

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

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

**CIV-2011-485-817
CIV-2017-485-513**

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

IN THE MATTER OF an application for an order
 recognising Customary Marine Title
 and Protected Customary Rights

BY the late Claude Augustin Edwards
 (deceased), Adriana Edwards and
 others on behalf of Te Whakatōhea

BY Maanu Paul, on behalf of the Mānu
 Paora Whānau

Counsel: T Sinclair and B Cunningham for Te Whakatōhea; Hiwarau C,
 Turangapikitoi, Waiotahe, and Ohiwa of Whakatōhea;
 Pakowhai Hapū; and Whānau-a-Apanui
 C Linstead-Panoho and T K Williams for Ngāi Tamahaua and
 Te Hapū Titoko o Ngāi Tamahaua
 M Mahuika and N Coates for Te Whānau-a-Apanui
 E Rongo for Ngāti Torere and Ririwhenua Hapū
 C Leauga, D Stone and D Lafaele for Whānau a Te Harawaka
 B Lyall for Te Ūpokorehe Trust
 M Sinclair, M Sharp and J Waaka for Ngāti Muriwai Hapū
 C Hirschfeld for Ngāti Huarere ki Whangapoua
 (watching brief only)
 A Warren and K Ketu for Whānau a Mokomoko
 H Irwin-Easthope for Te Rūnanga o Ngāti Awa
 A Sykes and C Dougherty-Ware for Ngāti Ira o Waioweka Rohe
 T Bennion for Ngāti Patumoana
 J Pou for Whakatōhea Māori Trust Board
 T Castle for Ngāti Taiwhakaea (watching brief only)
 J Mason and H Berger for Maanu Paul Paora Whānau

Interested Parties:

K Feint QC for Ngāti Ruatakenga
R Roff, R Budd and S Gwynn for Attorney-General
C Finlayson QC, A Dartnall and S Eldridge for Landowners
Coalition Incorporated
M Jones for Whakatane District Council

T Reweti for Bay of Plenty Regional and Ōpōtiki District
Councils
A Williams for Seafood Industries Representatives

Minute: 29 October 2020

MINUTE (NO. 36) OF CHURCHMAN J
[Whakatōhea – Minute (No. 2) Re Mānu Paora Whānau participation]

Background

[1] By a minute dated 28 August 2020,¹ the Court raised concerns about:

- (a) the lack of an application for leave by or on behalf of Mr Paul, the applicant in CIV-2017-485-513 to change the applicant’s status in the Whakatōhea application from an overlapping applicant requiring his claim to be determined to an interested party;
- (b) the statement in a memorandum dated 23 February 2020 that Mr Paul was going to exercise his “... right to refrain from actively participating in any hearings to be scheduled, until such time as the Case Stated Application has been finally determined in the Court.”; and
- (c) the fact that there was no indication during the case management conference (CMC) held only five days prior to the commencement of the Whakatōhea hearing, that Mr Paul had changed his mind again and did not intend participating in the Whakatōhea hearing in any capacity.

[2] In the Court’s minute of 28 August 2020, the Court raised concerns about whether Ms Mason, counsel for Mr Paul, had breached certain ethical obligations in relation to the actions set out in [1] above. Ms Mason was requested to file a memorandum addressing these issues.

¹ *Minute (No. 28) of Churchman J – Whakatōhea Re Mānu Paora Whānau Participation*, 28 August 2020.

Ms Mason's response

[3] Ms Mason has filed a memorandum dated 12 September 2020, supported by a “Second affidavit of Cletus Maanu Paul” dated 14 September 2020. The affidavit appears to be more in the nature of legal submissions than evidence, but in it, one of the statements Mr Paul makes is:

I wish to have my Tikanga Issues heard at the Māori Appellate Court. I have always supported the Case-Statement proposal, and have expressed that in a previous affidavit dated 4 September 2018. I am waiting for the outcome of Ms Collier’s appeal regarding her proposal to refer certain Tikanga Issues to the Māori Appellate Court.

[4] This statement wrongly implies that he has made some application in these proceedings to have tikanga issues referred to the Māori Appellate Court.

[5] The affidavit of 4 September 2018 referred to by Mr Paul in his affidavit of 14 September 2020 was not filed in these proceedings. It was filed in CIV-2017-485-398² (referred to in the Court’s minute dated 28 August 2020 at [12]–[14]). The other proceedings referred to on the cover sheet of the affidavit of 4 September 2018 was CIV-2017-485-512. This is the so-called National Application by Mr Paul that was struck out by the Court on 12 August 2020.³

[6] As at the date of swearing his affidavit of 14 September 2020, Mr Paul was therefore not involved in any proceedings when there was a request to have any of “his” tikanga issues heard at the Māori Appellate Court.

[7] In a memorandum of 12 September 2020, Ms Mason makes the claim that she had assumed that the Court had accepted her unilateral indication, in her memorandum of 23 February 2020, that Mr Paul could “... refrain from actively participating in any hearings to be scheduled, until such time as the Case Stated Application has been finally determined in the courts.” That statement is thoroughly disingenuous.

² *Re an application by Collier & Ors* [2019] NZHC 2096.

³ *Re an application by Cletus Maanu Paul* [2020] NZHC 2039.

[8] As is noted in the Court's minute of 28 August 2020,⁴ the Court has advised Ms Mason on a number of occasions that she cannot simply disengage from participating in proceedings such as CIV-2017-485-513, on the basis that she did not like the outcome in other unrelated proceedings and wanted to seek leave to appeal those other proceedings.

[9] In the memorandum filed by Ms Mason on 17 August 2020, she explained the abrupt decision by Mr Paul not to participate at all in the proceeding scheduled to commence that day because:

Te Arawhiti have not funded the Applicant's legal costs for the last two years, as they have not agreed with his wish to have his Tikanga issues heard and determined by the Māori Appellate Court.

[10] In relation to these proceedings (CIV-2017-485-513), it is not clear what significant legal costs would actually have been incurred in the last two years. There is only ever been one substantive affidavit filed in these proceedings which was the brief pro forma affidavit dated 4 April 2017, accompanying the original application. Given that it was filed more than two years ago, it presumably falls outside the ambit of work for which unpaid legal costs are claimed to have been incurred in "the last two years".

[11] Neither has Mr Paul ever filed an application in relation to these proceedings (or any other proceedings) to have "his Tikanga Issues heard and determined by the Māori Appellate Court." It therefore cannot have been any such work in relation to these proceedings that legal costs have not been paid for.

[12] Ms Mason has provided no copies of invoices which were claimed not to have been paid, or of any relevant correspondence between her and Te Arawhiti. On the information available, it is therefore difficult to understand what work relating to these proceedings has been done in the last two years which could support a claim to Te Arawhiti for reimbursement of legal costs.

⁴ Above n 1 at [14].

[13] In her memorandum of 12 September 2020, Ms Mason says that she:

... seeks a direction from His Honour as to whether the Applicants are required to file an application to refer their Tikanga Issues to the Māori Appellate Court.

[14] The answer to this question is obvious. The Court does not give advice to parties as to how to run their cases. Ms Mason is well aware that, unlike the situation with the applicant in *Collier*, Mr Paul has never either formally or informally asked the Court to have any matter of tikanga relating to these proceedings referred to the Māori Appellate Court. His position conveyed through counsel, is that he has a right to disengage from further participation in these proceedings because he wants to see what happens in the application for leave to appeal in the entirely unrelated *Collier* case.

[15] Ms Mason claims in her submissions of 12 September 2020 that she is aware of counsel for other parties and IPs involved in this proceeding having sought and being granted leave to be excused from attending the hearing. The implication is that this case is no different.

[16] There are two fundamental differences between Ms Mason's position and the position of the other counsel that she refers to.

[17] The first is that all other counsel have sought and obtained leave if they wished to be present by VMR link rather than in person, to attend for only some of the hearing, or not to be present at all but to participate by way of filing written submissions. The seeking and obtaining of leave is different to unilaterally announcing to the Court that you intend to participate on a different basis to what has been previously directed by the Court or indicated by the party or simply not turning up on the first day to a hearing without any prior indication to the Court.

[18] The second difference is that Ms Mason is the only counsel who has adopted the position that they are entitled to disengage entirely from participation in Court proceedings in respect of a particular client because she wants to appeal a ruling which did not go in her favour in another unrelated case. That she has maintained her entitlement

to do so in the face of clear indications from the Court that such action is not appropriate reflects little credit on her.

Conclusion

[19] Whether Ms Mason has acted professionally in relation to the conduct outlined above is ultimately a matter for the Law Society.

[20] I direct the Registrar provide a copy of this minute, the Court's minute of 28 August 2020 in this matter, Ms Mason's memorandum of 17 August 2020, her memorandum of 12 September 2020, and the supporting affidavit of Mr Paul dated 14 September 2020, be referred to the appropriate official at the New Zealand Law Society for such further action as they see fit.

A handwritten signature in black ink, reading "P.B. Churchman J". The signature is written in a cursive style with a large, stylized "J" at the end.

Churchman J