IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-398
[2019] NZHC 2096

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	LOUISA TE MATEKINO COLLIER AND OTHERS

Hearing: 25 June 2019

Counsel: J Mason for Applicants
Interested Parties:
T Sinclair (Ngāti Manu and Ngāti Rangi, Ngāti Rahiri Hapū, Ngā Hapū o Ngāti Wai Iwi, Te Whānau o Hōne Pāpita Rāua Ko Rewa Ataria Paama, Ngāti Kahu Te Rarawa and Te Uriohina, O Ngā Hapū o Taiamai Ki Te Marangi)
M Tuwhare (Manapo Tangaroa)
A Tapsell (Te Rūnanga o Whangaroa)
C M Hockly (Te Whakapiko, and Te Parawhau)
J Bartlett (Ngāti Manu, and Ngāti Rongo o Mahurangi)
L Thornton (Ngāti Rehua and Ngātiwai ki Aotea, and Ngāti Maraeariki and Ngāti Rongo ki Mahurangi)
C Terei (Ngāti Hine, Ngāti Kawa and Ngāti Rahiri, Te Kapotai, and Te Aupōuri)
C Woodward (Te Uri o Hau Settlement Trust)
G Erskine (Ngāti Rehua-Ngāti Wai ki Aotea)
K H Dixon (Ngunguru Marae Trust, Ngāti Takapari, and Patuharakeke Te Iwi Trust Board)
J K Harper-Hinton (Te Waiariki, Ngāti Kororā and Ngāti Takapari, and Ngāti Te Ata)
R N Zwaan (Whakarara Māori Committee)
R Judd (Te Rūnanga o Ngāti Whātua)
D Ward and G Melvin for Crown

Judgment: 23 August 2019

JUDGMENT OF CHURCHMAN J

The application

[1] The Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) permits applicants to apply to the Court for orders recognising either a Customary Marine Title (CMT) or protected customary rights.

[2] The five applicants in these proceedings, Louisa Collier, Awhirangi Lawrence, Arthur Mahanga, Hayward Norman, and Mitchell Collier have made such an application.

[3] By a memorandum dated 24 July 2018 (the application), counsel for the applicants in these proceedings sought the following directions from the Court:

> (a) [The applicants] propose that the Ngāpuhi Title Application be heard in 2 distinct parts as follows:
>
> (i) part of the areas specified in the Ngāpuhi Application ("the Test Case Area") be used to provide a factual and evidential basis, as a Test Case, so that the Courts can determine what criteria are required to prove CMT ("the CMT Criteria");
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> (ii) the remaining part of the Ngāpuhi Title Application be, in the first instance, the subject of negotiations with the Crown in accordance with sections 94-96 of the MACA Act, once the CMT Criteria have been finally determined; and
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> (iii) should the negotiation with the Crown not result in an agreement, then the remaining part of the Ngāpuhi Title Application be heard at that stage; and
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> (b) respectfully seek leave to request the Court to exercise its discretion to state a case to the Māori Appellate Court, as provided for under section 99 of the MACA Act.

[4] In relation to that part of the application which sought referral of questions to the Māori Appellate Court, the questions proposed were:

> (a) Do the Applicants hold the Test Case Area in accordance with Tikanga?; and

(b) If so, have the Applicants, in accordance with Tikanga, used and occupied the area from 1840 to the present day without substantial interruption? ("the Tikanga Questions").

[5] The area in respect of which the test case was proposed was said to be "from a point adjacent to Goat Island, in the South, to Ngunguru, in the North as set out on the map attached as Annex A, and out to the outer limits of the territorial sea".

The applicants

[6] The memorandum indicated that the five applicants were pursuing their applications on behalf of Ngāti Kawau and Te Waiariki Kororā over the rohe of Ngāpuhi. Ngāti Kawau and Te Waiariki Kororā are two hapū of Ngāpuhi. Their rohe includes the coast between Goat Island and Ngunguru, the area to which this application was specified as relating to.

[7] The description in the application of it being "the Ngāpuhi Title Application" requires clarification, as does the term "Ngāpuhi-nui-tonu". Documentation filed in support of the interlocutory application, particularly the second affidavit of Louisa Te Matekino Collier dated 4 September 2018, and the memorandum of counsel dated 5 November 2018, convey the impression that the application is being advanced on behalf of Ngāpuhi-nui-tonu.

[8] At [3] of her second affidavit of 4 September 2018, Ms Collier says:

> I am the lead applicant in relation to our application for Customary Title under the Marine and Coastal Area (Takutai Moana) Act 2011 on behalf of Ngāti Kawau and Te Waiariki Kororā, and the hapū and iwi of Ngāpuhi-nui-tonu, over the rohe of Ngāpuhi ("the Ngāpuhi Title Application").

[9] In [6] of the same affidavit, Ms Collier says:

> I too am anxious to ensure that our Ngāpuhi-nui-tonu customary interests in the Takutai Moana are protected, but not in a way that prejudices other applicants.

[10] In relation to the questions that the application wishes the Court to refer to the Māori Appellate Court, the outcome of that process is seen by the applicants as one which would vest any customary marine title in Ngāpuhi-nui-tonu.

[11] Ms Collier expressly says this in her second affidavit at [8]:

> We filed our application over the entire rohe of Ngāpuhi-nui-tonu as we believe that our Customary Title should be held collectively by all of us because it derives from our common and intertwined ancestry.

[12] And [9]:

> I want to the reassure the Court and other applicants that we have no intention of holding or administering any Customary Title on our own, without entering into a Tikanga process with other Ngāpuhi-nui-tonu applicants to work out how we, as kaitiaki, can hold and administer that title.

[13] In her third affidavit of 5 November 2018, Ms Collier deposed to the fact that there were at least 115 hapū in Ngāpuhi-nui-tonu.

[14] In her second affidavit of 4 September 2018 at [7], Ms Collier set out her understanding of the term Ngāpuhi-nui-tonu:

> The ancient term Ngāpuhi-nui-tonu describes the multiplicity of tribal nations, Iwi and Hapū, and Marae within Te Paparahi o Te Raki/Northland. It expresses the unity of purpose gained by the strategic historical alliance of kinship groupings between the various Iwi and Hapū in Northland …

[15] Ms Titewhai Harawira, in an affidavit of 4 September 2018, advanced a broader definition of the Rohe of Ngāpuhi-nui-tonu. At [7] she said:

> … the boundaries of Ngāpuhi-nui-tonu start from Te Rerenga Wairua/Cape Reinga, and extend all the way down on both the East and West coasts, to the Bombay Hills. This knowledge has been passed down to me through the oral histories told to me by Ngāpuhi kuia and kaumatua. We all know these boundaries to be true.

[16] Counsel for overlapping applicants took issue with the description of the application as being "the Ngāpuhi application" or the suggestion that it was being made on behalf of Ngāpuhi-nui-tonu. Typical of the concerns raised were those expressed by Ms Tuwhare.[1] She submitted that the five applicants represented just three hapū (Ngāti Kawau, Te Waiariki and Ngāti Kororā) of what she said were over 110 active Ngāpuhi hapū. She submitted:

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[1] Appearing on behalf of CIV-2017-404-579, Waimarie Kingi for Ngā Hapū o Tangaroa Ki Te Ihu o Manaia Tai Atu ki Mangawhai.

> Those 110 plus hapū confederate from time to time to advance specific courses when it's mutually beneficial to them. But that is only done after due consideration and by consent of the hapū. Otherwise the default position is that the hapū are autonomous and independent, albeit closely related political units who operate according to their respective tikanga.

[17] Ms Tuwhare submitted that it was culturally inappropriate to refer to the case as the Ngāpuhi test case and submitted that it should be referred to as being an application by the three hapū.

Area covered by test case

[18] The area to which the test case relates was said by counsel for the applicants, in the memorandum of 24 July 2018, to be subject to 33 overlapping claims. However, Collins J noted that the application affected 36 other applicants.[2]

[19] The same paragraph in that minute records the advice of counsel for the applicants to the Court that six of the overlapping applicants supported the application, four adopted a neutral stance, six had not expressed any view and 20 opposed the application.

[20] The Attorney-General, an interested party, also opposed the application.

[21] A number of the overlapping claimants also took issue with the assumption inherent in the application that all the overlapping claimants were members of Ngāpuhi or were represented by Ngāpuhi-nui-tonu.

[22] Ms Thornton, on behalf of Ngāti Rehua/Ngātiwai ki Aotea, Ngāti Kahuerueru and Te Uri Papa of Aotea and Hauturu[3], and Ngāti Maraeariki, Ngāti Poataniwha and Ngāti Rongo[4] submitted that Ngāti Rehua was not a hapū related to Ngāpuhi, as did counsel for Ngātiwai,[5] and Ngāti Manuhiri[6] in respect of their clients.

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2 Minute (No. 3) of Collins J, 17 September 2018 at [4].
3 CIV-2017-404-575.
4 CIV-2017-485-378.
5 CIV-2017-485-283.
6 CIV-2017-404-545.

[23] The fact that such a large number of the overlapping claimants assert that they are either not represented by Ngāpuhi-nui-tonu, or not in fact Ngāpuhi at all, raises difficulties for the test case proposal. Each iwi has its own tikanga. The application is predicated on the basis that only Ngāpuhi tikanga is relevant. It also proceeds on the basis that any CMT that might be the outcome of the application will be held by the applicants on behalf of Ngāpuhi-nui-tonu, and that any issue with the entity which is to hold the title will be dealt with in accordance with Ngāpuhi tikanga. This immediately excludes all overlapping claimants who are not Ngāpuhi-nui-tonu, and also marginalises those claimants who are one of the 100 plus hapū of Ngāpuhi, but who have not authorised the applicants to represent them.

[24] Ms Collier, in her third affidavit noted the difficulties that there were in getting any form of agreement among the many hapū of Ngāpuhi. She said:

> [12] We are a huge tribal collective, and there are many overlapping interests. As a result, it can take many years for us to reach a consensus amongst our people on any issue and, in particular, a matter as significant as our rights to the Takutai Moana.

[25] A number of the counsel for overlapping claimants in this case appeared before the Court in the case management conference (CMC) held that same day. Many adverted to the fact that divisions between different neighbouring hapū were of such magnitude that it was difficult, if not impossible, to even engage in dialogue about issues such as the boundaries of overlapping claims.

[26] The difficulties alluded to by Ms Collier in her third affidavit are relevant to the test case application, particularly the issue of what is proposed as to who would hold any CMT, and the method by which any dispute about that would be resolved. They raise issues as to whether the proposal is likely to be realistic or workable.

Course of proceedings

[27] Initially Collins J anticipated that this matter would be dealt with on the papers and he made a timetable order as to submissions on 31 July 2018. He varied the timetable by further directions of 20 August 2018 and 17 September 2018.

[28] Extensive submissions dated 5 November 2018, together with supporting affidavits, were received in support of the application. By a minute of 3 December 2018, Collins J indicated that it was now apparent that the issues raised by the application were complex and more suited to an oral hearing during which the propositions advanced could be fully tested and explored.

[29] Collins J arranged for an urgent fixture on 25 March 2019 for the matter to be heard. However, this fixture date clashed with the Wai 2660 Marine and Coastal (Takutai Moana) Inquiry. A number of counsel filed a memorandum seeking for the 25 March 2019 fixture to be adjourned and for the hearing to be held in Whangarei rather than Wellington where the March fixture was scheduled to take place.

[30] By a minute of 25 February 2019, Collins J transferred the hearing to Whangarei and directed that it take place on 25 June 2019 following the CMC scheduled for that morning for all the Whangarei cases. That is why it has taken longer than anticipated for this matter to get to hearing.

Justification for application

[31] The application has two different components: the test case, and the request for the Court to refer two issues to the Māori Appellate Court. Slightly different justifications are given for each aspect of the application.

[32] In terms of the test case, the principal justification advanced is that it would speed up the resolution, not just of this case, but of cases under the Act generally. It was submitted that the Māori Appellate Court would be likely to address the issues raised in this case more quickly than the High Court.

[33] It was also submitted that the applicants were ready to proceed, and it would be unjust for them to be held back because of the difficulties being experienced by other applicants in such matters as accessing funding or preparing evidence. The proposition was: the applicants are ready to go and should be entitled to have their case determined, irrespective of any opposition by, or disadvantage to, overlapping applicants.

[34] In relation to the reference of matters to the Māori Appellate Court, the justifications were slightly different.

[35] Ms Mason, for the applicants, developed an argument to the effect that, given that the applicants had a preference for resolving these issues in the Māori Appellate Court, the Court was obliged to accede to that. She expressed this proposition in slightly different ways:[7]

> Counsel submits that, given the historical context of the MACA Act, and its purposes and underlying raison d'être, the preference of the Ngāpuhi Applicants ought to be the starting point in the exercise of the High Court's discretion.

[36] It was also submitted that there was:[8]

> … a strong presumption that the preference of the CMT applicant as to which court ought to hear the Tikanga Māori issues should prevail unless there are very good reasons against this.

[37] This argument was based on the proposition that an underlying premise of the Act was access to justice and that access to justice meant a right of access by applicants to the Māori Appellate Court.

Test case

[38] Although Ms Mason, in a memorandum dated 4 September 2018, indicated that the applicants "no longer wish to use the term 'Test Case'", the reality is that what is being proposed is clearly in the nature of a test case and needs to be judged against the principles applied to test cases.

[39] There is no express provision in the Act that specifically authorises the taking of a "test case". The Court has an inherent jurisdiction to regulate its own affairs and to ensure that justice is administered properly. I am satisfied that this jurisdiction extends as far as considering whether or not any particular case should be treated as a "test case".

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7 Memorandum of counsel dated 4 September 2018 at [64].
8 At [69].

[40] In exercising its inherent jurisdiction, the Court is guided by those cases which have considered the concept of a "test case".

[41] From a recent decision of the High Court, it can be said that a test case is one where parties to a dispute have agreed that they will be bound by the outcome in a particular case. The High Court distinguished that from a "lead case" which is a case where the highest court in the judicial system has made a decision addressing a particular issue. [9]

[42] In distinguishing between the concepts of test case and lead case, the High Court adopted the approach taken by the House of Lords in *Giles v Thompson* where Lord Mustill distinguished lead cases from test cases saying:[10]

> They are lead cases, rather than test cases, because there is no agreement, formal or otherwise, that the parties to other disputes will be bound by the outcome of the appeals.

[43] On that approach, this case cannot be said to be a test case given the lack of agreement to be bound and, indeed, the strenuous opposition of the significant majority of overlapping applicants whose claims will be affected by this case.

Grounds of opposition

[44] Those applicants who opposed this case being treated as a test case to be accorded priority over other applications did so on a number of grounds. These included:

(a) there was no particular reason why this case, as opposed to any other case, should be regarded as a test case, and many reasons why it was unsuitable;

(b) the application had been commenced unilaterally without any prior discussion with overlapping applicants and the critical consent to be bound by the outcome of a test case was missing;

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9 *Blumberg v Frucor Beverages Ltd* [2018] NZHC 1876.
10 *Giles v Thompson* [1993] UKHL 2, at 4.

(c) there was no widespread support for the proposal;

(d) the very large number of overlapping claims made this case unsuitable to be a test case;

(e) a number of the overlapping applicants had experienced difficulties in obtaining funding and, if this case was accorded priority, they would be effectively forced into participating in it at a significant disadvantage;

(f) there was no funding presently available for participation in a "test case"; and

(g) there were no obvious gains to be obtained in terms of a quick hearing and a real risk that there might be significant delays in the Māori Appellate Court being able to consider the tikanga issues and consequent delays for the overlapping parties in having their cases considered.

There is substance to each of these concerns.

[45] To these concerns can be added the fact that integral to the test case proposal is the concept that after a hearing has been held to determine facts and the CMT criteria, "the remaining part of the Ngāpuhi Title Application [would] be, in the first instance, the subject of negotiations with the Crown in accordance with ss 94-96 of the MACA Act". This Court cannot force the Crown to engage in negotiations with any particular applicant. Neither can any applicant do so. So, the proposal is based on a sequence of events which neither the Court nor the applicants can control. Effectively the test case proposal is unworkable.

[46] There were also a variety of grounds of opposition in relation to that aspect of the proposal which involved referring the two tikanga questions to the Māori Appellate Court pursuant to s 99(1)(a).

[47] At the broadest level, the referral of these questions was opposed on the basis that, effectively, they encompassed the fundamental criteria that an applicant had to

meet in terms of s 58(1) of the Act and that asking the Māori Appellate Court to answer these questions was effectively transferring the jurisdiction of the High Court to the Māori Appellate Court.

[48] Other parties were concerned that if such broad questions were transferred to the Māori Appellate Court then, if the Māori Appellate Court produced answers that were unfavourable to them, they would be deprived of any right of appeal as there is no right of appeal from determinations of the Māori Appellate Court on issues of tikanga.

[49] Other overlapping applicants took issue with the particular wording proposed. The questions were closed rather than open-ended. Instead of asking which applicants held the test case area in accordance with tikanga, the question was directed solely to whether the three Ngāpuhi hapū held the area. If the answer to that question was no, this would not assist any of the overlapping claimants with their claims.

[50] A number of the overlapping claimants pointed out that they were not members of Ngāpuhi-nui-tonu, and that this was relevant when considering whose tikanga should be applied as each iwi had their own tikanga.

[51] Some applicants were concerned that the vagueness of the second stage of the proposal and the possibility that, if the proposal was implemented, it would not necessarily resolve the issue of which of the overlapping claimants held any customary title that may be issued. It was the level of disquiet about this aspect of the application that appears to have led to the second affidavit of Louisa Collier dated 4 September 2018 in which she said:

> [9] I want to reassure the Court and other applicants that we have no intention of holding or administering any Customary Title on our own, without entering into a Tikanga process with other Ngāpuhi-nui-tonu applicants to work out how we, as kaitiaki, can hold and administer that title.

[52] The applicants who did not identify as Ngāpuhi made the point that any such process would exclude them, and those applicants who were members of Ngāpuhi-nui-tonu but who were not represented by the applicants in these proceedings, pointed to the fact that given the tensions and disagreements evident between the various hapū,

it was unrealistic to expect that the parties could agree such matters as between themselves.

Analysis

[53] As discussed above, this case does not fall within the common understanding of the term "test case". Not only is there no agreement among the many overlapping applicants as to the suitability of this case to be advanced on a priority basis, there is no agreement to be bound by any finding the Court may make.

[54] I will now address the issue of whether, even though it is not a test case, this case should be accorded some form of priority.

[55] Expediting this case has a potential to cause significant disadvantage to other claimants who are not presently in a position to effectively participate in any hearing. There is some irony in the applicant's position. On the one hand, they submit that the direct engagement by the Crown with Te Uri o Hau is severely prejudicial to them because a consequence of a settlement being reached prior to resolution of the claims before the Court is that the ability of the Court to fully satisfy any claim they might have will be compromised. On the other hand, they deny that granting priority to this application could have exactly the same effect on those overlapping claimants who are unable or unwilling to fully participate in any test case hearing.

[56] The Court also needs to consider whether there are reasons other than establishing a binding precedent that justify this case being accorded priority.

[57] The applicants have submitted that Ms Collier is elderly and wishes to see this matter resolved during her lifetime. However, that does not distinguish this case from all of the other applications under the Act. A great many of those who are intended by applicants to give customary evidence are elderly or in poor health.

[58] Another ground advanced by the applicants is that according this case priority is necessary to achieve fairness between these applicants and other applicants who have entered into direct engagement with the Crown.

[59] In the submissions on behalf of the applicants of 4 September 2018, the argument was expressed this way:

> 129. Counsel submits that there are serious issues of unfairness and injustice which arise out of the Crown's conduct in continuing negotiations only with certain select groups, and behind closed doors. Neither the Ngāpuhi Applicants nor the Overlapping Applicants are part of those negotiations and have no visibility as to what is being negotiated. They therefore have no ability whatsoever to protect their interests. This is quite unlike the opportunities that Overlapping Applicants have to identify and protect their interests in the High Court process.
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> 130. The Ngāpuhi Applicants therefore submit that Te Uri o Hau's negotiations with the Crown, and any and all other negotiations, ought to be adjourned, those negotiations, and/or any proposed agreement prejudices the interests of the Ngāpuhi Applicants and the Overlapping Parties in the Ngāpuhi-nui-tonu rohe.

[60] This is an attack on the provisions of the Act which entitle applicants to enter into an agreement with the Crown recognising a protected customary right or CMT.[11]

[61] Many applicants, including a number of overlapping applicants affected by these proceedings, have sought to engage directly with the Crown in order to obtain a s 95 agreement. To date, the Crown has only engaged in such negotiations with applicants who had statutory priority. Te Uri o Hau is one of the applicants that the Crown is directly engaging with.

[62] In her submissions of 5 November 2018, counsel for the applicants acknowledged the provisions in Part 4, subpart 1 of the Act relating to direct engagement and specifically accepted that it was the Crown and not the Court that was empowered to initiate this process. It was also submitted:

> 110. The Ngāpuhi Applicants have dire concerns about the parallel processes that are occurring at the same time. …

[63] The submissions went on the say:

> 111. It is not clear that the MACA Act even allows for such an outcome, let alone whether it would be consistent with New Zealand's natural justice and bill of rights [sic] obligations. The Ngāpuhi Applicants

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[11] Marine and Coastal Area (Takutai Moana) Act 2011, s 95.

> will be writing to the relevant Minister seeking an adjournment of these negotiations. …

[64] Only Parliament has the power to amend the Act and if applicants are unhappy with any of the provisions of the Act, then engagement with the politicians who have the power to change that Act is the correct way to achieve change to the legislation rather than inviting the Court to restrain a process that is specifically authorised by the Act.

[65] In support of their submission that these proceedings should be expedited and that the proposed question should be referred to the Māori Appellate Court, counsel for the applicants claimed that this was necessary to address what was said to be political bias against Ngāpuhi.

[66] In submissions of 5 November 2018, counsel stated:

> 60. In relation to the stance of the Attorney-General, through the Crown, Counsel again raises the issue of the inherent unfairness and bias against the Ngāpuhi Applicants. The Ngāpuhi Applicants are concerned at the possibility that there are political incentives for the current Attorney-General (and the current Executive) to seek to show that the MACA Act, which exists due to the efforts of their political opponents) has failed Māori. …

[67] There has been no evidence tendered in support of this application that would justify the claim that Ngāpuhi have been treated in any manner different to any other applicants. To the extent that the Act accorded priority to those historical claims that were already underway, the applicants in these proceedings are in no different position to applicants elsewhere in the country where their claims overlap with other claims which have statutory priority.

[68] I cannot identify any basis upon which the claims in these proceedings should be accorded priority.

Statutory interpretation

[69] In support of the argument that the applicants are entitled to express a preference to have aspects of their claim dealt with by the Māori Appellate Court, and that the High Court is obliged to accommodate that preference unless there are very

good reasons to the contrary, the applicants have made extensive submissions about what the Act was intended to mean. They have submitted affidavit evidence from the Hon Tariana Turia, a former Cabinet minister who was involved in the drafting of the legislation.

[70] Reference was also made to statements made in the House of Representatives during the consideration of the Takutai Moana Bill. It is therefore necessary to set out the process that the Court is obliged to follow in ascertaining the meaning of s 99(1)(a) of the Act, which is the provision entitling the High Court to refer questions of tikanga to the Māori Appellate Court.

[71] The starting point in any exercise of statutory interpretation is to look at the text and purpose of the words used.[12] The purpose of the Act is set out in s 4, the relevant parts of which state:

> (1) The purpose of this Act is to–
>
> (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and
>
> (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and
>
> (c) provide for the exercise of customary interests in the common marine and coastal area; and
>
> (d) acknowledge the Treaty of Waitangi (Te Tiriti o Waitangi).

[72] There is nothing in the purpose of the Act that supports the applicants' argument about the determinative nature of their preference to refer questions to the Māori Appellate Court. Neither does the text of the Act support such a proposition.

[73] Section 99(1)(a) states:

> If an application for a recognition order raises a question of tikanga, the court may–
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> (a) refer that question in accordance with section 61 of Te Ture Whenua Maori Act 1993 to the Māori Appellate Court for its opinion …

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[12] Interpretation Act 1999, s 5.

[74] Section 99(1)(a) clearly provides that it is the Court that has the discretion to refer a question of tikanga to the Māori Appellate Court. It does not say that applicants have such a right or even that applicants are entitled to make such a request and the Court is obliged to have regard to their preference.

[75] The applicant filed an affidavit from Dame Tariana Turia which gave evidence of her understanding of why s 99(1)(a) was included in the Act. Extracts from that affidavit say, "Consequently, a key policy underpinning the MACA Act was the ability of Māori to refer any question of tikanga Māori to the Māori Appellate Court."

[76] And further, "There were no restrictions or conditions to be placed on those who wanted to refer tikanga Māori issues to the Māori Appellate Court".

[77] And:

> … I cannot see that there are any grounds, under the MACA Act, to oppose or reject the request for the Tikanga Questions to be referred to the Māori Appellate Court. They are exactly the sorts of issues which I, as part of the small group of people involved in negotiating the policy underpinning the MACA Act, envisaged would be referred to the Māori Appellate Court.

[78] These comments are irreconcilable with the actual wording of the Act.

[79] In passing the Act, Parliament deliberately removed the jurisdiction of the Māori Land Court to entertain applications for customary rights orders. It vested that jurisdiction in the High Court. While the concept of access to justice underpins the Act, there is no basis in the words used in the Act to conclude that the parties would only have access to justice if they were able to insist that aspects of their case be dealt with in the Māori Appellate Court.

[80] Access to justice was delivered by repealing the Foreshore and Seabed Act 2004 and reinstating the rights to access the Courts that had been extinguished by that Act.

[81] There is nothing in s 99(1)(a), or anywhere else in the Act, that purports to confer on an applicant the right to determine what matters are referred to the Māori Appellate Court. That is a decision solely for the High Court.

[82] Statements made in the House and/or expressions of opinion by a Parliamentarian as to what may have been intended by a statute, cannot be used to contradict the clear wording used in the Act.

[83] A leading text on statutory interpretation says:[13]

> *First*, the Courts have made it very clear that however compelling the expressions of opinion in *Hansard*, or in committee reports, or indeed anywhere else, those opinions cannot be used to alter the meaning of statutory words that are clear as they stand. The formal communication of the Legislature, on which citizens and their advisers rely, cannot be distorted by non-legislative material.

[84] As the High Court has said:[14]

> [I]t is ineffectual to call in aid speeches in the House of Representatives as to the effect of the law change being debated if the words of the statutory provision do not achieve the intended effect.

[85] The Court of Appeal has made similar comments:[15]

> Our preferred approach to statutory interpretation is to begin, as we have done, with the words of the statute, interpreted in accordance with the scheme and purpose of the legislation. Reference to the legislative history can then be used as a check on and to bolster the construction.

[86] Having concluded that s 99(1)(a) vests the jurisdiction in the Court, not the parties, to determine whether a particular issue of tikanga should be referred to the Māori Appellate Court, it is necessary to consider in this case whether it is appropriate for the Court to refer either or both of the proposed questions to the Māori Appellate Court.

[87] A reference to the Māori Appellate Court under s 99(1)(a) is to occur "in accordance with" s 61 of the Te Ture Whenua Maori Act. There is case law which provides guidance as to the appropriate circumstances in which questions of tikanga may be referred to the Māori Appellate Court in accordance with that provision.

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13 Ross Carter *Burrows and Carter on Statute Law in New Zealand* (5th edition, LexisNexis, Wellington, 2015) at 290 (citations omitted).

14 *Solicitor-General v Bujak* [2012] NZHC 2453 at [26] per Fogarty J.

15 *R v Aylwin* (2008) 24 CRNZ 87 at [58] per Glazebrook J.

[88] The case of *Proprietors of the Paraninihi Ki Waitotara v Ngā Ruahine Iwi Authority & Ors* involved proceedings before the High Court between the proprietors of the Paraninihi Ki Waitotara block and an iwi authority.[16] The proprietors applied to the High Court to exercise its jurisdiction under s 61 of Te Ture Whenua Maori Act to state a case on questions of tikanga to the Māori Appellate Court. The Court declined to do so and, in doing so, Harrison J articulated a number of issues of principle.

[89] Harrison J referred to the decision of the Court of Appeal in *Re the Bed of the Wanganui River.*[17] That case related to s 36 of the then Maori Purposes Act 1951 which the Court accepted was the probable source of s 61 of the Te Ture Whenua Maori Act.

[90] Harrison J noted that, in that case, the Court of Appeal had referred two discrete questions to the Māori Appellate Court by way of case stated for its opinion but only after hearing evidence and deciding certain issues.

[91] In the case before him, the Court had not heard any evidence or determined any factual issues. Harrison J concluded that, in these circumstances, a reference to the Māori Appellate Court would be premature and that it could "further compound the costs and delay experienced by the parties without any real benefit."[18]

[92] It is also important to remember the observations of the Court of Appeal in *Attorney-General v Ngāti Apa* where it said:[19]

> The nature of Māori customary interests is, as the Privy Council said in *Nireaha Tamaki v Baker* at 577, "either known to lawyers or discoverable by them by evidence."

[93] Applying these principles, I am satisfied that it is premature to refer to the two proposed questions to the Māori Appellate Court. This Court is both capable of, and has an obligation to, make findings of fact in respect of this application and others

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16 *Proprietors of the Paraninihi Ki Waitotara v Ngā Ruahine Iwi Authority & Ors* [2004] 2 NZLR 201.

17 *Re the Bed of the Wanganui River* [1962] NZLR 600.

18 *Proprietors of the Paraninihi Ki Waitotara v Ngā Ruahine Iwi Authority & Ors*, above n 19, at [18].

19 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 at [54].

affected by it. Ultimately, the time may be reached when it is appropriate to refer questions of tikanga to the Māori Appellate Court. However, it is unlikely that such questions would be in the closed form that these questions are.

Outcome

[94] For these reasons, the application for this case to be treated as a test case and the application to state the two proposed questions to the Māori Appellate Court is dismissed.

Costs

[95] I invite the parties to agree the question of costs between themselves but, failing agreement, those interested parties who opposed the application shall file and serve submissions within 14 days, and the applicant and those parties who supported the application will file and serve submissions in response within 14 days thereafter. The costs submissions are to be no longer than five pages in length.

Churchman J

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