

MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011

AUCKLAND CASE MANAGEMENT CONFERENCE

22 JULY 2020

Judicial Officer:

The Honourable Justice Churchman

Counsel:

Bryce Lyall for CIV-2017-404-574 and CIV-2017-485-378

Tamsin Gorman for CIV-2017-404-582

Rachael Jones for CIV-2017-404-520

Interested Party:

Geoffrey Melvin for Attorney-General

HEARING COMMENCES ON WEDNESDAY 22 JULY 2020 AT 10:00 AM

JUSTICE CHURCHMAN:

Tēnā koutou, tēnā koutou, tēnā koutou katoa. Nau mai haere mai ki Te Kooti Matua o Aotearoa.

Good morning and welcome to this morning's CMC. As you'll see numbers are well down on last year and the reason for that is influenced to some extent by COVID.

The Court has encouraged the filing of full memoranda. It has offered the opportunity of attendance by AVL. We were possibly expecting one counsel to attend by AVL so if the television screen suddenly flashes on, we will know Ms Mason is there.

I acknowledge those parties who have filed helpful memoranda and whose appearance I've excused.

I'd like to start by just raising for the attention of those counsel who have not been involved in the previous CMCs, a couple of developments since last. I hope you're all aware of the draft practice note that is on the website for these cases. If you aren't, if you could have a look at it. The opportunity to make submissions is still there. That draft practice note arose from issues that the Court was advised of last year and it's the product of the good work by Mr Melvin whose here and the other members of the mapping group who were three counsel, Ms Sykes, Mr Bennion and Mr Hirschfeld. So, the Court acknowledges their good work.

The purpose of that draft practice note is to ensure consistency, relevance as between the various maps so that parties can look at the map and see how it interacts with the other maps that have been filed. It's not retrospective or not intended to be retrospective so you don't have to amend your maps, but it is likely to be of some assistance to the Court and to the other parties if the maps are amended to the extent they're consistent with what is set out in the practice note.

Most counsel will be aware of the release of the Stage 1 Report of the Tribunal in relation to funding. There are comments in that report that are of concern to the Court. Mr Melvin, for the Crown, and Mr Agnew from Te Arawhiti who is present in the back of the Court have heard those comments a number of times before but if

your clients are having funding difficulties I'd encourage you to speak directly to Mr Agnew at the end of this CMC, or to correspond with Mr Melvin. They have on previous occasions been very helpful in resolving some of the more significant issues that have been raised.

To bring counsel up to date with the priority hearings, they are proceeding. The Whakatōhea application will start in Rotorua on 17 August. It will run for eight weeks. The Clarkson application is to be heard in Wellington. It's likely to run for a much lesser period but it will be disposed of. The Ngāti Pahauwera priority application for seven weeks in Napier starting, I think, on 9 February 2021. The Ngā Potiki application will also be heard. Justice Powell has been assigned to that.

So, the hearing of the priority applications is well underway. What that means for the other applicants is that, it is now possible for the Court to contemplate setting down those applications where the applicants are ready. The Court's preference is to set down not just a single application where there are overlapping applicants as there are in all cases, but to set down what could be described as large natural groupings of applicants.

As a result of some of the CMCs, the Court has been advised of parties who are ready to proceed, and of groupings of neighbouring applicants or cross-applicants who are also in a position to have a combined hearing. So, if your clients are in that position, I'd encourage you to talk to counsel for the overlapping claimants and if it's a situation where you think you can be ready for a hearing, it won't be earlier than the middle of next year given the fixtures that we're already committed to, but if you are in that position, file a memorandum, preferably a joint memorandum of counsel, and it may well be that the Court is able to set matters down from at least the middle of next year.

There's also the development in relation to the Crown's draft Direct Engagement Strategy. I'm sure all counsel are familiar with that. Given the length of time that that strategy is proposed to spread over, many of the matters in Te Tai Tokerau, are not scheduled for engagement in the decade 2035 to 2045.

A number of applicants who had preferred that as their course as opposed to litigation and that really issued proceedings as a placeholder, it looks like they will now vigorously, or more vigorously, pursue their litigation.

So, again, I don't know if any of your clients are in that situation, but it's something that you need to discuss with them given what looks like a protracted timetable in respect to some parts of the country for direct engagement.

So, with those preliminary comments, I'd ask Mr Registrar to call the matters in respect of those counsel who are here today.

REGISTRAR:

CIV-2017-404-574 and CIV-2017-485-378 – Ngāti Rehua-Ngatiwai ki Aotea; and Ngāti Maraeriki and its hapū.

LYALL:

Kia ora, good morning Sir. Lyall appearing for those applicants in lieu of Ms Thornton today.

JUSTICE CHURCHMAN:

Kia ora ano Mr Lyall.

REGISTRAR:

CIV-2017-404-582 – Te Whānau-a-Haunui.

GORMAN:

Tēnā koe, Tamsin Gorman appearing for Te Whānau-a-Haunui in lieu of my supervising partner Helen Andrews.

JUSTICE CHURCHMAN:

Tēnā koe Ms Gorman.

REGISTRAR:

CIV-2017-404-520 – Ngāti Whatua Orakei.

JONES:

Tēnā koe e Te Kooti, e Te Kaiwhakawā, no Ngāti Kahungunu, Ngāti Rakaipaaka ahau. Ko Rachael Jones tōku ingoa appearing for the Ngāti Whātua Ōrākei Trust.

JUSTICE CHURCHMAN:

Tēnā koe Ms Jones.

REGISTRAR:

And for the Attorney-General.

MELVIN:

Tēnā koe Your Honour, I appear for the Attorney-General.

JUSTICE CHURCHMAN:

Tēnā koe ano Mr Melvin.

Right, we could proceed through in order Mr Registrar.

REGISTRAR:

CIV-2017-404-574 and 378 – Ngāti Rehua-Ngatiwai ki Aotea and Ngāti Maraeriki and its hapū.

LYALL:

Good morning Sir. Memoranda were filed for both of these applications and both been brought by the same named applicant, they're essentially in the same position. So, I might address them as one, although they will be pursued for slightly different areas and separately.

In the case of Ngāti Rehua-Ngatiwai ki Aotea, an agreement has been reached with an overlapping applicant. Evidence will be shared and co-ordination is occurring, and the goal is a joint application at the end of that process.

JUSTICE CHURCHMAN:

How many overlapping applicants are there Mr Lyall?

LYALL:

Sir, I'm not in a position to confirm that this morning.

JUSTICE CHURCHMAN:

Are you even in a position to say whether there is a large number or just a few?

LYALL:

I would anticipate there's a relatively large number given the location of Aotea. I know groups from Marutūahu and then some of the groups are in Whangarei and then the groups that are established on Aotea itself have likely brought applications. I'm afraid Ms Thornton has carriage of this file and on my feet I'm not able to provide that today.

JUSTICE CHURCHMAN:

I was expecting to see her this morning. All right, thank you.

LYALL:

There is existing evidence for this application that's been developed through historical settlement negotiations and Waitangi Tribunal enquiries and that's being re-purposed, if you would, for this. I think that will provide a useful shortcut for the applicants. But having said that a 12-month adjournment is sought to allow that preparation to be completed.

On the issue of funding, I note in the memorandum it states that no response has been received. I'd spoken to Mr Melvin this morning and while we still have reservations about the speed of the funding, it does appear that some progress can be made in the short term. So, I have a tentative optimism there, and will continue to work with Te Arawhiti and officials on that.

JUSTICE CHURCHMAN:

Yes, that was the aspect of your memorandum that concerned me. When you say an application was made but no response had been received, what period of time are you talking about?

LYALL:

I'm unaware of the date that the application was made. Mr Melvin tells me that an upper funding limit has been set but I'm unaware that that's been communicated with our office. So, that's something I need to follow up with Te Arawhiti.

JUSTICE CHURCHMAN:

Well, I'll hear from Mr Melvin on that no doubt in due course.

LYALL:

Kia ora Sir. On the Ngāti Maraeriki application, much the same position – evidence is being prepared and a 12-month adjournment is sought in that case, and having, again, spoken with Mr Melvin, the same position as to funding.

JUSTICE CHURCHMAN:

Are you sufficiently informed to be able to indicate whether in 12 months' time it's likely you will be looking for fixture for both of these matters, or do you anticipate it may even be longer than that?

LYALL:

No, I'm instructed relatively recently that we will be looking to have a hearing set down in that 12 months' time period. But the major factor there would be receipt of funding to allow that preparation to occur.

JUSTICE CHURCHMAN:

Yes. Why I ask these questions and why I wanted to know the number of overlapping applicants, is because it would seem to me that Aotea might be an area that could be dealt with on a discrete basis, if all the overlapping claimants were in favour of that, or even if some of them weren't. Given that it's a defined geographic area, and I'm aware that many of the other applicants will have claims in other parts of the north, but, it does seem to me this is a candidate for an early hearing if the parties talk to one another and agree on that.

LYALL:

Thank you for that indication and that does seem to be a lot of sense in that approach, so that's something I'll take back to our clients Sir.

Unless you have any further questions, those are my submissions today.

JUSTICE CHURCHMAN:

Kia ora, thank you Mr Lyall.

REGISTRAR:

CIV-2017-404-582 – Te Whānau-a-Haunui.

GORMAN:

Good morning, Your Honour. Te Whanau-a-Haunui, I appear today, since the last CMC, they've been seeking Crown engagement with Te Arawhiti. That hasn't progressed. So, since the late last CMC, Te Whanau-a-Haunui has been seeking to engage with Te Arawhiti in respect of its application. It hasn't been able to progress matters with Te Arawhiti. This is as filed in memorandum on the 8th of June which sets out the background to that. I appear today to seek that Te Whānau-a-Haunui's application be placed on hold for 12 months to allow those discussions with Te Arawhiti to progress. That a further CMC be scheduled after 12 months and that we provide a further progress report ahead of that CMC.

JUSTICE CHURCHMAN:

Yes, as I understand it, Te Whānau-a-Haunui's application in terms of direct engagement is not scheduled to take place in accordance with the Crown's draft engagement policy until after 2035.

GORMAN:

Yes, that's correct, so Te Whānau-a-Haunui will be looking to hopefully bring that forward, so we need a bit more time to discuss that with Te Arawhiti.

JUSTICE CHURCHMAN:

Yes, I think as with every other applicant in that period. Good luck with that. All right, so essentially as far as this is concerned, you basically want a 12-month adjournment?

GORMAN:

Yes please, yes.

JUSTICE CHURCHMAN:

Are there any specific issues with funding that you want to draw to the Court's attention?

GORMAN:

No, there's no issues with funding Your Honour, well not that's been raised with me anyway, not at this point in time.

JUSTICE CHURCHMAN:

I am relieved to hear that, thank you, Ms Gorman.

REGISTRAR:

For CIV-2017-404-520, Ngāti Whātua Ōrākei.

JONES:

Tēnā anō koe e te Kaiwhakawā. I sought an indulgently late adjournment yesterday which was granted provisionally on my way up to Court this morning with Your Honour seeking some more information about the points in an earlier memorandum, so I am here to provide that information myself on behalf of the Ngāti Whātua Ōrākei Trust.

The first was the steps taken in the last 12 months. Like my friends here, our client's preference is Crown engagement with the Crown Engagement Strategy presenting I guess a crossroads for the trust. It has some hesitancy in pursuing the application through the Courts instead of Crown engagement. Obvious considerations there to take into account, and our earlier memorandum Your Honour did not seek a 12-month adjournment, but we would be looking to do that today.

The evidence, like my friend Mr Lyall, our clients have quite a lot of existing evidence that would of course be relevant to the Takutai Moana test, and that evidence has significant overlaps with the litigation I refer to in our 8 June memorandum that I indicated would have some effect on Ngāti Whātua Ōrākei's approach to in this jurisdiction, and I'm happy to explain that some more Your Honour.

JUSTICE CHURCHMAN:

Yes, well it was that cryptic reference to the litigation because I have no knowledge of what it is all about and you say it may well have an effect, so I am very interested on what effect it might have.

JONES:

Indeed Your Honour. So, that litigation you will see from the CIV number has its origins in 2015. Ngāti Whātua Ōrākei is seeking declarations in respect of Crown decision-making where it comes to the Office of Treaty Settlement's overlapping claims policy. Among those declarations are, and I'm paraphrasing, the Crown's obligation to respect, understand and accommodate the tikanga of Ngāti Whātua Ōrākei when it makes Treaty settlement decisions in the rohe and in the area that Ngāti Whātua Ōrākei claims as its traditional rohe.

And of course, that proceeding is not only defended by the Attorney-General, but by a number of applicants who, and I am hesitant to overuse the term "overlapping claims", but there are overlapping claimants in this jurisdiction who are also present in the declaratory proceeding and those are Ngāti Te Ata as a defendant, as the third defendant in the judicial review proceeding and the interested parties who are also present in the Takutai Moana space are Te Rūnanga o Ngāti Whātua, Ngāi Tai ki Tāmaki and to a lesser extent Waikato-Tainui and Ngāi Te Rangi, Sir.

So, I hope that is of assistance to Your Honour. Essentially, with the test under the MACA Act being a tikanga connection held since 1840, and again I paraphrase, that is the kind of evidence and the kind of factual findings that Ngāti Whātua Ōrākei is seeking from the High Court.

JUSTICE CHURCHMAN ADDRESSES MS JONES – BACKGROUND NOISE

JUSTICE CHURCHMAN:

If you just repeat that last submission, thank you.

JONES:

Your Honour, I was simply referring to the fact that the findings that my client is seeking in its judicial review proceeding are findings that it has, and has had, a tikanga connection with its rohe since 1840 at least, which of course is the test under the Takutai Moana Act, and so, is not obviously wanting to take any steps to prejudice any findings or the progress of that litigation in its discussion with other applicants in this space Sir.

JUSTICE CHURCHMAN:

Although to some extent, they are, while related, they are parallel proceedings because it seems to me you are seeking directions or declarations in relation to the Crown in its Treaty settlement role, whereas this Court here is, it is the same similar subject matter. It is interpreting a statute and has to apply the provisions of that statute and will not be bound by any declaration you get against the Crown.

JONES:

Indeed Sir, and that is where the difficulty arises with my client's preference to engage with Te Arawhiti, because we would say, and I am guessing here because I don't know what the final strategy is for overlapping claims under Te Arawhiti's policy, but of course, if my client were to get positive or were to succeed in its judicial review claim about a Crown policy to do with redress, as it were, under its Treaty settlement policy, my client would be heavily reliant on those findings and of course, findings about the Crown's obligations in Te Arawhiti's approach to Takutai Moana redress or whatever will come out of that engagement process.

JUSTICE CHURCHMAN:

How close are you to a fixture in that litigation?

JONES:

We have a fixture. We have a trial in February 2021 that is set down to begin I believe on the 9th of February for 10 weeks and all parties are marching towards that

hearing date Sir. So, obviously that will be determined next year and so, in the sense that these proceedings are being progressed, then we would be in a position to, I hope, to be in a position to make a call on readiness for this hearing if we had to at an adjournment – at a CMC this time next year.

JUSTICE CHURCHMAN:

Yes, there is no compulsion on counsel to do that. I am simply raising for the benefit of your client. The fact there are now realistic opportunities to have matters set down in this Court should they want to do that.

JONES:

Indeed Sir, and that is a very helpful indication.

JUSTICE CHURCHMAN:

All right.

JONES:

Unless Your Honour has any further questions?

JUSTICE CHURCHMAN:

No, thank you, Ms Jones.

REGISTRAR:

And for the Attorney-General.

MELVIN:

May it please Your Honour, I can address the two matters that my friend Mr Lyall raised. I have instructions in respect of the funding issues raised in both memoranda in relation to Mr Beazley's application of behalf of Ngāti Rēhua that's CIV ending 574. I am instructed that funding was approved on the 24th of February this year, and that Te Arawhiti have received the first reimbursement request and that is being processed at the moment.

JUSTICE CHURCHMAN:

When was that received Mr Melvin, do you know?

MELVIN:

I don't know that date Sir, no. And in respect of the other matter on behalf of Ngāti Maraeriki, that's CIV ending 378, I'm instructed that funding was approved on the 6th of July this year and at present there are no reimbursement requests that have been made.

The only other matters I would wish to address Sir is the general encouragement to counsel to participate in the consultation processes that Te Arawhiti is conducting on both its drafting engagement strategy and its review of the Crown's funding scheme for applications under the Act.

Unless Your Honour has any questions, those are the matters I wish to address this morning.

JUSTICE CHURCHMAN:

No, thank you, I have nothing further to what I have said to you in the previous CMCs. Thank you, Mr Melvin.

MELVIN:

As Your Honour pleases.

JUSTICE CHURCHMAN:

Well, thank you counsel for your submissions and your help. It is important that the Court remain with oversight of all of these cases to make sure that they do not get lost and parked up and not proceed. So, there will be another set of CMCs about this time next year.

Nō reira tēnā koutou, tēnā koutou, tēnā koutou katoa.

HEARING CONCLUDES: 10.32 PM