IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2018-485-000005
[2018] NZHC 1983

IN THE MATTER	of a proposed decision by the defendant to vest in Hokotehi Moriori Trust the land and all appurtenances thereon on Rēkohu/Wharekauri (Chatham Islands) known as the Taia Historic Reserve pursuant to the Reserves Act 1977
IN THE MATTER	of New Zealand Bill of rights Act 1990
IN THE MATTER	of the Declaratory Judgments Act 1908
BETWEEN	JOHN KAMO, MELODIE ERUERA-FRASER, MONIQUE CROON, STEPHEN TUUTA AND IWIROA WAIRUA being the trustees of the NGĀTI MUTUNGA O WHAREKAURI IWI TRUST Plaintiffs
AND	THE MINISTER OF CONSERVATION First Defendant
	HOKOTEHI MORIORI TRUST Second Defendant

Hearing: 19 July 2018

Counsel: T J Castle and T N Hauraki for Plaintiffs
G L Melvin and K Stone for First Defendant
P J Radich QC and A G Emanuel for Second Defendant

Judgment: 6 August 2018

JUDGMENT OF COLLINS J

PART I

INTRODUCTION

[1] Representatives of Ngāti Mutunga o Wharekauri Iwi Trust (Ngāti Mutunga o Wharekauri) seek declarations that, if the Minister of Conservation (the Minister) vests certain land with the Hokotehi Moriori Trust, the Minister will breach the rights of members of Ngāti Mutunga o Wharekauri affirmed by ss 18, 20 and 21 of the New Zealand Bill of Rights Act 1990 (NZBORA). The land in question is designated as an historic reserve under the Reserves Act 1977.

[2] The relevant sections of the NZBORA provide:

> (1) "*Everyone has the right to be secure against unreasonable* search or *seizure*, whether *of* the person, *property*, or correspondence or otherwise".[1]
>
> (2) "*A person who belongs to an ethnic*, religious, or linguistic *minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture,* to profess and practise the religion, or to use the language, *of that minority*."[2]
>
> (3) "*Everyone lawfully in New Zealand has the right to freedom of movement* and residence *in New Zealand*."[3]

[3] This judgment explains why I am declining to issue the declarations sought by Ngāti Mutunga o Wharekauri. I am not satisfied that its members' rights under ss 18, 20 and 21 of NZBORA will be breached by the vesting of the historic reserve land with the Hokotehi Moriori Trust.

[4] To explain my conclusions, I shall first set out the relevant background. I shall then set out the law governing declaratory judgments and the relevant provisions of the Reserves Act before explaining why the plaintiffs have not established that the

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1 New Zealand Bill of Rights Act 1990, s 21 (emphasis added).
2 Section 20 (emphasis added).
3 Section 18(1)(a) (emphasis added)..

provisions of NZBORA they rely upon will be breached if the Minister vests the land in question with the Hokotehi Moriori Trust. I shall then summarise my decision.

PART II

BACKGROUND

Taia

[5] The land at the centre of this dispute is called "Taia", the Moriori name for "coast". It is a 1,200 ha strip of land on the eastern seaboard of the largest of the islands in the Chatham Islands archipelago. The Moriori name for that island is Rēkohu, the English name is Chatham Island, and the Māori name is Wharekauri. I will refer to the island by its first name, Rēkohu.[4]

[6] The Pacific Ocean forms the eastern boundary of Taia. The western boundary is the Te Whanga lagoon, a large body of water that makes up approximately one-sixth of Rēkohu.

[7] Taia is a place of great spiritual and cultural significance for Moriori. It is a place where the first pou, or ancestral posts, were placed and where pre-European dendroglyphs – tree engravings – continue to survive on kōpi trees. Moriori call these tree engravings "rākau momori". The ecology of Taia is fragile. This fragility has led to significant conservation projects to preserve not only the cultural and archaeological taonga of the area, but also the fauna and flora of Taia.[5]

[8] Moriori arrived in Rēkohu from Eastern Polynesia approximately 800 to 1,000 years ago. There is evidence of some initial interaction between Moriori and Māori who, by this time, were occupying mainland New Zealand. From about the 15th

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4 As I understand it, there is no Moriori or Māori name for the Chatham Islands as a whole, so I will use the English name to refer to the islands collectively.

5 Ms Thorpe, an archaeologist, has explained in her affidavit the efforts that have been made by academic institutions and the Department of Conservation in close conjunction with Moriori and others connected with Rēkohu to research and preserve sacred Moriori sites on Rēkohu. Associate Professor Barber from the Department of Anthropology and Archaeology at the University of Otago has also explained the archaeological and conservation work that he has been associated with at Taia.

century to the early 19th century, however, Moriori occupied the Chatham Islands free from the effects of outside influences. Their isolation enabled Moriori to develop a pacifist society based upon a covenant of peace, known as "Nunuku's law", whereby any physical fighting had to conclude once blood was drawn.

[9] The lives of Moriori changed dramatically following the arrival of Lieutenant Broughton on the HMS Chatham in 1791, who claimed possession of the archipelago on behalf of the British Crown. By this time there were about 2,000 to 3,000 Moriori inhabiting Rēkohu and another smaller island in the archipelago.[6]

[10] European sealers and whalers started arriving in the Chatham Islands during the first decade of the 19th century. Some Māori sailed to Rēkohu from mainland New Zealand on vessels that took the first European inhabitants to the islands.

The arrival of Ngāti Mutunga and Ngāti Tama

[11] In the summer of 1832—1833, a Ngāti Mutunga chief visited Rēkohu. He returned to Wellington and told his and other Māori people about the unarmed peaceful people who occupied Rēkohu.

[12] In 1835, two shiploads of about 900 members of Ngāti Mutunga and Ngāti Tama arrived at Rēkohu. Despite having been invited by Moriori to co-exist peacefully, the new arrivals soon took full advantage of Moriori's pacifist principles. The events that unfolded almost destroyed the Moriori people. Those Moriori who were not killed by Ngāti Mutunga and Ngāti Tama warriors were enslaved. As a consequence, the Moriori population was reduced to less than 200 people within the next few decades.

[13] In his seminal book, *Moriori: A People Rediscovered*, the late Dr Michael King provides the following perspectives on what transpired following the invasion of Rēkohu by Ngāti Mutunga and Ngāti Tama:[7]

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6 Rangihaute, named Pitt Island by Lieutenant Broughton. Referred to by Māori as Rangiauria.

7 Michael King *Moriori: A People Rediscovered* (2nd ed, Penguin, Auckland, 2000) at 65 and 73—74.

> The Moriori were subject to different customary law, unacquainted with the conventions of Maori warfare and had not been exposed in recent decades to anything more brutal than individual hand to hand combat, which ceased when blood was drawn. Moreover, the victims of harsher conflict had nowhere in the Chathams to which they could escape. For them, this sequel to the Maori invasion had all the unreality, all the physical and psychic horror, that it might have had for non-combatants dropped into the same circumstances in the late twentieth century.
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> … the Moriori remnants were never reconciled to the events of 1835 and their aftermath. Their view of what had taken place was simple and unequivocal. Their mana whenua (which arose from at least half a millennium of occupation of Rekohu) had been ignored by the Maori, but had never been extinguished. They had not been defeated in fair contest, as they had not engaged in a contest. They had been dealt with neither as the owners of the islands, nor as the partners they had been prepared to be. Their offer to share the resources of Rekohu with those who were, after all, distant Polynesian kin, had been hurled back in their faces. They had been ignored, insulted, slaughtered and enslaved – brought to their knees physically, culturally and spiritually. But because they had neither broken Nunuku's injunction nor vacated their island, their own mana was intact.

[14] Mr Solomon, the Chairman of the Hokotehi Moriori Trust and a respected advocate of the interests of Moriori, has explained that by 1868 all Ngāti Tama and all but approximately 20 Ngāti Mutunga had returned to their ancestral homelands in Taranaki. By this time, although their numbers had been greatly depleted, the Moriori people formed the majority of the population of the Chatham Islands.

Native Land Court decision

[15] Crown confiscation of land in Taranaki in the 1860s encouraged some Ngāti Mutunga to remain on Rēkohu in order to gain title to land, albeit land that was far removed from their traditional territories. Judge Rogan, who sat on the Taranaki Compensation Court hearings, also presided over the Chatham Islands Native Land Court hearings in 1870. That Court appeared to accept the arguments of Ngāti Mutunga that they had acquired Rēkohu by conquest in 1835. The Native Land Court awarded Ngāti Mutunga title to 171,188 acres (97.3 per cent). At the same time, the Native Land Court awarded Moriori title to blocks comprising just 4,100 acres (2.7 per cent). Title to one of the Ngāti Mutunga blocks was issued in 1873 to four rangatira of Ngāti Mutunga. Encompassed within that title was the land that now comprises Taia.

Ownership of Taia in the 20th century

[16] Mr Parker, an historical researcher at the Crown Law Office, has provided an affidavit in which he traces the history of the legal title to the land that encompasses Taia. For present purposes, it is sufficient to note that in 1870 the land was leased to Mr Ritchie, a European settler. By 1886 the land in question had been transferred by Ngāti Mutunga rangatira to a Mr Hood, whose interest in the land was further divided and transferred to others in 1901. Mr Parker explains that over the following years a number of separate titles were issued in relation to the land that had been divested by Ngāti Mutunga, including the land that comprises Taia. Those who acquired titles included Mr Renwick, whose lands encompassed Taia. In 1955, the Crown acquired a large parcel of land, including Taia for the benefit of settlers. The Crown issued a deferred payment licence to Sunday Hough on 1 June 1955. Sunday Hough has been described in the evidence as a "highly respected senior kaumātua for Ngāti Mutunga on the [Chatham Islands]". He farmed the land that included Taia and obtained a certificate of title in his name for the property on 18 February 1974, after he had completed paying the Crown for the land. The same land was then acquired by Theodore (Ted) Hough, the son of Sunday Hough. A new title in the name of Ted Hough was issued in March 1987. Members of the Hough family have occupied the Taia lands in various capacities for almost 100 years.

[17] Sunday Hough and Ted Hough appreciated the historic and cultural significance of Taia for Moriori. This recognition led to Sunday Hough subdividing part of his land in 1974 and creating a 32 ha reserve called "Taia Bush Reserve" located in the middle of Taia. The Taia Bush Reserve, which has a number of rākau momori, was transferred to the Crown in 1976. The Crown continues to have possession of that reserve.

[18] In a letter dated 16 May 1988 sent to all residents of Rēkohu, Sunday Hough acknowledged Moriori as the tangata whenua of Rēkohu. He said that his efforts were designed to do "something to preserve some of the history of the Moriori". Ted Hough continued his father's tradition when he decided to sell Taia to the Crown as a reserve for Moriori. In a poignant statement, signed in November 2000, Ted Hough explained:

> Taia was known as a sanctuary for the early Moriori people.
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> …
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> The whole coast of Taia … on the seaward side, appears to be one continuous [Moriori] urupa. Many, many remains are scattered through the sandhills, exposed or partially exposed.
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> …
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> Artifacts have been discovered at various sites on the property. … These are held in a safe place to protect them from would be collectors. It is my belief that these artifacts are taonga to the property and will remain with whoever owns the property as their caretaker.
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> …
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> It is my belief that if Moriori had ownership of Taia they would be trustees, looking after the land for future generations as well as holding onto it in respect of past generations. Input into the management of areas of cultural significance, taonga, urupa and midden sites, their mana would be strengthened. By having the opportunity for free access to the land of their ancestors and a place available for all Moriori to stand upon, regardless of hapu, would help restore and enhance their spiritual wellbeing and sense of belonging. It would also give Taia back its status of being a Moriori sanctuary papa kainga.
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> It should not be forgotten that the most prized and treasured taonga are the bones and spirits of the ancestors that the land must be kept warm for future generations. An old saying "when we look at the water and the land, it is not just a tree or a hill, but our spiritual ancestors standing before us".
>
> Members of my family have been kaitiaki of this property for the best part of the last 100 years. John Renwick, my great-grandfather for approximately 45 years was followed by Fred Hough for six years, then my father Sunday Hough for approximately 30 years. I have been kaitiaki for the last 16 years and as current owner of Taia, now wish to offer the sale to Nga Whenua Rahui on behalf of Moriori, so that they may acquire the role, once again, as kaitiaki in their own right.

Waitangi Tribunal

[19] In 1988, Mr Solomon filed a claim in the Waitangi Tribunal in relation to the Chatham Islands on behalf of all Moriori. Ngāti Mutunga o Wharekauri unsuccessfully sought an injunction to try and stop the Waitangi Tribunal hearing the claim lodged by Mr Solomon.[8] After hearing that claim, and a related claim initiated

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8 *Te Runanga o Wharekauri Rekohu Inc v Waitangi Tribunal* HC Wellington CP118/94, 12 May 1994.

by Ngāti Mutunga o Wharekauri, the Waitangi Tribunal issued its report into Rēkohu in 2001.[9]

[20] The Waitangi Tribunal found that the awards made in 1870 by the Native Land Court in relation to Rēkohu were "indefensible" and "insufficient" for the future survival and development of Moriori.[10] The Waitangi Tribunal criticised the decision of the Native Land Court on the basis that it failed to take into account the continued ancestral occupation of Moriori. The Waitangi Tribunal found that, according to tikanga Māori, conquest was insufficient on its own to create and destroy customary title. Ancestral rights can survive conquest in latent form and may later fully revive or disappear with time. Equally, it was not the fact of conquest, but the post-conquest occupation, including the burying of ancestors, that created customary title. As the Waitangi Tribunal put it, "the chain of ancestral right had begun".[11] In fact, Moriori never relinquished customary title over the land, as they remained after the majority of Ngāti Tama and Ngāti Mutunga left. Equally, as Ngāti Mutunga did not intermarry with Moriori and did not bury their dead on the Chatham Islands until they had largely left, the Waitangi Tribunal concluded that they had "no [customary] right unless they could prove they were merely away [from Rēkohu] on business and intended to return".[12]

[21] The Waitangi Tribunal concluded the Native Land Court:[13]

> … aggrandised conquest and misunderstood the primacy of ancestral rights. The Treaty envisaged that customary interests would be respected and protected, but the court's rules and practices were such that the court was not an adequate tool for protecting customary interests.
>
> When customary interests conflicted, as they did in this case, or where custom was repugnant to justice or contrary to equity and good conscious, the Treaty envisaged that a just solution would be sought where that was required. The native land laws required a resolution of such conflict. But the Court was not an adequate agency for the task. Its terms of reference were too narrow, its rules were too simplistic, and it elevated conquest to an unnecessary degree at the expense of ancestral right-holders.

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9 Waitangi Tribunal *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wai 64, 2001).
10 At 174.
11 At 143–144.
12 At 145.
13 At 144.

[22] It is worth noting at this juncture that, while the Hokotehi Moriori Trust relies on the findings of the Waitangi Tribunal, it advances subtly different reasoning as to why the Native Land Court decision was flawed. It says that the Native Land Court ignored the fact Moriori had peacefully occupied Rēkohu for centuries before Māori arrived in force in 1835. It also ignored that Moriori had deliberately offered no resistance, meaning there had not been a war and they were never conquered.[14] Under tikane Moriori,[15] the Moriori people never lost their mana or customary authority over their lands because they never broke Nunuku's law.

[23] In any event, the findings of the Waitangi Tribunal are not accepted by Ngāti Mutunga o Wharekauri. It is its position that the Native Land Court properly recognised Ngāti Mutunga's mana whenua in relation to the Chatham Islands, and that it has at least an equal interest in Taia as Moriori.

[24] Mr McClurg, a member of Ngāti Mutunga o Wharekauri, has sworn an affidavit in support of the application for declarations. He explains that the purpose of his affidavit:

> is to provide the evidence necessary to expose what the Crown is proposing to do with the Taia land on Wharekauri (Chatham Island), which the Crown owns, and proposes to vest in a third party (a Moriori entity) in defeat of the plaintiffs' rights and interests in that Taia land.

[25] Throughout his affidavit Mr McClurg takes issue with the findings of the Waitangi Tribunal. For example, Mr McClurg explains "Ngāti Mutunga o Wharekauri … [is] the iwi holding mana whenua over all of Wharekauri (Chatham Island)" and that "Ngāti Mutunga have held mana whenua over Taia since 1835 and have never relinquished mana whenua". Mr McClurg reinforces this point when he says:

> The fact that Ngāti Mutunga o Wharekauri were the undisputed customary owners of Taia was recognised by the Native Land Court in 1870 when the first title to Taia was issued to Ngāti Mutunga o Wharekauri.

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[14] Mr Solomon explains that in March 1836 approximately 1000 Moriori gathered at the sacred meeting place called Te Awapātiki and after three days' debate made the conscious decision not to fight back against the invading Māori.

[15] Tikane is the Moriori equivalent of tikanga.

[26] At [53] to [56], I examine in further detail both Ngāti Mutunga o Wharekauri's and Moriori's claim to mana whenua over Taia.

Crown acquisition of Taia

[27] On 14 December 2001, the Crown agreed to purchase Taia from Ted Hough. Settlement occurred on 25 January 2002. Taia was then gazetted as an historic reserve under the Reserves Act on 23 May 2002.

[28] There is evidence that it was originally intended by the Crown and representatives of Moriori that the "control, management and administration" of Taia would be vested in Te Kotahi Moriori, a body representing two Moriori organisations that existed at that time, with the Crown retaining legal title to Taia. Te Kotahi has since been replaced by the Hokotehi Moriori Trust. There was, however, a level of uncertainty about the exact future legal arrangements concerning the vesting of Taia in the Hokotehi Moriori Trust. Those uncertainties led to various efforts being made to negotiate an agreement between the Hokotehi Moriori Trust and the Department of Conservation about the exact details of the vesting. The steps taken in the early stages after the Crown had acquired Taia included the Department of Conservation placing a notice in the Chatham Islands newsletter advising of the proposed vesting of Taia in the Hokotehi Moriori Trust. No objections or submissions were received following the advertisement of that proposal.

[29] A draft memorandum of understanding was then prepared setting out respective accountabilities and responsibilities of the Department of Conservation and the Hokotehi Moriori Trust. The first draft of that memorandum of understanding noted that although Ngāti Mutunga o Wharekauri had expressed concerns by letter in August 2002, they did not make a submission in relation to the proposal to vest after it was advertised in the Chatham Islands newsletter.

Objections of Ngāti Mutunga o Wharekauri

[30] In 2017, Ngāti Mutunga o Wharekauri communicated to the Minister its concerns and objections to the vesting of Taia in the Hokotehi Moriori Trust. The Minister then asked the Chatham Islands operations manager for the Department of

Conservation to engage with Ngāti Mutunga o Wharekauri to obtain any further information that it considered should be brought to the Minister's attention before a final decision on the vesting of Taia was made. In August 2017, Ngāti Mutunga o Wharekauri raised for the first time its concerns that the proposed vesting would amount to a breach of the NZBORA. The Minister later responded on 24 January 2018 inviting Ngāti Mutunga o Wharekauri to provide any further information on the value it associated with Taia. No further information was provided to the Minister or the Department of Conservation.

[31] Mr Kemper, a senior officer in the Department of Conservation, has explained in his affidavit that the memorandum of understanding between the Department of Conservation and the Hokotehi Moriori Trust is in its final form. It provides that the Hokotehi Moriori Trust will be responsible for "overall management decision making and for management of [Taia]", subject to certain provisos. Under the proposed vesting, the Hokotehi Moriori Trust will "lead decision making relating to cultural, historic, public access, tourism and other related use issues". The Director-General of Conservation will, subject to the Hokotehi Moriori Trust's agreement to annually planned activities, take a lead in ecological management and provide advice and assistance to the Hokotehi Moriori Trust in preparation of the management plan required by the Reserves Act.

[32] The evidence shows that the Department of Conservation and the Hokotehi Moriori Trust will consider the feedback received from other government departments and agree to any final changes before the Department of Conservation seeks cabinet approval for the memorandum of understanding. The Department of Conservation will then prepare a briefing for the Minister requesting a decision on whether to vest Taia with the Hokotehi Moriori Trust. Any information provided by Ngāti Mutunga o Wharekauri will be considered by the Minister in deciding whether to vest the reserve under s 26 of the Reserves Act.

Treaty Settlement negotiations

[33] Mr Solomon has explained that Moriori have been in Treaty settlement negotiations with the Crown since 2004, although there was a pause in these

negotiations between 2008 and 2016. An agreement in principle was signed between the Crown and Moriori in August 2017. The proposed vesting of Taia in the Hokotehi Moriori Trust is not part of the Moriori Treaty settlement negotiations.

[34] Mr McClurg explains that Ngāti Mutunga o Wharekauri is also in Treaty settlement negotiations with the Crown but, as far as I am aware, it has yet to sign an agreement in principle. Mr McClurg maintains that Taia should form part of the Treaty settlement negotiations and that:

> the proposal to vest Taia in a third party (Moriori) denies Ngāti Mutunga o Wharekauri its right and freedom to enjoy its cultural associations with that land; and amounts to an unreasonable seizure of [its] property".

PART III

THE DECLARATORY JUDGMENTS JURISDICTION AND THE RESERVES ACT

Declaratory judgments

[35] In the present case, the plaintiffs rely only upon the High Court's discretionary jurisdiction to issue a declaration, pursuant to either s 3 of the Declaratory Judgments Act 1908 or the Court's inherent jurisdiction. This is not a case in which Ngāti Mutunga o Wharekauri has sought to judicially review any decisions taken to date by the Crown. The applications for declarations are therefore not made in conjunction with the Court being asked to exercise its supervisory jurisdiction.

[36] The relevant provisions of s 3 of the Declaratory Judgments Act set a broad threshold for an application for a declaration. It relevantly provides:

> **3 Declaratory orders on originating summons**
>
> …
>
> Where any person claims to have acquired any right under any … statute, … or to be in any other manner interested in the construction or validity thereof,—
>
> such person may apply to the High Court … for a declaratory order determining any question as to the construction or validity of such statute, …

[37] The Supreme Court has explained in the following way the broad nature of the High Court's jurisdiction to grant declarations:[16]

> Declaratory judgments are available to make "binding declarations of right" whether or not "any consequential relief is or could be claimed". The effect of a declaratory order is to the same effect "as the like declaration in a judgment in an action". It is binding "on the person making the application and on all persons on whom the summons has been served, and on all other persons who would have been bound by the said declaration if the proceedings wherein the declaration is made had been an action". A declaratory judgment may be given "by way of anticipation with respect to any act not yet done or any event which has not yet happened". …

[38] The jurisdiction to make a declaration is discretionary. The High Court may refuse to issue a declaration "on any grounds which it deems sufficient".[17] Despite the breadth of the statutory language describing the High Court's discretion to issue a declaration, any decision to either issue or not issue a declaration would be amenable to challenge on appeal if the decision was made after taking into account irrelevant factors or failing to take into account relevant factors, was wrong in principle, or was otherwise plainly wrong.[18]

[39] Declaratory relief will not be considered appropriate where purely hypothetical issues are raised and where the answer to those issues would not affect any existing or future rights.[19]

[40] Particular care is required when an application for a declaration is predicated upon unresolved facts. This does not mean that factual issues can never be determined in a declaratory judgment proceeding. "[I]t is clear that in order to determine the rights of parties, the courts regularly determine facts and regularly grant declarations on factual questions."[20]

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16 *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [8], citing Declaratory Judgments Act 1908, ss 2, 4, 5 and 9 (citations omitted).

17 Declaratory Judgments Act 1908, s 10.

18 See *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

19 *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong* [1970] AC 1136 at 1158 per Lord Diplock; and *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA).

20 Lord Woolf and Jeremy Woolf *Zamir & Woolf: The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at [3-38]; *Ambrose v Attorney-General* [2012] NZAR 23 (HC) at [35]; and Declaratory Judgments Act 1908, s 2.

[41] In cases, however, where a factual issue arises that is directly relevant to determining the applicant's rights, and where that factual issue cannot be resolved, then there will be no basis for the Court to exercise its discretion to issue a declaration.[21]

Reserves Act 1977

[42] The purposes of the Reserves Act include putting in place measures "for the preservation and management for the benefit and enjoyment of the public" of areas of New Zealand that possess "indigenous flora or fauna" or which are of "historic, cultural, archaeological, scientific, educational, or community value".[22]

[43] The purpose of an historic reserve is to protect and preserve "places, objects, and natural features" on or in the reserve that "are of historic, archaeological, cultural, educational, and other special interest".[23] Section 18(2) of the Reserves Act sets out further requirements for the administration and maintenance of an historic reserve. These include the requirement that the public shall have the freedom of entry and access to an historic reserve, subject to certain conditions or restrictions prescribed under the Reserves Act and such conditions and restrictions the body administering the historic reserve considers necessary for the protection and general wellbeing of the historic reserve and for the protection of the public using it.

[44] Where a reserve is vested in the Crown, the Minister may vest the reserve in a local authority or a trust "to hold and administer the land … for the particular purposes for which the reserve is classified".[24] Under s 26(2), land vested in an administering body is held on trust for the purposes of the reserve's classification, subject to special conditions and specifications that may be put in place.[25] Under s 26(3), before land is vested in an administering body, the Minister is required to give public notice of the

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21 See *Pouwhare v Kruger* HC Wellington CIV-2009-485-976, 16 July 2009 at [27]—[28]; *R v Sloan* [1990] 1 NZLR 474 (HC) at 482; and *Ambrose v Attorney-General*, above n 20.

22 Reserves Act 1977, s 3(1)(a).

23 Section 18(1).

24 Section 26(1).

25 Where a historic reserve includes any ancestral burial grounds of Māori, the Minister may grant the right to bury or inter the remains of deceased Māori in a specified place within the historic reserve: s 46(2).

proposed vesting and "give full consideration to relevant objections and submissions" that he or she receives.

[45] The Minister may cancel any vesting of land in an administering body if either the administering body agrees to the cancellation or if the Minister is satisfied that either a breach of trust by the administering body has occurred or the land is not being used for the purpose for which it was vested. If a cancellation occurs, the reserve revests in the Crown.[26]

[46] The administering body is required, within five years of the date of its appointment, to prepare and submit to the Minister for his or her approval a management plan for the reserve under its control, management or administration.[27]

PART IV

THE APPLICATIONS

[47] It is convenient to follow the path laid by the parties and deal first with the application for a declaration in relation to s 21 of NZBORA, and thereafter deal with the applications in relation to ss 20 and 18 of NZBORA.

Section 21 of NZBORA

[48] Ngāti Mutunga o Wharekauri maintains that if the Minister vests Taia in the Hokotehi Moriori Trust, then she will unreasonably seize its property in breach of s 21 of NZBORA.

[49] The submissions on behalf of Ngāti Mutunga o Wharekauri involved two courses. The first of those relied on the following four steps:

(1) Ngāti Mutunga o Wharekauri has mana whenua over all of Rēkohu, and therefore over Taia.

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[26] Section 27.
[27] Section 41(1).

(2) Mana whenua is a form of property under s 21 of NZBORA.

(3) If Taia is vested with the Hokotehi Moriori Trust, then the mana whenua of Ngāti Mutunga o Wharekauri in relation to Taia will be extinguished.

(4) The extinguishment of its mana whenua will be an unreasonable seizure of the property of Ngāti Mutunga o Wharekauri.

[50] The second course differed from the first by advancing the proposition that the mana whenua of Ngāti Mutunga o Wharekauri is also underpinned by its relationship with the Crown through the Treaty of Waitangi. This relates to its Treaty settlement negotiations, including its desire to achieve a settlement with the Crown in relation to Taia. Mr Castle, counsel for Ngāti Mutunga o Wharekauri, submitted that this aspect of his clients' mana whenua would also be extinguished if the Minister vests Taia with the Hokotehi Moriori Trust, and that this extinguishment of the mana whenua of Ngāti Mutunga o Wharekauri would involve an unreasonable seizure of its property.

[51] The case for Ngāti Mutunga o Wharekauri raises a number of novel issues that have not been tested in New Zealand courts. It is unfortunate that such important issues have been raised in the format of an application for a declaration and in the context of unresolved factual disputes concerning crucial points of difference between the parties.

[52] Ngāti Mutunga o Wharekauri's application in relation to s 21 is premised upon it having mana whenua over Taia, either directly (in respect of the arguments I have summarised at [49]) or indirectly (in respect of the argument I have summarised at [50]). The claim to mana whenua over Taia by Ngāti Mutunga o Wharekauri is firmly rejected by the Hokotehi Moriori Trust. The scope of the dispute between the two iwi/imi[28] in relation to this issue can be seen in the following summary of their respective positions.

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[28] The Moriori name for iwi is imi.

Ngati Mutunga o Wharekauri's claim to mana whenua over Taia

[53] Mr McClurg asserts that Ngāti Mutunga o Wharekauri acquired mana whenua by conquest in 1835 over all of Rēkohu, including Taia. Mr McClurg says it is significant that the Native Land Court recognised the mana whenua of Ngāti Mutunga o Wharekauri over Rēkohu when, in 1870, it initially awarded 97.3 per cent of the Chatham Islands to Ngāti Mutunga o Wharekauri. As part of the claim advanced by Ngāti Mutunga o Wharekauri, Mr McClurg says that he has been reliably informed that there is a Ngāti Mutunga o Wharekauri urupā at Taia, although he does not know its exact location.

[54] Support for the approach taken by Ngāti Mutunga o Wharekauri can be found in the writings of Sir Hirini Moko Mead, the author of *Tikanga Māori: Living by Māori Values*.[29] Sir Hirini explains that in assessing issues of mana whenua in a particular rohe:

> … one has to strip away the layers of interest and eventually reach the point of identifying who had political authority and control over the land, and control of it in 1840.

[55] Ngāti Mutunga o Wharekauri have developed the "Mead framework" to explain their claim to mana whenua over Taia. The key elements of that analysis are:

(1) Ngāti Mutunga o Wharekauri established itself and secured mana whenua through conquest in 1835.

(2) Ngāti Mutunga o Wharekauri rangatira married Moriori women and assimilated them into the iwi. Other Moriori were also assimilated into Ngāti Mutunga o Wharekauri.

(3) Ngāti Mutunga o Wharekauri occupied Rēkohu, and constructed a pā, as well as other sites of occupation.

(4) Over time urupā were established over Rēkohu.

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[29] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003).

(5) Ngāti Mutunga o Wharekauri "embraced" Rēkohu, took charge of it and sowed its cultural identity on the island, including the naming of sites using Māori place names. Ngāti Mutunga o Wharekauri say it now identifies various taniwha on Rēkohu, who act as kaitiaki of its people.

(6) The boundaries of the rohe over which Ngāti Mutunga o Wharekauri asserts as mana whenua are defined by the shores of Rēkohu.

(7) Other iwi recognised Ngāti Mutunga o Wharekauri and it continues to be a recognised viable iwi on Rēkohu and the mainland. It has approximately 1,300 registered members.

(8) At the time of the signing of the Treaty in 1840, Ngāti Mutunga o Wharekauri was part of the Māori nation. In due course, it became a Treaty partner of the Crown.

(9) In 1870 the Native Land Court recognised that Ngāti Mutunga o Wharekauri had mana whenua over the Chatham Islands, including Taia.

The Moriori claim to mana whenua over Taia

[56] The Hokotehi Moriori Trust firmly rejects the claims by Ngāti Mutunga o Wharekauri that it has mana whenua over the entire Chatham Islands let alone Taia. In his affidavit, Mr Solomon cites extensively from the findings of the Waitangi Tribunal and makes the following points:

(1) Ngāti Mutunga and Ngāti Tama did not conquer Moriori in 1835 as there was not a fair contest between two combating sides. The Māori who arrived in 1835 may have followed their customs when they killed and enslaved Moriori but they did not engage in a contest with Moriori, who were bound to follow Nunuku's law.

(2) Ngāti Mutunga o Wharekauri did not assimilate Moriori into their society. Within one generation of arrival almost all of Ngāti Mutunga and all of Ngāti Tama had returned to Taranaki to assert their claims to ancestral lands in that region. By 1870, Ngāti Mutunga had been in the Chatham Islands for just one generation and had effectively left.

(3) According to Mr Solomon, "there is only one known instance of a marriage between a Māori man and a Moriori woman in the first decades following 1835". Rather than assimilate with Moriori, those Māori who remained on Rēkohu treated Moriori as inferior "paraiwhara".[30]

(4) It takes time for conquest to become legitimate in accordance with tikanga Māori. It usually takes three generations of continuous occupation for there to be a genuine conquest and assertion of mana whenua.

(5) There is no evidence to support Ngāti Mutunga o Wharekauri's claim to having identified taniwha at various places on Rēkohu. On the other hand, "Moriori have and retain ancestral deities over every square inch of Rēkohu [and the other islands in the archipelago]".

(6) The Waitangi Tribunal found that "on Rēkohu, in 1840, Māori had none of the elements to achieve an ancestral right, by incorporation, by intermarriage, or by maintaining control and burying their dead on the land over some generations".[31]

(7) Māori did not establish themselves at Taia. There was no Māori settlement or evidence of any Māori, other than the Hough family, living at Taia. Moriori, on the other hand, have continuously occupied Taia.

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30 Literally translated as "black fellas", a particularly derogatory term adopted from Europeans on sealing and whaling ships who used it to describe indigenous Australians.

31 Wai 64, above n 9, at 145.

(8) There is no evidence of any Māori urupā at Taia. Mr Lanauze, a trustee of the Hokotehi Moriori Trust who is of both Moriori and Ngāti Mutunga o Wharekauri descent, has explained in an affidavit that he has "walked over every square foot" of Taia and to his knowledge "there is no Ngāti Mutunga urupā on it". He says, if there was, he "would certainly know about it".

(9) As found by the Waitangi Tribunal, the Native Land Court's decision to award almost all of the Chatham Islands to Ngāti Mutunga rangatira was seriously flawed. The Native Land Court's decision, to the extent that it relied on the concept of mana whenua, can no longer be given credence.

[57] There are, however, some areas of agreement between those claiming mana whenua over Taia. For example, Mr Solomon unhesitatingly accepts that Ngāti Mutunga o Wharekauri is an iwi, just as Moriori are an imi. Mr Solomon also accepts that there are a number of Māori place names on Rēkohu. He points out, however, that many of the place names on Rēkohu retain their original Moriori names, such as Taia. Mr Solomon also points out that a number of locations throughout the Chatham Islands have European place names or names that are an amalgam of Moriori and Māori.

[58] I have set out in some detail the respective claims to mana whenua over Rēkohu, including Taia, in order to demonstrate how inappropriate it would be to issue a declaration that is predicated upon Ngāti Mutunga o Wharekauri having either direct or indirect mana whenua over Taia. The Hokotehi Moriori Trust strongly asserts the mana whenua of Moriori over Taia to the exclusion of all others.

[59] Both sides of the debate point to evidence and authoritative works that support their respective positions. The evidence that has been placed before me, however, has not been tested through cross-examination. This renders it very difficult to draw definitive conclusions where that evidence conflicts. It is also unfortunate that I have not had the benefit of hearing directly from any independent expert on mana whenua and how that concept may apply to the circumstances of this case.

[60] Ngāti Mutunga o Wharekauri calls in aid the decision of the Native Land Court in 1870, while the Hokotehi Moriori Trust relies extensively on the findings of the Waitangi Tribunal, whose report into Rēkohu continues to be disputed by Ngāti Mutunga o Wharekauri. While the findings of the Waitangi Tribunal would in normal circumstances be viewed as persuasive authority by this Court, I am placed in the invidious position of being asked to issue declarations concerning the meaning and effect of s 21 of NZBORA in the context of complex disputed historical facts and sensitive cultural and anthropological issues.

[61] It is Ngāti Mutunga o Wharekauri that has applied for a declaration based upon it having mana whenua over Taia. It has not, however, satisfactorily laid the factual foundation for the Court to issue the declaration that it seeks. The application based upon s 21 of NZBORA cannot therefore be issued.

[62] For the sake of completeness, I shall briefly address three legal issues that arise from the application for a declaration based upon s 21 of NZBORA.

Section 21 of NZBORA – property interests

[63] The first of those issues is whether s 21 applies to property interests. Mr Radich QC, senior counsel for the Hokotehi Moriori Trust, and Mr Melvin, senior counsel for the Crown, both submitted that s 21 is concerned with the protection of a citizen's privacy, and not directly with protecting property rights. Support for their proposition can be derived from at least six sources.

[64] First, the White Paper that provided commentary on the "search and seizure" right in the proposed Bill of Rights explained that the provision reflected established common law privacy principles that protected citizens from improper search and seizure.[32] The White Paper explained that:[33]

> The purpose of the bill is to apply … protection against unreasonable search or seizure not only to acts of physical trespass but to any circumstances where state intrusion on an individual's privacy … is unjustified.

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32 See *Entick v Carrington* (1765) 19 State Tr 1029.

33 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984—1985] I AJHR A6 at [10.152].

[65] Second, Parliamentary debates at the time NZBORA was passed include remarks about the absence of reference to property rights in the legislation.[34]

[66] Third, two bills to amend NZBORA by inserting an explicit guarantee of property rights were defeated at their Second Readings in 1998 and 2007 respectively.[35]

[67] Fourth, s 21 is situated in Part 2 of NZBORA under "Civil and political rights" and under the sub-heading "Search, arrest, and detention". As McGechan J observed in *Westco Lagan Ltd v Attorney-General*:[36]

> The reference to "civil and political" rights is neutral. The more immediate reference to "search, arrest, and detention", and context provided by associated sections is more telling. The portion of the act in which s 21 occurs goes on to deal with (marginal notes) liberty of the person, rights of persons arrested or detained, rights of persons charged, minimum standards of criminal procedure, retroactive penalties and double jeopardy, and right to justice. These go rather further (from s 24 on) than mere "bail, arrest, and detention" subject matters, but all focus plainly on prosecution and judicial process. It would be distinctly odd if the legislature had plonked provision intended to deal in a general way with seizure of property without compensation into such a matrix. I think there is a very strong likelihood the legislature did not so intend. That likelihood is increased by the absence of any clear provision as to seizure of property without compensation, despite the topic being canvassed in the preliminary White Paper …

[68] Fifth, NZBORA affirms New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).[37] The ICCPR does not provide a general guarantee against the deprivation of property.[38]

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34 See for example, (14 August 1990) 510 NZPD 3452 (W Kyd): "No view is taken on rights of property. Every well drawn constitution, such as that of the United States and the United Nations Bill of Rights, provides for rights of property, but that matter was not mentioned in the legislation".

35 New Zealand Bill of Rights (Property Rights) Amendment Bill 1997 (80-1), cl 2; and New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2005 (255-1), cl 4.

36 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [58].

37 New Zealand Bill of Rights Act 1990, Long Title.

38 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 17:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

[69] Sixth, in *Hamed v R*, the Supreme Court emphasised the privacy values that underpin s 21.[39] For example, the Chief Justice observed that "what constitutes 'search and seizure' and what is 'unreasonable' must be assessed in the context of the values underlying s 21".[40] The Chief Justice went on to say:[41]

> Section 21 protects personal freedom and dignity from unreasonable and arbitrary State intrusion. … The right protects privacy but, more fundamentally, it holds a constitutional balance between the State and citizen by preserving space for individual freedom and protection against unlawful and arbitrary intrusion by State agents. …
>
> … The values protected by s 21 are not simply property-based, as were the common law protections which preceded it. Rather, they provide security against unreasonable intrusion by State agencies into the personal space within which freedom to be private is recognised as an aspect of human dignity.

[70] Mr Castle submitted that s 21 applies to an unreasonable seizure of property. He gained some support for this submission from *R v Ngan*, in which Tipping J described the right under s 21 as comprising two parts:[42]

> The section protects citizens from unreasonable conduct on the part of state officials. Two interests are generally at stake. The first, which relates primarily to search, is the interest citizens have in being free from the prying eyes of state officials. The second, which relates primarily to seizure, is the interest citizens have in the security of their property and their uninterrupted possession of it. Hence the section requires that officials of the state do not by unreasonable search or seizure interfere with the property and privacy interests of citizens.

[71] Further support for Mr Castle's submission can be derived from *Wilson v New Zealand Customs Service*, in which Williams J held that the continued confiscation of several motor vehicles that had been seized by Customs officials violated s 21 of NZBORA.[43] This decision followed an earlier decision of the High Court in *Alwen Industries v Comptroller of Customers*, where a similar conclusion had been reached.[44]

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39 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.
40 At [10].
41 At [10] and [11] (citations omitted).
42 *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [60].
43 *Wilson v New Zealand Customs Service* (1999) 5 HRNZ 134 (HC).
44 *Alwen Industries v Comptroller of Customs* (1993) 1 HRNZ 574 (HC).

[72] For present purposes, it is sufficient for me to record that whilst, in *Hamed v R*, the Chief Justice and Blanchard J did describe the underlying principle of s 21 as being the protection of privacy, that was in the context of a search of land where the issue of direct property rights did not arise. While the Chief Justice did say "the values protected by s 21 are not simply property-based, as were the common law protections which preceded it", that statement must be read in context. The Chief Justice was making the point that an unreasonable search need not constitute a trespass. She was not saying that property rights are irrelevant to s 21. Additionally, Blanchard J also said, "the guaranteed right under s 21 reflects an amalgam of values: property, personal freedom, privacy and dignity".[45] These observations support the notion that both privacy rights and property rights may be engaged by s 21 of NZBORA.

[73] In my assessment, there is some merit in the submission that s 21 provides dual protection for property rights and privacy rights. To confine s 21 to the protection of privacy rights alone risks paying insufficient attention to Parliament's reference to "property" in the section and its decision to include the disjunctive word "or" between the words "search" and "seizure". While most cases to date focus on privacy rights, that is because they were decided in the context of law enforcement officers searching and seizing items located on or in property, rather than the seizure or confiscation of property by the state as a stand-alone measure.

[74] It is, however, unnecessary for me to reach any definitive conclusion on whether or not s 21 could ever apply to a case in which it is alleged that the Crown has unreasonably seized, or intends to unreasonably seize, an individual's land.

Section 21 of NZBORA – seizure

[75] The concept of seizure usually involves "the physical removal, or assumption of physical control over, a tangible item, whether permanent or temporarily".[46] In *Hamed v R*, Blanchard J made the following observations about the meaning of seizure:[47]

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45 *Hamed v R*, above n 39, at [161].
46 *Westco Lagan Ltd v Attorney-General*, above n 36, at [57].
47 *Hamed v R*, above n 39, at [150].

> Someone who places an object on land, and so knows where it is, is not searching for it when going to uplift it and is not seizing it when removing it again. It is not being removed from the possession of someone else, which is the essence of a seizure.

[76] Mr Castle did not provide any persuasive argument in support of his claim that the Crown was engaged in an act of seizing Taia, and could not do so because the Crown is currently in possession of Taia. Vesting Taia with the Hokotehi Moriori Trust will not involve the Crown taking Taia from the possession of another person or entity. Instead, the Crown intends to remove Taia from its own possession. That is the antithesis of a seizure.

[77] Mr Castle suggested that the conduct of the Crown in vesting Taia will involve it extinguishing the mana whenua of Ngāti Mutunga o Wharekauri in relation to Taia. If so, then that is a difficult argument to accept, as Mr Castle also submitted that while mana whenua can be recognised by the Crown or a court, they cannot confer or take away mana whenua, which is an inherent quality of the hapū or iwi that asserts mana whenua. Thus, Mr Castle's argument cannot be reconciled with the unique feature of mana whenua whereby, while the Crown may not recognise the mana whenua of Ngāti Mutunga o Wharekauri in relation to Taia, the Crown cannot quash or cancel the mana whenua of any hapū or iwi.

[78] Mr Castle may have been suggesting that the Minister would undermine, as opposed to extinguishing the mana whenua of Ngāti Mutunga o Wharekauri by vesting Taia in the Hokotehi Moriori Trust. If that was the argument that was intended to be advanced then, on the evidence before me, it is still difficult to identify any form of "seizure" under s 21 of NZBORA.

Section 21 of NZBORA – unreasonableness

[79] The evidence establishes that if the Minister does vest Taia with the Hokotehi Moriori Trust she will do so after considering submissions from Ngāti Mutunga o Wharekauri. The Minister will no doubt take into account the historical, cultural and anthropological information that I have traversed in this judgment and other relevant considerations. This aspect of the application for a declaration underscores why, in the context of this case, the proceeding is

misconstrued. It asks the Court to conclude that the Minister will be acting unreasonably if she vests Taia in the Hokotehi Moriori Trust in circumstances where we do not yet know all the factors she will take into account if she decides to vest Taia in the Hokotehi Moriori Trust.

[80] Thus, in addition to not satisfactorily establishing key factual requirements for a declaration under s 21, Ngāti Mutunga o Wharekauri cannot satisfy key legal requirements of s 21, namely that the Crown's actions will constitute an unreasonable seizure, regardless of whether or not property rights are engaged.

Section 20 of NZBORA

[81] Ngāti Mutunga o Wharekauri also applies for a declaration that the vesting of Taia will breach the rights of its members to enjoy their culture. This is a right conferred upon minority groups by s 20 of NZBORA.

[82] Section 20 replicates art 27 of the ICCPR and, as such, the interpretation of that article assists in understanding s 20. Both provisions protect members of a minority group in society from the denial of their right to enjoy their culture.

[83] While the right affirmed by s 20 is expressed in negative terms, the Crown is under an obligation to ensure that the existence and the exercise of the right are protected against denial or violation.[48]

[84] Not every interference with a minority group's right to enjoy their culture amounts to a denial of the right under art 27 of the ICCPR.[49] However, "any interference of significant magnitude is capable of being seen as a *pro tanto* denial of full enjoyment of the right".[50]

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48 Office of the High Commissioner for Human Rights *General Comment No 23: The Rights of Minorities (Art 27)* CCPR/C/21/Rev 1/Add 5 (1994) at [6.1].

49 *Lovelace v Canada* CCPR/C/13/D/24/1977 (1981) at [15].

50 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) at 408.

[85] As with the application for a declaration under s 21, Ngāti Mutunga o Wharekauri has failed to lay the evidential foundation required to engage s 20 in this case.

[86] While Ngāti Mutunga o Wharekauri has asserted mana whenua over Rēkohu in general, it has not satisfactorily demonstrated that it has mana whenua over Taia. Furthermore, it has not provided evidence of how the vesting of Taia with the Hokotehi Moriori Trust will deprive members of Ngāti Mutunga o Wharekauri of their right to enjoy their culture. There are two reasons for this conclusion:

(1) Ngāti Mutunga o Wharekauri does not take issue with Taia being an historic reserve. Even if Taia is vested with the Hokotehi Moriori Trust, its status as a historic reserve under the Reserves Act will remain exactly the same as it currently is.

(2) Following vesting, the management of Taia will continue to be subject to the relevant provisions of the Reserves Act, which includes the right of public access to Taia. While this in itself may not be a complete answer to Ngāti Mutunga o Wharekauri's claim that it will be denied the right to enjoy its culture, it is significant that it has not sought to challenge the creation of Taia as an historic reserve.

[87] Mr McClurg has raised the possibility of there being a Ngāti Mutunga o Wharekauri urupā on Taia. That is disputed by Mr Lanauze. If evidence does emerge of a Ngāti Mutunga o Wharekauri urupā on Taia, then I expect that Mr Solomon and members of the Hokotehi Moriori Trust will honour their promise to ensure that members of Ngāti Mutunga o Wharekauri can exercise their cultural rights and interests in relation to that urupā.[51]

[88] As Ngāti Mutunga o Wharekauri has not established that vesting Taia with the Hokotehi Moriori Trust will breach the rights of its members under s 20, it is not

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[51] There is also the additional safeguard of ministerial oversight for urupā recognised in the Reserves Act 1977, s 46(2): see above n 25.

necessary to consider whether any abridgement of the rights afforded by s 20 would be reasonably justified in terms of s 5 of NZBORA.

Section 18 of NZBORA

[89] The third declaration sought by Ngāti Mutunga o Wharekauri is to the effect that vesting Taia in the Hokotehi Moriori Trust would breach the rights of members of Ngāti Mutunga o Wharekauri to freedom of movement affirmed by s 18 of NZBORA.

[90] Mr Castle explained that if I could not issue declarations under ss 20 and 21, then there was no basis for me to issue a declaration under s 18. Notwithstanding that concession, I will briefly explain why Ngāti Mutunga o Wharekauri has failed to demonstrate any breach of s 18.

[91] The origins of the right to freedom of movement can be traced from the establishment of the Roman Empire, through art 42 of the Magna Carta to more recent affirmations of the right in art 13 of the Universal Declaration of Human Rights and art 12 of the ICCPR. At its most basic level, the right to freedom of movement assures citizens the freedom to move from one point to another within New Zealand. There is also a right to travel abroad and to re-enter New Zealand encompassed within the rights affirmed by s 18 of NZBORA. There are, however, numerous limitations to this right. The ability of the state to curtail the scope of movement of a person on bail and those on parole are examples of limits to the right to freedom of movement. The state may also limit freedom of movement during public health crises and civil emergencies. Private law remedies, such as those found in the laws of trespass and nuisance, can also significantly restrict the movements of a citizen onto private land.

[92] The vesting of Taia in the Hokotehi Moriori Trust will not change access to the land for members of Ngāti Mutunga o Wharekauri. As noted when dealing with the application in relation to s 20 of NZBORA, Taia is already an historic reserve under the Reserves Act. Once vested, the Hokotehi Moriori Trust will carry out the functions of the administering body in accordance with the Reserves Act, which includes the requirement that the public have freedom of entry and access to Taia.

[93] Access to Taia at some future time may be subject to limitations under the Reserves Act. It is, however, impossible to speculate at this juncture what restrictions, if any, might be put in place by the Hokotehi Moriori Trust and whether those limitations would be reasonably justified under s 5 of NZBORA.

[94] Accordingly, Ngāti Mutunga o Wharekauri has not demonstrated any breach of s 18 of NZBORA if the Crown vests Taia in the Hokotehi Moriori Trust.

PART V

SUMMARY AND DISPOSITION

Summary

[95] Ngāti Mutunga o Wharekauri has failed to satisfy the evidential requirements for issuing the declaration it has sought under s 21 of NZBORA. This is because it has not satisfactorily established its mana whenua over Taia or that any mana whenua it has will be extinguished if the Crown vests Taia in the Hokotehi Moriori Trust.

[96] Ngāti Mutunga o Wharekauri has also not satisfied key legal requirements of s 21 of NZBORA, namely that the Crown would engage in an act of unreasonable seizure by vesting Taia in the Hokotehi Moriori Trust, regardless of whether any property interests are engaged.

[97] Ngāti Mutuna o Wharekauri has failed to satisfy the evidential requirements for issuing the declaration it has sought under s 20 of NZBORA for the same reasons I have summarised at [95]. Nor has Ngāti Mutunga o Wharekauri demonstrated that vesting Taia with the Hokotehi Moriori Trust will deprive members of Ngāti Mutunga o Wharekauri of their right to enjoy their culture.

[98] Ngāti Mutunga o Wharekauri has also failed to satisfy the requirements for a declaration based on s 18 of NZBORA as the evidence does not establish any curtailment of the right of movement of members of Ngāti Mutunga o Wharekauri if Taia is vested with the Hokotehi Moriori Trust.

Disposition

[99] The applications for declarations are dismissed.

[100] The respondents are entitled to costs on a scale 2B basis. That is to be a single award, split between the two respondents, unless they reach a different agreement. This is a case that justified two counsel for each party.

D B Collins J

Solicitors:
Kahui Legal, Wellington for Plaintiffs
Crown Law Office, Wellington for First Defendant
Minter Ellison Rudd Watts, Wellington for Second Defendant