

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

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

CIV-2011-485-793

IN THE MATTER OF The Marine and Coastal Area (Takutai
Moana) Act 2011

IN THE MATTER OF Application by Colin Francis Reeder and Ors
on behalf of Ngā Pōtiki ā Tamapahore Trust
for an order recognising Customary Marine
Title and Protected Customary Rights

Date of Hearing: 19-22 and 27-29 April 2021, 4 and 5 May 2021

Appearances: A Warren and J Lewis for Ngā Pōtiki ā Tamapahore Trust
M Sharp (and S T Webster on 22 April 2021) for Ngāti He Hapū
Trust
T Bennion for Te Tāwharau o Ngāti Pūkenga
J Gear for Ngāi Te Rangi
N Tahana, A Tapsell and M Grant for Ngā Hapū o Ngāti Ranginui
Settlement Trust
G Melvin, A Goosen, and N-B Ngaronoa for the Attorney General
H Leef for Tauranga City Council
W McLeod in person
T Conder for Sunchaser Investment Limited Partnership, Te
Tumu Kaituna 14 Trust, Ford Land Holdings Pty Limited and
Carrus Corporation Ltd (by AVL on 5 May 2020)

Date of Minute: 7 May 2021

**MINUTE (No. 5) OF POWELL J
[Ngā Pōtiki Minute No. 14]**

[1] This Minute addresses a range of matters that have arisen or have otherwise been dealt with in the course of the Ngā Pōtiki Stage 1 hearings which commenced on 19 April 2021. The specific matters addressed in this Minute are:

- (a) The request by various parties for clarification of the scope of the Stage 2 hearings following the issue of my Minute (No. 4), and consequent amendments to the Stage 2 timetable.
- (b) The extension to the boundary of the Stage 1 hearings.
- (c) The application by Whitiōra McLeod to be an interested party in the Stage 1 hearings.
- (d) A timetable for the filing of submissions post-hearing.

The request for clarification of the scope of the Stage 2 hearings

[2] In my Minute (No. 4) issued on 19 March 2021 I considered an issue raised in particular by various Te Arawa applicants to “limit their respective participation in the Stage 2 hearings to that of interested persons so as to enable their own applications to be heard and determined by this Court as a separate and consolidated set of the proceedings that are dedicated to Te Arawa claimant claims”.¹ I rejected this approach noting that the scope of hearing had previously been set by Collins J,² and confirmed:³

The Stage 2 hearings will therefore continue to be for the purpose of addressing all of the customary marine title applications within the Ngā Pōtiki application area other than those covered in Stage 1.

[3] Following the issue of the Minute I received a joint memorandum from counsel for Ngā Pōtiki ā Tamapahore Trust, Ngāti He Hapu Trust, Tauranga City Council and the Attorney-General seeking clarification of aspects of that direction. In particular counsel noted that my direction, which essentially confirmed earlier directions issued by Collins J, had not taken into account two variations to those directions subsequently issued by Churchman J.

¹ At [3].

² At [10].

³ At [13].

[4] Having considered the memorandum and reviewed the earlier directions I am satisfied that there is in fact no inconsistency between the various directions. The variations made by Churchman J were not directly at issue in the matters under consideration before me. Those those variations are in fact consistent with my direction as they confirmed that the applications for Ngāti He Hapu Trust (CIV-2017-485-219) and for Te Runanga O Ngāti Whakahemo (CIV-2017-485-223) would only be heard to the extent of their overlap with Ngā Pōtiki's application, instead of being heard in full.

[5] Given this position I confirmed in open court in the course of the Stage 1 hearings that there was no change to the position as set out in my Minute (No. 4), and that Minute did not change the position with regard to either the Ngāti He Hapu Trust or Te Runanga O Ngāti Whakahemo.

[6] As a result I confirm the extensions of time sought by various parties following the issue of my Minute (No. 4). I am conscious that some time has now passed since the various memoranda were filed and, in the event, that further adjustments are required by those parties who had sought extensions, leave is granted for a further adjustment to those dates if that is necessary.

The extension to the boundary of the Stage 1 hearings

[7] In the Minute issued following the judicial settlement conference that took place on 11 March 2021, Associate Judge Andrew recorded:⁴

It is proposed that the seaward boundary of the Stage 1 inquiry is to be extended to the west so that the coastal marine area east of the white line in the map marked 'A' attached to the agenda for the judicial settlement conference, will be subject to the Stage 1 inquiry.

[8] Associate Judge Andrew gave leave for submissions to be filed on the issue and the last of these was filed shortly before the commencement of the Stage 1 hearings. Ultimately the extension proposed by the Ngā Pōtiki ā Tamapahore Trust, Ngā Hapū o Ngāti Rangi Settlement Trust, Te Tawharau o Ngāti Pukenga and Ngāti He was supported by the Crown and otherwise not opposed by any party. Following

⁴ At [5].

discussion at the commencement of the Stage 1 hearing, I confirmed that the hearings would proceed on the basis of the provisional acceptance of the extended boundary and would confirm my decision in due course. In the event, following the site visit on 20 April 2021 it became clear that the additional area sought to be included in the extended boundaries for Stage 1 was logically, culturally and geographically appropriate and I therefore confirmed the extension in the course of the hearing. In particular, the location of the Maungatapu Marae and Te Pā o Te Ariki to the east of the Maungatapu bridge and State Highway 29A made it clear that the extended boundaries proposed were far more appropriate in every respect than that provided by the Maungatapu bridge as the previous boundary . The application boundaries and the boundaries for the purposes of the Stage 1 hearing are (subject to future survey) therefore as set out in the Map annexed and marked “A” to this Minute, headed “Boundaries of Te Tāhuna o Rangataua”.

Application by Whitiora McLeod to be joined as an interested person

[9] On 14 April 2021, shortly before the commencement of the Stage 1 hearings, Whitiora McLeod applied to be joined to these proceedings as an interested person on the Ngā Potiki application. After hearing from counsel and Mr McLeod at the outset of the Stage 1 hearings I convened a conference to discuss the issue with Ngāi Potiki counsel and Mr McLeod. After subsequently being advised that no resolution was possible, I declined Mr McLeod’s application in Court in 4 May 2021. The reasons for that decision are set out below.

Background

[10] Mr McLeod purported to file the application “for and on behalf of Ngāti Kaahu” for the stated purpose to “be heard [in] support of Ngā Potiki’s application as a hapū of Ngā Potiki”.

[11] Mr McLeod’s application falls under s 104 of the Marine and Coastal Area (Takutai Moana) Act 2011 which provides:

Any interested person may appear and be heard on an application for a recognition order if that person has, **by the due date**, filed a notice of appearance.

(emphasis added)

[12] The “due date” referred to in s 104 is that specified in s 103(2) and (3) of the Act, which required a notice of appearance to be filed by 9 June 2017, as set out in the advertisement of the Ngā Potiki application published on 4 May 2017.⁵ It follows that as Mr McLeod did not file his notice of appearance within the time specified in s 103 he has no automatic right to now join the proceedings and the Act contains no provision for entering an appearance other than as provided in s 103. Mr Warren, on behalf of the Ngā Potiki ā Tamapahore Trust, submitted that there is in fact no jurisdiction to admit additional interested persons after the due date specified, although he has acknowledged that parties have in fact been granted leave to appear in the context of other applications under the Act, albeit in a context where an existing applicant has sought to be an interested person on a related application. In contrast, Mr Melvin for the Crown, submitted that this Court retains jurisdiction to add parties in the absence of an expressed prohibition if justice so requires.

[13] In any event Ngā Potiki opposes Mr McLeod’s application on the basis that it is unnecessary. All other parties abide the decision of the Court.

Discussion

[14] The strict interpretation of s 104 urged upon me by Ngā Potiki is consistent with the rest of the Act which deliberately imposed an arbitrary and finite deadline for the filing of applications under the Act. It is therefore difficult to see on what basis it can be argued that those wishing to appear as interested persons should be given any greater latitude than applicants. As counsel noted, although there are examples where this Court has in respect of other applications apparently extended time for an appearance to be filed, this has occurred in a context where a party has already taken steps under the Act in some form or other (such as having initiated Crown engagement). As a result in those cases the later granting of leave to participate as an interested party has been necessary so as to ensure all those with claimed interests are before the Court.

⁵ Specifically, s 103(3) requests that the date for filing must not be less than 20 working days after the application is published.

[15] Ultimately however it is not necessary to make a final determination with regard to jurisdiction, as I am satisfied it is not otherwise appropriate to join Mr McLeod as an interested person at this late stage in the hearing process.

[16] First and foremost, it is not necessary to join Mr McLeod because, as noted, he is not seeking to take any different position from the Ngā Potiki ā Tamaphore Trust, but rather supports the existing Ngā Potiki application. Mr McLeod's position is not only confirmed by the affidavit he has filed in support of his application and the closing submissions he has provisionally filed, but also through his positive and constructive participation in the site visit in the course of the hearings, which was entirely complementary to the other guides provided by the applicants.

[17] Moreover the evidence filed on behalf of Ngā Potiki confirms that Ngāti Kaahu are a hapū of Ngā Potiki,⁶ and there is insufficient information before me to conclude Mr McLeod has any better right to speak on behalf of Ngāti Kaahu or indeed any other part of Ngā Potiki or indeed that any evidence provided by Mr McLeod would add anything to that evidence already before me.

[18] Taken together, it is clear there is no substantive need for Mr McLeod to be joined as an interested party, and when this is coupled with the fact his application has been filed three years after the due date for interested persons to give notice it is now inappropriate to grant leave.

[19] Mr McLeod's application to join the proceedings as an interested person was accordingly declined.

Post-hearing timetabling

[20] The need to address post-hearing time-tabling issues was sparked by the request by Sunchaser Investments Limited Partnership to file closing submissions following the completion of hearings. Sunchaser had, together with Te Tumu Kaituna 14 Trust, Ford Land Holdings Pty Limited and Carrus Corporation Limited, maintained a notional watching brief in the Stage 1 hearings, with Te Tumu, Ford and

⁶ For example the affidavit of Colin Francis Reeder sworn 6 July 2020 at [27].

Carrus having previously been granted leave to file closing submissions 14 days after the final evidence transcript was circulated.

[21] In response to Sunchaser's request to be given the same time as Te Tumu, Ford and Carrus to file submissions, a request opposed by the applicants, I explained that this would in fact create practical issues for the preparation of the Stage 1 judgment. Following a helpful discussion with Mr Conder as counsel for Sunchaser, Te Tumu, Ford and Carrus, who confirmed that the submission to be filed would focus on issues arising with regard to the legal effect of resource consents it was agreed:

- (a) Closing submissions on behalf of Sunchaser, Te Tumu, Ford and Carrus would be filed by **5 pm on 12 May 2021**; and
- (b) Any party who had filed closing submissions has leave to reply to any specific matters by **5 pm on 17 May 2021**.

[22] In addition to these matters leave is given for the filing of the following additional material in respect of the Stage 1 hearings:

- (a) By **5 pm on 12 May 2021** the applicants are to file:
 - (i) a joint memorandum on behalf of Ngā Potiki, Ngāti He, Ngāti Pūkenga and Ngāi Te Rangi confirming the consideration of the four applicants as a single party group;
 - (ii) an amended draft order reflecting a single applicant group; and
 - (iii) submissions on the application of ss 78 and 79 of the Act, including as to whether the recognition that Te Tāhuna o Rangataua is a wāhi tapu by Heritage New Zealand Poutere Taonga is conclusive and, if so, what conditions are sought, in any Customary Marine Title in terms of s 79 of the Act; and
 - (iv) submissions on any issues arising in respect of Tauranga City Council titles to land.

- (b) **By 5 pm on 19 May 2021:**
- (i) Crown responses to the draft order and submissions on the wāhi tapu and Council title issues; and
 - (ii) a memorandum on behalf of Ngāti Ranginui confirming the position of Ngāi Te Ahi and Ngāti Ruahine with respect to the joint memorandum in (i) above.
- (c) **By 5 pm on 21 May 2021** any reply to the specific matters raised by the Crown in respect of the draft order; wāhi tapu and Council title issues.

[23] It was also agreed any changes requested to the transcript by any party are to be filed by **5 pm on 12 May 2021**.

[24] Finally, it was foreshadowed at the conference that directions would be given to enable the parties to make submissions on the *Whaktōhea* judgment when this is released by Churchman J. Leave is reserved for any party to file supplementary submissions addressing any issues arising within five working days of the issue of that judgment.

Powell J

"A"

Boundaries of Te Tāhuna o Rangataua

The seaward boundary is the white line. The coastal marine area east of the white line is subject to the stage 1 inquiry and includes Te Tāhuna o Rangataua.

