IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CIV-2011-485-793
CIV-2017-485-222
CIV-2017-485-294
CIV-2017-485-244
CIV-2017-485-223
CIV-2016-485-767
CIV-2017-485-770
CIV-2017-485-195
CIV-2017-485-219
CIV-2017-485-196
CIV-2017-485-250
CIV-2017-485-257

Hearing: 21 October 2019

Counsel: A Warren for Ngā Pōtiki a Tamapahore Trust, and Ngāti Tara Tokanui
K Tahana for Ngā Hapū o Ngāti Ranginui
J N Gear for Ngā Hapū o Ngāi Te Rangi
J P Koning for Ngāti Whakahemo
S Fletcher for Ngā Hāpu o Te Mōutere o Mōtītī
J Mason for Te Rūnanga o Ngāti Whakaue ki Maketū Inc
S T Webster for Ihakara Tangitū Reserve, Ngāti Hē Hapū Trust, and Ngāti Awa
T H Bennion for Ngāti Pūkenga, and Ngāi Te Hapū Inc

Interested Parties:
B Beverley for Tauranga City Council
M Hill for Bay of Plenty Regional Council
Y Moinfar-Yong for Attorney-General

Minute: 27 November 2019

MINUTE (NO. 7) OF CHURCHMAN J
(Ngā Potiki)

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[1] The application by Colin Reeder and others on behalf of Ngā Potiki a Tamapahore Trust (the Ngā Potiki application) is a priority application. This means that it is entitled to priority as to a hearing date over other applications.

[2] The area that is the subject of the Ngā Potiki application is also subject to applications by a number of other applicants. Those applications, or those parts of the applications that overlap with the Ngā Potiki application, are scheduled to be heard at the same time as the Ngā Potiki application.

[3] Following directions given at the case management conference (CMC) in Tauranga on 18 June 2019, Mr Warren, counsel for Ngā Potiki, filed a memorandum dated 8 October 2019 providing the Court with an update on communication between Ngā Potiki and the overlapping applicants. The memorandum reveals that counsel for Ngā Potiki has been active in attempting to engage with the overlapping applicants, and that some progress has been made toward, at least some aspects of, the Ngā Potiki application. That process of engagement is ongoing and is to be commended.

The Rangataua approach

[4] Arising from Ngā Potiki's engagement with other applicants, Ngā Potiki has proposed what is described as a "two-staged" approach to its application. The geographic scope of Ngā Potiki's application in the coastal marine area is extensive. It includes that part of Tauranga Harbour known as Rangataua and extends out to sea encompassing not only Mōtītī but also some smaller islands and rocky outcrops.

[5] Ngā Potiki proposes that its application be heard in two parts. The first part relating to Rangataua, and the second part addressing the balance of the area that is the subject of the application.

[6] There are five applicant groups that have applications in relation to Rangataua: Ngai Te Rangi Settlement Trust, Ngāti He Hapū Trust; Ngāti Pukenga, Ngā Hapū o Ngāti Ranginui Settlement Trust and Ngā Potiki. All either support the application for a two-staged approach or do not oppose it.

[7] The application is effectively being made under r 10.15 of the High Court Rules 2016 (HCR). That rule permits the Court to split a hearing in appropriate circumstances. The rule is designed to achieve the objectives set out in HCR 1.2 of the just, speedy and inexpensive determination of matters. It is available in relation to the Court's original jurisdiction as well as its appellate jurisdiction.[1]

[8] The Court is obliged to take into account, not only the interests of the immediate parties, but also those of other parties awaiting hearing before the Court.[2] The burden of displacing the presumption that all matters are to be determined in one trial rests on the party contending for split trials.[3]

[9] The Rangataua approach is opposed by counsel for Ngā Hapū o Te Mōutere o Mōtītī (Mōtītī applicants). The basis for the opposition is that it will result in an unacceptable delay in the hearing of the Mōtītī application. The Mōtītī application was originally timetabled to trial in 2018 but that timetable order was set aside when it became clear that the Mōtītī application would need to be heard alongside the Ngā Potiki priority application and overlapping claims.

[10] In the written memorandum filed prior to the Court hearing, Ms Feint, for the Mōtītī applicants, submitted that:

(a) it was not clear that having two separate stages would reduce the cost or Court hearing time;

(b) two sets of evidence would need to be produced;

(c) the split trial approach would not shorten the hearing; and

(d) there was a possibility of inconsistent factual findings or issue estoppel.

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1 *Attorney-General v Idea Services Ltd* HC Wellington CIV-2011-485-1562, 16 December 2011 at [37].
2 See *Turner & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 5 May 2010 at [9].
3 *Karam v Fairfax NZ Ltd* [2012] NZHC 887.

[11] It was also submitted that there could be possible additional delays due to an appeal or as a result of interlocutories. It was suggested that these risks could be avoided if judgment was not delivered until after the entire case had been heard.

[12] Ms Feint proposed what was said to be a "compromise solution" which would see the Mōtītī application, and the application for the surrounding rohe moana, to be heard in a specific hearing following Rangataua. This would result effectively in the Ngā Potiki application being heard in three stages, firstly, Rangataua; secondly Mōtītī; and thirdly the balance of the application.

[13] Ms Feint also proposed that the Court issue a single judgment in relation to all components of the Mōtītī application and that the Court require counsel for all other parties not to file an appeal against stage 1 until judgment was delivered on stages 2 and 3.

[14] Ms Feint was also concerned that interlocutory applications (in particular, discovery) needed to be dealt with promptly in order to avoid delays. She requested the Court to set a discovery timetable in order to avoid potential defended discovery applications derailing a future hearing.

[15] At the hearing, Mr Fletcher appeared on behalf of Ms Feint for Ngā Hapū o Te Moutere o Mōtītī. He clarified or modified some aspects of Ms Feint's memorandum. In relation to discovery, he accepted that because these proceedings were commenced by way of originating application, discovery was not something that the parties were entitled to as a matter of course. He confirmed he was not submitting that formal discovery should be applied for by all applicants but wanted to make sure that if there was a focused discovery application, that it was dealt with in a timely manner. He also confirmed that if a pūkenga was to be appointed, that should be done at a time which did not necessitate an adjournment of the hearing.

[16] In relation to the argument that having a two-stage hearing would require parties to prepare two sets of evidence, Mr Fletcher acknowledged that the issues relating to Mōtītī and Rangataua were substantially discreet, and although there would be some overlap in evidence, it would not be great. Mr Fletcher also acknowledged that given the discreet nature of the Mōtītī and Rangataua claims, the risk of issue estoppel or inconsistent factual or findings was reduced.

[17] Mr Fletcher did not pursue the suggestion that the Court, as a condition of granting the two-stage proposal, require the parties to the Rangataua hearing to undertake not to file an appeal against any decision in that case until after judgment in any subsequent stage or stages had been delivered.

[18] Mr Fletcher repeated the submissions in Ms Feint's memorandum of 18 October 2019 to the effect that there should be a splitting of the Ngā Potiki application into a further separate hearing that just related to Mōtītī and adjacent islands.

[19] A number of counsel referred to the fact that the Waitangi Tribunal had undertaken an urgent enquiry on the topic of who are tangata whenua at Mōtītī. This had commenced in May 2018 with closing submissions being filed in September 2019. It is unknown when the Tribunal will deliver a report but the parties' best estimate was late 2020 or early 2021.

[20] A number of counsel were of the view that there might be considerable benefit both to the parties and the Court for any hearing in relation to Mōtītī not to occur before the Tribunal report was available.

[21] While I accept that the availability of such a report may assist the parties and may contribute to a more efficient hearing of the relevant claims in this Court, I am reluctant to direct that the hearing of the claims relating to Mōtītī not occur before the release of the Tribunal report. The reason for this is that neither the claimants nor the Court has any control over when the Tribunal will ultimately release its report, and it would be unfair to Ngā Hapū o Te Moutere o Mōtītī to further delay the hearing of their claims.

[22] From comments made by counsel during the course of the CMC, it appeared that there was a realistic possibility that various claimants in the Rangataua area might co-operate in preparing joint evidence and may even advance a joint claim. There was general support amongst those applicants for a two-stage approach. Other than Ngā Hapū o Te Moutere o Mōtītī, those claimants not directly concerned with Rangataua but whose claims overlapped other parts of the Ngā Potiki claim did not see themselves as adversely affected by the two-stage proposal and abided the decision of the Court.

[23] The applicants involved in the Rangataua area estimated that a two-week hearing might be required to hear this part of the Ngā Potiki claim with a possible reduction in time should there be joint evidence and what was effectively a joint application.

[24] The interested parties (the local councils and the Crown) did not oppose the two-stage proposal.

[25] Having considered all the parties' submissions, I am satisfied that this is an appropriate case to direct a split hearing of Ngā Potiki's claim with the claim relating to Rangataua being heard before the balance of the claim. This hearing will be confined to the parties' claims for coastal marine title.[4]

[26] In terms of the timetable proposed at [9] of the memorandum of counsel for Ngā Potiki dated 18 October 2019, Ms Moinfar-Yong, for the Crown, expressed a preference for the Crown to be able to file evidence after the non-applicant interested parties rather than simultaneously with them.

[27] Given that counsel for the other interested parties thought that it was unlikely that they would be filing extensive evidence and, such evidence as they filed, would be designed to assist the parties or clarify issues raised in the applicants' evidence, the request by the Crown for sequential filing can be accommodated by amending the proposed timetable so that any interested parties (other than the Crown) file their evidence by the end of July 2020, with the Crown to file its evidence by the end of August 2020. As all Rangataua applicants are applicants in their own right, rather than being respondents to Ngā Potiki's claim, it is appropriate that all applicants file their evidence simultaneously.

[28] Although it did not seem that any party envisaged making any interlocutory applications (including an application for discovery), I think it is appropriate to build in a limit for such applications into the proposed timetable.

[29] Accordingly, the timetable directions in relation to the Rangataua part of the inquiry are:

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4 As delineated on the map appended to the memorandum of counsel for Ngā Potiki dated 8 October 2019.

(a) any party wishing to file any interlocutory application will do so no later than 28 February 2020;

(b) all applicants will file and serve their evidence by the end of April 2020;

(c) interested parties, other than the Crown, will file their evidence by the end of July 2020;

(d) the Crown will file its evidence by end of the August 2020;

(e) all applicants will file any evidence in reply by 15 October 2020;

(f) the Court will consider possible appointment of a pūkenga by mid-November 2020; and

(g) a two-week hearing will be allocated by the Registrar at the first convenient date in the first quarter of 2021.

[30] I have considered carefully whether there should be a further subdivision of the balance of the Ngā Potiki hearing so as to have a separate hearing relating to Mōtītī and adjacent islands. Ultimately, I have concluded that the most efficient approach is to just have one hearing for the balance of the Ngā Potiki claim. I am influenced in coming to this conclusion by the fact that the report of the Waitangi Tribunal into Mōtītī is likely (as a best estimate) to be available toward the end of 2020, and such a report could be of considerable assistance to both the parties and the Court.

[31] While it would be inappropriate to delay the hearing of the Mōtītī claims until the Tribunal report was available, if it turns out that there is considerable delay in the release of the report, it seems sensible to not hold the hearing prior to the probable release date of the report but to schedule a hearing at such time when it is likely to be available. If the report is not available within a reasonable time, then the benefits of having the report are outweighed by the detriment of further delays to Ngā Hapū o Te Moutere o Mōtītī.

[32] The timetable in respect of the balance of the Ngā Potiki application will be:

(a) any interlocutory applications (including discovery matters) are to be filed no later than 30 May 2020;

(b) all applicants' evidence to be filed by 30 July 2020;

(c) the evidence of any interested parties (other than the Crown) is to be filed by 30 August 2020;

(d) any evidence from the Crown is to be filed by 30 October 2020;

(e) any evidence from the applicants in reply is to be filed by 1 December 2020;

(f) the Crown will consider the appointment of a pūkenga by 15 December 2020; and

(g) the Registrar is to allocate a six-week hearing to commence in the second quarter of 2021.

[33] During the course of the CMC, the Bay of Plenty Regional Council offered to share with the applicants its expertise and resources in relation to mapping, particularly in relation to the area around Mōtītī. The applicants are encouraged to liaise directly with the Bay of Plenty Regional Council on this point.

[34] Counsel for Ngāti Whakahemo, Mr Koning, raised the issue of the likely size of affidavits to be filed in these proceedings with such affidavits likely to attach a considerable quantity of documentation by way of exhibits. The need for duplication of the same documents as exhibits to evidence of a number of applicants could be avoided if the parties were to adopt the model of a casebook. While the Court will not direct the preparation of a joint casebook, the parties are encouraged to consider this as an option. While unanimity amongst all applicants in relation to the use of a common casebook is desirable, even if only some applicants in either the Rangataua part of the Ngā Potiki application or the balance part, can agree on the preparation of a casebook, that is likely to achieve efficiencies and reduce costs. If the parties can agree on such a casebook, it should be filed contemporaneously with the filing of the applicants' evidence.

[35] The next CMC in relation to the Ngā Potiki and related claims will be held in Tauranga on 6 July 2020.

Churchman J