[38] For many longstanding operators, s 23 produces swings and roundabouts. They might surrender a few tonnes of existing quota and receive a few more tonnes as redeemed 28N rights. The losers are fishing operators who did not operate in overfished areas in the 1980s, or operators which did not exist when the QMS was established. Te Ohu Kai Moana is in the latter category.

[39] The difficulties associated with the 28N regime have been understood for many years, and the Ministry for Primary Industries has commissioned extensive policy work designed to address the anomalies it produces. In 2020 the then-Minister responded to the suggestion of a negotiated settlement by observing "sometimes it's best to just let the courts decide either way".

[40] As I will discuss in more detail in my substantive judgment, the Crown did not attempt to justify the operation of s 23 from a policy perspective. Mr Colson acknowledged its random and potentially arbitrary effect. The Crown's argument, in a nutshell, is that it is not for the Court, or Te Ohu, to comment on whether the system for managing 28N rights is just or fair. It is the law, and, Mr Colson submits, its essential features were the same in 1992, when the Crown and Māori reached their settlement, as they are today.

Positions of the parties

[41] Before discussing the application for interim relief, it is helpful to summarise the competing contentions in the substantive proceeding. They are useful in assessing the application for interim relief.

[42] In the substantive proceedings, Te Ohu asks for the following declarations:

(a) In allowing the 28N rights confiscations to occur the Crown is in breach of the Fisheries Settlement.

(b) The provisions of the Fisheries Act 1996 that allow the 28N right confiscations to occur are inconsistent with the Fisheries Settlement.

(c) To discharge its obligations under the Deed of Settlement and the Treaty the Crown is required to address the 28N rights anomaly.

(d) The Crown is obliged under the Fisheries Settlement to restore the lost 1989 settlement quota shares and compensate Māori for the losses arising from the 28N right confiscations.

(e) Such other declarations as the Court thinks fit.

The plaintiff

[43] Te Ohu's strongest submission is that the Crown has continuing obligations, pursuant both to the settlement and the Treaty, which the Fisheries Act as framed does not meet. While in many areas the exact nature of the Crown's obligation to Māori may be difficult to discern, it is straightforward in the area of commercial fisheries. If the Crown is meeting its obligations under the settlement, it is also meeting its obligations under the Treaty. Equally, a breach of the settlement inevitably implies a breach of the Treaty.

[44] If legislation, ostensibly designed to give effect to the settlement, fails to discharge the Crown's obligations, the Crown, as a signatory to the settlement and a

Treaty partner, is under an ongoing residual obligation, and a duty to provide appropriate redress.

[45] Te Ohu says the continuing expropriation of its settlement quota, as exemplified by the shares it will lose if the SNA8 TACC is increased, means the Crown's obligations under the settlement are not being honoured. It says that no one, on either side of the 1992 negotiations, contemplated that settlement quota would be stripped from Māori in years to come to repay a historic debt the Crown incurred to private fishing operators.

[46] Te Ohu produces evidence from Mr Whaimutu Dewes, who served on the interim Māori Fisheries Commission in 1989 and the inaugural Māori Fisheries Commission from 1990. He was a participant in the negotiations which led to the final settlement in 1992. He deposes:

> No one contemplated in 1989 or in 1992 that the Crown would or could use the 28N rights actually to take quota shares away from other quota holders to give to the 28N rights holders. And it was never anticipated that having agreed to apportion a minimum percentage of the fisheries resource to Māori, the Crown might then sometime in the future turn around [and] take part of that back again. I do not believe anybody in the settlement discussions — Crown or Māori negotiator[s] — contemplated such a thing. That would have undermined the whole point of the settlement, and it would never have been agreed to.

[47] Te Ohu submits that when the 1992 settlement is read as a whole, it is apparent the quota allocations were meant to provide Māori with a permanent stake in New Zealand's commercial fisheries, and the expropriation over time of a material part of the settlement quota means the law falls short of discharging the Crown's obligations under the settlement. It follows that part of the Crown's settlement obligation remains unfulfilled.

[48] At the same time, I understand Te Ohu to accept that some of the substantive declarations it seeks, as set out in paragraph [42] are untenable. For example, declaration (a) does not account for the distinct functions of the Crown, as the signatory to the settlement, and Parliament, which enacted s 23. Similarly, declaration (d) asks the Court to declare that the Crown is required to compensate Māori for losses sustained due to the operation of s 23. That declaration seeks to make the Crown liable in damages because a statute is operating as designed. Moreover, as

discussed in more detail below, s 308 of the Fisheries Act expressly protects the Crown from any finding that it has committed a civil wrong, and any award of damages, arising from the operation of s 23.

[49] Ultimately, I understand Ms Casey to agree that a declaration the Crown is in breach of its settlement obligations (and therefore its Treaty obligations) would be both consistent with the case as Te Ohu has framed it, and would not infringe the privative clauses in the Fisheries Act. It may be, if I reach that point, that the appropriate declaration might be couched in terms of residual obligations under the settlement, and made pursuant to Te Ohu's prayer for "such other declarations as the Court thinks fit".

[50] Ms Casey agrees that if a declaration along those lines were made, it would then fall to the Crown and Māori, as parties to the settlement and the Treaty, to craft appropriate redress for the breach the Court identifies. In the Court of Appeal's landmark decision in *New Zealand Māori Council v Attorney-General* (the *Lands* case), the ultimate decision — albeit secured by ongoing interim relief — was that it fell to the Treaty partners to devise a system which would safeguard Māori interests while allowing the State-Owned Enterprises Act 1986 to operate as intended.[14] Mr Colson agrees that if the final outcome of this proceeding is that the Crown is indeed in breach of the settlement, a comprehensive resolution will be required.

[51] Notably, the viability of that relief does not turn on the suspension of any particular transfer of settlement quota. Much has been taken already. Final relief for Māori, if a breach is ultimately established, will no doubt go well beyond preventing further loss.

The Crown

[52] The Crown responds to Te Ohu's claim in a number of ways. Four grounds of opposition are jurisdictional. First, it argues the Court cannot, or at least should not, make a declaration that s 23 of the Fisheries Act is inconsistent with the 1992 settlement. It argues that, for better or worse, s 23 is the law, and it is no part of the

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14 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 688.

Court's function to "criticise" an Act of Parliament as inconsistent with the Crown's settlement obligations.

[53] Second, the Crown argues that s 308 of the Fisheries Act expressly protects the Crown from a claim that any transfer of quota under s 23 breaches "any contract or arrangement relating to quota or annual catch entitlements" or shall be regarded as making the Crown guilty of a civil wrong. The section expressly protects the Crown from damages claims arising from the operation of s 23. It argues that Te Ohu's claim seeks to assert the Crown is in breach of a contract or arrangement, and (in substance if not in form) seeks damages as a result.

[54] Third, it argues the Crown's compliance with the settlement is non-justiciable. It relies on s 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act (the Settlement Act), which provides:

> **9 Effect of Settlement on commercial Māori fishing rights and interests**
>
> It is hereby declared that—
>
> (a) all claims (current and future) by Māori in respect of commercial fishing—
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> (i) whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise; and
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> (ii) whether in respect of sea, coastal, or inland fisheries, including any commercial aspect of traditional fishing; and
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> (iii) whether or not such claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal,—
>
> having been acknowledged, and having been satisfied by the benefits provided to Māori by the Crown under the Māori Fisheries Act 1989, this Act, and the Deed of Settlement referred to in the Preamble, are hereby finally settled; and accordingly
>
> (b) the obligations of the Crown to Māori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Māori in commercial fishing, or the

> quantification thereof, the validity of the Deed of Settlement referred to in the Preamble, or the adequacy of the benefits to Māori referred to in paragraph (a); and
>
> (c) all claims (current and future) in respect of, or directly or indirectly based on, rights and interest of Māori in commercial fishing are hereby fully and finally settled, satisfied, and discharged.

[55] Mr Colson argues that s 9 deems the Crown to have fully satisfied its obligations under the settlement, whether it has actually done so or not. He submits the effect of the section is that even a blatant breach of the settlement (if, for example, the law made provision for only five per cent of quota in new fisheries to be transferred Māori, instead of the promised 20 per cent) would be beyond the Court's reach; s 9 would deem the Crown to be fully compliant. He argues s 9 prohibits the Court from inquiring into or making findings with respect to any allegation of breach.

[56] Finally, the Crown argues Te Ohu's claim is barred by the Limitation Act 1950.[15] 28N rights have existed, in roughly their current form, since 1990. They were first discussed by the Court of Appeal in 1997. It argues Te Ohu's claim is "tantamount to" a claim for monetary relief, and is therefore time-barred.

[57] As to the merits of the claim, Mr Colson argues that s 23 does not appropriate quota in breach of the Crown's settlement obligations. He emphasises that *all* quota holders are equally liable to lose quota under s 23. The Act does not single out settlement quota for expropriation; s 23 is an equal-opportunity confiscator. It takes from Māori and non-Māori fishing operators alike.

[58] Further, the Crown argues that by 1992 the main features of today's s 23 were in place. While transfers under the 1990 amendment lacked the transparency of today's quota share system, by the time of the settlement the Fisheries Act provided that quota holders would lose catch entitlement because of the need to discharge unredeemed 28N rights. In other words, Māori received quota which, even as the law stood at the time, might be lost in favour of 28N rights holders. Mr Colson argues

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[15] It argues the actions giving rise to Te Ohu's complaint occurred before the Limitation Act 2010 came into force.

there is no term in the settlement, either express or implied, which promises quota allocations would be permanent.

[59] Finally, Mr Colson argues that quota are a statutorily-derived property right. As a creature of statute, quota are always subject to the twists and turns of the statutory scheme. There is no reason to single out this particular quirk for condemnation. Even leaving aside the fact the 28N regime existed in 1992, Māori could have had no expectation, when they entered the settlement, that the statutory regime would remain unchanged and entitle them to keep all their quota permanently.

Interim orders application

[60] In its present application, Te Ohu seeks an interim declaration that:

> Pending further order of the Court, … the Crown (via the Minister for Oceans and Fisheries) ought not to take any action under s 13 of the Fisheries Act 1996 that could affect settlement quota, without at the same time having safeguards in place to ensure that there is no permanent loss of settlement quota arising from the operation of s 23 of that Act as a result of such action.

[61] Though not in form an application for an injunction, the relief Te Ohu seeks is designed to restrain the Minister from proceeding with his SNA8 TACC decision (along with any other TACC decisions which might trigger the redemption is 28N rights). Te Ohu relies on r 7.53 of the High Court Rules 2016 — which allows a party to seek an interim injunction — "by analogy". It acknowledges r 7.53 does not apply on its face. By virtue of s 17 of the Crown Proceedings Act 1950, the Court may not issue an injunction against the Crown or an officer of the Crown. Instead, it may make "an order declaring the rights of the parties"; in this context declarations are made in the expectation the Crown and its officers will respect their terms.

[62] The wording of the declaration Te Ohu seeks is based on the interim order issued by the High Court, and substantively upheld by the Court of Appeal, in the *Lands* case. In that case, which concerned the transfer of Crown land to the newly-established state-owned enterprises, the High Court made an interim declaration that:[16]

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16 *New Zealand Māori Council v Attorney-General*, above n 14, at 649.

> … until further order of this Court or the Court of Appeal … the Crown ought not to take any further action that is or will be consequential on the exercise of the statutory powers contained in the State-Owned Enterprises Act 1986 to affect all or any of the assets the subject of any claim pursuant to any application to the Waitangi Tribunal filed on or before 31 March 1987.

[63] The Crown argues the analogy with *Lands* is inapt. In that case the plaintiff was seeking judicial review, and the declaration was an interim order issued under s 8 of the Judicature Amendment Act 1972.[17] The interim relief the New Zealand Māori Council sought in *Lands* was closely linked with the relief it sought in the substantive proceeding.

[64] Here, the Crown observes that Te Ohu is not seeking substantive relief with respect to the SNA8 fishery. The substantive proceeding merely asks the Court to make declarations setting out Te Ohu's legal rights under the settlement. In seeking to block the Minister from making his decisions without satisfactory safeguards, Te Ohu is effectively asking the Minister to indemnify it for the losses it will sustain if TACC increases.

[65] The Crown also argues *Lands* concerned the exercise of a bare power — the Minister was under no obligation to make a decision; he could decline to do so if he wished. In this case, the Minister has a broader set of statutory purposes he is required to consider. TAC and TACC decisions incorporate a broad range of interests, including the objective of utilising fish stock to the extent that can be achieved sustainably. A court-imposed halt to the Minister's decisions would prevent him from acting in accordance with that statutory purpose, would deprive the New Zealand economy of the benefit of an increased snapper catch and would immediately prejudice the 28N rights holders who stand to capture most, or all, of any new catch entitlement.

Discussion

[66] There is considerable doubt as to whether the court has the power to make an interim declaration under the Declaratory Judgments Act.[18] A declaration is, after all,

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17 Now expressed in s 15 of the Judicial Review Procedure Act 2016.
18 *Griggs v Attorney-General* [2021] NZHC 2913 at [42].

"a binding statement of right",[19] which may be appropriate even where other forms of relief, such as damages, are not available.[20]

[67] Te Ohu asks me to declare its rights under the settlement so it may seek substantive redress elsewhere. Given Te Ohu is not seeking substantive or mandatory relief as part of its substantive proceeding, it is difficult to discern a basis on which the Court might grant *ad hoc* mandatory relief.

[68] Moreover, I doubt the declaratory relief Te Ohu seeks in the substantive proceeding is compatible with an order restraining the Minister from acting. I doubt that even complete success in this proceeding would affect the Minister's power to make decisions under the Fisheries Act, even if further losses of settlement quota would cause additional damage the Crown will be required to address. This case is about determining Te Ohu's rights. The consequences of the declaration it seeks are beyond the scope of this proceeding.

[69] Interim relief and declaratory relief are usually regarded as incompatible. In *Coumat Ltd v Registrar-General of Land*, Gilbert J undertook a detailed survey of the law governing interim declarations.[21] He noted there is a long line of authority holding that an interim declaration is usually regarded as a contradiction in terms.[22] Declarations are, by definition, a final statement of a party's rights.

[70] That said, in *Sportsworld Society Incorporated v Shanahan*, Baragwanath J doubted that line of authority and observed it may be appropriate to make an interim declaration setting out the terms on which the Court would have granted an interim injunction if one were available.[23]

[71] Because of the importance of the issue, I have undertaken that exercise, applying the usual three-stage test for interim relief, namely an examination of whether Te Ohu has demonstrated a serious question to be tried, an analysis of the

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19 Declaratory Judgments Act 1908, s 3.
20 Section 11.
21 *Coumat Ltd v Registrar-General of Land* [2016] NZHC 1911, [2016] NZAR 1125.
22 At [26]–[31].
23 *Sportsworld Society Incorporated v Shanahan* (2005) 6 NZCPR 161 at [11].

balance of convenience, and an assessment of the overall justice of the case as a check.[24]

Serious question to be tried

[72] There is no doubt Te Ohu has demonstrated a serious question to be tried. At the risk of spoiling the suspense surrounding my substantive decision, I intend to reject the Crown's jurisdictional objections. The Fisheries Act, along with other legislation such as the Settlement Act and the Māori Fisheries Act 2004, commits the Crown to honouring the settlement. It is entirely appropriate for Te Ohu to seek declaratory relief if the statutory framework fails to give full effect to the promises the Crown made. A conclusion that terms of the settlement are not being fully honoured will not affect the operation of any existing statute; rather it will signal a residual, and presently unmet, settlement obligation.

[73] I read s 9 of the Settlement Act as a provision which protects the Crown from *further* Treaty-based commercial fishing claims, outside the scope of the settlement. The purpose of Settlement Act was to facilitate and implement the settlement; it was not designed, as the Crown appears to contend, to allow the Crown to breach its obligations with impunity.

[74] And this is not a claim for damages. The Limitation Act does not apply. In any event the Crown's breach, if there is one, is a continuing act; its obligations under the settlement are as binding on the Crown today as they were in 1992. It is, I am bound to say, regrettable that the Crown would seek to avoid judicial scrutiny of a highly arguable breach of its settlement and Treaty obligations by claiming Māori waited too long to bring their case, especially as the then-Minister essentially threw the issue to the courts in 2020.

[75] I regard the merits of Te Ohu's case as strong. While I have not yet reached a final view, Te Ohu has argued persuasively that the gradual repossession of settlement

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[24] *Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR at [30] citing *American Cynamid Co v Ethicon Ltd* [1975] AC 396 (HL); *Klissers Farmhouse Bakieres Litd v Harvest Bakeries Ltd* [1985] 2 NZLR (CA) at 142; and *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16, [2009] 1 WLR 1405 at [16]–[17].

assets is incompatible with an agreement designed to meet the Crown's obligations under the Treaty, and to provide Māori with a lasting stake in New Zealand's commercial fisheries. There is no evidence that anyone associated with the 1992 settlement understood or contemplated that settlement quota might be compulsorily reclaimed over time, still less that the confiscations would be made to satisfy a debt the Crown incurred to third parties in 1986.

[76] On the other hand, and to the extent it may be relevant to the present application, I do not consider Te Ohu has made a good case for declaration (d).[25] If there is a breach of the settlement, and accordingly the Treaty, the Crown acknowledges it will have to respond appropriately. But as already noted, the form that response might take is beyond the scope of this proceeding. I can do no more than declare a breach.

Balance of convenience

[77] I do not consider the balance of convenience favours the interim relief Te Ohu seeks. Leaving aside the disconnect between the interim declaration it seeks and the declarations it pursues in the substantive proceeding, an order restraining the Minister from making TAC and TACC decision would not be a proportionate response. It is true that Te Ohu stands to lose between 1.7 million and 2.4 million quota shares if the Minister increases the TACC. But those holdings, as substantial as they are, and as important as they are, represent between 1.7 and 2.4 per cent of the fishery. The balance of convenience does not favour disruption to the wider fishery because of an arguable dispute about a slice of that size.

[78] Moreover, there are many others whose interests would be harmed if I were to suspend the coming year's TACC decisions. Te Ohu stresses it has no quarrel with the 28N rights holders. 28N rights holders have waited patiently for nearly 40 years for their rights to be redeemed; none of this is their fault. Because of the magnitude of the increases the Minister is considering, SNA8's 28N rights-holders stand to gain between 20 and 24 per cent of the quota in the fishery.

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[25] See [42] above.

[79] The rights-holders are not before the Court, and would have every right to feel aggrieved if, after such a long wait, a dispute between the Crown and Te Ohu derailed their entitlement to a large share of a lucrative fishery.

Overall justice

[80] I dismiss the present application with some regret. I have every sympathy for Te Ohu's dismay at the prospect of still more settlement quota being lost; I agree its case is strong, and its desire to stop further harm is entirely understandable. But the breach, if there is one, has been going on for more than 30 years. If Te Ohu's case is ultimately successful, Mr Colson is right to note that a comprehensive response will be required. There will be much to put right, including any further losses that occur between now and final resolution of the claim.

[81] This case is confined to determining whether the Crown is in breach of the settlement and the Treaty. That said, at present I am not persuaded that even a proven breach of the settlement would render a TACC increase unlawful. The Minister proposes to apply the Fisheries Act as written. I am not persuaded the link between the arguable breach of the settlement and the exercise of lawful powers under the Fisheries Act is sufficiently strong to intervene.

[82] The breach, if established, arises because the Act does not meet the Crown's settlement and Treaty obligations. Resolution and redress may take any number of forms, but I am not convinced that interfering in the forthcoming round of TACC decisions is the answer, especially given the damage that would accrue to innocent third parties and the wider economy. Interim relief is discretionary, and I decline to order it here.

Final observations

[83] I have already noted my disappointment at some of the positions adopted by the Crown in this proceeding. Claims arising from possible breaches of the Treaty (or Treaty settlements) should not be met by technical defences. The Crown's professed confidence it is not in breach of its obligations is somewhat undercut by its determination to persuade me I should not even examine the question. If the Crown

is in breach of its obligations, it should be concerned about that, and anxious to put things right.

[84] It would be unwise for the Crown to ignore the possibility Te Ohu will ultimately be successful. Te Ohu has presented a very strong case. It follows that the Crown should at least be alert to the possibility of a declaration that the progressive loss of settlement quota breaches both the settlement and the Treaty, in a way which has resulted in long-term unfairness and harm to Māori.

[85] If that declaration is eventually made, Ms Casey is right to note that every fresh redemption of 28N rights will compound the breach. The Crown should consider itself on notice that that outcome, either in this Court or elsewhere, is a distinct possibility.

Result

[86] The application is dismissed. Costs are reserved and will be determined as part of the substantive proceeding.

Boldt J