IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2011-485-821
[2022] NZHC 394

UNDER	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	Ngāi Tahu o Mōhaka Waikare Ngāti Pāhauwera Development Trust Maungaharuru-Tangitū Trust the Attorney-General

On the papers:

Counsel:	C Hirshfeld, D C F Naden, and S M Yogakumar for Ngāi Tahu o Mōhaka Waikare R N Smail for Ngāti Pāhauwera Development Trust K M Anderson and M J Dicken for Maungaharuru-Tangitū Trust R L Roff, R E Budd and S L Gwynn for Attorney-General
Judgment:	8 March 2022

JUDGMENT OF CHURCHMAN J
(STAY APPLICATION)

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[1] On 22 December 2021, I issued a decision in relation to applications for recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).[1]

[2] This decision addressed applications on behalf of:

1 *Re Ngāti Pāhauwera* [2021] NZHC 3599.

(a) Ngāti Pāhauwera Development Trust (CIV-2011-485-821);

(b) Ngāti Pārau (CIV-2017-485-246);

(c) Ngāi Tahu o Mōhaka Waikare (CIV-2017-485-235); and

(d) Maungaharuru-Tangitū Trust (MTT) (CIV-2017-485-241).

[3] The various applicants were successful in part although none obtained all of the orders that they were seeking.

[4] The Court has been advised that various of the applicants have lodged notices of appeal to the Court of Appeal in respect of different aspects of the decision.

The stay application

[5] By application dated 10 February 2022, Ngāi Tahu o Mōhaka Waikare (Ngāi Tahu) has applied to the Court for an order staying the Court's judgment of 22 December 2021.

[6] MTT has supported the application for a stay; Ngāti Pāhauwera has filed a memorandum containing conflicting statements, firstly that it abides any decision of the Court; and secondly, that it considers:

> …that there will be merit in completing the Stage Two Hearing prior to the appeals being heard by the Court of Appeal.

[7] Ngāti Pārau has not filed a memorandum either supporting, opposing or abiding the decision of the Court. The Attorney-General, an interested party who took an active part in the proceedings, abides the decision of the Court. No memoranda have been received from the other interested parties (Mana Ahuriri Trust, Hawkes Bay Regional Council, Pan Pac Forest Products Ltd and Seafood Industry Representatives).

Grounds for application

[8] Ngāi Tahu lists three grounds in support of their application:

(a) the Court is proceeding to finalise recognition orders;

(b) if one or more of the proposed appeals succeed, it is likely that any final recognition orders previously made will have to be set aside and fresh recognition orders made; and

(c) the public interest favours staying the judgment until the appeals have been determined.

[9] MTT relies on the three grounds advanced by Ngāi Tahu and adds the following grounds:

(a) the "wide ranging appeals" if successful, will impact on any final recognition orders;

(b) there has been no delay in the stay application being filed and there is little or no prejudice to parties as it is unlikely any significant work has commenced on matters necessary for the Stage Two hearing;

(c) despite the ability to amend outcomes of the Stage Two hearing, there is the potential that any successful appeals will mean time and cost associated with a Stage Two hearing will need to be expended again, to hold a further Stage Two hearing

(d) final orders cannot be sealed until the appeals are disposed of, and therefore no successful party that will be injuriously affected by the stay;

(e) the overall balance of convenience favours a stay; and

(f) this application is distinguishable from *Whakatōhea Kotahitanga Waka v Te Kāhui Takutai Moana o Ngā Whānui Me Nga Hapū & Ors* [2022] NZCA 7.

The law

[10] Applications for a stay of a decision of the High Court are made under r 20.10 of the High Court Rules 2016 (HCR), s 112 of the Act, and r 12(3) of the Court of

Appeal (Civil) Rules 2005. Also relevant is s 113 of the Act which provides that a recognition order must not be sealed prior to the expiry of the appeal period or the disposal of any appeal.

[11] Two recent decisions have considered such applications for stay. The first being *Re Edwards*,[2] and the second being the appeal to the Court of Appeal from that matter, *Whakatōhea Kotahitanga Waka v Te Kāhui Takutai Moana o Ngā Whānui Me Nga Hapū & Ors*.[3]

[12] In assessing an application for a stay, the Court is required to balance the competing rights of the party who obtained the benefit of the judgment being appealed against the need to preserve the appellant's position in the event of the appeal succeeding. Relevant factors are often described as including:[4]

(a) whether the appeal may be rendered nugatory by the lack of a stay;

(b) the bona fides of the applicant as to the prosecution of the appeal;

(c) whether the successful party will be injuriously affected by the stay;

(d) the effect on third parties;

(e) the novelty and importance of questions involved;

(f) the public interest in the proceedings; and

(g) the overall balance of convenience.

[13] Appeals in relation to multi-party hearings for recognition orders under the Act are unlike standard civil proceedings in that there is not a plaintiff and defendant, and

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2 *Re Edwards* [2021] NZHC 3180.

3 *Whakatōhea Kotahitanga Waka v Te Kāhui Takutai Moana o Ngā Whānui Me Nga Hapū & Ors* [2022] NZCA 7.

4 See *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9], upheld on appeal *in Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA). See also *Keung v GBR Investments Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11].

it is not a situation of one party having been successful and the other party having failed. Therefore a number of the factors normally relevant such as the bona fides of an appellant or the apparent strength of an appeal are not directly relevant when considering an application for a stay such as the present one.

[14] The most important ground in relation to this stay application would appear to be whether the appeals by Ngāi Tahu or MTT would be rendered nugatory by failure to grant a stay.[5] It is in this respect that s 113 of the Act is relevant. Both the High Court in *Re Edwards*[6] and the Court of Appeal in *Whakatōhea Kotahitanga Waka v Te Kāhui Takutai Moana o Ngā Whānui Me Nga Hapū & Ors*,[7] concluded that a stay of a Stage Two hearing was not necessary to avoid appeals being rendered nugatory.

[15] The Court of Appeal in *Kotahitanga Waka v Te Kāhui Takutai Moana o Ngā Whānui Me Nga Hapū & Ors* put the matter this way:[8]

> In my view it is clear WKW's appeals will not be rendered nugatory if a stay is not granted. That is implicit in WKW's argument that recognition orders might have to be set aside if any of the appeals are successful.

[16] There are two factors that were present in the *Re Edwards* and *Kotahitanga Waka v Te Kāhui Takutai Moana o Ngā Whānui Me Nga Hapū & Ors* cases that are not present in this case. Firstly, there had been a delay of some months in bringing the stay application; and secondly, the successful parties had undertaken considerable work in anticipation of the impending Stage Two hearing.

[17] The Court of Appeal also said:[9]

> Moreover, s 113 is clear that recognition orders may not be sealed and come into effect until all appeals are determined. Rather than supporting the conclusion appeals must be determined before a hearing on recognition orders can be made, in my view s 113 supports the opposite conclusion. That is, s 113's unusual prohibition on sealing pending the outcome of appeals protects appellants from the usual range of prejudice said to arise where a challenged decision proceeds to execution.

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5 *Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd* [1977] 2 NZLR 41 (CA).
6 *Re Edwards* above n 2.
7 *Kotahitanga Waka v Te Kāhui Takutai Moana o Ngā Whānui Me Nga Hapū & Ors*, above n 3.
8 At [23].
9 At [27].

[18] These observations dispose of the argument that a stay is required in order to avoid appeals being rendered nugatory.

[19] MTT are correct that there has been no delay in the filing of the stay application and it is unlikely any significant work has been commenced. But the absence of such aggravating features (which were present in *Re Edwards*) does not resolve the matter.

[20] There is an element of speculation in MTT's submission that:

> …there is the potential that any successful appeals will mean time and cost associated with a Stage Two hearing will need to be expended again.

[21] The purpose of Stage Two hearings in cases relating to recognition orders under the Act is to allow the parties to comply with s 109 of the Act. That section requires successful applicants for recognition orders to submit a draft order for approval. That draft order must specify:[10]

> (a) the particular area of the common marine and coastal area to which the order applies; and
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> (b) the group to which the order applies; and
>
> (c) the name of the holder of the order; and
>
> (d) contact details of the group and/or the holder.

[22] A protected customary rights (PCR) order must also include:

> (a) a description of the right, including any limitations on the scale, extent or frequency of the exercise of the rights; and
>
> (b) a diagram or map that is sufficient to identify the area.

[23] Successful applicants for a customary marine title (CMT) order must include:

> (a) a survey plan that sets out the extent of the CMT area to a standard of survey determined for the purpose by the Surveyor-General; and

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[10] Section 109(2).

(b) a description of the CMT area; and

(c) any prohibition or restriction that is to apply to a wāhi tapu or a wāhi tapu area within the CMT area.

[24] The most onerous of these obligations is the preparation of survey maps in respect of CMT recognition orders. As CMT was awarded for the entire area covered by all the applications, survey maps are going to be required for all that area. The mapping of those areas is likely to be ultimately funded by Te Arawhiti which has effectively funded all of the applicants in these proceedings.

[25] If one or more of the appeals is successful and one party is substituted for another in parts of the coastal area, the maps themselves are not going to have to be redone but simply the names of the holders of part of the area amended.

[26] As Ngāti Pāhauwera has submitted, if the Stage Two hearing takes place before the hearing of the appeals in the Court of Appeal (and by inference a judgment is promptly issued on the Stage Two hearing), it may be possible for the parties to have the Court of Appeal consider any possible appeal against any aspect of the Stage Two hearing at the same time if the appeals against the Stage One hearing are heard. As the submissions for Ngāti Pāhauwera note, there would be savings in cost and the avoidance of delay if this was able to occur.

[27] If these proceedings are delayed, then potentially there could be very considerable delays in the finalisation of these proceedings. Many of the witnesses who gave evidence in Stage One were elderly. A number expressed the hope of achieving resolution of their claims in their lifetime.

[28] The recent experience of the Court in relation to the Stage Two *Re Edwards* hearing is that, notwithstanding the relatively short time between the Stage One and Stage Two hearings in that matter, a number of key witnesses who had given evidence at the Stage One hearing and, who were proposed to give evidence at the Stage Two hearing, died in the intervening period.

[29] I therefore conclude that it is in the public interest for applications for recognition orders under the Act to be finalised promptly.

[30] For the reasons discussed above, staying the Stage Two hearing which is scheduled to proceed on Monday 23 May 2022 in the Napier High Court will not render any of the appeals nugatory. Neither will it result in the need for unnecessary work which will have to be repeated. There is no evidence of any particular prejudice or inconvenience caused by refusing a stay and the public interest is best served by the avoidance of the potentially extensive delays should the Stage Two hearing not take place until all appeals are finally disposed of.

[31] For these reasons, the application for a stay is dismissed.

Churchman J

Solicitors:
Tamaki Legal Ltd, Auckland for Ngāi Tahu ō Mōhaka Waikare
Smail Legal Ltd, Auckland for Ngāti Pāhauwera Development Trust
DLA Piper, Wellington for Maungaharuru-Tangitū Trust
Crown Law Office, Wellington for Attorney-General