IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2011-485-817
[2020] NZHC 1549

IN THE MATTER OF	the Marine and Coastal Area (Takutai Moana) Act 2011
AND	an application by the late CLAUDE AUGUSTIN EDWARDS (deceased), ADRIANA EDWARDS and others on behalf of TE WHAKATŌHEA for a recognition order of protected customary rights and/or customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011

On the papers:

Counsel: Y Singh, T Sinclair and B Cunningham for Applicant

Judgment: 2 July 2020

JUDGMENT OF CHURCHMAN J
[Te Whakatōhea preliminary hearing application]

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[1] By a memorandum dated 30 June 2020, the applicant in this matter applies for various directions. Although r 10.15 of the High Court Rules 2016 (HCR) is not specifically mentioned, it appears that counsel are inviting the Court to consider and determine certain issues in advance of the hearing in this case which has been set down for an eight-week hearing commencing in mid-August this year.

[2] The applicant appears to want a pre-trial ruling as to whether "Te Ūpokorehe iwi" is a separate iwi or a hapū of Te Whakatōhea iwi.

[3] The memorandum notes that what it describes as the Te Ūpokorehe hapū elect representatives to the Whakatōhea Māori Trust Board which represents Te Whakatōhea iwi and that several Te Ūpokorehe hapū members have filed evidence in support of the Whakatōhea priority application.

[4] The applicant seeks directions from the Court that Te Ūpokorehe produce certain documents and answer certain questions including the basis upon which Te Ūpokorehe constituted itself an iwi.

[5] The memorandum then refers to the possibility of applying to the Court for a direction under s 61(1)(b) of the Te Ture Whenua Māori Act 1993, or an application to the Court under s 99 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).

Legal issues

[6] The memorandum raises a number of discrete legal issues:

(a) the application of HCR 10.15 in respect of preliminary determinations;

(b) the issue of who can be an applicant under the Act;

(c) the referral of questions of tikanga to the Māori Appellate Court or a pukenga.

HCR 10.15

[7] HCR 10.15 gives the High Court jurisdiction to decide a question or questions separately from any other question before, at or after, any trial or further trial. That discretion must be exercised in accordance with principle. The principles have been developed in the caselaw.

[8] 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 of dealing with the proceedings.[1] The burden of displacing the presumption rests on the party contending for a split hearing.[2]

[9] Among the many factors the Court has recognised as being potentially relevant in exercising the discretion, is the impact on the length of any subsequent hearing in determining a preliminary issue; a balancing of the advantages and disadvantages, both to the parties and in the public interest in shortening litigation but imposing two separate hearings, and the prospect of multiple appeals and how they might be dealt with.

[10] In the present case, a determination as to whether Te Ūpokorehe are an iwi or a hapū of Whakatōhea will not resolve the issue of whether they are entitled to advance a claim under the Act. That is because applications for orders under the Act can be made on behalf of iwi, hapū or whānau.[3]

[11] Where an issue of authority to represent a particular applicant arises, this Court clearly has jurisdiction to determine that.[4]

[12] Making a determination about whether Te Ūpokorehe are an iwi or hapū is likely to involve an intensive consideration of the evidence including tikanga evidence. Any attempt to address that as a preliminary issue will inevitably involve a duplication of evidence that will still need to be called at the substantive hearing. Therefore, rather than saving time and producing efficiencies, having a separate hearing on this issue is likely to have the opposite effect.

[13] Given that the fixture for the hearing of the full application has been set for some considerable time, there will also be logistical difficulties in attempting to superimpose a preliminary hearing on the timetable for the substantive hearing.

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1 See *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 5 May 2011 at [10].
2 See *Karam v Fairfax NZ Ltd* [2012] NZHC 887 at [58](d).
3 See Marine and Coastal Area (Takutai Moana) Act 2011, s 103(2).
4 See *Re Tipene* [2016] NZHC 3199 at [157]-[176].

[14] If there were any appeals against the outcome of a preliminary hearing, that would inevitably derail the substantive hearing which would greatly inconvenience all of the parties who have put considerable effort into preparing for it.

[15] These factors do not support holding a separate pre-trial hearing on this issue.

Applicants

[16] Other than in respect of the authority of a particular representative to act on behalf of an applicant, it is not for the Court to direct who can or cannot advance an application. There are many instances where whānau and hapū have advanced claims under the Act in circumstances where the iwi to which they whakapapa has also advanced claims which overlap or conflict with their claims. It is only going to be possible for the Court to determine such claims once it has heard all of the evidence.

[17] In this case, the sort of evidence or documentation that the applicant has sought a direction that Te Ūpokorehe provide, is obviously material that could potentially be relevant to the outcome of the proceedings. If it is not produced, the Court will no doubt be invited to draw inferences as to the reason for that. However, it is not for the Court to direct what evidence an applicant or interested party should or should not call in support of its case.

Tikanga

[18] While applicants are entitled to apply for directions under either s 99 of the Act or s 61(1)(b) of the Te Ture Whenua Māori Act 1993, the Court has a discretion as to whether it accepts such an application, and whether the issue is dealt with either by a pukenga or the Māori Appellate Court.[5]

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5 See *Re an application by Collier & Ors* [2019] NZHC 2096.

Outcome

[19] The application for a preliminary hearing and the provision of directions is therefore declined for the reasons set out above. The applicant remains free to raise these issues during the course of the substantive hearing.

Churchman J

Solicitors:
Legal Hub Lawyers, Auckland