IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-404-538
[2020] NZHC 2028

IN THE MATTER OF	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	an application by RIHARI DARGAVILLE for an order recognising Customary Marine Title and Protected Customary Rights of New Zealand Māori Council Members

Hearing:	23 July 2020
Counsel:	G Sharrock for Applicant Y Moinfar-Yong and R Budd for Attorney-General
Judgment:	11 August 2020

JUDGMENT OF CHURCHMAN J

Background

[1] On 30 March 2017, Rihari Dargaville (Mr Dargaville) filed an application under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) for an order recognising customary marine title (CMT) and protected customary rights (PCR). The application was said to be on behalf of "New Zealand Māori Council Members" and it was said to be in respect of the entire coastline of New Zealand.

[2] By way of justification for claiming CMT and PCR "on behalf of New Zealand Māori Council Members", the application said that "New Zealand Māori Council Members whakapapa to signatories of He Whakaputanga and Te Tiriti".

[3] The application was one of two so-called "national" applications.[1] The two applicants appear not to have talked to each other before filing their applications. Neither, it would seem, was either authorised by the New Zealand Māori Council (NZMC) itself to file such applications.[2]

[4] Mr Dargaville's application did not comply with a number of the requirements of the Act. Section 101 of the Act requires an application to include a description of the "applicant group".[3]

[5] Section 9(1) of the Act defines applicant group as "1 or more iwi, hapū or whānau groups that seek recognition under Part 4 of their protected customary rights or customary marine title". Neither the NZMC or a DMC fall within the definition of "applicant group". There was no indication that Mr Dargaville had been authorised to bring the application on behalf of any specific "applicant group" as is required.[4]

[6] The Act also requires a degree of specificity in any application in relation to the description of the applicant group and the identification of "the **particular** area of the common marine and coastal area to which the application relates" [emphasis added].[5]

[7] All applications under the Act are required to be publicly notified and the Act also prescribes the degree of detail to be provided in such notification.

[8] Section 103 stipulates that:

> (1) The applicant group applying for a recognition order must give public notice of the application not later than 20 working days after filing the application.
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> (2) The public notice must include, as a minimum–
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> (a) the name of the applicant group and its description as an iwi, hapū, or whānau, whichever applies; and

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1 The other was CIV-2017-485-512 brought by Cletus Maanu Paul.

2 By memoranda dated 30 May 2017 and 18 August 2017, counsel for the NZMC confirmed that the NZMC was not involved in either of the two "national" applications and had in fact made directions that no District Māori Council (DMC) could lawfully be involved in any application.

3 Section 101(c).

4 See *Re Tipene* [2016] NZHC 3199, [2017] NZAR 599 at [41]-[42].

5 Section 101(c) and (d).

(b) a brief description of the application including whether it is an application for recognition of a protected customary right or of customary marine title or both; and

(c) a description of the **particular** area of the common marine and coastal area to which the application relates; and

(d) the name of the person who is proposed as the holder of the order; and

(e) in the case of an application for a recognition of a protected customary right, a description of the rights; and

(f) a date that complies with the subs (3) for filing a notice of appearance in support of or in opposition to the application; and

(g) the registry of the Court for filing the notice of appearance.

[emphasis added].

[9] It is clear from these various prescriptive requirements that the Act anticipates that only one or more iwi, hapū, or whānau groups can be applicants and that such applicants are required to demonstrate the existence of CMT or PCR in relation to particular specified areas of the coastal marine area.

[10] One of the purposes of requiring such a level of specificity in relation to the applicant group, the nature of the claim, and the specific area that it related to, was to ensure that those applicants who were advancing similar claims in the same specific area would be aware of claims that overlapped with their own, and be able to consider whether they needed to become interested parties in respect of those claims. Others, who were not applicants, also needed the same level of specificity to know whether their interests were affected to such an extent that they should also seek to become interested parties.

[11] Because Mr Dargaville's application purported to cover all of New Zealand (as did the other national application), it impacted on and overlapped with every other application. During the course of the 2019 case management conferences (CMCs), many of the applicants voiced their concern about the adverse effects, by way of additional cost and uncertainty, in having to defend the two so-called national applications which did not comply with some fundamental requirements of the Act.

Developments

[12] When neither of the national applicants appeared receptive to the concerns raised by many of those applicants whose claims were impacted upon by the national applications, a number of counsel indicated that they had instructions to pursue strike-out applications at least insofar as the two national applications overlapped with their clients' claims. The Attorney-General had also raised concerns in respect of Mr Dargaville's application. He filed a request for further particulars of the claim which produced a response by way of memorandum dated 16 March 2018 which said the application was made "on behalf of all Māori as per the philosophy of the Māori Community Development Act".

[13] In response to that memorandum, on 10 April 2018, the Attorney-General filed an amended notice of appearance in respect of Mr Dargaville's application. This included raising the issues that the application did not comply with s 101 of the Act and had also not established the representative's status claimed.

[14] In order to attempt to encourage the national applicants to address the concerns expressed by cross-applicants, the Court issued a series of minutes.

[15] The Court's minute of 25 July 2019 directed Mr Dargaville and the other national applicant to specify exactly what claims were being advanced including providing details as to who the claims were being made on behalf of, and what geographic areas they related to.

[16] On 9 September 2019, Mr Dargaville filed a memorandum which specified some five areas of coastline that claims were being advanced in respect of and said that claims to all other parts of New Zealand were withdrawn.

[17] However, this memorandum still failed to provide sufficient information including the identity of the claimants and boundaries of the claim. This was addressed in a further minute of the Court dated 18 September 2019.

[18] Counsel for Mr Dargaville filed a further memorandum on 17 November 2019, but this memorandum still suffered from a number of defects. The defects resulted in

a further minute of the Court dated 30 January 2020 directing that counsel for Mr Dargaville provide adequate details of the claims that were to be advanced. Counsel for Mr Dargaville filed another amended application on 28 February 2020. This application purported to introduce claims in respect of four discrete claims by various individuals who had not been named in the original application.

[19] In a minute of 3 March 2020, the Court indicated its view that the amended application failed to comply with previous directions and as a result the Court was setting this application down for a consideration of strike-out either in whole or in part pursuant to r 15.1(1) of the High Court Rules 2016 (HCR).

[20] On 25 May 2020, counsel for Mr Dargaville filed a further amended application. It was signed by counsel rather than any applicant, and it was not accompanied by any affidavits. There were differences from the 28 February 2020 amended application in respect of some of the individuals on whose behalf the applications were said to be made, and some relatively minor differences in the description of the areas that were claimed.

Legal principles

[21] HCR 15.1(1) authorises the Court to strike-out all or any part of the pleading if it:

> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
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> (b) is likely to cause prejudice or delay; or
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> (c) is frivolous or vexatious; or
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> (d) is otherwise an abuse of the process of the Court.

[22] HCR 15.1(3) also authorises the Court to stay all or part of a proceeding instead of striking it out. HCR 15.1(4) specifically preserves the Court's inherent jurisdiction to strike-out all or part of a proceeding.

[23] The Act also specifically confirms the right of the Court to amend, vary or strike-out an application, with s 107(3) replicating the grounds set out in HCR 15.1(1). Section 107(5) replicates HCR 15.1(3).

[24] The similarity in the language between HCR 15.1 and s 107 means that the principle set out in the case law under HCR 15.1 are applicable when considering s 107 of the Act.[6]

[25] In *Re Ngāti Pāhauwera*,[7] the Court applied the principles set out in *Couch v Attorney-General*[8] and *Attorney-General v Prince*[9] and confirmed that the Court must take a cautious approach to striking out applications and exercise its powers sparingly. The Court also held that it was inappropriate to strike-out a claim summarily unless the Court could be certain that it could not succeed.

[26] The Courts have confirmed that applications under the Act may be amended. The Courts have also indicated it would be wrong to take an unduly strict or narrow approach to all or any amendments that are permissible under the Act.[10]

[27] Where an amended claim narrows down or refines the scope or nature of the claim, provided the claim was validly commenced, and there is no significant prejudice to any other applicant, such an amendment would normally be permitted.[11]

Mr Dargaville's case

[28] Mr Sharrock, on behalf of Mr Dargaville, emphasised that Mr Dargaville was a nationally regarded kaumatua and had been involved in the NZMC and the Tai Tokerau Māori Council for several decades. He submitted that Mr Dargaville was not a man who was vexatious but "a man of great honour and bravery" and that "to strike out a person of such mana is unthinkable".

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6 See *Re Ngāti Pāhauwera* [2020] NZHC 1139 at [54].
7 At [55].
8 *Couch v Attorney-General* [2008] NZSC 45.
9 *Attorney-General v Prince* [1998] 1 NZLR 262.
10 *Re Tipene* [2015] NZHC 169 at [20]-[21] and *Re Ngāti Pāhauwera*, above n 6, at [60].
11 At [66].

[29] These submissions misunderstand the matters to be considered on a strike-out application. The issue is not whether the applicant is a vexatious person, nor is there any question of an attack on the applicant's mana. It is the application itself which needs to be frivolous or vexatious, not the individual making it. In this case, whether the threshold in HCR 15.1 and s 107 of the Act is met, will depend on whether the application complies with the mandatory requirements of the Act.

[30] Mr Sharrock also submitted that the Act was "clearly a breach of the Treaty of Waitangi" and of a number of other international conventions. He argued that the application by Mr Dargaville "was to ameliorate the breach of Treaty and mitigate injustice" and that to describe the application as an abuse of process was "repugnant and unsustainable".

[31] These arguments do not engage with the prescriptive requirements of the Act as to what is required for a valid application under the Act. If an application does not meet those requirements, then the Court does not have the jurisdiction to waive those requirements because the applicant sees the application as one that remedies a Treaty breach. The provisions of ss 101 and 103 of the Act are mandatory.

The Attorney-General's case

[32] The Attorney-General argues that, by seeking recognition orders on behalf of all Māori, rather than one or more iwi, hapū or whānau groups, the original application was fundamentally inconsistent with the requirements of the Act and so untenable it could not succeed in terms of s 107(3)(a) of the Act.

[33] It was submitted that the various amendments to the application could not remedy the fundamental defects and that the last iteration of the application which named five individuals, who were not named in the original application, effectively sought to introduce new causes of action which were materially different from the original application after the statutory deadline for filing applications had passed.

[34] It was also submitted the application had been brought for an improper purpose, namely that it had effectively been filed as a placeholder on behalf of Māori

applicants who wished to advance a claim but had not done so before the statutory deadline.

[35] This last submission is of a different nature to the concerns which the cross-applicants had raised during the 2019 CMCs. The various cross-applicants had each focused on the adverse effect of the application on their clients' applications and would have been content for Mr Dargaville to amend his application so as to exclude any area claimed by their clients. However, as the Attorney-General has squarely raised the issue of improper purpose, it needs to be addressed.

[36] Ms Moinfar-Yong, counsel for the Attorney-General submits that the Act confers no discretion on the High Court to accept applications filed after 3 April 2017.

Analysis

[37] The Court in *Re Ngāti Pāhauwera*[12] referred to and applied the leading cases on the topic of whether an amended pleading constitutes something "essentially different" so as to be a fresh pleading.[13]

[38] I accept that the crucial question for the Court to determine in this case is whether the amendments to Mr Dargaville's claim change the essential nature of the claim giving rise to a new area of factual inquiry.[14] This assessment is objective, and the consideration must be of the substance of what is pleaded rather than the form.[15]

[39] I accept the submission that Mr Dargaville's application was a "protective" one brought specifically for the purpose of giving unidentified applicants who had not met the statutory deadline set out in s 100(2) of the Act the opportunity to still be able to advance a claim.

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12 Above n 6 at [37] and [44].

13 See *Transpower NZ Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61]; and *Ophthalmological Society of New Zealand Inc v Commerce Commission* CA 168/01, 22 September 2001 at [22]-[24].

14 See *ISP Consulting Engineers Ltd v Body Corporate Ltd 89408* [2017] NZCA 160; and *Re Ngāti Pāhauwera*, above n 6, at [59].

15 *ISP Consulting Engineers Ltd v Body Corporate 89408*, above n 14, at [22].

[40] Unlike the recent decision involving the application by Ngāti Ruatakenga,[16] where the Court held that the original application by the Whakatōhea Māori Trust Board, on behalf of the iwi and hapū of Whakatōhea, was sufficiently specific to cover claims by each of the hapū of the Whakatōhea iwi, in the situation where it was undisputed that Ngāti Ruatakenga were a hapū of Whakatōhea, Mr Dargaville's application did not identify either the areas of the coast it related to nor the identity of the applicants on whose behalf it was made. Neither was there any affidavit by Mr Dargaville that met the requirements of s 101(d) and (h), or s 103(2).

[41] I accept that the purpose of attempting to circumvent the time limits specified in the Act is an "improper" purpose. It is also clear that the original application did not contain the mandatory information prescribed by the Act as a prerequisite for a valid application.

[42] The final amended application went some way towards providing sufficient information although, as noted in the Court's minute of 3 March 2020,[17] because of the failure to comply with the directions of the Court as to amendments required, the final amended application was still non-compliant.

[43] However, the final amended application clearly introduces fresh causes of action which can be described as constituting something "essentially different" to the original application.

[44] The introduction of new causes of action after the statutory deadline for filing applications is an abuse of the Court's process. The amended application would involve investigation of areas of fact of a new and different nature, and on a new and materially different basis, from the original application.

[45] If "protective" applications of this nature were held to be permissible then effectively, a claim could be advanced by any claimant group in the future that they were entitled to advance a claim under the umbrella of such an application. Section 4 of the Act includes as its purpose the establishment of "a durable scheme to ensure the

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16 *Re Edwards* [2020] NZHC 1905.
17 *Minute (No. 5) of Churchman J,* 3 March 2020 at [16].

protection of the legitimate interest of all New Zealanders in the marine and coastal area of New Zealand …"[18]

[46] As this Court said in *Re Ngāti Pāhauwera*:[19]

> The durability of this legislation, and this purpose, is weakened if impermissible material changes are allowed to be made to applications under the Act after the limitation period has long since passed, because it may undermine the applications of other whānau, hapū, and iwi. Again, as observed by Mallon J, the Court must not take an unduly narrow approach to permissible amendments, but they must in fact, be permissible.

Outcome

[47] The application was filed for an improper purpose, namely to defeat the mandatory time limits imposed by the Act for the filing of applications.

[48] As filed, the application did not comply with the mandatory requirements of the Act to specify a claimant group of a type authorised by the Act to seek orders under the Act. Neither did it comply with the requirement to describe the particular part of the common marine and coastal area to which it related.

[49] The final amended version of the application was filed well beyond the time limits specified in the Act and referred to applicants who had not been identified in the original application. It was therefore something "essentially different" that amounted to a fresh pleading.

[50] For these reasons, the application by Mr Dargaville is struck out in its entirety under HCR 15.1 and s 107 of the Act.

Churchman J

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Crown Law Office, Wellington for Attorney-General

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18 Section 4(1)(a).
19 Above n 6, at [72].