

**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
KIRIKIROA ROHE**

**CIV-2017-419-083
[2023] NZHC 2207**

UNDER the Marine and Coastal Area
(Takutai Moana) Act 2011

IN THE MATTER OF an application by Angeline Greensill for and
on behalf of the Whāingaroa Moana
Collective for orders recognising customary
marine title and protected customary rights
under the Act

On the papers:

Counsel: A Sykes and J Cole for Applicant

Judgment: 16 August 2023

JUDGMENT OF CHURCHMAN J

Introduction

[1] The applicant has filed a second amended application, dated 11 August 2023, for orders under the Marine and Coastal Area (Takutai Moana) Act 2011, with an amended map pursuant to my directions of 28 July 2023.

[2] In a minute I issued on that date, I noted that in the applicant's amended application dated 16 June 2023, the applicant filed a revised map which, although it did not enlarge the claim area, contained an error which showed the seaward boundary as being 200 nautical miles from the coast rather than 12 nautical miles. Counsel agreed to amend that error and file an amended application with a corrected map.

[3] Counsel also accepted that some further clarification as to the precise protected customary rights (PCR) orders being sought was required and undertook to file an affidavit from the applicant, Ms Greensill, to provide greater clarity in this respect.

[4] Ms Greensill has filed a third updated affidavit dated 9 August 2023, updating her credentials, describing the Whāingaroa Moana Collective, on whose behalf the first and second amended applications have been filed, and explaining the effect of the second amended application in terms of clarifying the composition of the applicant group and the customary marine title (CMT) and PCR orders sought.

Revised map

[5] Counsel have now submitted a revised map which has corrected the earlier error. The seaward boundary of the application area has been reduced from 200 nautical miles to 12 nautical miles, or in other words to the outer limits of the territorial sea.

[6] The revised map is otherwise unchanged from that filed in the original application in 2017. It does not enlarge the claim area. Accordingly, the amendment to the map fits within the category of amended applications that will be allowed as set out in the *Ngāti Pāhauwera (strike-out application)* decision.¹

[7] Problematically, the revised map does not display co-ordinates of the application area. I draw counsels' attention to paragraph [8] of my minute of 28 July 2023, reminding parties to include co-ordinates on a map for an application area, with such co-ordinates to be displayed, at a minimum, at the two landward and two seaward boundaries.

[8] It is unclear to me why the applicant has filed a map which no longer includes co-ordinates, when previous versions of the map contained such co-ordinates. I refrain from directing that the applicant file yet another amended application and map, but only because the co-ordinates are included on the map in the original application, the text of the second amended application, and Ms Greensill's accompanying affidavit.

¹ *Re Ngāti Pāhauwera Development Trust (strike-out application)* [2020] NZHC 1139 at [62].

Amendment to applicant group

[9] The original application, dated 3 April 2017, was filed by Ms Greensill for and on behalf of Tainui hapū o Tainui waka. The amended application, dated 16 June 2023, and the second amended application, dated 11 August 2023, state that the application is made by Ms Greensill for and on behalf of “members of the Whāingaroa Moana Collective specifically Tainui hapū o Tainui waka and Ngāti Tamainupō”.

[10] Amendments pursuant to an amended application cannot amount to a material change to the application such that the amended pleading represents a fresh application under the Act and thereby constitutes an abuse of the Court.² In order for an amendment to an applicant group to be allowed, the amended application must not seek to add “new applicants who were not referred to at all in the original application and whose claims could not possibly have been identified from the wording of the original application”.³ The question becomes whether the “members of the Whāingaroa Moana Collective specifically Tainui hapū o Tainui waka and Ngāti Tamainupō” represents an expansion of applicants to whom orders may be made if their substantive application for orders succeeds whose claims could not possibly have been identified from the wording of the original application.

[11] Ms Greensill provides further information about the Whāingaroa Moana Collective in her affidavit accompanying the second amended application. The Whāingaroa Moana Collective comprises those hapū who whakapapa to the Whāingaroa Harbour and nearby coastal and marine area and includes:

- (a) Tainui hapū o Tainui waka, which itself comprises 12 hapū;
- (b) Ngaati Whakamarurangi, comprising Ngaati Koata, Ngaati Motemote and Ngaati Tahinga;
- (c) Ngaati Maahanga me Ngaa Uri o Te Awaitaia; and

² *Re Dargaville* [2020] NZHC 2028 at [44]; *Re Paul* [2020] NZHC 2039 at [36] and [64], upheld on appeal in *Paul v Attorney-General* [2022] NZCA 443 at [75]; and *Re Ngāti Pāhauwera Development Trust (strike-out application)* [2020] NZHC 1139 at [4].

³ *Re Paul*, above n 2, at [64].

- (d) Ngāti Tamainupō, comprising Ngā Uri o Tamainupō, Toa Kotara me Te Huaki.

[12] Ms Greensill states the members of the Whāingaroa Moana Collective have formally worked together since 2019 and since then have acknowledged each other's shared customary rights and interests in the takutai moana of the Whāingaroa Harbour and surrounding coastline, which includes the recognition of, and respect shown for, the shared exclusivity by which the members of the Whāingaroa Moana Collective hold, maintain and practise their mana whenua, mana moana and customary title to the coastal marine area in the application area. Ms Greensill says that the members of the Whāingaroa Moana Collective "have collectively contributed to the continuing exercise of mana tuku iho in the Application Area".

[13] As noted, the amended applications have been filed on behalf of members of the Whāingaroa Moana Collective, specifically Tainui hapū o Tainui waka and Ngāti Tamainupō. Ms Greensill explains that Ngāti Whakamarurangi is not separately identified, as members of Ngāti Whakamarurangi fall under the mantle of Tainui hapū o Tainui waka or are otherwise closely connected through intermarriage. Ms Greensill explains that Ngaati Maahanga me Ngaa Uri o Te Awaitaia chose not to be named as part of the applicant group by reason of their extant application lodged with the Crown for direct negotiations over an area which extends beyond the application area in this application. The question becomes whether the inclusion of Ngāti Tamainupō represents an unwarranted expansion to the group of applicants.

[14] Ms Greensill states that the whānau, hapū and iwi of the Whāingaroa Moana Collective have always been inclusive people, with relationships through intermarriage and permeable boundaries which allow access to each other's takiwā for particular purposes. Ms Greensill states in her affidavit:

27. Our society is a complex woven tapestry that is cemented by relationships sourced in whakapapa. Our rohe moana is integral to our identity and livelihoods and it is our responsibility to see that our relationship with it is protected. We do this collectively.

[15] Ms Greensill says the decision to file the amended application identifying the applicant group as the members of the Whāingaroa Moana Collective rather than

Tainui hapū o Tainui waka was so as to recognise the customary rights and interests of all members of the Whāingaroa Moana Collective on the basis of the shared exclusivity of the application area, which reflects the tikanga of the hapū of the area who have shared whakapapa and have worked together in the exercise of their customary practices since before 1840. Ms Greensill states that the members of the Whāingaroa Moana Collective have been sharing the Whāingaroa Moana for generations, in accordance with tikanga.

[16] I am satisfied in this case that amending the existing application to be for and on behalf of the members of the Whāingaroa Moana Collective was a pragmatic way to recognise what Ms Greensill says is the shared exclusivity which the members of the Whāingaroa Moana Collective enjoy over the common marine and coastal area within their rohe. Caution is required before granting such an amendment, as there is a real risk that as a result of such an amendment the applicant group may include persons whose identity could not have been known from the original application. In this case, and indeed perhaps by a fine margin, I am satisfied the amended applicant group is so sufficiently connected to the original applicant group, including the applicant herself being changed, and who are on the basis of the material before me so inextricably linked by whakapapa and a shared history of use, that it is not the case that their claims “could not possibly have been identified from the original application” and it is appropriate to allow the present proposed amendment. As I have said in an earlier case (although in that case not dealing with an amended applicant group), I consider that “while the details of the present application have changed, the nature of the claim has not”.⁴

[17] I am satisfied the amendment to the named applicant group does not represent a fresh cause of action and may be allowed.

Clarification as to PCR orders sought

[18] As noted above, at the judicial case management conference in Hamilton on 20 June 2023, I asked for clarification as to what activities the applicant group sought recognition in respect of under PCR orders.

⁴ *Tukōkō and Ngāti Moe* [2023] NZHC 473 at [20].

[19] In order to be granted orders for CMT, an applicant group must demonstrate how it has held the application area in accordance with tikanga and exclusively used and occupied that area from 1840 to the present day without substantial interruption. In order to be granted orders for PCR, the applicant group must demonstrate rights which have been exercised since 1840 and continue to be exercised by the applicant group in the common marine and coastal area in accordance with tikanga and have not been extinguished as a matter of law.

[20] In the aim of providing greater clarity as to the activities over which the applicant group seeks recognition under PCR orders, the second amended application has accordingly differentiated between those activities which are said to meet the statutory test for CMT, and those said to be capable of being the subject of PCRs. The applicant says this has removed any activities which are statutorily barred from being the subject of PCRs (such as fishing for species subject to the Fisheries Act 1996 or taking/harvesting aquatic plants not customarily found within the common marine and coastal area).

[21] The list of activities in the second amended application follows loosely that in the original application. However, the list is more expansive than the one in the original application. Again the question arises as to whether this constitutes a fresh cause of action and is an abuse of process.

[22] In the circumstances, I am satisfied it is not. The amended list of activities was provided at my request for greater particulars as to exactly what protection is being sought under PCR orders. The list of activities follows generally that in the original application, but with greater information provided, listing in more detail the different sorts of activities that are included within the categories of what was originally applied for. I am satisfied this does not expand the application so much as to constitute a fresh cause of action. The amended list of activities in the second amended application is allowed.

Conclusion

[23] Each of the amendments requested under the second amended application arguably borders on an indulgence. Overall, however, I am satisfied in respect of each

category of amendment that the amendments do not amount to a fresh cause of action and should be allowed.

Churchman J

Solicitors:
Annette Sykes & Co, Rotorua for Applicant