

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

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

**CIV-2017-404-481
CIV-2017-485-221
CIV-2017-485-224
CIV-2017-485-232
CIV-2017-485-259
CIV-2017-485-260
CIV-2017-485-267
Group M Stage 1(a)**

UNDER the Marine and Coastal Area (Takutai
Moana) Act 2011

IN THE MATTER OF an application for orders recognising
Customary Marine Title and Protected
Customary Rights

On the Papers

Minute: 6 October 2023

**MINUTE OF GWYN J
(MHWS evidence; Group M and N boundaries;
filing of amended applications; closing submissions; site visit)**

[1] I thank counsel for the applicants for their joint memoranda of 29 September 2023 and 5 October 2023, the Attorney-General's memoranda of 29 September and 2 October 2023 and the memorandum for Te Hika o Pāpāuma, dated 2 October 2023.

[2] Those memoranda address a range of issues which were discussed with counsel during the resumed hearing, on 6 October 2023. I record the outcome of those discussions below.

Evidence re MHWS; impact on division between stage 1(a) and stage 1(b) hearings

[3] The Court has granted leave for the Attorney-General to call the Surveyor-General, Anselm Felix Haanen, to give evidence about the line of mean high-water springs (MHWS) at rivers, particularly in relation to the Whareama River mouth.

[4] The Attorney's application arose from the opening submissions given on behalf of the applicant Te Hika o Pāpāuma, in which counsel submitted that there is uncertainty in the definition of MHWS which may prejudice applicants in fixing their landward marine-riverine boundaries. The evidence from Mr Haanen seeks to address that submission by clarifying the definition of MHWS in relation to a river mouth.

[5] Counsel for Pāpāuma have filed a memorandum indicating that Pāpāuma proposes to call expert reply evidence, from Dr Robert Bell.

[6] The Whareama River was originally to be part of the stage 1(b) hearing. On the application of Te Hika o Pāpāuma, by minute of 3 May 2023 I directed that the northern bank of the Whareama River would be the northern boundary of the stage 1(a) hearing and granted leave to Te Hika o Pāpāuma to participate in the stage 1(a) hearing in respect of the Whareama River mouth.¹

[7] Te Hika o Pāpāuma, and the other parties, have participated in the stage 1(a) hearing on that basis.

[8] As discussed with counsel, there are two options for hearing the MHWS evidence from Mr Haanen and Dr Bell: either in the second or third weeks or November, as part of the stage 1(a) hearing, or by readjusting the boundary of the stage 1(a) and (b) hearings and shifting the Whareama River mouth to the stage 1(b) hearing commencing on 12 February 2024.

[9] Counsel for the applicants had proposed a third course – to hear the MHWS evidence as a discrete issue during the hearing time currently allocated for stage 1(b).

¹ Minute of Gwyn J (Northern Boundary for the Stage 1(a) hearing) dated 3 May 2023, at [23].

Unfortunately, that is not an option for the Court as the judgment on the stage 1(a) hearing must be issued before the stage 1(b) hearing.

[10] Mr Hirschfeld advises that Dr Bell's evidence will not be available until the beginning of December 2023. Counsel expects the evidence will be relevant not just in respect of the Whareama River, but also to two other rivers that feature in the stage 1(b) application area. Accordingly, Pāpāuma's preference is to adjust the hearing boundary and shift consideration of the Whareama River to the stage 1(b) hearing.

[11] I understand the concern expressed by the applicants that adjusting the boundary of the two hearings in this way will have some adverse effect: it may require Ngāi Tūmapūhia-a-Rangi Hapū (CIV-2017-485-232) and the interested parties Ngāi Tūmapūhia-a-Rangi Ki Motuwairaka Inc and Ngai Tūmapūhia-a-Rangi Ki Okautete Inc, to participate in the stage 1(b) hearing to present opening and closing submissions in relation to the Whareama River. I appreciate this is not desirable, but unfortunately it cannot be avoided.

[12] Accordingly, I direct that the boundary of stage 1(b) is adjusted, so as to include the Whareama River mouth. Correspondingly, the boundary of the stage 1(a) hearing is adjusted to remove the Whareama River mouth.

[13] The further evidence relating to MHWS is to be filed and served in accordance with the following timetable:

- (a) Te Hika o Pāpāuma is to file and serve Dr Bell's evidence by **5pm Friday 1 December 2023;**
- (b) the Attorney-General is to file and serve any evidence in reply by **5pm Friday 19 January 2024.**

[14] As discussed with counsel, to the extent that relevant evidence has already been adduced in the stage 1(a) hearing that evidence can be "carried over" to stage 1(b), by refileing any relevant evidence in chief. Any relevant evidence adduced in

cross-examination during the stage 1(a) hearing may be introduced by appending the relevant pages of the notes of evidence from stage 1(a) to the refiled briefs/affidavits.

[15] At this stage it seems unlikely there will be a need to recall any stage 1(a) witnesses (who are not also giving evidence in stage 1(b)) but if that situation arises notice will be required of an intention to recall.

Boundary between Group M and N hearing areas

[16] By memorandum of 25 September 2023, counsel for the Attorney-General flagged an overlap between the Group M and Group N hearing areas in the offshore area, between the Ngai Tukōkō/Ngāti Moe application (CIV-2017-485-267) and the Group N application of the Muaūpoko Tribal Authority. The Attorney sought directions accordingly.

[17] Counsel for Muaūpoko Tribal Authority (MTA) has now filed a memorandum dated 5 October 2023 in this proceeding. MTA's application in the Group N hearing covers the Rangītikei River mouth south to Turakirae Head. Counsel advises that MTA does not seek any interest or wish to be heard in this Group M proceeding. MTA will file in the Group N proceedings a revised map of its application on the south-eastern boundary so that it runs in a straight line from Turakirae Head south to meet the line of the Ngai Tukōkō/Ngāti Moe application and follows the line of that application to 12 nautical miles, so that there is no overlap with any part of this Group M stage 1(a) proceeding.

[18] Counsel for Ngāi Tukōkō and Ngāti Moe, Ms Yogakumar and Ms Sreen, advise they will promptly file a memorandum addressing the overlapping boundary of their application.

[19] Once the two memoranda referred to above have been filed, the Court will issue a minute, in both the Group M and Group N proceedings, clarifying the boundary of the applications.

Amended applications

[20] The joint memorandum of counsel for the applicants dated 29 September 2023 records that they have reached preliminary agreement as to areas of shared interest within the hearing area. I acknowledge the significance of such agreements.

[21] Counsel are directed to file amended applications, reflecting those agreements, prior to the filing of closing submissions so that they are before the Court and all parties.

Closing submissions

[22] Closing submissions are to be filed and served by **5pm on Friday 20 October 2023**.

[23] Oral submissions are to be delivered in the High Court at Wellington, commencing on Tuesday 25 October 2023.

[24] Counsel for the applicants have proposed that the closing submissions of the Attorney-General and interested parties should precede the applicants' closing submissions or, in the alternative, the applicants should have a right of reply.

[25] Counsel for the Attorney-General submits his submissions should follow those of the applicants, having regard to the role of the Attorney as an interested party in all proceedings under the Marine and Coastal (Takutai Moana) Act 2011.

[26] I acknowledge the submission for the Attorney-General that his role in this proceeding should not be confused with that of an applicant or a respondent. Nor is he an "interested party" in the same sense as the tangata whenua third parties and the Seafood Industry Representatives (SIR), each of which has a direct interest in the outcome of the applications.

[27] In *Re Edwards (Whakatōhea) No. 2*² Churchman J acknowledged the role of the Attorney-General to appear in the "interests of the public", to ensure the Court has

² *Re Edwards Whakatōhea* [2022] 2 NZLR 772, [2021] NZHC 1025, at [21(a)].

all the relevant information before it and to assist in the interpretation and application of the Act through legal submissions. While that assistance is arguably less critical now, with the establishment of some general principles in earlier cases, the Court will be assisted by the submissions of counsel for the Attorney-General as to whether, in his view, the applicants have met the relevant statutory tests in respect of the application areas.

[28] However, I think it will be most useful for the applicants and the Court if the submissions for the Attorney-General precede those of the applicants, so the applicants have an opportunity to respond to any submission that they have not met the statutory tests in some respects. Given all applicants and interested parties will have received the others' written submissions in advance, I do not think there is a need for any right of reply; responses can be incorporated in the delivery of oral submissions.

[29] Accordingly, the order of submissions will be:

- (a) Kawakawa 1D2 Ahu Whenua Trust, Ngāi Tūmapūhia-a-Rangi Ki Motuwairaka Inc; Ngāi Tūmapūhia-a- Rangi Ki Okautete Inc (order to be determined by those parties);
- (b) SIR;
- (c) Attorney-General;
- (d) Applicants (order to be determined by the applicants).

[30] Counsel note that the judgment of the Court of Appeal in the appeal from the High Court decision in *Re Edwards Whakatohea*³ is imminent. If the Court of Appeal's decision is released after the parties have presented their closing submissions in this hearing, a timetable will be set in place to allow for filing and service of supplementary submissions to address issues arising from the appeal judgment.

³ *Re Edwards Whakatohea* above n 2.

Site visit

[31] As discussed, the third site visit, for the area from Lake Onoke to Matakītaki, is yet to take place. That remains scheduled for **Tuesday 10 October 2023**, depending on the weather. Counsel will advise the Court of the meeting place and time.

Questions for the Pūkenga

[32] The questions the Pūkenga, Dr Robert Joseph, is to answer in his report to the Court, were originally set in Churchman J's minute of 8 November 2022.

[33] The parties have filed a number of memoranda which propose revisions to those questions. As noted at this morning's hearing I will confer with Dr Joseph about the various proposals and will advise the finalised questions to the parties in a further minute on Monday 9 October 2023.

Gwyn J