IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-160; CIV-2017-485-214
CIV-2017-485-229; CIV-2017-485-273
CIV-2017-485-511; CIV-2017-485-261
CIV-2017-485-248; CIV-2017-485-258
CIV-2017-485-260; CIV-2017-485-211

GROUP N, STAGE 1(a) and STAGE 1(b)
[2024] NZHC 967

BETWEEN	the Marine and Coastal Area (Takutai Moana Act) 2011.
AND	applications for orders recognising Customary Marine Title and Protected Customary rights

Continued…

Hearing:	23 April 2024
Counsel:	O T H Neas for Ngāti Tamarangi Hapū N R Coates and P Walker for Ngāti Raukawa ki te Tonga B R Lyall for Te Whānau Tima (Seymour) and Te Ahi Kā o Te Mateawa T H Bennion and E A Whiley for Muaūpoko Tribal Authority Incorporated A M Cameron and A J Samuels for Te Ātiawa Ki Whakarongotai T N Hauraki for Tupoki Takarangi Trust (1999) E K Rongo for Ngāti Toa Rangatira D A Ward for Attorney General Appearance excused for Rangitāne o Manawatū Appearance excused for Te Patutokotoko
Judgment:	30 April 2024

JUDGMENT OF GRICE J

BY	William James Taueki on behalf of Ngāti Tamarangi Hapū (CIV-2017-485-160)

BY	Margaret Morgan-Allen for David Morgan Whānau (CIV-2017-485-214)
BY	Rachael Ann Selby on behalf of Ngāti Raukawa ki te Tonga (CIV-2017-485 229)
BY	Patrick Seymour on behalf of Te Whānau Tima (Seymour) and Te Ahi Kā o Te Mateawa (CIV-2017-485-273)
BY	Chris Shenton on behalf of Te Rūnanga o Ngā Wairiki Ngāti Apa (CIV-2017-485-511)
BY	Muaūpoko represented by Muaūpoko Tribal Authority Incorporated (CIV-2017-485-261)
BY	Trustees of Te Ātiawa ki Whakarongotai Charitable Trust on behalf of Te Ātiawa ki Whakarongotai (CIV-2017-485-248)
BY	Tiratu Williams and Patricia Grace for the owners of Hongoeka Blocks (CIV-2017-485-258)
BY	Te Ātiawa ki te Ūpoko o te Ika ā Māui Pōtiki Trust (CIV-2017-485-260)
BY	Tupoki Takarangi Trust (1999) on behalf of owners of Parangarahu 2B1 and 2C and their descendants (CIV-2017-485-211)

INTERESTED PARTIES	Te Rūnanga o Toa Rangatira Incorporated on behalf of the iwi of Ngāti Toa Rangatira (Crown engagement) MAC-01-12-021
	Attorney General
	Manawatū-Whanganui Regional Council, Greater Wellington Regional Council and Kāpiti Coast District Council
	Porirua City Council
	Edward Tautahi Penetito, and Donald Koroheke Tait of Ngāti Kauwhata Crown engagement MAC-01-11-008

Christopher Henare Tahana, Edward (Fred) Clark, Hayden Tūroa, and Novena McGuckin on behalf of Te Patutokotoko (CIV-2017-485-254)
(Intervener)

Rangitāne o Manawatū Settlement Trust (applied)

Seafood Industry

Horowhenua 11 Part Reservation Trust

New Zealand Transport Agency Waka Kotahi

[1] This is an application by Muaūpoko, represented by Muaūpoko Tribal Authority Incorporated, for leave to appeal the dismissal of an application to amend its recognition orders. The application is opposed by the following respondents:

(a) Ātiawa ki Whakarongotai Charitable Trust (CIV-2017-485-248);

(b) Rachel Ann Selby on behalf of Ngāti Raukawa ki te Tonga (CIV-2017-485-229);

(c) Te Rūnanga o Toa Rangatira;

(d) Tiratu Williams and Patricia Grace on behalf of the Owners of the Hongoeka Blocks (CIV-2017-485-258); and

(e) Tupoki Takarangi Trust on behalf of owners of Parangarahi 2B1 and Parangarahu 2C Land Blocks (CIV-2017-485-211)

[2] The decision for which leave to appeal is sought declined leave for Muaūpoko to extend its Coastal Marine Title claims (CMT) under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) to cover part of the Stage 1(b) area, over which it had made no CMT claims, in addition to Stage 1(a).[1] Muaūpoko seeks to extend its application for CMT beyond that sought in the original application to include the area north of the

[1] *Re Muaūpoko Tribal Authority* [2024] NZHC 536 [the dismissal decision].

Manawatū River to the Rangitīkei River and from the point at the north end of the Kāpiti Island south to Whareroa.[2]

[3] The Stage 1(a) hearings were due to commence on 6 May for eight weeks, with a further two weeks in October/November 2024 and another two weeks in July 2025. Stage 1(b) applicants are in negotiations with the Crown and the application has not been set down for hearing.

[4] The original applications were filed in March 2017 in order to meet a statutory cut-off date for the filing of recognition applications. The application for amendment to Muaūpoko's application was advanced on the basis that amendments are allowed under s 107 of the Act, and the Court has flexibility in that if it considers a Protected Customary Right (PCR) application is more appropriately decided as an application for CMT then the Judge may treat it as such. The applicant advanced three main arguments in support of the application:

(a) the amendment is not significant so does not change the essential nature of the 2017 original application given the expansive wording of the 2017 application;

(b) interpretation of the legislation; and

(c) changes are necessary given the original application was filed under time pressure due to the statutory deadline in 2017, and the law had been developed in a recent Court of Appeal decision indicating joint CMT was now an option.

[5] Mr Bennion also opposed a strike out application argued at the same time. He indicated that he had made the amendment application in order to put all parties on notice and so prevent claims of prejudice which may have arisen had he waited until the end of the hearing to make the amendment application.[3]

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2 At [9].
3 The dismissal decision, above n 1, at [15].

[6] In summary, the reasons for the dismissal of the application were that the proposed amendment was significant and changed the essential nature of the original application. That approach has been endorsed by the Court of Appeal.[4] The outcome was summarised in the conclusion as follows:[5]

> [51] I conclude that the application to amend before the Court introduces a CMT application which would be fresh, different and change the character of the application. The amendment sought would result in an application for substantially different rights over a much-expanded area with significantly different legal consequences than the original application had contemplated. This is a situation where the amendment sought at this time is "in substance a new application" and an amendment would be contrary to the interests of justice vis-à-vis other applicants and interested parties.

Legal principles

[7] In his submissions, Mr Bennion pointed to the principles set out in *Li v Chief Executive of the Ministry of Business, Innovation and Employment (No 2)*.[6] He noted that an application to appeal an interlocutory decision under s 56(3) of the Senior Courts Act 2016 is likely to be granted where:[7]

> (a) there is good reason to consider it before, or separately to, the substantive appeal; and (b) it is sufficiently meritorious in substance and relates to a sufficiently important issue as to outweigh the cost and delay of appeal.

[8] The respondents to the application adopted the criteria for leave to appeal against an interlocutory judgment under s 56(3) set out in *Finewood Upholstery Ltd v Vaughan*,[8] later confirmed by the Court of Appeal in *Greendrake v District Court of New Zealand*.[9] They noted that in *Finewood*, Fitzgerald J observed that:[10]

> [13] The requirement for leave to appeal should serve as a "filtering mechanism", to ensure that unmeritorious appeals of interlocutory orders, or appeals of interlocutory orders of no great significance to either the parties or more generally, do not unnecessarily delay the proceedings in which the orders were made.

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4 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 405, [2023] 3 NZLR 252 at [216] and [218].

5 The dismissal decision, above n 1 (footnotes omitted).

6 *Li v Chief Executive of the Ministry of Business, Innovation and Employment (No 2)* [2018] NZHC 1171, [2018] NZAR 1134 at [21].

7 At [22].

8 *Finewood Upholstery Ltd v Vaughan* [2017] NZHC 1679 at [13].

9 *Greendrake v District Court of New Zealand* [2020] NZCA 122 at [6].

10 *Finewood*, above n 8.

[9] The respondents also cited the more detailed considerations affirmed in *Greendrake*, which are not inconsistent with *Li*, as follows:[11]

(a) a high threshold exists;

(b) the applicant must identify an arguable error of law or fact;

(c) the alleged error should be of general or public importance warranting determination or otherwise of sufficient importance to the applicant to outweigh the lack of general or precedential value;

(d) the circumstances must warrant incurring further delay; and

(e) the ultimate question is whether the interests of justice are served by granting leave.

Applicant's position

[10] Mr Bennion accepted that the issue of delay should be given considerable weight in respect of this application. This is because the Stage 1(a) hearings were due to start on 6 May 2024 and were set down for eight weeks with a further two weeks of hearings in each October/November 2024 and July 2025. Due to funding issues, there is now a delay of one week to the initial commencement of the hearing. Te Arawhiti has indicated that it will fund the qualifying parties in relation to the May/June hearings but has made no commitments beyond that. The Court was advised that the commitment to fund the May/June hearings is dependent on that hearing being completed by the end of June.[12] A loss of the May/June hearing dates would also likely lead to the loss of the other hearing dates scheduled for this stage, as there would be insufficient time available to deal with the applications. Scheduling for matters under the Act which have not yet been allocated fixtures is now out to well into 2026.

[11] Muaūpoko submitted that there were arguable errors of fact and law, and the issue was of general or public importance warranting determination, or otherwise of sufficient importance to the applicant to outweigh the lack of general or precedential value.

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[11] *Greendrake*, above n 9, at [6], citing *Finewood,* above n 8, at [13].

[12] *Re Ngāti Tamarangi Hapū* HC Wellington CIV-2017-485-160, 24 April 2024 (Minute of Grice J) at [4] and [5].

[12] Mr Bennion in particular submitted that one of the reasons given for the dismissal of the amendment application had put the applicant in a difficult position in terms of its conduct of the hearing. He said that by accepting that prejudice to other parties was a reason to refuse the application to amend, the decision created a "conundrum" for Muaūpoko. This was because Muaūpoko intends to argue that in areas where it had sought PCR it now seeks shared or joint CMT, as it is entitled to do under s 107(1) of the Act. Mr Bennion submitted that according to the dismissal decision, the prejudice to other parties will only increase as the hearing proceeds because they were unable to prepare for that argument and, as one of the respondents had suggested, the notification process might need to be redone to allow for fair preparation. Mr Bennion further submitted that the Court is indicating that when it comes to consider whether to exercise its discretion under s 107(1) by finding that claimed PCR should really be joint or shared CMT after hearing all the evidence, it will also have to weigh up the alleged prejudice to parties that had been present since the commencement of the hearing and grown significantly throughout. In addition, Mr Bennion argued that not only might there be difficulties raised every time that Muaūpoko witnesses themselves speak about their interests being of a nature equivalent to shared or joint CMT, but such issues will also arise when Muaūpoko seeks to question witnesses for other applicant groups explicitly on matters relating to joint or shared CMT. It may also be necessary, Mr Bennion submitted, to seek to introduce further evidence at the hearing on the issue.

[13] Mr Bennion noted that the substantive application for Stage 1(b) had been adjourned pending direct negotiations with the Crown. He said those negotiations are placed in immediate jeopardy because the possibility of amendment has been ruled out, as the Crown may not entertain joint CMT in light of the dismissal decision. He accepted that even though those negotiations are immediately affected, since the timing of them is uncertain, they are not on their own a reason to have the appeal on this interlocutory decision heard immediately.

[14] Mr Bennion submitted that the grounds of appeal were capable of bona fide and serious argument, in particular those regarding how s 107 relates to the application for amendment. This had previously been the subject of a number of rulings in relation to claims under the Act, as set out in the dismissal decision. He noted that the Court

of Appeal in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* implied that the issue for consideration in relation to an amendment was that the entirety of the legal nature of the application might be changed, rather than considerations of delay and prejudice being central to any determination.

[15] In addition, he argued that serious legal questions arose from whether the initial Muaūpoko application might be construed as being sufficient to give notice of an application for shared or joint CMT. A further point for appeal was how the issue of prejudice was treated in the dismissal decision, since the application was determined before all the evidence had been filed and before the hearing had started. Mr Bennion submitted that the other parties had already filed evidence stating Muaūpoko had no CMT rights, and therefore they could not now be prejudiced by Muaūpoko asserting a right that had already been the subject of evidence – that is, the denial by the other parties of its rights. He also noted that there was an issue as to whether the Court should have approached the issue by stating that it was too early to consider the evidence before the hearing began, rather than taking the material which Muaūpoko pointed to as accepted fact.

[16] Mr Bennion said that these issues to be raised on appeal were of sufficient significance to the parties, as they dealt with customary rights which were hundreds of years old and would affect generations to come. In addition, the dismissal decision would have precedential significance in all applications under the Act and Mr Bennion was aware of at least one, and possibly two, applications in which the dismissal decision was relied upon by respondents. The reach of the decision therefore indicated it was a question of law or principle of sufficient importance to outweigh the cost and delay of appeal.

Respondents' position

[17] The respondents oppose the application for leave. They say there is no appealable error, and if there were, it is not of sufficient significance to warrant the delay to these applications which would be caused by appeal.

[18] In particular, the respondents submit that pursuant to s 56(6) of the Senior Courts Act 2016, should leave to appeal be declined under subs (3) or (5) in

respect of an order or a decision of the High Court made on an interlocutory application, any point that the applicant seeks to raise may nonetheless form part of any appeal against the substantive High Court decision.

[19] The Attorney General abides the decision but made submissions pointing out that the applicant's intentions do not, by themselves, indicate an arguable error of law of such importance that the interests of justice require leave be granted. Mr Ward noted that the applicant is free to challenge other applicants' claims to exclusive use and occupation.

[20] Mr Ward noted that the Court expressly did not make a s 107 determination and has not fettered its ability to do so when deciding on applications. Mr Ward submitted that the judgment correctly identified s 107 as providing judicial discretion to consider whether the PCR application should be decided as a CMT application, once the evidence has been tested. He said that is consistent with the scheme of the Act, particularly the statutory deadline in s 100.

Analysis

[21] On the ground of appeal which was the primary focus of Mr Bennion's oral submissions, namely the findings as to prejudice being of sufficient importance to outweigh considerations of delay, I agree with the submissions for the Crown. The applicant is free to lead evidence in support of its PCR application and then ask the Court to treat that application as a CMT application under s 107. If evidence is introduced or questions put by Muaūpoko that are not relevant to any application before the Court or do not otherwise assist the Court, that is a matter to be addressed in the hearing.

[22] In relation to the further grounds of appeal regarding the ambit of the original application wording as incorporating a joint or shared CMT application, this would only be of relevance to this particular application, as it relies on the wording of Muaūpoko's 2017 application in the area known as Group N. I acknowledge the importance of the recognition applications to Muaūpoko, but the dismissal decision does not preclude consideration under s 107 at a later stage of the proceeding. In terms of the reliance on the prejudice findings as a ground to dismiss the application, this

was only one reason. My conclusion was that the amendment was "in substance a new application."

[23] In relation to the precedential value of the dismissal judgment, I accept that any interlocutory judgments under relatively new legislation will have more significant precedential value because there will initially be few of them. However, there have been a number of rulings on applications to amend original applications made under the Act, and the one Court of Appeal judgment dealing with applications under the Act also discussed s 107 and amendment applications.

[24] The applicant indicated that a fast track hearing would be sought in the Court of Appeal, however in the circumstances no timeframe for dealing with an appeal was able to be provided. Given the fact that this hearing is now due to start in two weeks' time, it seems unlikely that even a fast track hearing would see a decision being delivered before the start of the hearing. The uncertainty of funding has now become an issue, which makes it more important for many of the parties that there is no disruption to the May/June hearing timetable. Difficulties with funding have already compromised some of the parties who are reliant on it for research and conducting the hearing. There would be inevitable prejudice if they lost the commitment to funding at least for the May/June part of the hearing due to delays in commencing the hearing. In addition, if the dates in May/June are lost it appears likely the hearing would not commence until sometime in 2026 at the earliest.

[25] In the circumstances I do not consider that the interests of justice support leave being granted in this case. The granting of leave will inevitably lead to a delay in the start date of a hearing on applications which have been filed since 2017 for a substantial hearing set down since at least mid-2022 and for which the preparations by all parties are all but completed. The delay may have an effect on funding and lead to the hearing being delayed for another two years. The applicant has the opportunity to pursue the points of appeal following the issue of the substantive judgment on the applications. In those circumstances the questions of law or principle to be raised by the applicant on appeal are not of sufficient importance to outweigh the cost and delay of appeal.

[26] The application for leave to appeal is dismissed. Any party seeking costs should file a memorandum within five days of the date of this decision. Any response should be filed by memorandum within a further five days and any reply within a further three days.

Grice J

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