IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-404-563

UNDER	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	an application by Te Rūnanga o Ngāti Whātua for orders recognising Customary Marine Title and Protected Customary Rights

On the papers:

Counsel:
M Chen and C Saunders for CIV-2017-404-563
A Sykes for CIV-2017-485-276
B Lyall and L Thornton for CIV-2017-404-524. CIV-2017-404-574, CIV-2017-485-378 and CIV-2017-485-239
A Mohamed and M Yogakumar for CIV-2017-404-580 and CIV-2017-404-518
J Graham and R Jones for CIV-2017-404-520
R Siciliano for CIV-2017-404-564
H Andrews and T Gorman for CIV-2017-404-582
C Hockly for CIV-2017-485-305
K Dixon and A Castle for CIV-2017-485-281 and CIV-2017-485-286
C Hirschfeld for CIV-2017-404-442
T Castle for CIV-2017-485-187, CIV-2017-485-188, CIV-2017-404-537, CIV-2017-404-542, CIV-2017-404-567, CIV-2017-404-542 and CIV-2017-404-573
T Bennion and G Davidson for CIV-2017-485-250
J Mason for CIV-2017-485-515 and CIV-2017-485-398
R Devine and C Woodward for CIV-2017-488-205
T Afeaki and S Tofi for CIV-2017-404-579
S-M Downs and H Jamieson for CIV-2017-485-231
J Kahukiwa and J Harper-Hinton for CIV-2017-404-566
T Hovell for CIV-2017-404-581
J Ferguson for CIV-2017-419-84

Interested parties:
G Melvin for Attorney-General
H Atkins for Manaia Properties Ltd

Minute: 7 December 2021

MINUTE (NO. 3) OF CHURCHMAN J

Background

[1] In a minute of 14 October 2021,[1] the Court addressed various timetabling directions in relation to the request by Te Rūnanga o Ngāti Whātua (TRONW) to progress towards a hearing of its claims under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).

[2] Counsel for the Attorney-General had filed a memorandum dated 12 October 2021 raising some queries in relation to practical issues including the sequence proposed for the four hearings, whether the hearings for one area would be concluded before the hearing for the next area started; the necessity for adequate provision for non-applicant third-parties; and the potential groupings of cases.

Developments

[3] In response to the Court's minute of 14 October 2021, counsel for TRONW has filed a memorandum dated 26 November 2021, along with supporting affidavits from Alan Riwaka and Tame Te Rangi.

[4] The documentation filed confirmed that it is now the preference of TRONW that the proposed order of the staged hearings be:

(a) Kaipara;

(b) Whangarei Harbour;

(c) Central East Coast; and

(d) Tamaki Makaurau.

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1 *Minute No. 2 of Churchman J, Re an application by Te Rūnanga o Ngāti Whātua*, CIV-2017-404-563 14 October 2021.

[5] The change in order appears to have occurred as a result of the need to accommodate another applicant Te Uri o Hau Settlement Trust (TUOH) as well as overlapping applicants in the Whangarei Harbour area.

[6] Both the memorandum and supporting affidavits address the issue of mandate, particularly as between TRONW and Ngāti Whātua o Ōrākei (NWOA).

[7] It seems that, although there has been some dialogue and correspondence, the parties are no closer to resolving the issue of mandate.

[8] There are some comments in the affidavit of Alan Riwaka that need a response from the Court. Mr Riwaka takes issue with the suggestion that the rūnanga was a body created by legislation for the purpose of negotiating and managing Wai 303 claims by certain Ngāti Whātua hapū who had not yet settled their historical claims. Mr Riwaka expresses the view that the TRONW Act 1988 confers much broader purposes and obligations on TRONW. The functions derived from the Māori Trust Boards Act 1955 (MTBA) are also referred to. Mr Riwaka says that, additional to the TRONW Act, the TRONW Deed of Mandate (1 July 2008) "confirms that TRONW is to represent the iwi of Ngāti Whātua in negotiations with the Crown and, also that the traditional rohe of Ngāti Whātua extends to cover Tamaki Makaurau (including the rohe of Ngāti Whātua Ōrākei)".

[9] The implication is that the Settlement Act, the Deed of Mandate, or the MTBA confers on TRONW the entitlement, if not the right, to represent all Ngāti Whātua applicants in claims under the Act. Such a proposition is not correct.

[10] The Act permits applications for recognition orders to be made by applicant groups which are specifically defined as meaning one or more iwi, hapū or whānau groups.[2]

[11] There are no specific mandate provisions in the Act and it is up to each applicant group to determine who will represent that applicant in pursuing their application.

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2 Marine and Coastal Area (Takutai Moana) Act 2011, s 9(1).

[12] There is no impediment to an applicant group nominating a post-settlement entity such as TRONW, or a board established pursuant to the MTBA, to be the nominated applicant who pursues the application on behalf of the applicant group.

[13] However, there is no obligation on an applicant group such as a whānau or hapū that restricts their ability to only choose as their nominated applicant, an entity established for purposes relating to a Treaty of Waitangi Act settlement, or for the purposes of the MTBA.

[14] Where an applicant group wishes to pursue its own application, and a question of mandate arises, then the preferable method of resolution is in accordance with tikanga without the direct involvement of the Court. However, if after such a process has been exhausted, there still remains a dispute about mandate for the purposes of advancing a claim under the Act, it may become necessary for the Court to resolve that in order to avoid the waste of resources inherent in two (or more) parties each claiming to have the right to advance a case on behalf of the same applicant group.

[15] Ongoing dialogue between TRONW and NWOA is therefore encouraged.

[16] As the Court has indicated in previous minutes, it is important for TRONW to establish, in respect of applications bought by other applicant groups that affiliate to it, who is actually representing the applicant group, and whether TRONW supports or opposes the application. The issue of who might hold any recognition order granted is also a matter for the applicant group itself to determine.

[17] TRONW needs to put more work into clarifying these issues.

Timetable orders

[18] In the absence of having received any input from parties other than TRONW, the Court is of the preliminary view that the various proposed stages will need to proceed sequentially rather than simultaneously. The principal reason for this is that, as acknowledged by counsel for TRONW, because of the number of overlapping applications, it is likely that the same counsel will be involved in multiple hearings. It is also possible that the same witnesses may

be called in respect of more than one of those hearings. It would therefore be unworkable to have applicant groups and their counsel involved in more than one hearing simultaneously.

[19] As there is typically a gap between Stage 1 and Stage 2 of a hearing under the Act, it may be possible for a Stage 1 hearing for a subsequent group to be undertaken between the Stage 1 and Stage 2 hearings in an earlier application. However, that would need to be timetabled carefully to avoid an overlap.

[20] The affidavit of Alan Riwaka indicated that TRONW was anticipating being in a position to confirm outstanding matters in February 2022. This matter had been scheduled to be called in Auckland on 2 February 2022. Given the comments by Mr Riwaka, that date is likely to be too soon.

[21] Accordingly, the hearing date is vacated and a new CMC will be held in Auckland at 10 am on 14 March 2022. All affected parties are to file and serve updating memoranda no later than 5 pm on **7 March 2022**.

Churchman J