IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2022-485-264
[2022] NZHC 3001

BETWEEN	RYSHELL GRIGGS Appellant
AND	LEGAL SERVICES COMMISSIONER Respondent

Hearing: 1 November 2022

Counsel: F Geiringer for Appellant
C F J Reid for Respondent

Judgment: 16 November 2022

JUDGMENT OF CHURCHMAN J

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[1] This matter is an appeal by Ms Ryshell Griggs against a decision of the Legal Aid Tribunal, confirming decisions of the Legal Services Commissioner (the Commissioner), declining Ms Griggs legal aid.

[2] Ms Griggs appeals on the ground that the Legal Aid Tribunal (the LAT) erred in law by concluding that s 47 of the Legal Services Act 2011 (the Act) applies only to proceedings in the Waitangi Tribunal, as opposed to proceedings in other Courts that arise from, and directly relate to, proceedings before the Waitangi Tribunal. She seeks an order that her applications for legal aid in respect of proceedings before the Court of Appeal and the Supreme Court, that followed a High Court judicial review challenge to a decision of the Waitangi Tribunal, be granted. The sole issue in this matter is the proper interpretation of s 47.

[3] The Commissioner opposes the appeal, and submits that the Tribunal made no error of law.

Factual background

[4] Ms Griggs is currently in receipt of legal aid for a representative claim before the Waitangi Tribunal, on behalf of Ngāi Tūmapūhia-ā-Rangi Hapū (Wai 429). Ngāi Tūmapūhia-ā-Rangi Hapū are a hapū of Ngāti Kahungunu ki Wairarapa. Part of the claim is an unresolved application for resumption[1] of two blocks of land: the Ngāumu Forest, which is located in the centre of their traditional rohe, and the Pouākani Lands. Legal aid is available for representative claims before the Waitangi Tribunal pursuant to s 47 of the Act. This claim is a legally significant one as the Tribunal's resumption jurisdiction has seldom been exercised and there is much at stake for a number of parties.

[5] Mercury NZ Ltd, the Crown, and the Raukawa Settlement Trust sought judicial review of preliminary determinations of the Waitangi Tribunal relating to Ngāi Tūmapūhia-ā-Rangi's claim. Various parties appealed the High Court's judicial review decision, and Ms Griggs sought legal aid so as to be able to participate in those appeal proceedings. The reason that the three entities were involved in the judicial review proceedings is that one of the blocks of land in respect of which resumption was sought (the Pouākani Lands) was not in the traditional rohe of Ngāi Tūmapūhia-ā-Rangi Hapū, but is located in the central North Island and was in the traditional rohe of Ngāti Raukawa and Ngāti Tūwharetoa.[2]

[6] In the 1880s, the Crown had acquired legal ownership of the Pouākani Lands and in 1915, gifted the Lands to Wairarapa Māori in compensation for having taken ownership of Lake Wairarapa.

[7] In 1949, the Crown compulsorily acquired 787 acres of the Pouākani land under the Public Works Act for the purposes of the development of the Maraetai I and II power stations.

[8] Mercury NZ Ltd now occupies the 787 acres upon which the two power stations are located. The value of the land is said to exceed $600 million. The value

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1 "Resumption" is a process whereby the Waitangi Tribunal is authorised to order that lands transferred to State-owned enterprises should be returned to Māori ownership.

2 *Mercury NZ Limited v Waitangi Tribunal* [2021] NZHC 654, at [10].

of the Ngāumu Forest is said to be $200 million.[3] The stakes for all parties affected by the resumption application are therefore very high. Unsurprisingly, the applicants in the judicial review and subsequent appeal proceedings were all represented by senior and very experienced legal counsel. The High Court noted that there was no direct authority on the meaning of the relevant legislative provisions and that the arguments being advanced by the parties were critical to not only this resumption application but to resumption applications generally.[4]

[9] The High Court determined the various applications for judicial review on 30 March 2021, setting aside the preliminary determination, and remitting the matter back to the Waitangi Tribunal for reconsideration.[5] The Supreme Court subsequently granted leave for the appeals arising out of that decision to be heard, without first having been heard by the Court of Appeal.[6] The appeals were heard in February 2022, but judgment has not yet been released. Ms Griggs did not participate in the judicial review proceedings in the High Court, having been advised that legal aid funding was unavailable for such matters. She did participate in the Court of Appeal and Supreme Court proceedings and it is the decision of the LAT to decline her application for legal aid for those two appeals that is the subject of these proceedings.

[10] The funding sought by Ms Griggs was denied because the Commissioner's view was that the judicial review proceedings and subsequent appeals were not 'in respect of proceedings before the Waitangi Tribunal', a decision upheld by the LAT. The Commissioner took the view that s 47 applies only to proceedings in the Waitangi Tribunal, and not proceedings before other Courts that arise from, and are directly related to, those Waitangi Tribunal proceedings. The LAT agreed.

The LAT decision

[11] Ms Griggs' application for review of the Commissioner's decision in the LAT needed to meet the grounds of review specified in s 52(1) of the Act, namely that the decision was manifestly unreasonable or wrong in law. The issue was identical to the

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3 At [6].
4 At [30].
5 *Mercury NZ Limited v Waitangi Tribunal*, above n 2.
6 *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Limited* [2021] NZSC 134; and *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Limited* [2021] NZSC 183.

issue presently before the Court – whether the Commissioner's interpretation of s 47 was correct.

[12] In making its decision, the LAT stated:[7]

> The Tribunal agrees with the Commissioner that the intention of s 47 is clear from the text. Legal Aid is available, as an exception to the prohibition on such aid for representatives, for proceedings "before" the Waitangi Tribunal.
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> As the Commissioner notes, the requirement in s 47(3) for the Waitangi Tribunal to provide a report to the Commissioner containing certain information is a clear indication [that] Parliament expected the s 47 exception to be confined strictly to proceedings in the Waitangi Tribunal itself. Parliament cannot have intended that the Waitangi Tribunal should provide reports to the Commissioner concerning the grant of legal aid for proceedings in the general courts, particularly where the Waitangi Tribunal is being challenged in the general courts.
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> Neither the purpose of the Act (access to justice) nor the Treaty nor the agreement between the Crown and the New Zealand Māori Council can alter the plain wording of s 47(1). For the same reason, it is not relevant that the Supreme Court has granted leave, having accepted that the appeal raises an issue of public importance.
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> (footnotes omitted)

Positions of the parties

Ms Griggs

[13] Ms Griggs submits that the LAT's interpretation of s 47 is incorrect. She says that the judicial review proceedings are in respect of proceedings that are before the Waitangi Tribunal, and that therefore legal aid should be available. She says that the LAT's interpretation is inconsistent with the purpose of subpart 6 of the Act, which was introduced on the basis of an agreement by the Crown to fund claimants for resumption through legal aid. She says that:

> The narrow interpretation means that where a legally aided applicant for resumption succeeds, and the Crown applies for judicial review, the legally aided applicant could not participate in the High Court, but would still be bound by whatever the High Court says. That is an absurd outcome and cannot have been what Parliament intended.

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7 *Re Griggs* [2022] NZLAT 003 & 004 at [32]–[34].

[14] Ms Griggs submits that the LAT was wrong to conclude that the phrase "in respect of any proceedings before the Waitangi Tribunal" is unambiguous. She says the related proceedings arise directly from the Waitangi Tribunal proceedings, and have clearly had an effect on the task of the Waitangi Tribunal. They are therefore "in respect of" those proceedings.

[15] Ms Griggs submits that the use of the words "in respect of", is different to other parts of the Act. For example, s 6 provides that legal aid may be granted in respect of "criminal proceedings in the District Court, the Youth Court, the High Court, the Court of Appeal, or the Supreme Court". The same wording is used in s 7 in respect of civil proceedings. The words "in respect of" must therefore have a broader meaning.

[16] Ms Griggs submits that the ss 47(3) and 49 reporting requirements cannot be determinative, as there is no reason why the Waitangi Tribunal:

> …having already issued a report when the initial application for funding to pursue the claim was made – could not issue a further report on the proposed judicial review proceedings or appeals.

[17] She says that such a report results from a referral of the legal aid application by the Commissioner to the Waitangi Tribunal, to which the Waitangi Tribunal must respond. She says that no such referral was ever made by the Commissioner in the present case.

[18] Ms Griggs submits that the Commissioner's interpretation of s 47 is inconsistent with the purpose for which legal aid was made available for Waitangi Tribunal claims. Legal aid for Waitangi Tribunal claims was introduced by the Treaty of Waitangi (State Enterprises) Act 1998, which also created the resumption regime, by which the Waitangi Tribunal can recommend the return of land or State-owned Enterprises to Māori. That Act gave effect to an agreement between the Crown and the New Zealand Māori Council (the Lands Agreement), which included provision for legal aid for Waitangi Tribunal claimants. Ms Griggs submits that the purpose of these amendments to the Act was to ensure that Waitangi Tribunal claimants received legal aid to pursue resumption claims. She says:

> The parties to the Lands Agreement cannot have intended to have limited the availability for legal aid to pursue resumption only where those claims are

> before the Waitangi Tribunal, and not in directly related proceedings before the Senior Courts.

[19] She submits that the decision is in breach of the spirit of the Lands Agreement and is in conflict with Te Tiriti o Waitangi. She says that the Crown has judicially reviewed every successful resumption claim, and that given the potential value of the assets involved in resumption claims, this is likely to continue.

The Commissioner

[20] The Commissioner submits that a grant of civil legal aid is not available to any body of persons, except as provided by ss 10(1), 12(3) and 47. He submits that none of the exceptions apply to the current matter, as s 47 permits grants of legal aid in proceedings before the Waitangi Tribunal, which the judicial review proceedings are not. He submits that there is no error of law in the LAT's decision. The Commissioner submits that it is clear from the Act that Waitangi Tribunal claims are the subject of a tailored regime for the grant of legal aid in respect of proceedings before the Waitangi Tribunal.

[21] However, he submits:

> From the contemporary documents obtained by the appellant, it appears that no express, specific agreement was reached between the Crown and the NZMC for the provision of legal aid to claimants in proceedings in other Courts that arise from, and directly relate to, proceedings before the Waitangi Tribunal. There is certainly no mention of such an intention in Hansard which is referred [to] in the appellant's submissions; rather the references are confined to claims before the Waitangi Tribunal.
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> Further, there is no express provision contained within the [Act] that refers to the Crown's obligations to comply with Treaty of Waitangi obligations.

[22] The Commissioner submits that the Act uses the terms "before" and "in" interchangeably in the various eligibility sections. He says:

> The appellant contends that the wording "in respect of" proceedings before the Waitangi Tribunal means "arising out of, or related to" proceedings before the Waitangi Tribunal. This contention is at odds with the clear meaning of "in respect of" that arises from its uses in the main "eligible proceedings" sections…. Those sections, and s 47, clearly name or define the proceedings that are eligible, either listing them by name, or defining by application type or close definition. The clear intention of the sections is to specify the

> proceedings/jurisdictions that are eligible for legal aid – and not to establish a "baseline" jurisdiction that gives rise to other eligibility.

[23] The Commissioner submits that pursuant to the Legal Services Regulations 2011, when providing a report under s 47(3), the Waitangi Tribunal is required to include a view as to whether it "considers that the terms on which the applicant may be represented by a provider should be limited in any way and, if so, in what way". He says being required to provide such a view in relation to proceedings not before the Waitangi Tribunal, would place it in a conflicted position. He says this is because it would have to present a view on any limitation to representation for proceedings that are likely to involve a challenge to some aspects of its own decision making. He submits that cannot have been Parliament's intention.

[24] Finally, the Commissioner submits that it would be wrong in principle for the Court to extend coverage for legal aid where that has not been authorised by Parliament.

Approach to appeal

[25] This appeal is brought pursuant to s 59 of the Act, which may only be on a "question of law". The standard to be applied is whether the LAT and the Commissioner have made an error of law, rather than whether their decisions are correct.[8] As to what constitutes an error of law, Randerson J has previously noted:[9]

> It is undesirable to suggest any exhaustive list but a decision may be wrong [in law] if it derives from an incorrect application or interpretation of the statute; or if it is wrong in principle; or if the decision-maker has failed to take into account some relevant matter; or has taken account of an irrelevant matter; or if it depends upon findings which are unsupported by the evidence.

Analysis

[26] Section 10(1) of the Legislation Act 2019 provides that the meaning of a provision must be ascertained from its text in the light of its purpose and its context.

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8 *R v Legal Services Commissioner* [2019] NZHC 2117; citing *Legal Services Agency v Brown* (2005) 17 PRNZ 523 (HC) at [30].

9 *Legal Services Agency v Fainu* (2002) 17 PRNZ 433 (HC) at [27].

This is the foundational approach to statutory interpretation. The sole ground of appeal in this case, is that s 47 was interpreted incorrectly.

The text

[27] The parties are agreed that the only applicable exception to the prohibition on legal aid for representative claims is s 47.[10]

[28] Section 47(1) provides:

> **47 Applications in respect of proceedings before Waitangi Tribunal**
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> (1) This section and sections 48 to 50 apply to an application for legal aid made in respect of any proceedings before the Waitangi Tribunal where—
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> (a) the application is made by a Māori; and
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> (b) the claim to which the application relates is submitted, or is to be submitted, by that Māori for the benefit of a group of Māori of which the applicant is a member.

[29] Unlike the Commissioner, I am of the view that both interpretations adopted by the parties in the present matter are equally available on the terms of the provision. The phrase "in respect of any proceedings before the Waitangi Tribunal" can mean either:

(a) legal aid is available to claimants only where proceedings are being heard by the Waitangi Tribunal directly; or

(b) legal aid is available to claimants for any proceedings that arise directly from, or are related, to proceedings being heard by the Waitangi Tribunal.

[30] I therefore do not agree that the provision itself is unambiguous. In order to conclusively identify the meaning of s 47, resort must be had to other methods of statutory interpretation. The interchangeable use of the terms "before" and "in"

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[10] See Legal Services Act 2011, s 11(1).

throughout the Act does not appear to me to support either party's interpretation.[11] Although, to me, the word "before" appears to be a wider term, I do not think that s 47 would be any less ambiguous if the word "in" had been used, given the presence of the words "in respect of". Those words have the effect of complicating the provision, as they may reasonably be interpreted in either a narrow or broad fashion. Again, their use throughout the Act does not appear to me to support either interpretation. Instead, this is a case where ordinary meaning alone cannot determine the matter.

Purpose

[31] Generally, the purposive approach requires that where two interpretations are reasonably open on the terms of a provision, the words of that provision should be given the one that best accords with the purpose of the legislation.[12] In the present case, there are two purposes that are relevant. Firstly, the purpose of the Act is to:[13]

> …promote access to justice by establishing a system that—
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> (a) provides legal services to people of insufficient means; and
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> (b) delivers those services in the most effective and efficient manner.

[32] Secondly, the legislation which created the right to legal aid for Waitangi Tribunal Claimants was the Treaty of Waitangi (State Enterprises) Act 1998 (TOWSE). That Act inserted what is now s 47, into the Legal Aid Act 1969. While the TOWSE Act does not contain a purpose provision, it does contain a lengthy preamble, which provides (among other things), that the TOWSE Act arose out of what is commonly referred to as the Lands case, and the Lands Agreement.[14] The preamble states:

> it is essential, in order to protect the position of Maori claimants and to ensure compliance with section 9 of the State-Owned Enterprises Act 1986, that there be safeguards—
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> (i) including power for the Waitangi Tribunal to make a binding recommendation for the return to Maori ownership of any land or interests in land transferred to State enterprises under that Act; and

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11 See ss 6–7.
12 *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 538.
13 Section 4.
14 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, (1987) 6 NZAR 353.

(ii) requiring the Waitangi Tribunal to hear any claim relating to any such land or interests in land as if it or they had not been so transferred; and

(iii) precluding State enterprises and their successors in title from being heard by the Waitangi Tribunal on claims relating to land or interests in land so transferred.

[33] Accordingly, the dual purpose of s 47 can be considered to be:

(a) to promote access to justice; and

(b) to protect the interests of Māori bringing claims to the Waitangi Tribunal, particularly in relation to the power of the Waitangi Tribunal to make binding recommendations in respect of Crown forest land.

[34] In the present case, I am not satisfied that there is any degree of conflict in those two purposive aspects. They appear to be complementary, speak to broader issues, and are evidenced by the Lands Agreement. Access to justice is a fundamental requirement of any legal system that purports to uphold the rule of law. Perhaps more uniquely to a New Zealand context, the protection of the interests of Māori, particularly within the Courts, likewise relates to the rule of law, as well as the Crown's obligations pursuant to Te Tiriti o Waitangi. This is already recognised by Waitangi Tribunal claims being an exception to the rule that legal aid is not available in respect of representative civil claims. Te Tiriti, it needs to be said, is also an extrinsic aid to statutory interpretation.[15]

[35] In this case, it is relevant that it was the TOWSE Act that inserted what is now s 47 into the Legal Aid Act 1969. As Cooke J said in the context of the substantive judicial review proceedings:[16]

> It can be presumed that Parliament intended to give full effect to the principles of the Treaty when enacting Treaty-related provisions, particularly provisions intended to remedy Treaty breaches. The ultimate question is what the particular purpose of these provisions is in light of that presumption.

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15 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188; and *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179, 184.

16 *Mercury New Zealand Limited v Waitangi Tribunal*, above n 2, at [69].

[36] Having considered the dual purpose of the legislation, it is apparent that dual purpose wholly supports the interpretation of s 47 advanced by Ms Griggs. Not only does the Commissioner's interpretation have the effect of denying access to justice, it curtails the ability of legally-aided Māori to protect and/or advance their interests when Waitangi Tribunal decisions are challenged in the Courts. As submitted on behalf of Ms Griggs, where Crown forest land is concerned, resort to the Courts has not been uncommon.[17] As the present case illustrates, the Commissioner's interpretation means that successful claimants in the Waitangi Tribunal in receipt of legal aid are prevented from participating in proceedings that affect their interests. As noted above, the judicial review proceedings involve a consideration of issues critical to the resumption applications. Such proceedings also possess a complexity that requires experienced counsel.

[37] Given that there is no right of appeal from a finding of the Tribunal, the only way of challenging a Tribunal decision is by way of judicial review. It is inconceivable that, in enacting s 47 Parliament intended to provide Māori with a mechanism for legal representation in defending or asserting their Treaty rights in the Tribunal, but denying them the opportunity to do so when the Tribunal's decisions on their rights are challenged by way of judicial review and then by further appeal.

[38] I am also drawn to this conclusion given the Commissioner's assessment that Ms Griggs could file a further claim in the Waitangi Tribunal, alleging a breach of the Treaty as a result of a failure by the Crown to provide legal aid for participation in proceedings directly related to Waitangi Tribunal proceedings. That suggests that the Commissioner is cognisant of the fact that his narrow interpretation of s 47 risks conflict with the Crown's Treaty of Waitangi obligations. As the Commissioner is an agent of the Crown, I find that concerning. The lack of a provision relating to the Crown's Treaty of Waitangi obligations in the Act appears to me to have little relevance, given the purposes outlined above.

[39] I note that in the substantive judicial review decision, the fact that an interpretation of the statute urged upon the Court would potentially have created a

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[17] For example see *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53; and *Attorney-General v Haronga* [2017] 2 NZLR 394.

further Treaty breach influenced Cooke J against accepting that interpretation,[18] I adopt the same approach in this case. The advancing of such a claim in the Tribunal would take years to decide and, in any event, it is not the role of the Tribunal to correct errors of law.

[40] I do not agree with the Commissioner that the requirements on the Waitangi Tribunal pursuant to the Legal Services Regulations 2011 may place the Waitangi Tribunal in a position of conflict in relation to a legally aided claimant participating in related Court proceedings. All that reg 20 does is to require the Waitangi Tribunal to provide a report to the Commissioner as to certain basic information. The Tribunal will have provided most, if not all, of this basic information at the time it provided the reg 20 report on the original Tribunal proceedings. The Waitangi Tribunal's role under reg 20 is to provide information, not make a determination on whether a claimant qualifies for legal aid.

[41] Accordingly, I am satisfied that the LAT made an error of law, in that it adopted an interpretation of s 47 contrary to the dual purpose of pt 2 subpart 6 of the Act.

[42] Finally, I note that the substantive resumption claims remain before the Tribunal. The Tribunal's decision was an interim one. Following the determination of the appeal in relation to the judicial review proceedings by the Supreme Court, the Tribunal will continue and make a final determination, no doubt guided by whatever conclusion the Supreme Court comes to. Ngāi Tūmapūhia-ā-Rangi will continue to be a party to the Tribunal hearing and to be entitled to a grant of legal aid. Those facts reinforce my view that the judicial review proceeding and any appeals from it can properly be said to be "in respect of" the proceedings in the Tribunal and therefore fall within s 47.

Result

[43] The appeal is allowed; the decision of the Commission is quashed, and I remit the decision relating to Ms Griggs' legal aid back to the Commissioner for

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[18] *Mercury NZ Limited v Waitangi Tribunal*, above n 2, at [113].

determination in light of this decision, pursuant to r 20.19 of the High Court Rules 2016.

[44] My preliminary view is that Ms Griggs is entitled to costs on a 2B basis. In the event the parties are unable to resolve costs between themselves, they may file memoranda with the respondent having 14 days to file and serve his memorandum and, the appellant having 14 days to reply. I will then determine costs on the papers.

Churchman J

Solicitors:
Woodward Law Offices, Lower Hutt for Appellant
Legal Services Commissioner, Wellington for Respondent