

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

**I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE**

**CIV-2017-404-305
Continued.../3
[2024] NZHC 805**

UNDER 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

BETWEEN TAMIHANA PAKI on behalf of TE PARAWHAU
First Named Applicant

AND KOROKOTA MARAE on behalf of TE PARAWHAU HAPŪ
Second Named Applicant

Continued.../3

Hearing: 10 April 2024

Counsel:

C Hockly for Te Parawhau (CIV-2017-485-000305)
R and M Enright for Korokota Marae on behalf Te Parawhau Hapū (CIV-2017-485-799)
K Dixon, L Tothill and T Talamaivao for Patuharakeke Te Iwi Trust Board (CIV-2017-485-281)
B Lyall and H Swedlund for Te Rae Ahu Whenua Trust (CIV 2017-485-239)
M Chen and C Saunders for Te Rūnanga o Ngāti Whātua (CIV 2017-404-563)
J P Kahukiwa for Te Waiariki, Ngāti Korora, Ngai Takapari (CIV 2017-404-566)
J Inns and K van Wijngaarden for Ngāti Wai (CIV-2017-485-283; CIV-2017-404-554)
J Mason, U Kuddus and P Corbett for Ngāti Kawau (CIV 2017 485-398); Ngā-Puhi-nui-tonu (CIV-2017-404-537); Reti Whānau (CIV-2017-485-515)
T Bennion and O Ford Brierley for Ngāti Pūkenga (CIV 2017 485-250)
C Terei-Tipene for Ngāti Hine (CIV-2017-485-231)

T Afeaki and G Erskine for Ngā Hapū O Tangaroa aki Te Ihu o
Manaia tae atu ki Mangawhai (CIV-2017-404-579)
J Golightly for North Port Limited
J Golightly for Marsden Cove Management Ltd
C Simmons, E Ellis for Channel Infrastructure NZ Ltd
R Roff and Y Moinfar-Yong for Attorney-General

Judgment: 15 April 2024

JUDGMENT OF HARVEY J

*This judgment was delivered by me on 15 April 2024 at 3:00 pm
pursuant to r 11.5 of the High Court Rules 2016.*

Registrar/Deputy Registrar

Continued ...

CIV-2017-485-799
CIV-2017-485-2841
CIV-2017-485-239
CIV-2017-404-563
CIV-2017-404-566
CIV-2017-485-283
CIV-2017-404-554
CIV-2017-485-398
CIV-2017-485-250
CIV-2017-485-231
CIV-2017-485-515
CIV-2017-404-573
CIV-2017-404-579
CIV-2017-404-537

AND

PATUHARAKEKE TE IWI TRUST
BOARD
Third Named Applicant

STEPHEN PANOHO on behalf of TE RAE
AHU WHENUA TRUST
Fourth Named Applicant

ALAN RIWAKA, Chief Executive of TE
RŪNANGA O NGĀTI WHĀTUA
Fifth Named Applicant

PERERI MAHANGA on behalf of TE
WAIARIKI NGĀTI KORORA, NGĀTI
TAKAPARI
Sixth Named Applicant

NGATIWAI TRUST BOARD on behalf of
NGATIWAI
Seventh Named Applicant

KARE RATA on behalf of NGĀ HAPŪ O
NGĀTI WAI
Eighth Named Applicant

LOUISE COLLIER on behalf of NGĀTI
KAWAU and TE WAIARIKI KORORA
Ninth Named Applicant

TE TAWHARU O NGĀTI PŪKENGĀ on
behalf of NGĀTI PUKENGĀ

Tenth Named Applicant

TE RŪNANGA O NGĀTI HINE on behalf
of NGĀTI HINE

Eleventh Named Applicant

ELVIS RETI on behalf of the RETI
WHĀNAU

Twelfth Named Applicant

MAIA HONETANA on behalf of NGĀ
TAHUHU NGĀATI TU KI NGĀTI
KUKUKEA

Thirteenth Named Applicant

WAIMARIE KINGI on behalf of NGĀ
HAPŪ O TANGAROA AKI TE IHU O
MANAIA TAE ATU KI MANGAWHAI

Fourteenth Named Applicant

JOEPH KINGI on behalf of NGĀPUHI NUI
TONU, NGĀTI RAHIRI, NGĀ TAHUHU
and NGAITAWAKE

AND

NORTH PORT LIMITED,
MARSDEN COVE CANALS
MANAGEMENT LIMITED,
CHANNEL INFRASTRUCTURE NZ
LIMITED,
ATTORNEY-GENERAL,
NGĀPUHI HAPŪ and NGĀPUHI-NUI-
TONU (MAC-10-10-50)
Interested Parties

Introduction

[1] Fletcher Concrete and Infrastructure Limited (Golden Bay) along with Marine Park Limited and Port Road Limited, trading as Port Nikau Joint Venture (Port Nikau) seek to be joined as interested parties. The proceedings are at an advanced stage, having commenced on 12 February 2024 and are expected to conclude on 3 May 2024. Applications by interested parties to join were due on 26 February 2018. Golden Bay and Port Nikau filed for waiver to apply out of time on 28 March 2024.

[2] The applications are opposed.

[3] The issue for determination is whether the joinder applications can be granted. At the hearing held on 11 April 2024, I confirmed that the applications were granted with reasons to follow.

The case for Golden Bay

[4] Kelly Stevens, the Manufacturing Manager of Golden Bay, filed an affidavit in support. She claimed that Golden Bay was unaware of these proceedings for recognition of customary marine title until 25 March 2024, when the matter was raised at a staff meeting. Golden Bay was unaware of any media reports about the proceedings until that date and did not receive notification of any applications through the usual process under the Resource Management Act 1991. There was no process in place for Golden Bay to itself identify notices for applications.

[5] Ms Stevens addressed a letter from Golden Bay to Te Parawhau Hapū dated 21 August 2023 which contained a relationship agreement between them and expressed support for the latter's application for recognition in these proceedings. Ms Stevens claimed that she was the person within Golden Bay who received the letter from Te Parawhau Hapū but did not understand that recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (Act) could adversely affect Golden Bay's interests. Ms Stevens said she understood the letter to be a reaffirmation of the existing relationship between Te Parawhau and Golden Bay and related to the "normal" RMA processes. She provided examples of interactions between Golden Bay and Te Parawhau which demonstrate their "longstanding meaningful relationship", including

instances of consultation and cultural monitoring services. In any case, the core of Ms Stevens' argument is that Golden Bay was not put on notice by the 21 August 2023 letter.

[6] Golden Bay submitted it should be granted waiver because the potential for veto rights associated with the recognition of customary marine title in the Whangārei Harbour may make its operations “unfeasible or commercially unviable”. In addition, it was contended that Golden Bay has the onus of raising substantial interruption in relevant areas subject to claims by applicants in the proceeding and wishes to do so to preserve its position.¹

[7] Further, Golden Bay currently undertakes consented activities in the marine and coastal area, including via two wharves, stormwater discharging activities, dredging of the commercial channel and reclamation of part of the Portland plant site. Finally, it was argued that Golden Bay's participation is necessary because it will provide evidence not already before the Court, which will assist in reaching a decision.

[8] Golden Bay acknowledged the lateness of its application but submitted that any prejudice to the applicants resulting from its delay is outweighed by the prejudice to Golden Bay in not reserving its rights. Counsel submitted that Golden Bay only intends to file one affidavit and will make its deponent available for examination in addition to conducting examination of the remaining witnesses. Any delay to the scheduled hearings will therefore be minimal.

The case for Port Nikau

[9] Port Nikau provided affidavits in support by Clare Davies Colley and Anthony Davies-Colley, Executive Directors of Marine Park Ltd, which forms part of the joint venture trading as Port Nikau. Ms Davies-Colley stated Port Nikau was also unaware of these proceedings until 27 March 2024 when the subject was broached in a meeting with various infrastructure operators in Whangārei Harbour. Following the meeting, Ms Davies-Colley engaged counsel to discuss the potential impact of the proceedings

¹ Golden Bay says that this onus is a new responsibility, arising from judgment of the Court of Appeal in *Re Edwards Whakatōhea* [2023] 3 NZLR 252, [2023] NZCA 504.

on Port Nikau and gave instructions for notice and waiver applications to be prepared that day.

[10] Port Nikau acknowledged the advanced stage of the proceedings but contended that it would be seriously prejudiced should waiver be refused. It proposed to adopt a “focused approach” to its participation in the remainder of the proceedings. Counsel argued that no new evidence will be introduced for Port Nikau, but that it would examine the remaining witnesses and make submissions on the issue of substantial interruption with respect to the areas in which Port Nikau operates. Those operations are undertaken across the Port Nikau ‘site’ which comprises 87 hectares and includes wharves, deep water wharves and marinas. According to counsel, Port Nikau has had or currently holds consents for activities including dredging, port operations, exclusive occupation of the coastal marine area, a sewage outfall pump facility, a seabed lease, permit to alter and maintain the seaward rock revetment, and reclamation at the Port Nikau site.

Discussion

[11] Section 104 of the Act provides that any interested person may appear and be heard on an application for recognition, if that person had filed an application to do so by the due date. I accept that both Golden Bay and Port Nikau are interested persons according to s 104 of the Act. Both entities have interests which may be affected by orders granting recognition. Those interests have been subject to extensive discussion in the proceedings to date by claimant parties.

[12] In terms of waiver, the Court has discretion under s 107 to deal flexibly with applications for appearances and recognition, including through its inherent jurisdiction.² While s 100(2) provides that the Court must not accept for filing an application outside of the due date, this Court has granted waiver to interested persons in appropriate circumstances.³ In *Re Rota*, Mallon J declined to accept an application for recognition that was not filed by the due date but suggested that the applicant may

² This is expressly contemplated by s 107(6).

³ See *Re Tipene* [2014] NZHC 2046 at [10] and *Ngā Takoto Iwi* [2023] NZHC 301.

instead apply to join as an interested person to the proceedings.⁴ Leave has previously been granted with respect to persons whose interests are potentially affected by a grant of recognition even in the later stage of proceedings, including council entities and those “who have structures... or conduct activities in the takutai moana that are potentially affected [by a grant of recognition].”⁵

[13] In *Ngāi Takoto Iwi*, Churchman J considered that it would be appropriate for the Court to grant leave for interested persons to be joined out of time where that person’s participation:⁶

- (a) would serve to inform the Court more fully on the relevant issues;
- (b) was necessary to justly determine the other applications;
- (c) is in line with the purposes of the Act;
- (d) does not cause prejudice or delay to other parties; and
- (e) is necessary to prevent significant prejudice, particularly where that person’s mana and overall wellbeing, or their rights and obligations with respect to the areas subject to the application, would be affected by their non-participation in the proceeding.

[14] The barrier to participation as an applicant for recognition is higher than that for participation. The predicted extent of an applicant’s participation is therefore relevant to the Court’s assessment and bears on the question of prejudice to other applicants as well as any delay caused by joinder out of time.

⁴ *Re Rota* [2017] NZHC 1445 at [2(c)].

⁵ *Re Edwards (No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [666].

⁶ *Ngāi Takoto Iwi* [2023] NZHC 301 at [25]-[27].

[15] I have considered the submissions filed in opposition to the applications by Golden Bay and Port Nikau including Mr Lyall's, which were adopted by the other applicants in opposition, and were particularly useful. He highlighted that these applications for waiver differ to others primarily because they have been made at such a late stage in the proceeding. Counsel contended that there is risk of prejudice to the other applicants who will not have sufficient time to engage with the submissions of Golden Bay and Port Nikau, and that it is arbitrary that certain witnesses will be subject to cross-examination by virtue only of their position in the witness list.

[16] Pointedly, Mr Lyall argued that it is unconvincing that the applicants were not aware of the proceedings up to this point (referring specifically to the letter discussed above at [5]) and that entering proceedings at this late stage is to the applicants' tactical benefit. A positive response from the Court could then incentivise other interested parties to act in a similar manner, to the detriment of applicants. Accordingly, counsel argued that the applications should be dismissed.

[17] Even so, as foreshadowed, I consider that these circumstances are appropriate for a grant of waiver of the time conditions under s 104. Having discussed with counsel, I am assured that there will be minimal disruption or delay to the schedule of proceedings. An alternative schedule has been prepared which accommodates the applicants.

[18] Golden Bay and Port Nikau have undertaken to minimise prejudice to the parties by limiting their activities in the proceeding. It is inarguable that they both hold interests which may be adversely affected, and which are already engaged by the evidence given to date. I consider therefore that the prejudice suffered by Golden Bay and Port Nikau if they are not heard on these matters does outweigh that to the applicants. The Court will furthermore be assisted by their participation in reaching a just and final determination. Moreover, as counsel are now aware, the arrangements for the hearing of those cases are now in place.

Decision

[19] The applications for joinder are granted.

[20] There is no order as to costs.