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

On the papers:

Counsel:	Y Singh, T Sinclair and B Cunningham for Applicant A Sykes and J Chaney for Ngāti Ira o Waioweka Rohe (CIV-2017-485-299) R Siciliano and K Ketu for Te Whānau a Mokomoko (CIV-2017-485-255) C Linstead-Panoho for Ngāi Tamahaua (CIV-2017-485-377) and Te Hapū Titoko o Ngāi Tamahaua (CIV-2017-485-262) T Bennion and G Davidson for Ngāti Patumoana (CIV-2017-485-253) R Roff and D A Ward for Attorney-General (Interested Party)
Minute:	19 May 2020

MINUTE (NO. 15) OF CHURCHMAN J

Background

[1] This minute addresses four memoranda in relation to the Whakatōhea hearing scheduled to commence on 17 August 2020; memoranda filed on behalf of the priority applicant dated 8 May 2020 (received at Court on 11 May 2020) and 15 May 2020; a

memorandum filed on behalf of the Attorney-General dated 13 May 2020; and a memorandum filed on behalf of five cross-applicants[1] collectively calling themselves Te Kāhui Takutai Moana o ngā whānau me ngā hapū o Te Whakatōhea (Te Kāhui) dated 15 May 2020.

The priority applicants' memoranda

[2] The priority applicants' memoranda indicated that they were filed on behalf of the priority applicant and four cross-applicants[2] collectively calling themselves "Whakatōhea Kotahitanga Waka".

[3] The memoranda referred to regular Zoom meetings having been held during the period of COVID-19 Alert levels 3 and 4 regarding overlapping boundaries, rights and interests.

[4] The memorandum indicated that Whakatōhea Kotahitanga Waka (WKW) supported a tribal Whakatōhea conference to be held on 29 May 2020 at Opotiki commencing at 11 am. It suggested that following a tribal conference, should it be necessary, a judicial settlement conference could be held.

[5] While the Court is always open to the possibility of a judicial settlement conference where there is evidence that such a conference might either resolve or significantly narrow the issues in dispute, such conferences take time to organise both in terms of venue and judicial availability. Such a conference would need to take place prior to the hearing scheduled to commence on 17 August 2020, and the parties need to be aware that the closer it is to the scheduled hearing date that a request for such a conference is made, the less likely it is that it will be able to be accommodated.

[6] In [13] of the memorandum of 8 May 2020, the priority applicants set out some seven issues which WKW saw as important to consider at the Whakatōhea tribal conference. The memorandum made it clear that the issues were simply a sample to

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1 Ngāti Patumoana, Ngāti Ira o Waioweka, Ngāi Tamahaua hapū, Te Hapu Titoko o Ngāi Tamahaua, and Te Whanau a Mokomoko.

2 Pakowhai – Larry Delamere (CIV-2017-485-264); Ngati Muriwai – Christina Davis (CIV-2017-485-269); Te Whānau a Apanui – Larry Delamere (CIV-2017-485-278), and Hiwarau – Dean Flavell (CIV-2017-485-375).

indicate issues for discussion, and counsel for Whakatōhea applicants were invited to forward matters for a proposed agenda.

[7] The memorandum of 15 May 2020 sought until 30 May 2020 to file an amended application. It also said that, by that date, the priority applicant and Larry Delamere (CIV-2017-485-278) would file updating memoranda.

The Attorney-General's memorandum

[8] The memorandum on behalf of the Attorney-General provided information as to the nature of the evidence to be filed. It noted that several applicants and interested parties have filed evidence late or subject to extensions granted by the Court, with the Attorney-General being served as late as 1 May 2020 with some cross-applicants' evidence.

[9] The timetable directions set by the Court on 29 November 2019 provided for the Attorney-General to file his evidence two months after the interested parties and four months after all cross-applicants.

[10] The late filing of evidence has reduced the time available to the Attorney-General whose evidence is due to be filed on 26 May 2020. The Attorney-General sought the following variations to the timetable:

(a) the Attorney-General file and serve an affidavit exhibiting their expert historian's report by **5 pm, Tuesday 2 June 2020**; and

(b) all other evidence filed on behalf of the Attorney-General should be filed and served by **5 pm, Monday 8 June 2020.**

[11] In view of the late filing of evidence by the other parties, I amend the timetable accordingly in relation to the dates upon which the Attorney-General's evidence is to be filed.

[12] The Attorney-General's memorandum notes that the priority applicant was directed to file an amended map and an amended application by 30 April 2020. An

amended map has been filed but not an amended application. The Attorney-General submitted that this had created the following difficulties:

(a) the application dated 18 May 2015 does not describe the application area as including the area around Whakaari/White Island, yet this is depicted in the amended map filed by counsel for the priority applicant on 30 April 2020. It is unclear from the amended map whether the seaward extent of any customary marine title and/or protected customary rights sought extends out to 12 nautical miles;

(b) the memorandum of counsel filed by counsel for the priority applicant on 30 April 2020 advises that the applicant is seeking protected customary rights around Whakaari/White Island, and in respect of the eastern part of the application area from Te Rangi to the Motu Awa. However, the application dated 18 May 2015 includes a schedule setting out the activities, uses or practices in respect of which protected customary rights are sought, in respect of different (and broader) geographical locations from those indicated in the memorandum of counsel for the priority applicant on 30 April 2020; and

(c) there is a reference in the memorandum of counsel for the priority applicant filed on 30 April 2020 to the priority applicant adducing further "kaumatua evidence". The Attorney-General points out that in the absence of any information as to what such evidence might relate to, it has the potential to prejudice interested parties and cross-applicants.

[13] The Attorney-General seeks four orders to address the current issues of ambiguity and uncertainty. These are orders that the priority applicant file an amended application clarifying the following:

(a) the areas in which customary marine title is claimed;

(b) the key material basis of that claim;

(c) the activities that are claimed as protected customary rights and the areas in which those activities are said to occur; and

(d) the material basis for those claims.

[14] The Attorney-General submits that these four matters need to be addressed by all cross-applicants.

[15] The Attorney-General sought a direction that the priority applicant file within five working days an amended application that specifically addresses the four matters set out in [13] above.

[16] It is critical that an applicant provides sufficient detail in their application so that all those potentially affected by it are aware of exactly what is being claimed. The priority applicant should have filed an amended application along with the amended map. There is still an unacceptable level of uncertainty about the precise nature of the claim. I direct that the priority applicant file an amended application addressing the matters set out at [13] above no later than 30 May 2020.

Te Kahui memorandum

[17] Te Kahui raised similar concerns about the fact that an amended application had not been filed with the amended map and there was now a disconnect between the application and the map. They noted that the revised map no longer includes parts of the applications of Te Kahui applicants, in particular on the eastern boundary.

[18] The memorandum confirmed that Te Kahui applicants wished to have all parts of their applications heard in full during the August 2020 hearing. At the moment, it is not possible for the Court to make a ruling on that point as it appears that, if the priority applicant amends its application so that it is consistent with its map, it may well be that some of the applications by Te Kahui applicants fall completely outside of the area in respect of which the priority applicant advances claim. If there is no overlap between the cross-claims and the priority claim, there is no basis for the overlapping claim to be heard contemporaneously with the priority claim. That is why it is so critical that the priority

applicant file an amended application making it clear exactly what the nature of the claim now is.

[19] The memorandum from Te Kahui advises that "they wish for all their respective applications to be heard on the basis of the 15 May 2015 map." This is not something that cross-applicants can direct. The priority applicant has filed an amended map. To the extent that the Court can understand the significance of the amended map, it appears that the priority applicant has refined its claim rather than extended it. However, until an amended application is filed, the Court cannot be certain about this. If the amended application refines the claim rather than extends it, the application will proceed on that basis. If there is still a lack of clarity about the exact nature of the claim, then that is a matter which can be addressed by submission at the hearing commencing on 17 August 2020.

[20] The memorandum on behalf of Te Kahui complains that they were not consulted in relation to the settlement issues listed in the priority applicant's memorandum dated 8 May 2020. They say that they "do not support the settlement issues put forward by the priority applicant and that there needs to be a further facilitated discussion to finalise any statement of issues to be explored in a settlement conference."

[21] The Court has no role to play in the tribal conference scheduled for 29 May 2020. It certainly cannot dictate to the parties what issues should be discussed. It appears clear that the issues referred to in the memorandum of 8 May 2020 by WKW were merely suggestions. There is no reason why, if Te Kahui claimants wish to participate in that conference, they cannot make their own suggestions for agenda items.

[22] The Te Kahui memorandum raises issues to do with tikanga including the use of the concept "kotahitanga". These are not matters that is appropriate for the Court to rule upon at this stage.

[23] Any initiative that may potentially resolve disputes between the parties or narrow the issues that the Court is required to adjudicate upon is supported by the Court, but beyond encouraging the parties to enter into dialogue with one another, the Court cannot direct how that happens or what issues the parties should discuss.

Churchman J