

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

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

CIV-2017-485-247

UNDER

The Marine and Coastal Area
(Takutai Moana) Act 2011

IN THE MATTER OF

An application by Roger
Tichborne, on behalf of Ngā
Hapū O Tokomaru Ākau, for
orders recognising Customary
Marine Title and Protected
Customary Rights

Hearing: 11 August 2022 via phone conference

Appearances: D C F Naden and M Yogakumar for Applicant
L O’Gorman QC and R Siciliano for Te Whānau a Ruataupare
B Lyall for Ngā Hapū o Kokoronui (abiding)
C Barnett and G Melvin for Attorney-General
B Scott and S Cvitanovich for Seafood Industry

Minute No.1: 12 August 2022

MINUTE (No.1) OF CULL J

[1] A telephone conference was convened in respect of the MACA hearing scheduled to begin in Gisborne on 5 September 2022. Counsel for the parties filed memoranda addressing final adjustments to the timetable directions and matters affecting the conduct of the hearing, as set out below.

Delayed start to hearing

[2] Counsel for Te Whanaū sought a delayed start to the commencement of the hearing by a week. This was strongly opposed by Ngā Hapū.

[3] Ms O’Gorman explained that as Counsel had been recently instructed, the request was made to enable more preparation time. In light of the strong opposition however, the request was no longer pursued. Accordingly, the hearing will begin on 5 September 2022.

Commencement time

[4] It was agreed by all parties that leave of the Court be sought to permit karakia, whai korero, mihi mihi and waiata to be made at the commencement of the hearing in accordance with tikanga Māori. Leave of the Court was also sought to end the hearing with karakia, poroporoaki and waiata. Similarly, leave is sought for the same karakia at the beginning and end of each daily Court sitting.

[5] Leave is granted accordingly and the applicants should make appropriate arrangements amongst themselves for the carrying out of the tikanga Māori requirements.

[6] Mr Naden asked whether on the first day of the hearing whether the proceedings could commence at 9 am to accommodate karakia and other tikanga greetings. All parties agreed and I direct therefore that the proceeding will commence at 9 am on 5 September 2022.

Strike-Out application

[7] Ngā Hapū has applied to strike-out the respondent’s application for Recognition Orders. The basis for the strike-out is the claim by Ngā Hapū that Te Whānau has no mandate to represent Te Whānau a Ruataupare.

[8] In his Minute dated 8 June 2022, Churchman J declined Mr Naden’s request for a separate interlocutory hearing, recording that:

7. There appears to be no reason why the issue of mandate cannot be addressed as a discrete issue in the 5 September 2022.

[9] Mr Naden asked that the strike-out application be heard at the commencement of the hearing on 5 September. After hearing from Ms O’Gorman and considering the

grounds for the strike-out application, I have declined Mr Naden's request. The issue of mandate appears to me to be at the heart of the contest between the applicant and the respondent and should be heard as a discrete issue in the substantive proceedings.

[10] I decline the request for a separate strike-out hearing.

Common bundle

[11] Counsel for the Attorney-General has undertaken to prepare and file a common bundle for the hearing. Ms Barnett asked that all parties provide an index of documents they wish to be included in the common bundle to be sent to the Attorney-General by 16 August 2022. To date, no responses had been received by the parties and the timetable is therefore adjusted from 12 August to 16 August. Consequently, the request that the common bundle be filed and served by 22 August is also granted.

Pūkenga Report

[12] The Court has appointed Dr Robert Joseph as a Pūkenga (Court expert) for this proceeding and confirmed the questions that would be put to him.¹ Counsel for the Attorney-General seek a direction that Dr Joseph's evidence be filed in sufficient time to review the evidence before opening submissions are due on 26 August. This was also to assist with the timely compilation and filing of the agreed common bundle. The initial date sought was 12 August for Dr Joseph's evidence to be filed but in light of today's conference and the adjustment to the timetable, Ms Barnett seeks that his evidence be filed by 19 August. Accordingly, the Registrar is to advise Dr Joseph to provide his evidence by 19 August accordingly.

Timetable adjustments

[13] Ms O'Gorman sought an extension to the date for Te Whanāu's reply submission from 12 August to 16 August. There was no objection to this request and Mr Naden sought a similar extension for Ngā Hapū's reply evidence.

¹ Minute (No.4) Churchman J, 29 March 2022 at [7].

[14] Accordingly, the timetable is amended to 16 August for the filing of each of the principal parties' reply submissions.

[15] The current timetable therefore is as follows:

- (a) Reply evidence to be filed and served by 16 August.
- (b) Parties to provide index for common bundle compilation by 16 August.
- (c) Pukenga evidence to be filed on 19 August.
- (d) Common bundle to be filed on 22 August.
- (e) Opening submissions to be filed and served on 26 August.
- (f) In addition, Counsel for the parties are to file and serve a list of witnesses and their proposed order of call, noting those that are to give confidential evidence by 31 August.

Te Reo interpreter

[16] Mr Naden sought that a Te Reo interpreter be available for the entirety of the hearing. After discussion with Counsel, it appears appropriate that a Te Reo interpreter is available to the parties during the taking of the witnesses' evidence, as many of the witnesses may wish to give their evidence in Te Reo. Accordingly, I direct the Registry to make suitable arrangements for a Te Reo interpreter to be available for the length of the hearing.

Hearing room requirements

[17] Mr Naden seeks that the hearing be held in a courtroom of sufficient size and capacity to allow for the attendance of the applicant witnesses, hapū members, support people and interested members of the public. Ngā hapū proposes to display various taonga including a scaled version of Te Ariuru Marae, together with an anchor stone for the purposes of their hearing presentation.

[18] There was no opposition to this request. However I indicated that the spacing in the courtroom must accommodate Counsel and comply with COVID-19 protocol restrictions. The protocols to be complied with are those of the Court.

[19] Mr Naden is to liaise with this Court's Registry and the Gisborne Registry to ensure that Counsels' space is not compromised. Further, restrictions on numbers within the Court will be regulated by the Court's Registry. If there is sufficient space for the display of various taonga, the Court grants leave but this must be subject to the practicalities required of the courtroom.

Notes of evidence

[20] Having read Counsels' memoranda, I direct that the notes of evidence be circulated to parties as soon as they become available in the first instance. I invite Counsel to provide a note to the Registrar of any amendments or corrections that they wish to raise in relation to the notes of evidence and these can be reviewed and corrected, during the course of the hearing, with brief Chambers' hearings to enable any contentious changes to be discussed.

Confidentiality order

[21] Following the joint memorandum of Counsel seeking confidentiality orders, I made the orders sought on 1 August. Mr Naden raised the issue of how the confidentiality orders were to be implemented. I have directed, with agreement of all parties, that when Counsel finalise the list of witnesses and their order of being called, they should indicate those witnesses who are to give evidence on confidential matters.

[22] When such witnesses are to give evidence, the Court will make the appropriate orders, either clearing the Court or allowing certain persons to remain, as the circumstances dictate. These matters will be dealt with during the hearing at the relevant time. The orders in relation to redacted and unredacted tangata whenua evidence are already made. The procedures in relation to the presentation and cross-examination of unredacted evidence will be the subject of rulings as the witnesses appear.

Site visit

[23] Ngā hapū request a site visit. This is opposed by Te whanaū and the Attorney-General abides, as do the other parties. After hearing from Counsel, I have directed that the issue of whether a site visit is made will remain open on a “wait and see” basis. As the hearing unfolds, the purpose of a site visit can be clarified and in that event, a careful process will need to be adopted to ensure fairness to all parties.

COVID protocols

[24] I reminded Counsel that the High Court is observing COVID protocols, which require the wearing of masks of all persons within the courtroom. Counsel who are addressing the Court or witnesses may remove their masks for that purpose and witnesses may also remove their masks when giving evidence. All other persons in the Court are to wear masks.

[25] Depending on the size of the public gallery, numbers will be restricted to observe adequate social distancing. In the interests of all participants in the hearing process, VMR or an equivalent audio visual link will be available for persons to observe proceedings without being present. Counsel are urged to discuss with their respective parties the logistics of such restrictions and make arrangements accordingly.

[26] Counsel will be supplied RAT tests, which Counsel can self administer before attending Court each day. Similarly, witnesses will be required to take RAT tests.