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

Teleconference: 28 October 2020

Counsel: R N Smail and E James for Trustees of the Ngāti Pāhauwera Development Trust
M Mahuika and L Underhill-Sem for Ngāti Pārau
G Erskine and M Sreen for Ngai Tahu o Mōhaka Waikare
K Anderson and M Dicken for Maungaharuru-Tangitū Trust
B Lyall for Mana Ahuriri Trust
G Melvin for Attorney-General

Minute: 28 October 2020

MINUTE (NO. 11) OF CHURCHMAN J
[Questions for pukenga]

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[1] By a minute of 14 October 2020,[1] the Court appointed Dr Des Kahotea as a pukenga in this matter.

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[1] Minute (No. 10) of Churchman J re *Ngāti Pāhauwera* CIV-2011-485-821, 14 October 2020.

[2] The Court proposed four written questions to be put to the pukenga and requested feedback from counsel by 21 October 2020. Several counsel have filed memoranda and a teleconference was convened on 28 October 2020 to address the issues arising.

[3] The two broad areas discussed were the content of the questions and the process that would be followed by the pukenga in the preparation of his report.

Content of questions

[4] Counsel for Ngāti Pāhauwera Development Trust (Ngāti Pāhauwera) sought to have proposed questions (c) and (d) deleted, and for question (a) to be modified to read: "What tikanga is supported by the evidence as applying in the application area?"

[5] The grounds upon which questions (c) and (d) were sought to be deleted were that these questions asked the pukenga to draw legal conclusions instead of assisting the Court to form its own independent judgement. It was also submitted that question (c) required the pukenga to reach a conclusion on the ultimate issue and that this generated "… the real and prejudicial risk that there will be over-reliance on this opinion without a thorough investigation and evaluation of the evidence."

[6] Reference was also made to the Privy Council decision in *Pora v R*[2] which it was asserted supported the proposition that notwithstanding s 25(2)(a) of the Evidence Act 2006 (the Act), the pre-existing common law rule forbidding evidence being given as to the ultimate issue still had a part to play, and that the fact finder should be allowed to make its own determination and to evaluate all of the relevant evidence including both expert evidence and other evidence "unencumbered by a forthright assertion from the expert".

[7] In a joint memorandum, counsel for Maungaharuru-Tangitū Trust (MTT) and Ngāti Pārau raised the issue that question (c) "Which applicant group or groups holds the application area or any part of it in accordance of tikanga?" was the ultimate issue that the Court had to determine. It was submitted that the Court should make a determination on that issue without input from the pukenga. They asked that this question be deleted.

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2 *Pora v R* [2015] UKPC 9 [27].

[8] Mr Erskine, counsel for Ngai Tahu o Mōhaka Waikare (Ngai Tahu), during the course of the teleconference, suggested a further modification to question (c) so that it read: "Which is the appropriate group to hold the application area or any part of it in accordance with tikanga?". That proposed modification was not supported by Mr Mahuika, Mr Lyall or Mr Melvin. I see no need for it.

[9] Mr Melvin, for the Attorney-General, noted that the proposed questions emphasised the customary marine title (CMT) aspect of the application rather than the orders for protected customary rights (PCR) that some of the applicants were seeking. He proposed an additional question which read: "Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?"

[10] He also noted that the pukenga may have some difficulty answering questions (b) and (c) without some guidance as to what it means to "hold" an area of the takutai moana in accordance with tikanga which was submitted to be a question of law.

[11] The Attorney-General also submitted a change to question (d) with the word "each" being substituted for the word "the" so that the question now read: "Who, in fact, are the iwi, hapū or whānau groups that comprise each applicant group?".

Analysis

[12] It is acknowledged that proposed question (c) contains a component of one of the issues that the Court will be called upon to determine. However, the previous common law rule prohibiting evidence being given as to the ultimate issues was expressly abolished by s 25(2)(a) of the Act. The comments of the Privy Council in *Pora v R* referred to above, specifically related to the facts of that case which involved a criminal jury trial.

[13] The Privy Council declined to receive the evidence of the expert's opinion on whether or not a confession was unreliable on the basis that it was not substantially helpful, usurped the function of jury, and depended heavily on the defendant's self-serving and hearsay statements. The expert was also criticised for expressing an unwarranted degree of certitude in his opinion.

[14] Ultimately the issue in terms of s 25 of the Act is whether the opinion evidence of the expert is likely to be substantially helpful to the Court. Dr Kahotea has been appointed because of his expertise in matters of tikanga. There has been no challenge to his expertise. Tikanga is a body of knowledge in which an expert is capable of developing expertise. That body of knowledge is also capable of being objectively verifiable. The pukenga, as an expert witness, is also able to be cross-examined and the connections between his expertise, the body of knowledge that makes up tikanga, and the conclusions he has reached, can be probed, should counsel wish to explore that.

[15] While the use of the word "holds" in s 58(1)(a) of the Act does potentially give rise to issues of legal interpretation, the pukenga is not being asked to express an opinion on those. As was the case with the *Whakatōhe*a hearing, it will be for the lawyers to make submissions to the Court as to the precise legal meaning that the word "holds" should bear.

[16] Unlike the situation with a jury, the Court is able to assess whether the pukenga is overstepping the boundaries of an expert or, in some other way, giving evidence that is inadmissible. If the pukenga attempts to draw legal conclusions instead of assisting the Court perform its own independent judgement on the facts, as counsel for Ngāti Pāhauwera are concerned might be the case, the Court is able to simply disregard such evidence.

[17] I therefore do not accept the arguments that one or more of the questions is inappropriate because it is a component of the ultimate issue the Court has to decide. The answers to the questions are likely to be substantially helpful to the Court.

[18] In relation to the minor amendments to question (a) proposed by Mr Erskine, it is not necessary to add the words "in question" to the end of the question because the application area is clear. It is the area covered by the applications that are before the Court. Mr Erskine also wanted the words "or support" inserted after the word "establish" so that question (a) reads: "What tikanga does the evidence establish or support applies in the application area?". There did not seem to be any opposition to that amendment, and I make it.

[19] In relation to question (b), Mr Erskine submitted that the words "or any part of it" be added so that the question now reads: "What aspects of tikanga should influence the assessment of whether or not the area in question or any part of it is held in accordance with tikanga?"

[20] It is possible that the pukenga might form the opinion that only part of the area that is the subject of these applications is held in accordance with tikanga, therefore such a modification may be helpful. There was no objection to it, so I make it.

[21] The amendments to proposed question (d) suggested by Mr Erskine flow from the possibility that the pukenga might express the opinion that different groups held different parts of the area covered by the application. It is similar to the amendments suggested by Mr Melvin which was supported by most other counsel. Accordingly, I alter question (d) so that it reads: "Who, in fact are the iwi, hapū or whānau groups that comprise each applicant group or groups?"

[22] Ms James proposed that question (a) be modified so that the words "is supported by the evidence" replaced the words "does the evidence establish" so that the question reads: "What tikanga is supported by the evidence as applying in the application area?" I can detect no difference in the meaning and see no need to amend question (a).

[23] Accordingly, the revised questions are:

(a) What tikanga does the evidence establish or support applies in the application area?

(b) What aspects of tikanga should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga?

(c) Which applicant group or groups hold the application area, or any part of it, in accordance with tikanga?

(d) Who, in fact, are the iwi, hapū or whānau groups that comprise each applicant group or groups?

(e) Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

Procedure

[24] The joint memorandum filed on behalf of MMT and Ngāti Pārau submitted that it would be ideal for any pukenga report to be available with all of the other evidence, prior to Christmas so that the parties could include comment on it in the submissions due on 26 January 2021.

[25] Mr Melvin supported that submission although he acknowledged that the report may be only in draft at that stage and may be amended as a result of oral evidence given at the hearing.

[26] The Court is aware of the many issues that can affect the ability of a witness to complete a report or brief of evidence on time. In this case, one of the relevant factors would be whether or not all of the parties are able to comply with the timetable directions.

[27] Accordingly, instead of directing the pukenga to file and serve his report prior to Christmas, he is encouraged to file and serve a draft report before Christmas. It is specifically anticipated that the report may be amended as a result of evidence given at the hearing, or in accordance with such further questions as the Court may request the pukenga to respond to.

[28] Counsel for MMT and Ngāti Pārau submitted that the Court should give directions to ensure that any discussions between the pukenga and the parties are transparent so that all parties know who the pukenga has communicated with in forming his opinion. They expressed a preference that the pukenga undertake the report process without consultation with any of the parties' witnesses.

[29] The Court is not prepared to accede to such a request. The pukenga is the expert in tikanga. It is up to him to undertake such inquiries and talk to such witnesses (or others) that he believes are relevant to determining the issues of tikanga. However, before the pukenga meets with or communicates with such parties, in the interest of transparency, the pukenga should advise the applicants and interested parties who it is he is proposing to meet or communicate with. If any information provided in the course of such a meeting/communication is relied upon by the pukenga in his opinion, he should identify what that is.

[30] MMT and Ngāti Pārau also requested that the pukenga disclose any conflicts or work undertaken for any of the parties involved in this application prior to commencing this work.

[31] It has already been established that the pukenga has no conflicts by way of whakapapa in that he does not have whakapapa connections to any parties. However, Ngāti Pāhauwera are to contact Dr Kahotea to ask him to file and serve a brief statement indicating whether he has any other conflict, including whether he has undertaken any work for Ngāti Pāhauwera, Ngāti Pārau, Ngai Tahu o Mōhaka Waikare, Maungaharuru-Tangitū Trust, Mana Ahuriri Trust or the Attorney-General.

[32] If the pukenga has undertaken work for any of these entities, he should specify when and what the work involved. This information is to be provided within 10 working days of the date of this minute.

P.B. Churchman J

Churchman J