

**CASE MANAGEMENT CONFERENCE
NAPIER
4 FEBRUARY 2019 at 10.00 am**

COURT:

Ms Smail, good morning

MS SMAIL:

Good morning sir, I appear for the applicants.

COURT:

Ms Roughton?

MS ROUGHTON:

Good morning sir, I'm representing Ngāi Tahu o Mohaka-Waikare today. Also, Mr Kingi, who is representative of the hapū and his partner, Mere are present today.

COURT:

Thank you. Good morning to you both.

Now, is it Mr Eccles?

MR ECCLES:

Good morning sir, I'm representing the Maungaharuru-Tangitū Trust.

COURT:

Ms Tukapua? Good morning

MS TUKAPUA:

Tēnā koe sir, good morning

Ms Tukapua on behalf of Te Kaha Hawaikirangi on behalf of Ngāti Parau, kia ora.

COURT:

Ms Mason, good morning

MS MASON:

Good morning sir. Today I'm appearing on behalf of Mr Paul, 512 and also have agency for Dargaville, 538 sir.

COURT:

Thank you very much on behalf of Mr Sharrock?

MS MASON:

Yes sir.

COURT:

And Mr Melvin, good morning

MR MELVIN:

Tēnā koe sir.

COURT:

Ms Smail, can we start with you. I have read Mr Waka's affidavit and understand that a large amount of the evidence that had been previously filed in the Māori Land Court would be transmitted to the High Court. What I don't quite appreciate at this stage is how much more evidence you are likely to be requiring or intending to rely upon and how much more time you require to have that evidence?

MS SMAIL:

Thank you sir. There's evidence your Honour's correct from the one week hearing in the Māori Land Court in 2008. There's also a considerable amount of further evidence that was filed between the parties with the Crown's part of engagement in 2013, which we prepared as affidavit evidence which is also relevant.

COURT:

Has that been filed in the High Court yet?

MS SMAIL;

No sir. There's a need to approach the people who gave that evidence in terms of whether they would be happy to present it in the High Court at a hearing and if not deal with that appropriately in terms of how we need to file it with the Court. There's also those applications it was alluded to by one of the memoranda from my friends, deal primarily with the northern half of the Ngāti Pāhauwera application area. They took a pragmatic approach in terms of dealing with an area which was not overlapped by any other separate iwi claimants apart of course from Mr Kingi, which obviously will need to be dealt with. So that evidence does cover the whole area to some extent but there is a need to consider what in the southern half still needs to be addressed.

COURT:

And this is because as I understand it, your claim now extends to the Esk River, is that right?

MS SMAIL:

Yes sir. The full extent of the application has been updated in accordance with the statute and we filed a map in December. The application refers to the Esk River and on instructions from my clients I understand the Esk River moved, the mouth of the Esk River I understand moved following the Napier earthquake and so their application of the map extends to historical mouth of the Esk River.

COURT:

Did it move north or south?

MS SMAIL:

It moved north. Those are my instructions. So, there's a need to check that we've covered everything in the southern part. In particular, that's the area we need to focus an historian's evidence on in order to address the overlaps.

COURT:

And how are you going with locating a historian because they seem to be becoming rarer and rarer and more and more expensive.

MS SMAIL:

We have an historian in train and we now have a firm date for when he is available to do the work. While he's available to start it from April, he won't be able to finish it until much later in the year as he's going overseas. So we anticipate that his evidence would be ready in November or December this year.

COURT:

Are you willing to let people know who your historian is?

MS SMAIL:

Sure, David Alexander.

COURT:

The only reason I ask is so that other people don't waste time trying to get hold of him.

How much time do you think that your clients' case will take to be heard?

MS SMAIL:

I've been thinking about this a great deal and trying to be conservative I think just for the evidence alone might take two to three weeks.

COURT:

Do you see merit in the overlapping claims being heard contemporaneously?

MS SMAIL:

My instructions from my clients are that they don't support the other applications being heard apart from those interested parties. Their concern is to reach a timely conclusion of their application although of course, in reality those applications which are completely overlapped will essentially present their whole case in response and –

COURT:

We're not dealing with a large number like some parts of the country where we are literally dealing with 30, 40 applicants for specific areas, particularly in the north. I mean we've really only got six overlapping claims but that's not taking into account the claims by interested

parties, but we've only got six actual overlapping claims. My inclination is that it would be highly meritorious to have all of those claims heard and considered contemporaneously so that every one's position is fully and properly understood, rather than having different tiers of claims. Now that said, I don't want to hold things up either and one of the challenges will be to move everything forward in a co-ordinated and caring way so that everyone's applications can be heard in a timely fashion.

That's very helpful Ms Smail. I may come back to you in a few moments.

MS SMAIL:

Thank you sir.

COURT:

Thank you very much.

Ms Roughton, Mr Kingi's expressed his concerns about trying to find a historian and that looks as if it's going to be a very challenging exercise for a number of people.

MS ROUGHTON:

Yes, it does sir. We have had the issues with an historian that we had had a few meetings with and the contract are through but we are making new approaches to another historian at the moment. We don't have anyone fixed yet sir so just in terms of our readiness, I think that we support the two memoranda that were filed last week sir by the other parties, by Ngāti Parau and by the Maungaharuru-Tangitū trustees. We think that we can have our evidence completed by the end of the year, ready for hearing next year as well.

COURT:

I know it's very early stages, but how much time do you think your client's case will take in terms of the presentation of their evidence?

MS ROUGHTON:

We haven't got a firm number of the witnesses as yet sir, but we would expect three to four witnesses, including the historian, so only we would say about two days.

COURT:

Okay. That might be a little bit optimistic but let's say four days just to be more accommodating.

MS ROUGHTON:

Okay.

COURT:

Thank you very much. I may come back to you Ms Roughton.

MS ROUGHTON:

I do have an issue that I'd like to raise. We just wanted to raise a question for your consideration sir, and also perhaps Ms Mason, who's representing both the national claims to respond also. Just in terms of the basis for the New Zealand Māori Council, the Mr Paul application, and I think the wording in their application was a firm belief that they hold and exercise tino rangatiratanga over the entire marine coastal area and have done so since time in memorial up to 1840 and since, without substantial interruption. Our question, which we just wanted to raise and whether this might be a question for submissions we leave it to the Court to decide, but whether the basis for that when the New Zealand Māori Council was created by statute in 1962 and the second question relates to Mr Dargaville's claim and he has in his claim stated that he represents the hapū of New Zealand. My client has instructed me that he has had no direct correspondence with Mr Dargaville and given any mandate to represent his hapū and so again just asking that question is that representative capacity of that claim.

COURT:

Well Ms Roughton I've been wondering for well over a year now as to whether or not any person would wish to try and take any steps to challenge the standing of Mr Paul and Mr Dargaville. So far no one has done so. The processes for doing so would involve a formal application and a full and proper opportunity for Mr Paul and Mr Dargaville to be heard and then for ultimately a decision to be made. So the points that you raise may have merit, but it would require a proper application and all who wished to be heard on that issue could be heard.

MS ROUGHTON:

As your Honour pleases.

COURT:

Thank you so much Ms Roughton.

Ms Tukapua?

MS TUKAPUA:

Sir, you may have seen my memorandum of counsel that I filed on Friday.

COURT:

Yes.

MS TUKAPUA:

So I think the position we've taken is pretty clear.

COURT:

You think all to be contemporaneously.

MS TUKAPUA:

Yes. As set out in my friend, Mr Eccles' memorandum, the area's covered by the applications is quite discrete and it doesn't involve the issue of cascading or secondary overlaps sir and just in the interests of cost and efficiency we consider that it would be best to have them heard at the same time.

COURT:

Now how are you going with the preparation of your evidence?

MS TUKAPUA;

Well we have engaged a historian. The historian's actually a member of the hapū. I don't sir have an indication of the number of witnesses, but I would imagine four days similar to Mr Kingi's application wouldn't be sufficient.

COURT:

And when do you think your evidence might be ready?

MS TUKAPUA:

We've indicated November or December.

COURT:

It's going to be a busy time isn't it?

MS TUKAPUA:

It is. Is there anything else at this stage?

MS TUKAPUA:

No sir.

COURT:

Mr Eccles?

MR ECCLES:

Yes sir. I don't intend to go through the memorandum on the file but I think I can address the issue of how long we might take. The MTT considered we would probably need about five or six witnesses so estimated at at least a week for calling of that evidence.

COURT:

Have you got an historian?

MR ECCLES;

Yes we have sir. Two historians lined up and we think that the evidence should be ready by the end of the year.

COURT:

Okay. Thanks Mr Eccles.

MS MASON:

Sir, on behalf of Mr Maanu Paul, counsel has just recently received instructions for some hapū and whanau from this area who would like to join or be a part of Mr Paul's claim and some of them are whānau, hapū and hau kāinga of the northern area that my friend Ms Smail referred to in the Taylor claim. Counsel proposes filing a memorandum with a specific map for those particular people because the instructions have just been received before the end of this month and in like manner there are instructions from another group of people, Mrs Ratima, Evelyn Ratima and her hapū and whanau, and they will also overlap with some other areas.

COURT:

When you say other areas, other areas outside of this claim area?

MS MASON:

Yes, so within this claim area over some of the other applications as well. In relation to the discussion about whether these should all be heard contemporaneously, I'd have to receive instructions on that. I was only instructed on Saturday and Sunday. But my feeling is that it really would be useful for the people who have overlapping interests perhaps to jointly instruct historians if they can, and certainly I'm thinking if there are 80 briefs of evidence or affidavits already there it would be useful to go through those first so we're not just duplicating what other people are doing and so my instructions are to speak with counsel for the other applications and try to work something out that would minimise the time for everybody so that these applications can be heard. What has happened is some groups within the bigger groups and say, for instance with Mr Taylor's claim with Ngāti Pāhuwera, have not been happy with certain things that might have been negotiated which involved just a portion of what they have expected would be on the table and so are splitting off in this way and so it probably would be useful for counsel to try to get together and work through those issues so that we are progressing together. The concern with not acting in that way and not having these heard contemporaneously is that with the limited funding, and counsel have gone on about for a long time, is that a lot of the offending will be used up assessing somebody else's claim, seeing whether that's adequate and then preparing a whole other claim and that would just duplicate the cost so that's really not the preferred option sir.

Sir those are all my submissions for the moment, but I will endeavour to before the end of this month file a map specifying these specific individuals and the groups and then attempt to co-ordinate with counsel so that if at all possible historians could be jointly instructed.

COURT:

Thanks very much Ms Mason.

MS MASON:

Thank you sir.

COURT:

Mr Melvin?

MR MELVIN:

The Crown's submission is to support the hearing of the various applications contemporaneously, those that materially overlap the Ngāti Pāhauwera application. That's consistent with the position we've previously advised the Court and it's one that just seems to make good sense and good use of both Court resources and applicants' resources.

COURT:

Yes. What can the Crown do to assist in the funding models that are causing road blocks for the engagement of historians? You would have seen Mr Kingi's affidavit?

MR MELVIN:

Well funding is available for all the High Court applicants and that will include preparation of evidence so there shouldn't be difficulties in terms of getting funding. I'm aware that for Maungaharuru-Tangitū Trust they've only just recently applied for an assessment of their upper funding limit and that's currently being worked through. I understand that they will be advised this week of decisions around that. So long as everyone is following the policy to seek the appropriate decisions for funding it should be available sir and I'm very happy to discuss with counsel.

COURT:

Did you see Mr Kingi's affidavit?

MR MELVIN:

What's the date of it sir?

COURT:

It was just last week, 18th January this year.

MR MELVIN:

No, I'm not sure that I have seen it actually.

COURT:

You can borrow mine.

MR MELVIN:

No, I haven't seen this sir. I'm not sure that was served on the Attorney-General.

COURT:

In a nutshell, Mr Kingi's explaining the challenges that he and his fellow applicants have encountered when trying to get a historian and the difficulties that they've had in trying to secure appropriate levels of funding for an historian.

MR MELVIN:

Sir, from a quick glance what I'm ascertaining from this is that there was some funding available but –

COURT:

Not enough.

MR MELVIN:

– at a level that wasn't considered sufficient then there was a difficulty in transferring funds. Sir, I'd have to take instructions on that particular issue but in principle anyway, as I've said funding is available. There will be –

COURT:

I wonder if you wouldn't mind just looking into that particular matter because –

MR MELVIN:

I certainly will sir.

COURT:

Looking at the matters from a high level at this stage, it looks as if applicants' evidence will not be available really for the Crown to respond to until the end of this year and I am anticipating the Crown will require approximately six months to prepare its evidence in response if it's electing to respond, and so we will be needing to try and pencil in a hearing date for the second half of next year, probably towards the end of next year. We still have the interests of interested parties who are not applicants and Pan Pacific Paper Mills have made it very clear they wish to have quite a say in this particular claim. So what I will do is try and see if I can secure some hearing time in this Court in the last quarter of 2020. I'll put in place a timetable which will also involve yet another case management conference early next year, which will set in time the timetable for you to get the Crown's case evidence in and for interested parties' evidence to be in as well.

MR MELVIN:

I can indicate sir that six months would be a suitable timeframe.

COURT:

Is there anything else you think I should be thinking about at this stage or trying to deal with at this stage from any counsel?

MS TUKAPUA:

I just have one point sir. I've just noted that the map of the overlapping applications filed by the Crown possibly it would be helpful if it was updated to show the amended application area of Ngāti Pāhauwera if that's possible.

MS MELVIN:

What my friend is referring to I think sir is a map I've brought along today which I actually haven't handed up but I'm happy to do so sir. This is a map that's been prepared by the

Takutai Moana Roopū, the new MACA unit within Te Arawhiti which now encompasses the Office of Treaty Settlements and various parts of the Ministry of Justice. I've got some copies here for my friends but not enough. This map might or might not be of particular use, but what it does show sir is the applications that are only High Court applications in an area that is larger than I should stress it's covering an area that is larger than the particular focus of the applications that we are discussing here today. That's because this map wasn't prepared specifically for today's purposes. But it shows the applications that are High Court only applications, applications for Crown engagement only, and applications for that of both High Court and Crown engagement applications and perhaps the greatest utility of it is and it shows that there are a number of Crown engagement only applications and they will likely wish to participate in any High Court hearing as interested parties. It does illustrate to an extent the complexity even for a simple area as this one is.

COURT:

Yes.

MR MELVIN:

And my friend Ms Tukapua was indicating an issue around the southern boundary of the Ngāti Pāhauwera application and this map doesn't have the –

COURT:

– the full extent of their claim.

MR MELVIN:

Yes.

COURT:

Just assist me. The southern part of the Ngāti Pāhauwera claim, which as I thought was bordered by the Esk River in the south, can somebody just tell me where the Esk River mouth is in relation to Cape Kidnappers? Is it slightly to the north?

MR MELVIN:

The current mouth is north of Napier city.

COURT:

Oh, is it?

MR MELVIN:

That's my understanding and the so-called historical mouth I think sir is around about what is today known as "Te Whanga Lagoon" which is around the airport area, Napier Airport. I'm very happy to be corrected by anyone who knows things better than I do. That's my understanding sir.

COURT:

Thank you for that.

Is there anything else that I can help anyone with at the moment?

Ms Mason?

MS MASON:

Sir, I'd just like to complain some more about the funding and at risk of giving evidence from the bar, the funding issues are being dealt with by the Waitangi Tribunal at the moment.

COURT:

Yes, and you've got a hearing I think 23rd or 24th March?

MS MASON:

Yes sir we have and the general conduct of the Crown and the funding, so we have got that hearing coming up. I don't know when the Tribunal would issue a report because then I think closing submissions are due perhaps a few weeks after that and in the meantime, the Crown's approach is to not do anything about things that are problematic. For instance, we have all the interlocutory hearings. None of those are being funded sir so these issues which are quite big issues fundamentally for the way that this legislation and these proceedings are played out, counsel is receiving no funding at all and despite robust protestations to the Minister in charge, the response has been "no you'll have to wait for that Tribunal report" which will not be for some months. In the meantime, their clients' interests are prejudiced and so sir I just wanted to make that point as a point of process and justice before this Court sir.

COURT:

Ms Mason just while you're on your feet. You're lead counsel in relation to one of those interlocutory applications, mainly the challenge to the standing of the Attorney-General? I had originally proposed to have that hearing in Whangārei, I think from memory on 23 or 24 March. But I gather that that is going to clash with the Waitangi Tribunal hearing which is going to involve same counsel. The Registry in the High Court is in the process of negotiating with the Waitangi Tribunal at the moment, with the view to having the High Court hearing in Wellington on the morning and sorry I can't remember if it's the 23rd or the 24th –

MR MELVIN:

It's the 25th sir.

COURT:

Thank you, even better. The 25th, having the High Court hearing on the morning of the 25th and then freeing counsel up to go to the Waitangi Tribunal straight after that so that we wouldn't be trying to hold a hearing in Whangārei that clashes with a Waitangi Tribunal hearing in Wellington.

MS MASON:

Sir just to clarify, is that to do with the application to state a case to the Māori Appellate Court?

COURT:

Yes, I'm sorry yes.

MS MASON:

So are you proposing, the Court is proposing that it should be held on that morning of the 25th in Wellington?

COURT:

In Wellington to accommodate counsel so that they are not trying to be in two places at once and we're trying to sort things out with the Waitangi Tribunal. I just wanted to give you a heads up so that you can start to factor in that you'll have two hearings in close proximity, but at least they'll be both in the same place.

MS MASON:

Thank you sir.

COURT:

Sorry Mr Melvin.

MR MELVIN:

I do feel obliged to respond to my friend's statement that the Crown's doing nothing to address problems with funding. That is simply not correct. There may be some issues with a particular application that has particular difficulty but certainly the Crown is not not responding to issues around funding generally. I just wished to make that clear to the Court.

COURT:

Is there anything else that anyone wishes to comment on or make any submissions on?

Thank you all very much for making yourselves available. A transcript of today's hearing and a minute will be issued in due course.

Thank you very much.