CASE MANAGEMENT CONFERENCE
AUCKLAND
27 JUNE 2018 at 10.00 am

COURT:

Ata mārie, ko Justice Collins ahau.

The lawyers who are present have heard what I am about to say on several occasions. Can I say primarily for the benefit of those who are seated at the back of the Court that I am very grateful for you coming to this Court today and I am grateful to those who have travelled some distance to be here.

This is the final case management conference in the first round of case management conferences concerning the 202 claims that have been filed under the Takutai Moana Act. Because of the logistical challenges of trying to manage 202 cases, I have confined the first round of case management conferences to the parties. I am of course aware that there are a number of interested parties and do I propose to engage with them after the first round of case management conferences has been completed and after I have issued a minute concerning the matters that have been discussed during the 10 first case management conferences.

The purpose of a case management conference is to assist the parties in advancing their proceeding to a substantive hearing. Sometimes it may be possible in a case management conference to resolve a dispute, but in reality most of a case management conference is taken up with just trying to advance matters forward so that the parties can have their substantive issues heard and ultimately determined.

When Parliament passed the Act in 2011, it prescribed for priority cases and there happened to be eight of them, which were filed under the previous statute. Although priority has to been given to those eight particular cases, it is important to emphasise that there is no reason why other cases cannot also advance and be heard some possibly even sooner than priority cases. One of the challenges is to identify those cases that overlap with priority cases and other cases that may be able to be advanced and that is one of the exercises that I am trying to undertake at the moment as I travel the country engaging with counsel and parties in this first round of

case management conferences. Trying to identify the overlapping claims is not an easy task but it is one that I am going to do to the best of my ability.

There are a group of cases where the applicants have commenced negotiations directly with the Crown and clearly, I want to encourage those who are able to resolve their claim through negotiation to do so. I appreciate that that's not going to be possible for quite a number of applicants but if there is an opportunity or a roadway forward through negotiation then I encourage parties to take it.

So having given you that overview I now invite the lawyers who are present to announce their presence and to identify who they are acting for. I think you have probably all got the same spreadsheet that I'm working off.

Mr Ward and Ms Gillies for the Attorney-General

MR WARD:

Yes sir.

COURT:

Thank you very much.

Ms Sykes

MS SYKES:

Yes sir. May it please the Court I'm assisted this morning by my learned junior Ms Bartlett Kameta and we are here today for application CIV-2017-485-276, which is an application by Mr Arapeta Hamilton for and on behalf of Ngāti Rongo o Mahurangi and Ngā Uri O Pōmare.

COURT:

Thank you very much Ms Sykes.

Mr Shankar

MR SHANKAR:

Yes sir, good morning. I represent Te Rūnanga o Ngāti Whātua with respect to CIV-2017-404-563.

COURT:

Thank you very much Mr Shankar.

Mr Hirschfeld may be tied up in another case downstairs at the moment but is coming up I understand.

Mr Erskine, good morning

MR ERSKINE:

Good morning sir. This morning I appear for one applicant, the CIV reference number last three digits is 518 and this is for Mrs Cotter-Williams and another on behalf of Ngāti Taimanawaiti.

COURT:

Thank you very much.

Ms Walker, good morning

MS WALKER:

Tēnā koe, I appear last three digits of 580 and on behalf of the Freda Pene Reweti Whānau Trust on behalf of Ngāti Rehua Ngātiwai ki Aotea.

COURT:

Thank you very much Ms Walker.

Ms Takitimu

MS TAKITIMU:

Tēnā koe, I appear your Honour for CIV-2017-404-556 a claim by John Henry Tamihere on behalf of Ngāti Porou ki Hauraki.

COURT:

Thank you very much Ms Takitimu.

Mr Sharrock? I noted Mr Sharrock was absent when we were in Whangārei on Monday. Has anyone heard from Mr Sharrock?

Ms Mason, good morning

MS MASON:

Sir Mr Sharrock has asked that I act on his behalf for this particular matter.

COURT:

So you're appearing in relation to all of the claims commencing 556 on the Schedule through to 567.

MS MASON:

Yes sir and just on behalf of myself I'm also acting on behalf of Mrs Collier's claim, which is 485-398 and then Mr Elvis Reti's claim, which is 485-515.

COURT:

Thank you very much.

MS MASON:

Thank you sir.

COURT:

Thank you Ms Mason.

Mr Pou? No appearance from Mr Pou.

Mr Kahukiwa, good morning

MR KAHUKIWA:

Mōrena Your Honour, tēnā koutou e ngā mana whenua o Tāmakimakaurau, otirā ki ngā hapū katoa, tēnā koutou, tēnā koutou, a tēnā koutou katoa. Your Honour, Kahukiwa for Ngāti Te Ata, 569 last three numbers of our application and Mr Roimata Minhinnick is in attendance today, who is the applicant on behalf of Ngāti Te Ata.

COURT:

Thank you very much.

MR KAHUKIWA:

Kia ora.

COURT:

Ms Thornton, good morning

MS THORNTON:

Tēnā koe sir, Linda Thornton appearing for two claims this morning sir. One is 2017-404-574, Mr Michael Beazley on behalf of Ngāti Rehua Ngātiwai ki Aotea and their hapū, Urewhakapiko Ngāti Kahuerueru and Te Uri Papa o Aotea and Hauturu. The other claim is 485-378 also Mr Beazley on behalf of Ngāti Maraeariki and its hapū Ngāti Raupō, Ngāti Kahu and Ngāti Poataniwha and Ngāti Rongo and its hapū Ngāti Ka and Ngāti Waitaua of Mahurangi.

Thank you sir.

COURT:

Thank you very much.

Ms Jones

MR VASUDEVAN:

Tēnā koe

My name is Aditya Vasudevan

COURT:

Good morning

MR VASUDEVAN:

I'm appearing in place of Ms Jones for Ngāti Whātua Ōrākei Trust, the last digits CIV number 520.

COURT:

Thank you very much.

Mr Ketu

MR KETU:

Tēnā koe your Honour

I appear for CIV-404-564, which is an application by the Ngāi Tai Ki Tāmaki Trust on behalf of Ngāi Tai Ki Tāmaki

COURT:

Thank you very much Mr Ketu.

Mr Sinclair

MR SINCLAIR:

Morning sir, tēnā koe

Sir, as you can see my learned friend has just turned up, Mr Hirschfeld.

MR HIRSCHFELD:

Apologies sir.

COURT:

No need to apologise I understand you have been detained in another court.

MR SINCLAIR:

Sir, I'm appearing for two applications today. One is on behalf of Mr Tom Castle, counsel. He's asked me to appear sir as he has other court fixtures today. The CIV number ends with the three digits 309 and that application sir is on behalf of Ngāti Mutunga o Wharekauri Iwi, Hapū, Whānau. The second application that I'm appearing for sir ends with CIV number 524 and that's made on behalf Gilbert Kiharoa Manihera Parker on behalf of Mahurangi.

COURT:

And Mr Hirschfeld, do you appear on 528 for Ngāti Hako

MR HIRSCHFELD:

Your Honour yes for Ngāti Hako sir and 264 for Mr Larry Delamere and 278 again for Mr Larry Delamere.

COURT:

Thank you very much.

Ms Andrews, good morning

MS ANDREWS:

Tēnā koe sir

I appear his morning on behalf of Te Whānau-ā-Haunui, their application number ends in 582.

COURT:

Thank you very much.

Now are there any other parties or entities present who have not been identified through this call through.

Ms Sykes, can I invite you to start the proceedings

MS SYKES:

Sir I appear in a little different capacity. My applicant is only making an application for customary rights as opposed to customary title so I just want to emphasise some different matters than I have in other appearances. There are 21 applications that we have identified that overlap and we provided that information. The Crown again is a little bit different in what they've identified. They've identified, the Attorney-General, 23 applications so to that extent we differ. They are not the two applications filed by my friend for the New Zealand Māori Council. They are again two different so again I think it's a matter of interpretation as to what's an overlapping interest and we may need a judicial conference to finalise those matters to see whether in fact they are truly overlapping. But in this particular context the questions of the interested parties are enormous. I think because of the location to the largest city in our country there is an enormous interest in the kinds of applications that are being made. So I signal early that I think we will need quite a different approach for this region than others because of the nature of the interested party objections to some of the applications that have been made.

In that respect, I move to the second point which I clarified earlier, the resourcing issues around interested parties. We have no assistance for that. Yet in preparing for today's attendance it is that which has absorbed much of the applicant's time is trying to work out how those applications are going to impact, those cross-party applications by third parties the progress of his claims and also the ability of him to assert those claims and just by way of information there is a suggestion for the development of a gas mineral extraction project in the vicinity of those areas he claims customary rights. If that which is going parallel to this in a resource management process, if that it is to be granted while his interests are still significantly delayed, that may extinguish some of his rights which would create some difficulties. I'm not too sure if you've encountered this elsewhere but I imagine that more and more if there is to be delays in the processing of applications beyond the eight priority ones, this will assume more and more complexity in this process. So in that regard as part of the funding issues there is no funding for resource management applications but by virtue of the Act all applications for resource consent matters are being served on my applicant and they are significant in number, nature and extent. And they are actually causing extreme stress for my group so we wish to

signal to the Crown and to the Court that there needs to be some recognition of this in the prioritisation of the hearing of claims. They're just drowning in the paper sir can I just be quite frank and we are not funded to do that and it's going to be a complex matter for our claimants here.

The third issue after hearing my friend Mr Kahukiwa in Whangārei yesterday, I am very much in support of here more than anywhere co-ordinating and lead counsel. I think they're different roles sir. I think we need lead counsel. I would say I'm not the lead counsel here. I look to my friends with Ngāti Whatua and other groups because they have significant claims to title as opposed to rights so I think there needs to be a recognition that in each of the areas claimed that there should be lead counsel, they should be leading and identifying the pace of matters and there should be co-ordinating counsel in addition to that to ensure those like my claimant or applicant are not forgotten. So I would be seeking a little variation to the times of I thought robust submissions that were made by my friend Mr Kahukiwa in Whangārei in that regard. But I believe they are important matters.

The final matter sir is the question of mapping. I got an email this morning from my friend from Kensington Swan, Ms Piripi. She's not here today. I understand there's someone here in her stead. But Mr Apiti says he could take on the whole of New Zealand so I'm very happy to receive that email this morning and he has sent his –

COURT:

How old is he?

MS SYKES:

He's young. He said he has a group that could assist him in this regard. He's been utilised by the Waitangi Tribunal and in Environmental Court litigation I've been involved in significantly and he says that he would cope particularly if your Honour was to identify a prioritised regime for which mapping would occur first. He feels he could cope with that so those are my instructions to advance the mapping but for the rest of my friends who haven't been aware, I've been making a submission that instead of all of us commissioning a mapper we should have one set of maps paid for by the Crown but with us inputting into that expert our particular co-ordinates and traditional evidence so that we have map books prepared for each of identified regions that can be used as a common base from which to cross-examine or to raise issues of overlap or consent orders if that can be achieved. So I see the mapping as being that for that purpose.

I was also enamoured in that regard by the submission by Ms Piripi that was made for judicial conference intervention for that after the mapping so that we could look at the Australian experience. I was involved in some of those matters in Australia sir. I agree that they were able to come to a settlement at a judicial conference quite often a little bit departing from the normal rules of judicial conferences but getting consent orders in place and identifying where conflicts occurred so that those were fast tracked to a more litigious approach so I concur with her approach that the Australian example is something that could help us. Of course there they were looking only at native title. We have the further complexity here of customary rights.

So sir unless there is any other questions from yourself, it's been a pleasure seeing you the last couple of weeks and we might see you in October in Rotorua sir.

COURT:

Thank you very much Ms Sykes.

Mr Shankar

MR SHANKAR:

Firstly, I would just like to support my learned friend Ms Sykes with respect to her submission regarding mapping. We would feel that that would be quite a useful exercise to go through. With respect to our particular application or the application on behalf of Te Rūnanga o Ngāti Whatua, we have identified that we do not overlap with any of the urgent or priority hearings and we were happy with the lists that has been provided to the Court on that basis. We do note that there is a large number of other applications which overlap with our application which we know would have been the case within a large area claimed. Given particular priorities of our clients at present we do not think that there's any particular urgency in proceeding with our application. However, we do know that our clients would like to reserve their rights as if there was priority or urgency given to any of the other applications which do overlap with their particular area claimed then they would be interested in participating. Our clients are willing to talk to other applicants that fall within the rohe to identify whether there is any possibility of either reducing or consolidating particular applications in order to expedite and to reduce Court time and processes and really those were my submissions unless you have any questions?

COURT:

No, thank you very much Mr Shankar.

Mr Hirschfeld, did you want to address me now?

MR HIRSCHFELD

I've previously addressed your Honour on the map and the more conferences we have sir the greater the ground smell as it were for that proposition to be looked at seriously. Again sir, I endorse that and particularly so in the case of Mr Apiti.

COURT:

Thank you very much.

Mr Erskine.

MR ERSKINE:

Yes sir, there's three matters which I'd like to touch on briefly. The first is in respect of the proposal by Mr Kahukiwa in respect of co-ordinating counsel and Ms Sykes in respect of lead counsel and while attractive on its face I just have a couple of questions. The devil may be in the detail and what does it entail. In respect of co-ordination and while co-operation between counsel and the parties is normally to be expected or encouraged, the primary concern is that respective clients' interests are protected so the extent of any co-ordination or if indeed co-operation in respect of a lead counsel would need to check the focus on protecting respective clients' interests and of course it may be that the co-operation that can exist in the Tribunal where more or less there's one team and the Crown's on the other side doesn't necessarily transfer quite to the High Court jurisdiction at least in this proceeding where unfortunately there are competing interests and overlapping interests so there's a question mark about that.

In terms of the extent there's co-ordination respective say logistics, one question that is a big issue has been the funding and it seems to me at least that Crown Law has assumed the role to a large extent of logistical arrangements and for that at least I commend them. That also has the advantage that the Crown has assumed payment for it and the payment has been a problem and remains a problem more funding, then it –

COURT:

When you say Crown Law as assumed responsibility, do you mean OTS?

MR ERSKINE:

Yes, in terms of the mapping and listing and that sort of thing. It will be an issue I think for applicants if there is a sort of co-ordinating other people's applications to whatever that means in terms of justifying payment for let's say your applicant is up North somewhere and you're

addressing an applicant who is in the South Island that we can't justify payment for that cost. There's going to be a funding issue about how that's funded, which is already a bit of an issue. So these are just questions and it's not I suppose not a proposal but I think there just needs to be a bit of thought to what might be a good idea in principle but in practice. I'm just not sure how it would work.

The second matter just briefly is just some comments in respect of the Attorney-General's status, the respondent. It has from memory stated that it shouldn't be on the intituling because it's not a respondent if my memory serves me correct and the basis of its appearance or I should say his appearance is as an interested party in serving this thing called "public interest" and I think from memory one of my learned friends has pointed out there seems to be an assumption that the public interest is somehow opposed to applicants' interests or Māori interests or common law rights of customary rights. The Attorney-General in their memoranda of March and April have said and at Whangārei at least on Monday have stated that they will put the applicants to proof. Now that assumes and presupposes an oppositional adversarial role and although there's no notice of opposition that's been filed by the Attorney-General, the only person that can put applicants to proof is somebody in the position of the respondent. So I just make those comments before we get to what role that should be and I just note from memory in the legislation there's actually only two references to Attorney-General. One is in the preamble and that's simply a reference to the case *Ngāti Apa* and the other is about service of documents. As a matter of substance if not form the Attorney-General has taken on a positional oppositional role in that respect of a respondent otherwise how can it put applicants to proof.

Finally, I touch briefly on a question raised in respect of the addressing the meaning of "exclusivity" and I reiterate reservations of myself and one or more counsel about that this should not be determined in a vacuum and without evidence and it seems to me the more I think about it what exclusivity means should file be in accordance with tikanga and what's tikanga may differ from region to region or applicant to applicant in accordance with the case law.

So that's really all I've got to say about those three matters sir.

COURT:

Thank you very much Mr Erskine.

Ms Walker

MS WALKER:

Sir, I'd just like to tautoko the points and matters raised by my senior counsel, Mr Erskine. I do not have any submissions at this stage sir.

COURT:

Right.

Ms Takitimu

MS TAKITIMU:

Tēnā anō hoki koe e te Tiati.

Your Honour in regards to Ngāti Porou ki Hauraki there is no or perceives to be no overlapping interests in regards to those claims that have been labelled as priority claims so they have no submissions to make in regards to the priority or prioritisation of proceedings save to say that Ngāti Porou ki Hauraki have been in direct negotiations with the Crown, with the Marine and Coastal Area team more recently prior to that with the Foreshore and Seabed team of the Ministry of Justice to seek an agreement regarding the recognition of their customary rights and interests. That has been paused while they appear in these proceedings solely because of resourcing issues that they can't really afford to be advancing this on two fronts at the same time. It is their preference to continue in direct negotiations if at all possible notwithstanding that they are do feel compelled somewhat to be involved in this process, one because of the timeframe set out in the statute required them to file an application and hedge their bets so to speak before the cut-off date, but also because in the advent of the some 202 applications there does seem to be some proposed overlapping to the areas that are subject to their application.

If I could your Honour, the matter in which I am tasked with raising before the Court before yourself today is the position Ngāti Porou ki Hauraki find themselves in in terms of being grouped into two proceedings, that is Group F and Group H and I think this echoes somewhat my learned friend's submission in regards to the expense and nature of filings upon the applicants at this point certainly is coming think and fast for them and in regards particularly to Group F, some of those filings upon them are of a very peripheral nature but they are still compelled to at least interrogate what is being filed on the record and to work out where they sit in regards to that. They would dearly love to be pulled out of Group F your Honour and have advanced a proposal to be dealt with solely in regards to Group H where they see the full measure of their application area as being concentrated in those areas. They have I think been

split between Group F and Group H because of the two distinct geographic areas, one at Mataora Bay in the Hauraki on the Coromandel Peninsular and the other at Harataunga known as Kennedy Bay. While they are seen as geographically distinct to us solely from a mapping point of view, from a tikanga and cultural point of view they are very interrelated and Ngāti Porou ki Hauraki see their claim proper as fitting within Group H primarily with their ideal position to keep a watching brief or an interested party status within Group F but not to be required or compelled to fully participate in that proceeding.

While I'm on my feet your Honour, I should note that I support and we have had some discussions with other counsel the proposal regarding mapping and the sharing of one set of maps particularly, we support the proposal that they might be paid for by the Crown and also we have, having caught up with some of our colleagues post the Whangārei case management conference, are interested in the concept advanced by my friend Mr Kahukiwa in regards to co-ordinating or lead counsel. That is something of course that has been quite successful for some time in the Waitangi Tribunal proceeding but also take on board in support of my learned friend's submissions regarding the ability of all claims to be fairly ventilated before this Court, particularly those that are smaller claims that will be fighting in a timetable sense to be heard and to be presented in their full measure before this Court and again I think those are lessons that we can take usefully from the Tribunal and at times there's been difficulties where negotiations per se with lead counsel or co-ordinating counsel have meant that trade-offs have needed to occur in regards to the timetable that places that lead counsel, sorry properly that co-ordinating counsel in the difficult position of needing to make timetabling decisions in terms of how much time a claim is given before the Court or in that case the Tribunal and I do think that the oversight of the judicial conference function to enable that co-ordinating counsel not to be placed in that tricky position amongst their colleagues, particularly where there are competing claims is of importance.

Those are my submissions.

COURT:

I'm very grateful to you. Thank you very much.

Ms Mason

MS MASON:

Thank you sir. Sir I'd like to start by advancing our proposal that was put before you on 6 June at the Tauranga conference and it covers much of what my colleagues have placed before you this morning in relation to trying to manoeuvre through this very difficult statute with the many different claims trying to reduce the resources that are invested into this and there was a proposal to put forward to look for a test case. I've met with counsel from Crown Law and they have no objection to such an exercise and it initially came out of submissions which were made about two things, the role of the Attorney-General in these proceedings which have again been raised by my friend Mr Erskine and the ambiguity around certain tests. Just reflecting on what Mr Erskine has said about the Whangārei conference and the Crown appearing to say that they will test or play a role that is about testing the evidence, sir that becomes very difficult when you think about the ambiguity that's there. So for instance what does substantial interruption mean and how can the Crown be testing the evidence of the claimants around the meaning of substantial interruption if we don't even know what that means and the real concern for the claimants is that the Crown is playing a role which really at the end of the day is intended to minimise the incidents of customary title and that's been the worry all along so their request remains for the Crown to set out really very clearly what it actually means by the public interest and as the submissions have been made earlier, my claimants' view is that it's really taking this quite litigious approach to it which my claimants say is a false dichotomy. It's a view which is a litigious one, the Crown versus Māori and somehow the public interest is about protecting the public who are not Māori claimants to title. That appears to be what is starting to happen and so sir the request for the Crown to really clarify what it means by the public interest and with each aspect of its requests or requirements to say how that is being served is one thing.

So when these submissions were made in the Tauranga one we had said that we would try to get together a test area because it does seem quite wasteful I suppose of public resources to continue with 202 claims. There is an area that some of my clients are keen on advancing and that is in the Northland area about the Whangārei part of the country. There are some reasons for this. The advantages are it's an area that contains agriculture areas, there's reclamations, private titles, there are marine reserves, so all of these diverse scenarios can be used to test what do those words mean in s 58. There are some high public use areas, there's the Marsden Point Oil Refinery there and there's also a very busy port. Sir I take your comments this morning about there doesn't need to be a statutory priority case but there was a case filed previously a titled case under the Foreshore and Seabed Act for Te Uri O Hau and there seems

to be a bit of confusion because the Te Uri O Hau claimants had said that that wasn't a statutory priority claim under s 125 but sir that is not how I read that so that's one issue. My clients are meeting with the clients for that claim next week to further the areas by which they would like to put into a test case at which case I think there may be a different view put forward by those claimants. For the moment, on the record they have said that they agree that it doesn't come under s 125. There seems to be an idea that the statutory priority claims are only the use claims, not the title claims and I can't see that out of reading this sir it says very clearly here that the statutory priority ones are any of the ones referred to under this section so that will be clarified next week. Sir in the meantime this proposal is being put together. The claimants envisage that they would send the tikanga matters off to the Māori Appellate Court as is allowed for under the Act so they would break it up and there would be two stages to it, one tikanga matters before the Māori Appellate Court and the rest of it before the High Court and they are expecting to have their evidence ready by the end of this year. They already have a mapping expert who has done mapping throughout other jurisdictions. He is Canadian and is currently doing a PhD in this area of mapping and the aim is to have the proposal filed with the Court by Tuesday 12 July and that would include having further consultations with Crown counsel on this and really trying not to get such a huge area but at the same time having an area that covers the different scenarios that can really test what substantial interruption means and what exclusive use and occupation mean.

Sir, in relation to the submissions that have been made this morning about having one lead counsel, this has been a matter of great contention before the Waitangi Tribunal proceedings and in some ways it has led to more paper work because some people have objected. As my friend Mr Erskine has pointed out there are conflicts of interest in various other things between claimants. Many of the claimants feel distrust of the whole process and there is sometimes a desire to have the lawyer that they have chosen. So counsel proposes that where there is an element of compulsion to having a lead counsel that creates more trouble than it's worth sir, but of course people should be encouraged to work together where they can and especially where there are overlaps.

Sir, those are all my submissions for this morning unless there are questions.

COURT:

Thank you very much Ms Mason.

MS MASON:

Thank you sir.

COURT:

Mr Kahukiwa

MR KAHUKIWA:

Rather than repeating my submission I made in Whangārei on Monday, can I just say that in my submission it's entirely an appropriate kind of structure that could work well here. One geographical feature of Tāmaki Makaurau your Honour as you know is that it's a place which is in terms of the dry land joined by two bridges going North and so there's lot of harbour and lots of coastlines and my client Ngāti Te Ata by virtue of their mana goes from the West Coast to the East Coast, the East Coast to the West Coast. They find themselves in three of the tentative zones, which in my submission it's not a bad starting point to try and geographically subdivide –

COURT:

And it is just a starting point.

MR KAHUKIWA:

Exactly and so perhaps my submission today your Honour is that for Tāmaki Makaurau again leadership from counsel must have a look at whether having three or four zones for those iwi is really that efficient and let's not forget that there is a statute in place, Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act, which achieved agreements around maunga, around motu so not a submission per se but just to indicate to the Court that the iwi here have had some recent experience with wrestling with these sorts of matters.

That's all for today your Honour.

COURT:

Thank you very much.

Mr Vasudevan

MR VASUDEVAN:

Tēnā koe Your Honour

Just a few brief submissions today. I just want to submit at the outset that Ngāti Whātua o Ōrākei reserves its position in relation to any suggestion that it take a lead counsel role in these proceedings.

COURT:

You're not putting your hand up.

MR VASUDEVAN:

Ah, but it does note the concerns made by my learned friends so far.

In relation to other matters we repeat the suggestions made about uniform approach to mapping and the benefits that could provide to applicants, particularly in terms of identifying overlapping claims that are quite muddy at the moment and as it's been noted in Whangārei as well there are discrepancies between what the Crown has identified as overlapping claims in particular proceedings and what counsel have identified. The uniform approach to mapping would go some way towards addressing those issues. In terms of specifics, Ngāti Whātua o Ōrākei our clients applied to directly engage with the Crown last March and are yet to hear anything in relation to that, so counsel hopes that that process will speed up or continue to move forward.

Finally, one point in terms of paper work there are a number of originating applications that both the Attorney-General and counsel identified as potentially overlapping with Ngāti Whātua o Ōrākei's application that we do not possess or are aware that we have been served with so we may file a memo to the Court following this conference requesting –

COURT:

Well I'm sure if you liaise directly with the Crown they will make sure that you have everything that they have that's been filed.

MR WARD:

I'm happy to assist sir.

COURT:

Yes.

MR VASUDEVAN:

Does your Honour have any further questions

COURT:

I can wave some magic wands. Thank you very much.

Ms Thornton

MS THORNTON:

Thank you sir. To cut to the chase I agree with Ms Sykes on the mapping issue, completely agree with that. I agree with the co-ordinating counsel suggestion that Mr Kahukiwa has made in Whangārei. I don't disagree with Ms Sykes' addition of lead counsel to that provided however we have – of course this has been raised already the big issue of conflicts of interest. If you have people who are driving this bus who have an interest in how the bus goes we're supposed to be dealing with people who also have an interest I just don't see how that can work out. My suggestion, and I don't know that it's very realistic, under the constraints that we face is that if the Court were inclined and want a lead counsel should be somebody who didn't have claims in this area. How that gets funded I couldn't begin to say. We're struggling to get funding to progress our own claims while lumbering in someone to help manage them. But if that barrier could be reduced then that might be an aid to the Court and it may be that it's able to be funded through the Crown's offices and heaven forbid us make that suggestion but that would be one way to get round the lead counsel problem because the obvious benefits should be well obvious.

With regard to my claim on 378 that covers Mahurangi area, that's Long Bay up to approximately Mangawhai and we see that as largely customary rights. There's not a lot of customary title left in that area but I think my clients have a postage stamp size area right on the beach but otherwise its customary rights in that area.

With regard to 574 Aotea and Hauturu claim, I would invite the Court's attention to, and of course obviously later on will make submissions on this, but there is a Māori Land Court case, the *De Silva* case in 1998 that held that the small islands and rocky outcropping surrounding that island were customary title. So it seems like it shouldn't be rocket science to translate customary title into customary marine title but of course that remains to be seen but we have allayed that on that area.

COURT:

Can you make me a copy of the Waitangi decision available to me please?

MS THORNTON:

Yes sir, it's Māori Land Court and I'll submit it.

COURT:

With regard to advancing the progress of all this, the question of mandate and who has rights to make applications I think I raised this parenthetically the last time but I think one place that may help in cutting down some of the contention through the threshold question of how is this order meant to be held to be answered right early on in the process because if it's all going to held under a hapū name then I think a lot of the arm waving may die down quite a bit. Of course, the question in the other claims where it's not just jockeying for an overlapping claim that really ends up in the same place which there are some of those. There's also the cross and counterclaims that where people have been at war for hundreds of years and those aren't going to just get solved in a case management conference I'm sorry to say and those I just don't see any real quick way around that sir. Our clients have research all over the place so we can be ready on some reasonable notice with submissions of evidence just based on the Court's determinations in that regard.

Those are pretty much my submissions sir.

COURT:

Thank you very much Ms Thornton.

Mr Ketu

MR KETU:

Thank you your Honour. First of all, I'd like to tautoko the proposal forward by my learned friend Ms Sykes in regards to mapping. I understand that Mr Apiti is familiar with the area that Ngāi Tai Ki Tāmaki had an interest in so I see no opposition with that proposal.

In terms of overlapping claims, our assessment is that the Ngāi Tai ki Tāmaki claim does not overlap with any of those that have been identified as priority. However, we have filed 16 notices of intention to appear on other applications sir.

In terms of our application that relates to both coastal marine title and protection of customary rights and the Ngāi Tai ki Tāmaki Trust also have an application for Crown engagement which is yet to progress sir.

I have no other submissions to make on that point.

COURT:

Thank you very much Mr Ketu.

MR KETU:

Thank you.

COURT:

Mr Sinclair

MR SINCLAIR:

Tēnā koe sir

My submission addresses three matters sir. The first one is the applicant counsel committee, the second one is the question of mapping and the third one is the question of funding sir. I'll go through the three of them rather quickly.

We support in principal the submission by Mr Kahukiwa regarding the supporting applicant counsel committee. The terms of reference of that sir is very important. We've been through this matter with the Waitangi Tribunal and the issues as my learned friend Ms Thornton has raised and others, including Ms Mason. Sir the scope of the committee is administrative and its terms of reference are focused on the administration of the claimant co-ordination with the High Court process. If that was the scope of it sir our claimants would support that. That's all we've got to say on that matter sir.

On the question of mapping, we commend the Crown for its mapping to date. We support the submissions of other counsel in regard to a single set of maps which we can all work from. My question on mapping relates to the mapping of those who have chosen the OTS pathway. It raises a matter for us simply because we are unclear where to source maps for those who have sought the OTS pathway and therefore to determine quite clearly the overlaps and boundaries with our applicants going through the High Court process. This becomes an issue for us when, as your Honour has pointed out, that we seek a discussion and negotiation between the various overlapping claimants amongst particular regions and hapū and whānau and iwi. So sir we would like the Crown to assist in that matter for those claimants that are not in the High Court process to develop a mapping for those seeking the OTS pathway sir.

In regard to funding, sir as we understand it the funding for High Court applicants does not involve engaging with those who aren't in the High Court process. We stand to be corrected on that sir but if we are to engage with those who have OTS applications only, we understand that funding pathway is either one or the other. There's no merging there so we'd like clarification on that point sir.

That's the end of my submissions sir.

COURT:

Thank you very much Mr Sinclair.

Ms Andrews

MS ANDREWS:

Thank you sir. Two brief submissions to make on behalf of Te Whānau-ā-Haunui. Firstly, in terms of the eight identified priority claims, there is no overlap in terms of Te Whānau's application with those claims. It relates to a fairly specific and identified area in both customary marine title and protected customary rights. The customary marine title area and smaller obviously than the protected customary rights area but there is certainly no overlap with either of those areas with any of the priority claims.

Secondly, the second question relates to possible adjournment of Te Whānau-ā-Haunui's High Court application. As has been noted they have also applied for direct engagement with the Crown prior to their High Court application. Their application area relates to the further Thames and you may be away there's some quite substantial agriculture activity proceeding in that area and as my friend Ms Sykes identified, there is an issue where resource applications are proceeding in advance of issues around customary marine title and protected customary rights being determined and obviously it is advantageous that those rights are clarified as soon as possible so that those rights can be presented to their maximum extent. But for that reason, OTS has very recently identified that they are likely to progress the direct engagement application as a matter of some urgency and there is a further meeting between my clients and OTS on that at 1.00 pm this afternoon. So I had previously indicated, I filed a memorandum with the Court on 18 June obviously advising of that advice and being received from OTS and seeking a 12-month adjournment at that point I've had discussions with my learned friend Mr Melvin, Mr Ward's colleague regarding that and understand the Crown wishes to wait until

they know the outcome of that meeting this afternoon before they advise their position on that adjournment. So sir quite happy to file a further memorandum with the Court in the next day or so advising of that outcome and whether that adjournment request is to be pursued as a result of –

COURT:

And hopefully if it is to be pursued that it might be dealt with by consent.

MS ANDREWS:

Indeed sir. Sir, nothing further to add on the matters you've heard from my learned friends on the mapping or lead and co-ordinating counsel matters. So unless there's any questions, those are my submissions.

COURT:

Thank you very much Ms Andrews.

Mr Ward

MR WARD:

Thank you sir. There's been a number of points raised this morning sir but I'll work through in no particular order.

A number of counsel sir have noted that the overlapping application areas that they've assessed are different from the overlapping application areas in the Crown's amended notices of appearance. Previously, your Honour had directed parties to indicate by memoranda whether or not they agreed with the Attorney's assessments on overlapping areas and some of the positions if I've understood my friends correctly, some applicants seem to have changed their assessment of application areas compared to those memoranda. To some extent sir that reinforces a point that the Crown's made previously at other CMCs that there is a need or there will be a need moving forward for some clarity around application areas and some clarity around the rights that are being sought and those the material elements of the rights for which recognition is sought ought to be known now by the applicants because of course the applicants are asserting that they have customary rights that have been in place and showing activity since 1840. It's not necessary in my submission sir to have a historian's report or archaeological evidence to be able to set out in a pleadings document with some material particularity what those rights are and the area to which those rights relate. So as we've said previously sir I think

there needs to be built into the timetabling a moving forward process for some kind of repleading some steps for amendment.

Sir my instructions are that there is scope in relation to the submissions that you've heard about funding for interested parties and for a number of other points. Obviously, I will seek instructions in relation to the submissions that have been made here and at the other CMCs. Respectfully, there is a limit to which the Court may be able to engage in funding issues that are essentially matters that are matters of executive policy and over which the Waitangi Tribunal has both jurisdiction and an active Tribunal inquiry. I am instructed that there is scope within the existing guidelines for engagement where applicants have an interested party application in another application.

COURT:

But not for entities who are solely interested parties, is that the position? That's what I've been hearing. Is that understanding correct from your perspective?

MR WARD:

My understanding is that there may be some space for further discussion with OTS but in broad terms yes, that's my understanding of the position.

COURT:

And is that a policy decision?

MR WARD:

Yes, the guidelines for funding are policy decisions.

COURT:

Okay.

MR WARD:

Sir in relation to mapping, as I indicated in Whangārei I think it's a matter in which we'll need to take further instructions.

COURT:

Yes. You can see some firstly a ground swell for this proposal since I think it was first mooted in Hamilton if my memory is correct, by Ms Sykes and in addition to the logistical value of a joint approach to mapping, it also helps clarify a number of the overlaps issues if it's done as well as people are hoping it will be done.

MR WARD:

Yes sir. I'm conscious of that and it's a matter on which I'll seek further instructions.

COURT:

Right.

MR WARD:

Sir, questions raised regarding the Attorney-General's status and the Attorney-General's role, the Attorney-General had previously queried some intitulements that listed the Attorney as the defendant and this to some extent is a technical point sir. The applications are originating applications so my submission there need not be a defendant because there is not necessarily an inter partes dispute. The Attorney's entitled to intervene under the rules and at common law as the Attorney. The Act provides for interested parties to join. The Act provides for interested parties to indicate whether they are in support or opposition of the application. The Crown filed a notice of appearance in the Elkington proceeding where it made clear that it opposed the application and then the Court granted a direction so that made that notice of appearance apply to all other applications.

COURT:

And the Crown's position will no doubt evolve in relation to intervening claims.

MR WARD:

Yes sir, this is the point that I was coming to. The proposition that we're putting people to proof those are my instructions. That will involve assessing the evidence that's filed. There are 202 applications and very few of them have filed any substantial volume of evidence so the Crown's position will depend on the evidence that is filed and it will depend on a range of steps that my friends have indicated that they're going to take in terms of further evidence discussions between counsel, discussions between applicant groups. We are at the early stages of a process. The Attorney will continue to keep his position under review. Having said that, the proposal that I understood Ms Mason to be making that the Court ought to require that the Attorney justify the Attorney's position on a rolling basis I'm not sure what jurisdictional basis was proposed for that. Counsel takes instructions from the Office of Treaty Settlements and from the Attorney and it appears on behalf of the Attorney. It's for the Attorney to assess the government's position in the litigation because it's a proceeding in the High Court so it is litigation. Respectfully, the Attorney has not taken a logistic approach so far. The Crown has sought to assist the Court and the applicants and faced with a large volume of material and has attempted to assist the Court in these initial steps of finding a way forward.

Some of my friends made reference to the Native Title Act and the approach taken in Australian Courts where respectfully a litigious approach has been taken in the past. I just note sir my

understanding if the Court will indulge me conscious this is from the bar, that in the Native Title Act jurisdiction there are processes for Native Title representative bodies to be determined well before any substantive proceeding is underway.

COURT:

Are you talking about mandate?

MR WARD:

In terms of mandating and representative status. The approach so far here is somewhat different. The Crown's reserved its position about the representative status of applicants with the exception of Mr Paul and Mr Dargaville's national applications. The Crown does question and continues to question those applicants' assertions that they apply as representatives of all Māori and all iwi hapū. We have sought better and further particulars on that point. The replies in my submission are unsatisfactory and it's likely that there will be a further application made after the completion of these CMCs.

Sir, in relation to Ngāti Porou ki Hauraki I'm very conscious that Ngāti Porou ki Hauraki see Harataunga and Mataora as linked and if that can be accommodated within the planning for that particular application there seems good reason for doing that.

COURT:

Right. And this is not a unique problem as we have seen in other CMCs.

MR WARD:

Yes sir.

COURT:

The groupings are a convenient starting point and no one's pretended they were anything other than that and have always recognised that there will be claimants around the edges whose position will need to be accommodated.

MR WARD:

Yes sir. They were a matter of convenience for this early stage. As the applications come closer to hearing the focus will be on those applications and the best way of dealing with those applications in my submission.

Your Honour Ms Mason made submissions about test cases and I understood the suggestion was that there should be a preliminary hearing of some kind. My friend referred to some of the discussions that we've had with her and I'm grateful for those conversations. The Crown does seem some value in test cases. There are eight test cases that the Act already provides

for, those are the s 125 priorities and in terms of having a preliminary hearing to discuss the test for customary marine title, your Honour knows the Court can make orders for a preliminary hearing under r 10.15 but the starting point for any preliminary hearing application is that all matters in issue should be determined in one trial because that's normally the most efficient way of dealing with the proceeding. So the applicant for a preliminary hearing has to persuade the Court that it's more efficient and more effective to have this particular issue dealt with ahead of the full trial and I don't have it to hand I'm afraid your Honour, Wylie J I think has given the most recent judgment on these issues, *Ngāti Whātua Ōrākei Trust v Attorney General*[1] gathering some of the authorities and setting out the factors before it has to consider. The assessment is often one of practicality your Honour and the practical difficulties here of having a preliminary hearing point clearly against that step. In my submission, it would be very difficult to separate out the issues of exclusive use and occupation or substantial interruption from any other issue in a way that would be efficient. There would be a duplication of evidence between the evidence at a preliminary hearing and the evidence at trial. It wasn't clear to me what specific issue Ms Mason was suggesting would form the basis of the preliminary hearing. If we were going to have a hearing into all of the elements of that limb of the s 58 test, you would effective be having a trial. It would be more efficient to do that within a single trial, rather than to separate out a material part of the test and require evidence to be heard twice.

COURT:

Well let's wait and see what Ms Mason's proposal is and then we can hear your submissions on that but I gather we're still a little way off having a formal proposal from her.

MR WARD:

Thank you sir.

Sir there was an issue raised at Whangārei that I've taken further instructions on. That relates to funding for mandating processes specifically. If an applicant has undertaken a mandating process for the High Court process at the beginning of its application OTS will provide funding for that process. Otherwise, the first milestone in the project guidelines which is a general setup establishment milestone I'm instructed that includes funding for reimbursement for mandating. I'm instructed that OTS understands that mandating may become necessary or desirable later in the process as occurred in the *Tipene* proceedings and OTS are open to

[1] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2016] NZHC 347.

discussions about transferring mandating funding for one milestone to a later milestone if that is an effective way of dealing with issues that have arisen. Sir my submission is there is more flexibility in the guidelines than the interpretation than was suggested to your Honour at Whangārei and in my submission, that reinforces the importance of applicants engaging with OTS as funding issues arise and I should say to my learned friends I'm happy to facilitate those discussions if that will assist parties or the Court.

Unless your Honour has any questions, the Crown position has been set out in the series of memoranda we have filed prior to the hearings.

COURT:

Thank you very much Mr Ward.

I'm going to be reflecting over the next week or so on a minute that will hopefully encapsulate most the matters that have been raised with me in these 10 case management conferences, one of which has been adjourned to late October and I won't be saying too much about that particular application.

My hope is that in the second half of next year we will start to have some cases heard. That's my hope and I've started to pencil into the Court diary some times for hearing in the second half of next year. I appreciate that there is a huge amount that needs to be done between now and then and that many people will not be able to get up to speed sufficiently in order to have their cases heard in the second half of next year. I also want to mention that it may very well be that as evidence is accumulated and as positions become clearer, we may be able to utilise the judicial settlement conference procedure as a means of trying to achieve resolution with some cases. I don't think I can say any more than that at this stage. I recognise that there will be a number of cases that won't be able to be resolved without a full hearing but hopefully there will be a number that will be able to be resolved without having to resort to a full hearing and it will be a question of how matters evolve over the next 12 months as we work towards trying to achieve some finality if that's at all possible.

So thank you all. I am particularly grateful to counsel who have appeared before me on a number of occasions over the last few weeks. It's been a pleasure and as I say the next step will be receiving some memoranda tidying up some issues that have been signalled and then I will get my minute out.

So unless there are any other matters I'll adjourn now.

Thank you very, very much.