IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2011-485-817

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	the late Claude Augustin Edwards (deceased), Adriana Edwards and others on behalf of Te Whakatōhea

Hearing (via AVL): 19 March 2020

Counsel:
T Sinclair and B Cunningham for Whakatōhea (CIV-2011-485-817), Turangapikitoi and Ohiwa (CIV-2017-485-375), Pakowhai Hapū (CIV-2017-485-264), and Te Whānau a Apanui (CIV-2017-485-278)
A Sykes and J Chaney for Ngāti Ira o Waioweka Rohe (CIV-2017-485-299)
T Bennion for Ngāti Patumoana (CIV-2017-485-253)
R Siciliano for Te Whānau a Mokomoko (CIV-2017-485-253) (by memorandum only)
R Zwaan and S Alexander for Te Upokorehe (CIV-2017-485-201)
N Coates for Te Whānau a Apanui (CIV-2017-485-318)
R Clark for Te Hapū Titoko o Ngai Tama (CIV-2017-485-262), Te Hapū Titoko o Ngai Tamahau (CIV-2017-485-377), and representing T Castle for Ngai Taiwhakaea (CIV-2017-485-185)
J Lewis for Te Whānau a Harawaka (CIV-2017-485-238)
J Pou for Whakatohea Māori Trust Boardf (CIV-2017-485-292) (by memorandum only)
S T Webster for Ngāti Awa (CIV-2017-485-196) (by memorandum only)
E Rongo for M Jones for Ririwhenua Hapū (CIV-2017-485-270)
C Davis for Ngāti Muriwai (CIV-2017-485-269)
M Exton for Sunchaser Investments and Waihau Bay Sports Fishing Club (Interested Party)
M Jones for Whakatane District Council (Interested Party)
T Reweti for Bay of Plenty Regional Council and Opotiki District Council (Interested Party)

B Scott and S Roberts for Seafood Industries Representatives (Interested Party)
A C Dartnall for Landowners Coalition Incorporated (Interested Party) (by memorandum only)
R Roff and D Ward for Attorney-General (Interested Party)

Minute: 30 March 2020

MINUTE (NO 10) OF CHURCHMAN J

Introduction

[1] On 19 March 2020, a further case management conference (CMC) in this matter was held. Counsel attended both in Wellington and by AVL from the High Court in Rotorua. Counsel had been requested to file, in advance of the CMC a memorandum setting out the matters that they saw as needing the attention of the Court prior to the hearing. I am grateful to those counsel who did that although I note that a number were received shortly before the CMC which gave the Court and other parties little time to absorb the issues being raised.

Identity of parties

[2] A number of counsel referred to the fact that they had only received submissions or affidavits from a limited number of those who were either cross applicants or interested parties. Counsel sought an authoritative list. Mr Sinclair for the applicants filed what he thought was a comprehensive list. I direct the Registrar to review that list and add to it the contact details of any other parties who have filed either an overlapping application or and interested part request.

[3] A related matter is a concern by the applicant and others that parties who are neither applicants nor interested parties but who have sought direct engagement with the Crown, have been contacting the applicant (or other parties) wanting copies of the evidence or other documents. Some of these parties are also apparently under the impression that they are entitled to attend and participate in the hearing. As has previously been made clear, the Court is not involved in the process of direct engagement by the

Crown and has no information as to the identity of those parties who have opted for that process instead of filing an application with the Court. It is not within the Court's power to direct the Crown to provide details of the entities that it is in direct engagement with. Subject to any order that might be made by the Court on a specific application, there is no general obligation on the applicant or any other party to provide all of their evidence to an entity that is not either an applicant or an interested party in these proceedings. In response to a query as to whether parties who have only sought direct engagement can now seek to become interested parties, the answer is that the time for applying to become an interested party has now passed.

What actually will be heard in August 2020?

[4] The application on behalf of Whakatohea will be heard in full. There are a number of other applications that overlap it. Those overlapping applicants have been given the opportunity to have that part of their application that overlaps the Whakatohea claim heard at the same time as this application. The Court will not be hearing those parts of their applications that relate to areas outside of the Whakatohea claim. Clarification of this point resulted in two interested parties (Sunchaser Investments Limited and Waihau Bay Sports Fishing Club) indicating that, as they were only interested in parts of the overlapping claims outside of the Whakatohea claim boundary, they would not be fully participating in the August hearing. They sought leave to file written submissions, asked that they continue to be served with copies of the evidence filed by the other parties (and specifically asked to be served by Whakatohea with their evidence). Sunchaser requested a direction that Te Uri a Te Hapū and Ngāti Awa provide them with copies of their evidence and the Waihau Bay SFC sought a direction that Whānau a Apanui provide their evidence.

[5] I make all of these directions. I also direct that, given the size of some of the evidence and the costs of serving it in hard copy, it can be served electronically rather than in hard copy. Hard copies will continue to be filed with the Court.

[6] Overlapping claimants are not obliged to have the overlapping part of their claim heard and determined in the August hearing. Provided they have given their notice as an interested party or applicant within the statutory time limit, they may appear at the

hearing, call evidence and cross examine if they wish to do so, without advancing their own claim to the overlapping areas. Counsel for Ngāti Awa, in his written memorandum, indicated that they did not seek to advance their overlapping claim at the August hearing but would file evidence outlining the general nature of the Ngāti Awa interests and rohe. Counsel sought leave to file this evidence at the same time as the interested parties on 31 March 2020. That application is granted. Counsel for Te Whānau a Apanui also indicated that her client is not seeking, at the August hearing, any orders in respect of the overlapping part of their claim. In her written memorandum counsel sought a "direction" from the Court as to the extent to which customary marine title (CMT) between her client and Whakatohea would be determined given what she said was an indication by Whakatohea that they would not be seeking CMT in respect of the overlapped area. Unless the applicant specifically advises the Court that it does not want part of its application determined, the Court is obliged to consider and determine the whole of the application. Counsel should discuss with the applicant her concerns on this point and, if agreement is reached, a joint memorandum should be filed.

[7] Some confusion was expressed in relation to the Manu Paora Whānau claim (CIV-2017-485-513) as to whether that claim was going to be advanced at all at the hearing. There was no appearance at the CMC on behalf of this overlapping applicant and no memorandum filed. If they wish to advance their claim, they will need to comply with the timetable directions that apply to all other cross-applicants.

[8] Counsel for Whānau a Harawaka (CIV-2017-485-238) sought leave to file evidence concerning the title histories of the Tumapahore blocks slightly out of time. Such leave is granted.

Maps

[9] Counsel for the applicant had served a revised map and indicated that a further revised version would be filed in approximately three weeks' time. Concern was expressed by some cross-applicants as to the precise boundaries of the claim. Counsel for Te Whānau a Apanui requested that the applicant clarify its eastern claim boundary, particularly as to whether or not it extended east of the mouth of the Motu river.

[10] I direct that the revised map that counsel indicated would be filed address this issue. I also remind the parties that the Bay of Plenty Regional Council has offered to make resources available that might assist in the refining of maps.

Multiple applications

[11] Counsel for Whakatohea expressed a concerned that multiple applications had been made by different members of the same hapū for the same sorts of orders. While the Court is concerned about this development, it is not possible, short of a full hearing, to determine which representatives of any given hapū have particular rights (that is a question of fact dependant on the evidence called), the Court simply notes that such multiple applications by different members of the same applicant group may make it harder for any of the applications to succeed where a joint or combined application could have the opposite effect. Likewise, the Court cannot make a preliminary determination as to whether or not Te Upokorehe is an iwi or a hapū of Whakatohea. This is a question of fact. It also might be of no relevance as hapū and whanau have as much right to advance a claim as an iwi does.

Bundle of documents

[12] There was considerable support for the use of an electronic bundle of documents. Counsel also suggested the use of a drop box and the preparation of something akin to a "record of inquiry". Counsel for the Attorney-General indicated that they would liaise with the applicant in preparing a common bundle under r 9.4 of the High Court Rules 2016. She also referred to the Courts Practice note on the Use of Electronic Bundles and Electronic Casebooks in the High Court HCPN 2019/1. I would strongly encourage counsel to continue their dialogue with the objective of utilising an electronic bundle or casebook. As I have already indicated, counsel are able to serve documents by email.

Judicial settlement conference

[13] A number of the cross-applicants raised the possibility of a judicial settlement conference (JSC) once all the evidence was filed. Counsel for Whakatohea saw little point in such an exercise unless it was preceded by the settling of a list of issues in advance

and a firm agenda. As I have reiterated, there are considerable advantages to the parties in agreeing on as many aspects of their claims as possible rather than having the Court have to determine issues. At least while the current issues with COVID-19 remain, there is no possibility of convening a JSC. However, a JSC is not the only form of technique to come to a mutually acceptable solution and I would encourage the parties to take every opportunity to continue to korero with each other. I was advised that the Kotahitanga group continue to work towards a joint application and I applaud that initiative.

Attendance at hearing

[14] A number of the parties indicated that they did not intend attending for all of the hearing. Others sought directions. No party is obliged to attend the whole hearing if they do not want to. The order in which the parties will present their cases will be finalised prior to the hearing commencing so that parties should know, at least in a general sense, when they are likely to be called upon. The order proposed in [13] of Mr Sinclair's memorandum for this CMC provides a useful starting point. I invite the applicant to liaise with all other parties to see if agreement can be reached as to the order of presentation.

[15] The Opotiki District Council indicated that they would be calling evidence from only one witness. They did not anticipate this would be controversial. Once this evidence has been filed and served, any party wishing to cross-examine this witness should give notice to ODC no later than 7 August. If no notice is given by this date, his attendance at the hearing is excused.

Whakatohea Māori Trust Board

[16] Mr Pou, on behalf of the Whakatohea Maori Trust Board (WMTB), filed a memorandum indicating that his client no longer wished to advance its own claim to orders under the Act but wished to support the claims of its hapū. He sought to change his client's status from applicant to interested party. There was some disquiet about this from other applicants. It is not necessary for the status to be changed (even if that were possible). That is because, as I have outlined above, a cross applicant can elect not to have its claim considered by the Court but still participate in the hearing. Mr Pou

indicated that his client's particular interest was as to where any CMT issued might vest. He will be entitled to make submissions on that point should he wish to do so.

Te reo Māori

[17] There was universal agreement as to the slight variation to the rules relating to the use of te reo and translations that had previously been circulated. A number of applicants indicated that their witness, or at least some of them, would speak in te reo. It will be important, once the order of presentation is finalised, for counsel to indicate precisely when those witnesses are likely to give evidence so the appropriate arrangements for the attendance of an interpreter can be made.

Appointment of pukenga

[18] Little progress was made on this issue. No-one opposed the appointment of a pukenga, but no-one had any suggestion as to who might be appropriate. This is an issue where the Court would prefer to appoint someone who the parties agreed was appropriate. The parties are invited to korero on this issue and to provide either a joint memorandum or their own memoranda as to who might be suitable. Such memoranda are to be filed and served no later than 30 April. The Court will then make a determination.

Seafood Industry submission

[19] Mr Scott, who appeared for an interested party, the Seafood Industry representatives, explained that his clients have no interest in which applicant might be entitled to an order under the Act and, accordingly, no wish to participate in the hearing for all eight weeks. He indicated that some evidence would be filed on behalf of his clients.

[20] He suggested that the question of what orders might issue and their contents was logically something that followed the Court's determination as to whether any of the applications were successful and invited the Court to effectively have a two-part hearing and address this issue once it had been ascertained which, if any of the applicants had

established valid claims. There is merit in this suggestion. It was not opposed by any of the other parties and I proposed to adopt it.

Timetable

[21] The Attorney-General set out a proposed timetable in the written memorandum filed prior to the CMC. None of the parties took substantial issue with it. I acknowledge that uncertainties around COVID-19 may mean that we have to revisit aspects of the suggested timetable, I think it is important that, if we are able to proceed to a hearing in August, there is a timetable in place.

[22] Accordingly, I make the following timetable directions:

(a) close of pleadings date is **28 July 2020**;

(b) the parties are to file an index of documents to be relied on by **31 July 2020**;

(c) a common bundle is to be filed and served by **5 August 2020**;

(d) a chronology of facts is to be served on behalf of the applicant by **7 August 2020**;

(e) all notices of application to cross-examine to be filed and served by **7 August 2020**;

(f) counsel for the other parties are to file any notice of response to the chronology by **10 August 2020**; and

(g) each applicant is to file a synopsis of opening submissions by **10 August 2020**.

[23] The Court will arrange for a further CMC (possibly by AVL) to be held approximately one month prior to the start of the hearing.

Churchman J