IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-3555
[2012] NZHC 3107

IN THE MATTER OF	The Judicature Amendment Act 1972
BETWEEN	TE WHANAU O WAIPAREIRA TRUST Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing: 27 - 31 August, 17 and 18 September 2012

Appearances: P H Thorp and M J Collier for the Plaintiff
J E Hodder SC, JWJ Graham and K Toki for the Defendant

Judgment: 21 November 2012

RESERVED JUDGMENT OF PRIESTLEY J

This judgment was delivered by me on Wednesday 21 November 2012 at 3.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……..

Counsel/Solicitors:
P H Thorp, Barrister, Auckland. Email: peter@thorp.co.nz
M J Collier, Davenports West Lawyers Ltd, Henderson.
Email: maddie.collier@davenportswest.co.nz
J E Hodder SC, Chapman Tripp, Auckland. Email: jack.hodder@chapmantripp.com
JWJ Graham, Chapman Tripp, Auckland. Email: justin.graham@chapmantripp.com
K Toki, Chapman Tripp, Auckland. Email: kiri.toki@chapmantripp.com

CONTENTS

Introduction

[1] The plaintiff (Waipareira) is an incorporated charitable trust under the provisions of the Charitable Trusts Act 1957. In 1998 the Waitangi Tribunal (in its report Wai 414)[1] treated Waipareira as having the right of rangatiratanga equivalent to an iwi to organise, advocate, and advance the interests of urban Maori in West Auckland.

[2] The defendant is being sued on behalf of the Minister of Social Development, who is the Minister of the Crown responsible for the Ministry of Social Development (the Ministry).

[3] One of the Ministry's many responsibilities is the administration of the Children, Young Persons, and Their Families Act 1989 (the Act).

[4] Since 1998 the Ministry has operated a programme known as Family Start. In general terms, the objective of Family Start is to target and assist families (particularly vulnerable mothers), who, for any combination of reasons, such as their youth, relationship instability, numbers of children, or economic deprivation, are not providing a safe parenting environment for their babies and young children. The laudable aims of Family Start are to teach and reinforce good parenting techniques, encourage families to provide their children with a safe and nurturing environment, and in particular to minimise the risk of children becoming the victims of abuse.

[5] The Ministry supervises and funds Family Start, but it does not implement it. It pays "providers" whose responsibility it is to carry out the programme under the general aegis, control, and supervision of the Ministry.

[6] Waipareira was one such provider. Family Start is one of approximately 13 services which it provides for the Ministry. The funding given by the Ministry to Waipareira for Family Start was significant – approximately $1.5 million each year –

---

[1] Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998).

being some 37 per cent of the total revenue Waipareira received from the Ministry for its 13 services.

[7] The relationship between the Ministry, being responsible for implementing overarching government policy and funding Family Start, and Waipareira was contractual. Later in this judgment I discuss the relevant terms of the contract.

[8] Some self-evident propositions emerge from the narrative thus far which need to be stated:

- The New Zealand Government through the Ministry, as a matter of policy, has set up the Family Start programme and funds it.

- The core object of the Family Start programme is to protect vulnerable children.

- The mechanisms adopted by the Ministry to implement Family Start include contractual relationships with providers (of which Waipareira was one).

- Public monies are paid to providers.

- The Act provides a degree of statutory overlay.

- Many of the families who it is hoped will benefit from Family Start are Maori.

[9] On 30 March 2012 the Ministry terminated the agreement with Waipareira. The contract between the parties contained a dispute resolution mechanism. It was invoked. The Ministry and Waipareira agreed to mediate. The mediation occurred on 18 May 2012 which led to a settlement agreement.

[10] In general terms the Ministry was to reassess Waipareira's performance and decide whether to revoke or uphold its 30 March termination decision.[2] The

---

[2] Infra [62] – [65] for discussion of the settlement terms.

Ministry's review did not bring about a change of heart. On 1 June 2012 the Ministry resolved it would not revoke its earlier termination. This proceeding challenges the termination and subsequent processes.

What is the basis of Waipareira's challenge?

[11] It is unnecessary to trace the procedural history of Waipareira's claim. Mr Thorp observed a number of times during the hearing that late discovery of the notebook of a critical Ministry official and witness, Ms P Alshaikh, had caused procedural difficulties for Waipareira.

[12] Nor do I intend to dwell on the initial procedural divide between the parties as to whether (if the proceeding was primarily a judicial review proceeding) there should be no cross-examination of deponents or whether (if the proceeding was primarily a contractual dispute) all witnesses should be available for cross-examination on their briefs of evidence. These difficulties were alluded to in Dobson J's minute of 28 June 2012, but no ruling was made.[3]

[13] Waipareira's pleadings culminated in its second amended application for review and statement of claim dated 22 August 2012.

[14] The causes of action can fairly be summarised as follows:

Judicial review

(a) The Ministry's decision (pleaded as "the second termination decision"), which on the evidence was made on 1 June 2012, not to revoke its decision to cancel Waipareira's agreement was the exercise of a statutory power. Such decision was not made fairly or reasonably. In particular, the decision did not take proper account of an external report, "the Leeson report",[4] which Waipareira had provided to the Ministry.

---

3 *Te Whanau o Waipareira Trust v The Attorney-General* HC Auckland CIV 2012-404-003555.

4 See infra [92] – [98] for more detail on the Leeson report.

(b) Additionally, the Ministry had acted "solely upon the advice" of Ms Alshaikh whose assessment was incorrect, unreliable, biased and not in good faith.

Breach of contract

(c) As an alternative cause of action, and without prejudice to the judicial review claim, the Ministry's 1 June 2012 decision was in breach of the settlement agreement between the parties because, contrary to the settlement agreement, it did not take any proper account of the Leeson report and considered matters arising out of the Alshaikh assessment and the agreed monitoring visit which it ought not to have taken into account.[5]

[15] As a second alternative cause of action, Waipareira alleges (again without prejudice to the previous causes of action) that the Ministry breached the Fair Trading Act 1986.

[16] The Ministry, for its part, has counterclaimed. It alleges that by bringing this proceeding Waipareira has breached or purported to cancel the settlement agreement between the parties. It seeks a declaration to that effect, and further seeks a declaration that the Ministry's decision of 30 June 2012 terminated the contractual relationship between the Ministry and Waipareira so far as Family Start was concerned.

Relevant statutory overlay

[17] Some brief references to the Act are necessary. The statute has some but not decisive relevance.

[18] Mr Thorp submitted in his opening that the Ministry funds social services pursuant to the Act which, at one level, is correct. Counsel emphasised the s 4 "Objects" of the Act. The overarching object is "to promote the well-being of

---

5 See infra [45] – [171].

children, young persons and their family groups". Of particular importance is s 4(b) (assisting parents, families and whanau to discharge their responsibilities to prevent children suffering harm, ill-treatment, abuse, neglect, or deprivation). Section 4(d) has a similar object, being assisting children. Section 4(e) states as an object the provision of protection of the children from the same evils stipulated in s 4(b).

[19] People exercising powers under the Act (including courts) must be guided by the s 5 "Principles" which include family and whanau participation, maintaining the relationship between children and their families and whanau and various other principles of no relevance here.

[20] Part 8 of the Act empowers the Ministry's Chief Executive to approve iwi social services.[6] Section 397(b) prohibits the Ministry's Chief Executive Officer from approving any body or organisation as an iwi social service unless satisfied that the body is capable of exercising or performing the powers, duties, or functions conferred or imposed on it.

[21] The Ministry indeed has approved Waipareira as a provider of a number of iwi and cultural social services. But there is much more to the relationship than that. To the parties' relationship I now turn.

History of the relationship

Original funding agreement

[22] Waipareira and the Crown (through the Chief Executive of the Ministry) executed a 27 page funding agreement dated 5 July 2010. The agreement covered five contracts in all, including the Family Start contract. Waipareira's obligation was to provide the Family Start programme to whanau in the Waitakere (West Auckland) area for an annual funding sum of $1,804,122.12. The agreed term for providing the Family Start programme was a period of three years from 1 July 2010.

[23] Under the heading "Relationship", the parties to the agreement acknowledged they had made it "in good faith using a collaborative approach". They further

---

6 Section 396.

acknowledged the agreement was built on a successful relationship between the parties and that it was their intent "to continue with that relationship in order to achieve the agreed results for families".

[24] Waipareira committed itself to certain specified "outcomes" which were to be achieved through "an integrated service delivery model focused on whanau wellbeing", working in partnership with whanau. The outcomes included aspirational benefits for children, parents, and whanau, such as nurturing sound physical, spiritual, and emotional wellbeing; parents being "confident and self managing"; achievement of improved health, education and welfare outcomes for children; whanau enjoying "healthy, respectful, stable relationships free from violence"; and being able to access resources and services to determine social, educational, health, housing, and economic needs. Young people were to receive guidance and support "required to achieve their full potential at school and within whanau and communities" whilst rangatahi (younger generation) were to develop resilience and make positive lifestyle choices.

[25] Under the heading "Monitoring", the parties agreed to quarterly "support meetings" to discuss progress, support their relationship (to be "transparent" and promote a "no surprises" approach), facilitate improvement and support professional practice, and "share learnings" (*sic*) about the impact of services on whanau. In addition to these quarterly support meetings, there was to be one annual monitoring visit within four weeks of the conclusion of each financial year "to verify the achievement of reported outcomes through a review of client files and other relevant material, including client evaluations, surveys and other tools used to measure results for whanau".

[26] The contract provided for volumes for the respective programmes (525 clients for Family Start). Either party could terminate the agreement on giving three months notice in writing, although the Ministry could terminate immediately if there was a breach by Waipareira or failure to provide the service satisfactorily.[7]

---

[7] Other grounds for immediate termination were provided and are not relevant here.

[27] There was provision, if the contract was terminated, for refunding overpayments, an agreement by Waipareira to transfer client information to another provider, and a mutual agreement "to openly and honestly record the reasons for termination in a way that contributes to more effective future delivery".

Variation

[28] Partly as a result of decisions by Cabinet to sharpen the focus of Family Start and to create more safeguards for children at risk of abuse, Waipareira's contract, along with other Family Start providers, was varied. Both parties signed a variation dated 19 August 2011. The termination provision of the original agreement was varied, permitting the Ministry to terminate the agreement or any part of it at any time by giving three months written notice. The provisions permitting immediate termination by the Ministry effectively remained.

[29] Monitoring of the Family Start service delivery was now to be monthly, with a focus on new Key Performance Indicators (KPIs) contained in an appendix to the agreement. $1.417 million was scheduled to be paid to Waipareira for the year ending 30 June 2012 in respect of 270 annual Family Start clients, with the Family Start programme incorporating the Parents as First Teachers programme.

Policy changes and performance concerns

[30] Between December 2009 and March 2010 the Ministry developed and implemented policy changes relating to the Family Start programme. A review report in December 2009 by Jo Cribb observed that a home visiting service for the most disadvantaged children produced positive results if a programme was implemented and delivered effectively. The report referred to varying performance of providers.[8]

[31] The Cribb report made a number of recommendations which included implementing "a results-based contract" for providers that included benchmarks for

[8] The report was wide-ranging and involved extensive consultation with a large number of agencies and individuals outside the Ministry who had a focus on children.

service, quality, and results. For providers who were producing poor results, the recommendation was the Ministry should diagnose the reasons for their unsatisfactory performance, put support in place (including possible secondments), and if after "a reasonable period of time" performance had not increased the Ministry should move to another provider or seek some alternative arrangement.

[32] Wellington bureaucracies seldom implement reports in toto. The Ministry provided its response to the Cribb report to the Minister in February 2010. A further report was provided to the Minister in November 2010 summarising progress "in lifting the performance of Family Start providers". It gave options "for the management of the remaining under-performing providers".[9]

[33] Two options were suggested in respect of under-performers. One was to continue to work with them to improve their performance. The other was to discontinue contracts for some or all of the under-performing providers and develop alternative forms of parental support for vulnerable families. Waipareira was one of 11 identified under-performing Family Start providers.

[34] A cabinet paper, dated 23 March 2011, made a number of recommendations including new governance arrangements for the Family Start programme. The subject of the paper was "Making Family Start more effective for the most vulnerable children". This paper was approved by the Cabinet Social Policy Committee. The Minister effectively directed the Ministry to make the programme more child-centred, focus on the prevention of abuse and neglect, improve quality assurance measures including lifting social work practice and supervision, and various other improvements.

[35] This led to a letter to Family Start providers from the Minister which emphasised achieving better results, reducing child abuse and neglect, and developing "a more comprehensive set of performance measures". The letter heralded clear and "progressively high expectations".

---

[9] Ministry of Social Development *Family Start Provider Performance: Progress Update and Options for Managing Remaining Under-Performers*, 25 November 2010.

[36] A number of administrative and personnel changes were made inside the Ministry. Mr Carl Crafar was seconded to a position which was effectively that of director of Family Start. Mr Crafar was aware from the outset that Waipareira was one of the worst-performing Family Start providers. He was aware of a Ministry recommendation that a financial sanction be applied to Waipareira because of its under-performance. He decided, for a number of reasons, not to adopt that recommendation. Key Performance Indicators (KPIs) were developed by the Ministry. Family Start providers were informed at a meeting on 5 May 2011 (attended by the Minister and Mr Crafar) that there would be a formal review of all providers in early 2012.

[37] There was a meeting on 5 July 2011 involving Mr Crafar, various Waipareira personnel, and Waipareira's CEO Mr John Tamihere. A few days before that meeting Mr Crafar had received and read a memorandum from Ms Alshaikh (the Ministry's Northern Region Senior Advisor for Funding, Planning, and Reporting for the Planning and Community Services Division) which dealt generally with Waipareira's contract, volumes, and performance. The report noted that over the past year Waipareira had, on average, been the lowest performing Family Start provider in the country in all key performance areas relating to vulnerable children. It had shown no sustainable signs of improvement, despite receiving one of the highest monetary rates in proportion to contract volumes and intensive monitoring support. Ms Alshaikh recommended (as had Waipareira) separating out Family Start and Parents as First Teachers contracts and reducing volumes.

[38] At the conclusion of the 5 July 2011 meeting Mr Crafar and Mr Tamihere had a conversation. Mr Crafar bluntly informed Mr Tamihere that Waipareira was the worst-performing Family Start provider in New Zealand and that Mr Tamihere had six months to sort out the problem, otherwise Waipareira would be fired.[10] There is no dispute this conversation took place.

[39] On 26 July 2011 Mr Crafar wrote to Mr Tamihere. This letter was similar in form to letters sent to other Family Start providers. It refers to relevant personnel changes within the Ministry. It states the Ministry will be seeking "a demonstrable

[10] These were the words Mr Crafar says he used.

improvement in the programmes (sic) effectiveness over the next 12 months". It refers to monthly monitoring with effect from 1 July 2011, with the possibility of the monitoring being reduced to quarterly monitoring if performances improved. It states that monitoring will focus on KPIs, which are detailed. KPIs and other relevant monitoring data were to incorporate a computer data and information system, FS-Net.

[40] Nine of the KPI measures were to be introduced from 1 July and four from 1 October. Of 13 measures seven were new. Amongst the new measures were "intensive home-visitation" (which translates into simple language as frequent home visits), and supervision practices.

[41] The letter indicates that the expected level of performance for KPIs has been raised from 70 per cent to 95 per cent. The letter concludes that when performance targets were not met, the reasons why will be discussed during current monitoring. The Ministry acknowledged that Family Start providers would need time and support to achieve new KPIs and would not be penalised for things outside their control.

[42] However, the letter concludes; "a consequence of poor performance without an acceptable reason may be the withholding of payments and continued poor performance may result in contract termination".

[43] These policy and administrative changes were in part the background to the variation of the parties' contract. On 19 August 2011 Waipareira's contract with the Ministry was varied, to which I have referred.[11] Mr Tamihere, in evidence, acknowledged that when it signed the variation Waipareira was very much "under the pump".

[44] In summary, Waipareira and the Ministry had a historical relationship, continued by the 21 July 2010 contract whereby Waipareira provided the Ministry's Family Start programme in West Auckland. Waipareira had been assessed as being one of the worst providers. The Ministry, implementing government policy, changed the focus of the Family Start programme to ensure the programme indeed assisted

---

[11] Supra [23].

children at risk. Changes were also made to improve the performance of providers. These changes, culminating so far as Waipareira was concerned in the 19 August variation, provided the Ministry with a contractual right to terminate on three months notice. The variation introduced monthly monitoring and KPIs to check performance. Throughout this period of transition, Waipareira was well aware its performance was bad, and that its future as a Family Start provider was at risk.

Termination

[45] Waipareira, correctly perceiving that its future as a Family Start provider was in jeopardy, engaged some highly competent staff to grapple with both its performance issues and the changed methodology which the August 2011 variation imposed. It employed Ms N Hellesoe as its Family Start practice leader. Ms Hellesoe began her employment on 16 January 2012. Well qualified, she had held a comparable position with another Family Start provider, Anglican Trust for Women and Children. It engaged Ms S A Hughes as a practice leader from November 2011 who had previously been employed by a Family Start provider in Porirua. In overall command was Mr Tahe Tait who was engaged as manager for Waipareira's social services from September 2011. Mr Tamihere had taken steps to seek out Mr Tait, who had extensive Family Start experience from 1998 with a number of organisations. The affidavits of all three make it clear they are experienced and competent.

[46] It is common ground (amongst the deponents if not counsel) that Waipareira's Family Start programmes and the performance of its personnel began to improve. The Ministry's assessment, however, was that the improvement was insufficient and too slow.

[47] In early November 2011 Mr Crafar was informed by Ms Alshaikh that the Trust had recruited five new employees to work on Family Start. Mr Crafar regarded this as a positive development, but was justifiably concerned that recruitment at this level suggested Waipareira must have been operating with insufficient staff numbers. He also noted the time lag since his July meeting with Waipareira.

[48] In January 2012 Mr Crafar began a new role inside the Ministry. He formally handed over to Mr Murray Edridge in early March 2012. From then on Mr Crafar had no direct involvement with matters involving Waipareira, although he still had some oversight of the Family Start programme. His various briefing meetings with Mr Edridge included discussion about the seven providers who were at risk of non-renewal or termination and performance issues generally. In late February or early March 2012 Mr Crafar had a telephone conversation with Mr Tait (who had some previous Ministry involvement) to prod him somewhat. Mr Tait advised Mr Crafar that he had multiple roles within the Trust which were very time consuming. (A similar perception was held in the following months by Ms Alshaikh.)

[49] At the outset of assuming his responsibilities Mr Edridge was aware from Ministry officials that the Family Start programme was in a state of transition and that seven providers had been operating at an unacceptable level. Indeed this topic was recorded in talking points when Mr Edridge first met the Minister on 7 March 2012.

[50] Mr Edridge, for administrative law purposes, was the effective decision maker for the termination of Waipareira's contract and the Ministry's subsequent decision not to revoke that termination. Mr Edridge is a chartered accountant who has worked in a number of industries. For 10 years, before joining the Ministry, he had worked for Barnardos in New Zealand – eight years as its chief executive. As most people know, Barnardos is a large organisation which provides social services and education to children and families. Although counsel suggested, when cross-examining Mr Edridge, that his Barnardos background might make him biased, I totally reject such a proposition. Mr Edridge struck me as being a candid witness and a competent and well informed official.

[51] So far as the seven under-performing providers were concerned, Mr Edridge, during discussions with other officials, reached the view that any assessment should be based on the providers' performance against KPIs, performance to date, assessment by officials of the providers' willingness and capacity to improve, and in particular, their ability to lift their performance to an acceptable level.

[52] Mr Edridge was aware of the July 2011 conversation between Mr Crafar and Mr Tamihere.[12] In late March 2012 Mr Edridge relayed a message to Mr Tamihere that Waipareira should be concerned about the possible non-renewal of its Family Start contract and that perhaps there should be some discussion. During the brief telephone conversation between the two men on 26 March 2012 (Mr Tamihere telephoned in response to a message Mr Edridge left three days earlier), Mr Edridge emphasised that Waipareira's contract was vulnerable.

[53] Mr Edridge held meetings with officials in late March 2012 dealing with various recommendations about the seven non-performing providers. Each provider was discussed in turn. Two had demonstrated a willingness and capacity to improve their performance and had put forward an action plan to address issues which the relevant teams were prepared to support.

[54] One of the officials, particularly relevant to Waipareira, was Ms Alshaikh, whose Ministry role was Senior Advisor Funding, Planning, and Reporting for the Northern Region's Planning and Community Services Division. She was an official with 11 years experience in the Ministry and, so far as Family Start providers were concerned, was directly responsible for overseeing Waipareira and another provider, the Anglican Trust for Women and Children. Ms Alshaikh had carried out monitoring visits to Waipareira in September and October 2011. She also had contact with and communications from Ms Hughes.

[55] Further monitoring of Waipareira had taken place in February 2012 which resulted in a performance assessment. Ms Alshaikh's recommendation was that Waipareira's contract should be terminated. Ms Alshaikh raised a number of concerns. Waipareira had consistently under-delivered across all three KPIs (contract volumes, AM/BTL,[13] and supervision). From July 2011, and also prior to the establishment of the Family Start directorate up until December 2011, Waipareira had only one qualified supervisor. Quality and frequency of supervision was a matter of concern.[14] Mr Tait had acknowledged tensions between traditional

---

12 Supra [38].

13 Ahuru mowai/born to learn.

14 The role of a supervisor, as with all social agencies, is to monitor, supervise, and counsel whanau and social workers.

whanau-centred iwi social services and the child-centred focus of Family Start and considered it would take time to address entrenched cultural values, where family violence was frequently regarded as being a family's business to sort out. Despite verbal undertakings, and a commitment and willingness to improve, improvements were not yet evident in KPIs, file checks, or adherence to key programme components. Communication with Mr Tait was difficult.

[56] Mr Edridge did not consider Ms Alshaikh's report alone. There were, however, two particular matters which concerned him. The first was Waipareira's failure fully to implement child safety tools. This created the potential for children to be at risk even though they were under the umbrella of the Family Start programme. The second concern was that contract volumes were very low, meaning that the Ministry was paying for services which were not being provided. Mr Edridge was also concerned about Waipareira's slow response to emails and requests.

[57] Mr Edridge prepared a briefing paper for the Ministry on the five remaining non-performing providers. Because the Minister of Social Development, Hon Paula Bennett, had a daughter who was employed by Waipareira, any decisions relating to Waipareira had properly been delegated to another Minister, Hon Tony Ryall. Waipareira material was not forwarded to Ms Bennett.

[58] On 30 March 2012 Mr Edridge contacted or left messages for the chief executives of the five providers whose contracts were to be terminated (including Waipareira). The contracts of 27 other partners were renewed. A detailed letter was sent by Mr Edridge on the same day conveying the Ministry's intent to terminate the Family Start component of Waipareira's contract three months hence.

[59] The letter referred to cl 3.1(l) of the 19 August 2011 variation whereby the Ministry could terminate the agreement by giving three months notice in writing. The letter further informed Waipareira the Ministry intended to tender for the provision of Family Start services and that Waipareira might want to apply.

Mediated agreement

[60] Waipareira was aggrieved by the Ministry's termination of the contract. It invoked the dispute resolution terms of the July 2010 contract which inter alia bound the parties to participate in mediation if they are not able to settle their dispute by negotiation.

[61] One possible reason why Waipareira felt aggrieved by the Ministry's termination decision was that Mr Tamihere had the impression the Ministry had extended a 12 month period of grace to Waipareira to put its house in order. In his affidavit, Mr Tamihere refers to the 5 July 2011 meeting he had with Ministry officials and Mr Crafar, and states that Waipareira was given an assurance that time would be extended by the Ministry to help rebuild its "newly appointed" Family Start team and that 12 months was the likely time necessary to achieve that rebuild to reach the level of performance the Ministry required. Given that new key Waipareira staff had yet to be appointed in July 2011, and given further that there was no reference to that 12 month indulgence in any correspondence or extra documents, it seems improbable that any "assurance" was given. Indeed when he was cross-examined, Mr Tamihere graciously admitted he was mistaken in that regard.

[62] A mediation between the parties with an experienced mediator and solicitor, Mr D J Clark of Auckland, led to a settlement dated 18 May 2012 which relevantly provides as follows:

> 1 MSD shall carry out a monitoring visit in respect of the Trust on 23 and 24 May 2012. That monitoring visit shall encompass all matters usually reviewed on such a visit. However in the case of this visit, the file review will be expanded so as to include a greater number of files than usual.
>
> 2 Promptly following that monitoring visit, MSD shall decide, having regard to information that includes the results of the monitoring visit, whether to revoke the Notice. Should any external report be provided by the Trust to MSD on or prior to 24 May 2012, MSD shall have regard to, but shall not be bound by, that report. MSD shall take into account any further information in relation to any KPI that the Trust may put to the Ministry
>
> …

> 4 If MSD decides to revoke the Notice, the Notice shall no longer be of any effect. The Agreement shall continue in force and unchanged in every respect.
>
> 5 If MSD decides not to revoke the Notice, the Notice shall stand and the Trust shall not challenge the Notice in any way, whether by seeking injunctive relief or otherwise. To avoid doubt the Notice period in that case shall expire, and the Agreement shall come to an end, on 30 June 2012.
>
> …
>
> 9 This Settlement Agreement is in full and final settlement of the Dispute between the Parties.

[63] It was common ground that the settlement agreement constituted the only legitimate evidence about what the parties had agreed. What occurred at the mediation is privileged and not properly the subject of inquiry. Indeed, it is the settlement agreement which lies at the heart of Waipareira's claims.

[64] Relevant to those claims and the parties' respective positions are the following features of the above agreed terms:

(a) A monitoring visit was to take place within the week.

(b) The monitoring would encompass "all matters" usually reviewed (not limited to KPIs).

(c) A greater number of files would be reviewed than usual.

(d) If an "external report" was to be provided by Waipareira before 24 May then the Ministry would have regard to that report, but would not be bound by it. (The evidence suggests that Waipareira had commissioned a report from Dr Heidi Leeson to review, in an independent fashion, its Family Start performance. Clearly the parties agreed to such a report being placed before the Ministry and considered.)

(e) The Ministry was obliged to take into account any further information relating to KPIs which Waipareira might put to it.

(f) If the Ministry decided not to revoke its termination notice then the notice stood and the agreement would be terminated with effect from 30 June 2012 (the stipulated three month notice period).

(g) If the Ministry decided not to revoke the termination notice then Waipareira was obliged not to challenge the notice in any way, by injunctive relief or otherwise. (This raises whether Waipareira's proceeding in this Court is a breach.)

(h) The settlement agreement constituted a full settlement of the parties' dispute.

[65] So, in broad outline, Mr Edridge would reconsider the 30 March 2012 termination of the contract. His options were either to confirm the termination or revoke it. In reaching that decision he was obliged to have regard to a fresh and somewhat expanded monitoring visit, and to any additional materials, including Dr Leeson's report, which Waipareira might choose to place before him.

The extra monitoring visit

[66] Waipareira's case sets great store on the monitoring visit and in particular on various perceived deficiencies with it. In his opening Mr Thorp put it thus:

> The purpose of the further monitoring visit was and can only have been to determine whether or not the Trust was achieving what it said it was, only an ongoing improved level of performance from its rebuild said it was on target to achieve satisfactory KPI compliance within the 12 months it considered it had.

Were the Ministry to find that there had indeed been an improvement on Waipareira's part, counsel submitted the termination should be revoked.

[67] The monitoring review took place on Waipareira's site on 23 and 24 May 2012. The review was led by Ms Alshaikh. She was accompanied by two Ministry officials who were to assist with reviewing files, Mr M Panapa and Mr P McInerney. Ms M Gallichan was the Ministry's northern region practice advisor whose role was to review Waipareira's supervision files (a support role, as far as Waipareira was

concerned).[15] Ms Gallichan was also available as a resource. She was subsequently asked by Ms Alshaikh to check and review Mr McInerney's file checks. She did so and found Mr McInerney's conclusions were sound.

[68] Clearing out Ms Gallichan's role first, Waipareira's supervision files (a sample of five) led her to conclude that files were generally of an adequate standard and that there had been an improvement in communication and transparency between supervisors and staff. She retained concerns, however, about some inconsistencies in the supervision files. She also had concerns, at a practical level, flowing from her discussions with Ms Alshaikh and Messrs McInerney and Panapa, about what their file checks revealed.

[69] The outcome of the 23-24 May monitoring visit was Ms Alshaikh's report to Mr Edridge with which I deal in the next section of the judgment.

[70] There is considerable evidence, both affidavit and viva voce, on the monitoring visit. For reasons which will be apparent when I discuss counsel's submissions, I need not deal with this evidence extensively. I deal with some matters, however, which have arguable relevance to legal issues (and which certainly were emphasised by Waipareira), and make factual findings.

[71] Ms Alshaikh was surprised by and somewhat critical of what she perceived to be the attitude of Mr Tait during the monitoring visit. Although she considered the monitoring visit was "a tense but professional occasion", she was surprised that Mr Tait initially seemed unwilling to remain beyond the initial meeting at Waipareira's premises. She considered that Mr Tait should have contributed more to preliminary discussions. (Mr Tait, on Ms Alshaikh's evidence, at one stage went to visit Messrs Panapa and McInerney and asked them to stop work on checking files because he wanted to discuss concerns which had been raised by Mr Tamihere.) At a later stage, during the same timeframe that Mr Tait had gone to discuss matters with Mr Tamihere, Mr Tait emphasised that his understanding of the settlement agreement

---

[15] Waipareira's supervision files held by its supervisor for each whanu worker. A worker's caseload should be discussed with a supervisor on a weekly basis. The file should identify risks or issues raised and a summary of recommended steps that can be taken recorded.

was that the Ministry should only be monitoring Waipareira's post-February 2012 performance. For some reason Ms Alshaikh felt threatened by Mr Tait's demeanour.

[72] I have no doubt that both Mr Tait and Waipareira staff who were involved in the monitoring visit would have felt defensive. The monitoring visit was a critical component of the settlement agreement and would clearly have an influence on whether Waipareira's contract would be reinstated or remain cancelled. Mr Tait does not canvass in his four affidavits his version of what occurred during the monitoring visit. Because he was not required for cross-examination this aspect was not explored with him.[16] I am thus not prepared to make an adverse finding against Mr Tait.

[73] I find that, for whatever reason, Ms Alshaikh was surprised and disconcerted by Mr Tait's approach. I refuse to find that Mr Tait was threatening. I further find that the Waipareira staff who attended the meeting were cooperative but were somewhat on the defensive, answering questions and providing requested information rather than volunteering it. I further find that Waipareira failed, during the monitoring visit to provide Ms Alshaikh with further information relating to any KPIs which cl 2 of the settlement agreement entitled them to do.

[74] The next factual issue relates to a handwritten document which Ms Alshaikh prepared before she visited Waipareira. It was a document which was not discovered or inspected until after this proceeding was filed. It caused Waipareira to amend its pleadings. The document comprises eight pages from Ms Alshaikh's notebook. The focus of inquiries is on the first page.

[75] The document is headed "File Check Exceptions". It contains information which Ms Alshaikh gleaned from FS-Net before the monitoring visit. Twenty-five files are listed covering four months (January – April 2012) and divided into two columns. The first column is headed "did not receive weekly visit (not visited four

---

[16] Counsel agreed that the deponents who were to be cross-examined should be limited to those whose affidavits were in clear conflict on core issues, particularly over Waipareira's allegation of bad faith. Accordingly the deponents who were cross-examined were Messrs Tamihere, Edridge, Ms Alshaikh, and Dr Leeson.

times)". The second column is headed "SNA not within [recommended] time frame".[17]

[76] There are other files listed. Three appear beside the heading "Cases of longest duration where [child safety tools] not applied". Another three files are listed beside the heading "Initial SNA overdue!" displaying the due dates (two being January 2012 dates and one being an early April 2012 date). There are also headings which suggest that, in addition to the monitoring schedule, Ms Alshaikh intended to investigate three issues. The first was whether child safety tools were applied to families who engaged before December 2011 and also to existing families before that date. The second issue to investigate was that in May 2012 referrals (27 per cent) had come from Family Start Waipareira and 21 referrals were self-referrals. The third aspect to be investigated was expressed by the words that 46 children had been assessed as safe from abuse and neglect and three cases had been identified as safety risks, in respect of which the safety plans in place were to be viewed.

[77] Ten of these various files have been ringed (by Ms Alshaikh). Her evidence was that she ringed these files at random because she would not be able to inspect all the files on the sheet. All three cases of longest duration files were ringed. Two February 2012 files were ringed in the column "Did not receive weekly visit". Two April 2012 files were ringed in the column "SNA not within recommended time frame". All three "Initial SNA overdue" files were ringed. This sheet was subject to much evidence by Ms Alshaikh and Dr Leeson.

[78] I found Ms Alshaikh's evidence to be convincing and I accept it. She stated in her 24 August 2012 affidavit that one focus of the monitoring visit had to be the child safety tool data. All providers had to apply those tools to all families by the end of May 2012 (a week beyond the monitoring visit).

[79] In preparation for the monitoring visit Ms Alshaikh reviewed FS-Net data on child safety tools. She also reviewed Waipareira's monthly FS-Net reports. She discovered there were 192 files (extracted from the various reports) which demonstrated non-compliance with the two KPIs in January 2012 up to 22 May.

---

[17] SNA is an abbreviation for "Strengths and Needs Assessment".

From those 192 files Ms Alshaikh wrote on the paper (which was from her notebook) a few file numbers for each relevant month where either a family had not received the required number of weekly visits or an SNA had not been received within the required timeframe. Ms Alshaikh deposed that she had no personal knowledge of those files beyond what appeared in the FS-Net reports. In making the list of files Ms Alshaikh's intention was to discuss with Mr Tait and his team apparent trends from the FS-Net data, such as the fact that the number of weekly visits did not seem to be increasing in tandem with an increase in volumes.

[80] When Ms Alshaikh endeavoured to explore with Waipareira staff why KPIs had not been met, the reaction was defensive. She faced accusations that she was focusing on past performance. When she tried to discuss the number of internal referrals to the Family Start programme Mr Tait said to her "they are all real families you know". Whether or not Mr Tait so commented it is, for the reasons I have already given, not a matter I need to resolve. Ms Alshaikh, because of the defensive approach she encountered, was unable to discuss the various files and issues on her sheet of paper with Waipareira staff. She therefore selected some of the files she had noted at random to review herself.

[81] "Random", the word used by Ms Alshaikh, was in a statistical sense, misleading. There was no random selection as such. Rather she made a choice of files on her sheet. The use of the word had unfortunate consequences. Certainly Messrs Panapa and McInerney, in another part of the building, were pulling and inspecting files randomly from storage areas. They had no prepared list from which to work. But the use of the word "random" by Ms Alshaikh has prompted Dr Leeson to opine in her affidavits that Ms Alshaikh's file selection was flawed and indeed biased. Mr Thorp for his part cross-examined and made submissions on the premise that Ms Alshaikh deliberately selected files with a view to showing Waipareira's performance in the worst possible light.

[82] I have considered carefully the evidence of both Ms Alshaikh and Dr Leeson. I have read the reports of both women. I have heard them being cross-examined and indeed asked them questions myself. I have a very clear view and make the following factual findings:

(a) I am satisfied, for the purposes of the monitoring visit, Ms Alshaikh sensibly and legitimately examined the FS-Net data relating to Waipareira's Family Start files and listed some 192 files which merited further investigation.[18]

(b) I accept Ms Alshaikh's evidence about the provenance of the handwritten sheet from her notebook headed "file check exceptions" and her evidence as to why she ringed 10 files for personal inspection.

(c) I reject Dr Leeson's evidence and counsel's submission that Ms Alshaikh's selection of the files she would inspect was driven by some improper reason or because she wanted to inspect files which were least favourable from Waipareira's standpoint.

(d) I reject the suggestion that, in either her selection and inspection of the files, or in the way she structured and carried out the monitoring visit, Ms Alshaikh was biased.

(e) The selection of the initial 192 files by Ms Alshaikh was both sensible and legitimate given the centrality of KPIs, and child safety tools in particular, to the Ministry's Family Start policy.

(f) The fact that some of the files might have involved families which pre-dated Mr Edridge's 30 March 2012 decision, the unfavourable February 2012 monitoring report, or indeed Waipareira's realisation in July 2011 that, if they were to keep their contract, there would need to be a marked improvement, is irrelevant. The files all involved families in respect of which Waipareira was receiving public monies for Family Start purposes. Along with other providers, Waipareira had the opportunity since July 2011 to restructure its systems and ensure that KPIs and child safety tools were being applied to all families for whom it was a Family Start provider.

---

[18] The 192 figure is probably not totally accurate because of compilation and data errors.

Ms Alshaikh's monitoring report

[83] Ms Alshaikh's report, completed on 25 May 2012, followed the same format that was used for all Family Start providers. Under the heading "Background" Ms Alshaikh stated that all aspects of Family Start performance had been reviewed, predominantly focusing on the February to May 2012 period "to determine whether developments over this period were sufficient and sustainable enough to support a different recommendation to [termination]". Where historical context was relevant the assessment drew on the original February 2012 assessment and gave by way of example the 31 May deadline for applying child safety tools to all families.

[84] I do not intend to detail the report fully. The report's summary under the heading "Key Performance Indicators" noted some evident improvement. It noted in some KPI areas the statistics did not represent an accurate picture. Although parenting assessment outcomes were all reported in FS-Net at 100 per cent, case file checks and discussions with practice leaders revealed that child safety tools were not being applied properly and in some cases (a specific case was mentioned) where families' needs were high, the whanau worker was reluctant to apply the tools. (The specific example was disputed in evidence from Waipareira deponents.)

[85] With regard to SNAs, individual family plans, and child safety tools Ms Alshaikh reported an inconsistent standard and uncertainty as to whether supervision was resulting in files being checked. Social work practice had improved since the February assessment, but there were still some cases where there was cause for concern.

[86] Current active volumes were 204 families. Other families, about 30, on Waipareira's evidence, were awaiting eligibility checks. The contracted volume was 270, so there was a significant under-performance. AM/BTL assessments (where each family should receive at least one monthly visit) was tracking at 68.6% by 22 May (up from 60.26 per cent at the March quarter) but fell below the minimum expected standard of 95 per cent. Supervision had improved but checks revealed supervisors were not consistently signing off the child safety tools and parenting practice assessments.

[87] With regard to child safety tools, where Waipareira was graded by Ms Alshaikh as under-performing, the report noted an apparent misunderstanding by Waipareira's Family Start team. Instead of the tools being applied to all families, Waipareira had only been applying them to families which had been engaged after November 2011.

[88] The report dealt in some detail with the difficulties which occurred during the monitoring visit, particularly Ms Alshaikh's perception of Mr Tait.

[89] The report also referred to and summarised three statements or documents which Waipareira's leadership team had given Ms Alshaikh at the conclusion of the monitoring visit. Ms Alshaikh acknowledged that Waipareira seemed to be targeting the right families and that a number of "quality referrals" had been received throughout 2012. Arising out of those three statements, however, she expressed some concerns which were:

(a) A high level of skill and supervision was needed to work effectively with at risk families.

(b) There needed to be a direct approach to correct practices which did not adhere to key programme requirements.

(c) There needed to be direct cultural input to ensure the child safety tools were used across all cultures.

[90] Ms Alshaikh's conclusion was:

> There is currently not enough evidence that these standards can be achieved and maintained as "business as usual" without intensive and ongoing monitoring support and assistance from the Ministry (in fact some of the above requirements were not even proactively identified by the Leadership Team at our monitoring meeting). While this level of assurance cannot be provided on an evidence basis, I am not comfortable recommending that the Ministry revoke the notice of termination.

[91] During the course of the hearing, on a file by file basis, some numbers and facts which were contained in the Alshaikh report were corrected or challenged. I do not intend to detail these, first, because they are of marginal relevance and secondly,

because it is not this Court's function, in the context of this proceeding, to review or critique Ms Alshaikh's work.

Dr Leeson's report

[92] Dr Leeson's report, as envisaged by the settlement agreement, was provided to the Ministry by Waipareira. Mr Edridge read it. He also sought comment on it from Ms Alshaikh.

[93] Dr Leeson is a psychometrician and an applied statistician. She has Bachelors degrees from Massey University and a PhD from New Zealand's premier university, the University of Auckland. Her PhD topic was "Maximising Information: applications of ideal point modelling and innovative item design to personality measurement". She has some expertise in overseeing the management of small and large research contracts including projects for District Health Boards, the Ministry of Health, and the Ministry of Education. She has, in her field, impressive academic credentials.

[94] Dr Leeson's report and her four affidavits are effectively a frontal assault on Ms Alshaikh's methodology. Her report, clearly prepared under time constraints, was sent to the Ministry in draft on 29 May 2012. Subsequently Dr Leeson was asked to comment on the reasons given by Mr Edridge for rejecting her evaluation and report. Her deployment by Mr Thorp is, with respect, slightly odd. In administrative law terms, and in particular having regard to the terms of the settlement agreement, the decision maker was neither Ms Alshaikh nor Dr Leeson. It was Mr Edridge. In any event cl 2 of the settlement agreement[19] stipulated that the Ministry must have regard to the Leeson report but was not bound by it.

[95] Nonetheless, Waipareira submits, on the basis of Dr Leeson's evidence, that Ms Alshaikh's assessment (with which Mr Edridge, after much pondering, eventually agreed) was fundamentally flawed. The principal flaws are said to be:

---

[19] Supra [62].

(a) Ms Alshaikh's three point rating system was unscientific, inherently subjective, and in the absence of set criteria unreliable.

(b) Clearly checks on various files were incorrect and incomplete.

(c) Ms Alshaikh did not select files randomly but deliberately selected the worst of the worst (an expression which had its origins in Dr Leeson's opinion).

(d) The files checked by Ms Alshaikh were featured in her report without disclosing they were not selected randomly, thus making her report misleading and unreliable.

(e) Incorrect and disputed assumptions about risk were made by Ms Alshaikh, who failed to interview the whanau worker concerned.

(f) The file check sheets, specially designed for the May visit, encompassed matters which were not usually reviewed.

(g) The focus on Waipareira's past performance was to its disadvantage.

[96] Although, in terms of the settlement agreement, the Leeson report should have been in the hands of the Ministry by 24 May, Messrs Edridge and Tamihere agreed in an email exchange to extend the time to 5 pm on 29 May 2012. Before making his decision Mr Edridge sent the Leeson report to Ms Alshaikh for comment (on the afternoon of 31 May 2012). She had not previously seen the report.

[97] Ms Alshaikh provided her comments the same afternoon. They were that the Leeson report was largely descriptive and unsubstantiated; in parts it was vague and appeared contradictory and indicated "some misunderstanding of the requirements and measurements of the Family Start programme". She expressed a concern that Dr Leeson indicated that "at a practice level the KPIs are seen at times as a barrier to providing the type of service that is needed by the whanau they serve". She commented that if Family Start was not the appropriate service for whanau then families should be referred to a service that better met their needs.

[98] Ms Alshaikh considered there was nothing in Dr Leeson's report which would prompt her to change any of her findings or comments. She considered that, to a degree, the Leeson report confirmed her findings that the programme requirements were not fully understood by Waipareira. In that regard she particularly emphasised Dr Leeson's perception that KPIs were constraining and that possibly current KPIs would not be sustainable in the long term.

Mr Edridge's decision

[99] Mr Edridge had discussions with various members of his team on 30 and 31 May 2012. He had read and absorbed Ms Alshaikh's monitoring report. He also read Dr Leeson's report which Waipareira had sent to him on 29 May. Mr Edridge had no prior knowledge of or contact with Dr Leeson.

[100] Mr Edridge's assessment was that Waipareira was certainly performing better than it had been in February 2012. However, given that the Ministry policy was to ensure higher standards of performance from Family Start providers, he did not consider Waipareira was performing at an acceptable level. Nor did he consider Waipareira would be able to maintain an acceptable level for the next 12 months to honour the contract. Mr Edridge's decision was thus to adhere to his earlier decision to terminate the contract. In terms of the settlement agreement, he decided not to revoke his termination decision.

[101] Mr Edridge sent a letter conveying his decision to Mr Tamihere on 1 June 2012. Before that letter was sent he left a message to that effect on Mr Tamihere's cellphone. Because Mr Edridge had earlier told Mr Tamihere he would be making his decision overnight on 29 May, he apologised for the delay which, he informed Mr Tamihere, was attributable to making "the most informed decision possible". Mr Edridge encouraged Waipareira to tender for the contract in respect of which the Ministry would shortly seek expressions of interest.

[102] Mr Edridge's letter of 1 June 2012 to Mr Tamihere was, in my view, fulsome and totally transparent. It ran to four pages. It additionally enclosed Ms Alshaikh's Performance Assessment Report.

[103] Given that Waipareira's proceeding attacks the legitimacy of Mr Edridge's decision I set out its salient reasoning in full:

> It is encouraging to note that some improvement is evident in Waipareira's service competencies, particularly with the Key Performance Indicators (KPI's) and Social Work Practice. However it was noted that the KPI statistics which were high, for example Parenting Assessment Outcomes (100%), were not always supported by the practice revealed through the detailed case file checks. It was also noted that social work practice, as demonstrated through the case file checks and interviews with Whanau Workers, remained variable.
>
> In other areas such as the Key Programme Components and Willingness and Capacity, evidence of efforts to improve was noted, for example the frequency of supervision (and indeed the general adequacy of supervision) but concerns remained that the improvements still did not consistently meet the required standards. For example, Supervisors were still not consistently signing off tools, plans and assessments. At a senior management level, concerns were expressed about the ongoing lack of engagement and responsiveness and the adequacy of risk reporting to the Te Whanau O Waipareira Trust Board.
>
> It is clear that the Practice Leaders Niusulu Hellesoe and Sue Hughes are to be commended on their competency and enthusiasm. Ms Hellesoe in particular is noted in the Report as demonstrating a strong ability to lead and manage change, and her networks, reputation and tools and resources demonstrate that she is a real asset to Waipareira. However, I agree with [Ms Alshaikh's] Finding's opinion that it is inappropriate for a programme of Family Start's value and importance to be so heavily reliant on one staff member. It raises serious questions about resourcing and appropriate work allocation as well as the sustainability of the programme.
>
> It was also very concerning to note the senior manager's attitude to the assessment process and the apparent lack of engagement with the programme itself. For example, in the context of the Report findings regarding the incorrect application of Child Safety Tools, it was noted that the manager's engagement at an earlier stage "would have assisted in creating confidence that there was a commitment to programme fidelity at the highest level and that, while the Practice Leaders (sic) energy was necessarily absorbed into the day to day doing of things, there was someone at a higher level with firm strategic oversight who could monitor the boundaries and effectiveness of the Whanau Worker role in the Family Start programme" (the inference being that his was not currently being demonstrated). It was also noted that the manager had not intended to stay at the general monitoring discussion on the morning of 23 May 2012 and that this reflected a trend that had been noted in previous site assessments, for example in relation to the finalisation of the Service Improvement Plan, when the senior manager was unavailable to attend the "sign off" meeting and made it clear that he had delegated this responsibility to his two Practice Leaders.
>
> The Report also responds to three written statements that were provided by Waipareira. The pledge of ongoing commitment by the eleven Family Start

> workers is noted and I acknowledge their professionalism in continuing their efforts to improve despite their uncertain circumstances.
>
> However, serious concerns remain with Waipareira's Family Start services and these are summarised on page 19 of the Report. It is clear that, while improvements have occurred, there is not enough evidence to conclude that the standards can be achieved (or where they have been achieved, maintained). Accordingly the Report conclusion was that the original recommendation to Terminate on Notice was upheld.

[104] Mr Edridge's letter then devotes five paragraphs to Dr Leeson's report which he had considered. He made the following points:

(a) Dr Leeson had acknowledged "limitations of scale and breadth" because of the two week period during which she had to prepare her report which she regarded as a "snapshot". She was unable to comment on matters of actual practice and service delivery which were the Ministry's key concerns.

(b) The positive aspects of the Family Start programme, which Dr Leeson had noted, being the supportive leadership and strong management skills, were not always evident during the May 2012 monitoring visit, particularly in the area of child safety tools.

(c) The Ministry agreed with Dr Leeson that there had been considerable improvements in the programme, but the Ministry's concerns related to sustainability, particularly in the staffing area.

(d) The Ministry disagreed with Dr Leeson's assessment that KPIs were "constraining" and "at times a barrier to providing the type of service that is need by whanau" because KPIs had been specifically developed to measure service components needed for high needs families. Furthermore, other providers had been able to meet KPI requirements, so why Dr Leeson saw them as a "barrier" was unclear.

(e) The desire of Waipareira staff to improve their professionalism and practices was commendable but much of the improvement had been driven by external pressure and support from the Ministry which

> raised a significant concern over whether momentum would be sustained once that support and pressure had been withdrawn. The Ministry's expectation was that a large professional organisation such as Waipareira should be self-managing. That was not apparent.

[105] Mr Edridge's letter concluded with a comment that Waipareira was welcome to submit a proposal for the Family Start contract which it had lost.

[106] Mr Edridge was cross-examined on his affidavit and generally on his decision. He impressed me as a thoughtful and methodical man who had approached his responsibilities (including his obligations under the settlement agreement) in a thorough and painstaking way. I reject the suggestion that Mr Edridge approached his task of making a decision with a closed mind. I reject too the suggestion that his decision was predetermined or biased.

[107] I asked Mr Edridge, given that his 30 March 2012 decision to terminate Waipareira's contract was probably the first major decision he had made as a Ministry official, whether there might not be some subjective or subconscious pressure on him to confirm the correctness of his prior decision. Mr Edridge stated his preference would have been to revoke his 30 March 2012 decision. That would have been his preferred outcome and would have "made life easier for me going forward". He commented that the Ministry had worked very hard to help get Waipareira to an acceptable standard but he did not think Waipareira had reached that level.

[108] When Mr Thorp suggested, in cross-examination, that "the easier option" of revoking his submission would have meant going directly against his staff's recommendations and that Mr Edridge did not want to upset his staff, Mr Edridge rejected that suggestion. He was not prepared to compromise his integrity. Additionally he trusted his staff's judgment.

[109] I was puzzled why it should be that, if Waipareira was clearly not performing its obligations as a Family Start provider to the required standard, the Ministry would encourage it to retender for the contract. If Waipareira's performance was

inadequate on 1 June 2012 it was unclear how it could metamorphose into an adequate provider a short time thereafter. Mr Edridge, however, saw no paradox in this. If Waipareira wanted to re-tender for the contract and considered it was able to provide an acceptable standard of service, there should be no barrier placed in its way. As Mr Edridge saw it, even though Waipareira had been substandard, his hope was that in the three months before termination they may suddenly improve and be sufficiently good so that they could be re-engaged even though its contract had been terminated. This approach by the Ministry rules out any bias or hostile animus.

General comment

[110] The reasons contained in Mr Edridge's 1 June 2012 letter, set out in the previous section of this judgment, strike me as being legitimate and rational. I say that to underline what this proceeding is *not* about. This Court, as Mr Hodder SC reminded me on a number of occasions, is not sitting on an appeal from either Mr Edridge's decision or Ms Alshaikh's monitoring assessment. It is not this Court's function to reassess the judgments and findings of those two officials.

[111] Nor is it appropriate for this Court to embark upon an analysis of the appropriateness of KPIs, or whether the way in which data was entered into FS-Net correctly or incorrectly mirrors the reality of a particular whanau file. Nor can this Court make assessments about the adequacy of Waipareira's staffing levels, or whether the demonstrable improvement by Waipareira as a Family Start provider was adequate or the trajectory of improvement sustainable.

[112] All those matters sit inside the preserve of the Ministry. This Court can intervene in this proceeding, as it was pleaded, only if the Ministry has transgressed well known administrative law and judicial review principles or has breached its contractual obligations.

[113] The dispute between the Ministry and Waipareira has its roots in the policies underlying the Family Start programme and changes made to it. The programme is designed to safeguard and ameliorate the condition of children who are at risk or are disadvantaged because of parental inexperience and incompetence. Family Start

providers are funded with public revenue to assist and up-skill families in that situation. It goes without saying that providers must exhibit a high degree of skilled competence.

[114] The introduction of further KPIs and child safety tools in mid-2011, to be fully operative 12 months later, was designed to sharpen the focus on at risk children. Although the Ministry has delegated the provision of Family Start assistance, it nonetheless must retain a high degree of monitoring and supervision. FS-Net and the application of KPIs and other assessment tools will never be infallible. But a combination of FS-Net information, monitoring tools, and monthly monitoring visits at least provide coherent platforms (not perfect) on which the performance of Family Start providers can be assessed.

[115] Waipareira, through Mr Tamihere, accepted that in July 2011 it was one of the worst-performing providers. It is small wonder that, starting as it was so far behind, the task of adapting to new standards and systems proved to be so difficult. It was some months before new and highly competent senior staff were engaged. Much was done. But, in the Ministry's assessment, the fundamental changes required, particularly in the areas of volumes, staffing levels, upgrading the files, applying new tools, and possibly commitment were not achieved. Nor was the Ministry confident that the improvements could be sustained.

[116] Mr Tait, in his affidavits, has given evidence (some of which is disputed by Ms Alshaikh) that whilst Waipareira has been held over as a Family Start provider since the contract was terminated on 31 March 2012, its standards have continued to improve and FS-Net data shows that all required targets have been reached. Because that evidence of Mr Tait was not central to the issues I have to decide, I make no comment on it. If Mr Tait is correct, and if since the May 2012 monitoring visit, Waipareira's performance has improved and is sustainable, then its prospects of success through re-tendering for the Family Start contract are good.

[117] The issue in this proceeding is whether Mr Edridge's 1 June 2012 decision can be impeached. To that I now turn.

Discussion

[118] My approach can be discerned in part from earlier sections of this judgment. I endeavour, in this section, to group counsel's submissions under various categories without doing violence to them.

[119] Mr Thorp's closing submissions can fairly be summarised as follows:

(a) In the light of both the Treaty of Waitangi and the Waitangi Tribunal's decision in Wai 415, Waipareira had the status of a preferred provider of social services to children, young people and families in West Auckland. Treaty principles and the dimension of partnership obliged the Ministry, in deciding whether or not to exercise its contractual rights, to treat Waipareira in a different manner from what it would an identically placed non-iwi provider to whom Treaty principles did not apply.

(b) Because the Ministry, through Mr Edridge, was exercising statutory powers under the Children Young Persons & Their Families Act 1989, any decisions made by Mr Edridge had to be fair and reasonable.

(c) The process whereby Mr Edridge made his 1 June 2012 decision was flawed. In particular he gave inappropriate weight to Ms Alshaikh's assessment. Additionally he must have had a preference not to be seen to be changing his mind in reaching a different decision from his 30 March 2012 decision.[20]

(d) Mr Edridge failed to provide Waipareira or Dr Leeson with an opportunity to respond to and comment on the Alshaikh assessment. (I have difficulty in seeing where this submission leads, given the very clear terms of the settlement agreement which imposed no obligation on the Ministry to afford Waipareira or Dr Leeson a further

[20] I have dealt with the second limb of this submission in a previous section of this judgment, supra [107] – [108].

right of comment. I can only think that the submission is designed to invoke, albeit unconvincingly, natural justice considerations.).

(e) Mr Edridge failed to give consideration to approvals which had been given to Waipareira by the Child, Youth and Family arm of the Ministry.

(f) Mr Edridge made insufficient allowance for Waipareira's expectation that it would have more time to rebuild. In that regard, Mr Edridge should have given greater weight to Dr Leeson's report. (This broad submission again endeavours to amplify the clear and unambiguous terms of the settlement agreement. Mr Hodder correctly submitted that the Ministry's obligation under the settlement agreement was to make a binary decision – either to confirm or revoke its earlier termination of the contract.)

(g) The monitoring visit conducted by Ms Alshaikh and other Ministry officials on 22-23 May 2012 was coloured by an incorrect interpretation of the settlement agreement. In particular, Ms Alshaikh assessed matters which lay outside the description "all matters usually reviewed" used in cl 1 of the settlement agreement. (This submission, to which I shall return, ignores the fact that the settlement agreement specifically provided the file review would be "expanded so as to include a greater number of files than usual". It also avoids the fact that Family Start providers were all to be assessed in the light of new KPI and other changes flowing from the shift of policy focus.)

(h) Ms Alshaikh's methodology was inaccurate, incomplete and misleading. Care is needed in dealing with this submission to ensure that the detail of Ms Alshaikh's monitoring assessment does not mask the pleaded issues of whether the Ministry's process is amenable to judicial review and whether the Ministry had breached its contractual obligations. I include under this head Mr Thorp's separate submission

that the Alshaikh assessment was unreliable because the three point rating system was unsatisfactory.

(i) Ms Alshaikh's assessment was unreliable because it was not completed in good faith. I have already dealt with this submission in an earlier part of my judgment.[21] But, in fairness to Mr Thorp, I shall deal briefly with some of his sub-points.

[120] I now consider these submissions under general headings and add to them some matters arising out of the comprehensive and helpful submissions of Mr Hodder SC.

Termination of contract

[121] Although Waipareira's pleadings correctly focus on the 1 June 2012 decision which flowed from the settlement agreement, issues of bias and background might perhaps be linked to the manner in which the Ministry terminated the contract.

[122] Counsel discussed the contractual term, incorporated into the contract by the 19 August 2011 variation, which permitted the Ministry to terminate its agreement with Waipareira or any part of it at any time by giving three months notice in writing. There is arguably an inequality of arms (common though this may be) when a contract confers on one party a unilateral right of termination.

[123] The law seems tolerably clear that such a unilateral right cannot be challenged unless it is exercised in bad faith or irrationally.[22] The Ministry's reasons for terminating the contract as it did on 30 March 2012 have been discussed elsewhere.[23] There is no evidence to justify a finding that the Ministry acted in bad faith or irrationally in such a way as to permeate the subsequent processes.

---

21 Supra [82].

22 *Socimeer International Bank Limited v Standard Bank London Limited* [2008] EWCA Civ 116, [2008] Lloyd's Law Reports 158 (CA); *Attorney-General of Belize v Belize Telecom Limited* [2009] UKPC10, [2009] 1 WLR 1988 (PC).

23 Supra [45] – [59].

Treaty principles, Wai 414 and claimed preference

[124] At the outset the constitutional point needs to be stressed that, although recommendations of the Waitangi Tribunal are entitled to respect, they remain but recommendations.

[125] In its Wai 414 report the Tribunal made a number of findings about the Crown's dealing with the Waipareira Trust in the area of provision of social services.[24] The Tribunal recommended the government should apply the principles of the Treaty to protect the rangatiratanga of all Maori. Because Waipareira was a community that exercised rangatiratanga in fact in welfare matters, it was entitled to expect recognition as such by the Crown and entitled to have its rangatiratanga protected.[25]

[126] It would be inconsistent with the Treaty, stated the Tribunal, to deploy funding to threaten the rangatiratanga of te whanau by compromising its unity. Thus the Crown consult with Waipareira on service planning in the district.[26]

[127] In support of his general submission that Waipareira had the status of a preferred provider of social services in West Auckland and that it was entitled to preference or priority, Mr Thorp referred to Wai 414 and to the objects of the Act set out in ss 4(b), (c), and (g).[27] He also submitted that the principles set out in ss 5A (b) and (c)(ii) of the Act applied. Additionally, in his opening, he referred the Court to the 1 October 2010 Code of Funding Practice.

[128] None of these matters raised by Mr Thorp can mask the undisputed fact that the relationship between the Ministry and Waipareira was contractual. No statute, certainly not the Children, Young Persons and Their Families Act, has incorporated the Tribunal's recommendations as they relate to Waipareira. Nor is there any statutory provision which gives Waipareira any preference in the Family Start field

---

24 Above n 1.
25 Ibid at 221-222 and 237.
26 Ibid at 225.
27 Section 4(g), not mentioned earlier in this judgment, enacts the object of "encouraging and promoting co-operation" between organisations providing services for children.

or entitles it to assume that its contractual obligations can be performed in a looser fashion than would be permitted of other contract parties.

[129] There is force in Mr Hodder's submission, that the Crown-Maori Relationship Instruments Guideline produced by Te Puni Kokiri (and referred to in Mr Crafar's affidavit) correctly draws the distinction between an aspirational document relating to Crown-Maori relationships, and contractually binding documents. The document states:[28]

> Any contract for service should be recorded separately from the [Crown-Maori relationship instruments] in a document that is intended to be legally binding on the parties; they should generally not be combined. If the two are combined the document should clearly indicate which parts are, or are not, legally binding.

[130] Finally in this area, I adopt and follow the approach of Woodhouse J in *Te Tai Tokerau Mapo Trust v The Chief Executive of the Ministry of Health*.[29] The plaintiff in that case was a health and disability services provider for Maori people in Northland which had a contractual relationship with the Northern Regional Health Authority. When its agreements were not extended, the plaintiff sought judicial review. His Honour saw this dispute as being primarily a contractual one. However, the plaintiff had placed some emphasis on the Treaty. His Honour stated:

> [99] … For example, the plaintiff in some of its claims places emphasis on the principles of the Treaty of Waitangi. An instance is the review ground alleging breach of a legitimate expectation. Here the plaintiff pleads that a legitimate expectation arose from, amongst other things, the principles of the Treaty. The relationship between Maori and the Crown through the Treaty was probably one of the main reasons for the Agreements. But it is the Agreements which created the relationship between the two particular parties – the plaintiff and North Health – and it is the Agreements which spell out the rights and obligations of each party. The Agreements expressly recorded the particular rights and obligations arising from the Treaty of Waitangi. These did not change on the transfers to the Health Funding Authority and then to the Ministry.

[131] In any event, I consider that throughout 2011 and 2012 the Ministry has conducted itself, in its dealings with Waipareira, in a spirit of partnership.

---

[28] Ministry of Justice and Te Puni Kokiri *Crown-Maori Relation Instruments: Guidelines and Advice for Government and State Sector Agencies* (September 2006) at 20-21.

[29] *Te Tai Tokerau Mapo Trust v The Chief Executive of the Ministry of Health* HC Whangarei CIV-2010-488-307, 5 August 2011.

Waipareira was a longstanding provider of a number of iwi and child-related services. The funder-provider relationship, although contractual, must require a high degree of goodwill, mutual cooperation, and partnership to succeed. Typical of the working relationship is the 2008 memorandum of understanding between Waipareira and the Child, Youth and Family Services Henderson Office. The short document has a heading "Partnership Intention". The parties state their relationship will have regard for the Treaty. It recognises Waipareira's "right and obligation to act on behalf of its community of interest". The basis of the relationship is to "achieve improvements in Maori social status in West Auckland".

[132] It is abundantly clear to me that, throughout the process described in this judgment, the Ministry was acutely aware of its partnership relationship with Waipareira. Waipareira's status as one of the worst performers had been tolerated. A previous suggestion that the contract be terminated had not been adopted by Mr Crafar. Despite termination and the 1 June 2012 decision, the door is still open for Waipareira to re-tender. All these matters indicate a partnership which the Ministry valued and which it had bent over backwards (so far as Family Start was concerned) to retain. There is nothing here which points to the principles of the Treaty of Waitangi being flouted. Nor is there anything in the Treaty which justifies a conclusion that a non-performing partner or contracting party is immune from adverse consequences.

[133] For all these reasons I reject Mr Thorp's submissions based on Treaty principles, Wai 414, and an asserted preference.

Mr Edridge's 1 June 2012 decision

[134] I have already dealt with aspects of Waipareira's submissions on this topic and made findings.[30] Mr Edridge's obligation to decide whether his decision to terminate should be revoked or stand flowed from the 18 May 2012 settlement agreement. To the extent that he is making this decision on behalf of the Ministry he was probably exercising a statutory power. But whether it was a statutory power amenable to judicial review is problematic.

---

[30] Supra [106] – [109].

[135] The settlement agreement flowed from a dispute resolute mechanism in the parties' head contract. The Ministry's obligation, to be discharged by Mr Edridge, was effectively to revisit the earlier termination decision in the light of a further monitoring visit and additional materials to be supplied. I do not consider, despite Mr Thorp's submissions, that Mr Edridge breached the Ministry's contractual obligations. The law seems clear that a contractual power exercised by a public body is amenable to judicial review. However, judicial review is normally only undertaken if the power has been exercised fraudulently, corruptly, or in bad faith.[31] A contractual power can also be reviewed if it has a nexus to a statute to the extent that the power is a statutory power rather than a private commercial power.[32]

[136] *Lab Tests Auckland Ltd v Auckland District Health Board*[33] is a recent and important authority. I adopt Mr Hodder's undoubtedly correct analysis of that case in which the Court of Appeal, with reference to other authorities, enunciated certain principles. The Court should be cautious when public services are concerned (at [90]). The "orthodox" position is that judicial review is not available simply because a public body was exercising the power. There must be something more (at [45]). The purpose of judicial review is to ensure public as opposed to private or commercial powers are not abused (at [45]). If the public body and a private party have operated within a contractual framework that may be determinative (at [59]). The Courts are not well placed to analyse the results of an evaluative process – a particularly important consideration in looking at the Alshaikh report (at [340], [342], and [385]).

[137] *Mapo Trust*[34] involved similar considerations, that being a case where a Maori organisation was party to an agreement which spelled out contractual rights and obligations and was determinative of the parties' relationship. Again I adopt with respect Woodhouse J's comments and analysis:

> [96] The foundation for the decision was what I call the primacy of contract in determining whether a decision by the defendant, who had been

---

31 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 391.

32 *Webster v Auckland Harbour Board* [1983] 2 NZLR 646 (CA) and see generally *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 (CA).

33 Ibid.

34 See n 29.

in a contractual relationship with the plaintiff, is open to judicial review. In the judgment, delivered by Lord Templeman, their Lordships observed that – the power of the Corporation to determine the contractual arrangements was derived from contract and not from statute. At the conclusion of the judgment their Lordships said:

> The causes of action based on breach of statutory duty, abuse of a monopoly position and administrative impropriety are only relevant if the causes of action based on contract are rejected. If the causes of action based on contract are rejected, the other causes of action will only constitute attempts to obtain, by the declaration sought, specific performance of a non-existing contract. The exploitation and extension of remedies such as judicial review beyond their proper sphere should not be encouraged.

[97] The Privy Council's conclusion on the facts was, of course, directed to the position if the Court, in the substantive hearing, concluded that there was no contract because the contract causes of action failed. The conclusion I have reached on the facts of this case is different – by contract the parties agreed that their relationship would come to an end on a particular basis. However, the underlying and basic principles leading to the Privy Council's conclusion are in my judgment equally applicable. Where, as here, the relationship between the parties was created by contract, and the plaintiff's complaints are in substance directed to failure to continue with the contract, the first and primary enquiry must be in contractual terms. As the Privy Council observed in *Mercury Energy*,[17] in respect of the challenge by Mercury Energy to the decision of Electricity Corporation to terminate the supply contract:

> The Court can only interfere if Mercury alleges and proves that the decision was not made according to law. The decision which is impugned is the decision to terminate the contractual arrangements.

In this case I have concluded that the result of which the plaintiff complains – termination of further contracts – is a result which was agreed to by both parties. If the decision is one that was agreed to by both parties, and that *agreement* is not impugned, the result the plaintiff now complains of was in fact a result produced in accordance with law.

…

[131] For these reasons I am satisfied that, even if there is an extant decision of the defendant which unilaterally resulted in the ―termination of the plaintiff, the lawfulness of the process by which such a decision was made is to be determined solely by the terms of the Agreements between the parties. The decision is not amenable to judicial review.

[138] My conclusion is that that Mr Edridge's 1 June 2012 decision is not amenable to judicial review. He was exercising a contractual right, flowing from the May 2012 settlement agreement to revoke or confirm his previous termination decision. The power he was exercising was doubly rooted in contract flowing as it did from both the settlement agreement and the head contract's dispute resolution and process.

[139] There is thus no basis on which I can or should review Mr Edridge's decision. Nor is it appropriate for me to assess and evaluate Ms Alshaikh's assessment report which Mr Edridge considered.

[140] There is absolutely no basis to find that Mr Edridge's decision was motivated by fraud, corruption, or bad faith. It follows too that there is no obligation (and certainly no contractual obligation contained in the settlement agreement) for Mr Edridge to invite comment from Waipareira and Dr Leeson on the Alshaikh report.

Mr Edridge failed to have regard to other CYF approvals

[141] There is nothing to this point. Both historically, and in terms of the 5 July 2010 contract, Waipareira was providing a number of programmes on behalf of the Ministry. Approvals given by CYF managers in West Auckland for Waipareira to carry out certain functions and provide services have no relevance to Waipareira's performance as a Family Start provider. Certainly they have no relevance to the parties' obligations under the settlement agreement and Waipareira's ability to provide Family Start services in an acceptable way.

Mr Edridge failed to make allowance for a reasonable time for Waipareira to rebuild

[142] This submission can be disposed of swiftly. There was no time period extended to Waipareira within which to bring its performance up to an acceptable standard. Mr Tamihere accepted in evidence that there was no agreement between him and Mr Crafar that there would be a 12 month period from July 2011.[35] The settlement agreement is totally silent on any expected time period. From July 2011 Waipareira, along with other Family Start providers, had to make certain organisational and process adjustments to adapt to changes in Family Start programmes and policies. In that regard Waipareira was on an equal footing with all other providers. There is no basis to suggest that Mr Edridge should have given some weight to a reasonable time period within which to rebuild.

---

35 Supra [61].

[143] Certainly Mr Edridge in his decision[36] and Ms Alshaikh in her assessment were aware of a number of improvements. Dr Leeson in her report (considered by Mr Edridge) highlighted the dedication of Waipareira's staff and their determination to implement the Family Start programme. Both Mr Edridge's decision and, to a lesser extent, Ms Alshaikh's assessment, suggest that unfortunately Waipareira had done too little too late. Mr Edridge held legitimate concerns over whether the improvement could be maintained. Concerns were expressed about client volumes and staffing levels.

[144] Whether, as Mr Tait deposes, that improvement has been maintained and Waipareira is now performing at acceptable levels will be a matter for assessment by the Ministry if Waipareira decides to retender for the contract.

Ms Alshaikh's monitoring visit was coloured by incorrect interpretations and breaches of the settlement agreement

[145] Mr Thorp's submission here is first that, by incorporating into her review the Ministry's new performance expectations, Ms Alshaikh and the Ministry had breached the settlement agreement since these were not matters usually reviewed. Secondly, Mr Thorp submitted that Ms Alshaikh should not have had regard to matters and files which related to Waipareira's pre-February 2012 performance.

[146] Thirdly, Mr Thorp submitted that Ms Alshaikh conducted her review in a manner contrary to that indicated by Mr Edridge in emails. The relevant email exchanges between Messrs Edridge and Tamihere are, in my view, of marginal relevance. Mr Tamihere emailed Mr Edridge on 23 May 2012, five days after the mediated settlement agreement stating it was important the Ministry "re-affirm the trust and goodwill" over the review exercise which had been agreed. It states (possibly a reference to what occurred in the mediation) that the Ministry would be looking for a demonstrable improvement for the future and evidence of sustainability. Ms Alshaikh's February monitoring review would be "the start point" of the agreed review.

---

[36] Supra [100].

[147] Mr Edridge was able to "re-affirm" the Ministry's review would be in good faith and with goodwill; the review would assess Waipareira "against all current practice and delivery standards for Family Start"; that past poor performance would not disadvantage Waipareira; and that the Ministry would be seeking assurances that Waipareira had "the processes, practices, and leadership in place to deliver the Family Start Services for the balance of the current contract in accordance with the Ministry's expectations".

[148] Fourthly, Mr Thorp submitted that, in the wake of the settlement agreement, the Ministry was under a Treaty-type or good faith obligation to disclose Ms Alshaikh's adverse perceptions of Mr Tait and his performance. Furthermore, Ms Alshaikh had failed to seek clarification from Mr Edridge about the range and extent of files she and the other Ministry officers could examine.

[149] I am not carried by these submissions. Clause 1 of the 18 May 2012 settlement agreement contained the parties' agreement that the monitoring visit would "encompass all matters usually reviewed on such a visit". A review of necessity must include Waipareira's current performance and active files. It is untenable to submit that a review should not encompass the Ministry's new performance expectations (including such matters as child safety tools and regular home visits) which Waipareira, along with other Family Start providers, was obliged to implement. Certainly some of the files examined by Ms Alshaikh involved families who had been the beneficiaries of the Family Start programme before January 2012. Any detected failure to apply the Ministry's new expectations to families remaining on Waipareira's books would be a legitimate matter of concern.

[150] There is no evidence to suggest that the scope of Ms Alshaikh's review was substantially different from the prior February 2012 monitoring visit. Furthermore, given Waipareira's firm and correct indications that it was actively upskilling its staff and lifting its game, both parties would have expected the monitoring visit to assess new procedures, ongoing administration, and claimed improvements.

[151] Although there may be a hint (so far as the Tamihere/Edridge email exchange was concerned)[37] of matters contained in the mediation, I am prepared to accept that Mr Edridge committed the Ministry to carrying out the monitoring review in good faith and with goodwill. But, far from assisting Waipareira's case, Mr Edridge's email was quite specific. The Ministry would want assurances about Waipareira's processes, practices, and leadership, to deliver the Family Start programme. It would in particular be assessing current practice and delivery standards and would be uninfluenced by past poor performance. These are precisely the areas which were dealt with by Ms Alshaikh in her reports. Past files did not determine her recommendations. Rather past files were examined to see whether previous deficiencies had been rectified and new procedures implemented. Doubts were expressed about staffing levels. Doubts were expressed about commitment to critical KPIs and child safety procedures. Doubts were further expressed about sustainability. Despite Mr Thorp's submissions, the email exchange does not assist Waipareira.

[152] Mr Edridge was required to make a judgment. So too was Ms Alshaikh obliged to make an assessment of Waipareira's performance during the May monitoring visit. This was done. The terms of the settlement agreement were adhered to. I reject the submission that Ms Alshaikh's methodology and the way she carried out the monitoring visit were in breach of the settlement agreement. Nor, for the reasons I have stated are her actions amenable to judicial review.

[153] In the context of the parties' agreement and what was required of the Ministry and Mr Edridge, criticisms of whether or not the files were selected randomly by Ms Alshaikh, whether or not incorrect conclusions were drawn about some of the files, and whether or not all the domains of File Check Sheets were completed have no relevance.

[154] Nor, importantly, was there any contractual obligation on the Ministry for Ms Alshaikh's methodology to be explained in advance or agreed to by Waipareira.

---

[37] Supra [96].

Other expert evidence

[155] The defendant filed three affidavits from experts, partly to bolster its assessment of Ms Alshaikh and Mr Edridge and partly to counter the criticisms from Dr Leeson.

[156] One affidavit was sworn by Dr David Fergusson, a research professor at the University of Otago's Christchurch campus who holds a University of Otago PhD in paediatric research. Two affidavits were sworn by Emeritus Professor David Thomas who, for 11 years until 2008, was a Professor of Social and Community Health at the University of Auckland's Faculty of Medical and Health Sciences.

[157] As was the case with Mr Tait, neither of these deponents was cross-examined. Their evidence was given minimal weight by both counsel in submissions, and properly so since the ultimate legal issues did not require the expertise of the two deponents.

[158] All that needs to be said is that Dr Fergusson, for his part, considered that there was more than sufficient evidence to justify Ms Alshaikh's recommendation that Waipareira's contract should be terminated. Nor did he consider that Dr Leeson's materials, despite her probably correct conclusions about how Waipareira staff were functioning at the time (she observed them), were an adequate refutation of the Ministry's concerns. Professor Thomas (who holds a PhD in Psychology from the University of Queensland) addressed in great detail Dr Leeson's report and affidavits. Unlike Dr Leeson he was not prepared to conclude that there were "significant errors" made in ratings by the Ministry's monitoring team. He further considered that Dr Leeson's criticisms did not detract from the validity of the key points made in Ms Alshaikh's review. Nor did he consider that Ms Alshaikh had selected files in order to support "an incorrect, misleading, and overly negative impression of [Waipareira's] overall performance".

[159] To the extent that these expert opinions are consistent with my own conclusions, they provide a degree of comfort. But I stress my own conclusions have been made on the basis of the evidence, submissions, and my impressions of

relevant witnesses. They have been totally uninfluenced by the opinion evidence of Drs Fergusson and Thomas.

The Alshaikh assessment was unreliable because it was not completed in good faith

[160] Previously in this judgment I have rejected claims of bad faith made against Ms Alshaikh.[38] Mr Thorp's submissions require me to buttress somewhat my factual finding.

[161] Counsel's closing submissions stated that "absence of good faith is not always susceptible of precise definition". He went on to submit that:

> Knowledge that an inaccurate and complete and misleading report of a monitoring visit will be relied upon by a decision-maker to achieve an outcome that might not occur otherwise must comprise the absence of good faith towards the party adversely affected by the decision made in reliance upon the report.

[162] That is, with respect, a somewhat tenuous proposition. However, it premises that Ms Alshaikh had *knowledge* that her report was inaccurate, incomplete and misleading. There is no evidence to support such a proposition. Having listened to Ms Alshaikh, and indeed asked her some questions of my own, I reject it.

[163] Mr Thorp was critical of Ms Alshaikh not conducting the "normal feedback session". There were, of course, time constraints. In any event, as is clear from both Ms Alshaikh's report and her evidence, the Waipareira staff were not particularly forthcoming and gave the appearance of being defensive.

[164] I already rejected and repeat my rejection of the suggestion (emanating from Dr Leeson) that Ms Alshaikh deliberately chose five files which were the worst of the worst. Mr Thorp submitted that it was an inescapable conclusion that "despite her denial, Ms Alshaikh separated out the files she circled or highlighted for examination in order to assist her in identifying the worst of the worst". In his submission the markings which appeared on Ms Alshaikh's notebook sheet can only be explained this way.

---

[38] Supra [82].

[165] I reject that submission. I have already dealt with how the sheet of paper was constructed by Ms Alshaikh from FS-Net data. One might as well turn the argument on its head and submit that if the files were indeed the worst of the worst (and there has been no direct evidence that they were), then Waipareira for its part should have prioritised making those five files better.

[166] In an endeavour to attack Ms Alshaikh's bona fides, Mr Thorp further submitted that the difficulties which Ms Alshaikh described with Mr Tait "must have caused her to decide to do all she could, not to have to deal with the Trust in the future". This, Mr Thorp submitted was consistent with other aspects of her subsequent conduct. She failed initially to disclose her notebook page. She had not thought about her notes until well after this proceeding began. Her explanations in evidence were unconvincing because she had previous experience as an appeals officer in the Ministry's legal services team and she well knew what the words "random" meant.

[167] Mr Thorp further submitted that there were many aspects of Ms Alshaikh's assessment which were "consistent with the intention to criticise wherever possible and, therefore the absence of good faith".

[168] In short, submits Mr Thorp, the Alshaikh report and indeed the monitoring visit on which Mr Edridge relied to make his decision, were fatally flawed because they were the products of Ms Alshaikh's resolve to make sure that the Trust was punished. Her selection of files and her general assessments during the monitoring visit were deliberately skewed to ensure that the termination decision was unchanged.

[169] I totally reject such a submission. There is no basis for such an assessment. Nor, with respect, is there any basis for such a sustained attack on Ms Alshaikh's professionalism.

[170] I am satisfied, as I have stated elsewhere,[39] that Ms Alshaikh's selection of files was based solely on a small selection, under different columns and headings,

---

[39] Supra [75] – [78] and [82].

which she drew from the FS-Net data. She had no idea when she visited Waipareira what those files might reveal. For Mr Thorp's submission to have any credibility Ms Alshaikh's alleged bad faith and bias would somehow have had to include Messrs Panapa and MacInerney.

[171] The allegation of bad faith was never even pleaded (and properly so) until such time as the late discovery of Ms Alshaikh's notebook. Far from being a smoking gun I regard the notebook as damp squib. The bad faith allegations are unfounded and I reject them.

Result on Plaintiff's first and second causes of action

[172] My analysis in the previous two sections of this judgment lead me unhesitatingly to the conclusion that Waipareira's two causes of action must fail. There is no sound basis on which Mr Edridge's 1 June 2012 decision not to revoke the Ministry's previous termination of Waipareira's contact can be impugned by judicial review proceedings. Mr Edridge's obligation was to make one of two possible decisions on the basis of further agreed information. His decision cannot be attacked as being unfair, unreasonable, biased, or in bad faith. Nor, for the reasons which I have articulated, can the process of the agreed monitoring visit and Ms Alshaikh's report on which Mr Edridge relied be attacked.

[173] Nor is any basis defined that Mr Edridge or the Ministry breached, as a matter of contract, the terms of the 18 May 2012 settlement agreement.

[174] On these two causes of action there must be judgment for the defendant.

Fair Trading Act claim

[175] Mr Thorp did not pursue the Fair Trading Act cause of action with any vigour. He was not, however, prepared to withdraw it.

[176] I consider the Fair Trading Act 1986 has no sensible application to the parties' dispute or the facts. Waipareira's broad allegation is that, in terms of s 9, it has been misled or deceived. There is no sound evidential base for such a finding.

[177] The Ministry cannot possibly fall inside the s 2(1) definition of being "in trade". Although s 4(1) of the Act binds the Crown to the extent that the Crown engages in trade, I do not consider contractual relationships between the Ministry and Family Start providers constitutes trade.[40]

[178] Quite apart from the statute having no application to this dispute there is no basis to find that the Ministry misled or deceived Waipareira either in respect of its 30 March 2012 decision or its 1 June 2012 decision.

[179] There is judgment for the defendant in this cause of action.

Counterclaim

[180] The Ministry counterclaims seeking a declaration that Waipareira's Family Start contract was terminated as of 30 June 2012 and additionally that this proceeding was a breach of the parties' 18 May 2012 settlement agreement.

[181] Mirroring to a slightly lesser extent Mr Thorp's approach to Waipareira's Fair Trading Act claim, Mr Hodder did not pursue the counterclaim with vigour. He saw it as a necessary device to drive a stake through the heart of Waipareira's proceeding in the event that Waipareira's causes of actions were to fail.

[182] Mr Hodder's submission was that the combination of the settlement agreement and Mr Edridge's 1 June 2012 decision means that the Ministry's 30 March 2012 termination notice stands. As a result Waipareira's Family Start contract ended on 20 June 2012 (although it has in fact been held over). The parties' settlement agreement (cl 5) provided that if the termination notice was to stand Waipareira "shall not challenge the notice in any way, whether by seeking injunctive relief or otherwise".

---

[40] See in general policy terms *Glaxo New Zealand Ltd v Attorney-General* [1991] 3 NZLR 129 (CA) at 139, 140; *Integrated Education Software Limited v Attorney-General* [2012] NZHC 837 at [101].

[183] In essence Mr Hodder submits that Waipareira has (by bringing these proceedings) done precisely what it covenanted not to do in cl 5 of the settlement agreement. It has thus breached it.

[184] I am reluctant, for precedent reasons, to rule that a clause of the type contained in the 18 May 2012 agreement invariably ousts the right of a party to seek relief in a court. Certainly I consider Mr Hodder's submissions present a strong argument. I lean towards granting the counterclaim but am hesitant to do so because I see little useful purpose.

[185] An interpretative argument might possibly be open on the wording of cl 5 that "injunctive relief or otherwise" does not extend to claims of judicial review and breach of contract. Particularly, given that the Ministry is a government agency offering, through Family Start, a public service, I express a reluctance to construe cl 5 so widely that the remedy of judicial review, which is a vital constitutional tool, can be excluded without more.

[186] After some thought, my decision is to dismiss the counterclaim. I do so largely for pragmatic reasons. If the plaintiff accepts this Court's judgment and does not appeal it, then judgment for the defendant on the counterclaim would serve no useful purpose. If the plaintiff, however, contests my judgment by appealing it, then the route lies open for the defendant to cross-appeal, thereby providing the Court of Appeal with an opportunity to determine the sensitive issues to which I have alluded in this section of my judgment.

[187] There is judgment for the plaintiff on the counterclaim.

Costs

[188] Prima facie the defendant has succeeded and is entitled to costs on the 2B scale.

[189] I note, however, that counsel wish to be heard on costs over which issue there will clearly be some sensitivities.

[190] It would be my hope that counsel can agree costs between them without further intervention by this Court. If costs need determination by me, however, then I direct that the defendant is to file submissions by Friday 8 February 2013 and the plaintiff submissions in reply by Friday 22 February 2013.

.....…
Priestley J