
MINUTE (NO. 22) OF CHURCHMAN J

Introduction

[1] A case management conference (CMC) by VMR was held on 12 August 2020 to address various procedural and logistic issues prior to the commencement of the hearing of this matter next Monday, 17 August 2020.

[2] During the course of the hearing, the Court responded to various oral requests for extensions (mainly in relation to the filing of opening submissions) and there have been further such requests received this morning. Concern was expressed at the CMC that counsel were unable to complete their openings without the chronology having been filed.

[3] The draft chronology was filed last night after the conclusion of the CMC so all counsel should now have it. Other than where the Court has made a different direction in respect of the time for filing opening submissions, all such submissions are expected to be filed and served no later than 5 pm, 13 August 2020.

[4] If counsel are unable to respond to matters raised in the draft chronology by 5 pm today, they are to file their opening submissions in draft form with leave to file and serve no later than 4 pm, 14 August 2020, an amended version of their opening submissions addressing such further issues as may have arisen from the draft chronology.

Pukenga

[5] As explained to counsel, Professor Temara is no longer able to be a pukenga and Dr Hiria Hape has been appointed in his place. Both Dr Hape and Mr Hauraki have indicated that they are likely to attend at Court for the duration of the fixture.

[6] The late finalisation of the pukenga has meant that they do not have the opportunity to prepare a report prior to the hearing. This has implications for the two draft timetables that the parties have provided the Court with. The draft timetables were

filed respectively by the applicants (Whakatōhea Kotahitanga Waka) and Te Kāhui collective.

[7] The applicant's proposal was that the facilitated tikanga process would occur for the first week and the first two days of the second week of the hearing. Te Kāhui's proposal was that the pukenga would present their report at the start of the second week and would be questioned on it by counsel for the rest of the second week with there being an adjournment for a tikanga facilitation process to occur during the third and fourth weeks. Neither of those options is realistic.

[8] Although there has been discussion between counsel about the proposed tikanga facilitation process, it appears that lack of funding has meant that the process has not been finalised. Prior to her appointment as pukenga, Dr Hape had been suggested as a facilitator. During the course of the CMC, counsel raised the possibility that the pukenga, (Dr Hape and Mr Hauraki) might undertake the role of tikanga facilitation.

[9] As the Court indicated, the pukenga are expert witnesses whose statutory role is to advise the Court on such issues of tikanga as are referred to them by the Court. It could be argued that acting as a facilitator created a potential conflict in that role. However, there was widespread support for the proposal that Dr Hape and Mr Hauraki be approached to undertake the role of facilitation as part of their pukenga role, and no objection to it. The Court will therefore raise the issue with the pukenga.

[10] Ms Rudd, counsel for the Attorney-General, also advised, during the course of the CMC, that should the pukenga be unable to act as tikanga facilitators, Te Arawhiti had indicated that funding would be available to meet the cost of an alternative tikanga facilitator.

[11] Beyond suggesting the timeframe within which the tikanga facilitation process might take place, neither the applicant nor Te Kāhui draft timetables suggested any detail as to what it might involve. Normally, the conferencing or caucusing of expert witnesses is a matter arranged by the parties themselves and occurs at a time convenient to the parties rather than being a process that requires the hearing to be adjourned. However, the parties seemed to assume that an adjournment would take place during the course of

the hearing for the tikanga process to occur. The Court will endeavour to accommodate that, but it is not possible, at this stage, to specify precisely when that will occur. It will certainly not be during the first week of the hearing and probably not the second week.

Openings

[12] The hearing will commence at 10 am on 17 August 2020. In the absence of unexpected issues that need to be dealt with as preliminary matters, it is likely that the Court's introductory comments will be brief. All counsel will be expected to deliver their openings in the first week. The draft timetable submitted by Te Kāhui sets specific times for the various parties to deliver their openings. While the sequence in which counsel will deliver their openings can be fixed in advance, it would be inappropriate for the Court to prescribe fixed starting or finishing times for each counsel. Counsel will be expected to be ready to start their openings when the counsel prior to them in sequence has finished. They will have such time as they need to complete their openings and not be compelled to finish within any pre-allocated time limit.

[13] If counsel do not intend to be physically present throughout the entire hearing, they should monitor the progress which is being made with openings so that they are ready to commence as soon as the counsel ahead of them has finished. The Edwards' applicants will proceed first shortly after 10 am, to be followed by the Whakatōhea Kotahitanga Waka applicants, in the order set out in the draft Te Kāhui timetable.

[14] I would normally have expected the other applicants who are seeking to have their cross-claims determined, to have proceeded next. However, there was considerable support for the Attorney-General opening at this point. Ms Budd, for the Attorney-General indicated that she was comfortable either opening then or after all the applicants had opened. It is important to remember that the Attorney-General is not the respondent in these proceedings, nor automatically a contradictor, but is an interested party, albeit an interested party with certain statutory rights. However, given that there appeared general support for the Attorney-General opening next, that will occur. That will be followed by openings from overlapping applicants in accordance with the order set out in the draft timetable proposed by Te Kāhui to be followed by openings by the remaining interested parties.

[15] Once the openings have been completed, the Edwards Whakatōhea evidence will be given. The witnesses will proceed in accordance with the sequence set out in the applicant's draft timetable with one qualification. Some of the other applicants have adopted the evidence tendered by witnesses for the Edwards Whakatōhea application. The applicant's draft timetable appeared to provide for those witnesses being serially cross-examined on their evidence as part of each separate application. This would require such witnesses to attend at Court on a number of days to be cross-examined more than once on the same evidence.

[16] Any witnesses whose evidence has been adopted by multiple applicants should only be cross-examined once. Any counsel who has instructions to cross-examine such a witness should ask all questions at the same time, irrespective of whether the cross-examination strictly relates to the evidence in the context of the Edwards Whakatōhea claim or aspects of the evidence that might support other claimants.

[17] Should counsel request that any witnesses' further attendance be excused following the completion of their evidence-in-chief, cross-examination, and re-examination, in the absence of any compelling reason to the contrary, it is likely that the Court would grant a request.

[18] Following completion of the evidence of the applicant in the Whakatōhea Kotahitanga Waka applications, the overlapping applicants will give their evidence in accordance with the sequence set out in the applicant's draft timetable. There are some applicants whose claims overlap with the priority application, and who wish to participate in the hearing and call evidence, but not to have their overlapping claims determined by the Court. Those applicants will give their evidence following the completion of the evidence of cross-applicants who do wish the Court to determine their claim.

[19] Following the completion of this evidence, the Attorney-General's witnesses will give their evidence in accordance with the sequence set out in the applicant's draft timetable, to be followed by the evidence of the interested parties in the order set out in the applicant's draft timetable.

[20] If the tikanga facilitation has not occurred by this time and, depending on the rate of progress of the hearing, the facilitation is likely to occur at this point, to be followed by closing submissions in the sequence set out in the applicant's draft timetable. Depending on the timing of the report prepared by the pukenga, all counsel will have opportunity of responding to it. This is likely to be by way of filing written submissions although, should the report be available prior to the conclusion of the time allocated for this hearing, and should it be logistically feasible, such a response may be incorporated into counsel's closing submissions.

[21] It is important for counsel to understand that these timetable directions are indicative only and may be subject to change in response to developing events.

COVID requirements

[22] During the course of the CMC, it was suggested that the hearing venue (the Energy Events Centre) was proposed to become a mobile COVID testing centre. The advice I have received from the Registrar is that this is incorrect and that it is the Rotorua Stadium that is proposed for such a venue.

[23] Procedures in accordance with COVID Level 2 will be in place at the hearing venue in relation to social distancing and the availability of hand sanitisers. Counsel are free to wear masks and gloves should they wish to do so. As this is an ordinary sitting of the High Court as opposed to the Court sitting in Chambers, counsel attending in person will be expected to robe. Where counsel are attending by VMR, the provision of the High Court Remote Participation Rules apply. Under those rules, counsel have the option of robing or not as it suits them.

Tikanga and kawa

[24] A powhiri has been arranged to commence at 8.15 am on Monday, 17 August 2020. This will proceed in accordance with tikanga. However, because the COVID Level 2 requirements limit any public gatherings to no more than 100 people, there will obviously be limitations on the number who can physically attend both the powhiri and the Court hearing itself.

[25] The Court is aware that there will be a number of applicants who would wish to attend part or all of the hearing, and that it is of considerable cultural importance that they be entitled to do so.

[26] Inevitably, there will be times when more people than the limit of 100 will wish to be present at once. The Court has no power to modify the limit of 100 people per gathering under the COVID Level 2 procedures. All it can do is to make directions as to what precedence there should be among applicants. Counsel clearly have the highest priority; there should also be at least one representative of each applicant group and interested party present at all times if they wish to be. Beyond that, the numbers will be allocated pro-rata amongst the various claimants.

[27] The Court is aware that some counsel have indicated that they will be attending by VMR rather than being physically present. In order to assist the Registrar in being able to calculate how many spaces are available for members of applicant groups, it is imperative that counsel who do not intend physically being present on any particular day or days, advise the Registrar of that in advance so that the vacant spaces can be allocated to the claimants.

[28] It is also possible that some expert witnesses may wish to be present to hear the evidence of other expert witnesses. If that is the case, then counsel should also notify the Registrar in advance so that can be arranged.

[29] These are difficult and unprecedented times. Should there be any significant change, particularly that of the COVID status in Rotorua, the directions set out in this minute are likely to have to be revisited. The forbearance and patience of counsel and the parties is acknowledged. The continued co-operation of all parties will be required if this hearing is to be able to proceed notwithstanding the challenges we are facing.

[30] Should the COVID level status of Rotorua change from Level 2 to Level 3 at any stage, either prior to or during the hearing, it is unlikely that the hearing will be able to commence or resume until after Rotorua returns to COVID Level 2 status.

[31] Counsel are reminded that if they, or any witnesses, become ill during the course of the hearing, they should advise the Registrar and remain away from the hearing, participating by VMR until they are well.

Churchman J