MACA INTERLOCUTORY HEARING
WHANGAREI
25 JUNE 2019 at 2:15 pm

CIV-2017-485-398 – LOUISA TE MATEKINO COLLIER & ORS

COURT:
If we start by having counsel record their appearances so I know who is here and who wishes to participate in the hearing.

MS MASON:
Ms Mason on behalf of the applicant.

COURT:
Thank you Ms Mason.

What I had proposed, sorry I wasn't clear on that, is in terms of the order of the proceedings, I know Ms Mason filed a suggested timetable, but, I think I have a better way of doing things so if you bear with me, and that's those people who support the application being advanced by Ms Mason, if they could introduce themselves or announce themselves and I'll invite those people to follow Ms Mason in terms of the order of submissions.

I'm aware that there are a large number of people who either have expressed no view, or who have indicated that they are ambivalent, if they could indicate who they represent and whether or not they wish to make oral submissions to me. And then there are obviously a number of people who oppose the application and, again, if you could just indicate who you are and I'll record all of those details and we'll proceed through on the basis that those who support the application will go first. To the extent that those who are neither for or against it are here, if they want to say anything, they can go next. Those who are opposed to it will go next and there will be a final right of reply.

Now, of course, we are somewhat pressed for time, but I can indicate to counsel is that I've read every memorandum that's been filed, and I know some of you filed something this morning, and I don't need you to go through again and recap your submissions which are set

out there. But, to the extent that those of you who wish to respond to what others have said, it may be most productive if we focus on that sort of submission this afternoon otherwise we're just going to run out of time.

So, with those introductory comments, yes, I acknowledge you're for the applicant Ms Mason. Do we have any other counsel here who are in support of the application, if you could introduce yourselves and indicate who you represent?

Right, perhaps then we could proceed to those counsel who have adopted a neutral position in respect of the application who wish to preserve their client's rights but don't wish to advance either for it, or against it. Do we have any such counsel present?

MR SINCLAIR:
Sir, my name is Sinclair and I take that position sir. In regard to the applicants that I appear for today sir.

COURT:
Yes thank you Mr Sinclair.

MS TUWHARE:
Sir, Ms Tuwhare. I'm appearing on this matter for 404-579. And the applicants for Manapo Tangaroa previously supported the proposal in principle. They still support it in principle, but I wish to make with your leave, fuller and further submissions on the way in which the applicants would like the proposal to be pursued in a case management sense, and some of the facts and law that we would like your Honour to consider before making a determination on it.

Sir, it's not a neutral position as such, it's supportive of the proposal in principle but foreshadowing that we see some difficulties with proceeding in the way Ms Mason is wishing to progress it.

COURT:
Thank you Ms Tuwhare.

MR TAPSELL:
Tēnā koe your Honour. Counsel's name is Tapsell and I appear for Te Runanga o Whangaroa, 236.

My attendance today, as I indicated earlier, is just in relation to the extension of the application. We spoke, me and Ms Mason, over lunch, and I think it was agreed that a formal application will be made in writing. And I'll let her address that further in her submissions.

I have to apologise I'll have to leave early with your Honour's leave of course as I didn't originally intend on being here. I should be here until about 3 o'clock just to reserve my client's position.

COURT:
Thank you Mr Tapsell.

MR TAPSELL:
Thank you your Honour.

COURT:
Any further counsel adopting a neutral position?

Right, if we could have counsel whose clients are in opposition to the application please.

MR HOCKLY:
Tēnā koe sir. Counsel's name is Hockly for Te Whakapiko, 485-228; and Te Parawhau, 485-305. That was opposed by my clients. I don't wish to make any submissions, simply to note that we were involved in an initial discussion [inaudible] of the application that was then made. I think we have formally notified the Court by memorandum that it is opposed sir. Thank you.

COURT:
Yes, thank you and I've read that memo.

BARTLETT:
Tēnā koe ano sir. Counsel's name is Bartlett and I appear on behalf of Mr Hamilton who has two applications in opposition and that's Ngāti Manu, 277; and Ngāti Rongo o Mahurangi, 276.

The test case application area overlaps with the 276 application area.

COURT:
Yes, thank you Ms Bartlett.

MS THORNTON:
Tēnā koe ano sir. Counsel's name is Ms Thornton. I'm here on behalf of Michael John Beazley on behalf of Ngāti Rehua and Ngātiwai ki Aotea 404-574 and Ngāti Maraeariki and Ngāti Rongo ki Mahurangi, 485-378, and we oppose. Thank you sir.

COURT:
Tēnā koe Ms Thornton.

MS TEREI:
Tēnā koe sir. Counsel's name is Ms Terei and I appear on behalf of Ngāti Hine – 231, Ngāti Kawa and Ngāti Rahiri – 265, Te Kapotai – 26, and Te Aupouri – 240. And we oppose sir, and I do have submissions to make. Kia ora.

COURT:
Tēnā koe Ms Terei.

MS WOODWARD:
Tēnā koe sir. Counsel's name is Ms Woodward and I appear on behalf of the Trustees of Te Uri o Hau Settlement Trust, 488-205. And we oppose, and I have some short submissions to make you Honour.

COURT:
Tēnā koe Ms Woodward.

MR ERSKINE:
Good afternoon sir. This afternoon I appear with my learned friend Mr Hill for the application by Freda Pene Reweti Whānau Trust on behalf of Ngāti Rehua-Ngāti Wai ki Aotea, 404-580.

I do intend to make five brief points and submissions which also includes the effect of the application, not just on the directly affected applicants, but in the wider area of Ms Collier's originating application area.

COURT:
Tēnā koe Mr Erskine.

MS DIXON:
Tēnā koe te Kaiwhakawā ano. Counsel is Kelly Dixon appearing on this matter, on behalf of 485-279 and also 281 and 286 and that is the Ngunguru Marae Trust, Ngāti Takapari and Patuharakeke Te Iwi Trust Board.

I don't intend to repeat the submissions that have been filed on 10 August 2018 but to reserve the right should any supplementary issues arise today sir, to respond.

COURT:
Tēnā koe Ms Dixon.

MS HARPER-HINTON:
Tēnā koe your Honour. Counsel's name is Ms Harper-Hinton appearing for Te Waiariki, Ngāti Kororā and Ngāti Takapari, 566; and Ngāti Te Ata, 569.

Counsel was instructed that both applicants oppose the test case proposal.

COURT:
Tēnā koe Ms Harper-Hinton.

MS ZWAAN:
Tēnā koe te Kaiwhakawā. Counsel's name is Ms Zwaan. I appear for the Whakarara Māori Committee application, 298.

I received instructions over the lunch break that the applicant opposes the extension possibly sought to include Whangaroa in the test case proposal. Other than that I have no submissions to make today but I would like to seek leave if that application is made, to file submissions on that point.

COURT:
Yes, thank you Ms Zwaan. I propose dealing with that as a preliminary matter because it seems to me we need to clarify before we get into the substance of this, whether or not it's going to be extended. So, maybe you'll be back up addressing me sooner than you think.

MS JUDD:
Tēnā koe sir. Counsel's name is Ms Judd for Te Runanga o Ngāti Whātua, 404-563. You'd have received our submissions filed earlier this year. We don't intend to make any further submissions other than to simply state that we oppose.

COURT:
Thank you Ms Judd.

MR WARD:
Te Kaiwhakawā, tēnā koe. Sir, Ward and Melvin for the Attorney-General as an interested party in opposition.

COURT:
Thank you.

Is there anyone else who wishes to be involved in this hearing who has not, to this point, indicated their attendance?

Right, thank you. If we could start Ms Mason.

MS MASON:
Thank you sir. As you have indicated that the issue of moving the test case boundaries to Whangaroa should be a preliminary matter. Counsel has received instructions that the area is to be moved, or be enlarged, however, this will be done at a later date. Counsel has received instructions for other applications around the country for matters to be referred to the Māori

Appellate Court, but was awaiting the outcome of this Whangarei one. So, that's where that matter sits.

I had a discussion with my friend, Mr Tapsell, and had advised him that we would contact him as well. So, hopefully that deals with that matter.

COURT:
I think that's a sensible suggestion that allows us to proceed without counsel indicating that they're unprepared and need to get instructions. So, Mr Tapsell as far as you are concerned, there's no reason you need to stay further if you have a plane to catch, and that goes for any other counsel who are in that position where they were only interested in this if the geographic boundary was to be extended.

So, thank you, that's the only preliminary issue I can think of, so, if you would move to the substance.

MS MASON:
Thank you sir. I have heard and acknowledge your comments that you have read all of these. But I'd like to just pick up certain points that are crucial in this inquiry. And also bearing in mind that some other matters related to this have come up during the various CMCs over the last few days.

The first one is the 11 January memorandum. At [7] it sets out how this came about, and why the idea of running a test case came up. And there's a submission there in [8], and primarily related to the definition of exclusivity on an application, and the criteria in the Act.

One of the things that was identified was that the test states that customary marine title exists in a specified area of the common marine and coastal area, if the applicant group holds a specified area in accordance with tikanga.

And secondly, that they held that area exclusively. So, they've exclusively used and occupied it from 1840 to the present day without substantial interruption.

And the first thing that people think of is, well if it exclusively used and occupied, how can they there be these overlapping claims, and what does exclusive actually mean.

Then in s 59, there are some things that can be taken into account, and s 9(1) says that, one of the matters that *may be*, so this is not mandatory like it was in the previous Act, so, it says that, ownership of the adjacent land *may be* a relevant factor.

And, then if you take that view and you say, well it's actually not a mandatory requirement and then people start collecting extensive evidence of who owns the adjacent land, and did they own it in 1840, and do they own it now, and how many subsequent owners have there been. That's a very very expensive exercise. And, counsel understands that the Crown has collected this evidence but at the end of the day, the Court may find that that's not actually a relevant consideration.

And so, when one turns one's mind to the way the amount of evidence that needs to be collected, and the ambiguity in the test, we thought, well perhaps there should be a test case. How can we go through with all with these huge ambiguities, what kind of evidence are we going to collect.

Sir, you've heard all the complaints about the funding. If we're going to have to be cautious, and advise our clients, it could be this or it could be that, so you need to actually protect yourself and do the whole lot. Then, that was really not an ideal situation.

So, that's where that arose sir.

At the Wellington conference, my friend, Mr Bennion, raised the possibility of an interlocutory application, looking at whether resource consents that had been issued extinguished that title. And, this was one of the things. So, there are a whole lot of factors. Do those resource consents extinguish title, do marine reserves extinguish title, is the fact a report being there, does that extinguish title, is the fact that a whole lot of people go swimming there. So, there are all of these sorts of issues that, if one had to collect evidence without some more definitive criteria, would make that task of collecting evidence an enormous one. So, that's where that came from.

In the initial application on 11 January, one of the things that was said was, in particular the extent that exclusive use and occupation can co-exist with incidents of public access and

navigation. That is, does public access and navigation reduce, cancel out, or destroy claims of exclusive use?

So, turning back to the s 59(3) says: "The use at any time by persons who are not members of an applicant group, of a specified area of the common marine and coastal area for fishing or navigation, does not, of itself, preclude the applicant group from establishing the existence of customary marine title."

So, the only real indicators in the Act are, you have to have exclusive, but exclusive for the purposes of this Act, allows public use for fishing and navigation. So, then the natural consequence of that was, what about swimming – how much public access if it's used by 20 people a day – is that enough to extinguish? And these were the sorts of high level questions.

Set out there in [8(c)], it says that the Court's decision on the above will assist greatly in determining the extent of the CMT claims and therefore the nature and extent of the evidence required to be produced and filed.

And if these matters are not determined prior to hearing, the applicant fears that substantial resources, including the Court's and the applicant's time and funds will be expended in an inefficient and ineffective manner gathering evidence that may not be relevant and/or unnecessarily hearing the same arguments at every proceeding. So, counsel imagined that this hearing, as with all of the others in the country, would have to go through exactly the same issues.

Counsel say that a further injustice will occur because Māori, not knowing what exactly the criteria are, will gather and file evidence that may, at the end of the day, be irrelevant.

So sir, you have on the one side the Crown collecting the evidence that it thinks it's relevant, and we know, my friend, has told the Court that evidence on adjacent land has been collected. And, yet there are applicants who say that ownership of the adjacent land is not a definitive characteristic of their title.

Sir, at this point, I'd like to just say that that particular issue is hugely controversial, and one of the major differences between the Foreshore and Seabed Act and the MACA Act was that

the Foreshore and Seabed Act required, it made it mandatory, that you had to own adjacent land if you were to get title. So, in that sort of way, it was a lot more precise. It was a lot easier for applicants to say, yes this is unrealistic trying to apply in these areas where they are heavily populated by others. However, this subsequent Act that was part of a political deal, so to speak, removed that jurisdictional bar and made that criteria of the ownership of adjacent land a mere discretionary one.

We don't know whether at the end of the day the Court will say, well I'm sorry, you actually have to show that you still own some adjacent land or whether the Courts will say, well the Act actually says it may be a relevant consideration not a mandatory relevant consideration and agree with the applicants that it's not determinative. So, that's where it came from.

When the application was first filed, the Crown opposed and said, you can't have that sort of discussion or interlocutory application absent from some factual circumstances. And counsel agreed, that seemed sensible. So, this area was found.

COURT:
That's the principle that all of the cases that have looked at s 61 of Te Ture Whenua Māori Act seems to have decided. You need a factual background before you can make principle findings.

MS MASON:
Yes sir. So, that's how the test case, because it originally it was one of these academic questions about what does this mean, so then this area was found and then the reason for this area in Whangarei being used was that, they had recently had a Waitangi Tribunal inquiry so a lot of evidence had already been collected that would probably be helpful in these proceedings, and also, there were a lot of different scenarios along that coast. So, there was a port. There was some agriculture with resource consents that are involved in that, and there's a marine reserve, and there were a whole lot of, it included some rural areas, there was a mix of adjacent land that was owned and adjacent land that wasn't, and so that area was selected.

Then we move onto the next lot of submissions, so that, essentially, was the proposal and there's a map that was attached at, sorry it is a memorandum that was filed on 24 July 2018. And by the time it got to this stage, Mrs Collier's application is one, some of my friends this morning referred to some of the legal applications, Mrs Collier's application is on behalf of

the Confederation of Ngapuhi-nui-tonu. So, it stretches all the way down to the base of the Bombay Hills. And the Ngapuhi-nui-tonu Confederation involves a number of iwi up here. She filed that because her situation is that she has whakapapa to all of those areas. Like some of the counsel this morning, there is a resistance or a reluctance to try to break their idea of title into component parts. She also does not see that it has to be broken down into component parts and the evidence, there have some meetings that have been held with Professor Manuka Henare, who is going to be one of the expert witnesses. And his evidence is along the lines of you can have this sort of regional interest, an iwi interest, a rangatira interest that intersects with and sits alongside the hapū interests and the whānau interests. And this is what his tikanga view is, and it's not one as opposed to the other. They're not mutually exclusive.

So, those discussions have already been held and that was the idea behind Mrs Collier's application. But, because her application was so extensive, going to collect evidence across the whole area seemed also to be another quite expensive process so it was decided that the Whangarei part of her application would be advanced. So, that is a part of her application only.

And then the idea was that the remaining part of her application may well be negotiated with the Crown because by then, there would be some clear indications as to what that test meant.

I'd just like to say at the moment, there have been a number of negotiations that have been in train for a very very long time, and there has been no conclusion on those, counsel submits precisely because of this ambiguity. So, you have a situation where the Crown's view from what has been presented, is that this title exists in small discrete areas, but the applicant's view is that the title exists everywhere. So, the two parties are just miles apart.

This is why, the submission is that there will be no movement on that until the decision is made by the Court. At this point, I'd just like to point out a problem with the negotiations with the Crown. And I know sir that you have been recommending that people go into negotiations with the Crown. But one of the issues is that, those people who go into negotiations with the Crown, presumably if they are successful, they will then go through this process that is set out in the Act and then they would enact legislation.

So sir, is it envisaged that that legislation would extinguish all these claims? Because, if you have all these live claims before the High Court that are half-way through, or a quarter, and maybe we're still here in three years' time, with the same situation, and then the Crown is negotiating with one party, and they reach some agreement, and the Crown says, yes I'll recognise your application and I'll grant you title. The next step is, we'll do some, pass some legislation. That legislation would be extinguishing these claims before the High Court which raises an enormous issue of justice.

So, counsel had met a number of times with these applicants and had worked through a lot of this. As you can see from all the memoranda filed, there has been some substantive thought given to this matter and some, I couldn't estimate how many meetings we had, but a lot of meetings, case strategy prepared, all of these matters were tossed around. And the conclusion was that, the only real way forward, was to have a case, at least, addressed before this Court. And that's really where we're at.

There is a map attached to that area. All of the overlapping applicants were identified. Two who we record. I had one of my assistants at my office who personally rang every single lawyer representing that group and also sent an email to every single lawyer representing that group. So, the efforts, very robust efforts, had been made to discuss these matters with others. Some people filed objections, which they're entitled to do, and responses have been provided to these objections here.

Then the official or the first memorandum setting out the test case area was filed on 24 July. The Crown had initially, at that stage, said at [4], that the Crown did see some value in test cases but that they thought that the test cases should be one of those s 125 priority cases. And counsel continued with this idea of a test case. At [9] it sets out the different factual scenarios, that there was a marine reserve, there was a high public use area for recreational and scientific, high public use and navigation areas, agriculture farms, reclaimed land, a range of resource consent holders, a busy port, an oil refinery. And then the substantial volume of evidence that was already in existence because it had been gathered for the purposes of that Wai 1040 inquiry.

So, not just that, also, as has been mentioned previously, the mechanisms are still in place here in Northland because they have only recently concluded that Tribunal inquiry. My

friend, Ms Tuwhare, referred to the way that the Waitangi Tribunal inquiry had worked with the area put into regions and that submission is supported because if this area was divided into those regions, so Whangaroa is one, Whangarei is one, and there was some others, then that might be helpful in moving forward.

So, that was set out there. And then, at this stage, as part of that application, the applicants decided that they would like their tikanga questions referred to the Māori Appellate Court. So, it wasn't until this memorandum on 24 July that this occurred. So, the application also included a request for his Honour to agree to the proposal to state that case to the Māori Appellate Court. Counsel attached an Annex C, helpfully, a form which could be used to refer that case to the Māori Appellate Court.

And then after that, there was some more submissions in opposition that were filed. There were some further discussions and in one of the memoranda, there's some explanation of those people who were neutral and those people who supported. And it worked out that about half of the claims objected. So it was about half objected, about like, how many in support and many were neutral.

Mr Sharrock couldn't be here this afternoon. All his clients support this.

So, then the Crown objected, and then on 4 September, another memorandum was filed. At this stage, a lot of the objections from the applicants were related to the idea that it was a test case. I think that a lot of people didn't like that they should be bound by what comes out of this case. So, at [11] of that memorandum, counsel advised the Court that the Ngapuhi applicants no longer wished to use the test case. The word 'test case'.

COURT:
The use of the word doesn't alter the substance of the application and its potential precedential effect.

MS MASON:
Yes sir, and that was acknowledged there. What was acknowledged was somebody will have to go first, whoever that was, and that there would be some more generic guidance as to the test for customary marine title coming out of that, but there would be in specific areas, depending on the factual circumstances, a number of different variations.

It seems from the objections, that a lot of people just didn't like the term. So, at this stage, the applicants thought, well, if it's going to bother people so much, we can change that. So, they were in the, a number of other measures had been taken to try to work through the nature of the objections. And at some stage, I've got the numbers here at [8], so there are 38 applications, six of the overlapping parties had indicated that they wish to collaborate on the proposal, four had indicated that they did not oppose, and would abide the decision of the Court, six had not expressed a view, and 20 had objected, and the Crown had also objected.

So, in relation to dealing with the issues that were being put forward, Mrs Collier filed an affidavit saying essentially that she was giving an undertaking that she didn't want the title, if there was anything to reside with her, and what was proposed was a sort of two-stage process in relation to working through all of the issues that had come out of the objections.

So, that the first stage was about inquiring as to the nature and extent of a new title, and the second stage was about all of the applicants, together, determining a tikanga process and, together determining how any title would be managed.

So that seems to me to be the best option on the table as an order.

COURT:
Well the Court has heard quite a lot of comment today from the various parties about the, let's say, difficult, relationship as between some of the applicants, can you realistically assert that all of that is going be left behind and somehow there will be agreement as between all of the parties?

MS MASON:
Sir, what I envisage happening, if this goes forward, is that let's imagine that the tikanga matters go to the Māori Appellate Court, that process in itself will work through some of the tikanga issues because, presumably other parties would either join, follow suit, or join as an interested party so that they could reserve their rights or protect their positions, and then a determination may or may not be made. Sometimes the Māori Land Court or the Māori Appellate Court will take the stance of trying to encourage the parties during this process to get agreement.

I think it will be difficult to get agreement and that's across the board, but counsel's submission is the best option and a way to work through these problems would be the Māori Appellate Court is best placed with the specialist processes and knowledge and systems that they have to work through this.

And whatever the issue, at the end of the day, there are these 40 claims. Either the Court makes a decision about it, whether it's the High Court or the Māori Appellate Court, counsel's submission is that the Māori Appellate Court would be better placed to work through these tikanga issues. But, certainly, the option of the Crown negotiating with one or two parties and then the others remaining with the High Court and somehow legislation extinguishing their claims before the High Court is really the least desirable.

COURT:
That's quite a different issue from the proposition I put to you and that was, if I could just repeat myself, in light of everything that I've heard this morning about the issues as between the overlapping applicants, would it be responsible for the Court to adopt a mechanism which provided no ultimate resolution but left that ultimately to the parties to agree amongst themselves, given their history?

MS MASON:
No, well sir, in terms of leaving that up to them, that is, there's always the backstop of the Court making a decision. So, what was proposed was that this issue of how they would manage title be seen, or dealt with secondly, and preferably, in accordance with tikanga, if that didn't work out, there is always the backstop of the Court.

So, one of the things was, should these overlapping issues be dealt with first or second. If there's a referral to the Māori Appellate Court, one possibility is that it's not dealt with second, it's actually dealt with at the time that the tikanga issues are dealt with, so right at the beginning.

COURT:
Well the Māori Appellate Court would have no jurisdiction to do that, that jurisdiction to address the issues arising under the Act is solely within this Court other than the tikanga issues that the Court might refer to the Māori Appellate Court.

MS MASON:
Yes sir, but in deciding the tikanga issues, they would necessarily have to be looking at the overlapping claims. If they were deciding at 1840 who had title where, because that would be the tikanga issue that would be the first stage, then they would have to look at the competing claims, and so at least at that stage, at that phase, in New Zealand's history, they would be having to make some decisions about, at tikanga, who had what interest where, which would then have a flow-on effect, into the rest of it.

COURT:
In effect it becomes an unappealable finding.

MS MASON:
Yes, but that's the same with all the tikanga issues that go to the Māori Appellate Court. That matter is addressed in my submissions later on. That's how the Māori Appellate tikanga issues work.

In this regard, it might sound so unusual, but in this regard, that's also how the Waitangi Tribunal works in terms of its interpretation of the Treaty of Waitangi. It has the exclusive authority to do that. And in terms of not being appealable, it of course, can be judicially reviewed.

COURT:
There's a fundamental difference between judicial review and appeal though.

MS MASON:
Yes sir, but as I submitted, that's the case currently with all tikanga matters at the High Court that are referred to the Māori Appellate Court not just under this Act.

The first issue that the Crown had raised was that the matters, the case stated to the Māori Appellate Court could only be of fact or law and not of both. Sir, I won't address that because the Crown later withdrew that.

COURT:
No, they've modified position substantially.

MS MASON:
Yes. So, then the next issue was whether sending this matter, these tikanga questions to the Māori Appellate Court was in some way ultra vires, the legislation, as one problem.

COURT:
Well I think the real issue there is the nature of the propositions that you wish to refer to the Māori Appellate Court are essentially the fundamental threshold or jurisdictional questions under the Act which this Court has been tasked with the responsibility of addressing. As I understand the argument, it's when the Act gives that function to this Court, it can't give it away, as much as it might, at times, like to avoid having to deal with these difficult issues. If the Act says this Court has to do it, this Court has to do it.

MS MASON:
Yes sir, but the Māori Appellate Court has not been asked to do the task of the High Court. And I go back to the Ngāti Apa case, and as part of the submissions, so both of this date, and the later ones on 5 November, counsel went through, essentially, what happened with Ngāti Apa.

What happened with Ngāti Apa was, it was a case before the Māori Land Court.

COURT:
I'm familiar with Ngāti Apa, you don't need to take me through it.

MS MASON:
So, the outcome was that the matters of custom had to be decided first and they had to be decided at the Māori Land Court.

And the submissions also set out a whole lot of material from Hansard around the debates that occurred with the passage of the MACA Act, and all of those debates and all the experts, talk about this new system that has been put in place being a replacement or a replica of what was to have occurred after Ngāti Apa.

So, the first step then is to ask the question, "what was the interest at tikanga?" How was their title ascertained, what did it look like, and there was some passages that were put in here from Ngāti Apa of the Court of Appeal at that time merely saying that we shouldn't start with some skewed nature of property. And if I may read that out: "The proper starting point is not

with assumptions about the nature of property (which, as was recognised in *Amodu Tijani*, may be culturally skewed if they if they are "conceived as creatures of inherent legal principle"), but with the facts as to native property. The nature of Māori customary interests is, as the Privy Council said in *Nireaha Tamaki v Baker* at 577, "either known to lawyers or discoverable by them by evidence".

And so, the submission was that that would be the starting point. And if you see that that's the starting point and then after that there is this enormous question of what things have extinguished that. So, in the interim, from 1840 to now, what has extinguished that title, and that's what has led to the role of the High Court.

So, for instance, as was set out there, the issue of resource consents and marine reserves, there's an issue that has been raised around these settlements that have already occurred, have they extinguished some part of the title, and those are these unknowns that are left to the High Court. So, the submission or the idea that somehow the High Court will be sitting there with nothing to do, is rejected.

The submission of counsel is that actually, this case will have to proceed in those two stages because that is what the Act requires. The Act requires a decision or looking at what was that title in 1840, how did it arise, what does it look like, does it look like property in the way that western property is, is it communal, is it in component parts, did hapū have a different type of interest to the whānau, did iwi have an interest, how did this all work. And so, the proposition is that the best place for these issues to be determined is the Māori Appellate Court and then after that, the High Court's jurisdiction would be about, OK, right, what things have extinguished that, and that would be looking at external jurisprudence, it would be looking at if the Court decides that adjacent land is relevant, that would be a matter for the High Court, that's not a matter for the Māori Appellate Court.

The resource consents, the public use and a whole lot of decisions there, so , I don't accept at all that somehow the High Court will have nothing to do.

So, I don't know if I need to go through the political background. There's an affidavit from Dame Tariana Turia. So, all of those have already been set out there.

The other matter is that the High Court, under the Act, had a wide discretion to refer these matters, and the options really were that, as I read the Act sir, the options are that you have to grapple, someone has to grapple, with these tikanga matters and either they get sent off to the Māori Appellate Court or there's a pukenga that can sit with the High Court. But these were the options provided, and the applicants' clear preference is for this matter to go to the Māori Appellate Court.

In the submissions of counsel, given the nature of the issue, given the fact that these mechanisms were a key part of getting agreement between the National Government and the Māori Party at the time, that the preference of the applicants ought to be given weight.

COURT:
I don't understand that submission. What legal basis is there when interpreting the wording of a statute for the preferences of a party who wishes to invoke that Act to govern what the interpretation would be?

MS MASON:
Sir, I had raised this matter at, there was the *Attorney-General*… one of the early New Zealand Māori Council Abroad cases I had set out in here, *Attorney-General v New Zealand Māori Council* … quick and practical interpretation is demanded.

COURT:
But that's got nothing to do with proposition I put to you.

MS MASON:
Right, ok. So, in the memorandum dated 5 November at [65], I say, there is wide discretion for this Court to exercise in determining whether to refer the tikanga questions to the Māori Appellate Court. The general approach to statutory interpretation in New Zealand is to interpret provisions consistently with fundamental human rights and freedoms. It is submitted that the rights of the Ngapuhi applicants consist of fundamental rights and freedoms derived from Te Tiriti, which is an international legal document, which is the primary source of the rights and interests for Māori.

There's an excerpt there from the New Zealand Māori Council, the *Lands* case.

COURT:
If I could stop you there. None of that is in anyway relevant to the proposition that one of the parties with an application under the Act who has a preference, must have that preference had regard to, or be determinative.

MS MASON:
Sir these cases are quoted because of what they say about interpreting the rights of Māori in these sorts of instances. To be distinguished from, perhaps the objections of others, who say that they object, the other applicants. But this is in response to the Crown's submission that the preference of the applicant shouldn't matter.

COURT:
We're not talking about Māori against the rest of the world, I have in front of me a number of different Māori group, iwi, hapū, whānau, who themselves seek different outcomes, whose preferences am I obliged to have regard to?

MS MASON:
Yes sir. I have been just addressing the Crown problem

In terms of that issue, it's very difficult because what has to be weighed up, the submission is that what needs to be weighed up is the interest of those who object versus the interest of those who want to move forward.

COURT:
Again, I need to stop you Ms Mason. You need to engage with the proposition I'm putting to you. And you've said to me that the preferences of your clients are a matter which must guide me in interpreting the statute, and I'm trying to understand the legal basis by which I'm entitled or obliged to favour the preferences of one applicant group over the preferences of another applicant group, and I can't see it in the statute. I'm looking to you to help me, to direct me to where you say the source of that obligation comes from.

MS MASON:
Sir, that's not in the statute, it's a different submission when it comes to the objections of the other Māori applicants. So, I'm not using the statutory interpretation argument for that. The argument for that is that, it is unfair that objectors can have the effect of delaying these proceedings so that the years roll by and applicants who might have elderly persons wanting

to give evidence then pass on. So, that's the unfairness argument that is the argument about why this should proceed.

COURT:
Look, I'm just trying to clarify this whole issue of you say that the Court must have regard to, and give weight to the preference of one group of applicants, and I don't understand why that should be so?

MS MASON:
Sir, if I may clarify, that issue, those arguments were in relation to the objections from the Crown about how this is to be.

COURT:
Look, forget about the Crown for the moment.

MS MASON:
Yes, ok, so let's forget about the statutory interpretation argument because that applies to that…

COURT:
Well we can't do that because that's what the Court is obliged to do. It must interpret the statute.

MS MASON:
Yes sir. There is nothing in the statute that gives a preference to one lot of applicants over the other in terms of which approach they want to take. There is nothing in there. And, there is nothing to say that one group of applicants should be preferred over another except for some arguments about fairness and justice. And the submission is that it is unfair for one lot of applicants to hold the others, or to force the others into. And, so this conundrum is just the way the Act works. Because the alternative, is that my clients would have to be forced into the pukenga approach. So, either the tikanga issues are dealt with by the High Court with a pukenga sitting, or they are referred to the Māori Appellate Court.

COURT:
Well there is a third approach and that's reminiscent of the *Ngāti Apa* approach, the Court makes findings on the facts that need to be considered and then to the extent to which there

are tikanga issues, refers those to the Māori Appellate Court at the conclusion of its fact-finding exercise. And that seems to be consistent, certainly with the case law. I know the Te Ture Whenua Māori Act is different, and it doesn't relate to the Takutai Moana, but in terms of the principles the Courts have consistently enunciated is that, once you've made those findings of fact, then you refer it to the Māori Appellate Court for whatever tikanga issues, at that point, need to be resolved.

MS MASON:
Yes sir, the argument here again is that, the Act envisaged that this tikanga matter around what their interest was, would be sent to the Māori Appellate Court. And there is nothing to prevent that from occurring, and this is a very special different Act. It was politically negotiated. And, if the sentiment was that the options should be given to the applicant then that should be resolved.

So, the only other argument is that, that would be, in counsel's submission, much would take longer. It would be a duplication. These cases are very much, counsel sees the running of these applicants' cases in two distinct parts. There's the 1840 tikanga part and then there's the latter part.

COURT:
You've said, I don't need you to go back over it again.

MS MASON:
So having this third option will take more time because the facts would have to be there, and it would just take up more resource on their part.

COURT:
Well, in terms of what the Māori Appellate Court said in *Jones v Wickliffe,* referring the case or question of tikanga to the Māori Appellate Court where you haven't made findings of fact, can equally result in unnecessary duplication. And you'll recall in that case, they sent the matter back because they didn't have the requisite findings of fact that they needed to address the tikanga issues.

MS MASON:
Yes sir, in this instance, the questions of fact are more colloquially or [inaudible] referred, and so the complication that arose in that case doesn't arise here.

So, the submission is that it would be quicker and easier to have this referred, that part, and in the second part, to remain with the High Court.

Sir, the other submissions were mostly, in relation to that point about the jurisdiction. In relation to the point about the consultation and the fairness and which option is going to advance, the applicants have taken all reasonable steps to consult with, and to accommodate the other parties, and continues to want to work with them, and the expert witness evidence will be made available to the other parties that are involved so that they can have a say in that. Professor Henare has agreed to have some hui to discuss his approach. And so they're doing as much as they can to collaborate. And sir, it's accepted that at the end of the day the Court will have to make to decision about this.

But, again, the submission is that, the applicants really do not want this case, or these issues to be continuing for much longer. They had expected a decision in December last year and then it was moved to this date and would like a decision on it sooner rather than later. They consulted, in person, with Te Uri o Hau.

Sir, those are the objections to, the responses to the Crown objections. And mostly they were about that issue of the High Court not having much of a case left. That submission is rejected sir, as has been set out previously.

Now, the overlapping claims, there were some responses that are set out from [70] onwards. Now, some of the complaints were about Mrs Collier's undertaking that she didn't want title for herself or for her whānau or for her hapū, but she did want the matter to proceed.

And some of the objections were that there was not enough detail in that. Because the only thing that had been said was that she had said I will enter into a tikanga process with all of the other applicants and we will decide whatever that looks like later. The idea behind that was that there might not be any title to talk about or there might be lots, and that could be decided then. It was not realistic to have any detail, and she would have submitted that it would inappropriate, unrealistic and contrary to tikanga for the Ngapuhi applicants to unilaterally prescribe the details of the process themselves.

So, if they did enter into some process like this, then they could work out how that would be. Sir, if that process didn't work, then it would be up to either the High Court or the Māori Appellate Court if the High Court were minded to send that particular issue to the Māori Appellate Court to make a decision on that.

There was some objections that talked about the funding, and said that there was no funding available for them, or for the overlapping applicants to resolve issues of overlap. Again, sir, this has been a separate matter, everybody was practically in the same boat in relation to funding, and it was unfair to use that, or for that to be a matter that prevented some of the applicants from wanting to move forward.

Another matter that was raised was that this application didn't have any statutory priority, and the response to that was that, his Honour had previously said that if applicants and applications are ready to go, then he would be happy to hear them. And this particular area, the Te Uri o Hau application is a statutory priority application. They've asked for their application to be adjourned and they are in negotiations or discussions with the Crown.

And, I earlier referred to the problems with negotiations with the Crown. Presumably, if they obtain some success, there's still this issue of these live applications before the High Court. I presume the Crown would not be passing legislation to extinguish these claims. But I don't know.

In [92], it says that there is an excerpt there from Crown's submissions where the Attorney-General says that he is not opposed to applications for recognition orders being progressed to a hearing, and that he supports the Court's willingness to hear and determine any application that can be progressed to a stage where it is ready.

Then there was some other submissions that were really against the idea of the Collier undertaking, applicants who didn't like that two-stage process, perhaps they wanted the overlapping issues to be addressed prior to any case proceeding.

And the response to that really is that it's very unrealistic to expect that these 40 applicants will reach some agreement now, and it would prolong matters. And, as has been set out in the affidavits from Mrs Titewhai Harawira and from Mr Paul, they are very senior persons,

they've seen a lot of this in their lives. And they say that will be damaging to Māori, to their whanaungatanga to start entering into a process that can involve a lot of conflict, and at the end of the day, the Courts might find that there is no title. And so, they would have done all of that for nothing.

So, their preference then had been to have that to, for want of a better word, divvy up the spoils when you find out, if you have some, because you might be doing all of this divvying up, and there's actually nothing there.

Now, at [99], there was some submissions about this not being a test case. So, that was some of the objections were people really didn't want this to be a test case because they didn't want to be bound. And as we discussed earlier, of course there will be some generic things that come out of any, whatever the first case is, which will set a precedent and of course there will be some specific things which might apply from case to case. It will be different.

The next lot, so it's really this memorandum of 5 November that has all this lengthy sections divided up all of the objections and the next objection is this one about Crown engagement. Again, I raise this problem in here. The Ngapuhi applicants have dire concerns about the parallel processes that are occurring at the same time. It is neither fair nor just that the Crown continue to have confidential negotiations with only one group of applicants where there are multiple overlapping claims over the same area.

COURT:
But that's a pathway that's set out in the Act. This Court can't overturn that or disregard it.

MS MASON:
Yes sir, I'm aware that that is a pathway that is set out in the Act. There are a lot of problems with this Act and I just don't think that when it was drafted that people had any real idea that there would be so many overlapping claims. And so a lot of these problems that the Court has been faced with, were never envisaged. So, that's why we're this situation.

Sir, I go back to the earlier point that presumably if any of these negotiations are successful, the obvious thing is that the legislation would extinguish these claims and so that's just really the applicants are alarmed about, which is why they say that the High Court is aware that those decisions about this will come out of, and not the engagement process.

It's acknowledged that engagement with the Crown is a good option but, only after at least one or two cases have been finally determined.

Unless you have some questions, I have finished.

COURT:
Thank you Ms Mason.

We will now take a brief afternoon adjournment.

Ms Tuwhare, do you wish to address the Court?

MS TUWHARE:
Yes thank you sir.

A preliminary matter. I'm flying partially blind because I haven't had the Crown's submissions until just now but, if I just quickly, won't alter my submissions too much, so, I'll attempt to provide something useful.

So these submissions are made on behalf of Waimarie Kingi for Ngā Hapū o Tangaroa ki te Ihu o Manaia tae atu ki Mangawhai, that's the name of the application. The submission in relation to the case stated application which Ms Mason has filed, is concerned initially with the label that's been used, so the application that's been filed has been made on behalf of her clients whose application is for Ngāti Kawau, Te Waiariki and Ngāti Korora.

Those three hapū, Ms Mason's clients make up three out of the hundreds of hapū of Ngapuhi. Ngapuhi are the largest iwi in the country with over 110 active hapū. Those 110+ hapū confederate from time to time to advance specific courses when it's mutually beneficial to them. But that is only done after due consideration and by consent of the hapū. Otherwise the default position is that the hapū are autonomous and independent and albeit closely related political units who operate according to their respective tikanga.

This longstanding tikanga of the hapū of Ngapuhi has been vigorously defended and upheld in recent times. Most recently during the Waitangi Tribunal processes of the district inquiry and the Tuhoronuku mandate inquiry, which was determined under urgency.

And, thus, the use of the term Ngapuhi test case is problematic. The Ngapuhi application, as well is the other term that's been commonly used. It's problematic in and of itself and is misleading and in itself is a breach of tikanga in many ways. And I just urge this Court not to make the mistake of adopting labels that even mislead or redefine longstanding cultural identities and ways of operating.

So, that's just a minor point in the scheme of things really, but a very important one.

COURT:
Just on that, what do you say would be an appropriate way for the Court to refer to it?

MS TUWHARE:
To refer to the actual applicant parties.

COURT:
Or to the application, the Court obviously doesn't consciously wish to cause anyone offence but needs to know where the offence is going to be created.

MS TUWHARE:
I think the applicant parties, and I know there's more than one applicant group for those particular hapū of Te Wairariki, Ngāti Korora and Ngāti Kawau or they may have those other parties, counsel directly representing those other groups may have a more firmer view on that, but certainly, it seems to me to be the safest option to refer to the application as the application as it actually is, using the names of the people in the intituling and the relevant CIV number.

COURT:
Thank you.

MS TUWHARE:
On the issue of case stating law and/or fact under the Act, it is my submission sir that tikanga is clearly central to the issues before this Court. Tikanga is referred to 14 times within the Act and obviously the preamble of the Act makes specific reference to intrinsic and inherited rights of iwi, hapū and whānau derived in accordance with their tikanga.

And it even refers to one of our tikanga of manaakitanga within that preamble. And it defines the meaning in the definition section and it also defines mana tuku iho as inherited right or authority derived in accordance with tikanga.

So, it's somewhat trite to point out that a right or authority when recognised that law has the force of a legal right and in turn shapes our law. Furthermore, the customary values and practices may be both fact and have legal force. The Act generally seeks, in my submission, to recognise rights derived from, and exercised in, accordance with tikanga, plus the legal recognition of tikanga in the Act contemplates tikanga as a source of law.

Given that tikanga is a central part of a system of principles, values, rights and obligations which, when removed from their cultural paradigm, run the risk of being misunderstood or assessed according to a different set of values and principles which permeate the dominant paradigm that we are in, in the High Court, in this country. And that is why tikanga or Māori customary law needs to be found to exist as a matter of fact, at least for now.

Counsel hopes that one day tikanga is understood by all who share this country and the values, principles, rights and obligations that are commonly understood by Māori, can be commonly understood by all and respected by all, and hopefully readily practiced. But, until that day, we are obliged to prove its existence and the parameters of the tikanga as a matter of fact.

Our former Chief Justice, Dame Elias has helpfully guided us in this regard. I'll just briefly read a couple of paragraphs from *Takamore v Clarke*, the Supreme Court decision.

"What constitutes Māori custom or tikanga in the particular case is a question of fact for expert evidence or for reference to the Maori Appellate Court in an appropriate case. A Court asked to identify the content of custom by evidence is not engaged in the same process of interpretation or law-creation, as it is in its responsibility in stating the common law. As in all cases where custom or values are invoked, the law cannot give effect to custom or values which are contrary to statute or to fundamental principles and policies of the law. But it is necessary for the Court to take care in identifying the custom or values truly relevant to its determination."

The Supreme Court then went on to, Chief Justice then that she was, moved on to state that "The role of the Court is not to judge the validity of traditions or values within their own terms. It is concerned with the application of established traditions and values in fulfilling the Court's own function of resolving disputes which need its intervention. The determination of the Court says nothing about what is right according to the value systems themselves. Indeed, the determination of the Court can only settle the immediate legal claim."

In my submission, it is for this reason that an ability to defer to a specialist Court is very important. And, there are potentially many relevant tikanga Māori in a general sense that would support the claimants' applications, as well as specific tikanga of the respective groups in relation to the respective and more personal whakapapa, histories and realities which have shaped their respective tikanga practices.

The relative tikanga can, and ought, to form, in counsel's submission, important parts of the evidence and legal submissions to be brought before the Court in this jurisdiction and obviously in the Māori Appellate Court if s 99 is invoked.

For example, I just want to refer to a couple of points that have been made about exclusive use, the term exclusive use. And exclusive use is something that can be dealt with in tikanga terms, in my submission. And it can, and often is, articulated in tikanga terms, and so it's non-exclusive use is more common to find tikanga in relation to the non-exclusivity of rights.

And, tikanga can, and often will, determine the level of exclusivity or inclusivity of the use and occupation. And that needs to be teased out in addressing these applications.

The other matter which jumps out at me is the matter of extinguishment. Extinguishment is also often articulated in tikanga terms. Extinguishment at law must consider extinguishment as a matter of tikanga, if we are accepting that tikanga is a source of law.

So, given that s 99 provides that we can refer important questions of tikanga to the Māori Appellate Court, in counsel's submission, this path that is being applied for in any application before the Court is entirely discretionary. In counsel's submission, the High Court must

consider whether its determination of the applications before it requires the specialist jurisdiction of the Māori Appellate Court to assist it on questions of tikanga.

The Act contemplates, in counsel's submission, the High Court in stating the question of tikanga is deferring to that specialist knowledge and experience of three Judges of the Māori Appellate Court in substitution of its own judgement on those questions, as the Court's bound by the Māori Appellate Court's opinion.

The binding nature of the opinion of the Māori Appellate Court supports the notion that the Court in applying the law as it relates to tikanga Māori must be very careful in its determination of what the relevant tikanga are. But, also, in the application of the relevant tikanga. This leans itself to deferring to that specialist knowledge and expertise.

I just want to before turning to s 61 of Te Ture Whenua Māori Act, I just want to raise a couple of points in relation to the proposal that this be a two-step process where one in which the Māori Appellate Court would ascertain the proprietary interest as a matter of tikanga, and the second part of that proposal seems to contemplate the High Court determining where extinguishment has occurred, simply ignores the fact that extinguishment at law can also involve aspects of tikanga. The second step being the sole role of the High Court is somewhat artificial in that regard.

COURT:
So are you submitting that that should also be a matter for the Māori Appellate Court?

MS TUWHARE:
Not quite sir. And I'll move on to be a bit clearer about what I'm ultimately saying. But, essentially, the submission is that that is just simply premature at this stage before we have facts and submissions before the Court and have clearly articulated issues that we're grappling with in tikanga terms, to refer anything to the Māori Appellate Court, but that this Court should be open to doing that when it is necessary.

If I can just pick up on s 61 of Te Ture Whenua Māori Act, in my submission, s 61 contemplates any question of fact relating to the interest or rights of Māori or any question of tikanga being stated, and therefore if we're accepting that tikanga is a source of law, and also

must be adduced by fact, we must accept that either fact or law can be case stated to the Māori Appellate Court.

Nothing in the Act limits the Court's ability to state questions of tikanga which are questions of fact and/or law. How the case stated questions are posed is to assist the High Court in its final determination is flexible in counsel's submission, but of great importance to the utility in outcomes of the process. Particularly in light of the fact that we would forego appeal on these issues and it's my clients' position that we need to be careful about foregoing any right of appeal on these issues.

COURT:
What does that practically mean though? It sounds like you're wanting a dollar each way.

MS TUWHARE:
Yes, sort of sir. I am actually. I would like a dollar on taking a more clearly articulated questions of tikanga to the Māori Appellate Court, at the point in time when it is clear that we need the Māori Appellate Court's assistance on that, and until we have submissions and evidence before the Court, we're simply not going to be able to know whether or not they're straightforward for this Court to determine whether or not there is any contesting, or whether all parties have accepted that the tikanga is what they say it is, and so on and so forth.

COURT:
That position is inconsistent with Ms Mason's application.

MS TUWHARE:
It's inconsistent with Ms Mason's application, but I do support the application, and my clients support the application in principle, that we shouldn't rule out moving the questions of tikanga to the Māori Appellate Court at some point, but just not now.

COURT:
Well the Act says that the Court has that discretion.

MS TUWHARE:
Certainly. And the way in which the questions are currently posed in the current application, seems to be too broad to offer any practical assistance to this Court without unnecessarily, in my view, limiting our right of appeal.

COURT:
That's irreconcilable with the approach Ms Mason has urged upon me.

MS TUWHARE:
Well then, perhaps it's a submission in opposition sir. But that is the position sir. That the contemplation of shifting these important questions of tikanga, once we've had them clearly articulated, and at this stage, they're still too broad and haven't been clearly identified, and in my submissions, would be the better time to consider a proposal such as Ms Mason's putting. I'm not saying that it shouldn't happen, just saying that we need more before we can pursue it.

Thank you sir, unless you have any further questions.

COURT:
No, thank you Ms Tuwhare.

MS THORNTON:
Counsel is Ms Thornton again, and I'm here on behalf of Mr Beazley.

One of the things that occurs to me about this proposal on the test case is the fact that it doesn't involve agreed facts or facts that are not in dispute. In my experience cases that involve new statutes or precedents that are new to determination, if you want to really set up a good case for challenging the law or testing the law, you're probably going to do better if you don't have a lot of disputed facts because when you have an outcome, you know what the basis of that is.

Here, we're hearing about several Ngapuhi hapū who want to make findings that they have rights in certain areas, and one of areas there overlaps my client's area is, for one of them, is Great Barrier Island and Little Barrier Island, Aotea and Hauturu, and the other area is Te Oneroa Kahu, which is Long Bay up to Te Arai Point, which is basically North Shore, Auckland to Mangawhai.

Now, my client is not a Ngapuhi, has no association to Ngapuhi and these areas are claimed as being Ngapuhi-nui-tonu tribes. Now, if we go through a test case hearing, if we come out with an answer that doesn't satisfy Ms Mason's clients, then do we know that that's been a

result of the application of the law, the new law, on how exclusivity works or anything like that, or maybe it's just the Court found that my client's rights were going to be enforced and not hers.

So, once you have a big factual dispute like that, you're muddying the waters about what's going to be the real outcome, for example. And this will lead into the whole question of the referral to the Māori Appellate Court. Ms Mason mentioned claiming rights down to the Bombay Hills, as being Ngapuhi right. Now my client can explain why that, and how that, apparent so-called boundary came into effect. He can explain how come it's no longer relevant, and how that came to happen. And, I suggest that it won't require Māori Appellate Court determination to make a decision based on that evidence. Whether the Court finds in his favour or not, it's not that mysterious. But at least that ought to be heard before a reference is made to the Māori Appellate Court. Should this Court hear that issue and decide that it can't determine under normal knowledge and it needs the assistance of the Māori Appellate Court, I agree with Ms Tuwhare, that's when you make the referral. But right now, with like the effort it's just meant to abdicate or transfer the determination this Court is meant to make, to the Māori Appellate Court, is not consistent with the statute.

The other thing I wanted to emphasise is, this morning we talked to some degree about working together and trying to resolve overlapping claims or issues, or resolve issues that make overlapping claims contest each other, trying to work together if we can make a way forward that involves joint claims or claims that will relieve some of the tension among hapū or claimants.

This proposal is very counterproductive to that, and instead of working together to try and resolve this issue, we are now front and centre going hellbent to either get this thing going right away and get this determination before this Court as quickly as possible and that is going to cut across the efforts of trying to resolve these contentious issues or potentially contentious issues, and instead of dealing with things that bring people together as is often stressed in Te Ao Māori. We're dealing with things that separate people.

And I guess, to my thinking, this is really being driven by an ambition that isn't really as productive as we would hope. And for that reason, I would urge the Court to deny this application and do it in such terms that it's very clear that we don't want to go through this

again in Whangaroa. We don't want to go through it again in another location, because it's not really based on location, it's based on several propositions that aren't supported.

Those are my submissions sir.

COURT:
Thank you Ms Thornton.

MS TEREI:
Tēnā koe sir. As I said previously, I am here on behalf of Ngāti Hine, Ngāti Kawa and Ngāti Rahiri, Te Kapotai and Te Aupōuri.

From the outset sir, I just wish to clarify that this Ngapuhi application in terms of overlapping claims, doesn't actually overlap per se with all of our clients, but our clients have expressed a wish to at least come today to preserve their interests and to express to the Court that there is a concern that although it appears as if it's only affecting overlapping claimants, it actually concerns the wider applicant groups given that this test case proposal has the potential to also set a standard for other applicants throughout the country that are making applications to the High Court.

So, the submissions that I'm about to make are in relation to the fact that is something that is currently being confronted by our clients.

I wish to make three relatively brief submissions, and the first one is in regards to the first stage that has been proposed by my learned friend, Ms Mason. And it says that the purpose of, although no longer called the test case, is to determine the factual and evidential threshold for all applicants under the Act to prove customary marine title.

The issue that we have with that particular way of articulating that is there's nothing compelling the Court to use the Ngapuhi application as the test case to determine the criteria or threshold for proving coastal and marine title. I say that with the context of the Court is developing jurisprudence in respect of the factual and evidential threshold required to prove CMT.

For example, there was the discussion that there was a lack of clarity around what certain parts of the test mean. And, in the first case before the High Court in *Tipene* in 2016, the Court there said, although the evidence was overwhelming in respect of exclusive use and occupation without substantial interruption, they thought it sufficient to note that the clear words of the Act needs to be applied with an appreciation for the context in which the particular claim arises. Remoteness, environment and changes in technology are all relevant. These may explain periods of no or occasional use while nevertheless maintaining a connection to the land. That was at [149].

Sir, our submission is that the current status in terms of trying to determine the factual and evidential threshold will naturally fall with the cases that are currently before the High Court. The Judge's reasoning in its decisions as it comes to consider the cases that are currently before it, will naturally develop the very thing that this Ngapuhi case is trying to push for. And it's on that basis that we don't support, or don't think that there's compelling enough reason for the Ngapuhi test case to be that test case that determines a threshold. There are already cases before the High Court and those cases will naturally start to define what those various evidential and factual threshold criteria is.

That's our first submission sir.

The second one is in relation to overlapping claims, and it has been touched on numerous times throughout today, not just in this hearing but earlier today. And I think that you're getting a good idea around the dynamic and complex nature of overlapping applications up here in Te Tai Tokerau. And it was also extensively discussed with you around the political environment up here. And, it's really with that contextual knowledge that we respectfully ask the Court to exercise caution when trying to, it's almost compelling our clients to take part in a process that they have already said that they don't want to be a part of.

As Ms Mason has said, in fairness to her clients, that they want to get this thing going, and that other applicants are holding up their claim, it's a different side to the same coin. On the other hand, we don't want to be compelled to take part in a process that we don't agree to. As you would be aware there's now going into about 40 overlapping claims, 20 in opposition, as well as the Attorney-General, and I think that the key point in regards to this particular issue with overlapping claims, is that it's unknown how complex overlapping claims can be,

because the Court is only just grappling with how many there are. Picking up this particular application and running with it, at this particular stage without having the necessary factual circumstances behind it, can cause great prejudice to our clients. Prejudice in the form of having to engage in a process that they don't agree, as I've already mentioned.

Also, the inability to advance their claim in the manner of their choosing. If this Ngapuhi application is able to go forward sir, our clients will be roped into having to participate. Their overlapping claims will have to be presented in Court, and as I've said, that's already something that they are adverse to.

You mentioned earlier today that there is a need for a measure of agreement, and I put to you that 20 in opposition is not quite as close to agreement, as we would suggest, to be preferred by the Court. There's complexities and things involved in this particular proposal that the Court should exercise caution on.

The suggestion has been made that overlapping claims can be dealt with in a second phase or further down in the process. There's danger in that particular kind of suggestion, mainly because, as my friend, Ms Tuwhare already articulated, hapū rangatiratanga is something that is held fast to here in Tai Tokerau. And the suggestion that their concerns will be addressed in a later phase, without the opportunity to actually have those dealt with initially, is a great concern for them sir.

My final submission is mainly in regards to matters of tikanga to be taken to the Māori Appellate Court. And it's very brief and it's along the same lines as what Ms Tuwhare is saying.

It's our submission that it's premature to really consider this particular issue at this phase. For example, at least in the first instance, the Court needs to grant the test case proposal for Stage 1 to even proceed, before we would need to consider whether the tikanga part of it needs to be ever considered in the first place.

So, our submission sir is that, were the Court minded to consider these tikanga issues, that it's not appropriately placed here. That it is something that needs to be considered further down the process, and that we're not at that point in the process yet. And so, with that in mind, we

submit that it's premature, at this stage, to determine whether these particular matters need to be stated to the Māori Appellate Court, and a better place is the time that those facts are before the Court.

Those are my submissions sir, unless you have any questions.

COURT:
No, thank you Ms Terei.

MS WOODWARD:
Thank you sir. As noted earlier, counsel's name is Ms Woodward and I am giving submissions on behalf of the Trustees of the Te Uri o Hau Settlement Trust.

Ms Mason referred earlier to the Crown's prioritisation of Te Uri o Hau's claim. For reasons given in both the Crown's and our memoranda, that's not a statutory prioritisation. This was a prioritisation taken by the Crown due to the early nature of Te Uri o Hau's claim.

I submit that this is not a reason to elevate the test case proposal.

Ms Mason has also raised concerns about Te Uri o Hau's direct engagement with the Crown and a memoranda has expressed the view that negotiations should be adjourned. Your Honour has already raised that…

COURT:
It's just not something that the Court can do.

MS WOODWARD:
An express pathway, yes exactly, and I support that position your Honour.

I also wish to submit as my learned friend, Ms Thornton, has raised that the test case proposal is focused on Ngapuhi. For example, the clear undertaking refers to a tikanga process with other Ngapuhi-nui-tonu applicants to work out how the title would be administered in that Stage 2 process referred to.

I wish to clarify Te Uri o Hau is a hapū of Ngāti Whātua, not Ngapuhi. The title held on behalf of Ngapuhi-nui-tonu will not be held on behalf of Te Uri o Hau.

Therefore, I submit that the test case proposal is inherently prejudicial to Te Uri o Hau, and any tikanga negotiation may not be accommodating of Te Uri o Hau.

Your Honour, if you have any questions, that concludes my submissions.

COURT:
No, thank you Ms Woodward.

MR ERSKINE:
Thank you sir. Counsel's name is Erskine, and I appear for the applicant group Ngāti Rehua, Ngātiwai ki Aotea, which are also centred around the Great Barrier Island or Aotea, and CIV reference is 580.

As I alluded to earlier, I have five points. They're largely practical, the points. Having said that, I broadly agree with the submissions made as to law, including the proposition that the Court can't abdicate its responsibility which is given to it by Parliament to determine statutory requirements.

The first point, I had wondered whether it's just stating the obvious, but to make at least to be stated, and that is that there is no consent, or insufficient consent, for this application. As I recall, or to the best of my knowledge, consent was not sought by or on behalf of my applicant group before the application was filed. In other words, it was filed unilaterally. And there is still no consent, and I don't expect there ever to be consent, although I can't guarantee that.

That's important because there are two bases of this interlocutory application, informal as it has been. One, if there isn't consent, and the application can't be heard, at least given its size, because evidence is required on behalf of all the other 30 or so applicant groups that are drawn into the test case area proposal.

If, however, regardless or notwithstanding the lack of consent, then an order should not be made because for practical reasons that are alluded, it cannot work.

And that leads me to my second point which is if the application is too large, the 30 or more applications in the area, and this accords with the approach that is apparent of the Court to

date in setting down applications or priority applications which is, the area sought to be determined is far from discrete.

Obviously an extreme example of that are the national applications. But, that leads to the third point which is the costs and the time and the delay of hearing such an application. As I recall, in one priority application which was a CMC in February this year for Ngāti Pahuwera. There were five overlapping claims. So, that makes six applications and, if I recall correctly, that's been set down for seven weeks. Now, if we multiple that by some six times, 30 applications or so, we're getting to the best part of a year to have this heard in the Māori Appellate Court with everyone's evidence, expert evidence and pukenga. I also suggest that an issue for such a large application may not be what is meant by exclusive, but whether such a large application can show any use or occupation in various areas, which are governed if you like, by marae or hapū.

The effect of that length of application would be to delay everyone else's applications or many other applications while this is progressed. And that is referred to in the application or the original memorandum filed by Ms Collier, or on behalf of Ms Collier, which is that part of the area will become a test case area, this is at [2(a)], but the remaining part, and that is the part which goes from the Bombays upwards, broadly, would be, and this may be optimistic, subject to negotiations with the Crown, once the CMT criteria have been finally determined. The CMT criteria being what is proposed to be referred to the Māori Appellate Court. What that seems to suggest to me as I've set out in my submissions from last year, is that requires, at worst, every other applicant group, north of the Bombays or thereabouts to wait until this test case application has been determined before they can progress their applications. So, for that reason, that is a concern, not only to my applicant group based around Aotea, but it is a concern to Mr Tatui and all the other applicant groups who are here today. That their application risk at least, being delayed by this test case proposal.

All in all, and further to, I suppose the purpose of HCR 10.15, the overall problem of the practical level it doesn't secure the objective of the HCR, including r 1.2 which is, this application will not secure the just, speedy and inexpensive determination of this application or the other proceedings. As Ms Downs alluded to earlier, in dealing with this and also the other large applications which I'd politely describe as ambitious, it is incurred what is

precious funding, which is already an issue for all the applicants and is the subject of current Waitangi Tribunal proceedings.

And those are my points sir.

COURT:
Yes thank you Mr Erskine.

MS HARPER-HINTON:
Ms Harper-Hinton for Koroa Te Waiariki, Ngāti Kororā and Ngāti Takapari and Ngāti Teata.

I just have a couple of brief points sir.

My friend Ms Mason referred to efforts that were made by staff to contact overlapping applicants. The emails and telephone calls. I just want to clarify that this was after the application for a test case was made. So, there was no consent or agreement from the hapū to go about this.

The second point I wanted to raise is that Ms Mason's divvying up customary title at a Stage 2 which we again, haven't consented to anyone holding that title on their behalf, and there's been no consultation about how that procedure would work or consent to that procedure.

So, she talks about the divvying up at Stage 2, but at Stage 1 is where the case stated occurs, so this is where the determination of whether you hold the area in accordance with tikanga over the very large test case area, is made. At [102] of her 5 November memorandum, she states that it's not necessary for the overlapping applicants to progress in concert with the test case because it's really Stage 2 that concerns them.

My simple submission is that if you're concerned with Stage 2, you are going to be concerned with Stage 1 because how can a case stated be answered without the overlapping applicants because the case stated asks who holds that area in accordance with tikanga.

COURT:
Do your clients accept they're part of Ngapuhi-nui-tonu grouping or not?

MS HARPER-HINTON:
No, your Honour.

And those are my submissions sir.

COURT:
Thank you Ms Harper-Hinton.

MR WARD:
Thank you sir. Mr Ward for the Attorney-General sir.

Your Honour the Attorney-General's submissions are set out in more detail in the submissions of 10 August and the memorandum of counsel 11 October 2018.

Given your Honour's indication, I'm going to focus on a small number of points relating to some of the oral submissions made in support of the application.

The Attorney-General agrees that the applicants and the interested parties will be assisted by the High Court hearing applications and developing case law. There's clearly a benefit in developing case law, in particular cases, that will provide guidance in other cases where the facts are similar.

The Attorney-General doesn't oppose the Collier applicants advancing their application to a hearing or doing so on an expedited basis if the Court thinks that's appropriate. The Attorney-General's opposition to the proposal is not based on any hostility towards the applicant. It's not based on any desire to thwart the application. The opposition is based on the view that the proposal is problematic, that it has a number of practical and legal difficulties that mean that the Court ought not to grant the application.

We set those out in detail in our written submissions our first point being that the overlapping, the level of opposition by overlapping applicants is problematic. Secondly, the benefits of this particular test case are overstated. I'll come back to that point. And the proposed questions are inconsistent with the statutory scheme. Your Honour has touched on that in discussions with other counsel. The questions go beyond questions of tikanga. They remove part of the test that the High Court must apply, and abdicate that responsibility, in my

respectful submission, to the Māori Appellate Court, that is not what the statutory scheme establishes. And further, the case law, we filed a case book yesterday, the case book shows that the approach in the High Court and significantly in the Māori Appellate Court, doesn't support the approach that Ms Mason advocates.

Sir, at best, the test case would give guidance but it would not necessarily give clarity that my learned friend says the application would provide.

In the memorandum of counsel of 24 July at [3(b)], there's a suggestion that the test case would provide clarity for all other applications. In this area, the application of the statutory test would be highly fact specific. It would depend upon the particular evidence for each application.

The issues that were raised in *Tipene* will not be the issues that are raised for what customary marine title applications that affect large metropolitan harbour areas. They will be different. The issues that are raised about leading the test will be different, according to different tikanga, according to the history of the uses of an area. There are a range of factors that will shape how the Court will need to assess the evidence.

So, the submission is that there should be some caution about suggesting that a single case will provide clarity for all possible future hearings on these points.

In my written submissions to the proposed question, it's the Māori Appellate Court is outside the statutory scheme and I don't propose to go through that in any detail. It's set out in the written submissions.

COURT:
Yes, I've read your submissions.

MR WARD:
Ms Mason referred in passing to the legislation being a political statute. And in interpreting the statute, in my submission your Honour, the starting point is s 5 of the Interpretation Act. The assessment of Parliament's intent is based on the text of the statute and the purpose of the statute. The purpose of the statute is set out in s 4.

In my submission, there isn't an ambiguity that requires the Court to look to Hansard. And there's no warrant to look beyond Hansard. The statutory scheme is pretty set out and the statutory purpose, this is a jurisdiction the High Court has.

Ms Mason mentioned the decision of the Court of Appeal in *Ngāti Apa*, and I understood the point to be that the Court there discussed references back to the Māori Land Court, but of course that was because *Ngāti Apa* involved an application under Te Ture Whenua Māori, for land status orders. This Act doesn't place the jurisdiction with the Māori Land Court, it places the jurisdiction with the High Court. Section 98 removes the jurisdiction of any other Court.

In relation to the discretion the High Court has under s 99, there is a further option, your Honour mentioned three, there's the option of putting a question of tikanga to the appellate court, or of the High Court appointing a pukenga. Your Honour mentioned the approach that Justice Harrison favours, in the *Parininihi* case of referring a question after the hearing of the High Court, I simply note that s 99, because it's a discretion, the Court may choose to do none of those things. The Court could choose, if it wished, to address the issues in s 58 through the evidence that's put to it in the High Court hearing.

And at [16], in the *Parininihi* case, Justice Harrison says that that's an appropriate approach in many cases. He also says that the best time for the Court to assess whether or not there ought to be a question put to the Māori Appellate Court, is after the High Court has had an opportunity to test the evidence and to identify with some clarity the particular questions which should be put to the appellate court.

In my submission, that approach applies to s 99 as much as it does to s 61 of Te Ture Whenua, and it's telling, in my submission, that the Māori Appellate Court's response is to send it back, the case stated, to the High Court and say that those issues have to be tested in the Court that's sending the questions through.

Unless your Honour has any questions, those are my submissions.

COURT:
No, thank you Mr Ward.

Anything in reply?

MS MASON:
Sir, I'd like to, if I may, address the objections that were said by the other applicants first.

Some of the objections are related to just being too early and parties not being ready, and that the questions were too broad. Essentially, the applicant's position is that this is the third year and they should not be prejudiced because people have done very little for two years. So, that's just not a fair or just determination, or criteria.

The other applicants were notified very early on. There's been some year and a half since the original proposal was put, and then going back to the prejudice caused to the applicants, is really very severe and, for instance, one of the witnesses was going to be sitting with Professor Patu Hohepa, he is the foremost expert on language and on Ngapuhi culture, and he is now unwell, and we've had to look at other ways for instance of Professor Manuka Henare's, Professor Hohepa, and getting evidence that way. So, these are the kinds of delays that kinds of prejudice that our applicants are suffering because people are just, for whatever reason, not getting on with their cases.

Just in that regard, there was one of the applicants that said that they only filed an application because they wanted to be in there. So, that's an abuse of process, to be filing applications with no real intention of progressing them, and then for those people who actually have progressed their applications, who have done a lot of work, and who are actually serious about engaging in this process, to be dragged back or to be held back with such prejudice by such applicants is clearly unfair.

COURT:
Just on that point Ms Mason, I suspect the majority of the applicants have filed proceedings in this Court have only done so to preserve their position in case they're not able to engage with the Crown. It's by far the preference of most of them, so, I don't see that as being an abuse of process. It's a position that applicants have been forced to adopt, otherwise they'll be statute-barred.

MS MASON:
I don't understand that people are not progressing their applications because they want to engage with the Crown. Sir, there are a number of applicants that have no desire to engage with the Crown and many have filed because they don't want to be left behind, but they actually oppose the entire Act. This is the difficulty with this Act, and just going onto, many of the other applicants, you can see, my friend, Ms Tuwhare, while I'm just trying to work out having a dollar each way, that is really not a sufficient reason to delay Mrs Collier's application. And, those issues I acknowledged. So, all of the applicants are in the same boat in this regard. They're all in this situation. None of them like this Act but they have to engage, and they have to move forward because they do not see that it's realistic after already being amended or repealed and replaced once, that actually there will be any significant movement in terms of this Act, politically.

Just stepping back from all of this and taking a look at all these different objections, many of the objections are about the application progressing in the first place.

The submission of the applicants is that, somebody is going to be prejudiced somewhere along the line. So, it's either the applicant, because they will be forced into the High Court where the pukenga is sitting there, which they don't want to do, or the others who say, we don't want to go to the Māori Appellate Court. So, whichever option you look at, somebody is going to be upset about it. And, the submission is that, considering all of that, this is actually the best option for a start sir. It's the only option on the table, two years on.

But actually this is the best option and the reason that this is the best option is Mrs Collier has been really clear to say, actually I'm not doing this for myself, so I don't walk away with anything. I'm doing this because I want to progress this application while we've got all this knowledge by these elderly people, we might not have that in a year, or two, or three or four or five, and that's why I'm doing this.

Sir, in light of that, the submission is that, this should progress.

The other matter is that the whole idea of going to the Māori Appellate Court, is to achieve some conclusion that title is held collectively by all of the applicants.

COURT:
Well if I could just tackle you on that one. As you've heard the non Ngapuhi applicants say that the mechanism being proposed is ultimately the allocation of who holds the title, if any is ultimately given, in accordance with Ngapuhi tikanga. They make the point that that's not their tikanga. So what you're proposing has the potential to disadvantage or disenfranchise them.

MS MASON:
Yes sir and if you turn it the other way the things that they are saying would be objected by my applicants saying that it is Ngapuhi tikanga, and for instance the submission by my friend for Te Uri o Hau, that somehow Te Uri o Hau is not part of Ngapuhi-nui-tonu because they are part of Ngāti Whātua. Well, it's well-known that Ngāti Whātua is part of Ngapuhi-nui-tonu, and all of these matters could be resolved by the tikanga evidence. Because you'll have one applicant will have a view of tikanga and another one will have a different one and either there is a stalemate and the delays continue, or it gets scheduled somewhere or other, and the tikanga evidence can work through this, so there's plenty of people who can give evidence on all of these issues that have been raised.

In that regard, Professor Manu Henare is a very very senior Ngapuhi person who has a very senior role at Auckland University…

COURT:
You don't need to go into that. I'm well aware of who he is and what his reputation is.

MS MASON:
So, the submission is that somebody or some group is going to have their toes trod on and so there's no perfect answer as my friend, Mr Erskine, said.

They will never get consent. This will never be a matter of consent and so it really falls to your Honour to make a decision on this. And the submission is that the only, and the best option, on the table, is this application.

My friend for Te Uri o Hau, made a submission that Te Uri o Hau claim is not a statutory priority claim. Counsel has made submissions that actually it is a statutory priority claim and those are set out in one of the memoranda already filed.

Essentially, just going back to the prejudice that is claimed will have been suffered by those applicants who don't consent to go into this Māori Appellate case. They don't consent to proceed with Mrs Collier's application. Her application is ready. The Attorney doesn't, from what I gather, doesn't object to Mrs Collier's application proceeding. The Attorney objects to the case stated part of it but in terms of Mrs Collier's application proceeding, many of the applicants appear to be objecting to that and so this is the same problem, people who aren't ready objecting to an applicant that is ready to proceed. So, those two things have to be distinguished.

Just in relation to the matters raised by the Crown. Firstly, counsel makes the point that we don't accept that the Crown actually has a role in this matter. And in terms of the role and status of the Attorney, it is causing a great deal of prejudice and there is a great concern that the Crown shouldn't even be involved by making submissions in this interlocutory matter. And again, sir, the point about timetabling something for that interlocutory application to be heard.

The Crown says there is no ambiguity. The reply to that is that we wouldn't be here if there was no ambiguity. That the discretion, that is a matter that Parliamentary Hansard debates become relevant.

The Crown, even though counsel doesn't accept that the Crown or the Attorney-General ought to be involved in this proceeding, there is an objection to the Attorney-General wanting Option 3. The applicants don't accept this. They go back to the whole point of putting the Māori Appellate Court option in there was so the applicants actually had a choice, and if they wanted to go to the Māori Appellate Court, unless there is some great reason why they shouldn't go, this option should be granted.

COURT:
That's not what the statute says. The statute says the Court has the discretion to choose, which amongst the various available options is most appropriate in each case.

MS MASON:
Yes and the submission from the applicants is that the weighting given to the applicants' preference should be quite high.

COURT:
We've discussed that before and you weren't able to identify for me the basis for a legal principle that says that.

MS MASON:
Just going back to the earlier submission, it's really the fairness one. It's the weighing up the prejudice to the applicants versus the prejudice to the applicants who have objected.

In that regard, the applicants who have objected, if you followed through and you say, alright let's imagine Mrs Collier's application goes to the Māori Appellate Court, and there's a finding that that area is held collectively by the applicants, and that was all that was found, that decision says nothing about which applicants get what. So, that's the part that the applicants are concerned about, that they would prejudiced, and the submission of counsel is that they won't be prejudiced in that regard.

Sir, those are my replies.

COURT:
Thank you Ms Mason.

Thank you to counsel for your contributions. It's been a long day. I'd like to be able to promise you an immediate decision. I'm sitting in Court or otherwise unavailable for the next month. So, it will be soon after that as I get some time to write the decision. But, I do appreciate the submissions that you've made and the effort that you've all put into it.

Mr Registrar, the Court will now adjourn.

COURT CONCLUDES – 4:56PM.