

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE**

**CIV-2017-485-242
CIV-2017-485-247
CIV-2017-485-255
CIV-2017-485-302**

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 HARO TE MOANA EDEN MCILROY
ON BEHALF OF TE WHĀNAU A
RAKAIROA KI WAIPIRO AND
TE WHĀNAU A IRITEKURA
(CIV-2017-485-242)

BY ROGER TICHBORNE ON BEHALF OF
NGĀ HAPŪ O TOKOMARU ĀKAU
(CIV-2017-485-247)

BY MARISE LANT FOR NGĀ HAPŪ O
KOKORONUI KI TE TOKA A TAI AU
TAKUTAI KAITIAKI TRUST
(CIV-2017-495-255)

BY TATE PEWHAIRANGI AND OTHERS
ON BEHALF OF TE WHĀNAU A
RUATAUPARE KI TOKOMARU
(CIV-2017-485-302)

Teleconference: 4 February 2021

Counsel: C Beaumont for CIV-2017-485-242
 G Erskine for CIV-2017-485-247
 B Lyall for CIV-2017-485-255
 N Milner for CIV-2017-485-302
 G Melvin for Attorney-General

Minute: 4 February 2021

MINUTE (NO. 1) OF CHURCHMAN J

[1] A teleconference was held on 4 February 2021 in relation to the possibility of setting down for hearing an application for orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) in relation to the takutai moana in and around Tokomaru Bay which is situated on the East Coast north of Gisborne.

[2] The application brought by Roger Tichborne on behalf of Ngā Hapū o Tokomaru Ākau (CIV-2017-485-247) is ready to proceed with a timetable toward hearing. There are two overlapping applications, one by Haro McIlroy on behalf of Te Whānau a Rakairoa ki Waipiro and Te Whānau a Iritekura (CIV-2017-485-242) and by Tate Pewhairangi on behalf of Te Whānau a Ruataupare ki Tokomaru (CIV-2017-485-302).

[3] Mr Milner, on behalf of Te Whānau a Ruataupare ki Tokomaru, indicated that his client does not wish for that part of Mr Erskine's client's application which overlaps with his client's application to proceed. The reason for that is that Mr Milner's client has a preference for engagement in direct negotiation with the Crown.

[4] Effectively Mr Milner's argument was that his client's preference for direct engagement in respect of their claim overrode the wish of Mr Erskine's client to have its application, under the Act, determined by the Court in full.

[5] As explained to Mr Milner, his client is perfectly entitled to pursue its application by way of direct engagement. However, the fact that it has that preference cannot prohibit the Court from considering the application filed by another applicant, including any area of overlap.

[6] Mr Milner's client will, if it chooses to do so, be able to participate in any hearing, either as an interested party or, should it wish to do so, or, because it has a current application before the Court, participate in any hearing, in respect of the overlap, as a claimant.

Ngāti Porou Act

[7] The memorandum filed by Mr Melvin on behalf of the Attorney-General, drew the Court's attention to the relevance of the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (Ngāti Porou Act). This Act has relevance to some of the applications, in particular the application by Haro McIroy on behalf of the Te Whānau a Rakairo ki Waipiro and Te Whānau a Iritekura (CIV-2017-485-242).

[8] The Ngāti Porou Act provides that it (and not the Act) applies to “Ngā Hapū o Ngāti Porou in respect of Ngā Rohe Moana”.¹

[9] The term “Ngā Hapū o Ngāti Porou” is defined as meaning the hapū of Ngāti Porou named in Schedule 2 of the Ngāti Porou Act. These are the hapū that ratified the deed of 9 August 2017 to amend the deed of agreement between Ngāti Porou and the Crown.

[10] Under the Ngāti Porou Act, each hapū of Ngā Hapū o Ngāti Porou is represented by a “management arrangement”.²

management arrangement means an entity, or the trustees of a trust, whose details are specified in a Part of Schedule 2 (and which represents, and exercises and performs rights and responsibilities of, each hapū o ngā hapū o Ngāti Porou named in that Part in respect of the area of ngā rohe moana o ngā hapū o Ngāti Porou described in that Part.

[11] The Ngāti Porou Act provides that an application made before the commencement of the Ngāti Porou Act 2019 to the High Court under the Act that has not been decided or withdrawn must be treated as having been made under the Ngāti Porou Act if the applicant group is listed in Schedule 2 of the Act and the application area is in Ngā Rohe Moana.³

[12] The Ngāti Porou Act does not apply to Hapū o Ngāti Porou who have not ratified the 2017 deed to amend.

[13] The Minister for Treaty of Waitangi negotiations has determined under s 111 of the Ngāti Porou Act that certain hapū have CMT in an area Ngā Rohe Moana o Ngā Hapū o Ngāti

¹ The Ngāti Porou Act 2019, s 6(2).

² The Ngāti Porou Act 2019, s 9.

³ The Ngāti Porou Act 2019, cl 3, Schedule 1.

Porou. The Governor-General made an Order in Council on 21 September 2020 recognising that CMT referred to in the Minister's determination. That order:

- (a) names the CMT hapū;
- (b) describes the boundaries of the CMT area; and
- (c) specifies the management arrangement that represents the hapū in respect of the area of Ngā Rohe Moana o Ngā Hapū o Ngāti Porou.

[14] Under the Ngāti Porou Act, the High Court is prevented from recognising any other CMT under that Act in the CMT areas described in the Order in Council.⁴

Attorney-General's position

[15] The memorandum filed on behalf of the Attorney-General submitted that applications CIV-2017-485-247 and CIV-2017-485-302 remain applications that are able to be considered under the Marine and Coastal Area (Takutai Moana) Act 2011.

[16] In relation to CIV-2017-485-255, it was submitted on behalf of the Attorney-General that, insofar as it is an application on behalf of Ngāti Ira, Ngāti Patuwhare, Te Whānau a Te Rangipureora, Ngāti Kuranui, Ngāti Kahukuranui, and Ngāti Konohi, it was able to continue under the Act. But insofar as the application was on behalf of Ngāti Hau and Ngāti Whakarara, it was to be treated as having been made under the Ngāti Porou Act. That was because Ngāti Hau and Ngāti Whakarara are named in Part 6 of Schedule 2 of the Act.

[17] It was submitted that the Ngāti Whakarara – Ngāti Hau Takutai Kaitiaki Trust, being the management arrangement specified in Part 6 of Schedule 2 of Ngāti Porou Act now represents these two hapū under that Act.

[18] In relation to application CIV-2017-485-242, the Attorney-General submitted that it must be treated as having been made under the Ngāti Porou Act because both Te Whānau a Rakairoa ki Waipiro and Te Whānau a Iritekura are hapū named in Part 5 of Schedule 2 of the

⁴ The Ngāti Porou Act 2019, s 117.

Ngāti Porou Act. Ngā Hapū o Waipiro Takutai Kaitiaki Trust, the management arrangement specified in Part 5 of Schedule 2 of the Ngāti Porou Act, now represents these two hapū under the Ngāti Porou Act.

[19] In a memorandum dated 25 January 2021, Mr Beaumont, counsel for the applicant in CIV-2017-485-242 submitted:

It is not clear under the Ngāti Porou Act what the process is for the potential transfer of an application from the MACA Act to the Ngāti Porou Act. Funding may also not be available to the applicant as there is under the current regime. In any case, it is submitted that further legal submissions may be required on this matter.

[20] In the same memorandum counsel also submitted that the options were:

- (a) The Applicant negotiates with Te Rūnanganui o Ngāti Porou Trustee Limited and seeks the consent of the current mandated entity to continue to progress the application under the MACA Act;
- (b) The Court could consider the question of its jurisdiction to address the application of the Applicant under the MACA Act as a separate question before trial under r 10.15 of the High Court Rules 2016; or
- (c) The Applicant withdraws from these proceedings and makes a new application under the Ngāti Porou Act.

[21] Counsel for the Crown submitted that none of these options were available.

[22] Given that Te Whānau a Rakairoa ki Waipiro and Te Whānau a Iritekura are hapū named in Part 5 of Schedule 2 of the Ngāti Porou Act, and that Part 5 of Schedule 2 specifies a management arrangement representing the two hapū, the Court is prohibited from further considering any application under the Act.

Mandate dispute

[23] Mr Tichborne, on behalf of Ngā Hapū o Tokomaru Ākau (CIV-2017-485-247) and Mr Pewhairangi on behalf of Te Whānau a Ruataupare ki Tokomaru (CIV-2017-485-302) appear to be in dispute as to who, between themselves, represents Te Whānau a Ruataupare ki Tokomaru. They are also in dispute as to which pathway to pursue, with Mr Tichborne seeking an order under the Act from the High Court, but Mr Pewhairangi seeking Crown engagement.

[24] This issue of mandate needs to be resolved before any directions as to hearing are made. Ideally the issue should be resolved in accordance with tikanga between the parties themselves. However, if that is not achievable then it will need to be determined by the Court.

[25] In addition to these two parties, the Attorney-General would obviously be entitled to be heard at any interlocutory hearing determining the question of mandate. That is because it is Attorney-General that is involved in direct engagement with Mr Pewhairangi.

Directions

[26] Mr Lyall, on behalf of Ngā Hapū o Kokoronui Ki Te Toka a Taiau Takutai Kaitiaki Trust (CIV-2017-495-255), and Mr Beaumont on behalf of Te Whānau a Rakairoa Ki Waipiro and Te Whānau a Iritekura (CIV-2017-485-242) are to have until 28 February 2021 to obtain instructions and file memoranda addressing the position of their clients.

[27] Mr Erskine is to have until the same date to file a memorandum addressing the issue raised by Ms Johnson who drew to the Court's attention a copy of an agreement apparently entered into several years ago by Mr Erskine's client in respect of their takutai moana claims.

[28] This matter will be adjourned for a further teleconference to be scheduled once the memoranda of counsel addressing the issues raised in this minute have been filed.

Churchman J