IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-267
CIV-2017-485-232
CIV-2017-485-259
CIV-2017-485-224
CIV-2017-485-260
CIV-2017-485-221
[2023] NZHC 473

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:

Counsel:
D Naden, M Yogakumar and M Sreen for Tukōkō and Ngāti Moe (CIV-2017-485-267)
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)
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] On 3 April 2017, the applicant, Tukōkō and Ngāti Moe, applied to the Court for recognition orders pursuant to s 98 of the Marine and Coastal Area (Takutai Moana) Act 2011. On 17 February 2023, the applicant filed an amended originating application including four categories of proposed amendments from the original application.

Discussion

Contact details

[2] The first amendment seeks to update the email and phone contact details for the applicant. There is no issue with this.

Correction to description of specified area

[3] The amended application also seeks to correct the description of the northern and southern boundaries. The original application incorrectly described Lake Ferry as being in the northeast and Mataikona (Cape Palliser) as being in the southwest. The amended application seeks to amend the descriptions so that Lake Ferry is described as being in the northwest and Mataikona (Cape Palliser) in the southeast, as is in fact the case.

[4] It is appropriate that the descriptions be amended so they are correct. The amendment correcting the descriptions of the northern and southern boundaries is allowed.

Reduction to specified area

[5] Thirdly, the amended application seeks to amend the direction of the seaward boundary line for the specified area to which the application relates. The original application stated the seaward boundary "extends to a point that is approximately half-way between the North and South Islands and then to the edge of the territorial sea at

12 nautical miles". The amended application provides that the seaward boundary "extends perpendicularly from Lake Ferry and Mataikona to the outer limits of the territorial sea". A map of the specified area is provided.

[6] In the *Ngāti Pāhauwera (strike-out application)* decision, I struck out the amended application on the basis the change applied for was a "considerable" extension which would result in a significantly greater overlap with other application areas and "likely entail the addition of new evidence and inquiries from the parties".[1] It was not a "relatively insignificant" geographical change and in fact amounted to a fresh cause of action.[2]

[7] None of these factors are present with the present application. The suggested amendment represents a reduction or refinement of the boundary, which will in turn reduce the specified area. The proposed boundary amendment does not have the effect of drawing in any new overlapping applications and I understand it does not cause prejudice to any other parties.

[8] Similar refinements which have sought to narrow the application area in similar circumstances have been allowed.[3]

[9] The application to amend the boundary as described in the amended application is therefore allowed.

Protected customary rights

[10] Finally, the applicant seeks to amend the application to provide greater detail of the protected customary rights recognition orders it seeks.

[11] The original application provided as follows:

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1 *Re Ngāti Pāhauwera Development Trust (strike-out application)* [2020] NZHC 1139 at [62] and [65].
2 At [65] and [67].
3 See for example *Re Tipene* [2015] NZHC 169 at [16]; and *Te Hika o Pāpāuma* [2023] NZHC 291 at [11].

Protected Customary Rights

Kaitiakitanga

22. Kaitiakitanga involves guardianship, conservation, education and protection measures and practices.

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

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

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[12] The amended application provides:

Description of Protected Customary Rights

22. 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. For traditional practices such as maramataka; and

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

        i. driftwood;

        ii. shells;

        iii. hangi stones and other rocks;

        iv. karengo;

        v. kelp;

        vi. whitebait;

        vii. crabs;

        viii. booboos (cat's eyes); and

        ix. coastal harakeke (flax).

[13] The wording of the amendment is clearly significantly different. The expiry for applications under s 100(2) has long since passed. As I stated in *Re Dargaville*, "[t]he introduction of new causes of action after the statutory deadline for filing applications is an abuse of the Court's process."[4]

[14] The question for determination here is whether the amendment sought is so significant as to amount to a fresh cause of action and therefore constitute an abuse of the Court as an application that is clearly statute-barred under s 100(2).[5]

[15] The test of whether an amended pleading is "fresh" is whether it is something "essentially different".[6] In determining whether an application is fresh, the consideration must be of the substance of what is pleaded, rather than the form.[7] Whether there is such a change is a question of degree.[8] 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.[9]

[16] By contrast, in *Re Tipene* Mallon J allowed the applicant's second amended application, though it expanded the applicant group.[10] In that case her Honour considered that the essence of the application had not changed, stating "the details of the cause of action have changed but the nature of it has not".[11]

[17] The situation in this case is clearly distinguishable from that in *Re Dargaville*.[12] That case concerned one of two so-called "national" applications, and the original

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4 *Re Dargaville* [2020] NZHC 2028 at [44].

5 See 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)*, above n 1, at [4].

6 *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].

7 *Re Dargaville*, above n 4, at [38], citing *ISP Consulting Engineers Ltd v Body Corporate Ltd* 89408 [2017] NZCA 160 at [22].

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

9 At [43].

10 *Re Tipene*, above n 3.

11 At [16] and [18].

12 *Re Dargaville*, above n 4.

application, which did not include a description of the "applicant group", and did not comply with a number of the requirements of the Act.[13] It also, on account of purporting to cover all of New Zealand, impacted on and overlapped with every other application.[14] I also considered the amended application would involve "investigation of areas of fact of a new and different nature, and on a new and materially different basis, from the original application."[15]

[18] The situation here is clearly different. In this case, the original application sought orders for the applicant group to practise "kaitiakitanga" in respect of the specified area, which was said to involve "guardianship, conservation, education and protection measures and practices". The proposed amendment here seeks to include the addition of traditional practices and the taking, utilisation, gathering, management, and/or preservation of all natural and physical resources. This is admittedly an expansion of the protected customary rights orders originally sought. However, I am of the view the proposed additional orders sought are sufficiently linked to the purposes for which recognition orders were originally sought. I do not consider the amended application will involve "investigation of areas of fact of a new and different nature, and on a new and materially different basis, from the original application", as was the concern in *Re Dargaville*, which, as I have noted, took place in an entirely different context.[16]

[19] In this case, the applicant group is unchanged, and the specified area has been reduced by the amended application, not enlarged. I do not consider the new orders sought are materially different from the original, and I also note there appears to be no objection to the proposed amendment, nor any prejudice to any other party.

[20] As Mallon J stated in *Re Tipene*, in the circumstances of applications under the MACA Act, it would be "wrong for the Court to take an unduly narrow approach to permissible amendments".[17] I consider in this case, echoing the words of Mallon J in

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13 At [4].
14 At [11].
15 At [44].
16 At [44].
17 *Re Tipene*, above n 3, at [21].

that case, while the details of the present application have changed, the nature of the claim has not.

[21] I therefore allow the amendment to the details of the protected customary rights orders sought.

Conclusion

[22] I am of the view the amended application is not so significantly different from the original application as to amount to a fresh cause of action and as such an abuse of the Court. The amended application is allowed.

Churchman J

Solicitors:
Tamaki Legal, Auckland for Applicant