IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-398
[2020] NZHC [51]

IN THE MATTER OF	the Marine and Coastal Area (Takutai Moana) Act 2011
AND	an application of an order recognising Customary Marine Title and Protected Customary Rights
BY	LOUISA TE MATEKINO COLLIER AND OTHERS

On the papers:

Counsel:	J Mason for Applicants G S G Erskine (Ngāti Rehua-Ngāti Wai ki Aotea) J Inns for Ngāti Wai Trust Board D A Ward for Attorney-General
Judgment:	31 January 2020

JUDGMENT OF CHURCHMAN J
[Application for leave to appeal two decisions and application for a stay]

Background

[1] This decision relates to three separate applications. By notice of application dated 20 September 2019, Louisa Te Matekino Collier and Others (the Applicants) sought leave to appeal an interlocutory decision of the Court dated 23 August 2019. That application also contained a request for an order "granting a stay of proceedings in respect of all parties' claims in the proceedings, which overlap with the Proposal Area, pending the final determination of the Applicants' application for leave to appeal, and their appeal in the event that leave is granted."

[2] By application dated 29 October 2019, the Applicants sought leave to appeal a decision of the Court dated 1 October 2019 which was the costs decision in relation to the judgment dated 23 August 2019 that the applicants had previously sought leave to appeal.

[3] Leave to appeal was required pursuant to s 56(3) of the Senior Courts Act 2016 (SCA) because these were decisions on an interlocutory application, and the exceptions in s 56(4) did not apply.

[4] By notice of opposition dated 3 October 2019, counsel for Ngāti Rehua-Ngāti Wai ki Aotea (an applicant also claiming customary marine title in the same area as the Applicants), opposed the application for leave to appeal and the stay application. The grounds relied on were:

(a) that there were no arguable errors of law;

(b) that the alleged errors relied on were not material and would not have changed the outcome;

(c) that the "test case" proposal did not raise any issues of public or general importance and the issues that the Applicants sought to refer to the Māori Appellate Court (MAC) only related to the Applicants;

(d) that any appeal would cause significant delay and additional cost;

(e) that the questions the Applicants wished to refer to the MAC were required to be determined at the substantive hearing by the High Court; and

(f) that the test case proposal did not seek any area specified in their substantive application "be expedited".

[5] By notice dated 4 October 2019, the Attorney-General also opposed all the orders sought by the Applicants. The grounds of opposition included that the:

(a) Applicants had not identified any arguable error of law or fact and that the proposed appeal appeared to be an attempt to re-litigate the interlocutory application for a "test case" and referral of questions for the MAC;

(b) proposed appeal did not give rise to a question of law of such general or public importance that required determination by the Court of Appeal but was simply an attempt by the applicants to seek a second-tier review of an interlocutory application to expedite part of their application for recognition orders; and

(c) delay that would be caused by the granting of the stay application could not be justified.

[6] By notice of application dated 29 October 2019, the Applicants sought leave to appeal the costs decision in this matter dated 1 October 2019.

[7] Three applicants whose applications for customary marine title (CMT) overlapped with part or all of the area of customary marine title claimed by the Applicants had opposed the test case and had applied for costs following the outcome of the interlocutory decision.

[8] In a decision dated 1 October 2019, Ngāti Rehua-Ngāti Wai ki Aotea had been awarded costs of $2,987.50, the Ngāti Wai Trust Board $358.50, and Te Waiariki Ngāti Korora and Ngāti Takapari Hapū/Iwi, Hapū of Niu Tireni $1,508.69.

[9] By notice of opposition dated 12 November 2019, the Attorney-General opposed the application for leave in relation to costs on the grounds that:

(a) the Applicants had not identified any arguable error of law;

(b) there was no error in the Courts holding that the interlocutory application was not "public interest" litigation such as to justify departure from the usual rule that costs follow the event, and that the application was not bought for the benefit of all New Zealanders but rather in pursuit of the Applicants' own interests;

(c) the Court did not err in declining to award costs against the Attorney-General; and

(d) no arguable error of fact had been identified.

[10] A joint memorandum of counsel dated 14 November 2019 was filed by Mr Erskine and Ms Inns, on behalf of two of the three parties that had been awarded costs. It did not specifically oppose or consent to the application in relation to costs but sought a number of directions. These were:

(a) that the application for leave to appeal the test case be heard at the same time as the application in respect of leave to appeal the costs order;

(b) if leave was granted in respect of the test case, and the appeal was successful, it was submitted that the High Court costs orders could be reviewed by the Court of Appeal pursuant to r 48 of the Court of Appeal (Civil) Rules 2005, and the High Court would not need to address the leave application in respect of the costs judgment; and

(c) if leave to appeal the test case judgment was declined, only then should the High Court address the leave to appeal in respect of the costs judgment.

Section 56(3)

[11] Although s 56(3) SCA is relatively recent legislation, it has been the subject of a number of High Court and Court of Appeal decisions.[1]

[12] The principles that can be distilled from these cases are:

(a) there is no doubt that s 56(3) was intended to reduce the volume of appeals to the Court of Appeal from interlocutory decisions in the High Court;[2]

(b) there was no equivalent to s 56(3) under the Judicature Act 1908 and the new section represented a significant change in procedure and procedural rights;[3]

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1 *A v Minister of Internal Affairs* [2017] NZHC 887; *Finewood Upholstery Ltd v Fletcher Heywood Vaughan* [2017] NZHC 1679; *Ngai Te Hapū Incorporated v Bay of Plenty Regional Council* [2018] NZHC 1142; *Ngai Te Hapū Incorporated v Bay of Bay of Plenty Regional Council* [2018] NZCA 291; *McLaren v McLaren* [2018] NZCA 570; *Sutcliffe v Tarr* [2019] NZCA 360.

2 *Ngai Te Hapū Incorporated v Bay of Plenty Regional Council* [2018] NZCA 291 at [15].

3 *Sutcliffe v Tarr* [2019] NZCA 360; [2018] 2 NZLR 92 (CA) at [8].

(c) a high threshold exists for the granting of leave. An allegation of error of law or fact is generally insufficient. An applicant should raise an arguable error;

(d) leave should only be granted where the circumstances warrant incurring further delay;

(e) the alleged error should be of general or public importance that requires determination or otherwise be of sufficient importance to the applicant to outweigh the lack of any general or precedential importance;[4]

(f) the requirement for leave to appeal should serve as a "filtering mechanism" to ensure that meritorious appeals of interlocutory orders, or appeals of interlocutory orders of no great significance to either the parties or more generally, do not unnecessary delay the proceedings in which the orders were made;[5] and

(g) ultimately, and taking into account the considerations referred to above, the Court hearing an application for leave to appeal from an interlocutory order will need to stand back and assess, in a pragmatic and realistic way, whether the interests of justice are served by granting leave to appeal.[6]

These are the criteria against which the three applications must be tested.

[13] The extent to which s 56(3) has added to the pre-existing principles relating to the leave can be ascertained from the summary relating to leave in the Court of Appeal decision of *Sandle v Stewart*. There Somers J said in the context of an appeal from a decision of the District Court rather than an appeal from the High Court to the Court of Appeal of the purpose of leave requirement was that it was:[7]

> … to limit the cases which may go on appeal in the interests of finality of litigation and the workload of the High Court while preserving the integrity of the law and the interests of justice. That is shown by the principles upon which leave is given – where an issue of principle is concerned, where really greater sums are involved, where on the face of it an appeal is likely to succeed.

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4 The last three principles are usually referred to in all of the cases on s 56(3).
5 *Finewood Upholstery Ltd v Fletcher Heywood Vaughan*, above n 1, at [13].
6 At [14].
7 *Sandle v Stewart* [1982] 1 NZLR 708 (CA) at 715, line 41.

Analysis

[14] In the application of 20 September 2019, the Applicants rely on a number of grounds.

[15] The first ground is that the Court mischaracterised the case stated proposal by saying that it was a demand that the Court was obliged to grant. At [35] and [36] of the 23 August 2019 judgment, the Court set out, verbatim, the argument of counsel for the Applicants on this point. There appears to be no challenge to the fact that these passages are accurately recorded.

[16] In the analysis section of the judgment, the Court further referred to the Applicants' argument on this point saying at [69]:[8]

> In support of the argument that the applicants are entitled to express a preference to have aspects of their claim dealt with by the Māori Appellate Court, and that the High Court is obliged to accommodate that preference unless there are very good reasons to the contrary, the applicants have made extensive submissions about what the Act was intended to mean.

[17] The Court has clearly addressed both the written and oral submissions of the Applicants on this point.

[18] However, as Mr Erskine noted in his submissions, any error in this regard is immaterial as the Court specifically considered whether it was appropriate to refer the two proposed questions to the MAC.[9]

[19] The second ground relied on by the Applicants is that the Court incorrectly applied the principles in *Proprietors of Parininihi Ki Waitotara v Ngā Ruahine Iwi Authority & Ors*.[10] The specific claims made in relation to the Court's interpretation of this decision were:

(a) That the Court had characterised the proposal as a test case "when in actual fact it was merely a request to progress the CMT application in two parts." Such a submission is untenable.

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8 *MACA – Collier & Ors* [2019] NZHC 2096 at [69].
9 At [69]-[93].
10 *Proprietors of Parininihi Ki Waitotara v Ngā Ruahine Iwi Authority & Ors* [2004] 2 NZLR 201 (HC).

(b) The application was specifically described by counsel for the Applicants as a test case. It was only when a number of the 36 affected cross-applicants complained that they had neither been consulted in advance about the test case proposal nor agreed to any result of the test case binding them that the Applicants sought to change what the test case proposal was called.

(c) It is unrealistic for the Applicants' counsel to claim that the proposal was "merely a request to progress the CMT Application in two parts". The sole justification given for referring the two questions of tikanga to the MAC was as a test case so that the MAC decision would guide all other applicants.

[20] Further grounds relied on by the Applicants were that the Court had "assumed" that the applications which had statutory priority under s 125(3)(a) of the Act, had to proceed first and that the test case proposal could not be heard prior to any priority applications. The basis for the claim that the Court had this "assumption" is not identified. No passage or passages in the judgment are referred to as supporting this claim. That is no doubt because there is nothing express or implied in the judgment that deals with these "assumptions" at all.

[21] The fourth ground is an allegation that the Court mischaracterised the Applicants' intentions as wishing to proceed "irrespective" of any potential prejudice to overlapping applicants. What the Applicants' intentions were and whether the Court "mischaracterised them" is irrelevant to the outcome of the application. This allegation does not involve an error of law.

[22] The fifth ground was that the Court had based its judgment in part "upon highly controversial evidence from the Bar, about what was and was not, Ngāpuhi tikanga, and about who was and was not, part of Ngāpuhi-nui-Tonu."

[23] Once again, no passage in the judgment is referred to. In reality, the judgment does not make any finding about what is, or is not, Ngāpuhi tikanga. What is claimed to be "highly controversial" evidence from the Bar about who was, or was not, part of the Ngāpuhi-nui-Tonu, was not challenged by the applicants' counsel during the course of the hearing. From the fact that there are some 37 separate applications on behalf of different whānau, hapū and iwi, the Court was entitled to conclude that Ngāpuhi-nui-Tonu had no common view as to issues relating

to who should hold customary marine title. Neither, during the course of the hearing, did counsel for the Applicants challenge the position adopted by a number of counsel for other applicants that their clients were not in fact Ngāpuhi at all. This point does give rise to any error of law or fact.

[24] The sixth ground is that the Court assumed that the consent of all, or most of, the overlapping Māori applicants, was required before timetabling could be put in place to progress the CMT application. Again, such an "assumption" is unsupported by any passage in the judgment. I would also note that the issue in the interlocutory application was not whether or not a "timetable could be put in place to progress the CMT application", it was whether the test case proposed by the Applicants should be referred to the MAC.

[25] The seventh ground is that the Court mischaracterised what was said to be an undertaking given by the Applicants "as proposing a resolution of overlapping interests on the basis that only Ngāpuhi tikanga was relevant, when the Applicants had referred generally and inclusively to "tikanga" and "tikanga Māori processes". Once again, no passage in the judgment is referred to as supporting this claim.

[26] The Applicants' claim was specifically predicated on the basis that all 36 cross-applicants were in fact members of Ngāpuhi-nui-Tonu and that the Applicants were entitled to represent them as Ngāpuhi-nui-Tonu. The affidavit evidence of Louisa Collier dated 4 September 2018 made it specifically clear that the only tikanga process that the Applicants proposed entering into was one with members of Ngāpuhi-nui-Tonu. The relevant passage of her evidence is set out at [51] of the judgment. There was no concession anywhere in the affidavit evidence filed on behalf of the Applicants or the submissions of their counsel that claimants who were not Ngāpuhi would have their consent obtained or be consulted at all.

[27] In any event, given the Court's other findings as to the appropriateness of the test case proposal, whether the Court mischaracterised the Applicants' position on this point is irrelevant, and would have made no difference to the outcome.

[28] The eighth ground relied on is that the Court mischaracterised the test case proposal as "unworkable" "by omitting relevant parts, when in actual fact the Proposal to Proceed was

workable". The application does not explain what "relevant parts" were omitted, neither does it point to any error of fact or law.

[29] At [2](a)(iii) of the Applicants' application of 20 September 2019, submits as a ground that the Court had failed to apply the decision in *Attorney-General v Ngāti Apa "*That the first step in the proceedings is to determine the nature and extent of the rights and custom".[11]

[30] The issue in this case was whether or not only the MAC could determine the matters that were the subject of the test case proposal or whether, in accordance with the statute, jurisdiction to consider the questions posed by the Applicants was vested in the High Court. As is set out in [92] of the decision, the Court in fact followed the decision in *Ngāti Apa* in its conclusion in this regard.

[31] At [2](iv) of the application, a further error said to be a ground of appeal is stated to be that the Court permitted "the participation of the Attorney-General … as an interested party … when the Attorney-General ought to have been disqualified from participating."

[32] At the hearing, the Applicants' counsel did not object to the Attorney-General participating. However, more importantly, a separate hearing has been held to define the role of the Attorney-General in proceedings under the Act.[12] Counsel for the Applicants took an active part in that case. No appeal has been lodged by any party to that case. Not having filed an appeal in that case, the Applicants would appear to be attempting to challenge its findings in these unrelated proceedings which did not address the issue.

[33] In [2](a)(v) of the application, it is submitted that the Court erred by "generally, failing to accord sufficient weight to certain relevant factors, and, taking irrelevant considerations into account, or, in the alternative, according too much weight to certain factors."

[34] These factors are not particularised. It is therefore not possible to discern what the alleged error of fact or law actually is.

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[11] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).
[12] *MACA – The Role and Status of the Attorney-General* [2019] NZHC 2658.

Conclusion on first leave application

[35] This application for leave to appeal an interlocutory ruling to the Court of Appeal does not meet the high threshold required. There is no arguable error; the proposed appeal is unmeritorious and is effectively an attempt by the Applicants to re-litigate the issues raised in the test case proposal.

The stay application

[36] The stay application was extraordinary broad. What the Applicants sought was:

> An order granting a stay of proceedings in respect of all parties' claims in the proceedings, which overlap with the Proposal Area, pending the final determination of the Applicants' application for leave to appeal, and the appeal in the event that leave is granted.

[37] The reference to "all parties' claims" refers to the 36 other parties who have lodged claims for CMT that either in whole or in part, overlap with the claims of the Applicants. This was not relief sought in the original interlocutory application and is inconsistent with that part of the Applicants' submission that suggests that the purpose of the interlocutory application was really only to seek a timetable which expedited its own application.

[38] As was noted in the interlocutory judgment,[13] the Applicants are concerned that they are disadvantaged by the structure of the Act which permits those applicants with statutory priority, to have their cases dealt with ahead of other applicants and they are also aggrieved that the statute permits the Crown to undertake direct engagement with such applicants as it sees fit. (The Applicants were particularly concerned with the Crown's direct engagement with Te Uri o Hau – an applicant with claims in the same area as the Applicants).

[39] The purpose of the stay application seems to be to stop priority applications or applications where the Crown has engaged in direct engagement from proceeding ahead of the Applicants' application. As it was explained at [64] of the interlocutory decision, if the Applicants are unhappy with the right of direct engagement conferred by the Act or the designation of some applicants as priority applicants, then it is not appropriate for them to invite the Court to restrain a process that is specifically authorised by the Act.

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[13] At [55], [58]-[66].

[40] As discussed above,[14] the issue of delay is an important matter for the Court to consider when addressing an application for leave to appeal under s 56(3) SCA. All of the applicants affected by the interlocutory application were gravely concerned by the effects of delay. All referred to the fact that their witnesses were largely kuia or kaumatua who were elderly or unwell, or both. Indeed, at [57] of the interlocutory decision, I have recorded that counsel for the Applicants herself expressed concerns about the very same matter.

[41] Staying all other proceedings that overlap in the test case area would cause significant delays. Even if leave to appeal had been granted, there is no basis upon which a stay of all the other applications would have been justified.

Costs application

[42] The same principles discussed above in relation to the application to appeal the interlocutory application apply to the separate application for leave to appeal the costs order. I will not repeat them.

[43] In the notice of application dated 29 October 2019, the Applicants advance eight grounds which they say justify appeal. The principal ground seems to be that the interlocutory application was "public interest" litigation which benefitted all New Zealanders, both Māori and non-Māori. It is difficult to reconcile this submission with other parts of the application which submit that "the Applicants had merely sought to further their CMT Application."

[44] The application also seems to try and distinguish between Interested Parties and Overlapping Applicants. The Act does not make that distinction. Parties entitled to appear are either applicants for CMT or PCR under the Act or they are Interested Parties. The Attorney-General, for example, is an interested party.[15] All of the three parties who applied for, and were awarded costs, were applicants in that they were advancing substantive applications for recognition orders under the Act.

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[14] At [5] and [12].

[15] See an application by *H Rihari & Ors* [2019] NZHC 2658 and the discussion there as to who may be an Interested Party.

[45] The interlocutory application was to benefit the Applicants. It potentially significantly disadvantaged the large majority of the 36 other applicants whose claims were affected by it. It was ill-considered and had no prospects of success.

[46] It is entirely possible that there may be a sound public policy basis for not awarding costs in relation to a substantive application for an order under the Act itself, but the situation where an applicant files an interlocutory application to advance its own position that has significant potential detriment to the position of other applicants is different. Where parties are needlessly put to expense in defending an application which potentially could have produced outcomes adverse to them, they are entitled to apply for costs.

[47] In addressing cases under the Act, the Court is constantly reminded by applicants of the limited funds available to pursue applications under the Act. The Court is also frequently reminded of the difference between the actual cost of running litigation and the amount of reimbursement available. Applicants should not have to expend their limited funds defending interlocutory applications that should not have been bought.

[48] Ironically, the Applicants clearly accept that it is appropriate for some costs awards to be made in relation to interlocutory applications in proceedings under the Act.

[49] In the costs memorandum filed on behalf of the Applicants dated 26 September 2019, the Applicants sought costs against the Attorney-General. The justification for this costs application was never clear. The Attorney-General had neither sought nor obtained an award of costs in relation to the interlocutory application. The Attorney-General had filed careful and helpful submissions in relation to the test case proposal, which were consistent with the overall conclusions reached by the Court.

[50] The Court declined the Applicants' request for an award of costs against the Attorney-General. The Applicants seek leave to appeal that finding as well. The application does not explain how the Court erred in not granting the Applicants, who were wholly unsuccessful, costs against the Attorney-General, when the Attorney-General's submissions were consistent with the decision of the Court. This aspect of the application for leave to appeal could be categorised as an abuse of the process of the Court.

[51] Nothing in the application for leave to appeal the costs award comes close to meeting the criteria required to be met in relation to s 56(3) SCA.

[52] If the Applicants wish to challenge this costs ruling, or any other costs ruling that may be made in the course of these proceedings, s 56(6) SCA provides them with an opportunity to do so once the substantive decision on their application is issued. That would be the appropriate time for such a challenge to be made.

Outcome

[53] For the reasons set out above, the applications in relation for leave to appeal the two interlocutory decisions and the stay application, are dismissed.

[54] The Applicants asked that any costs award in relation to the applications for leave to appeal and stay application be reserved. However, as all of the applications have been dismissed, there is no reason why the Court should not address the question of costs.

[55] Should any of the parties who have filed submissions in relation to the leave applications wish to pursue an application for costs, they are invited, in the first instance, to attempt to agree costs and, failing agreement, within 14 days of the date of this decision to file costs applications of no greater than three pages in length. The Applicants will then have five days to file submissions in response of no greater than three pages in length. The Court will then deal with the issue of costs on the papers.

Churchman J

Solicitors:
Phoenix Law Ltd, Wellington for Applicants
Tamaki Legal, Auckland for Ngāti Rehua-Ngāti Wai ki Aotea)
Oceanlaw New Zealand, Nelson for Ngāti Wai Trust Board
Crown Law, Wellington for Attorney-General