

**MACA CASE MANAGEMENT CONFERENCE**  
**DUNEDIN**  
**30 MAY 2018 at 10.00 am**

**COURT:**

Good morning and thank you for coming.

For the benefit of the members of the public who are seated in the back. I explain that this is a case management conference. It's the second of the first round of case management conferences concerning the 202 claims that have been filed under the Marine and Coastal Area (Takutai Moana) Act.

Because of the massive logistics involved in trying to manage 202 claims, I have confined the first round of case management conferences to the parties. I am aware that there are a number of interested parties and I propose to engage with them after the first round of case management conferences with the parties has been completed.

The purpose of a case management conference is to assist the parties in advancing their proceeding to a substantive hearing. Sometimes it's possible in a case management conference to resolve conflicts but the primary objective is really just to administer the files and advance them as best that we possibly can towards a substantive hearing.

The claims seem to be falling into a number of groups. There are eight priority cases that are afforded priority by Parliament under the Act and I appreciate that none of those priority cases are in the South Island. They all happen to be in the North Island.

Then there are a group of cases where the claimants are engaging with the Crown, or endeavouring to commence engagement with the Crown, and some of them are seeking adjournments whilst they try and get on with negotiating with the Crown.

Then there a group of claims that overlap with the priority cases and one of the challenges I have is to try and sort out which of those overlapping claims with priority cases ought to be heard at the same time as the priority cases.

I think there is a fourth group which doesn't fit into any of those other three categories and I suspect that most of the cases in the South Island although there are some up in the northern part of the South Island where there are negotiations with the Crown, I suspect most of the claims in relation to the South Island would fall into that fourth category at this stage any way.

Having given that explanation I will call upon counsel.

Good morning Mr McLachlan, I appreciate you appearing for Ngāi Tahu and good morning to you Mr Ward, for the Attorney-General.

Now, there is one claim by Ngāi Tahu and I will hear from Mr McLachlan in a moment and then there is a claim from Te Whānau o Topi and I'd just like the representatives of that claim group to come forward so that I can hear from them as well.

Mr Colin Topi comes forward.

Good morning. Are there others who want to come forward?

So, I assume you're Mr Fife?

**MR FIFE:**

Mr Fife yes.

**COURT:**

Thank you very much.

Mr Fife, one of the matters that I am trying to get my head around in relation to your claim is how it interrelates with another claim relating to the Ruapuke Island Group and Ms Inns from Nelson is representing that group. As I understand it, their claim completely overlaps your claim, is that your understanding?

**MR FIFE:**

That's correct.

**COURT:**

So, are you having discussions with them about your claim and their claim could be heard in a way that compliments each other?

**MR FIFE:**

No, not so much a turf battle. I suppose for us we've been following a manner of process with this whole Act and the application that we've put in. We know at some stage we will have to sit down and discuss with the other application the implications of the overlap that you've just stated and I think like everyone else our intention is to do it through the Crown engagement process and being able to sort that again, as a matter of due process as we kind of go through these phases that either the Court or the Crown asks for your Honour.

**COURT:**

So have you commenced a process of negotiation with the Crown, have you done that yet?

**MR FIFE:**

We haven't heard anything from the Crown except the fact that they've acknowledged our application and it's gone in and there's been some discussions around a hui for funding that at the moment taking place but anything that I've not heard from the Crown is more about the logistical nightmare that seems to be with all the case managing you know with all the applications that have gone in and everything's kind of slowed up I guess so that's going to put a freeze on it.

**COURT:**

So is it your desire to try and engage with the Crown and with the other group's claim that overlaps yours?

**MR FIFE:**

It's our desire to engage with or be proactive in engaging with anyone that's overlapping our application. We've already had discussions with Ngāi Tahu last year as they were another one that's overlapped our application and like we've said in our memos we have sent to the Crown, to the Courts, it is our intention firstly to engage with the Crown on this application.

**COURT:**

As I understand the memorandum that's been filed on behalf of Ngāi Tahu they propose to amend their claim as time progresses in order to recognise if not your interests then the interests of others who have a similar claim to yours.

**MR FIFE:**

Thank you, that's correct.

Mr Ward, is there any negotiation with Mr Fife's and his organisation or those he's acting on behalf of, or any other claimants in relation to the island?

**MR WARD:**

No sir. My instructions are that the Office of Treaty Settlements is reviewing the applications for engagement that have been made but a decision about which new engagement applications will be taken up. That decision is between 12 and 18 months away.

**COURT:**

Oh really. Okay.

**MR WARD:**

We signalled that now in the memorandum of the 25<sup>th</sup>. OTS are prioritising the other existing engagements. It will be some time before OTS decides which of the other engagement applications it will be taking up.

**COURT:**

Right. Mr Fife I suspect that what might be in your best interests is to do your best to try and accelerate the negotiations with the Crown and what I will be doing is after I have completed this first round of first case management conferences which won't be until about four weeks' time that I've completed them, I will be issuing a minute. But what I think I am likely to be doing in relation to your case is urging you to engage with the Crown as best you possibly can and also set in place a timetable for your evidence to be worked up and presented to the Crown which will assist you in relation to your negotiations with the Crown. Then I am likely to adjourn your case management conference to a second case management conference at some point in the first quarter of next year. I'm just giving you a general indication as to what I'm likely to be doing.

**MR FIFE:**

So what would that adjournment be around, so what would be the agenda of that adjournment if it was –

**COURT:**

The agenda of that adjournment would to be give you the time to accumulate your evidence and to advance as best you can your negotiations with the Crown.

**MR FIFE:**

Okay. What's the transparency level between the Crown and the Courts? Because I think what we are worried about and I think a lot of other locations are worried about is that applicants are getting siloed into something that's racing ahead quite quickly with the Courts and I would suspect 90 per cent of applicants would prefer to engage with the Crown. So is there transparency happening between both the Crown and the Court to see what levels we are actually at and what's the Crown doing about getting some traction going on their side of things

so people are not accumulating these you know court costs and lawyers' costs, etc etc. So that's one thing that when I looked through or when we were going to come to this meeting or this conference our concern that we wanted to bring up is how long is it going to take before the Crown actually start to move on some of the things so in relation to those recommendations that you've made to our application we know that we are not going to be here in the first quarter of next year sitting in front of you again and there's been no movement or not enough movement on this side of the fence your Honour.

**COURT:**

Everything you've said is fair enough for you to say. In terms of transparency between the Courts everything that I say to the Crown I'm saying to you. There is nothing that I say to the Crown which isn't also said to all of the other applicants. It's as open as it could possibly be. My task is really to try and manage the applications that have been filed and I appreciate that a lot of them have been filed as a holding measure because there was a statutory deadline for you to get your claim in. But at the same time and I fully appreciate that the desirable outcome is a negotiated outcome with the Crown. Everyone would I am sure think along those lines or most people would think along those lines. My task however, is to try and be the best I possibly can to manage all of the claims through to some form of conclusion and in doing that I am mindful of the fact that hopefully there will be a lot of negotiations going on with the Crown which might ultimately render it unnecessary for the Court to actually hear a claim and make a determination. But I would not want to be sitting here in five years' time and looking at you and saying, "well sorry, you haven't got anywhere with the Crown and now we're just going to have to accelerate trying to have your case heard". I really would like to move things in a way that's not rushed, and gives everyone a real opportunity to be heard and make sure that all interests are taken care of as best I possibly can but at the same time not just let things linger.

**MR FIFE:**

With regards to affidavit and evidence for applications and like you have just stated you'd recommend us engaging with the Crown, those key criteria around meeting those tests that the Act requires is that more a question for the Crown and when we negotiate with them or is that something that you can give us clearer indication on exactly what it is. Basically, what I'm saying is, "do I need to go and get 50 affidavits from people around that know our family that have a wee bit of clout around society to say that yes we can attest that Te Whānau Topi have come from the area of Ruapuke and have used the marine and coastal area ever since 1840?" Or do we actually need someone with a PhD to say we need them to sign a bit of paper at the bottom to say they've done the research and they can quantify the fact that they belong or that

Te Whānau Topi belong from there. So, where is that level that we need to get to to be able to prove and I'm not just talking about the Crown but you might have an idea of that. But if we do come to the first quarter of next year and you need to accelerate our case, what is it that you want to see and be presented with?

**COURT:**

I suspect that the material that I would be looking for if I were to be hearing your case would be very similar to the material that the Crown would want to see as part of the negotiations and that material is going to relate to historic and cultural evidence relating to the use of the foreshore since 1840. Now I don't think that that's going to have to involve 50 affidavits. But credible cultural evidence from your whānau and if possible from an independent historian would be the sort of information that I would be looking for if I was sitting in as the Judge in your case and I suspect that's the sort of information the Crown would be looking for as part of its negotiations with you.

So if I can also give you a little bit of steer, on Monday I was holding a similar hearing in Wellington and there was a priority claim in that list and the claimant in that priority claim indicated that she was anticipating four witnesses and others who were asserting an overlapping claim were also indicating witnesses of about that number. Now I'm not holding them to that but I just don't you to go looking for 50 witnesses when four or five really good ones might be more than you need.

Mr Ward, is there anything you'd like to say in response to the discussions I've had with Mr Fife?

**MR WARD:**

Thank you sir, just two points briefly. Of the four categories that you identified at the beginning obviously the Crown is keen to develop some precedents through the priority cases but the Crown is quite open to cases that are in that fourth category. If they are developing in a position where they can be moved along that may well be of advantage to everybody.

**COURT:**

Yes. Well I certainly wouldn't want to convey the message that non-priority claims should be put on hold. In fact, one of the thoughts I was having when preparing for today's hearing is that some in the South Island might be able to be advanced a lot quicker than possibly even some of the priority cases.

**MR WARD:**

Yes, I simply wanted to signal that the Attorney is open to that. Conscience of that may occur as these pleadings develop and these cases develop and similarly sir in engagement with applications the Crown is applying the same statutory test that the Court would apply. I think that's useful to signal to applicants. There's a broader point about overlapping applications sir. I'll address you on that point after counsel for Ngāi Tahu if I may.

**COURT:**

By all means.

**MR WARD:**

Thank you sir.

**COURT:**

Was there anything else you wanted to say Mr Fife? I'll give you a chance later if you need to.

**MR FIFE:**

I just have another question about the funding side of things but if that needs to wait.

**COURT:**

I might not be able to help you much with that.

**MR FIFE:**

Okay, no that's alright. I just wanted to know is there a clear pathway that we can actually obtain funding to be able to get some of this historical research? I know that there's communication going around and there's hui at the moment. Unfortunately to my surprise they're not even coming down below Wellington to be able to talk about some of the funding that marine and coastal area is providing.

**COURT:**

So who's organising a hui?

**MR FIFE:**

I've got a letter here.

**COURT:**

Is it OTS?

**MR FIFE:**

OTS yeah. I think they're just going to the North Island. From what I gather from emails and correspondence I've seen there seems to be a lot of confusion and like I mentioned before costs building up for a lot of applicants going down this court process and a lot of them are unable to pay their fees and their costs to their solicitors to do some of the work for them and whilst

we kind of taken it on our own bat at this stage it will come to a point where Te Whānau Topi would have to engage with a lawyer to be able to progress the case forward if that does go that way. On the other side of the coin to have historians and do some of the research we will need to do to prove ourselves against the tests of the Act, there seems to be a lot of confusion and with myself about the processes about having to go to attain that funding to be able to get some of this traction going on our application at the moment. So my question is, is there going to be a better way to be able to get funding or is it a clear, and if you do know, on your understanding is it a clear pathway to be able to get that funding as it is now or is there going to be some easier way or a better way to better facilitate the applicants that currently have got applications in?

**COURT:**

I'm afraid I just don't know the answer to that question Mr Fife. The only thing I can encourage you to do is to engage with OTS over the funding process. But I'm afraid that's completely outside of my area.

**MR FIFE:**

Thought I'd ask.

**COURT:**

Fair enough.

Mr McLachlan

**MR McLACHLAN:**

On the funding issue sir, I attended the OTS forum in Wellington. There is actually a power point that I'd be able to send to Mr Fife which might help him with his application.

**MR FIFE:**

Thank you.

**COURT:**

Thank you very, very much.

**MR McLACHLAN:**

I actually sort of overzealously prepared you a bundle of documents because you know what it's like when you're a junior in case there are any sort of particular memorandum of counsel you wanted to go to but whatever suits you in terms of –

**COURT:**

I think it's likely that Ngāi Tahu would fit into that fourth category of cases that I referred to right from the outset. But I really want to emphasise that that fourth category doesn't have to progress less slowly than a priority case and it may be that a well-resourced entity like



Ngāi Tahu may be in a position to be able to advance their claim a lot more rapidly than even some of the priority claims. I just don't know at this juncture. So, I wouldn't want you to think for a moment that I'm not interested in seeing the Ngāi Tahu claim or indeed any of the other claims in relation to the South Island slowed down in any way whatsoever. In fact in some respects the issues in relation to the South Island might be a little clearer than many of the issues in parts of the North Island where overlapping claims are going to be challenging, that's the best way I can express it.

**MR McLACHLAN:**

Yes, I think that's right. One of the benefits of Ngāi Tahu's applications there are large portions of it but there are no overlaps.

Is there anything else you would like to say? I've read your memorandum and I'm very grateful for your memorandum. But my provisional thinking is that I would want to try and put in place some form of a timetable for Ngāi Tahu and then adjourn the case management conference to a date in the first quarter of next year.

**MR McLACHLAN:**

I think that's sensible from Ngāi Tahu's perspective. We are also trying to engage with the Crown so Ngāi Tahu would want those processes to be if possible occurring simultaneously to get benefit of both of them. Te Rūnanga's intention, because there may be application on behalf of Ngāi Tahu Whānui generally, is that we would over time amend our application to a client's specific areas so the Court might hear an application about Mōtītī Islands or about McCarthy on the West Coast rather than about the takiwā as a whole.

**COURT:**

That's very very helpful, thank you.

Mr Ward

**MR WARD:**

Thank you sir.

**COURT:**

Overlaps.

**MR WARD:**

Yes sir. Simply to note as my learned friend said, this is an example of something that's seen in other parts of the country as well where some of the overlapping groups belong to the same whānau of the same broader iwi or hapū grouping and in my submission that's something for

the Court to bear in mind and to hear from applicants about when it's considering how to weigh overlapping applications and what it might mean for adjoining parties or encouraging parties to be interested parties in particular applications and I am grateful to my friend for the signal that Te Rūnanganui may amend its application area to be able to accommodate smaller applications.

**COURT:**

But Ngāi Tahu's taken a broad brush approach right from the beginning in order to preserve all interests and sensibly modify as time goes on.

**MR WARD:**

And whether that dynamic plays out in other parts of the country will be for other –

Sir, just one other smaller point. Ngāi Tahu have raised in a previous memorandum the question about adjusting boundaries of the case management groups. That will also be a matter that no doubt the groups in Te Tau Ihu in Nelson will have submissions on. The Crown doesn't have a particular view for the South Antarctic and the Southern Islands, indeed for all of the offshore islands, it may be in fact be better for those islands simply to be accommodated within the mainland groups so that at the moment the offshore islands are in a separate group review. It may simply be more –

**COURT:**

But that's just for administrative purposes. There's no magic to that.

**MR WARD:**

It may be more convenient just to include them into the relevant group on the mainland. We are happy to accommodate that in the next mapping exercise that the Crown does sir.

**COURT:**

Thank you very much Mr Ward.

**MR WARD:**

Thank you sir.

**COURT:**

Mr Fife, was there anything else you would like to say in response to Mr Ward or Mr McLachlan or any other matters that you'd like to raise?

**MR FIFE:**

I realise I haven't been standing like everyone else has. I think I've said everything I need to say, thank you.

Mr McLachlan, nothing.

**MR LACHLAN:**

I thought that given we're mentioning the case management groupings it would be helpful if I could address on the proposed changes that Te Rūnanga sought in an early memorandum if that's helpful for you?

**COURT:**

Yes, by all means.

**MR McLACHLAN:**

So in terms of the first two changes the first I don't know the groupings in tab 3 of that big bundle that's the Crown early memo from 30 June and it has in the back to it all those maps and the row of the map starts from map 8 and then they start continuing. Map 8 and then there's map 9 as well and that's where Ngāi Tahu's application starts. But you'll see on the West Coast the Group Q on map 8 the Te Tau Ihu is titled, the Group Q boundary perfectly, the Group Q and Group R boundary sort of meets perfectly with the border of Ngāi Tahu's application and what we addressed in earlier memorandum is that –

**COURT:**

So does Ngāi Tahu's application encompass R?

**MR McLACHLAN:**

Yes.

**COURT:**

But stops at Q.

**MR McLACHLAN:**

But it stops at Q on the West Coast. On the East Coast currently, – see where line 170 that yellow line you can see it so we go up further north but the proposal we had was to actually move the Group Q R boundary up so that it's also at that same northern boundary. So then you have this sort of the same disputes between Te Ātiawa o Te Waka a Māui Rangitāne which is over a contested area of that northern boundary on both the East and the West Coast and that would mean Te Rūnanga's application is all in Group R rather than sort of being in both Group Q and Group R on an overlap. And then on the Group U issue which is the offshore islands. The only additional point to add there is that there is the Te Rūnanga Nui o Te Aupōuri Trust, which is an application for the Kermadec Islands up in Group A. They agree with Ngāi Tahu's position which is that those offshore islands are better dealt with as part of the same grouping of the island in respect they relate. So for Ngāi Tahu the Auckland Islands and Bounty Islands

and Antipodes Islands would become part of Group R rather than being part of the offshore islands because with respect there's not that much relationship between the Kermadec Islands and the Auckland Islands in terms of the customary title issues between them.

**COURT:**

Alright. The current classifications have been devised by the Crown to try and best manage the claims in a systemic way but it is not set in stone and I'm sure there will be changes made as people's knowledge improves.

Thank you all very very much for coming. As I said, I am going to issue a minute but it probably won't be coming out until July after I've completed 10 first case management conferences this being the most southern point to which I go and in a couple of weeks' time I'm up in Whangārei and almost everywhere in between.