

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE**

CIV-2011-485-821

IN THE MATTER OF the Marine and Coastal Area (Takutai
Moana) Act 2011

IN THE MATTER OF an application by the Trustees of the
Ngāti Pāhauwera Development Trust
TORO WAAKA, TUREITI MOXON,
CHAANS TUMATAROA-CLARKE,
REX ADSETT, GERALD ARANUI,
AMIRIA TOMOANA and TOM KEEFE
on behalf of NGĀTI PĀHAUWERA for
Customary Marine Title, Wahi Tapu
Protection and Protected Customary Rights

On the papers

Counsel: R N Smail and E James for Trustees of the Ngāti Pāhauwera
 Development Trust
 K Anderson and M Dicken for Maungaharuru-Tangitū Trust
 M Mahuika for Ngāti Pārau
 G Erskine and S J Roughton for Ngai Tahu o Mōhaka Waikare
 B Lyall for Mana Ahuriri Trust
 J Mason for Maanu Paul
 M Williams fir Pan Pac Forest Products Ltd (Interested Party)
 G Melvin for Attorney-General (Interested Party)

Minute: 15 June 2020

MINUTE (NO. 8) OF CHURCHMAN J

[1] A teleconference was held in this matter on 5 June 2020 and a minute issued on 11 June 2020 amending certain timetable directions.

[2] Ms Mason, counsel for C M Paul (CIV-2017-485-512), sought and obtained leave to file a further memorandum by 12 June 2020. That memorandum was to address her client's

wish not to advance its application for this matter scheduled in February and March 2021 but to participate in that hearing as an interested party.

[3] Ms Mason has now filed the relevant memorandum. It refers to directions made in the Whakatōhea proceedings (CIV-2011-485-817) in support of a claim that her client should be permitted to participate in the hearing as an interested party.

[4] The rulings made in the Whakatōhea application reflect the facts of that case. There is one distinguishing feature with the present case and that is the directions made by Collins J on 12 February 2019 that all six overlapping claims (including that of Mr Paul) be heard jointly. Mr Paul has therefore known since 12 February 2019 that his claim, to the extent that it related to the area relevant to the Ngāti Pahauwera claim, was scheduled to be heard with the Pahauwera claim which has been allocated a fixture in February and March 2021. It would appear that he has made no effort at all to prepare for that hearing.

[5] In the memorandum dated 12 June 2020, Ms Mason says that the reason for Mr Paul's inactivity is that he wishes to have certain tikanga issues referred to the Māori Appellate Court. She refers to an application that was made by Ms Collier and others in CIV-2017-485-398. That submission ignores the fact that the application in CIV-2017-485-398 had nothing to do with any tikanga issues relating to the area covered by the Ngāti Pahauwera application. It related exclusively to issues that were particular to CIV-2017-485-398.

[6] It also overlooks the fact that the Court dismissed the application and also a subsequent application for leave to appeal that decision to the Court of Appeal. Although the applicant in that case has applied direct to the Court of Appeal for leave to appeal, unless such leave is granted, and the decision of the High Court overturned, there is currently no live application relating to tikanga issues in CIV-2017-485-398.

[7] The memorandum dated 12 June 2020 goes further and suggests that in all areas where Mr Paul has advanced claims, not just the area relating to the Ngāti Pahauwera hearing, he does not intend to advance his application but only to participate as an interested party. He is said to adopt this view because he supports the applicant in CIV-2017-485-398 and wants to have the Māori Appellate Court, rather than the High Court, determine relevant issues in this case.

[8] Applicants under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act), cannot dictate to the Court the basis upon which they will participate in Court hearings. All applicants are subject to directions, rulings and judgments delivered by the Court. If they deliberately ignore a timetable direction, or a direction that their claim or part of their claim will proceed at a particular time, then they risk fundamentally jeopardising that claim.

[9] There are some claims where, as a result of the number of cross-claimants and the nature of the overlapping claims, that it is most expedient for only part of overlapping claims to be heard with the principal claims (such as the Whakatōhea hearing) and other claims (such as the Ngāti Pahauwera one) where the number of so-called “cascading” claims is such that reasons of costs and efficiency make it appropriate for all overlapping claims to be heard in their entirety with the principal claim. That is why Collins J made the directions he did in this matter on 12 February 2019. If counsel for an applicant ignores those directions with the result that other applicants are put to the avoidable expense of having to participate in two hearings instead of one, that may well have costs consequences.

[10] The other practical consequence in the present case of a cross-applicant such as Mr Paul not participating in the hearing in February and March 2021 is that any findings made by the Court in respect of other overlapping claims may impact on the ability of Mr Paul to convince any future Court of the merits of his claim.

[11] In relation to those priority hearings where the Court has permitted cross-applicants to opt not to have the whole or part of their cross-claim heard, Mr Paul’s position that he would wish to participate as an interested party is noted but, to the extent that the Court has directed cross-claims be heard together (such as in relation to the Ngāti Pahauwera case), if any cross-applicant wishes to vary the directions given by the Court, they will need to apply and obtain leave in the normal fashion.

[12] In addition to seeking a stay of that part of his case relating to the area covered by the Ngāti Pahauwera hearing, counsel also sought for her appearance at the case management conference (CMC) scheduled for Wellington, Dunedin, Nelson, Gisborne, New Plymouth, Whangarei and Auckland, occur by way of AVL or telephone, and if such facilities are not available, to be excused from attending.

[13] The CMC on 5 June 2020, to which Ms Mason’s memorandum of 12 June 2020 relates, dealt specifically with the Ngāti Pahauwera hearing. It is not appropriate for the Court to dispense, in advance, with counsel’s attendance at an unspecified number of other CMCs.

[14] On 22 May 2020, the Court issued a minute providing directions for the annual round of CMCs which commence in Wellington on 29 June 2020. The Court directed that all applicants file a brief memorandum detailing progress made since the last CMC and outlining any orders or directions that the applicant sought from the Court. The minute directed that such memoranda be filed and served no later than 8 June 2020.

[15] It is not optional for applicants to ignore minutes such as this. Depending on the content of memoranda filed, the Court may be prepared to dispense with the participation of counsel in any CMC completely and make a direction on the papers.

[16] In prior years, some CMCs were able to be adjourned without any hearing where all applicants in relation to that CMC filed appropriate memoranda in advance and were agreed on that course of action. That option is still available.

[17] The Court has an obligation to ensure that all applications are advanced in a timely manner and in a way which causes the least avoidable cost and inconvenience to all applicants. That is why regular CMCs are scheduled. Unless the Court is receiving periodic information about how claims are progressing, it is not able to discharge its obligation to establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal of New Zealand and recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua.

[18] Accordingly, the request for a blanket dispensation from attendance at all future CMC is declined. Counsel is directed to promptly file memoranda in accordance with the Court’s minute of 22 May 2020.

Churchman J