

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

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

**CIV-2011-485-821
[2023] NZHC 826**

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

IN THE MATTER OF an application for orders recognising
Customary Marine Title and Protected
Customary Rights

On the papers:

Counsel: R N Smail and E A James for Ngāti Pāhauwera Development
Trust (CIV-2011-485-821)
M K Mahuika, L A V Underhill-Sem and T W Afoa for
Ngāti Pārau (CIV02917-485-246)
D C F Naden, S M Yogakumar and L K Millington for
Ngāi Tahu ō Mōhaka Waikare (CIV-2017-485-235)
K M Anderson and M J Dicken for Maungaharuru-Tangitū
Trust (MTT) (CIV-2017-485-241)

Interested parties:

B Lyall for Mana Ahuriri Trust
H P Harwood for Hawke's Bay Regional Council
M Williams for Pan Pac Forest Products Limited
A Williams for Seafood Industry Representatives
R Roff and S Gwynn for Attorney-General

Judgment: 19 April 2023

**JUDGMENT OF CHURCHMAN J
[Stay application]**

Introduction

[1] In 2021 I heard claims for recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) by a number of applicant groups in respect of the takutai moana between Napier and Wairoa.

[2] On 22 December 2021, I issued the *Re Ngāti Pāhauwera (Stage 1)* decision (the Stage 1 decision).¹ On 19 January 2023, I issued the *Re Ngāti Pāhauwera (Stage 2)* (the Stage 2 decision),² (together, the decisions).

[3] On 20 February 2023, two of the applicant groups, Ngāti Pāhauwera and Maungaharuru-Tangitū Trust (MTT) filed separate notices of appeal against the Stage 2 decision (the appeals). Other parties involved subsequently filed notices of appearance in respect of the appeals.³

[4] By memorandum dated 17 March 2023, the applicants, on behalf of the Ngāti Pāhauwera Development Trust and Ngāi Tahu ō Mōhaka Waikare, have applied under r 20.10 of the High Court Rules 2016 and r 12 of the Court of Appeal (Civil) Rules 2005 for an order to stay the proceedings pending the determination of the appeals by the Court of Appeal.

[5] The applicants seek the stay on the basis that obtaining the factual material required by the Court to finalise the orders made in the decisions will take time and incur costs. The applicants say they do not accept the recognition orders made in the decisions and do not wish to expend this time and cost to finalise those orders when the scope of the orders may change materially following the Court of Appeal's decision. The applicants contend it is therefore in the interests of justice to stay the proceedings, and that doing so will mean that further proceedings in the High Court can be decided consistently with the findings of the Court of Appeal as to the correct interpretation and application of the Act.

Relevant law

[6] Rule 20.10 of the High Court Rules provides:

20.10 Stay of proceedings

- (1) An appeal does not operate as a stay—
 - (a) of the proceedings appealed against; or

¹ *Re Ngāti Pāhauwera (Stage 1)* [2021] NZHC 3599 [Stage 1 decision].

² *Re Ngāti Pāhauwera (Stage 2)* [2023] NZHC 15 [Stage 2 decision]

³ On 8 March 2022, Ngāti Pārau filed a notice of appeal of the Stage 1 decision, above n 1.

- (b) of enforcement of any judgment or order appealed against.
- (2) Despite subclause (1), the decision-maker or the court may, on application, do any 1 or more of the following pending determination of an appeal:
 - (a) order a stay of proceedings in relation to the decision appealed against:
 - (b) order a stay of enforcement of any judgment or order appealed against:
 - (c) grant any interim relief.

...

[7] Rule 12 of the Court of Appeal (Civil) Rules provides:

12 Stay of proceedings and execution

- (1) None of the matters referred to in subclause (2) operate as—
 - (a) a stay of a proceeding in which a decision was given; or
 - (b) a stay of execution of that decision.
- (2) The matters are—
 - (a) an application for leave to appeal; or
 - (b) the giving of that leave; or
 - (c) an appeal.
- (3) Pending the determination of an application for leave to appeal or an appeal, the court appealed from or the Court may, on an interlocutory application,—
 - (a) order a stay of the proceeding in which the decision was given or a stay of the execution of the decision; or
 - (b) grant any interim relief.

[8] An application for a stay under these rules requires the Court appealed from 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.⁴ The relevant factors to be taken into account in this balancing exercise include:⁵

- (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 proceeding; and
- (g) the overall balance of convenience.

[9] The apparent strength of the appeal is also a relevant factor.⁶

Discussion

[10] I turn to consider each of the factors in turn:

- (a) *Whether the appeal may be rendered nugatory by the lack of a stay:*
The appeal will not be rendered nugatory if a stay is not granted. Whether the orders are overturned or not is unaffected by a stay. The orders may be overturned on appeal notwithstanding this application for a stay being declined. The Court of Appeal will have the opportunity to consider the merits of the matter and provide any guidance as to the correct interpretation and application of the Act irrespective of whether a stay is granted or not.

⁴ See *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87; and see *Re Edwards (Te Whakatōhea No 4)* [2021] NZHC 3180 at [15].

⁵ *Keung v GBR Investment Ltd* [2010] NZCA 396 at [11], citing *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] 3 NZLR 239 at [9].

⁶ At [11].

- (b) *The bona fides of the applicant as to the prosecution of the appeal:* There is no reason to doubt the bona fides of the applicants as to the prosecution of the appeal. The appeals were brought in good time and there has been no delay in bringing this stay application.
- (c) *Whether the successful party will be injuriously affected by the stay:* There is a risk the successful parties from the Stage 2 decision would be injuriously affected by a stay pending determination of the appeals. As I noted in *Re Edwards (No 2)*, “[t]he parties who have chosen to come to Court are entitled to expect that the Court will determine their application. They are also entitled to expect that such a determination will occur reasonably promptly following the conclusion of the hearing.”⁷ The successful parties from the Stage 2 decision are entitled to have the orders in that decision finalised, and a stay pending determination of the appeals would delay those orders being finalised.
- (d) *The effect on third parties:* The stay application is brought by only two of the parties to the Stage 2 decision. The other parties have been served with notice of the application. The only other memorandum received by the Court was from Maungaharuru-Tangitū Trust. They supported the stay application. In the circumstances the effect on third parties is unclear. In the absence of any objection from any third parties, the possible effect on third parties here is not a reason to decline the stay.
- (e) *The novelty and importance of questions involved:* These proceedings involve a number of novel and important questions, being one of the earlier Stage 2 decisions within the architecture of the MACA regime. However, as with the unsuccessful stay application in the *Re Edwards (Whakatōhea)* proceedings, not granting a stay does not prevent those questions being considered.⁸ The Court of Appeal will be able to consider in the appeals the legal and factual questions it deems relevant

⁷ *Re Edwards (Whakatōhea) (No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [409].

⁸ *Re Edwards (Te Whakatōhea No 4)*, above n 4, at [17(e)].

to the appeals, and provide its conclusions and guidance as usual in the appeal process.

- (f) *The public interest in the proceeding:* The public interest in these proceedings is significant, but not as high in the *Re Edwards (Whakatōhea)* matter, in which an application for a stay following the Stage 2 decision was nevertheless declined.⁹ As in that matter, the case of *Jackson v Te Rangi*, in which a stay *was* granted, is not analogous here.¹⁰ In that case, a stay of a fresh appointment to the relevant board in that case was appropriate until the appeal was heard, because to go through the process of a fresh appointment before the appeal clarified the correct approach would have been a waste of resources. The situation is very different here. As with the *Re Edwards (Whakatōhea)* matter, the successful parties in the Stage 2 decision have carried out significant work to this point, some of which has been publicly funded. In the absence of a compelling reason, the outcome and finalising of such work should proceed. On the other hand, the applicants say the Stage 2 decision called for them to furnish the Court with “further factual material, such as the filing of new maps”. In fact, the Court has not called for “further factual material” in the form of “new maps”. Rather, it has called for maps which actually comply with the clear prescriptive requirements in the Act, which should have been submitted at the Stage 2 hearing. More importantly, the work done in this regard will not be wasted.

The appeals from the decisions do not assert that no orders for CMT should have been made. Rather, the essence of the appeals is as to where the boundaries of the respective orders should be and who should hold CMT. Irrespective of the outcome of the appeals, maps of the takutai moana that comply with the provisions of the Act need to be prepared. All of the applicants are funded by Te Arawhiti, which will

⁹ At [17(f)]–[18].

¹⁰ *Jackson v Te Rangi* [2015] NZHC 1149.

ultimately meet the costs of map preparation, so no issue of significant wasted expenditure by the applicants on map preparation arises.

- (g) *The overall balance of convenience:* The last-mentioned point is also relevant in respect of the overall balance of convenience as well. If recognition orders are to be granted in the form specified by the Act, maps need to be prepared. The successful applicants will have to do that. As far as the Court is aware, the appeals do not challenge the Court's directions as to what the Act requires to be included in the maps.

The fact that the judgment is executory at this stage, with the orders needing to be finalised, does not support the grant of a stay. Many judgments are executory, in the sense that they require things to be done following delivery of the judgment, and the Court has routinely declined stay applications for these types of judgments.¹¹

The balance of convenience favours the proceedings continuing in the normal course of events. The Stage 2 decision has been released. The applicants have not been able to point to any valid reason justifying a stay.

- (h) *The apparent strength of the appeal:* It is always difficult to predict the outcome of an appeal when the Court is dealing with relatively untested legislation. It cannot be said that the appeals have no prospect of success. However, the more relevant point is that none of the appellants seek to overturn the whole decision. Rather, they are only unhappy with those parts where they were not as successful as they had hoped to be. So, unlike the situation in many civil appeal proceedings in which the appeal can produce a result which totally changes the outcome of the decision in the Court below, a successful appeal or appeals will make relatively modest changes to the overall decision, none of which will be frustrated if a stay is not granted.

¹¹ For example the *Re Edwards (Te Whakatōhea No 4)* unsuccessful stay of proceedings, above n 4.

Conclusion

[11] I consider the above factors relevant to the grant of a stay are all either neutral or support the continuation of proceedings to their finalisation. For these reasons, I decline the application for a stay of the proceedings pending determination of the appeals.

Result

[12] The application is dismissed.

Churchman J

Solicitors:

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cc: M Williams, Napier for Pan Pac Forest Products Limited