

**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 1905**

UNDER	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), Adrian Edwards and others on behalf of Te Whakatōhea
BY	Te Whakatōhea Māori Trust Board on behalf of the iwi and hapū of Whakatōhea applicant and Ngāti Ruatakenga, hapū of Whakatōhea interested party

On the papers:

Counsel: K Feint QC for Ngāti Ruatakenga
T Sinclair for Te Whakatōhea

Judgment: 31 July 2020

JUDGMENT OF CHURCHMAN J

Background

[1] An issue has arisen as to the basis upon which the Whakatōhea Māori Trust Board (WMTB) and Ngāti Ruatakenga (Ngāti Rua) can participate in the hearing of the Whakatōhea priority application set down to commence in Rotorua on 17 August 2020.

[2] By a document described as “Application opposing the application of Mandy Hata and the Whakatōhea Māori Trust Board” dated 27 July 2020, counsel for Whakatōhea took issue with the status of Ngāti Rua and the ability of WMTB to advance an application on behalf of Ngāti Rua. The four grounds of opposition were said to be:

- (a) the Ngāti Ruatakena (sic) application missed the statutory High Court deadline April 3 2017;
- (b) further grounds for declining Ngāti Ruatakena (sic) application was not filed in accordance with tikanga;
- (c) Ngāti Ruatakena (sic) hapū representatives have been part of and been mandated hapū representatives to the Whakatōhea Edwards application since and after it was filed (sic) to the Māori Land Court for Whakatōhea hapū by Whakatōhea hapū in 2005;
- (d) that the WMTB application cannot advance Ngāti Ruatakena as the Whakatōhea Māori Trust application was not mandated in accordance with tikanga.

Facts

[3] It is undisputed that Ngāti Rua are a hapū of the iwi Whakatōhea. By application dated 3 April 2017, WMTB filed an application for customary marine title (CMT) and protected customary rights (PCR) to identified areas of the coast of the eastern Bay of Plenty. The application was accompanied by an affidavit in support providing details of the claim and a map of the relevant area.

[4] The application was said to be made by WMTB “for and on behalf of the Whakatōhea whānau, hapū and iwi”.

[5] By application dated 3 April 2017, Mandy Merearia Hata (Ms Hata) applied for the recognition of CMT and PCR on behalf of Ngāti Rua hapū and other hapū of Whakatōhea. The application is no longer being pursued on behalf of the other five Whakatōhea hapū listed in the original application.

[6] By letter of 18 April 2018, the then Minister of Treaty Settlements acknowledged receipt of the application of 3 April 2017.

[7] The application by Ms Hata was a pre-printed form which she had filled out and posted to the Minister for Treaty of Waitangi Negotiations. It constituted an application for direct engagement with the Crown. Ms Hata did not commence proceedings in the High Court asking the Court for orders under the Marine and Coastal (Takutai Moana) Act 2011 (the Act).

[8] Prior to the 2019 series of case management conferences (CMCs), Ms Hata filed two documents in the High Court. One was described as “Notice of appearance on behalf of Ngāti Rua and other hapū from Whakatōhea iwi”, and the other “Memorandum for and on behalf of Ngāti Rua and other hapū from Whakatōhea iwi”. Both documents had been prepared by Ms Hata without legal assistance.

[9] Ms Hata personally appeared at the CMC in 2019. The Court explained to her that there was a difference between the two pathways of direct engagement and litigation in the High Court. She had correctly commenced the process of direct engagement on behalf of Ngāti Rua but there were no High Court proceedings extant in respect of a claim by Ngāti Rua. She was referred to the claim that had been filed by WMTB on behalf of Whakatōhea hapū, which had been validly commenced and covered all of the area of the claim that Ms Hata wished to advance in the Court on behalf of Ngāti Rua.

[10] Ms Hata took legal advice and, with the assistance of counsel, filed a memorandum of counsel dated 6 July 2020 and an affidavit from herself dated the same date.

[11] The memorandum of counsel recorded that Ms Hata had filed a notice of appearance dated 17 June 2019 as an interested party in the Whakatōhea application (CIV-2011-485-817) and the WMTB application (CIV-2017-485-292).

[12] The memorandum further recorded that Ngāti Rua had reached agreement with WMTB that it would advance Ngāti Rua’s CMT application along with the applications of other hapū that it was advancing. The memorandum also recorded that counsel had been instructed “to act on behalf of Ngāti Rua as an interested party”. The memorandum also sought leave to file evidence late and, in support of this, referred to

Ms Hata's affidavit which detailed the circumstances which had led to the misunderstanding as to the nature of the application that had been lodged on behalf of Ngāti Rua on 3 April 2017.

[13] Mr Sinclair, on behalf of Whakatōhea, opposed these applications. He sought and was granted leave to provide written submissions. Counsel for Ms Hata was granted leave to file submissions in reply within 24 hours of receiving Mr Sinclair's submissions.

[14] Mr Sinclair sought a further extension of time within which to file submissions, eventually filing on 27 July 2020 some 90 pages of submissions and attachments. Ms Feint QC, filed a memorandum in reply on 28 July 2020.

The issues

[15] Mr Sinclair submits:

The application of M Hata was filed later than six years after the commencement of the Act, and the Court must not accept for filing or otherwise consider M Hata application (sic) that purports to be filed after that date to participate as a fully applicant in the Whakatōhea Edwards priority hearing under any circumstances. The application of M Hata for and on behalf of Ngāti Rua is statute-barred and must be declined participation as an applicant to the Whakatōhea Edwards priority hearing.

[16] This submission does not accurately record the situation. Ms Hata, on behalf of Ngāti Rua, validly commenced a claim under s 95 of the Act for direct engagement with the Crown. The WMTB validly commenced a claim in the Court on behalf of Whakatōhea hapū specifying the areas to which the claim related in a manner that those affected by the claim could understand. The claim was appropriately notified. Ms Hata has filed a valid notice of intention to appear as an interested party in the Whakatōhea priority application. A notice of intention to appear is different to an application for CMT or PCR.

[17] As an applicant who validly filed a s 95 notice, it is appropriate that Ms Hata be an interested party in respect of the same area described in her notice which is the subject of Court proceedings. Ms Hata clearly accepts that she cannot now, after 3 April 2017, file a separate claim in Court seeking CMT or PCR.

[18] However, given that there is no dispute that Ngāti Rua is a hapū of Whakatōhea, and its claim falls entirely within the claim commenced and notified by the WMTB on behalf of Whakatōhea, there is no reason why WMTB cannot advance a claim on behalf of Ngāti Rua.

[19] However, the consequence of doing that would be that Ngāti Rua would not be able to continue to seek direct engagement under s 95 and would be bound with whatever outcome the Court reaches in relation to the WMTB claim. It would have been open for Ngāti Rua to simply participate in the Whakatōhea priority proceeding as an interested party, to have preserved their right to direct engagement. However, that is not the course they have chosen.

[20] Mr Sinclair's memorandum asserts that Ngāti Rua is a hapū of Whakatōhea and has authorised the priority claim to proceed on its behalf. He also submits that Ms Hata has not complied with Whakatōhea tikanga and that the Court should not permit Ngāti Rua's further involvement in these proceedings on that basis. Mr Sinclair specifically does not seek the Court to strike-out the WMTB claim.

[21] It is clear that there are multiple entities each seeking to advance claims on behalf of the same hapū of Whakatōhea. The Court has previously raised its concern about the difficulty that such multiple overlapping applications in respect of the same hapū can raise and encouraged such parties to co-operate with one another.

[22] On an interlocutory application, the Court is not in the position to determine complicated questions of mandate and authorisation. Ultimately, where that is challenged, it is up to each applicant to establish the mandate that they claim. That can only be done in the context of a full hearing with cross-examination.

Outcome

[23] Whakatōhea's applications to have the claim by WMTB on behalf of Ngāti Rua, and Ngāti Rua's application to participate as an interested party rejected are declined. The relevant matters of mandate and authorisation will be addressed during the course of the substantive proceedings.

[24] The application to file evidence out of time is granted with a direction that the evidence is filed and served forthwith.

Churchman J

Solicitors:

Legal Hub Lawyers, Auckland for Priority Applicants
Annette Sykes and Co, Rotorua for Ngāti Ruatakenga