

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

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

CIV-2017-485-770

IN THE MATTER OF an application by TE RŪNANGA O
NGĀTI WHAKAUE KI MAKETŪ
INCORPORATED, for and on behalf of
Ngāti Whakaue ki Maketū Hapū, for
recognition orders under the Marine and
Coastal Area (Takutai Moana) Act 2011

(AND OTHER PROCEEDINGS LISTED
IN THE SCHEDULE TO THIS MINUTE)

CIV-2017-485-218

IN THE MATTER OF an application by HORI TURI
ELKINGTON as trustee of the Ngāti Koata
Trust for recognition orders under the
Marine and Coastal Area (Takutai Moana)
Act 2011

(AND OTHER PROCEEDINGS LISTED
IN THE SCHEDULE TO THIS MINUTE)

On the papers:

Counsel: J Mason for Applicants (CIV-2017-485-398, CIV-2017-485-512,
CIV-2017-485-515, CIV-2017-485-513, CIV-2017-485-514,
CIV-2017-485-770)
L Thornton (CIV-2017-404-574, CIV-2017-485-387, CIV-2017-485-249)
C Hockly (CIV-2017-485-305, CIV-2017-485-352, CIV-2017-485-228)
A Sykes (CIV-2017-485-299)
T Bennion (CIV-2017-485-253)
J Kahukiwa (CIV-2017-404-572, CIV-2017-404-568, CIV-2017-404-566,
CIV-2017-404-569)
B Lyall (CIV-2017-404-556)
C Finlayson QC and A Dartnall for Gold Ridge Marine Farm Group
(an interested party)
D Ward and Y Moinfar-Young for Crown

Minute: 5 September 2019

MINUTE (NO 3) OF CHURCHMAN J

[1] In a minute dated 27 August 2019, I granted leave to counsel for the applicants and counsel for the other parties who had participated in a teleconference held on 21 August 2019 to file and serve submissions within seven days on the issue of the eligibility of the interested party (Gold Ridge Marine Farm Group) to participate in the hearing on this matter allocated for 7 and 8 October 2019.

[2] By memorandum of 27 August 2019, Ms Mason sought an extension of time until 2 September 2019 to file submissions.

[3] By memorandum of 26 August 2019, Mr Kahukiwa sought a similar extension and, by memorandum of 28 August 2019, Mr Lyall, on behalf of the applicants in CIV-2017-404-556, sought an extension to file submissions by 5 pm, Friday 30 August 2019.

[4] Mr Lyall's client had not previously signalled an intention to be involved in the October hearing and Mr Lyall had not participated in the teleconference on 21 August 2019.

[5] For various reasons (difficulties following a computer upgrade in relation to the applications for extension by Ms Mason and Mr Kahukiwa, and an oversight by the Registrar in relation to Mr Lyall), the three requests for extension were not brought to my attention until shortly before 5:00 pm, 3 September 2019. All such requests for extension granted.

[6] Ms Mason and Mr Kahukiwa filed their substantive submissions on 2 September 2019, and Mr Lyall on 30 August 2019. The timetable directions set out in my minute of 27 August 2019 at [7] are amended to allow the interested party (Gold Ridge Marine Farm Group) seven days from the date of receipt of the submissions by them to respond.

[7] In the memorandum filed by Mr Lyall of 30 August 2019, he sought leave of the Court to file submissions acknowledging that he was outside the deadline of 30 August 2018 set by Collins J on 18 July 2018 in relation to the indications of a wish to participate in the hearing that has been scheduled for October this year.

[8] I am minded to grant the application but if any other applicant wishes to oppose it, they should file and serve a memorandum setting out the grounds for their opposition no later than

9 September 2019 and I will consider that issue on the papers at the same time as I consider the submissions received in relation to the application by Gold Ridge Marine Farm Group.

Extraneous matters

[9] Some aspects of the content of Ms Mason's memorandum of 2 September 2019 need comment.

[10] Paragraph 2 of the memorandum states:

Essentially, the applicants seek the following:

- (a) that His Honour disclose any association he has with Mr Finlayson, and/or Gold Ridge, and/or any of their agents or representatives, that may constitute a conflict of interest, or a perceived conflict of interest; and
- (b) a preliminary determination from the High Court under r 10.15 of the High Court Rules 2006, in relation to the in-principle approach that the Court expects to take on the issue of costs in these proceedings (the in-principle costs application); and
- (c) that the hearing set down for 7 and 8 October 2019 be adjourned until the issues contained in this MoC have been finally determined.

[11] The memorandum concludes at [18] which says:

Finally, the applicant respectfully reserves the right to file submissions opposing the involvement of Mr Finlayson, and opposing the Gold Ridge Application, once a determination on the In-Principle Costs Application has been made.

[12] These submissions appear to proceed on the assumption that counsel can dictate how a proceeding will be conducted. That is not how litigation in the High Court works.

[13] Addressing firstly the issue of costs raised by Ms Mason, it seems that her concerns arise not out of this case but in relation to a recent decision in another case that she was involved in as counsel.¹

[14] At the conclusion of that decision in that case, where Ms Mason's clients had been unsuccessful in relation to the orders they were seeking, I invited the parties to agree the

¹ *Re an application by Louisa Te Matekino Collier & Ors* [2019] NZHC 2096.

question of costs between themselves, and failing agreement set a timetable for costs submissions.

[15] As yet, no costs submissions have been received by the Court and it may be that none will be. However, if they are, and Ms Mason is called upon to respond to those submissions, that will be the occasion for her to advance arguments as to why the normal costs principles set out in r 14.02 of the High Court Rules 2016 (HCR) should not apply.

[16] It may well be that there are strong policy reasons why no issues of costs should arise in relation to any application for Coastal Marine Title or protected customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) and that such reasons also extend to opposed interlocutory applications related to such proceedings, but each application will need to be judged on its merits.

[17] The hearing for 7 and 8 October 2019 has specifically been scheduled to address the role of the Attorney-General and not any other issue. It is not appropriate at this very late stage to attempt to add other issues to it.

How Gold Ridge got to participate in the teleconference?

[18] At [4] of her memorandum of 2 September 2019, Ms Mason says:

During the 21 Aug JTC, those parties present were advised at the outset that Gold Ridge, represented by Mr Finlayson, had applied to the Court to be involved in the AG Hearing (“the Gold Ridge Application”), and that this request to be a party had been granted.

[19] The correct account of this matter is that after close of business on 20 August 2019, the solicitor acting for Gold Ridge Marine Farm Group emailed an application to the Registrar pursuant to r 10.15 of the HCR. Also emailed was a memorandum in support, and that memorandum sought leave to be included in the teleconference scheduled for 9:00 am the following day, 21 August 2019. That memorandum was signed by A. C. Dartnall who was described as “solicitor/counsel for Gold Ridge Marine Farm Group”. There was no indication in either of the documents that external counsel had been briefed.

[20] The Registrar alerted me to the fact that the emailed application had been received and provided me with copies of the documents, shortly before the 9:00 am teleconference was due

to proceed. He enquired whether Ms Dartnall should be connected to the teleconference. I agreed to that, wishing to give Ms Darnall the opportunity to explain the 11th hour application that had just been received.

[21] Contrary to the statement in Ms Mason's memorandum, at no stage, either prior to or during the teleconference, did I grant Ms Dartnall's client the status of party to the proceedings. That is why the minute issued following the teleconference expressly timetabled the right of counsel to make submissions in opposition to the application made by the interested party to participate in the October hearing, with a right of reply being extended to the interested party following which a decision on the papers was to be made.

[22] To the extent that the timetable order for exchange of submissions ahead of the October hearing related to the interested party, it was expressly qualified to be only on the basis that the "interested party survive the challenge to its right to be involved in these proceedings".²

Conflict of interest

[23] Ms Mason's memorandum is unfortunately worded. It could be interpreted that the Court made a determination to insert the interested party and its legal advisors into these proceedings without hearing from other parties because of a conflict of interest arising from a perceived relationship with counsel. This calls for a response.

[24] Until the morning of 21 August 2019, I had never heard of Gold Ridge Marine Farm Group. I have no idea who their agents or representatives are. The only information I have about them is what was contained in the two documents emailed to the Court. I had never previously heard of Ms Dartnall.

[25] I was not aware that Mr Finlayson QC had been instructed as counsel by the interested party and would be appearing on the teleconference until he introduced himself at the commencement of the teleconference after I had gone through the list of the various counsel who had filed memoranda, and who I was anticipating would be present.

² Minute No 2 of 21 August 2019 at [13](c).

[26] I do know Mr Finlayson both professionally and personally. When I was first appointed to manage the MACA list, I issued a minute on 11 April 2019 detailing potential conflicts of interests. In that minute, I recorded that I had undertaken work for Ngāti Toa Rangatira, principally in respect of the Northern South Island inquiry.

[27] There was significant litigation arising from that inquiry³ and most of the senior lawyers in Wellington and the South Island who were active in Waitangi Tribunal work were involved in different aspects of that litigation.

[28] Mr Finlayson was one of those lawyers. He represented the interests of Ngāi Tahu in relation to various aspects of the litigation associated with the Northern South Island inquiry. Consequently, we were adversaries in a number of cases including one that went to the Privy Council. In that context, I got to know him well professionally in the period 2000-2005.

[29] I also know Mr Finlayson socially but in the same way that I know a number of other counsel who regularly appear before the Court in MACA matters. I have seen very little of him since my appointment as a High Court Judge in June 2017.

[30] However, more relevantly to Ms Mason's comments set out in [10] above, I have never had any involvement with Mr Finlayson about anything to do with MACA or with the interested party Gold Ridge Marine Farm Group. I do not consider there is any conflict of interest, actual or perceived, that prevents me from hearing the interlocutory application set down in this matter, whether or not Mr Finlayson ultimately appears as counsel for a party.

Churchman J

³ Including the important Court of Appeal decision in *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643.