

**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 a Tamapāhore trust
for an order recognising Customary Marine
Title and Protected Customary Rights

Date of 28 & 29 October 2021 and 12 November 2021
Hearing:

Appearances: J Lewis for Ngā Pōtiki ā Tamapāhore Trust (by VMR)
 (CIV-2011-485-793)
 M Sharp for Ngāti Hē Hapū Trust (CIV-2017-485-219)
 T Bennion for Te Tāwharau o Ngāti Pūkenga
 (CIV-2017-485-250)
 J Gear for Ngāi Te Rangi Settlement Trust (CIV-2017-485- 244H)
 K Feint QC and I Peters for Ngā Hapū o Te Moutere o Motiti
 J Koning for Ngāti Whakahemo (CIV-2017-485-223)
 B Cunningham for Te Uri a Tehapū (CIV-2017-404-562) (by VMR)
 J Kahukiwa & J Harper-Hinton for Ngāti Whakaue
 (CIV-2017-404-568H) (by VMR)
 H Irwin-Easthope for Te Rūnanga o Ngāti Awa
 (CIV-2017-485-196)
 J Pou for Ngāti Makino Heritage Trust and Ngāti Pīkiao Iwi Trust
 (CIV-2017-485-291)
 C Bidois for Te Kapū o Waitaha Trust
 R Budd, A Goosen, and C Barnett for the Attorney General
 L Murphy for Ford Land Holdings PTY Limited, Te Tumu Kaituna 14
 Trust, Sunchaser Investments Limited Partnership and Carrus
 Corporation Limited
 B Scott & L Te Rata for Seafood Industry Representatives (by VMR)

Date of Minute: 16 November 2021

**MINUTE (No. 20) OF POWELL J
[Ngā Pōtiki Minute No. 29]**

[1] The primary purpose of this Minute is to record the reasons for and outcomes of three issues arising in the course of the Ngā Pōtiki Stage 2 hearing, namely:

- (a) an application for an adjournment by the Seafood Industry Representatives on 28 October 2021;
- (b) an application by Te Rūnanga o Ngāti Whakaue ki Maketū on 29 October 2021 for leave to adduce evidence in response to the supplementary affidavit of Nepia Ranapia; and
- (c) An application by Ngā Hapū o Te Moutere o Motiti for the appointment of a Pūkenga or referral to the Māori Appellate Court to consider wāhi tapu issues and for leave to file and present reply submissions.

[2] In addition, the Minute details a proposed agenda and timetable for a post hearing telephone conference to be held on 30 November 2021.

The Seafood Industry Representatives adjournment application

[3] The Seafood Industry Representatives, through counsel Mr Scott, sought an adjournment of the Ngā Pōtiki Stage 2 hearing in so far as it related to the recognition of wāhi tapu or wāhi tapu areas in any CMT order. Specifically, Mr Scott submitted that an adjournment was necessary to enable the Seafood Industry Representatives to:

- (a) understand the nature and extent of the geographical area covered by the proposed wāhi tapu, including “the location of the boundaries of the wāhi tapu or wāhi tapu area that is the subject of the order” (s 79(1)(a));
- (b) understand the nature of “the prohibitions or restrictions that are to apply, and the reasons for them” (s 79(1)(b));
- (c) understand the evidence supporting the above matters, including that the applicant “requires the proposed prohibitions or restrictions to protect the wāhi tapu” (s 78(2)(b)); and

- (d) consider the extent to which the wāhi tapu conditions (specifying the geographical area and the proposed prohibitions or restrictions of any wāhi tapu or wāhi tapu area) will “prevent fishers from taking their lawful entitlement in a quota management area” (s 79(2)(a)).

[4] The application followed the confirmation by Ngā Hapū o Te Moutere o Motiti (“Te Moutere o Motiti”) during the course of the evidence of Te Atarangi Sayers on 14 October 2021, that Te Moutere o Motiti sought to include recognition of wāhi tapu and/or wāhi tapu areas in any Motiti CMT. The immediate consequence of this was the pausing of Mr Sayers cross-examination and the subsequent directions given at a judicial conference on 21 October 2021 enabling Te Moutere o Motiti to file a supplementary affidavit by Nepia Ranapia on the wāhi tapu issue by 26 October 2021, a course of action that was not opposed by any party.

[5] Notwithstanding these earlier directions the Seafood Industry Representatives waited until the morning of Mr Sayers recall before seeking an adjournment. Declining the application, I noted that an adjournment would serve no useful purpose with regard to the first three matters identified by Mr Scott on behalf of the Seafood Industry Representatives:

- (a) First, it was difficult to see how any party could understand the nature and extent of the wāhi tapu without hearing the evidence from Te Moutere o Motiti.
- (b) Instead, the recall of both Mr Sayers and Mr Ranapia provided all parties, including the Seafood Industry Representatives, with the opportunity to explore the nature and extent of the wāhi tapu and wāhi tapu areas sought to be protected by Te Moutere o Motiti and the nature of any prohibitions or restrictions that they are seeking to have applied and why such conditions are thought to be necessary.
- (c) Given that position there was nothing to be gained by any adjournment given the knowledge about the claimed wāhi tapu falls entirely within Te Moutere o Motiti.

[6] The fourth matter identified by Mr Scott could only be assessed once the position of Te Moutere o Motiti was understood. As a result it logically falls within a later part of the inquiry, dependent on my findings on the existence of wāhi tapu in the first place.

[7] Moreover, as I discussed with Mr Scott, in the event that he considers there was insufficient information before the Court to conclude the test in s 78(2) of the MACA had been made out, it was open for him to submit in closing submissions there was no basis for the making of a wāhi tapu order or any conditions applying to it.

[8] The application for adjournment of the evidence of Mr Sayers and Mr Ranapia on wāhi tapu on 28 and 29 October 2021 was therefore declined.

Te Rūnanga o Ngāti Whakaue ki Maketū application to file reply evidence

[9] The application by Te Rūnanga o Ngāti Whakaue ki Maketū (Ngāti Whakaue ki Maketū”) was essentially a different response to the same issue identified by the Seafood Industry Representatives. As with the Seafood Industry Representatives no issue was taken at the judicial conference on 21 October 2021, and the issue of filing reply evidence was only first informally raised on 28 October 2021, followed by a memorandum brought before the Court on the morning of 29 October 2021, immediately before Mr Ranapia was recalled to present his supplementary evidence.

[10] Having heard from Ms Mason I declined the application noting in particular:

- (a) The issue of reply evidence had not been raised at the judicial conference.
- (b) While further information had been placed before the Court by way of Mr Ranapia’s supplementary affidavit the wāhi tapu and wāhi tapu areas had in fact largely been identified in Mr Ranapia’s earlier evidence and the evidence of Mr Sayers. This earlier evidence had been filed in December 2020 so any party, applicant or interested person who took issue with the identification of those particular areas as wāhi tapu had close to eleven months to file evidence or to seek leave to file

evidence challenging that classification. The supplementary brief did not fundamentally change that position it just explained in more detail what was sought by way of protection, which as I had indicated to Mr Scott probably falls to be considered in a second stage of the discussion, depending as it is on findings as to the existence and nature of the wāhi tapu.

- (c) Furthermore, it was noted Ngāti Whakaue ki Maketū had just spent at least a day leading evidence after the issue of wāhi tapu had been raised and before the recall of Mr Sayers and Mr Ranapia and there was no attempt to lead additional evidence from the Ngāti Whakaue ki Maketū witnesses about the wāhi tapu status of those reefs or islets around Motiti.

Applications by Ngā Hapū o Te Moutere o Motiti

[11] The applications by Te Moutere o Motiti were made at the conclusion of the hearing on 12 November 2021. As I had signalled throughout the closing submissions hearing that commenced on 8 November 2021, the priority was to ensure that all parties were given the opportunity to present comprehensive closing submissions and to respond to other parties at the same time so as to obviate the need for any general right of reply. To the extent that time was available after all parties had completed closings a limited opportunity would be available for oral reply submissions, with priority given to those parties who had presented first and who had had the least time to consider the other submissions filed.

[12] As it happened after completion of the Crown closing submissions on 12 November 2021 Ngā Pōtiki and Ngāti Hē, who had been the only parties to present closing submissions on 8 November, were given the opportunity for brief reply submissions. These were completed just before 5 pm at which point Ms Feint made the following applications on behalf of Te Moutere o Motiti:

- (a) That I appoint a Pūkenga to consider the supplementary wāhi tapu evidence of Mr Ranapia or alternatively consider referring the issue to the Māori Appellate Court; and

- (b) Sought leave to file written reply submissions and present oral submissions on a “fact intensive” whakapapa issue relating to the definition of the Motiti applicants.

[13] Having heard from counsel, both applications were dismissed.

[14] As I explained to counsel at the hearing the application for the appointment of a Pūkenga or referral to the Māori Appellate Court was inappropriate at this time; given the evidence has been put before me to consider. At the very least it is necessary to consider that evidence in the context of all the other evidence and submissions before considering whether it is necessary to hand the issue over to a Pūkenga or the Māori Appellate Court.

[15] Likewise, the application to provide an oral reply and file the more general written reply was also dismissed. Not only was the specific issue Ms Feint wished to reply orally upon an issue that had been exhaustively explored in evidence and in closing submissions with both Ms Feint and Ms Irwin-Easthope, there was simply no further hearing time for an oral reply. As noted, I had already advised counsel that no general reply would be entertained as to do so would inevitably trigger written reply submissions from all parties – noting there were already some 800 pages of written legal submissions plus appendices, while a whole additional round of replies would also result in replies to replies. Instead in the context of the hearing it was necessary to bring the filing of submissions to a close to enable me to go away and consider the evidence and the submissions that have already been made.

The next hearing is a post-hearing telephone conference – 30 November 2021

[16] As foreshadowed at the end of the Ngā Pōtiki Stage 2 hearing it will be necessary to convene a telephone conference to consider a number of issues that emerged in the course of the hearing and as a result of the fact that a number of the parties have yet to confirm the exact areas over which a CMT is sought and/or with whom they are willing to share a CMT, and that a number of parties appear to now be claiming areas greater than any existing application.

[17] The telephone conference will take place at **10 am on 30 November 2021**. At this stage the following matters will be considered:

- (a) confirmation of CMT area/shared CMT areas of each party;
- (b) confirmation of the basis upon which CMT application area sought by any party is greater than application filed or now purports to include groups not previously named;
- (c) status of Stage 1 evidence; and the
- (d) jurisdiction for any CMT holder to hold on behalf of any other group as kaitiaki.

[18] In the event that any party seeks to include further issues, these are to be identified by way of memorandum to be filed no later than 12 noon on 19 November 2021. A Minute will then be issued no later than 5 pm on 22 November 2021 confirming the final the agenda for the conference.

[19] Memoranda confirming the positions of the parties with regard to each of the issues to which they have an interest are to be filed by **5 pm on 25 November 2021**.

Powell J