IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-232
CIV-2017-485-259
CIV-2017-485-267
CIV-2017-485-224
CIV-2017-485-260
CIV-2017-485-221
[2023] NZHC 470

Group M 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:

Appearances: D Naden, M Yogakumar and M Screen for Ngāi Tumāpuhia-a-Rangi Hapū (CIV-2017-485-232)
T Bennion for Ngāti Hinewaka (CIV-2017-485-259)
D Naden, M Yogakumar and M Sreen for Tukōkō and Ngāti Moe (CIV-2017-485-267)
R Siliciano for Rangitāne Tū Mai Rā Trust (CIV-2017-485-224)
M Houra for Te Ātiawa ki Te Upoko o Te Ika a Maui Potiki Trust (CIV-2017-485-260)
J P Ferguson for Trustees of Ngāti Kahungunu ki Wairarapa Tāmaki-nui-a-Rua Settlement Trust (CIV-2017-485-221)

Interested parties:
B Lyall for Ngāi Tumapuhia-A-Rangi Ki Motuwairaka Inc and Ngāi Tumapuhia-A-Rangi Ki Okautete Inc
B Scott for Seafood Industry Representatives
G Melvin for Attorney-General

Judgment: 10 March 2023

JUDGMENT OF CHURCHMAN J

Introduction

[1] The applicant, Ngāi Tūmapūhia-A-Rangi Hapu, applied for recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) on 3 April 2017. On 17 February 2023, the applicant filed an amended application proposing amendments to the original application under two heads, namely a change of applicant and the description of protected customary rights for which it seeks recognition orders.

[2] The questions for determination here are whether the amended application is consistent with the statutory requirements under s 101 of the Act for an application for recognition orders, and whether the amendments sought amount to a material change to the application such that the amended pleading represents a fresh application under the Act and thereby constitutes an abuse of the Court.[1]

Discussion

Change of applicant

[3] The first set of amendments relates to the named applicant. The amended application changes the name of the applicant from "Ngai Tumapuhia-A-Rangi Maori Marae Committee Incorporated" to "Ngāi Tūmapūhia-a-rangi Hapū Committee". It also changes the representative of the applicant group from "Ryshell Griggs and Tūmapūhia-A-Rangi Māori Marae Committee Incorporated" to "Ngāi Tūmapūhia-a-rangi Hapū Committee". The amended application also updates the email and phone contact details for the applicant.

[4] No reason is adduced in the amended application for the proposed change to the applicant. However, the "applicant group" is unchanged, namely "Ngā Uri o Ngai Tūmapūhia A Rangi Hapū". It appears it is only the "applicant", who is the representative of the applicant group, that is to be amended.

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1 *Re Dargaville* [2020] NZHC 2028 at [44]; *Re Paul* [2020] NZHC 2039 at [36] and [64], upheld on appeal in *Paul v Attorney-General* [2022] NZCA 443 at [75]; and *Re Ngāti Pāhauwera Development Trust (strike-out application)* [2020] NZHC 1139 at [4].

[5] There appears to be no change to the applicant group on whose behalf the recognition orders are sought. There would therefore be no material change to the application such that the amended application represents a fresh cause of action and an abuse of the Court.

[6] However, I consider there is a statutory impediment to the amendment sought. The amended application fails to meet the statutory requirements for an application in respect of the applicant, the applicant being the representative of an applicant group.

[7] Section 101 of the Act stipulates the necessary contents of any application for recognition orders under the Act. An application for a recognition order must, among other things, "describe the applicant group",[2] and "name a person to be the holder of the order as the representative of the applicant group".[3]

[8] The originating application and amended application involve a distinction between an "applicant" and an "applicant group". The term "applicant group" is defined in s 9(1) of the Act in the following terms:

> **applicant group—**
>
> (a) means 1 or more iwi, hapū, or whānau groups that seek recognition under Part 4 of their protected customary rights or customary marine title by—
>
> (i) a recognition order; or
>
> (ii) an agreement; and
>
> (b) includes a legal entity (whether corporate or unincorporate) or natural person appointed by 1 or more iwi, hapū, or whānau groups to be the representative of that applicant group and to apply for, and hold, an order or enter into an agreement on behalf of the applicant group

[9] However, the term "applicant" itself is not defined in the Act.

[10] Arguably, (b) of the definition of "applicant group" in the Act operates to incorporate an "applicant" (in the sense that term is used in the amended application) within (b) of the definition of "applicant group", since "applicant group" is said to

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2 Marine and Coastal Area (Takutai Moana) Act 2011, s 101(c).
3 Section 101(f).

include “a legal entity (whether corporate or unincorporate) or natural person appointed … to apply for, and hold, an order or enter into an agreement on behalf of the applicant group”. That is what would typically be described as an “applicant” and appears to be the sense in which the original and amended applications use the term “applicant”.

[11] However, the proposed applicant in this case is a committee. In other words, it is neither a natural person *or* a legal entity (even one that is unincorporate). Section 9(1) of the Act clearly contemplates that an “applicant group” (and therefore, it seems, an “applicant”) may be either a natural person or a legal entity (whether corporate or unincorporate). But it must be one of those. A committee is neither.

[12] Therefore, in removing the original representatives and not naming an alternative natural person or legal entity in their place, the amended application does not, in the terms of the Act, name a “person” to be the holder of the order as the representative of the applicant group. The application therefore fails to meet one of the stipulated statutory requirements for an application, namely s 101(f).

[13] There is a simple solution. The application must be amended and resubmitted to name either a natural person or legal entity (whether incorporate or unincorporate) to be the holder of any order as the representative of the applicant group.

Protected customary rights

[14] The amended application also seeks to amend the originating application to provide greater detail of the protected customary rights recognition orders sought by the applicant group.

[15] The original application provided:

> **Description of Protected Customary Rights**
>
> *Kaitiakitanga*
>
> 17. Kaitiakitanga involves guardianship, conservation, education and protection measures and practices.

18. The Applicant Group practices kaitiakitanga in respect to the Specified Area.

19. Access to all parts of the Specified Area is a key requirement of the Applicant Group's continued practice of kaitiakitanga.

Kaimoana Gathering and Protection

20. The Applicant Group continues to gather kaimoana for customary usages.

21. The Applicant Group's kaitiakitanga extends to the protection and management of kaimoana in the Specified Area.

…

[16] The amended application provides:

Description of Protected Customary Rights

17. Protected customary rights orders are sought in respect of the following activities in the specified area:

    a. For exercising kaitiakitanga in the specified area which involves guardianship, conservation, education and protection measures and practices;

    b. For kaitiakitanga of customary (non-commercial) fisheries;

    c. To take, utilise, gather, manage and/or preserve all natural and physical resources including the collection of:

        i. Rocks in the specified area;

        ii. Sand in the specified area;

        iii. Driftwood in the specified area;

        iv. Shells in the specified area;

        v. Crabs in the specified area;

        vi. Whitebait in the specified area;

        vii. Karengo in the specified area;

        viii. Flax in the specified area;

        ix. Puha and pingaongo in the specified area;

        x. Pūpū/booboos in the specified area;

    d. For traditional practices such as maramataka.

e. For traditional practices such as the gathering of resources for rongoa purposes.

[17] The amended application expands the protected customary rights over which recognition orders are sought. The question is whether the amendment sought is such a departure from the original application that it represents a fresh cause of action introduced after the statutory deadline and should therefore be struck out as an abuse of the Court process.[4]

[18] I am of the view the amendments are not so different from those in the original application as to represent a material change and a "fresh" cause of action. The test of whether an amended pleading is "fresh" is whether it is something "essentially different".[5] Whether there is such a change is a question of degree.[6] In *Re Dargaville*, for example, I struck out the amended application in that case as it "clearly introduce[d] fresh causes of action" which constituted something "essentially different" to the original application.[7]

[19] However, this is not the case here. The original application sought orders in relation to practising kaitiakitanga over the specified area and gathering and protecting kaimoana, to which the applicant noted its kaitiakitanga extended. The amended application is a more detailed expansion of this, listing a number of natural and physical resources which might be collected for purposes of taking, utilising, gathering, managing and/or preserving those resources. Although, as can be seen above, this list goes beyond strictly kaimoana, all are closely related to this original purpose. It will also, in any case, be necessary that the taking, utilisation, gathering, management and/or preservation of the resources in this list is performed in accordance with kaitiakitanga. The expanded list may be seen as linked to kaitiakitanga also in this way. The same applies for the traditional practice of

4 *Re Dargaville*, above n 1, at [44].

5 *Chilcott v Goss* [1995] 1 NZLR 263 (CA) at 273, citing *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 (SC) at 961; and see *Ophthalmological Society of New Zealand Incorporated v Commerce Commission* CA168/01, 26 September 2001 at [22]–[24], cited in *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61(c)], cited with approval in *Re Ngāti Pāhauwera Development Trust (strike-out application)*, above n 1, at [37].

6 *Ophthalmological Society of New Zealand Inc v Commerce Commission*, above n 5, at [23].

7 At [43].

maramataka, which it appears the applicant views as consistent with its (at this stage, contended) kaitiakitanga over the area.

[20] The gathering of resources for rongoā purposes is arguably a greater departure from the original application. Nevertheless, this is noted in the amended application as a traditional practice, and in the original application the applicant described its activities in the area as having been exercised since 1840. I note both applications refer to kaitiakitanga as involving "guardianship, conservation, education and protection measures and practices." There is a strong body of mātauranga behind the practice of rongoā, and it is at least arguable that the collection of resources for rongoā purposes is consistent with the applicant's practice of kaitiakitanga in the area. I am also satisfied that the inclusion of collecting resources for rongoā purposes will not involve "investigation of areas of fact of a new and different nature, and on a new and materially different basis, from the original application", which was my concern in *Re Dargaville*.[8] Indeed, the situation in this case is entirely different from that in *Re Dargaville*. I am mindful of the importance of ensuring that the rights over which recognition orders are sought under the Act are not unduly expanded well beyond the expiry date for any applications, particularly given the strict and clear restriction in the legislation against doing so.[9] However, in this case I am satisfied the collection of resources for rongoā purposes is sufficiently proximate to the purposes under the original application as to be allowed. As Mallon J stated in *Re Tipene* (in which her Honour allowed an amended application involving an expansion of the applicant group), in the circumstances of applications under the Act it would be "wrong for the Court to take an unduly narrow approach to permissible amendments".[10]

[21] Accordingly, I am satisfied that the expanded description of protected customary rights over which recognition orders are sought is not materially different from the description in the original application. There also appears to be no prejudice to any other party as a result of the expanded description, nor any objection from any party to the proposed amendment.

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8 At [44].
9 Marine and Coastal Area (Takutai Moana) Act, s 100(2).
10 *Re Tipene* [2015] NZHC 169 at [21].

[22] I therefore allow the amendment to the description of the protected customary rights orders sought.

Conclusion

[23] The application to amend the applicant is declined. The application must be amended to name either a natural person or legal entity (whether incorporate or unincorporate) to be the holder of any order as the representative of the applicant group.

[24] The application to amend the description of the protected customary rights over which recognition orders are sought is allowed.

Churchman J

Solicitors:
Tamaki Legal, Auckland for Applicant