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: T Sinclair and B Cunningham for Te Whakatōhea

Minute: 16 June 2020

MINUTE (NO. 17) OF CHURCHMAN J

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[1] Counsel for Whakatōhea have filed two memoranda in this matter both dated 15 June 2020.

Judicial settlement conference

[2] The first memorandum asks the Court to allocate a judicial settlement conference (JSC) to be "held at the earliest opportunity". Some 11 separate topics are listed as being addressed at the JSC.

[3] There is no indication in the memorandum what the attitude of the various other cross-applicants might be to the idea of a JSC.

[4] This is an important omission because when the idea of a JSC in this matter was first mooted following last year's case management conferences (CMC), the idea ultimately foundered as a result of insufficient support from cross-applicants.[1]

[5] We are now approximately two months from the commencement of the eight-week hearing. The annual round of CMCs for all applications under the Act will take place between 26 June and 23 July 2020. Those CMCs will involve a number of counsel representing parties in this matter, as counsel often represent multiple parties engaged in a number of different cases.

[6] The Court is prepared to urgently investigate whether, logistically, a JSC can be held between now and 17 August 2020. However, the same situation applies as was noted in the Court's minute in this matter of 27 August 2019. Before the Court will direct a JSC, it needs to have confidence that a sufficient number of the cross-applicants have bought into such an exercise so as to raise the prospect of there being significant gains being achieved so that the eight-week hearing is likely to be reduced by matters being agreed.

[7] To that end, the applicants are required to urgently advise the Court what discussions they have had with the cross-applicants and the degree of support there is from the cross-applicants for a JSC.

[8] From reviewing the list of issues that the applicants wish to be covered in the JSC, it appears that they are ambitious and probably beyond the scope of a JSC even if it were to be allocated two days. There are also a number of matters which can be progressed without the formal structure of a JSC and these include the discussions and agreements regarding maps and matters such as clarifying representation of applicants.

[9] The memorandum notes that the Zoom meetings that the applicants have invited other cross-applicants to, have not attracted the attendance of many applicants. That does not encourage the Court to have confidence that a JSC is likely to achieve its objectives.

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1 See Minute No. 2, Churchman J, in the matter of an application by Edwards & Ors on behalf of Te Whakatōhea, CIV-2011-485-817, 27 August 2019.

[10] The memorandum refers to the possibility of joint applications for a shared customary title as one way of addressing the "exclusivity" test in s 58 of the Act. That is also something that the parties do not need a JSC to sanction and are able to discuss directly with each other.

[11] The Court will therefore make preliminary enquiries as to the feasibility of a JSC at some stage between now and 17 August 2020 while awaiting the applicants' response to the issues raised in this memorandum.

Preliminary questions of law

[12] The second memorandum effectively seeks rulings from the Court on preliminary issues. The rulings sought relate to concepts of exclusivity and joint exclusivity, and also the issue of continuity of claims between the mainland and Whakaari where there is a gap in the 12-mile nautical limit between these two points.

[13] The Court will consider an application under r 10.15 of the High Court Rules 2016 (HCR) for a decision on a question prior to trial where the resolution of such an issue will expedite proceedings by limiting or defining the scope of the trial in advance or obviating the need for a trial altogether.

[14] However, the starting point is the assumption that all matters in issue are to be determined in one trial because that would normally be the most expeditious and efficient manner for dealing with the proceeding.[2]

[15] Preliminary hearings are best suited to the determination of a question of law.

[16] The various questions posed by the applicants in this case are matters which can only be resolved with a careful consideration of facts that are in many cases hotly disputed.

[17] Given the imminence of the hearing and the advanced stage of preparation for it, any attempt by the Court to address these legal issues without making findings of fact, is

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2 See *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 5 May 2010 at [10].

likely only to divert the parties from preparation for the hearing. The sorts of questions posed are also inherently unsuitable for separate determination.

[18] These issues will undoubtedly arise during the course of the substantive hearing and the parties should prepare to make submissions on them. However, ultimately, they are only able to be resolved once the Court has made findings of fact. That is not something that it could do at a preliminary hearing.

[19] Accordingly, the application for rulings on legal issues prior to the hearing is declined.

Churchman J