

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

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

CIV-2011-485-821

IN THE MATTER OF the Marine and Coastal Area (Takutai
Moana) Act 2011

IN THE MATTER OF an application by the Trustees of the
Ngāti Pāhauwera Development Trust
TORO WAAKA, TUREITI MOXON,
CHAANS TUMATAROA-CLARKE,
REX ADSETT, GERALD ARANUI,
AMIRIA TOMOANA and TOM KEEFE
on behalf of NGĀTI PĀHAUWERA for
Customary Marine Title, Wahi Tapu
Protection and Protected Customary Rights

Teleconference: 16 November 2020

Counsel: R N Smail and E James for Trustees of the Ngāti Pāhauwera
Development Trust
M Mahuika and L Underhill-Sem for Ngāti Pārau
G Erskine and S Roughton for Ngai Tahu o Mōhaka Waikare
K Anderson for Maungaharuru-Tangitū Trust
B Lyall for Mana Ahuriri Trust
H Harwood for Hawkes Bay Regional Council
A Williams for Seafood Industries Representatives
R Roff, R Budd and N Morrall for Attorney-General

Minute: 17 November 2020

**MINUTE (NO. 12) OF CHURCHMAN J
[Hearing directions]**

[1] A teleconference of all parties involved in these proceedings was held on 16 November 2020. Two memoranda had been filed in advance of the teleconference, one dated 11 November 2020 by Ms Smail, counsel for the priority applicant, and one dated 13 November 2020 by counsel for all of the applicants and the Attorney-General.

[2] The memorandum of 11 November 2020 disclosed that the pukenga, Dr Kahotea, had a whakapapa connection to a law clerk employed in the firm of counsel for the priority applicant. However, as the law clerk and the pukenga have never met and had no personal connection, no relevant conflict of interest arises.

[3] That memorandum also attached to it a letter from Dr Kahotea confirming that he had no professional conflict of interest in relation to any of the parties involved in these proceedings.

[4] The memorandum of 13 November 2020 raised a number of issues.

The common bundle

[5] Counsel for the Attorney-General has agreed to organise the electronic bundle with the input of all other parties, with the bundle to be filed and served by **21 January 2021**. Counsel are to confirm a final index of documents no later than **12 January 2021**.

[6] Counsel for the priority applicant will provide one hard copy of the bundle to the Court. No other party indicated that they required a hard copy. The hard copy will be provided to the Court no later than the day of the commencement of the hearing.

Chronology and facts

[7] The Court has the power to modify the normal requirement in r 9.9 of the High Court Rules (HCR) that a chronology of the facts that a plaintiff intends to rely on is to be provided 15 working days after the bundle. The parties submitted that there was limited utility in a chronology given the significant timeline involved, and the highly contested nature of a number of facts.

[8] As explained to counsel during the course of the teleconference, in the Whakatōhea proceedings (CIV-2011-485-817), the Court was assisted by having a chronology. However, the Court accepts that a chronology covering every conceivable relevant fact would be lengthy and expects that the chronology will detail the most significant facts relied by the priority applicant and other parties. If there is a significant disagreement between the parties about any

essential fact, the fact of that disagreement should be brought to the Court's attention in accordance with HCR 9.10.

Te reo Māori interpreter

[9] The joint memorandum indicated that a number of witnesses may wish to give their evidence in te reo. The Registrar has made preliminary inquiries of the Māori Land Court to see whether one of its interpreters might be available. Unfortunately, that is not going to be possible.

[10] Subsequent to the teleconference, the Registrar has made contact with Dr Hiria Hape, an experienced translator, and she has accepted appointment as a translator for these proceedings.

[11] Whether Dr Hape attends for the entire hearing or only for those parts of it where the witnesses have given notice of intention to speak in te reo will depend on the number of such notices given. It may be that all the witnesses requiring an interpreter are grouped together, or in convenient smaller groups so that the interpreter is not required to attend for all seven weeks. That will only be known once notices of intention to speak in te reo are received by the Registrar.

Presentation of evidence

[12] The parties sought directions as to the manner in which witnesses would give evidence. All witnesses will be required to file either a brief of evidence or affidavit in accordance with the timetable directions relating to these proceedings. It is expected that the evidence presented by witnesses to the Court will not depart significantly from their brief or affidavit other than in respect of replying to evidence given by other witnesses.

[13] Some of the evidence filed by the professional witnesses is extensive. Where the professional witnesses feel the need to read all or substantially all of their evidence, then they will have that option. However, witnesses will also have the opportunity of providing a written summary of their evidence which they will speak to. Witnesses wishing to avail themselves of

this opportunity should file and serve the summary no later than five working days prior to giving their evidence.

[14] It is anticipated that tangata whenua witnesses will generally read their evidence in full. If, through reasons such as age, infirmity, or for any other good reason, a witness wishes to have someone else read their evidence-in-chief, that should be able to be accommodated. Where a witness is more comfortable in te reo Māori rather than English, there is also the option of them being cross-examined in te reo. In such cases, a notice should be given to the Registrar so that he can arrange for an interpreter to be available at the appropriate time.

[15] The hearing venue is now confirmed as being the Napier Conference Centre situated at 48 Marine Parade. The concerns that the parties had about the capacity of the Napier High Court to successfully accommodate this hearing have therefore been addressed.

[16] It is also intended that the Court will have a VMR system available. This is primarily to address the prospect that there may be some form of COVID restrictions that limit the ability of either counsel or witnesses to attend in person. Should any counsel either intend to participate themselves by VMR or have a witness that wishes to give evidence by way of VMR, the Registrar should be notified promptly so that the necessary logistical arrangements can be made.

Order of proceedings

[17] All counsel other than counsel for Ngāti Pārau submitted that each party should open and then call their witnesses. Ngāti Pārau advocated a similar approach taken to that in Whakatōhea where all the parties opened at the commencement of the hearing and then each party proceeded to call their evidence.

[18] I believe it is likely to be of assistance to the Court for each of the parties to open at the commencement of the hearing so that the Court is aware of what issues still require rulings. The Court anticipates that having had the opportunity to consider the other parties' evidence, there may well be some modifications of applications at the commencement of the hearing, and it is likely to be in all parties' interests for everyone involved in the hearing to have a clear picture of what is, and is not, still an issue.

[19] Accordingly, all parties will be expected to open at the start of the hearing and the order of the presentation of cases will be as set out in [23] of the joint memorandum.

[20] Counsel also requested a break of a few days to provide closing submissions after the transcripts from the hearing have been provided. There are real difficulties with this proposal. There has been a substantial delay in the completion of the transcripts of the Whakatōhea hearing to the extent that those transcripts still have not been completed. The closings in that case proceeded on the basis that they were in draft form with counsel being granted leave to file a final form with references to relevant portions of the transcript once the transcript eventually became available.

[21] It seems inevitable that there will be a similar delay in the preparation of transcripts in this case. Such a delay may mean the hearing venue is no longer available and that closings proceed in Wellington with the option of participation by VMR. The Court is reluctant to see that. These proceedings are important to the parties and to the extent that it is feasible, the proceeding should take place at a venue which the parties are able to physically present at.

[22] The Court is prepared to allow a period of some days, possibly up to a week, following the conclusion of the evidence for counsel to finalise closing submissions. Exactly how much time will be available will depend on the pace at which the hearing has been progressed. It is not possible, at this point in time, to make a definitive ruling on that issue.

Pukenga

[23] The joint memorandum raised a query as to process should the pukenga wish to interview witnesses. This included a query as to whether counsel for witnesses could be present at any such discussions or meetings.

[24] It is anticipated that the pukenga will be provided with an electronic copy of all briefs of evidence filed in this matter as soon as those briefs of evidence are made available. The pukenga is an expert in tikanga and it is up to him to identify what further material he may require to answer the questions posed to him by the Court. If the pukenga wishes to interview people who are either witnesses to be called in these proceedings or others who are not proposed to be witnesses, then he should advise the Registrar, so the Registrar can notify all

the parties. Upon receipt of such notification, the parties may wish to suggest that the pukenga interview other parties. However, all such communications are to be through the Registrar rather than direct to the pukenga and it will be up to the pukenga whether he chooses to accept such an invitation.

[25] There is no necessity for people whom the pukenga might wish to interview to have legal representation during the course of any such meeting or discussion.

Court conclusion time

[26] The Court is mindful that many of the counsel will be travelling from centres other than Napier. On a Friday afternoon the Court will rise at such a time that permits counsel (and the Court) to catch flights home.

A handwritten signature in black ink, reading "P.B. Churchman J". The signature is written in a cursive style with a large, stylized "J" at the end.

Churchman J