A BREACH OF THE FISHERIES SETTLEMENT: *TE OHU KAI MOANA TRUSTEE LTD V ATTORNEY-GENERAL* [2025] NZHC 657, [2025] 2 NZLR 382

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The judgment of the High Court of New Zealand in *Te Ohu Kai Moana Trustee Ltd v Attorney-General* found that the Crown had breached the Fisheries Deed of Settlement by depriving Māori of fishing quota in order to pay debts to other fishing operators (so-called 28N rights holders). The judgment broke new ground regarding the enforceability of settlements for breaches of te Tiriti o Waitangi/the Treaty of Waitangi and could lead to significant compensation, although the Crown has appealed it.

1. Background

The case had a complex factual and legal background. New Zealand introduced a Quota Management System (QMS) for fisheries in 1986 to address overfishing. Fishing operators were allocated quota based on their catch history. The Government provided compensation to operators whose catch was cut. The operators were offered two options. The first was a cash payout. The second was to receive a deferred entitlement to future quota if and when the quota for the species was increased in the future. This was provided for in s 28N of the Fisheries Act 1983.

Originally, when the quota for a species was increased, the Crown could do what it liked with the new quota — for instance, auction it off. On the other hand, quota owners would receive compensation if the quota for a species was reduced. But the QMS was subsequently changed so that quota holders automatically received increases or decreases to their quota when the overall quota for a stock was increased or decreased. They no longer received compensation for reductions in quota.

The effect of this change was that 28N rights now came at the expense of other quota holders, rather than of the Crown. Quota holders would suffer the cuts when quota for a stock was reduced, but 28N rights holders would take priority for any subsequent increases in quota. Where there were significant falls and subsequent increases in the quota for a stock, existing quota holders – including Māori – could lose significant proportions of their quota share to 28N rights holders.

Te Tiriti o Waitangi/the Treaty of Waitangi was signed between the British Crown and Māori rangatira (chiefs) in 1840. Article 2 guarantees Māori, in the English version, "full exclusive and undisturbed possession of their … Fisheries … so long as it is their wish and desire to retain the same in their possession." In the Māori version, it guarantees Māori tino rangatiratanga over their whenua, kāinga and taonga. Sir Hugh Kawharu, in his widely-used English translation of the Māori version of te Tiriti, translates this as "the unqualified exercise of their chieftainship over their lands, villages and all their treasures".

The Crown's failure to consult with Māori regarding the introduction of the QMS resulted in legal proceedings and Waitangi Tribunal claims. This led to negotiations between the Crown and negotiators representing Māori. A Deed of Settlement (**the Deed**) was signed on 23 September 1992. The Deed provided for the Crown to allocate $150 million to the Māori Fisheries Commission to purchase a 50% stake in a major fishing company, Sealord, and to develop the Māori fishing industry. It also provided for 20% of quota for any new species introduced into the QMS to be provided to Māori, as well as providing for various other matters. Aspects of the Deed were given legal effect by the Treaty of Waitangi (Fisheries Claims) Act 1992 (the Settlement Act).

Te Ohu Kaimoana (the successor of the Māori Fisheries Commission) filed proceedings in the High Court seeking declarations that the impact of the 28N rights on Māori quota was a breach of the Deed, and that the Crown was required to address this breach and provide restitution and compensation.

2. The Court's reasoning

The Crown argued that the Deed was not legally binding and could not be enforced in the courts. It relied on the Court of Appeal's comments regarding the Deed in *Te Runanga o Wharekauri Rekohu v Attorney-General* ('*Sealords*'):[1]

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[1] *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 (CA) ('*Sealords*') 308.

> The deed is couched in the form of a legal contract and contains, especially but not only in cl 6, numerous provisions having that appearance. One of these, cl 1.2.5, is a severability clause designed to apply in the event of partial invalidity. Nothing in that clause or in the deed as a whole should be allowed to obscure the truth that the deed is a compact of a political kind, its subject-matter so linked with contemplated Parliamentary activity as to be inappropriate for contractual rights. At best the provisions for payments might be contractually enforceable, yet they are so associated with the rest of the deed that even that is doubtful.

In another case relating to a different Treaty settlement, the Court of Appeal had said:

> The settlement deed in this case is in the nature of a political compact, as were those in issue in the *Sealords* case and *Milroy*. The obligation of the Crown to introduce a Bill to give effect to the proposed settlement is an Executive act so closely tied to the parliamentary process that it would breach what Cooke P called the "established principle of non-interference by the Courts in parliamentary proceedings" if the Court were to issue a declaration that had the effect of deterring the introduction of the Bill. The combination of this principle and the essentially political nature of the settlement deed means that the issues relating to the settlement deed are not justiciable.[2]

However, Boldt J distinguished these cases on the basis they related to the position before the deeds of settlement had been implemented by legislation. His Honour stated:

> It was the Settlement Act and subsequent legislation which gave the settlement legal effect. In *Sealords* the Court of Appeal said the Deed meant nothing until it was enshrined in legislation; six weeks later legislation enshrining much of it in law came into force.[3]

Justice Boldt concluded:[4]

> …. the Court's conclusion the Deed was a political compact with no legal force lasted only until it was ratified by the Settlement Act. After that it was incorporated by reference into legislation, and, as I have concluded, continues to bind the Crown today.

The Crown argued that Te Ohu Kaimoana's claim was barred by s 9 of the Settlement Act, which provided:

> It is hereby declared that—
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> (a) all claims (current and future) by Maori 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
>>
>> (ii) whether in respect of sea, coastal, or inland fisheries, including any commercial aspect of traditional fishing; and
>>
>> (iii) whether or not such claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal,—
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>> having been acknowledged, and having been satisfied by the benefits provided to Maori by the Crown under the Maori 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 Maori 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 Maori 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 Maori 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 Maori in commercial fishing are hereby fully and finally settled, satisfied, and discharged.

[2] *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 [83].
[3] *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2025] NZHC 657, [2025] 2 NZLR 382 [118].
[4] Ibid [133].

However, Boldt J concluded that the purpose of this provision was to protect the Crown from fresh claims, not from claims that it had failed to comply with its obligations under the Deed.[5] His Honour rejected the Crown's submission that s 9(b) of the Settlement Act deemed the Crown to have met its obligations under the Deed regardless of whether it had actually done so,[6] observing: "The Settlement Act was designed to facilitate implementation of the agreements in the Deed, not to license the Crown to breach its obligations with impunity."[7]

The Crown also argued that Te Ohu Kaimoana was seeking to have a statutory provision declared inconsistent with the Deed. It said that this would breach art 8 of the Bill of Rights 1688 and the Parliamentary Privilege Act 2014. But Boldt J said that this mischaracterised the case: a finding that there was a breach of the Deed would not affect the operation of the statute and the breach could be rectified in various ways.[8]

Justice Boldt rejected the Crown's attempt to rely on a limitation defence or analogous common law and equitable doctrines. His Honour said that Te Ohu Kaimoana was not seeking damages, limitation statutes did not apply, the settlement had ongoing force, and the Crown's breach was a continuing act.[9]

Justice Boldt concluded his discussion of the Crown's affirmative defences with some critical observations on the Crown's approach to the litigation:[10]

> Credible claims the Crown has breached its obligations under the Treaty (whether in the form of a Treaty settlement or more generally) should not be met with technical defences. Treaty settlements are steps towards reconciliation, the restoration of mana[11] and the putting right of historic wrongs. They are too important, if a credible suggestion of breach emerges, to be resolved on anything other than their merits. If either party is non-compliant, it should be concerned about that and anxious to put things right.

The parties disagreed about whether the case was about private law or public law. Te Ohu Kaimoana presented it at a public law case based on the Settlement Act, while the Crown insisted it was a private law case based purely on the Deed.[12] The Judge agreed that it was fundamentally a public law case, but said that "the Crown's emphasis on the principles of private law has provided a useful cross-check on my approach to the Settlement Act and the agreement it was enacted to implement."[13] He concluded that both approaches led to the same outcome.[14]

In assessing whether the Crown had breached the Deed, Boldt J found that the parties had not turned their minds during the negotiations to how 28N rights would affect the quota share of existing quota holders[15] and that they had intended the allocations of settlement quota to be permanent.[16] He concluded that Māori would not have signed the Deed if it had spelt out that "settlement quota would also be subject to permanent confiscation without compensation in some fisheries…"[17] His Honour stated:[18]

> It follows that in the absence of any provision in the Deed which provided that settlement quota were subject to expropriation to meet the Crown's historic 28N obligation, both parties were entitled to presume the transfers would be permanent. If it were otherwise, Māori could have had no expectation that any of the other benefits they derived from the settlement would be permanent either. For an agreement like the 1992 settlement, which was designed to provide definitive resolution of a previously intractable dispute, impermanence and uncertainty would have been intolerable. Permanence is presumed in all agreements, but was essential in this one.

[5] Ibid [126].
[6] Ibid [127] and [147].
[7] Ibid [147].
[8] Ibid [138]-[140].
[9] Ibid [148]-[150].
[10] Ibid [152].
[11] "Mana" can be translated in various ways, including prestige, authority, control, power, influence and status: "Mana" *Te Aka Māori Dictionary* <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=mana> (accessed 23 July 2016).
[12] Ibid [153-[154].
[13] Ibid [157].
[14] Ibid [157].
[15] Ibid [172].
[16] Ibid [177].
[17] Ibid [184].
[18] Ibid [185].

The principles of te Tiriti o Waitangi/the Treaty of Waitangi, including the Crown's obligation of active protection of Māori interests, supported this interpretation of the Deed.[19] The Judge concluded that "[t]he obligation not to expropriate settlement quota without compensation continues to bind the Crown today."[20]

The Court declared that:[21]

(a) The Crown's obligation to transfer 10 per cent of existing fishing quota to Māori, initially created by the Maori Fisheries Act 1989, formed part of the 1992 fisheries settlement.
(b) Both parties to the settlement intended the transfer of settlement quota would be permanent, and that quota would not be compulsorily re-acquired from Māori without compensation.
(c) It is a breach of the settlement, and by extension the Treaty, for the Chief Executive to appropriate settlement quota from Māori under s 23 of the Fisheries Act 1996 without providing redress which preserves the value of the quota Māori acquired as part of the 1992 settlement.

Justice Boldt left the parties to negotiate how redress for the breach should be provided: this "is always a matter of negotiation between Treaty partners."[22] His Honour said that the Crown must provide redress that makes good the losses Māori … have sustained",[23] but he noted that there were many ways this might be done[24] and it did not necessarily require changes to the s 28N rights:[25] "If all else fails, the Crown and Māori may simply agree that monetary compensation will provide adequate redress."[26]

3. Comment

The High Court's conclusion that the Deed was legally enforceable has a wider significance for Treaty settlements. The legal enforceability of Treaty settlements was hitherto unclear, given the comments in earlier Court of Appeal judgments about deeds of settlement being political compacts. The Court's reasoning would apply equally to other Treaty settlements that have been given effect by statute. If the High Court's approach is upheld on appeal, it is likely to provide a precedent that will be relied on to challenge alleged breaches of other Treaty settlements. This could be a new frontier for Treaty litigation in New Zealand.

Justice Boldt's distinction between enforceability before and after statutory effect has been given to a settlement neatly distinguishes the previous case law on the enforceability of Treaty settlements, which had looked increasingly out of step with the contemporary Treaty jurisprudence of the New Zealand courts. However, this distinction still leaves questions to be answered. It remains unclear what the position is when only some provisions of a deed of settlement are incorporated into legislation, as is very common. In this case, Boldt J did not appear to regard the fact that only some provisions of the Deed were incorporated into legislation as affecting the conclusion that the Deed was now enforceable. However, the issue was not directly addressed and may only be resolved if and when a case is brought that squarely relies on provisions of a settlement that have not been incorporated into legislation. There is also the question of the enforceability of Treaty settlements that were never intended to be incorporated into legislation, although they are less common.

The reliance on statutory incorporation as a criterion for the enforceability of Treaty settlements has an appealing logic, but these unresolved questions suggest that it may be an oversimplification. It is not clear that it can explain why obligations that have not been incorporated in statute are enforceable or deal with the situation where the deed of settlement was never intended to be given statutory effect. Yet there is no good reason why the Crown should be able to breach such obligations without recourse. There is no question of comity or interference with parliamentary proceedings in such circumstances. Precluding legal recourse when the Crown has breached its obligations would be inconsistent with te Tiriti o Waitangi/the Treaty of Waitangi and its principles of good faith, active protection of Māori interests, and the provision of redress. The honour of the Crown, so often invoked in discussions of Treaty principles, requires that the Crown be held to its promises.

The statements in earlier cases have to be seen in the context of attempts to challenge the adequacy of Treaty settlements and prevent them from being implemented. A claim that the Crown has failed to comply with a settlement is very different to this, even if the obligation has not been given statutory effect. Some deeds or

[19] Ibid [186]-[187].
[20] Ibid [189].
[21] Ibid [198].
[22] Ibid [192].
[23] Ibid [140].
[24] Ibid [195].
[25] Ibid [140].
[26] Ibid [195].

provisions may be conditional on, or made in contemplation of, statutory effect being given to them and unable to be enforced until that is done. But this should ultimately be a question of interpretation of the deed or provision in question. Where the parties did not intend for a deed or provision to be given statutory effect, this should not be taken to mean that it is legally unenforceable.

If the Crown's appeal against the judgment is unsuccessful, it will remain to be seen whether redress is provided in the form of monetary compensation or by other means. Altering the provisions of the Fisheries Act regarding 28N rights may be difficult because of the promises made to 28N rights holders, so some form of compensation may be the most likely form of redress. This may require an ongoing mechanism in addition to payment for past losses, since it may be difficult to estimate the future impact of s 28N rights on Māori quota.