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 Potiki a Tamapahore trust for an order recognising Customary Marine Title and Protected Customary Rights

Hearing: 30 June 2021

Appearances: James Lewis (by VMR) – CIV-2011-485-793 (Ngā Pōtiki) and
as agent for Tom Bennion for CIV-2017-485-250 (Ngāti Pūkenga)
Karen Feint QC (by VMR) CIV-2015-485-767
(Ngā Hapū o Te Moutere o Motītī)
John Kahukiwa - CIV-2017-404-568
(H Kahukiwa for the Koromatua Hapū of Ngāti Whakaue) and
as agent for Janet Mason for CIV-2016-485-770
(Te Rūnanga o Ngāti Whakaue ki Maketu) and
as agent for Jason Pou for CIV-2017-485-291
(Ngāti Makino and Ngāti Pikiao)
Brett Cunningham - CIV-2017-404-562 (Te Uri a Te Hapū)
Michael Sharp (by VMR) - CIV-2017-485-219 (Ngāti He Hapū)
Kate Tarawhiti (by VMR) - CIV-2017-485-193
(Te Rūnanga o Ngāti Awa)
Rachel Budd, Alan Goosen and Cate Barnett for the Attorney General

Date of Minute: 7 July 2021

MINUTE (No. 10) OF POWELL J
[Ngā Pōtiki Minute No. 19]

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[1] This telephone conference was convened to discuss various matters arising from memoranda filed by the applicants and the Crown with regard to the appointment of pūkenga and the Stage 2 hearing schedule.

Pūkenga

[2] The memoranda filed revealed no consensus as to whether a pūkenga should be appointed in respect of the Ngā Pōtiki Stage 2 hearings but counsel for Ngā Pōtiki nonetheless requested that a conference be convened before any decision was made.

[3] At the conference Mr Lewis for Ngā Pōtiki confirmed Ngā Pōtiki's support for the appointment of a pūkenga, not least for the purpose of facilitating a pre-trial expert conference, as well as assisting the Court and/or facilitating discussions with the parties on any issues of tikanga arising in the course of the Stage 2 hearings. Ms Feint also supported the appointment of a pūkenga, primarily to assist with the determination of tikanga issues likely to arise in relation to Motītī, noting that such issues had previously arisen in the context of a recent Waitangi Tribunal enquiry.[1]

[4] Conversely, Mr Kahukiwa on behalf of the Te Arawa applicants, submitted that in the absence of a specific tikanga issue arising, there was in fact no jurisdiction for this Court to appoint a pūkenga. Other applicants noted that as not all evidence has yet been filed in relation to Stage Two, and the scope of any tikanga issues not yet known, any appointment was simply premature.

Discussion

[5] Having had the benefit of a constructive discussion with counsel I conclude that while there is clearly jurisdiction to appoint a pūkenga at this time, it is premature to do so.

[6] With regard to the issue of jurisdiction, it is neither appropriate nor necessary to attempt to read down the power to appoint pūkenga as set out in s 99(1)(b) of the Marine and Coastal Area (Takutai Moana) Act 2011. Instead I agree with Ms Budd

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1 Urgent inquiry Wai 2521 Ngā Hapū o Te Moutere o Motītī completed hearings September 2020. Report yet to issue.

on behalf of the Crown, that it is not necessary for a discrete issue of tikanga to arise over and above the fundamental question of tikanga required to be determined by the Court on an application for a recognition order before the Court is entitled to appoint a pūkenga.

[7] While there is therefore jurisdiction to appoint a pūkenga in every case, whether it is necessary or indeed appropriate to do so is a matter of discretion for the Judge hearing a particular application, and will in large measure depend on whether the Judge hearing the application will be assisted or not. As Palmer J noted in *Ngāti Whātua Ōrākei Trust v Attorney General*:[2]

> The relevant considerations are similar to those in allowing an interested party to intervene in proceedings. In deciding whether to appoint pūkenga, the Court will weigh the likelihood the appointment will assist the Court against the risk of prejudice or unfairness to the litigants, guided by the overall interests of justice.[3] The power is more likely to be exercised:
>
> (a) the more important are the questions of tikanga in a case;
>
> (b) the less expert tikanga evidence is provided by the parties; and
>
> (c) the less procedural prejudice or unfairness an appointment would cause to the parties.

[8] The pūkenga appointed in *Re Tipene*[4] perhaps reflected the second of these considerations, while the appointment of the pūkenga in *Re Edwards*,[5] perhaps the third. On the other hand, no party considered pūkenga were necessary for the Ngā Pōtiki Stage 1 hearings and no appointment was made.

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2 *Ngāti Whātua Ōrākei Trust v Attorney General* [2020] NZHC 3120 at [37] (citations included).

3 *Mohamed v Guardians of New Zealand Superannuation* [2020] NZHC 1324, (2020) 25 PRNZ 205 at [2]; *DN v Family Court at Auckland* [2019] NZHC 2028, [2019] NZFLR 150 at [11]; *Capital + Merchant Finance Ltd (in rec and in liq) v Perpetual Trust Ltd* [2014] NZHC 3205, [2015] NZAR 228 at [41]; *Taylor v Key (No 1)* [2014] NZHC 3306, [2015] NZAR 730 at [9]; *Seales v Attorney-General* [2015] NZHC 828 at [43], citing *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25 at [32]; *Ngāti Whātua Ōrākei Trust v Attorney General* [2017] NZCA 183, [2017] NZAR 627 at [11].

4 *Re Tipene* [2015] NZHC 2923.

5 *Re Edwards* (Te Whakatōhea No. 2) [2021] NZHC 1025 [7 May 2021].

[9] As Palmer J also noted, where the parties provide a significant amount of expert tikanga evidence:[6]

> If there is a conflict in expert evidence, and if it needs to be determined, it is the Court's role to determine the conflict on the basis of the evidence of the parties and interveners.

[10] In this case there is currently no obvious need for facilitation of experts, nor any discrete issue of tikanga identified upon which pūkenga would be of assistance. Moreover, as a number of counsel acknowledged the nature of any specific issue arising (for example involving Motītī) will be a significant factor in the selection of appropriate pūkenga, as will be the need to ensure appropriate balance having regard to the identities of the groups in dispute.

[11] In the circumstances I decline to appoint any pūkenga at this time. Leave is however reserved for parties to make application in the event that any specific question of tikanga is identified following the filing of evidence in accordance with the timetable set out my Minute (No. 9).

Hearing schedule

[12] Memorandum filed by Ngā Pōtiki also provided useful information collated from the parties with regard to the upcoming hearing. The following matters arising from that memoranda were discussed at the conference:

(a) **The request for a two-week gap between the completion of evidence and closing submissions** – Six weeks hearing time is available for the Stage 2 hearings. The hearing time and date was allocated well over a year ago and any change will present significant practical and logistical issues. The six-weeks available for the hearing is to be used for all planning purposes.

(b) **Opening submissions** – I confirm it is the Court's preference to have all opening submissions presented at the outset of the hearing. This will enable me to focus on relevant issues as the evidence is presented.

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6 *Ngāti Whātua Ōrākei Trust v Attorney* General, above n 2, at [39]

As Ms Feint noted, it may not be necessary to have four-days set aside for opening submissions as it will not be necessary to cover off the general jurisdiction of the Court in opening, nor the approach to determining recognition orders.

(c) **Closing submission**s – Notwithstanding the comments in (a) above the Court will endeavour to give counsel as much time as possible between the completion of evidence and the commencement of closing submissions. How much time will be available will obviously depend on when the evidence is completed.

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Powell J