IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-512

IN THE MATTER OF	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	an application for an order recognising Customary Marine Title and Protected Customary Rights
BY	CLETUS MAANU PAUL, Chairperson of the Mataatua District Māori Council, on behalf of all Māori ("the Applicant")

CIV-2017-404-538

IN THE MATTER OF	an application by RIHARI DARGAVILLE for an order recognising Customary Marine Title and Protected Customary Rights of New Zealand Māori Council Members

On the papers:

Counsel:	J Mason for CIV-2017-485-512 G Sharrock for CIV-2017-404-538
Minute:	30 January 2020

MINUTE (NO. 4) OF CHURCHMAN J
[Case Management Conferences – "National Claims"]

Background

[1] On 18 September 2019, the Court issued a minute in relation to the claims in these two proceedings filed by Mr Paul and Mr Dargaville. This minute was a sequel to a minute dated 25 July 2019 which had been issued in relation to a series of case management conferences (CMC) held between 10 and 27 June 2019.

[2] In relation to indications by parties whose claims were overlapped by the two national claims that those parties intended to move to strike-out the two national claims, the relevant parts of the July 2019 minute said:[1]

> [42] However, before entertaining a strike-out application, the Court will give the two national claimants the opportunity to file a memorandum specifying precisely what claims they are actually advancing, on whose behalf those claims are made and what geographic areas they relate to. Such memoranda will be filed and served within one month from the date of this minute.
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> [43] To the extent that there will be geographic areas where no specific claim is being advanced, the Court will expect the national applicants to make that clear and to withdraw from further involvement in relation to hearings in respect of those areas.
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> [44] Should the national applicants fail to comply with this direction then the Court will entertain applications that the claims should be struck out.

[3] Neither of the national applicants complied with the directions in the July 2019 minute. This resulted in the Court issuing the further minute of 18 September 2019.

[4] In relation to the Paul application, the minute directed that adequate particulars of the amended claims being advanced by Mr Paul be provided including maps identifying the boundaries of the claim.

[5] A memorandum filed on behalf of Mr Paul following the July 2019 minute had said that a "first amended application with identifying maps" would be "filed in the coming weeks". The Court directed in the 18 September 2019 minute that an adequate application be filed and served within two months of 18 September 2019.

[6] In relation to the Dargaville application, the identity of some of the applicants claimed to be represented was not clear and it was also unclear as to whether the claims were for coastal marine title (CMT) or protected customary rights (PCR).

[7] Mr Dargaville made a claim in respect of the Hawkes Bay/Wairarapa Coast where no claimant at all was identified. A memorandum filed on behalf of Mr Dargaville promised an

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[1] In a matter of an application by Hori Turi Elkington and Ors, CIV-2017-485-217 and other proceedings, Minute (No. 2) of Churchman J [Case management Conferences 2019] 25 July 2019.

updated claim reflecting the final claims "within 30 days". Mr Dargaville was also given two months from 18 September 2019 to file an adequate claim.

[8] Mr Sharrock, on behalf of Mr Dargaville, made it clear that other than in respect of the five identified claims, claims in respect of all other areas in New Zealand were withdrawn.

[9] The material filed in support of Mr Paul's claim did not make any such statement and appeared to proceed on the assumption that the "national claim" (i.e. a claim to all of New Zealand on behalf of "all Māori") would still continue.

The November memoranda

[10] On 17 November 2019, Mr Sharrock filed what was said to be an amended application for orders for customary title. The document was in the form of a memorandum signed by counsel rather than an application signed by an applicant or applicants. The memorandum also contained an express acknowledgement that "Except for the defined areas below, the claim is hereby withdrawn."

[11] Unfortunately, there are still some difficulties in ascertaining exactly who the claims are on behalf of. The principal reason for this is that the memorandum has been drafted to refer to applicants as "including" certain named hapū or iwi. This leaves open the possibility that other applicants, in addition to those specifically identified might emerge at some subsequent stage. This is not acceptable. All of the claims now being advanced in this application overlap other claims. Those overlapping claimants are entitled to know the identity of the whānau, hapū or iwi who have lodged claims in respect of the same area as them.

[12] Accordingly, I direct that the application is to be amended so as to clearly and specifically list all of the claimants and to delete reference to the word "including" where it is used to define who the applicants are.

[13] Paragraph [3](a)(ii)(3) of the memorandum also seems to be incomplete. The two subparagraphs preceding it list respectively Mina Pomare Peita of Ngāti Korokoro and Rihari Dargaville of Te Hikitu as "additional representative claimants specific to this area" but subparagraph (3) just has the words "of Ngāti Manawa" without listing any name. The identity of the applicant on behalf of Ngāti Manawa needs to be specified. It also needs to be specified

which applicants of the various hapū listed the two named "additional representative claimants" are advancing claims on behalf of.

[14] The memorandum continues to advance an extensive claim to the Hawkes Bay/Wairarapa Coast without identifying any claimant. This claim overlaps with a number of existing claims within the area designated on the accompanying map. Those overlapping claimants are entitled to know who it is that is advancing a claim over the same areas they are claiming exclusive and continuous rights.

[15] If adequate details of the identity of the claimant(s) in respect of the Hawkes Bay/Wairarapa Coastline are not provided within one month from the date of this minute, that claim is likely to be struck out.

[16] Paragraph 3(d)(ii) of the memorandum refers to the Waitara claim the details of which are set out on a map marked "D". Paragraph [ii] says, "The additional representative claimants (sic) specific to this area are Pikokore Moore."

[17] It is not specified which applicant or applicants Pikokore Moore is intended to represent. This needs to be remedied.

[18] The same comments apply to [3](e)(ii) of the memorandum which says, in relation to the claims identified in a map attached and marked "E" that "The additional representative claimants (sic) specific to this area is Benjamin Hanley." Again, it will need to be clarified exactly who Benjamin Hanley is advancing the claim on behalf of.

[19] Three unsigned, undated and unsworn affidavits from Rihari Dargaville were submitted in support of the amended application. These affidavits will have to be executed in the normal manner before they can be accepted for filing.

The Paul claim

[20] On 28 November 2019, counsel for Mr Paul filed two documents. One was titled "Memorandum of counsel notifying parties of specific applicants to be joined to a national claim" and the other was titled "Index to memorandum of counsel notifying parties of specific applicants to be joined to a national claim".

[21] No actual amended application was filed and the memorandum notifying parties of specific applicants concluded by stating "A First Amended Application which incorporates the interests of the New Applicants, and attaches Maps A to G, will be filed in due course."

[22] The first problem with this memorandum is that it proceeds on the basis that the original national claim filed by Mr Paul on behalf of all Māori can continue and that the separate claims foreshadowed will be supplemental to it rather than in substitution for it. There is no provision in the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) for a claim to be made on behalf of "all Māori". Section 100 of the Act details who may apply to the Court for a recognition order. Under s 100(1), only an applicant may apply to the Court for a recognition order. Section 9 of the Act defines an applicant group as one or more iwi, hapū, or whānau groups that seek recognition under Part 4 of the Act of their protected customary rights or customary marine title.

[23] An applicant group is defined as including "a legal entity (whether corporate or unincorporated) or a natural person appointed by one 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.[2]

[24] The assumption that an applicant can claim either a protected customary right or customary marine title on behalf of all Māori rather than a particular iwi, hapū or whānau also is fundamentally inconsistent with the structure of the Act which involves individual applicant groups calling evidence to establish the nature of the nature of the right continuously and exclusively exercised by them, and the particular area that relates to the exercise of that right.

[25] Mr Paul is directed, within one month of the date of this minute, to file an amended application providing adequate details of those applicants he is authorised to represent. If the application covering the rest of New Zealand is not withdrawn within one month, the Court will set down for hearing a strike-out application pursuant to r 15.1 of the HCR.

[26] There are further difficulties with the amended application foreshadowed by Mr Paul. Paragraph [3]a of the memorandum of counsel of 18 November 2019 indicates the claim is

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2 Marine and Coastal Area (Takutai Moana) Act 2011, s 9(1).

being advanced on behalf of "Kereopa Ratapu and Lewis Ratapu, on behalf of Tawapata South 3A4 Trust Board, who claims CMT over an area of TTM in the Gisborne region …".

[27] As explained above, a claim can only be advanced on behalf of an iwi, hapū or whānau. While an entity such as a trust board can advance a claim on behalf of an iwi, hapū or whānau, if authorised by such an applicant, a claim cannot be advanced that a trust board can hold customary marine title. When the amended claim is filed by Kereopa and Lewis Ratapu, it must be on behalf of an identified iwi, hapū or whānau.

[28] The same comments apply to the foreshadowed claim by Jane Mahingarangi Ruka Te Korako "on behalf of Waitaha Grandmother's Council". Any claim that Ms Te Korako wishes to advance will have to be advanced on behalf of an identified iwi, hapū and whānau who has authorised Ms Te Korako to bring a claim on their behalf.

[29] In [3](g) of the memorandum, it is said that there is to be a claim by "Hillary Seymour, on behalf of her whānau and hapū." The whānau and hapū are not identified and will need to be.

[30] It also appears that the claim by Hillary Seymour is intended to included Portland Island located off the southern end of the Mahia Peninsula. From the maps filed with the memorandum, Portland Island would also seem to be claimed in the claim to be advanced by Kereopa and Lewis Ratapu. In the absence of any detail as to the claim, it is reasonable to assume that both sets of claimants assert that they meet the exclusivity and continuity thresholds required for the recognition of customary marine title. If that is the case, then there may well be a conflict of interest in Ms Mason representing two claimants whose claims are in contradiction to each other. Counsel would be wise to give this matter further thought before filing the amended claim.

Churchman J