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

Hearing (by VMR): 14 March 2022

Counsel:
M Chen and C Saunders for CIV-2017-404-563
L Thornton (on instruction for 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
M Yogakumar for CIV-2017-404-580 and CIV-2017-485-252
M Denton for CIV-2017-404-520
R Siciliano for CIV-2017-404-564
C Hockly for CIV-2017-485-305 and CIV-2017-485-799
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 for CIV-2017-485-250
J Mason for CIV-2017-485-515 and CIV-2017-485-398
R Devine for CIV-2017-488-205
T Afeaki for CIV-2017-404-579
C Terei for CIV-2017-485-231
J Kahukiwa for CIV-2017-404-566
T Hovell for CIV-2017-404-581
G Chan for CIV-2017-404-518
R Devine for CIV-2009-488-205
J Inns for CIV-2017-485-283
K Dawson for CIV-2017-404-442

Interested Parties:
G Melvin for Attorney General
G Mathias for Langs Beach Society Incorporated
E Ellis for NZ Refining Limited
L Ford for Manaia Properties Limited
S Darroch for Gibbs Foundation Limited

Minute: 28 March 2022

MINUTE (NO. 4) OF CHURCHMAN J

[1] A case management conference (CMC) was held by way of VMR on 14 March 2022 to progress the timetabling of applications under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) in the area around and to the north of Tamaki Makaurau. Memoranda were received from some 27 different applicants or interested parties. I will set out the position of each party.

Te Rūnanga o Ngāti Whatua

[2] Ms Chen filed two memoranda of counsel supported by two affidavits outlining progress towards hearing.

[3] The most significant development was agreement between Te Rūnanga o Ngāti Whatua (TRONW) and Ngāti Whatua o Ōrākei.

[4] The amended application means that TRONW's application no longer overlaps with that of the Ngāti Whatua o Ōrākei Trust or Mr Stanley Rāhui Papa on behalf of Waikato Tainui.

[5] Mr Ferguson, counsel for Waikato Tainui sought and obtained leave to withdraw on the basis that his client no longer had an interest in the proceedings.

[6] An amended and refined proposal for sequential hearing was made. The proposal was still to have four separate hearings to proceed in the following order:

(a) Kaipara;

(b) Whangarei and South Coast;

(c) Central East Coast; and

(d) Southeast Coast.

[7] The general boundaries were identified in a map accompanying the memorandum.

[8] Counsel noted that although TRONW's claim did not cover the entire Whangarei harbour, it would have been artificial to divide the harbour up into two separate hearings given the significant overlap of other claimant groups with interests in the whole harbour. I agree with that proposition.

[9] Counsel also raised the issue of strike-out applications in respect of four overlapping applicants. It was submitted that those applications did not disclose any reasonably arguable case and that the applicants were refusing to engage with TRONW or their counsel.

[10] As explained to counsel, there are some matters which are more readily susceptible to strike-out applications than others. Obvious examples are instances where, on its face, an application does not meet one or more of the procedural requirements of the Act; or where a variation to an application amounts effectively to an extension or increase to the area covered or nature of the application. An obvious lack of mandate where another applicant clearly has mandate in respect of the same applicant group would also fall into that category.

[11] An issue of lack of any reasonably arguable case may be more difficult for the Court to deal with at strike-out stage but is clearly something that would benefit from counsel for the parties engaging in dialogue with a view to either providing sufficient detail (if that is available), or amending the application deleting parts that have no prospect of success.

[12] The Court will certainly rule on such strike-out applications as are made but encourages counsel to assist the parties to engage, in a tikanga manner, with each other to try and reach agreement and avoid what can be the polarising effect of strike-out proceedings.

[13] Counsel's request for leave to file further affidavits in response to matters raised in the memoranda filed by other counsel is granted. Any such documentation is to be filed and served within one week of the date of this minute.

Ngāti Whatua o Ōrākei

[14] The one-page memorandum filed by counsel provided no information on the readiness of Ngāti Whatua o Ōrākei to proceed to hearing or as to their interactions with those applicants who remain as overlapping applicants within the area of the application. The memorandum contained the statement:

> …no other applicant has a customary interest in Ngāti Whatua o Ōrākei's takutai moana that is comparable or as significant in tikanga to Ngāti Whatua o Ōrākei.

[15] The intention of counsel is drawn to the wording in s 58 of the Act. In order to obtain a recognition order for customary marine title (CMT), an applicant must establish that they hold the specified area in accordance with tikanga and have exclusively used and occupied that area from 1840 to the present day without substantial interruption.

[16] The concept of exclusivity is something fundamentally different to the suggestion that an applicant has a more significant interest in an area than other overlapping applicants.

[17] In the next memorandum filed, the Court would expect to have a report on the steps taken by Ngāti Whatua o Ōrākei to interact with the other overlapping applicants to address the issues of conflicts between the application. The Court would also expect to receive information as to the steps taken by the applicant by way of preparation for the hearing as well as an estimate of the time that might be required to be allocated to this applicant's application.

Collier and Reti

[18] Ms Mason filed memoranda in respect of both matters. Little appears to have been done to advance matters towards hearing. The Court appreciates that issues to do with COVID have made it more complicated for counsel to obtain instructions but the fact that many applicants have been able to engage in positive tikanga-based interactions with overlapping claimants confirms that it is possible to make progress. The Court is concerned that those applicants who use COVID difficulties as an excuse for not doing anything will end up getting left behind.

[19] In relation to the issue of strike-out of the Reti claim, counsel's memorandum on this issue noted that Mr Reti and his whānau and hapū had interests throughout the application area with an example being that one of Mr Reti's tūpuna had "mana whenua interests in an area called Parakiore".

[20] Again, counsel are reminded of the wording of s 58 of the Act in relation to CMT and s 51 in relation to protected customary rights (PCR). The fact that an applicant group may have whakapapa links to a particular area is an important first step but, unless the specific requirements of ss 51 and 58 of the Act are met, it cannot justify the grant of recognition order.

Te Roroa

[21] Ms Dawson indicated that Te Roroa wishes to pursue direct engagement while at the same time preserving its interests as an interested party in any Court hearing. Counsel identified an overlap with TRONW in the Kaipara area and expressed a preference for a Kaipara hearing to be held later in the hearing schedule rather than to be the first in the sequence of hearings. If that wish could not be accommodated, counsel estimated five days would be needed to present its evidence as an interested party in the Kaipara hearing.

[22] I note that two matters referred to in the schedule of overlapping claims listed by counsel (Dargaville CIV-2017-404-538 and Paul CIV-2017-485-512) have both been struck out. It appears that a number of the other overlapping applications are likely to be the subject of strike-out applications.

Ngāti Hine

[23] Ms Terei appeared for Ngāti Hine. The memorandum of counsel dated 7 March 2022 provided little helpful information beyond noting that Ngāti Hine were "amenable to working with all parties in respect of timetabling". It does not appear that any engagement with overlapping parties have been initiated or any such discussions entered into. It is in the interests of all parties to actively pursue such negotiations and/or discussions as soon as possible.

Parker

[24] Similar comments apply to the memorandum filed by Mr Lyall in respect of this application. While the memorandum did address the issue of progress in relation to gathering of evidence and preparation for the hearing, it contained a statement "…we signal that the applicants are willing to meet with any overlapping applicant that wishes to." Once again counsel need to take the initiative.

McGee

[25] As a result of the amendment to the application by TRONW, there is no longer an overlap with TRONW.

Hamilton, Beazley and Klink

[26] Ms Thornton appeared on behalf of Ms Sykes in the Hamilton application and for the Beazley and Klink applicants. The joint memorandum helpfully detailed progress toward hearing. It also contained the observation:

> The age and health of Mr Hamilton, and other prospective tangata whenua witnesses to be called as part of the case means that the applicants are seeking to go first in the hearing planned, rather than third as described by TRONW in its papers if that could be accommodated.

[27] Unfortunately, having aged and infirm witnesses is a feature common to almost all applicant groups and, of itself, does not justify an alteration in the proposed sequence of hearings.

[28] Ms Thornton indicated that if the two applications covered by the joint memorandum proceeded to trial, they will need between a week and 10 days.

Ngāi Tai ki Tamaki

[29] Ngāi Tai ki Tamaki have interests in what are proposed to be the third and fourth of the sequential hearings. Ms Siciliano indicated that three days would be required for the

Area D hearing. The Ngāi Tai ki Tamaki application did not extend into proposed areas A or B.

Ngāti Taimanawaiti (sometimes referred to as Ngāti Tai)

[30] Mr Chan indicated that Ngāti Taimanawaiti wished to participate in the proposed Stage D (Tamaki Makaurau) hearing and that it was their intention to convene a hui with all overlapping applicants in that area. Counsel confirmed that Te Arawhiti had expressed a willingness to assist in facilitating such a hui.

[31] Tangata whenua evidence collection was proceeding and the applicant was engaging with a historian with an anticipated completion date for the historian's report of the first quarter of 2023.

[32] Mr Chan for Ngāti Taimanawaiki filed a further memorandum of 10 March 2022 in response to TRONW's third amended application. He said that Ngāti Tai (Manawaiki) are a separate and distinct group to Ngāi Tai. The memorandum rejected the suggestion any inference arising from the memorandum filed in support of TRONW that Ngāti Tai and Ngāi Tai were effectively the same group and needed to sort out mandate issues.

Te Parawhau

[33] Mr Hockly for Te Parawhau, submitted that all of the Whangārei Harbour needed to be heard at the same time and there should be a separate hearing for some of the offshore islands.

[34] A joint memorandum was filed in relation to four applicants. In addition to Te Parawhau, the other applicants were Patuharakeke Te Iwi Trust Board; Stephen Panoho on behalf of Te Rae Ahu Whenua Trust; and Richard Nathan for Rōpu o Rangiriri.

[35] These applicants all have applications that centre on Whangārei Terenga Paraoa (Whangārei Harbour). These applicants did not support the concept of their applications being heard along with that of TRONW They wished to utilise available time to explore the concept of joint exclusivity with other Whangārei-based hapū. They suggested that the proposal advanced by TRONW was not conducive to such an approach.

[36] They submitted that if the Court was going to timetable matters then instead of the area relating to Whangārei proceeding first, it should proceed as the third or fourth of the proposed stages. Counsel did not want the applications to be scheduled earlier than 2023.

[37] TRONW's revised proposal had Kaipara proceeding first and Whangārei proceeding second. I am not persuaded that there is a sound basis for altering that sequence.

[38] Because of the significant lack of progress by some applicants in the proposed Area A, it is not realistic to timetable that area for hearing this year. This group of applicants estimated that their cases would require a total of about 14 days of hearing time. However, because a number of the applicants have not expressed how much time they think they would need to present their case (and cross-examine other parties), the Court cannot sensibly estimate a total time of hearing.

[39] The Court encourages these applicants to persevere with their proposed initiative of exploring a concept of joint exclusivity with other Whangārei-based claimants. However, such an activity is not mutually exclusive with the Court attempting to assist parties to get their cases to a state where a timetabling order can be made.

[40] These applications will be called again at the CMC to be held in Whangārei on 21 June 2022.

Ngāti Te Ata

[41] Mr Kahukiwa said that his client was willing to meet with TRONW to discuss their applications but stated that COVID had prevented this occurring to date.

[42] His client supported the concept of four sequential hearings and did not oppose Kaipara being the first hearing dealt with. Although noting that the southern boundary of the proposed Kaipara heading would appear to fall outside their north western boundary, they wish to be included in the email distribution list for all matters in relation to the proposed Kaipara hearing, and also wanted to "…have liberty to file in that stage any evidence or submissions that they apprehend as being adverse to their interests."

[43] I have interpreted this request as being that they wish to participate as an interested party and not an applicant. They have leave to do that.

Te Uri o Hau

[44] Ms Devine, for Te Uri o Hau, filed a joint memorandum with Ms Yogakumar, for Te Pōpoto ki Ōturei dated 10 March 2022. It noted that TRONW had listed Te Pōpoto as a Ngāti Whatua hapū. This assertion was rejected. It said that Te Pōpoto ki Ōturei was a hapū of Ngā Puhi. Te Uri o Hau acknowledged that it was a hapū of Ngāti Whatua. It is also a priority claimant. It is presently working through a process of direct engagement. Te Uri o Hau did not want a timetable that undermined the direct engagement process and required them to duplicate efforts in two different forum. Discussions and virtual hui between Te Uri o Hau and TRONW had occurred and both parties apparently agreed to continue this kōrero. It opposed the setting down of TRONW's claim in late 2022 or early 2023.

[45] As a priority claimant, Te Uri o Hau would be entitled to have its claim heard first. However, it is not for the Court to direct the Attorney-General how to proceed with direct engagement. Neither is it appropriate for any delay with the process of direct engagement to stall the progress of those claimants who are ready, willing, and able to move toward a hearing.

Te Pōpoto ki Oturei

[46] This claim overlaps with that of Te Uri o Hau. The parties have had hui and are engaged in further kōrero. They support Te Uri o Hau' request that the matter not be timetabled. They did not support Kaipara being the first of the proposed areas to be set down for hearing.

Ngātiwai Trust Board

[47] Ms Innes noted that Ngātiwai Trust Board had an application which overlapped that of TRONW, and is an interested party with respect to the application by TRONW. There has apparently been no further engagement between Ngātiwai and TRONW since September

2021. The memorandum indicated that Ngātiwai's research programme was "progressing" and that Ngātiwai had "engaged with other overlapping applicants when invited to do so".

[48] As indicated in respect of other applications, a proactive stance rather a reactive one, is required to ensure that overlapping applicants have actually explored with the other applicants with whom they overlap, what the basis for that overlap is and whether there is any possibility for agreement.

[49] The memorandum noted that Ngātiwai was opposed to a staged hearing process because it would cause it and other applicants to deplete their resources participating as interested parties in a number of hearings. No alternative to a staged hearing process was suggested. For logistical reasons, it is simply not possible to contemplate having one hearing that covers all parts of the TRONW application.

[50] The memorandum did not give any estimate of time that might be required by Ngātiwai.

Waikato-Tainui and Stanley Papa

[51] Mr Ferguson filed a memorandum which confirmed that as a result of the amended application filed by TRONW, there was now no longer any overlap between his clients' applications and that of TRONW; that his clients no longer wish to be interested parties in the TRONW application (CIV-2017-404-563), and that Waikato-Tainui's notice of appearance in relation to the TRONW application was withdrawn. Leave is granted for these requests.

Kingi, Stead (x2), Dargaville and Nova

[52] Mr Castle filed a memorandum in respect of these five applications. The memorandum contained no helpful information on the issues of preparedness for hearing, state of evidence preparation or time that might be required by any of these applicants to present their cases. The memorandum did support a staged, sequential hearing of the type proposed by TRONW. The memorandum indicated that counsel had not been able to obtain full instructions. It is not entirely clear why this should be so.

[53] The Dargaville application was one that Ms Chen, for TRONW, had indicated may well be the subject of a strike-out application. Mr Castle invited Ms Chen to send him a copy of the draft strike-out application by 25 March 2022 and said that he would respond by 14 April 2022. Ms Chen indicated that she would do so.

[54] The Court expects that when these matters are next called, counsel will file a memorandum that provides the Court with helpful information on the state of preparedness of the various claims.

Ngāti Rehua – Ngātiwai ki Aotea

[55] This application relates to proposed Area C. The memorandum of counsel indicated that there had not been any kōrero with TRONW about the overlapping applications. In respect of the proposal that the seaward boundary of Area C be extended to approximately three miles off the west coast of Hauturu, the applicant invited the Court to consider, including Hauturu in the Area C. That is a sensible suggestion and I make that direction.

[56] The memorandum also rejected any inference that Ngāti Rehua – Ngātiwai ki Aotea were part of Ngātiwai. It asserted that Ngāti Rehua – Ngātiwai ki Aotea were a Kawerau people with ties to Te Uri o Makinui. It was acknowledged that some Ngātiwai hapū had customary interests in Aotea and Hauturu.

[57] The memorandum drew the Court's attention to the fact that TRONW had filed maps which did not claim a seaward boundary out from the East Coast but that the third amended application purported to expand the application area with an undefined seaward boundary which it was submitted purported to significantly enlarge TRONW's claim area.

[58] The memorandum noted that counsel had been instructed to move to strike out the enlarged area of the application. Any such application should be filed and the Court will then timetable it to a hearing.

Ngāti Pūkenga

[59] Ms Davidson's memorandum confirmed that this applicant was able to proceed to hearing by late 2022 and able to meet any timetable directions. It indicated that the applicant required one day to present its case which related to the Whangārei Harbour.

Interested parties

New Zealand Refining Company Limited

[60] Ms Ellis indicated that Refining New Zealand was a interested party to the application by TRONW and a number of other applicants in the Whangārei/Northland area. It agreed with the proposed four staged hearing approach and the order of hearings.

[61] Counsel intended participating the Whangārei hearing. Two hours was estimated to be required for presentation of evidence-in-chief. Counsel requested that the Registry provide an updated case party list with contact information/addresses for service of all relevant parties. The reason for this was to ensure that counsel ensured all relevant correspondence.

Manaia Properties Limited

[62] Manaia Properties is interested in seven separate applications and wishes to be heard as an interested party. They expressed no view on the revised proposal in relation to the sequencing of hearings.

The Attorney-General

[63] The Attorney-General supported a staged process and did not have a preference as to the sequence in which matters proceeded. Of the various proposed areas, the Attorney-General's research in relation to Kaipara is the most advanced but was still relatively limited. Confirmation was sought that the sequence of hearings would proceed in accordance with the revised proposal. That is confirmed. The Attorney-General should therefore prioritise research for this area. When a timetable is issued, it will include time for reply evidence by the Attorney-General.

[64] The Attorney-General strongly supported kōrero between overlapping applicants and encouraged applicants who wished to obtain details of what support was available to contact Te Arawhiti.

[65] In relation to Te Uri o Hau, Mr Melvin reported that a meeting between the Crown and Te Uri o Hau was scheduled for April and suggested that the fact that direct engagement was under way is a fact that should influence any timetabling directions. As noted above, the fact that direct engagement is occurring will not have the effect of delaying the hearing of those applications that are ready for hearing.

Adjournment

[66] Applicants granted leave to file further affidavit evidence should file that in accordance with the directions in this minute. If any of the possible strike-out applications are to proceed, formal applications with supporting affidavits should be filed.

[67] Unless specified otherwise in this minute, all applications are adjourned until the June 2022 CMCs. The Court will expect to receive memoranda detailing progress prior to those CMCs.

Churchman J