IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2011-485-793

IN THE MATTER OF	The Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	Application by Colin Francis Reeder and Ors on behalf of Ngā Pōtiki ā Tamapahore Trust for an order recognising Customary Marine Title and Protected Customary Rights

On the papers: At Whangarei

Date of Minute: 19 March 2021

MINUTE (No. 4) OF POWELL J
[Ngā Pōtiki Minute No. 13]

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[1] At the judicial conference in Tauranga on 14 December 2020, an issue arose with regard to the scope of the Stage 2 hearings currently scheduled to be heard in September 2021. My Minute (No. 2) issued following the conference set out the issue in the following terms:

> At the conference Ms Mason [on behalf of Te Rūnanga o Ngāti Whakaue ki Maketū] noted that her client's position was currently in a state of flux but that its overall preference was for its application to be dealt with along with Te Arawa claimants rather than as part of Ngā Potiki.
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> This submission raised a fundamental issue with the scope of the Stage 2 hearing in particular. As I discussed with counsel at the conference, it is difficult to see on what basis the Court could proceed to hear the Ngā Potiki Stage 2 claims without also determining the interests of any other claimants claiming an interest within that geographical boundary. As a number of the Ngā Potiki claimants noted, such an approach would mean that they would be unable to have their coastal marine interests determined following the Stage 2 hearings but instead would have to repeat their evidence at a subsequent hearing of the overlapping claims.

[2] Following the issue of directions, submissions on the issue were called for and subsequently filed by all parties.

[3] In the event, a number of parties raised issues with applicants being required to pursue their applications within the scope of the Ngā Pōtiki Stage 2 hearings. The Te Arawa applicants (Koromatua Hapū of Ngāti Whakaue, Ngāti Makeno and Ngāti Piako, and Te Rūnanga o Ngāti Whakaue ki Maketū) sought to limit their participation in the Stage 2 hearings to interested persons so as to enable their own applications to be "heard and determined by this Court as a separate and consolidated set of the proceedings that are dedicated to Te Arawa derived claims". Broadly, the Te Arawa applicants submitted that in terms of the Marine and Coastal Areas (Takutai Moana) Act 2011:

(a) There is nothing in the Act that requires all interests within a particular place to be determined at the same time as the interests of the first application to be heard are determined, but that other applicants claiming interests in the same area can have their own interest determined in subsequent hearings. It was submitted that such an approach is more consistent with the purpose set out in s 4(1)(b) of the

Act to recognise mana tuku iho and is more workable than the alternative.

(b) There is otherwise no mutuality between the various applications.

(c) Priority given by s 125 of the Act refers only to the timing of the hearing and does not mean that the court "can grant recognition of the customary marine title over land to which the Te Arawa applicants have not yet been fulsomely heard".

(d) The application can otherwise be further staged to enable a third stage for the Waiariki to Te Tumu Coastal Area after the remainder of the Ngā Pōtiki and Te Arawa applications have been determined.

(e) Determining all interests within the Ngā Pōtiki coastal area is inconsistent with the approach taken in the course of the hearing of the Whakatōhea applications[1] which did not require all applicants to participate as applicants, but also allowed participation as interested parties.[2]

[4] Similar submissions were made by the trustees of Ngā Hapū o Ngāti Ranginui Settlement Trust ("Ngāti Ranginui"). They opposed what they saw as the "limiting of options" through being required to pursue their applications in a manner inconsistent with the Act and the previous decision of the Court in the Whakatōhea applications, and which required the "fracturing" of their application area.

[5] Te Runanga O Ngāti Awa, which had previously indicated it did not wish to have that part of its application which overlaps with Ngā Pōtiki application "be heard and/or determined by the Court", confirmed in its submissions on the scope of the hearing issue that in the event that all overlapping claimants were required to be heard and determined as part of the Ngā Pōtiki Stage 2 hearings, it would also seek to have

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1 Application by the late Claude Augustin Edwards (deceased), Adriana Edwards and others on behalf of Te Whakatōhea (CIV-2011-485-817) ("Whakatōhea applications").

2 Whakatōhea applications Minute (No. 10) of Churchman J, 30 March 2020 at [6].

that part of its application determined, requiring only a slightly enlarged timetable to enable this to occur.

[6] Te Rūnanga O Ngāti Awa nonetheless also submitted there should be consistency as to how priority applications and applications generally are heard and determined. It noted, as the Te Arawa applicants and Ngāti Ranginui and the Ngāti Ranginui Settlement Trust had, the directions issued by Churchman J in the Whakatōhea applications, and questioned whether all interests were required to be heard together, an issue aggravated by the complexity of funding arrangements for applicants.

Discussion

[7] I have considered the submissions made carefully, but, as a number of the applicants have pointed out, the scope of the Ngā Pōtiki Stage 2 hearings has in fact already been determined. Specifically, in his Minute (No. 5), Collins J, who had been tasked with the managing all proceedings commenced under the Act, issued a direction with regard to the scope of the Ngā Pōtiki hearings. That direction relevantly provided:

> There are 14 other applications that overlap with Ngā Potiki's application. many of these applicants have engaged in discussions about how to progress their respective claims.
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> There is agreement that six other applicants should be heard in full in conjunction with Ngā Potiki's application. Those six applicants are:
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> (1) Ngā Te Hapū Inc (CIV-2017-485-000257);
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> (2) Ngā Hapū o Te Moutere o Mōtītī (CIV-2015-485-000767);
>
> (3) **Te Rūnanga o Ngāti Whakaue ki Maketū** (CIV-2016-485-000770);
>
> (4) **H Kahukiwa for Koromatua Hapū of Ngāti Whakaue** (CIV-2017-404-000568);
>
> (5) M Ririnui for Te Rūnanga o Ngāti Whakahemo (CIV-2017-485-000223); and
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> (6) M Ririnui for Ngāti He Hapū Trust (CIV-2017-485-000219).
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> There is also agreement that three applicants partially overlap with the western area of Ngā Potiki's application and that those applications should be heard to

the extent that they overlap with Ngā Potiki's claim. Those applications have been filed by:

(1) Ngāi Te Rangi Settlement Trust (CIV-2017-485-000244);

(2) **Ngā Hapū o Ngāti Ranginui Settlement Trust** (CIV-2017-485-000294); and

(3) Te Tāwharau o Ngāti Pūkenga (CIV-2017-485-000250).

There is also agreement that there are three applications in the eastern area of Ngā Potiki's application that should be heard in conjunction with Ngā Potiki's application to the extent that they overlap with Ngā Potiki's claim. Those three applications are:

(1) **Te Rūnanga o Ngāti Awa** (CIV-2017-485-000196);

(2) **Ngāti Mākino Heritage Trust and Ngāti Pikiao Iwi Authority** (CIV-2017-485-000291); and

(3) R Parkinson for Te Uri a Tehapu (CIV-2017-404-000562).

(emphasis added)

[8] It is apparent that since Minute (No. 5) of Collins J was issued on 27 June 2018, it has been envisaged that each of the applicants claiming interest in the geographical area covered by the Ngā Pōtiki application would be required to proceed with their respective applications for customary marine title within the Ngā Pōtiki application area at the time the Ngā Pōtiki application was heard. The issue raised has therefore already been determined and no basis has been identified for revisiting that earlier determination at this late stage of proceedings.

[9] In particular, and notwithstanding submissions made on behalf of the Ngāti He Hapū trust that customary marine titles under the Act may not be exclusive, I consider the approach proposed by the Te Arawa applicants and Ngāti Ranginui would lead to considerable uncertainty and is substantially impractical in terms of both time and resources.

[10] It is quite simply impossible, given the nature of claimed customary interests, for every applicant to expect a single discrete hearing to address all of their interests under the Act. Instead, there will inevitably be overlaps that can only accommodated by splitting hearings such that parts of one application are heard with the whole of others. The exact location of the boundaries of hearings will inevitably also be shaped

by the requirement to hear priority applications first, thereby requiring particular geographical areas to be considered. I am conscious that some applicants have drawn parallels to the Native Land Court process of the nineteenth century and the consequences that resulted from customary owners being effectively forced to defend customary interests in lands brought before the Court. With respect, this is not the case here. All of the applicants noted in Collins J Minute (No. 5) have chosen to bring their respective applications to discrete parts of the coast before this Court. The only issue is when and in what circumstances the different applications should be heard, and whether those applications are determined over one or several hearings.

[11] The approach favoured by the Te Arawa applicants would effectively mean that it is unclear whether customary marine title could be granted to the remainder of the applicants otherwise wishing to proceed in Stage 2 of the Ngā Pōtiki hearings, or whether, having presented their evidence and submissions in support of those applications, those applicants would then have to wait until such time as all other applications (including those by the Te Arawa applicants and Ngāti Ranginui) were heard. If the latter, those applicants would (presumably) be expected to participate again as interested parties. In addition to the inevitable doubling up of Court time and the resources of applicant groups, and the undoubted delay that would result, there is no guarantee that the Judge hearing subsequent applications of applicants claiming interests in the Ngā Pōtiki Stage 2 area, over which the Te Arawa applicants and Ngāti Ranginui also claim interests, would be the same Judge who heard the Ngā Pōtiki Stage 2 hearings.

[12] On the contrary, having a single hearing for all applications within a particular area of coastline is clearly the most efficient approach. It will provide the ability to determine the appropriate holders of customary marine title with the least delay and expenditure of resources by all parties, while at the same time ensuring that all customary interests claimed are not overlooked.

[13] The Stage 2 hearings will therefore continue to be for the purpose of addressing all of the customary marine title applications within the Ngā Pōtiki application area other than those covered in Stage 1.

[14] To the extent that adjustments to the Stage 2 timetable are required by any party as a result of this Minute, memoranda are to be filed on or before 24 March 2021. Any responses to enlargements sought are to be filed by 26 March 2021 following which further directions will be issued and, if necessary, a telephone conference convened to address any issues arising.

Powell J